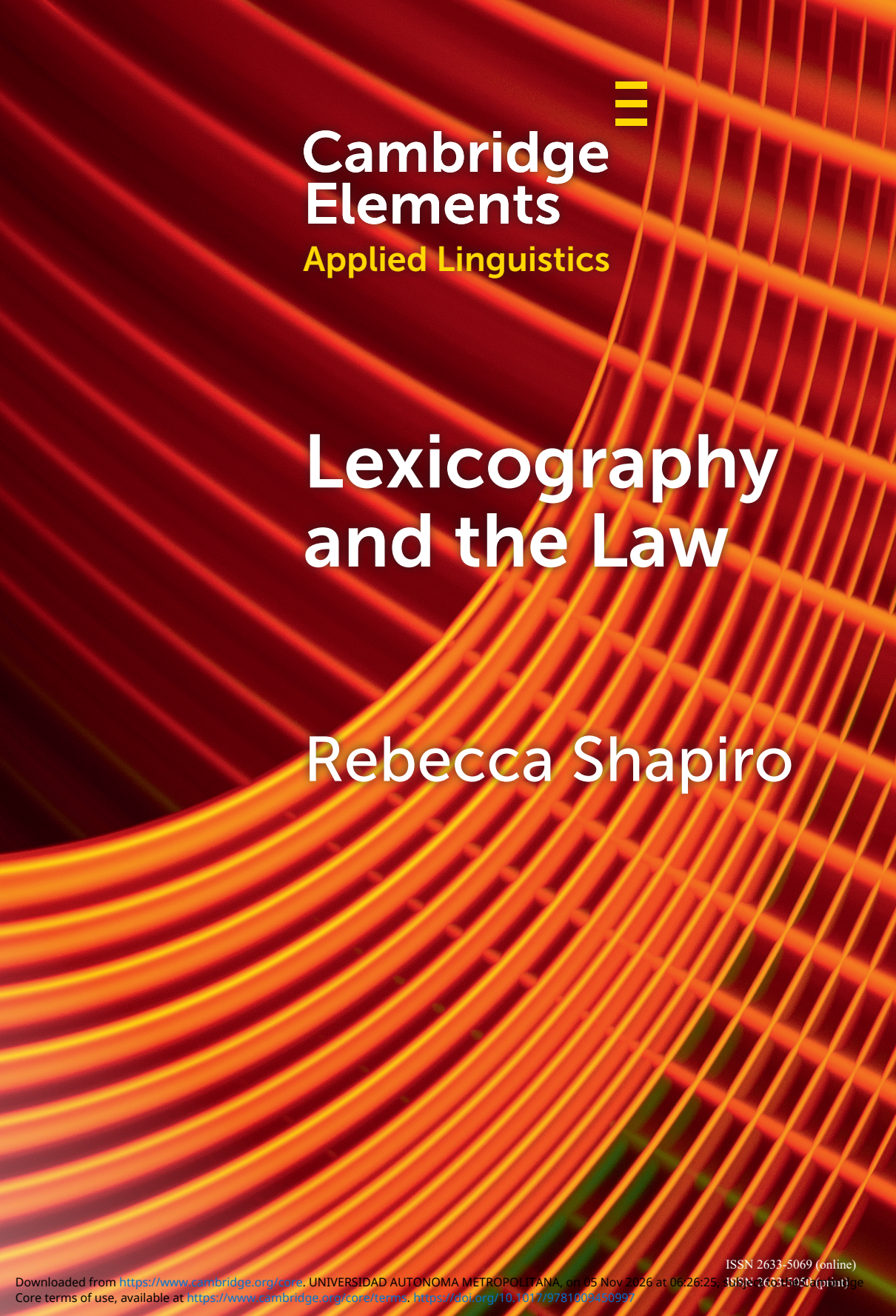


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LEXICOGRAPHY AND THE LAW

Historical Dictionaries, Originalism, and the Emoluments Clause of the United States Constitution

Rebecca Shapiro
The City University of New York

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Lexicography and the Law

Historical Dictionaries, Originalism, and the Emoluments Clause of the United States Constitution

Elements in Applied Linguistics

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Abstract: Legal professionals in the United States increasingly have relied on dictionaries, both current and historical, in court cases. This practice is complicated because originalist jurists are often not well-versed in lexicographical principles that would provide a fuller view of historical reasoning. This Element first contextualizes several issues in early English dictionaries and eighteenth-century language that illustrate how using dictionaries from the founding era in questions of law can be problematic: The Element provides examples of words changing over time, explains methodology of devising and borrowing in definitions, details who the readers of such dictionaries were, and more. The Element then excerpts John Mikhail's essential article written in response to *CREW et al. v. Trump* to show how lexicographical methods and linguistic textual evidence can be better used in legal cases and analysis by triangulating meaning and identifying a prototypical definition.

This Element also has a video abstract: www.cambridge.org/EIAL_Shapiro_abstract

Keywords: historical dictionaries, originalism, lexicography, language and law, emoluments clause

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Introduction

Perhaps the most important recent instance in the news of a widespread need to find a word's definition occurred after former president Donald Trump was sued in 2016–2017 for abusing the domestic and foreign Emoluments Clauses of the United States Constitution. A perfunctory Google search asking "what does 'emolument' mean" yields 1,600,000 results, starting with numerous dictionary sites. Narrowing the query to "Trump emoluments dictionary" yields 360,000 results. The search engine also offers several questions to click on underneath the first items displayed: "What is the emoluments clause in simple terms?"; "What is the meaning of emoluments?"; and "What does the Constitution say about emoluments?" These search results indicate that many people understood that something important was happening, and that they wished to know how former President Trump was connected to emoluments, as well as how emoluments have been related to the Constitution. I present that example to show that even while there was more than one lawsuit against then president Donald Trump for using his public office to enrich himself privately, it appears that many of the American people did not know the particulars of the suits or their contents. Nor did they know where in the Constitution the legal principle may be found. Even if people were aware that there was a possible constitutional crisis underway, the topic is not generally well-known, and defining the term needs to be the first step in understanding the potential damage to the nation.

The search questions and results above show that, typically, when people are interested in knowing the meaning – or spelling – of a word, they reach for a dictionary. Today, rather than pulling a printed dictionary from a bookshelf, they usually turn to readily accessible free online dictionaries, which initially show one or two lines; anyone wishing to find out more must expand the text box to see additional lexicographical information. If users wish to know an older, even archaic, meaning of a word, it is unlikely that they would readily find anything online for free. Perhaps because of readers' lack of interest in etymology – the history of a word – or because etymology is typically located after the parts of speech, various senses, and sample sentences, the result is that often detailed information on the biography of a word – how it entered English from another language, or its change over time – is usually not found or is behind a paywall, and thus getting that information becomes less of a priority than the speed with which an on-demand digital world provides a snap definition. There are, however, people for whom knowing the history of words is critical; parsing meaning is often taken very seriously in the business community or in the legal field. In the United States, understanding the meaning of a word as it was used during a particular time has become essential in certain

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circumstances, such as copyright law. For instance, when a term – or a specific usage of that term – came into being could mean a company might claim rights to a product or to its name. Similarly, trying to accurately pinpoint the meaning of a term from the colonial period in United States history could affect how a statute is understood and implemented today. Those people who focus on practical applications of etymology provide high-stakes examples of how business is conducted or how laws are applied.

As the above examples suggest, those who work with etymology can have outsize power over their fellow citizens' lives. Today's meanings may not tally with the meanings assigned when a text was written. Many jurists invested in the history of language wish to discern how the authors of the United States Constitution and other essential founding documents intended for those texts to be interpreted and implemented, as if the law could be frozen in amber by fixing words and meanings as they were used and understood then. It is widely believed today that the reading and interpretation of laws ought to be reflected in the language of the time when they were written, the eighteenth century. Such jurists often seek confirmation from old English language texts and dictionaries, looking for what would be considered an "original" meaning, that which the founders intended. A problem arises when they fail to fully accept that language is constantly changing, and that it was even more greatly in flux when the old dictionaries they consult were being written and published. It is precisely because English was changing that there was an enormous need for models of linguistic propriety in words, rules, and writing. Even lexicographers and grammarians (who were often the very same people) could not agree on what was correct; some of their linguistic postulates were meant to enlighten, while others were meant to simply sell books. The presumption today that the language found in old dictionaries could be depended on by scholars and jurists is hardly correct because we cannot fully appreciate the nuances and contexts of earlier times; ultimately, the best understanding of what people wrote and thought about during the colonial period is based on educated guesswork formed from inductive research.[1] One might imagine that jurists who make a habit of searching for original meanings in early texts would have an authoritative canon of old dictionaries as well as being trained in analysis of their content and context. Those presumptions, however, are wrong, as there was no consensus even among lexicographers of that period as to what was the best language to define.[2]

[1] For example, English spelling was not yet regularized, religious lexicographers believed that English was derived from Hebrew, most women were illiterate, double negatives were still acceptable, and arbitrary rules such as to not interrupt an infinitive with an adverb were just being codified.

[2] Phillip A. Rubin explains the biases of judges and courts toward certain dictionaries as well the biases of the dictionary authors (2010: 170).

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The purpose of this Element, then, is to explain how and why old dictionaries must be used with caution, even skepticism. Such an approach should be combined with knowledge of the politics, education, economics, and other important issues in England and the United States during the early modern and colonial periods to highlight what is essential to good legal work as well as to good scholarship. The Element provides a case study on how old dictionaries have been employed for political – partisan – purposes to cherry-pick definitions of words rarely used today in support of a legal argument. As there is no such thing as a fixed language and we are always merely playing catch up, we can never completely know the full conditions under which a word was used historically. It is because of our lack of understanding of language in the past that prescriptivism – seeking out rules for language and definitions – does not prevent mistakes. We are most effective in determining the old meanings of words when we try to ascertain how others understood language and then base our interpretations on precedent and collective agreement of the outer boundaries of acceptable meaning. The further from agreement we are, the less clear and more arguable are meanings.

The urge to employ dictionaries, and specifically English dictionaries, from the colonial period when the United States was founded, can be traced recently to lawyers and judges who ascribe to a newer theory of textualism which posits that it is possible to find objective, original meaning in texts written during an earlier period to provide the correct usage.[3] To them, it is wrong to rely on a legislature's intent or a legislative history for meaning. While many textualists know that language is dynamic and a social construct, in general they hold that meaning should be based on a text's or a word's context, including nearby words. The number of judges who follow this newer form of textualism, led most famously by the late Supreme Court justice Antonin Scalia, has grown over the last several decades, and consequently, the number of dictionaries cited has also risen.[4] Jonathan Siegel explains that Justice Scalia's reliance on textualism has had an outsize effect on the legal profession and has inspired other judges to prioritize dictionaries without knowing what went into writing them, contrary to what the other, older form of textualism in practice has allowed. Siegel (2009: 117) writes:

> Textualists believe that a statute's passage through the constitutional process – the passage of the same statutory text by the two houses of Congress and

[3] Lawrence M. Solan writes that linguists and lexicographers do not use such terms as "original" because there is no such thing; rather, they rely on a "prototypical" meaning, in which meaning is determined to be more or less like a central category and a real-world example is used to "best" exemplify a word's meaning (2020: 285).

[4] See Ellen Aprill (1998), as well as Samuel A. Thumma and Jeffrey L. Kirchmeier (1999).

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> either its signature by the President or the overriding of the President's veto – imbues *that text* with legal force, regardless of what anyone intended and regardless of what purpose anyone tried to achieve. Again, as the textualists put it, "[w]e do not inquire what the legislature meant; we ask only what the legislature means." [italic in the original]

In response to courts relying more heavily on dictionaries, there has arisen a robust body of scholarly research that analyzes rulings and provides commentary on how jurists have used dictionaries. Scholars who object to the overreliance on a textualist's assertion that only the text and its meaning are important are engaging with an argument much like the critical theory and new historicist debates of the last quarter of the twentieth century against the New Critics, who believed only the text is reliable.[5] Scholars and critics have determined that though the impulse might be sound, this habit of using dictionaries has not been professionalized or codified, resulting in problems and pitfalls such as the perception that a dictionary is a more assertive means of ascertaining meaning than relying on a legislature; or that a dictionary is an objective reference tool without bias. These textualists have recently become concerned with centering language without much of its context.

One of the main arguments against this new form of textualism is that jurists who employ dictionaries often use them without understanding the limitations of the definitions they contain.[6] They also neglect to understand how a word's definition – or its "prototype," in linguistic terms – needs to be identified, not on usage in a particular circumstance, but by its "outer boundaries,"[7] that is, the range of acceptable meanings of a term before it begins to lose clarity and consensus. Chief among the critics of the new textualists is Lawrence M. Solan, who points out that much of the scholarship written about courts using dictionaries is generally negative:[8] jurists seem not to understand that just because old dictionaries are contemporaneous to founding documents, this does not necessarily mean they are more reliable: They may not be any more neutral than the texts themselves, and their entries may not be ordered consistently.[9] It is thus good to recognize that what is considered to be an ordinary meaning in a legal document will not necessarily be the first sense provided or that the different senses of a given word will be ordered in the same way by different lexicographers. Lawyers and lexicographers are, of course, in different fields with

[5] Indeed, see "Textualism's Mistake" (2022). [6] See Lawrence M. Solan (2005).

[7] Lawrence M. Solan (2020) provides a good explanation of this in practice.

[8] For example, see James J. Brudney and Lawrence Baum (2013), Jeffrey L. Kirchmeier and Samuel A. Thumma (2010), and Lawrence M. Solan (2003).

[9] Dictionary authors from the founding period were not neutral in the ways they chose words, ordered senses, defined words, and referred to contemporaneous sources. They also were in competition for readers.

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different and sometimes divergent motivations. Moreover, lexicographers historically have not employed systematic ways to define words or categorize senses; until recently, they could use intuition and provide only examples from literate, printed sources which by nature are more conservative than speech because of the need to document usage. In fact, it was not until the mid eighteenth century and Samuel Johnson's *Dictionary of the English Language* that lexicographers routinely began to refer to words in use and to provide illustrative citations. Lexicographers, particularly during the eighteenth century – the period that interests US jurists today – certainly have not used more objective methods to catalogue words and definitions and so their work can be easily misunderstood, manipulated, or misused. There are numerous cases of lexicographers borrowing from each other, plagiarizing each other, and selectively using certain source material in their definitions or samples.[10] While Johnson is considered the lexicographer who caused the field to become more professionalized than it had been because he employed assistants and was one of the first to rely on his own writing income, he alone did not cause the field to become more uniform and predictable. This only happened in the nineteenth century, when Richard Chenevix Trench, then a member of the Philological Society, published his landmark study, "On Some Deficiencies in Our English Dictionaries" (Trench 1857). Charlotte Brewer (n.d.) writes that Trench

> delivered a formidable critique (based on wide reading of a variety of historical texts) of the failure of past dictionaries to present a complete record of the language: they provided insufficient treatment of words now obsolete; they did not list all the possible senses of words; they did not record all the variant forms a word could take; they were one way or another partial or biased. These [published] lectures in turn gave birth to the ideal of the dictionary that was to become the [*Oxford English Dictionary*], one that would list every word in the language, tracing its path through history from cradle to grave and searching out its first and last occurrence in printed texts.

To show important ways old dictionaries have been constructed and also used in the law, this Element has two sections of theoretical and practical discussions and closes with a short discussion of how academic work can publicly engage issues of power, language, and authority. Section 1 provides several examples of how language in legal discourse and cases can indeed be unclear to both lay readers and legal professionals. This opacity of language perhaps leads some jurists to believe that legal texts are in need of the kind of clarity that comes from using a dictionary, one of the most common reference books available. The

[10] Some handy references about the emergent concept of plagiarism: Rebecca Shapiro (2020), Alicia Rodríguez-Álvarez (2017), and Jack Lynch (2002).

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section continues by detailing how English lexicography in the eighteenth century was responding to linguistic uncertainty; one reason for this phenomenon was increased literacy brought about by the rise in a middle class and increased educational and professional opportunities. The authors of dictionaries were keen to provide prescriptive self-help manuals for readers to learn privately how to navigate a different lexical environment. Taking a cue from the pioneering work by DeWitt Starnes and Gretchen Noyes (1991/1946), Section 1 also studies how specific words – "ordinary" and "emolument" – developed over time and across several eighteenth-century English dictionaries. Almost all of the early English dictionaries of that time, notably those by Samuel Johnson and Noah Webster, who have been cited considerably of late, were prescriptive, meaning that the authors were concerned with creating rules about language, rather than observing language in use. Johnson is known for the establishment of some of the most significant lexicographical and editorial principles, and Webster is lauded for asserting a declaration of independence of American lexicography from English lexicography.

Section 2 excerpts John Mikhail's article "The Definition of 'Emolument' in English Language and Legal Dictionaries, 1523–1806" (Mikhail, 2017a), which was written in response to and took issue with the Department of Justice's brief in response to *CREW et al. v. Trump*, accusing then-President Trump of violating the domestic and foreign emoluments clauses of the United States Constitution. The Trump Department of Justice document only cites old dictionaries that correspond to its premise that Trump did not break the law; Mikhail thoroughly demonstrates how the Trump Department of Justice cherry-picked definitions to suit its claim that an emolument was merely "profit arising from office or employ," a minor sense of the definition, instead of the much more common sense. According to Mikhail, this other sense is to be found in more than 90 percent of extant early English dictionaries "published between 1604 and 1806 [which] define 'emolument' in a remarkably uniform fashion, regularly consisting of one or more of the following terms: 'profit,' 'gain,' 'advantage,' and 'benefit.'"[11] Mikhail painstakingly documents the lexicographical evidence of which of the two senses predominated, as well as which dictionaries the founders were likely to have obtained and read; he even supplies contemporaneous examples of "emolument" written by the founders that show how the Department of Justice's definition elided the kind of historical evidence on which it claimed to rely: that it was an obscure term, uncommonly used. Rather than accept the argument that both senses were equally plausible,

[11] John Mikhail (2017a, "Definition").

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Mikhail instead presents copious evidence that the Department of Justice's choice of texts was so small a sample as to make its argument irrelevant. Mikhail in this manner scotches the Department of Justice's claim that "emolument" was a term of art in the eighteenth century; to call it a term of art would mean that it would have been confined to a specific and narrow field, which he shows is plainly untrue. While the word "emolument" is rarely used today outside of financial or legal fields, it was used during the founding period regularly enough for it to appear in the majority of general dictionaries, rather than in "hard word," or specialized, dictionaries. Together, these sections present not just a fascinating and near-contemporary case history of the misuse of old dictionaries by the legal profession – one that could have had lasting effects on the United States government – they explore in incisive ways how legal theories and the application of lexicographical ideas are not congruent fields. They can be complementary, but should be treated, as this Element shows, with care and awareness of the fallibility of their authors. Dictionaries from earlier periods, we will see, are artifacts, but they are not meant to be looked at objectively as mirrors of language; rather, they are meant to be considered almost a Platonic idea of what language *ought* to be, based on the kinds of words, definitions, senses, examples, and sources to which those writing them had access, and even their own backgrounds. Instead of collect books and study their contents as if they accurately represent the past to us, those who want to study dictionaries and the law should think of them as orthographic projections of extraordinary desires, and never as repositories of ordinary language.

It is hoped that this Element will help readers to understand that nothing is free of bias, even works that proclaim their objectivity. Merely choosing a topic of study is a form of bias, as it reveals the author is interested in one side versus another. Addressing the problem of bias by acknowledging it and attempting to identify its sources can be key to ameliorating it. The lack of openness regarding bias – or the disregard of the explicit bias in early English dictionaries by jurists today – can lead one to assume that the argument or perspective is settled belief, instead of an ideology that is more or less accepted by the group that holds sway in society. One of the most potent legal and political disputes in the United States over the last several decades is found in how the Second Amendment of the United States Constitution is interpreted. This debate hinges on eighteenth-century language; the amendment can be read in more than one essential way. While the Supreme Court in 2022 and beyond seems prepared to defend the inclusion of assault rifles under the Second Amendment, a study finds that of the thousands of eighteenth-century newspaper advertisements selling firearms, those that refer to repeating rifles – guns capable of firing several shots in

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rapid succession – are "exceedingly rare."[12] This study, then, should give credence to the argument that the "right to bear arms" would not have typically considered repeating rifles to be common or safe enough to be covered by the Second Amendment. Just knowing the meanings of words from today and applying them to content of yesterday ignores the reality of how dictionaries functioned: they work best in their own time, when we do not project onto them what we now believe them to be.

1 There Is No Ordinary Reader; Or, Issues Concerning Historical English Dictionaries

Legislators, lawyers, and judges who write and interpret laws – in order to achieve mutual comprehensibility in their own legal context but also in the broad social and linguistic framework – should agree on the meanings of words and language, since the way that laws are written shapes and controls the way people live and institutions operate. Conflicts and disagreements abound, however, about the meanings of words in court and in legal cases. Because laws or texts were written long in the past, we are no longer sure that the meanings are the same. Those people charged with reconciling language with meaning often invoke what words are *supposed* to imply, often by studying words in isolation (by consulting dictionaries) or reviewing adjacent words (by using a computer-generated corpus).[13] Putting a word in broad context can be important to understanding its meaning at a given time. Thus, the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[14] But many individual words in the amendment have been vigorously contested: "well regulated," "militia," "State," "keep," "bear," and "arms."[15]

Another law that contains contested language is the British North America Act of 1867, which unified colonial entities within Canada. The language of that act determined that women were not considered "qualified persons" and therefore were excluded from being appointed to offices by the Governor General. It is not that the term "qualified" changed, but *who* was qualified changed.[16] A more recent example of defining key terms comes from the libel case that former Alaska governor and vice-presidential candidate Sarah Palin brought against the *New York Times*. As reported by Jeremy W. Peters (2022), an

[12] See Kevin Sweeney (2023).

[13] By far the easiest to use and access of the corpora is Corpus of Contemporary American (English), created by Brigham Young University, which is commonly referred to as COCA.

[14] U.S. Const. amend. II. https://constitution.congress.gov/constitution/amendment-2/.

[15] See also: Lawrence Solan (1993).

[16] Supreme Court of Canada. 1928. Reference re meaning of the word "Persons" in s. 24 of British North America Act, 1928 CanLII 55 (SCC), [1928] SCR 276.

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editorial in the newspaper used the word "incite" to connect her falsely to a shooting. The issue under consideration was whether she could have been defined as a "public figure" – the court ultimately found against her. Identifying the truth conditions of a word or term based on context should make the meaning clear, though the truth of something may change over time; hence, the change in word meaning.

As a result of disputes that can arise when determining the meaning of language in law, lawmakers, jurists, and legal professionals often look to dictionaries to guide their arguments or decisions. Legal scholars have shown that, particularly in the United States, judges refer to dictionaries to help interpret meaning, and the percentage of jurists who rely on dictionaries has increased greatly since the last decades of the twentieth century,[17] perhaps reaching absurd levels: in an oft-cited article, Adam Liptak (2011) describes Chief Justice John Roberts using several dictionaries to look up words – one of which was "of" – to confirm that "it means pretty much what you think it means." Certain legal professionals have come to rely on dictionaries to understand language from the colonial period and founding era of the United States more often in the last four decades than in the century before, and despite legal precedent. Not only do they reach for current dictionaries, they also have used dictionaries from the period when the laws were written, often the eighteenth century; one reason for an increased reliance on old dictionaries is that judges use them to find out the "original" meaning of a term – based on the assumption that this is to be found in such reference works – in order to interpret properly the law today.

In light of how seventeenth- and eighteenth-century dictionaries address issues different to those from our own period,[18] it is essential to present some caveats about what makes using old dictionaries in court problematic. A main concern for those who reach for eighteenth-century dictionaries should be how they are now considered texts that document the language of an age that is vastly different from our own. According to Jason Weinstein (2005), as a result of referring to dictionaries as much as they do, justices have effected "a nearly complete abandonment of another contextual source – legislative history." When Justices turn to overused interpretation of statues, the desire to cite authority does not dissipate. Therefore, as Weinstein discusses, opinions on statutory interpretation frequently cite no legislative history, dictionaries, or other seemingly neutral sources as justification. While legal opinions have

[17] See Gregory E. Maggs (2014) and James J. Brudney and Lawrence Baum (2013).

[18] There are numerous texts that address this issue, helpfully organized in anthologies such as Anthony P. Cowie (2009), Sidney I. Landau (2014), Jonathan Green (1996), Henri Béjoint (2010), and John Considine (2017).

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hinged on definitions (especially since the 1990s), justices have relied on "citations to prior authority such as case law" (Weinstein 2005). What has generally been lacking is a guide from a lexicographical perspective that will assist jurists in understanding who the early lexicographers were, who they developed their work for, what ideologies propelled them, as well as the hazards of applying current contexts to historical ones. It is hoped that once these concerns are laid out, those in the legal profession might be more inclined to see dictionaries as supportive instead of as authoritative.

After the reformation of the Anglican Church in England, many ministers found themselves on the wrong side of the Crown and the law. As their beliefs and practices were no longer wanted, these Dissenters had to find a field that suited their skills, and education of various sorts became a sensible profession (Shapiro 2017: xviii). Lexicographers wrote with specific goals in mind, such as to instruct women and servants in the Christian Bible, to provide the ability to read and pray silently, or eventually to take to the ministry themselves. Others later wished to focus on spelling reform and enunciation, even adding diacritical stress marks so readers could practice these new words in speech.[19] Moreover, early lexicographers had clear agendas for reading sacred texts or understanding "hard" words – terms of art often borrowed or translated from other languages into English – to increase their audiences of literate readers and also create new readers. Additionally, word lists and definitions were lifted unapologetically from earlier or competing dictionaries. Sidney Landau (2014) writes that "exclusive ownership of published material, though doubtless cherished, was not a reasonable expectation if its commercial value was likely to be great. The indignations sometimes expressed by early lexicographers did not make them stint from copying from others" (50–1), though they were often careful to cite predecessors' dubious choices or failed attempts. Claims of authority over language unite many dictionary authors; they maintained that their methods, word lists, or purposes were different when in fact they were often remarkably similar. In particular, borrowing word lists and verbatim definitions helped to solidify the reach of linguistic prescriptivism during that period and the perception of formality during ours, as DeWitt Starnes and Gretchen Noyes first discussed in 1946 (Starnes and Noyes 1991/1946: 49–57). Indeed, John Considine (2015) disputes the modern idea of plagiarism existing in early dictionary making; what borrowing meant then was more flexible than our understanding today, as we generally consider quotations without attribution to be plagiarism. The borrowing that occurred meant that these new reference

[19] Robert Cawdrey (1604) and Thomas Dyche (1968/1707).

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works could increase social cohesion with individual reading, English literacy, and linguistic conformity – things we might now assume were the case but in fact were not fully adopted. These and other educational texts smoothed the way for historical changes such as early capitalistic markets and social mobility. The ubiquity of borrowing by competing lexicographers created not only competition but outrage and news – it also had the effect of norming certain words for users and creating the assumption today that language was more fixed than it was.

Lexicographical order was not employed during this time, as it was just beginning to be set. As the scientific world expanded, so did the lexicographical one, and over time methods and styles were established. Likewise, during this time, several scholars and lexicographers attempted to establish more structure and create a government-sponsored academy for regulating English, much like the Spanish, Italian, and French ones.[20] Daniel Defoe's *Essay on Projects* discusses the need for a regulating body, and Jonathan Swift advocated for an academy, as well. Each time, they failed to impose order.

Just as there was only nascent order in lexicography in the founding era, so there is no organizing canon of old dictionaries that legal practitioners consult, with the exception of those by Samuel Johnson (1755), Noah Webster (1828), and the law dictionary *Black's*. Therefore, if a legal professional wishes to use other dictionaries of that time period, they should understand words in their historical contexts and be guided by the paratextual matter of dictionaries. Consider how the word *ordinary* has been cited or used in legal circles in recent decades. The term *ordinary* is frequently used to indicate something that is usual and has commonality, though it entered civil law and the language through its application in canon law. The English word was borrowed from Latin and then French; in the medieval period *ordinary* was a noun referring to "a person who has, of his or her own right and not by the appointment of another, immediate jurisdiction in ecclesiastical cases, such as the archbishop in a province, or the bishop or bishop's deputy in a diocese."[21] While that initial sense still occurs today, the term eventually predominated as a secular term and in legal language. To get a sense of the long history of the word, its first legislative sense is found in John Cowell's *The Interpreter: or Booke Containing the Signification of Words* (1607) as:

> Ordinarie (Ordinarius) though in the ciuil lawe, whence the word is taken, it doth signifie any iudge that hath authoritie to take knowledge of causes in his owne right, as he is a magistrate, and not by deputation: yet in our common

[20] See History of the Royal Society (n.d.).
[21] Oxford English Dictionary, n.d., s.v. "ordinary," www.oed.com.

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> lawe, it is most commonly, and for ought I remember, always taken for him, that hath ordinarie Iurisdiction in causes ecclesiasticall.

That definition is repeated in Thomas Blount's *Glossographia* (1656):

> Ordinary (ordinarius) though in the Civil Law, whence the word is taken, it signifies any Judge that has authority to take knowledge of Causes in his own right; as he is a Magistrate and not by deputation, yet in our Common Law it is most commonly and usually taken for him, that hath ordinary Jurisdiction in Causes Ecclesiastical.

Shortly afterwards, Cowell's definition reappears in Edward Phillips's *The New World of English Words* (1658), largely verbatim:

> Ordinary, (Lat.) in the Civil-law, signifieth any judge that hath authority to take knowledge of causes in his own right, as he is a Magistrate, and not by deputation, in Common-law it is usually taken for him that hath ordinary Jurisdiction in Causes Ecclesiastical.

It is easy to see that many definitions of this term are not original and are repurposed, as per custom. By the middle of the eighteenth century, the ecclesiastical sense of *ordinary* as a noun was becoming archaic, as John Kersey the Younger (1702) wrote in *A New English Dictionary*: "a Diocesan Bishop, or his Suffragan." We see how the sense of the word changed diachronically; lexicographers reusing language affirmed many definitions as part of the lexical record – a form of lexicographical precedent – but without evidence of the word in use other than in formal documents like dictionaries it is impossible to determine common usage.

The other sense of *ordinary*, the adjective familiar to contemporary English users, is related to the judicial one and refers to something being the norm, usual, customary. The *Oxford English Dictionary*'s first use of this sense of *ordinary* is "Belonging to the regular or usual order or course of things; having a place in a fixed or regulated sequence; occurring in the course of regular custom or practice; normal; customary; usual." Because current users of English are unfamiliar with the earlier religious sense it is easy to imagine someone misconstruing the older meaning, such as in a Middle English translation of Alain Chartier's (1965/1617) French text, "His iustice is thyne ordenary iuge, but His mercy He made a party."[22] That is, it might be possible to perceive the judge to be a civil jurist, when he was not one at all. Today, because lexicography is dominated by descriptivism and the observation of language in use, the authority of a definition of a word *in use* and not necessarily *in print* means that

[22] www-oed-com.ezaccess.libraries.psu.edu/view/Entry/132361?rskey=TdbIxd&result=2&isAdvanced=false#eid.

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repeated use establishes precedence, though this kind of precedence is different from that in the legal profession.

The reality is that most users of dictionaries today do not know the theoretical principles that organize the dictionaries they use – in print, but especially online. For the most part, editorial decisions remain in the background. We assume that certain principles are in place with respect to alphabetization, sense ordering or disambiguating, or adding more encyclopedic information. We have come to expect our wishes to become literal commands. In the past, however, such information could not be assumed, and therefore dictionary users were instructed to read the dictionary in order to use it. For example, the majority of dictionaries published before and during the founding era focused on the educated variety of English used in metropolitan regions, particularly London and, to a lesser extent, Edinburgh, as both cities were seats of learning, culture, and commerce. Focusing on such a narrow slice of the English-speaking population meant that dialectal senses, regionalisms, and cant were excluded by design in order to create a fixed, national language. This is unlike many dictionaries of today, which have usage notes to indicate which words deviate from the standard. With few exceptions, such as the dictionary by William Kenrick (1773) whose word list comprised primarily basic words, dictionaries of the seventeenth and eighteenth centuries did not include language as it was used by, everyday people, as authors were concerned that vulgar or incorrect English would corrupt speakers and readers.

Taking pains to educate readers in what they considered appropriate ways of understanding and speaking English, early lexicographers added notes and pronunciation marks for guidance. Thomas Sheridan, a former actor and schoolmaster, wrote a pronouncing, or orthoepic, dictionary to correct what he believed to be poor speech habits and uncouth accents. James Buchanan, a Scots lexicographer and schoolmaster, was likewise interested in proper stress and pronunciation; Samuel Johnson provided sample sentences to illustrate how a word should be used. While Johnson's sample sentences and sources allowed readers to contextualize words, Ellen Aprill writes that those samples are culled from some of the most elite authors in philosophy, science, and literature and are the social class equivalent of using the *New York Times* as source material (1998: 292). Rather than reflect the vernacular language of users, dictionaries, written by and for the educated and the elite, imposed arbitrary prescriptivism and subjective judgment in their texts and on their readers. Moreover, as lexicographers reused each other's language, they affirmed that some words and definitions would become part of the lexical record – a form of lexicographical precedent. It is important to understand that seeing how words are repeated among dictionaries but without having additional evidence of language in use,

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we cannot always be fully certain of ordinary meaning. Therefore, to be more assured of common or ordinary meaning for some words during the founding era, a fuller search should include online databases of historical books, ballads, pamphlets, newspapers and other popular published material, which would provide additional evidence of usage in a variety of contexts.[23] Even so, it is crucial to note that these databases do not document literacy or a work's popularity; instead, they collect extant texts and let the reader infer.

Dictionaries were commercial products. As with paratextual matter establishing an author's bona fides, they were sold on the basis of *this* work being better than *that* work, as theirs had the "best" words. (If that is not subjective, it is hard to see what is.) Soon, early dictionaries became packed with information unrelated to actual definitions, becoming more like almanacs or encyclopedias, including information on important market days, holy days, monarchs, and the like.[24] These jam-packed dictionaries were not well-organized, methodologically sound texts based on the kinds of orderly lexicographical principles that we assume today. Not until Nathan Bailey and Samuel Johnson in the mid eighteenth century explicated their reasons for adding or subtracting words, citing sources, and identifying errors did the field move towards professionalization. And those who assume early lexicographers were motivated by anything other than profit or esteem and their work was neutral run the risk of perpetuating the mistakes of their forbears, not eliminating them.[25]

It is critical when learning about the history of early English dictionaries to note that these authors believed that English should be tamed and that they needed to prescribe fixes for English. Prescriptivism, then and now, means that while these authors understood that language would change, they believed that it was their responsibility to impose constant vigilance on it and indicate what was correct or not. Lexicographers during the founding era did not want to expose the reader to ordinary language at all, so solely using old dictionaries to ascertain what was common at that time is not a reliable way to understand meaning. In fact, some lexicographers found ordinary language distasteful, a form of vulgarity or deterioration (Landau 2014: 244). Dictionaries before the twentieth century did not represent all usage or all users, so those seeking to comprehend words during the time a law was written were unlikely to find them in a typical or everyday manner requisite for most users. When jurists and legal

[23] See online databases such as Early English Books Online (EEBO; Eighteenth Century Collection Online (ECCO); The Burney [Newspaper] Collection, and others.

[24] A useful source for understanding the full extent of how paratextual matter informed dictionaries is from Roderick McConchie and Jukka Tyrkkö (2018).

[25] Of course, see Johnson's famous message written on April 5, 1776, to James Boswell (1791): "No man but a blockhead ever wrote except for money."

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professionals use dictionaries – old and new – to understand earlier meaning or intent but without lexicographical knowledge, their conclusions may create precedents in language that do not reflect actual usage; rather, a prescriptivist approach then and now reveals that what dictionaries promoted was an ideal meaning.

Despite what people might want from dictionaries as far as a definitive answer on meaning, they do not provide sufficient ways to "fix" – or set – language. They do, however, provide information as to its use during a particular time, area, or circumstance. Not only can language not be fixed, but it is essential to acknowledge that it changes, even before and while dictionaries are produced. The most famous claim about "fixing" the language derives from Samuel Johnson's (1747) "Plan of a Dictionary," in which he presents a rationale for his forthcoming monumental *A Dictionary of the English Language* (1755). In the "Plan," Johnson details his choices to include or exclude words as well as how and why they should be spelled or pronounced. Scattered throughout Johnson's preliminary text are words that might appeal to someone seeking a definitive answer for why English needed to be reformed or adjudicated, as he uses words such as "corrupt," "rules," and "permanent"—language that would seem to illustrate a grave problem. Indeed, he states that "one great end of this undertaking is to fix the English language," by which he means to stabilize and set it for posterity (Johnson 1747: 12). Johnson's ambitions, however, were quashed by the time he wrote the preface to his dictionary eight years later. He would, in just a few years, conclude:

> Those who have been persuaded to think well of my design, require that it should fix our language, and put a stop to those alterations which time and chance have hitherto been suffered to make it without opposition. With this consequence I will confess that I flattered myself for a while; but now begin to fear that I have indulged expectation which neither reason nor experience can justify. When we see men grow old and die at a certain time one after another, from century to century, we laugh at the elixir that promises to prolong life to a thousand years; and with equal justice may the lexicographer be derided, who being able to produce no example of a nation that has preserved their words and phrases from mutability, shall imagine that his dictionary can embalm his language, and secure it from corruption and decay, that it is in his power to change sublunary nature, or clear the world at once from folly, vanity, and affectation. (Johnson 1755)

In that section Johnson also discusses the proper pronunciation of words, orthoepy, which was an important topic for eighteenth-century lexicography. Johnson's shift from wholly prescriptive to aspirationally prescriptive should alert modern readers that even Johnson, considered the most influential lexicographer of

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English, could not do then what they want to do now. Those who wish to know how words were used during an earlier period would do well to study the front matter, footnotes, and back matter, where authors and editors present their perspectives. Instead, readers will likely turn directly to the words as they do with contemporary dictionaries, creating a knowledge vacuum with respect to why dictionary writers made certain choices—what they included, left out, how senses were ordered, who was the audience, and so on – and how a current reader can approach this information. To ignore paratextual matter in old dictionaries precludes understanding the language these old texts document; their goals and objectives were different to those who seek meaning and definitions today.

Johnson's comments about language occur in a section on what comprises proper pronunciation, which other eighteenth-century dictionaries promoted in addition to defining words and providing grammatical advice. Pronunciation has changed a great deal, not just from the passage of time, but also by virtue of geography: speakers in the United States created their own variety of the English language, of which accent, lexicon, and grammar were often distinct; and while jurists wish to know what words originally meant, at this time, pronunciation was, arguably, as important or even more important than defining words. This period in English history was when the economy and social classes were shifting, and more people were becoming literate and successful. Chief among the reasons for focusing on orthoepy as much as if not more than meaning are the rise in literacy rates as well as the rise in income and middle-class status. People were seeking the "correct" way to read, write, and use the language in speech; what had once been "hard words," loans from other languages, or terms of art, were becoming more familiar, and people who could read now had opportunities to be more comfortable saying the words they read. Lexicographers were happy to oblige and dictated the "right" way to "English" the language.[26] The reality is that so much of the linguistic and grammatical rules that developed during this period have been arbitrarily enforced, eliding the fact that meaning is arbitrary to begin with.

The most influential lexicographer in the United States is Noah Webster, who wrote dictionaries, grammatical works, and schoolbooks for a new nation's readership. Webster's important pedagogical work, commonly known as the *Blue Back Speller* (1788), was important to early nineteenth-century literacy

[26] Many of the language rules of this period, some of which we still are asked to follow, were often based on Latin grammatical structure and not English. Two of the more famous and long-lasting "rules" are that it is incorrect to split an infinitive as well as to use a double negative, promoted by Bishop Robert Lowth. It is also at this time that the "universal he" pronoun was promoted by Anne Fisher, a grammarian and lexicographer. For more information on the arbitrary rules of English, see Joan Beal (2020).

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projects and it remained an essential academic foundational children's workbook for over a century.[27] In addition to Webster's pedagogical projects he helped to establish the American language as distinct from that of the British.[28] In so doing, he explicitly quarrels with Samuel Johnson's work. As Jack Lynch (2006: 46) writes,

> Webster's objections to Johnson are partly linguistic but also political. Webster was born in 1758, three years after Johnson's *Dictionary* first came out, and he came of age during the Revolutionary generation in America – he was in Philadelphia in 1787 as the Constitution was being written. And at a time when American cultural identity was still in its infancy, Webster was determined to make the case for his fledgling nation. American culture had little to boast about in Webster's day.

Webster, though, was an early believer in his national culture, and he was convinced that his language books could help to shape the country's identity.

In his *Compendious Dictionary of the English Language*, Webster (1806) argued not just with Johnson's theory of language and lexicography, but also lexical items and spelling. Another of Webster's key assertions was that varieties of English other than British would eventually predominate. His politicization of the American language, or the language(s) of the Americas, was such that he asserts, correctly, that it would eventually have greater reach and influence than the language of England:

> In each of the countries peopled by Englishmen, a distinct dialect of the language will gradually be formed; the principal of which will be that of the United States. In fifty years from this time, the *American-English*, will be spoken by more people, than all the other dialects of the language, and in one hundred and thirty years, by more people than any other language on the globe, not excepting the Chinese. Those words which express ideas common to the several nations will remain so the same in all the dialects, as to render mutual intercourse easy – circumstance for which the citizens of each country will be much indebted to the art of printing, which will retard the progress of variations. But those terms in Great Britain, which express local ideas only, will be lost in the dialects of India and America, while local circumstances among the descendants of the English in their new settlements, will originate new words, or give to old words new significations, which will never be generally received or known in Great Britain. (Webster 1806: xxii–xxiii)

It is the case that contrasts in lexicon, senses, meaning, grammar, and accent make the English of Britain and that of its former colonies sufficiently different,

[27] It was called "the Blue Back Speller" because of its blue cover. There were nearly 400 editions during Webster's lifetime.

[28] For a good discussion of early English usage rules and the desire to create an American version of the English language see Ward E. Gilman (1989: 7a–11a.)

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so they should be considered separate varieties. Webster's view of a *British* versus *American* language and literacy made his editorial choices – such as terminology, orthoepic and spelling reform, or commenting on the deficiencies of other dictionaries – necessarily politicize his lexicography, though no more than others with more subtle ideologies; Webster (1828) made his claims more explicitly in *An American Dictionary of the English Language*.

The takeaway from eighteenth-century lexicographical prescriptivism is that when so little of the English population was literate, using examples from historically canonical literature means that present-day jurists who rely on those definitions or sample sets are shown what the elite knew and wanted others to know; the early examples are not predictive of extensive societal usage and do not indicate how people with less education or awareness of classical or "great" literature would have interpreted language in a day-to-day, much less a legal context. Those who view language today through the lens of old dictionaries, but without the additional knowledge of history, reinforce elitist ideologies. Even lexicographers such as John Ray (1674) and Francis Grose (1785), interested in regionalisms and slang, narrowly focused on specific types of language reflecting specific users and were not representative of common usage. In fact, such "irregular" senses were actively discouraged, as lexicographers considered them inferior and unworthy of dictionary users who wanted to learn the "correct" usage of a word.[29] The "correct" usage is also what would have been the "ideal" meaning; but because lexicographers put constraints on examples and sources, "ideal" then is helpful but not definitive for interpreting today.

A recent and striking example of how contemporary lawyers have used dictionaries is from the United States Department of Justice's response to *CREW et al. v. Trump*. In 2017 several lawsuits were filed against then President Donald J. Trump for violating the foreign and domestic emoluments clauses in the United States Constitution and profiting unduly from his office.[30] A brief summation of the conflict is found in Ilya Shapiro's (2008) blog post

[29] Early lexicographers hated idiosyncrasies though they practiced them. See John Walker (1791): "The origin of this ridiculous irregularity . . . is not hard to guess. Some shallow writers, or perhaps printers, have heard that good authors have complained that our language is clogged by clusters of consonants. This was sufficient to set these smatterers at work on so easy a business as that of unloading the language of its useless letters; and we find under the notion of useless, and clusters of consonants, we are near being deprived of the most useful letters we have." James Buchanan wrote: "As a misinterpretation of the signification of words, most [dictionaries] have a pernicious influence upon those who depend upon a dictionary for their expositor," later railing against the Bible as a lexicographical teaching tool, as they might promote Deism (cited in Shapiro 2017: 259).

[30] See U.S. Const. art. 2, § 1, cl. 7 (https://constitution.congress.gov/browse/essay/artII-S1-C7-1/ALDE_00000233/); and the foreign emoluments clause, U.S. Const. art. 1, § 9, cl. 8 (https://constitution.congress.gov/browse/essay/artI-S9-C8-1/ALDE_00001096/).

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regarding when the Obama–Biden administration also confronted the issue, which was resolved before they took office. While a suit filed on the basis of those claims is unusual, it is not at all unusual that both sides would rely on dictionaries from the founding period to define what was an emolument. Accordingly, United States District Judge Peter Messitte allowed a lawsuit against Trump to proceed in large part because of the strength of the lexicographical evidence provided by the plaintiffs. The judge "cited evidence provided by Georgetown University law professor John Mikhail about how dictionaries from the founders' time defined the word 'emolument' more broadly than argued by Trump's lawyers. The Trump legal team argued that emoluments were payments specifically related to office holding, and the activities of the Trump International Hotel were independent of that definition" (Bomboy 2018).

What makes this case remarkable is not just that the differing sides were using dictionaries, or that the texts used were radically different. What makes this case different is the quality and number of dictionaries used, which seems to reinforce the idea that some legal professionals do in fact understand that language is different today. For example, one would imagine that the language of the domestic and foreign emoluments clauses is fairly straightforward, even accounting for the two centuries that have passed since the Constitution was written. The foreign emoluments clause, in Article I, Section 9, states that, "No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." The domestic emoluments clause, in Article II, Section 1, reads, "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." At issue is the definition of *emolument*, which by synonymy and context, appears to prohibit gifts or funds gained as a result of the office of president. The Justice Department, in contrast, employed a very narrow definition of emolument. The Department of Justice also claimed that "emolument" was at the time of the founding a "term of art," meaning that a term or word referred to a specific field, when in fact it was not. John Mikhail (2017a) writes that the Department of Justice ignored 92 percent of old dictionaries because their definitions focused on the sense of emolument unfavorable to their claim. The Justice Department instead cherry-picked definitions that concluded that emoluments were only linked to "profits arising from office or employ," but this is belied by the massive amount of evidence Mikhail showed to the contrary.

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The sense of emolument that was far more common – indeed, ordinary – was the one more broadly applied and pertained to any benefits and rewards.[31]

Additional support for emolument to be considered in the sense of profit or gain in general comes from the *Historical Thesaurus of the Oxford English Dictionary*, which is unequivocal that payment from employment was a minor sense.[32] The majority sense that this dictionary finds is synonymous with "advantage," defined as "Benefit; increased well-being or convenience … a benefit received" and falls under the definition "profit or gain arising from station, office, or employment; dues, rewards, remunerations, salary." A supporting quotation from the *Oxford English Dictionary* is from Phillip Brooks: "Men who want to be scholars for the emoluments … emoluments will bring," meaning that the reward for learning is knowledge (1881: 69). Further evidence of judicial consensus as to the meaning of emolument being greater than mere salary, and discussed without reference to a dictionary, is from a letter by Robert Bork, Attorney General of the United States, to Gale W. McGoo. The definition of emolument had arisen during a hearing, and committee members requested legal clarification. In Bork's follow-up letter, he wrote,

> the constitution, of course, does not define "emolument." The debate of the constitutional convention suggests the framers were primarily concerned with increasing salaries. However, it is clear that in adapting Article I, Section 6, Clause 2, the framers sought to prevent corruption in the appointment to civil office by removing any inducement … Therefore, a fair reading … requires that the term "emolument" be given a broader meaning all merely an increase in salary. (Bork 1973)

Bork provides evidence of a case in which the United States government sought to recoup expenses from the port of New York and "the court responded that the term emolument is comprehensive … Embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office."

The definition and use of the term emolument applying to both wages and other gifts or remuneration is not new. It has been used in that context for centuries; for example, in *A Manual for United States Consuls: Embracing Their Rights, Duties, and Emoluments*, Sidney Henshaw (1849) discusses the establishment in countries like France and England of regular and "competent salaries … has probably divested the office from many temptations to partiality and speculation which otherwise would have been expected" (24). The implication is that an emolument is some kind of financial surfeit that would make up for poor salaries. Likewise, in several former British colonies such as India

[31] www-oed-com.ezaccess.libraries.psu.edu/view/Entry/61242#eid5726514.
[32] *Historical Thesaurus of the Oxford English Dictionary*. www.oed/thesaurus/start.

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and Barbados, the salaries of civil servants are still called "emoluments." But the term in the United States had long been disused and has become an archaism, leading some people to consider not just the term, but even debate over its violation to be irrelevant. John McWhorter (2019), wrote an article on how the term is today outdated, so perhaps others likewise believe that the lawsuits over this term and its implications were destined to fail because the thing itself and that which it describes do not make sense. If the signifier no longer conjures up the signified, the implication is that the sign is likewise incomprehensible, which, in a generous reading, may account for the small number of dictionaries the Department of Justice relied on. If the government was arguing that the term no longer holds current meaning or has become semantically narrow, then one could argue that there should be greater impetus to understand what the word meant during the founding era, not less. Referring to many dictionaries for the definition of the term ought to clarify what the term was meant synchronically. Even so, because language changes as society changes – as evidenced from Samuel Johnson's resigned admission and Noah Webster's aggressive declaration of independence – definitions from a particular time merely allow us to *presume* meaning and not *assume* meaning.

It should be clear by now that using founding era dictionaries presents problems today in law because, while those dictionaries were indeed prescriptive, they contained implicit and explicit biases and values of another time and place. It is anachronistic to rely on such works as arbiters since each place and time is marked by its own prejudices and early English dictionaries are no different; dictionaries and their compilers are more conservative than speech and whatever they record has been in use by the public for some period of time before a word is entered into a dictionary. There are certain criteria for inclusion as well as placement in a sense order. Because a dictionary is often a compilation, in the best circumstances, of the linguistic competence of a particular group of users, that means there are more words than people will typically use or want to use. Dictionaries are records of usage, and the record has order, but the order is not always the same in every case. To understand the ideology behind each dictionary, one must first understand how the lexicographer records words. Even then, it must be acknowledged that "No lexicographer of English starts with a blank piece of paper, but rather stands in a tradition of dictionary making that reaches back more than six centuries" (Jackson 2002: 27).

M. Lynne Murphy (2018) explains some of the distinctions between British and American attitudes toward dictionaries and how they have been embedded in respective social constructions of national identity. She opens an article on various marketing techniques of British and American dictionaries with

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a discussion of how dictionaries have been used not just in schools but also in legal decisions. Murphy asserts that the two nations differ greatly in their attitudes toward authority and, paradoxically, self-help books such as dictionaries. Murphy (2018) uses the term "dictionary culture" to explore how these texts "reflect and contribute to the larger society's situation concerning language, authority, literacy, education, commerce and interactions of these and related areas and the complexes of social values concerning these matters" (1). The evidence that the United States relies on dictionaries to be not just formulaic but authoritative is amply supported not only by metatextual matter in Webster's dictionaries but also in the grammatical books of the nineteenth and twentieth centuries. In contrast, Britain experienced a similar reliance on dictionaries and grammatical rules in the eighteenth century, suggesting that society in the United States might be a few centuries behind in its search for the right or correct way to use language. Not only are dictionaries more prevalent in American schools and popular discourse, but dictionaries are relied on more heavily in American than in British courts and the difference between them is startling.[33] It appears that American reliance on "the dictionary" occurs because those who look words up affirm their democratic ideals and concepts about national self-reliance – but which actually signals an obedience to authority, in this case, textual authority – whereas British users see using a dictionary as a way to augment what they already know about the superiority of their language and laws.

That the United States has a written constitution is another dramatic way its government imposes authority over itself, its people, and its language. The self-determination that the United States sought in developing its Declaration of Independence and later its Constitution can be seen as related to, or an extension of, the eighteenth-century dictionaries often written by Dissenting Protestants, just the kind of spiritual guides whose views on religion and society similarly would find acceptance and support in colonial America. It is problematic, then, if certain dictionaries are used and not others; the repetition of texts and definitions, regardless of utility or quality, has the consequence of instilling into law those works or meanings that are cited. The fact that one nation's constitution is written, and therefore codified, and the other's is not, indicates perhaps that the former's inability to accept ambiguity in society or its interpretation of laws is a factor in its still being tied to obedience to authority. The arbiter that the United States obeys is no longer England; instead, the nation and its courts have sought authority in the written word as defined by dictionaries written by people with agendas. Ignorance of the politics of lexicography means

[33] Murphy cites the uptick in US court cases as significantly greater than in British cases: roughly 30 percent in US cases versus less than 4 percent in British ones.

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that reading old dictionaries with only current knowledge is not just anachronistic but is itself a political act.

2 Excerpt from "The Definition of 'Emolument' in English Language and Legal Dictionaries, 1523–1806," by John Mikhail

On 23 January 2017, Citizens for Responsible Ethics in Washington (CREW) sued then president Donald Trump, just a few days after he took office. A non-partisan organization dedicated to exposing corruption and ethical violations in government, CREW was founded in 2003 and had been working on a wide range of cases focusing on the need for transparency in and accountability for governmental decisions and policies. Before the suit, starting in December of 2016, John Mikhail, a law professor at Georgetown University, decided to explore the history of the word "emolument," and how it had been used in old dictionaries during the time of the founding of the United States in the eighteenth century. One of the reasons for doing so was that conservative judges often argue that consideration of the original meaning of a word is essential to how a law is currently interpreted. In fact, the Department of Justice at the time of the lawsuit did use early dictionaries, but very few of them. The dictionaries they chose gave a sense of the term that would have been considered narrow and not germane to contemporaneous examples of the term. In an interview on National Public Radio, Professor Mikhail explained that "prior to maybe December of 2016, I had not given much thought to the word," and yet shortly afterwards, he and his assistant Genevieve Bentz became very familiar with most of the English-language dictionaries published during the seventeenth and eighteenth centuries as well as numerous other reference books, and primary documents such as letters, contracts, and philosophical treatises that would have been available to the framers of the Constitution (Overby 2017). Fred Barbash (2018) explains how Mikhail's careful work identifying hundreds of documents and thousands of instances of "emolument" was cited in a historic ruling by US District Judge Peter Messitte in Maryland, who allowed a suit brought by the District of Columbia and Maryland to move forward, rather than be dismissed, which is what the Trump administration had hoped. Barbash also relays how Judge Messitte called Mikhail's research "exhaustive" and used his definitions in his rulings.

[The contents of the selection from John Mikhail's work have been lightly edited by Rebecca Shapiro for the purpose of clarity and brevity, and any discrepancies between the published version by Cambridge University Press and John Mikhail's original version are due to her edits, not his. Professor Mikhail would like to acknowledge here the outstanding efforts of research assistant, Genevieve (Bentz) Lewis, who did the lion's share of work in locating

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many of the historical dictionaries that his paper drew upon. For space considerations Professor Mikhail's extensive appendices, which include clarifying images and extensive contemporaneous primary-source quotations, could not be included in the print Element; however, they can be found in the original article (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693), as well as in the online resources for this Element: (www.cambridge.org/Shapiro). All references to items numbered with an "A-" prefix are available in the Online Appendix. A published version of Professor Mikhail's research can be found in his article, "The 2018 Seegers Lecture: Emoluments and President Trump," 53 *Valparaiso University Law Review* 631 (2019).]

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THE DEFINITION OF "EMOLUMENT" IN ENGLISH LANGUAGE AND LEGAL DICTIONARIES, 1523–1806

John Mikhail

Introduction

On June 9, 2017, the US Department of Justice (DOJ) filed a brief in support of President Donald Trump's Motion to Dismiss in *CREW et al. v. Trump*,[34] one of three emoluments lawsuits currently pending against the president.[35] In its brief, DOJ argues *inter alia* that:

- "Plaintiffs' expansive reading of the Emoluments Clauses is contrary to the original understanding of the Clauses and to historical practice. The term 'Emolument' in this context refers to benefits arising from personal service in an employment or equivalent relationship."[36]
- "Neither the text nor the history [of the Emoluments Clauses] shows that they were intended to reach benefits arising from a President's private business pursuits having nothing to do with his office or personal service to a foreign power."[37]
- "At the time of the Nation's founding . . . an 'emolument' was a common characteristic of a federal office and comprehensively described 'every species of compensation or pecuniary profit derived from a discharge of the duties of the office.'"[38]

[34] Memorandum of Law in Support of Defendant's Motion to Dismiss, Citizens for Responsibility and Ethics in *Washington et al. v. Donald J. Trump* (S.D.N.Y., June 9, 2017) (Case 1:17-cv-00458-RA) (henceforth "DOJ Brief").

[35] See Citizens for Responsibility and Ethics in *Washington et al. v. Donald J. Trump* (S.D.N.Y. May 10, 2017) (Case 1:17-cv-00458-RA); *The District of Columbia and The State of Maryland v. Donald J. Trump* (D.C. MD, June 12, 2017) (Case 8:17-cv-01596-PJM); *Senator Richard Blumenthal et al. v. Donald J. Trump* (D.D.C., June 14, 2017) (Case 1:17-cv-01154). All three cases turn on the application of two constitutional provisions to President Trump, the foreign emoluments clause, and the domestic emoluments clause. The first clause provides that

> no Person holding any Office of Profit or Trust under them [i.e., the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, §9, cl. 8. The second clause provides that:

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

U.S. Const. art. II, §1, cl. 7.

[36] DOJ Brief, *supra* note 34, at 2–3.

[37] *Id*. at 26.

[38] *Id*. (quoting *Hoyt v. United States*, 51 U.S. 109, 135 [1850]; emphasis omitted).

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- In light of "common usage" at the time of the founding, "the term 'Emolument' in the Emoluments Clauses should be interpreted to refer to a 'profit arising from an office or employ.'"[39]
- "The history and purpose of the [emoluments clauses] is devoid of concern about private commercial business arrangements."[40]

To defend these and other historical claims,[41] DOJ leans on two founding-era dictionaries: *A Complete and Universal English Dictionary on a New Plan* by James Barclay (1774) and *The Difference between Words, Esteemed Synonymous, in the English Language* by John Trusler (1766). According to DOJ, Barclay defines "emolument" as "profit arising from an office or employ,"[42] while Trusler explains that the term "relates to commissions and employments; intimating, not only the salaries, but, all other perquisites."[43] Repeatedly invoking these definitions in support of President Trump's Rule 12(b)(6) motion,[44] DOJ argues that they justify what it calls an "office-and-employment-specific construction"[45] of "emolument," which, it claims, categorically precludes the possibility that any of the profits, gains, or advantages President Trump or his businesses receive from foreign, federal, or state governments constitute violations of the emoluments clauses.[46]

DOJ concedes that "the plaintiffs' definition of ['emolument'] as encompassing 'anything of value' resembles a concurrent, broader definition that existed at the time of the founding."[47] It insists, however, that "common usage"[48] then reflects Barclay's narrower definition.[49] DOJ argues that if the term "emolument" is ambiguous, that ambiguity ought to be resolved with Barclay's

[39] *Id*. at 28 (quoting Barclay 1774). [40] *Id*. at 34.

[41] See, e.g., *id*. at 27 ("The Emoluments Clauses Prohibit Benefits Arising from the U.S. Official's Provision of Service Pursuant to an Office or Employment"); *id*. ("The Emoluments Clauses apply only to the receipt of compensation for personal services and to the receipt of honors and gifts based on official position"); *id*. ("The Emoluments Clauses . . . do not prohibit any company in which the President has a financial interest from doing business with any foreign, federal, or state instrumentality"). DOJ does not identify these additional claims as originalist, but their context implies that it regards them as such.

[42] DOJ Brief, *supra* note 34, at 28 (quoting Barclay 1774).

[43] *Id*. at 29–30 (quoting Trusler 1766).

[44] See, e.g., *id*. at 28 (quoting Barclay 1774); *id*. at 30 (quoting Barclay 1774); id. at 31 (paraphrasing Barclay1774); id. at 29–30 (quoting Trusler 1766).

[45] *Id*. at 32. *See* also *id*. (arguing that "the term 'Emolument' . . . should be understood as office-and-employment specific"); *id*. at 40 ("For over two centuries, the Emoluments Clauses have been interpreted and applied in an office-and-employment specific manner").

[46] *Id*. at 27–32; see generally *id*. at 26–48. As Marty Lederman observes, DOJ's conclusion does not necessarily follow from its premises. Even if one accepts the government's narrow definition of the term "emolument," at least some of the conduct alleged by the CREW plaintiffs in their complaint appears to violate the foreign emoluments clause. See Lederman (2017).

[47] *Id*. at 30. [48] *Id*. at 28. [49] *Id*.

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definition.[50] For these and other reasons, DOJ maintains, the plaintiffs fail to state a valid claim upon which relief can be granted.[51]

There are significant problems with these arguments and other aspects of the government's brief, several of which have been identified by other commentators.[52] The core problem I wish to highlight concerns the government's historical definition of "emolument." Simply: that definition is inaccurate, unrepresentative, and misleading. Particularly because DOJ might seek to utilize this flawed definition in subsequent court filings, this article seeks to correct the historical record. It does so on the basis of a comprehensive study of how "emolument" is defined in both English language dictionaries published from 1604 to 1806 and English legal dictionaries published from 1523 to 1792.

I first summarize the main findings of this investigation (Part I), followed by brief remarks about the dictionaries we have good reason to believe the founding generation of Americans actually owned, used, and relied upon (Part II). Next, I consider some of DOJ's other historical arguments (Part III), before presenting the sources, methods, and documentation used in this study (Part IV). Finally, I conclude. The bulk of the article consists of three appendices, which reproduce over 100 images of English language and legal dictionaries published from 1523 to 1806, along with tables and transcripts of the definitions contained within.

Collectively, these investigations are designed to accomplish more than simply aiding judges and holding lawyers' feet to the fire in the emoluments cases now pending in three federal courts. They also provide a basis for educating members of Congress, government officials, journalists, and the wider public about the historical meaning of this important yet obscure constitutional term. Finally, these inquiries seek to contribute to a growing body of research in historical semantics and legal interpretation, a field that seeks to determine more precisely how diachronic lexical shifts have occurred and to evaluate their implications for constitutional and statutory interpretation. Among other things, the studies undertaken here illustrate how a more thorough and systematic investigation of historical dictionaries and other documentary records can assist in these broader endeavors.

I. Findings and Discussion

Respecting English language dictionaries, this article makes at least four specific contributions. First, it demonstrates that one or more elements of the broad

[50] *Id.* [51] *Id.* at 51.

[52] See, e.g., Jane Chong (2017); Michael C. Dorf (2017); Andy Grewal (2017); Lederman (2017); Leah Litman (2017); Richard Primus (2017); Simon Stern (2017).

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definition of "emolument" DOJ rejects in its brief – "profit," "advantage," "gain," or "benefit," – can be found in *every* known English language dictionary definition of "emolument" published between 1604 (the date of the first monolingual English language dictionary)[53] and 1806 (Noah Webster's first dictionary).[54] Second, it demonstrates that over 92 percent of these dictionaries define "emolument" *exclusively* in these terms, with no reference to "office" or "employment."[55] By contrast, DOJ's preferred definition – "profit arising from an office or employ" – appears in fewer than 8 percent of these dictionaries.[56] Third, this research documents that even these outlier dictionaries always include "gain, or advantage" in definitions, a finding obscured by DOJ's brief selectively quoting Barclay.[57] Finally, this report highlights how Trusler's volume is not a standard dictionary at all, but rather a thesaurus, which presumes that "gain," "profit," "lucre," and "emolument" are synonyms, albeit words with subtly different connotations.[58] Moreover, Trusler's account of these words was copied directly from a French thesaurus, Abbé Girard's *Synonymes François*.[59] His volume has long been viewed skeptically because "this book, including its preface, is for the most part an acknowledged translation"[60] of Girard's French text and because it "lacked the integrity of a work originally conceived with the problems of the English language in mind."[61] In short, Trusler's explanation of "emolument" was not even reliably

[53] Robert Cawdrey (1604). The only surviving copy of the first printing of this book is owned by the Bodleian Library at Oxford University. For additional background, see De Witt T. Starnes and Gertrude E. Noyes (1991/1946).

[54] Noah Webster (1806). For discussion of Webster's contributions to English lexicography, see David Micklethwait (2005). For support of the proposition asserted in the text, see Table 1: Definitions of "Emolument" in English Dictionaries, 1604–1806, at A-2 to A-4 (henceforth "Table 1").

[55] See Figure 1: Statistical and Longitudinal Analyses of Lexical Definitions, 1604–1806, at A-5 (henceforth "Figure 1"). See also Table 1, at A-2 to A-4.

[56] See Table 1, at A-2 to A-4; Figure 1, at A-5.

[57] Compare DOJ Brief, *supra* note 34, at 28, 30 (defining "emolument" as "profit arising from profit or employ" and attributing that definition to Barclay [1774]) with Online Appendix A, at A-3, A-5 (documenting that Barclay's full definition of "emolument" is "profit arising from profit or employ; *gain or advantage*") (emphasis added). Barclay also explains how "emolument" differs from synonyms such as "profit" and "lucre" that appears to have been copied from Trusler without attribution. Compare Barclay (1774), at A-8, with Trusler (1766), at A-122. The only other dictionaries from 1604 to 1806 that lend support to DOJ's definition of "emolument" also include "gain, or advantage" in definitions. See Online Appendix A, at A-3 and A-8 (recording definitions in William Rider [1759] and Daniel Fenning [1771]). Except for minor differences in punctuation, the definitions by Barclay, Rider, and Fenning are identical, suggesting that Rider (1759) was probably the first English lexicographer to use this definition and that Barclay copied his definition directly from either Rider or Fenning.

[58] See A-122 to A-129.

[59] Abbé Girard (1748); see A-122 to A-124.

[60] Rebecca Shapiro (2017), at 280 (quoting Gertrude E. Noyes [1951], The Beginnings of the Study of Synonyms in England. *PMLA*. 66, 951, 954).

[61] *Id*.

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grounded in an investigation of the English lexicon, let alone its "common usage."[62]

The suggestion that "emolument" was a legal term of art at the founding, with a sharply circumscribed "office-and-employment-specific"[63] meaning, is also inconsistent with the historical record.[64] A large quantity of evidence already available and easily searchable in the public domain suggests that the founders used the word "emolument" in wide variety of contexts, including private commercial transactions.[65] This article adds to that emerging historical consensus by documenting that none of the most prominent common law dictionaries published from 1523 to 1792 even includes "emolument" in its list of defined terms.[66] Specifically, the primary reason this term is used in these dictionaries is to define other, less familiar words and concepts.[67] Together with the fact that

[62] DOJ Brief, *supra* note 34, at 28. [63] *Id*. at 32.

[64] Although DOJ does not clarify whether it thinks that "emolument" was a legal term of art at the founding, President-Elect Trump's lawyers at Morgan, Lewis & Bockius did rely on this claim in their white paper on presidential conflicts of interest, which they circulated in connection with his preinaugural press conference. Moreover, they made this historical argument in the course of defending the very same "office-and-employment-specific" meaning of "emolument" to which DOJ subscribes in its brief. See Sheri Dillon et al. (2017) ("[A]n emolument was widely understood at the framing of the Constitution to mean any compensation or privilege associated with an office – then, as today, an 'emolument' in legal usage was a payment or other benefit received as a consequence of discharging the duties of an office"); *id*. (observing that the Supreme Court "explained that 'the term emoluments . . . embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of [an] office'" and noting that "[o]ther legal experts early in the Nation's history used the word the same way") (quoting *Hoyt* v. *United States*, *supra* note 40); *id*. at 5 (discussing the "common legal use at the Founding"). Other informed observers have also made similar claims. See, e.g., Trevor Burrus (2017) ("Unless we believe that the Framers intended to prohibit any presidential secondary source of income that could, even incidentally, do business with a foreign government or official, then clearly 'emolument' is a term of art that covers specific types of payments and gifts"). It is unclear whether Professor Natelson assumes that the definition of "emolument" he ultimately endorses ("all compensation with financial value received by reason of public office, including salary and fringe benefits") was a legal term of art, but his article could be read to imply this. See Robert G. Natelson (2017). Finally, Professor Tillman has submitted an amicus brief with an originalist orientation in *CREW et al. v. Trump* which also endorses an "office-and-employment-specific" definition. See Brief for Scholar Seth Barrett Tillman as Amicus Curaie in Support of Defendant, *CREW et al. v. Trump*, Case 1:17-cv-00458-RA Document 37-1 (Filed 06/16/17) (henceforth "Tillman Amicus Brief"), at 5 ("To put it in its simplest terms, an 'emolument' is the lawfully authorized compensation that flows from holding an office or employment"); *id*. ("Emoluments should be understood as the compensation which is to be fixed by law by the body that creates the office or position under discussion, or by the body charged with fixing the office's or position's regular compensation").

[65] See, e.g., John Mikhail (2017b).

[66] See "Table 3: Definitions of "Emolument" in Legal Dictionaries, at A-91.

[67] See, e.g., Thomas Blount (1691), at A-107: "Maritima Angliae" is "the Emolument arising to the King from the [sea]"; Giles Jacob (1729), at A-111 (same); Timothy Cunningham (1764), at A-115 (same). See also Cunningham (1764), at A-113 (using "emolument" to define "Apportum"); Richard Burn (1792), at A-120 (uses "emoluments" to explain "Isle of Man"). Giles Jacob's (1729) influential *A New Law Dictionary* includes a "Form of a Release and Conveyance of Lands" in which "A. B." conveys to "C. D." a property together with "all . . .

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none of the major abridgments appear to define or explain "emolument" either,[68] and that Blackstone and other influential writers of the period frequently used the word in comparably diverse contexts, including private business settings,[69] these findings reinforce the conclusion that "emolument" was not a legal term of art at the founding, which referred only to specific types of payments or benefits associated with discharging the duties of a government office.[70]

Because the fact that "emolument" was frequently used in private business settings is not widely appreciated and has been vigorously denied,[71] this point is worth elaborating at greater length, though two illustrations should suffice. With the possible exception of Hugo Grotius, no early modern writer on the law of nations was more influential than Samuel Pufendorf. His most significant work, *De Jure Naturae et Gentium* (*On the Law of Nature and of Nations*), was published in Latin in 1672 and soon translated into every major European language. The first English translation was by Basil Kennet in 1703, with successive editions appearing in 1710, 1717, 1729, and 1749. The founders were intimately familiar with Pufendorf's masterpiece and often quoted Kennet's translation; for instance, George Wythe did so in his argument in *Bolling v. Bolling*; John Adams did so in his *Novanglus* essays; James Wilson

Easements, Profits, Commodities, Advantages, *Emoluments*, and Hereditaments whatsoever." Jacob, at A-110 (emphasis added). See generally "Table 3: Other Uses of "Emolument" in Legal Dictionaries," at A-92; "Transcript of Legal Dictionary Definitions and Uses, 1523–1792," at A-93.

[68] Although this article focuses on definitions of "emolument," this should not imply that dictionaries are the only or best source for understanding how concepts were understood during the founding era. Other sources, such as case reports, abridgments, treatises, and statutes, may be at least as relevant, if not more so. A preliminary review by Simon Stern (2017) suggests that "emolument" does not appear in any of the major abridgments since the sixteenth century, such as those by Fitzherbert, Brooke, Rolle, Bacon, and Viner. If this is correct, then it lends further support to the conclusion that lawyers did not think that the term "emolument" required special explanation. I am indebted to Simon Stern for these observations and findings.

[69] See, e.g., John Mikhail (2017c); Jed Shugerman (2017). There are many other comparable illustrations in the legal, political, and economic literature of the period. See, e.g., *infra* notes 72–76 and accompanying text.

[70] Unlike the legal dictionaries investigated here, modern law dictionaries do often define "emolument" in terms of office- or employment-related compensation. See, e.g., DOJ Brief, *supra* note 34, at 30, n. 26 (quoting the 2014 edition of *Black's Law Dictionary*). See also, e.g., *Black's Law Dictionary* 542 (Bryan A. Garner 1999) (defining "emolument" as "Any advantage, profit, or gain received as a result of one's employment or one's holding of office"); *Black's Law Dictionary* 616 (Henry Campbell Black 1951) (defining "emolument" principally as "The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private"). As this article documents, however, the same was not true when the Constitution was framed and ratified.

[71] See, e.g., Tillman Amicus Brief, *supra* note 64, at 2 ("Financial gain arising from private business transactions are not emoluments"). See also Seth Barrett Tillman (2017).

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did so in his *Law Lectures*; and Alexander Hamilton did so in his *Pacificus* essays.[72] In Kennet's translation, the word "emolument" occurs twice and both occasions involve private market transactions:

> "What they call *Lex Commissoria* makes void the Bargain if the Price be not paid by such a Day. And, in this Case, either the Seller may immediately deliver the Goods, and, in Default of the Payment, claim them again with the *Emolument*, or else the Goods maybe kept in Possession, till the Payment be actually be made; which last seems to be the safest Way, for generally this Clause is designed in Favour of the Seller, to save him from being put to any Trouble in the quest of his Money . . . ."[73]
>
> "A Man was Guilty of Usury properly so called, not only when he received back a Consumable Commodity with Increase, but if by reason of such a Loan, he lived in another's House Gratis till he was paid; or gave less Rent for it, than otherwise he would have done; or if he received any *Emolument* from a Pawn left with him upon Account of the Debt."[74]

Likewise, many of the founders were well-acquainted with Adam Smith's economic theories. For example, Benjamin Franklin requested a copy of *An Inquiry into the Nature and Causes of the Wealth of Nations* shortly after it was published in 1776; James Madison included Smith's book in his 1783 *Report on Books for Congress*; Robert Morris reportedly gave out copies of *The Wealth of Nations* to members of Congress in the 1780s; and James Wilson quoted Smith in defense of the Bank of North America in 1785.[75] In *The Wealth of Nations*, "emolument" also occurs twice and again, both occasions involve private market transactions:

> A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures. The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their *emoluments*, whether they consist in wages or profit, greatly above their natural rate.[76]

[72] See Bernard Schwartz, Barbara Wilcie Kern, and R. B. Bernstein (1997) (reproducing Wythe's argument in *Bolling*, which in turn quotes Kennet's 2017 edition of Samuel von Pufendorf); Kermit L. Hall and Mark David Hall (2007); "Pacificus No. III, [6 July 1793].

[73] Samuel von Pufendorf (1717), 259–260 (original emphases deleted, spelling modernized, and emphasis on "emolument" added).

[74] *Id*. at 271.

[75] See Willcox (1983), 241–243 (listing "Smith's Wealth of Nations" among the books sent to Franklin); David Lefer (2013), 245–246 (relating that Morris "found Smith's thought so persuasive, in fact, that he gave out copies to members of Congress"); "Report on Books for Congress, [23 January] 1783" [original source: Hutchinson and Rachal (1969), 62–115 (including "Smith on the wealth of Nations" in his list of books); James Wilson (1785) (quoting Smith's remarks on banking).

[76] Adam Smith (1952), 208 (emphasis added).

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> The city of Amsterdam derives a considerable revenue from the bank . . . The bank is supposed, too, to make a considerable profit by the sale of the foreign coin or bullion which sometimes falls to it by the expiring of receipts, and which is always kept till it can be sold with advantage. It makes a profit likewise by selling bank money at five per cent agio and buying it in at four. These different *emoluments* amount to a good deal more than what is necessary for paying the salaries of officers and defraying the expense of management.[77]

In the face of illustrations like these, which occur frequently in eighteenth-century literature and reinforce what is apparent from a cursory review of the founders' own writings, it is unclear why some respected scholars insist that the original meaning of "emolument" did not encompass financial gains arising from private business transactions.

II. The Founders' Dictionaries

Even if one sets aside the foregoing problems, the government's dictionary-based argument in its motion to dismiss is flawed in another, more fundamental respect. Little or no evidence indicates that the two historical dictionaries – Barclay (1774) and Trusler (1766) – on which DOJ relies in its brief to defend its "office-and-employment-specific" definition of "emolument" were owned, possessed, or used by the founders, let alone had any impact on them or on the American people who debated and ratified the Constitution. For example, neither dictionary is mentioned in the more than 178,000 searchable documents in the *Founders Online* database, which makes publicly available the papers of the six most prominent founders. Nor do these volumes appear in other pertinent databases, such as *Journals of the Continental Congress*,[78] *Letters of Delegates to Congress*,[79] *Farrand's Records*,[80] *Elliot's Debates*,[81] or the *Documentary History of the Ratification of the Constitution*.[82] Finally, their role in constitutional adjudication appears negligible.[83]

The contrast with the historical dictionaries DOJ ignores or dismisses in its brief could not be sharper. Significantly, many of the founders actually owned and used these dictionaries. Moreover, the US Supreme Court has often relied

[77] *Id.* [78] See Worthington C. Ford (1904). [79] See Paul H. Smith et al. (1976)
[80] See Max Farrand (1911). [81] See Jonathan Elliot (1836).
[82] See John Kaminski and Gaspari Saladino (1976).
[83] See Gregory E. Maggs (2014) (indicating that Barclay has been cited once by the Supreme Court, in a dissenting opinion by Justice Thomas). Note that the generalizations in the text also apply to Rider (1759) and Fenning (1771), the only founding-era dictionaries which even weakly support DOJ's arguments. Little or no mention of either of these volumes can be found in any of the foregoing databases. One possible exception concerns an 1820 letter from Edmund Kelly to James Madison, though Kelly apparently refers to Fenning's "Spelling Book" rather than his dictionary. See "To James Madison from Edmond Kelly, 26 September 1820."

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on these dictionaries to interpret the original public meaning of constitutional terms. Here are five noteworthy illustrations:

a. Johnson

Samuel Johnson's *Dictionary of the English Language*[84] is probably the most famous eighteenth-century dictionary.[85] Many founders owned copies of it or referred to it in correspondence and other papers. Writing as "A Friend to America," Alexander Hamilton used Johnson's *Dictionary* to take swipes at Samuel Seabury in *A Full Vindication*[86] and *The Farmer Refuted*.[87] Benjamin Franklin eagerly ordered several copies when it became available in 1755.[88] James Madison included Johnson's *Dictionary* in his *Report on Books for Congress* in 1783,[89] and Thomas Jefferson did likewise in his *List of Books for the Library of Congress* in 1802.[90] The Supreme Court has cited Johnson's *Dictionary* on numerous occasions, including *Morrison v. Olson,*[91] *District of Columbia v. Heller,*[92] and *Citizens United*.[93]

In the first edition of his *Dictionary* and every subsequent edition consulted, Johnson defines "emolument" as "Profit; advantage."[94]

b. Bailey

Another lexicographer well-known to the founders was Nathan Bailey. One scholar characterizes Bailey's commercial success as "staggering,"[95] and another describes his *New Universal Etymological Dictionary* as "the supreme popular dictionary of the 18th century, holding a position analogous to that of Webster in the 19th century."[96] Benjamin Franklin advertised Bailey's *New Dictionary* for sale on multiple occasions.[97] John Adams,[98] Thomas Jefferson,[99] and other

[84] Samuel Johnson (1755).
[85] See, e.g., John Algeo (2009: 158) ("The publication of Johnson's Dictionary was certainly the most important linguistic event of the eighteenth century").
[86] See "A Full Vindication of the Measures of the Congress, &c., [15 December] 1774."
[87] See "The Farmer Refuted, &c., [23 February] 1775."
[88] "From Benjamin Franklin to Peter Collinson, 26 June 1755."
[89] "Report on Books for Congress, [23 January] 1783."
[90] Cheng (2010), 229–233.
[91] *Morrison v. Olson*, 487 U.S. 654, 719 (1988) (using Johnson to interpret the original meaning of "inferior").
[92] *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (using Johnson to interpret the original meaning of "arms").
[93] *Citizens United v. FEC*, 558 U.S. 310, 428 n.55 (2010) (using Johnson to interpret the original meaning of "speech").
[94] For transcripts and images of the eighth edition of Johnson's *Dictionary* (1783), see A-2, A-7, A-44.
[95] Melissa Patterson (2015).
[96] Percy W. Long (1909), 25, 31.
[97] See, e.g., "Extracts from the Gazette, 1741"; "Extracts from the Gazette, 1744."
[98] See, e.g., "[April 1761]."
[99] See, e.g., "From Thomas Jefferson to James Eastburn, 2 April 1819"; "From Thomas Jefferson to John Adams, 15 August 1820."

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founders owned copies. When Franklin and his associates founded the Library Company of Philadelphia in 1731, their first book purchase included Bailey's *Dictionarium Britannicum*.[100] The Supreme Court has cited Bailey in cases such as *US v. Lopez*,[101] *INS v. St. Cyr*,[102] *Bond v. United States*,[103] and *Arizona State Legislature v. Arizona Redistricting Commission*.[104]

In his *New Universal Etymological Dictionary*, Bailey defines "emolument" as "Advantage, Profit."[105] In his *Dictionarium Britannicum*, he defines "emolument" as "Profit gotten by labour and cost."[106] Finally, Bailey and Scott's *New Universal Etymological English Dictionary* defines "emolument" as "Profit."[107]

c. Dyche and Pardon

Thomas Dyche and William Pardon's *A New General English Dictionary* was both the first English dictionary to include grammar and the first to be marketed to female as well as male readers.[108] This highly popular book went through eighteen editions by 1794.[109] Franklin advertised the book for sale on many occasions, including 1730,[110] 1741,[111] and 1744,[112] ordering seventy-two copies from his bookseller in September 1746,[113] followed by a second order in January 1747,[114] implying he may have sold up to one copy per day over this period. John Adams mentioned Dyche and Pardon's *Dictionary* in a diary entry in 1778.[115] The Supreme Court has cited Dyche and Pardon in cases such as *NFIB v. Sebelius*,[116] *Zivotofsky v. Kerry*,[117] and, most recently, *Manuel v. Joliet*.[118]

In their *New English Dictionary*, Dyche and Pardon define "emolument" as "Benefit, advantage, profit."[119]

[100] See Library Company of Philadelphia (1770), 106.
[101] *United States v. Lopez*, 514 U.S. 549, 586 (1995) (used Bailey to interpret the original meaning of "commerce").
[102] *INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (using Baily to interpret the original meaning of "suspend").
[103] *Bond v. United States*, 134 S. Ct. 2077, 2104 (2014) (using Bailey to interpret the original meaning of "treaty").
[104] *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2671 (2015) (using Bailey to interpret the original meaning of "legislature").
[105] Nathan Bailey (1721), at A-26. [106] Nathan Bailey (1730) (A-28).
[107] Nathan Bailey & Joseph Scott (1755) (A-46). [108] Merja Kytö and Pähta Paivi (2016).
[109] See George Watson (1971). [110] See "Extracts from the Gazette, 1730."
[111] See "Extracts from the Gazette, 1741)." [112] See "Extracts from the Gazette, 1744)."
[113] See "From Benjamin Franklin to William Strahan, 25 September 1746."
[114] See "From Benjamin Franklin to William Strahan, 4 January 1747."
[115] See "[February 1778]."
[116] *National Federation of Independent Businesses (NFIB) v. Sebelius*, 567 U.S. 519, 649 (2012) (using Dyche and Pardon to interpret the original meaning of "regulate").
[117] *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2104 (2015) (using Dyche and Pardon to interpret the original meaning of "naturalization").
[118] *Manuel v. City of Joliet*, 137 S. Ct. 911, 927 (2017) (using Dyche and Pardon to interpret the original meaning of "seizure").
[119] See Thomas Dyche and William Pardon (1735) (A-36).

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d. Ash

The influence of John Ash's *The New Complete Dictionary of the English Language* on the founders is less clear. Still, his dictionary is often included in lists of founding-era dictionaries.[120] Ash is probably best known today for adding profanity in his dictionary.[121] His grammar book was purchased by Alexander Hamilton in 1796,[122] and George Wythe also owned a copy, which he bequeathed to Thomas Jefferson.[123] The Supreme Court has cited Ash's dictionary in cases such as *NFIB v. Sebelius*[124] and *Burstyn v. Wilson*.[125]

In his *New General English Dictionary*, Ash defines "emolument" as "An advantage, a profit."[126]

e. Entick

Perhaps because it was pocket-sized, John Entick's *New Spelling Dictionary* was a primary means by which Americans communicated with one another in code during the founding era. From 1777 to 1779, the Lee brothers used a cipher based on Entick's dictionary for this purpose.[127] John Jay proposed a cipher based on Entick to Robert Morris in 1780,[128] and John Adams used Entick similarly in 1781.[129] In a 1781 letter to George Washington, James Lovell describes how British army officers did likewise.[130] Philip Schuyler devised a cipher based on Entick's dictionary and shared it with Rufus King and Alexander Hamilton in 1798.[131] During the first Congress, John Adams and Roger Sherman debated the meaning of "Republic" in light of Entick's definition of that term.[132] While serving as president of the United States, Thomas Jefferson purchased a 1777 edition of Entick's dictionary.[133]

Entick's *New Spelling Dictionary* defines "emolument" as "Profit, advantage, benefit."[134]

Rightly emphasizing that all dictionaries are not created equal, Justice Antonin Scalia and Bryan A. Garner recommend four founding-era dictionaries –

[120] See, e.g., Antonin Scalia and Bryan A. Garner (2012), 419; Gregory E. Maggs (2014), 382–383.
[121] See Jesse Sheidlower (2009) and also Joseph Crabtree (2014).
[122] See "Account with Archibald Drummond, 4 October 1796."
[123] See "To Thomas Jefferson from George Jefferson, 22 July 1806."
[124] *NFIB v. Sebelius*, *supra* note 120(using Ash to interpret the original meaning of "regulate").
[125] *Joseph Burstyn v. Wilson*, 343 U.S. 495, 537 (1952) (using Ash to interpret the historical meaning of "sacrilege" and "blasphemy").
[126] John Ash (1775), at A-71. [127] See Edmund C. Burnett (1909).
[128] See "To John Jay (Jun. 5, 1781)," in Robert Morris (1973).
[129] "Enclosure: Key for a Code System, 8 September 1781."
[130] "To George Washington from James Lovell, 14 October 1781."
[131] "To Alexander Hamilton from Philip Schuyler, 11 June 1799."
[132] "To John Adams from Roger Sherman, 18 July 1789." [133] "Memorandum Books, 1807."
[134] John Entick, The New Spelling Dictionary (1765), at A-61.

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Johnson, Bailey, Dyche and Pardon, and Ash – as "the most useful and authoritative" English dictionaries from 1750–1800.[135] Scalia and Garner do not include Entick in their list, but they arguably should have, in light of the fact that the founders frequently used Entick's dictionary to communicate in cipher.[136] In this context, however, that issue seems largely beside the point, since DOJ's research was guided neither by Scalia and Garner's recommendations nor by Entick.[137] All five of these dictionaries define "emolument" in the broad manner favoring the plaintiffs – "profit," "gain," "advantage," or "benefit." None of them hints of an "office-and-employment-specific"[138] definition.

III. Other Historical Arguments

In light the foregoing considerations, it seems clear that the impression DOJ creates in its brief by contrasting four historical definitions of "emolument" – two broad and two narrow – is highly misleading.[139] So, too, is the government's argument that any doubt or ambiguity arising from these competing definitions should be resolved in favor of its preferred definition by means of the doctrine of *noscitur a sociis*.[140] Furthermore, a close examination of the government's other historical arguments reveals many of them also cannot withstand scrutiny:

- To support its preferred definition of "emolument," DOJ cites *Hoyt v. United States*, a case in which the Supreme Court wrote that "the term emoluments … embrac[es] every species of compensation or pecuniary profit derived from *a discharge of the duties of the office*."[141] *Hoyt* was a statutory case, however, which required the Court to interpret an 1802 statute referring to "the annual emoluments of any collector of the customs."[142] The Court's language makes perfect sense in that statutory

[135] See Scalia and Bryan A. Garner (2012).
[136] See Edmond *C.* Burnett (1909). See also *supra* notes 127–131 and accompanying text.
[137] The government does refer to one of these five dictionaries in its brief; however, in both the text and table of authorities it neglects to state its authors. See DOJ Brief, *supra* note 34, at xii, 30 (citing *A New General English Dictionary* without noting its authors were Dyche and Pardon). Moreover, on both occasions it mischaracterizes the 1754 edition as the "18th ed." when in fact it was the eighth edition. See *id*. at xii, 30. DOJ also fails to indicate the author of the second *contra* dictionary it cites, *A Complete Dictionary of the English Language* (2d. 1789). The careless indifference toward sources favoring the plaintiffs is striking.
[138] *Id*. at 32.
[139] See DOJ Brief, *supra* note 34, at 29–31 (contrasting the "narrower" definitions of "emolument" given by Barclay and Trusler with two "broader" definitions given by *A New English Dictionary* [18th ed. 1754] and *A Complete Dictionary of the English Language* (2d. 1789)").
[140] *Id*. at 30–31.
[141] *Hoyt v. United States*, 51 U.S. 109, 135 (1850) (emphasis added by DOJ).
[142] 2 Stat. at Large, 172, § 3 (April 30, 1802).

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context, but it has no constitutional implications. It certainly did not purport to circumscribe the scope of "emolument" for constitutional purposes.[143]

- DOJ asserts that because of "common usage in the Founding Era . . . the term 'Emolument' in the Emoluments Clauses should be interpreted to refer to a 'profit arising from an office or employ.'"[144] The paragraph that supposedly justifies this claim, however, contains only two examples of founding era usage: an 1802 statute and an address by President Washington.[145] Neither is remotely sufficient to prove the point at issue – and they surely do not demonstrate any "common usage."[146] Like other members of his generation, moreover, Washington frequently used the word "emolument" in private commercial contexts, or to convey a broader meaning.[147]

[143] Jane Chong (2017) makes a similar point about *Hoyt* in her insightful commentary on DOJ's brief (observing that *Hoyt* must be read "with an eye to [its] facts: [the case does] not assert that 'emoluments' must derive directly from discharge of duty; rather, the kind of emoluments at issue in [*Hoyt*] was the kind derived for discharge of duty").

[144] *Id*. at 28 (quoting Barclay [1774]).

[145] *Id*. at 28.

[146] At most, the two examples weakly support the claim that "emolument" often referred to government salaries, something no one disputes or denies – since of course such salaries *are* emoluments in any plausible definition. The point at issue is whether "emolument" was *always* used so rigidly; in other words, whether concepts such as "government salary" or "payment or other benefit received for discharging the duties of an office" were somehow built into the semantic content of "emolument" at the time. Convincing evidence for the latter proposition is noticeably lacking. See Mikhail (2017b).

[147] See, e.g., "From George Washington to John Price Posey, 7 August 1782" (criticizing Posey for "selling another Mans Negros for your own *emolument*") (emphasis added); "Proclamation on Intercourse with British Warships, 29 April 1776" (referring to "wicked Persons, preferring their own, present private *Emolument* to their Country's Weal") (emphasis added); "Virginia Nonimportation Resolutions, 22 June 1770" (calling for a boycott of sellers of British and European goods who "have preferred their own private *emolument*" to "the dearest rights of the people of this colony") (emphasis added); "Washington's Memoranda on Indian Affairs, 1789" ("Every Navigable River throughout the Territory shall be deemed a highway and no obstruction shall be placed therein for the *emolument* of any person whatsoever") (emphasis added); "General Orders, 8 August 1775" (referring to men who send others "to work upon their Farms, for their own private *Emolument*") (emphasis added); "General Orders, 5 June 1778" (observing that "nothing can justify the converting [of horses] as appears to have been intended to private *Emolument*, to the Injury of the Right Owner") (emphasis added); "General Orders, 22 April 1779" ("he has purchased the rations of rum from the Artificers and sold them again for his own *emolument*") (emphasis added); "General Orders, 16 October 1780" (referring to "selling a quantity of Rum . . . at an advanced price, the Profits of which it is presumed were then intended for his own private *emolument*") (emphasis added); "From George Washington to Colonel Josias Carvil Hall, 3 April 1778" (referring to "Officers seduced by views of private interest and *emolument* to abandon the cause of their Country") (emphasis added); "From George Washington to Anthony Whitting, 2 June 1793" ("for these things, if not lost or stolen, are frequently sold for their own *emolument*") (emphasis added); "From George Washington to Gilbert Simpson, 13 February 1784" (observing that "something more than your own *emolument* was intended by the partnership") (emphasis added); "From George Washington to Elias Boudinot, 17 June 1783" (referring to "the *emoluments* which might be derived from the Peltry Trade at our Factories") (emphasis added).

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- DOJ claims that the prohibition on receiving foreign emoluments in the Articles of Confederation "was prompted by"[148] a series of events involving American diplomats Arthur Lee, Silas Deane, and Benjamin Franklin, which occurred in connection with their "successfully negotiating the Franco-American alliance treaty of 1778."[149] This causal claim is at odds with the fact that the prohibition on foreign emoluments in the Articles was initially drafted by John Dickinson at least two years before the events in question.[150]
- DOJ points out that four of the nation's first five presidents (Washington, Jefferson, Madison, and Monroe) maintained active plantations while in office, and in the course of doing so at least two of them exported agricultural products to other countries.[151] DOJ speculates that these activities *might* have included commercial transactions with a foreign state, but it provides no direct evidence that any such transactions occurred.
- DOJ calls attention to President George Washington's purchase of several lots of public land in what became the District of Columbia from the federal government in 1793. DOJ assumes that this transaction was constitutional, and it infers on that basis that the plaintiffs' broad definition of "emolument" must be mistaken.[152] The government's inference is highly debatable and arguably invalid. Unlike the foreign emoluments clause, the domestic

[148] DOJ Brief, *supra* note 34, at 33. [149] *Id*. at 34. See generally *id*. at 32–34.

[150] See Worthington C. Ford (1904), at 547 (July 1776). The "Dickinson Draft" of the Articles of Confederation included a prohibition on foreign emoluments in Article IV, which read in pertinent part:

> No Colony or Colonies, without the Consent of the United States~~in Congress~~ assembled, shall send any Embassy to or receive any Embassy from, or enter into any Treaty, Convention or Conference with the King or Kingdom of Great-Britain, or any foreign Prince or State; nor shall any Colony or Colonies, nor any Servant or Servants of the United States, or of any Colony or Colonies, accept of any Present, Emolument, Office, or Title of any Kind whatever, from the King or Kingdom of Great-Britain, or any foreign Prince or State; nor shall the United States assembled, or any Colony grant any Title of Nobility.

Id. To the best of my knowledge, this passage, written in Dickinson's handwriting, constitutes the first occurrence of the language that eventually became the foreign emoluments clause of the US Constitution. Note that in Dickinson's draft, the prohibition on accepting emoluments extended not only to all colonial and federal officials, but also to "any Colony or Colonies" themselves. This fact appears to be another indication that the original understanding of "emolument" was not limited to "office-and-employment-specific" payments or benefits. The Dickinson Draft was modified by a committee of the whole on August 20, 1776, whereupon this reference to "any Colony or Colonies" was dropped and language identical to that found in the Articles of Confederation was adopted. *See id*. at 675.

[151] DOJ Brief, *supra* note 34, at 36–37 (noting that Washington "exported flour and cornmeal to 'England, Portugal, and the island of Jamaica,'" and that Jefferson "exported his tobacco crop to Great Britain").

[152] *Id*. at 38–39.

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emoluments clause appears to be concerned only with emoluments that the president receives "for his services" as president.[153] Because any benefits Washington received from this purchase of public land were not received *for his services as president*, the domestic emoluments clause was not violated by this transaction. The precise definition of "emolument" is immaterial to this analysis. On any definition, the constitutional outcome would be the same.

- Perhaps most remarkably, DOJ asserts that "[t]he history and purpose of the [emoluments clauses] is devoid of concern about private commercial business arrangements."[154] This assertion is false and inconsistent with the best explanation of the broad sweep of emoluments prohibitions adopted by American governments from 1776 to 1789, many of which were designed specifically to prevent corruption and restrain public officials from placing their private commercial interests over their public duties. Six prominent illustrations are the Virginia Declaration of Rights,[155] the Constitution of

[153] See, e.g., Andy S. Grewal (2017); "Letter of Milton J. Socolar for Comptroller General of the United States to Senator George Mitchell" (1983). See also Jacob E. Cooke (2010), 493–494. If I understand Professor Grewal correctly, he assumes that the domestic emoluments clause (DEC) should be interpreted to include a tacit repetition of the phrase "for his services" as a modification of the second occurrence of the verb "receive," so that in effect the clause should be read like this:

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive [for his Services] within that Period any other Emolument from the United States, or any of them.

This reading of the DEC seems plausible – at least as plausible as one in which the second occurrence of "receive" is held to be entirely unmodified, or is construed very broadly, to read: "and he shall not receive [for any reason whatever] within that Period any other Emolument from the United States, or any of them." If the former and more focused reading is adopted, then the constitutional analysis of a domestic emoluments clause violation in any given case may turn simply on whether the president received the emoluments in question "for his services" as president. In familiar cases such as President Washington's purchase of land from the federal government, President Kennedy's receipt of naval retirement pay, President Reagan's receipt of California retirement benefits, and President Obama's receipt of interest payments on US Treasury bonds, the answer is invariably no. In all of these cases, the definition of "emolument" can be as broad or as narrow as one likes, and the constitutional outcome would be the same – because the payments or benefits at issue were not received by the president "for his services" as president. Note that the foregoing analysis implies that at least some of the specific allegations that have been made against President Trump for domestic emoluments clause violations may not be valid legal claims. On the other hand, the analysis appears to explain and justify many of the historical examples that are thought to pose the most difficult challenges to the broad meaning of "emolument" presupposed by plaintiffs' foreign emoluments clause claims.

[154] *Id*. at 34.

[155] See Virginia Declaration of Rights (VA. Const. art. I, § 1, 1776) ("That no man, or set of men, are entitled to exclusive or separate *emoluments* or privileges from the community, but in consideration of public services" (emphasis added).

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Pennsylvania,[156] the Articles of Confederation,[157] the 1784 Consular Convention with France,[158] the 1788 Consular Convention with France,[159] and the 1789 Act to Establish the Treasury Department.[160] DOJ neglects to discuss any of these landmarks in early American public law, opting instead to focus attention on less significant matters. In short, DOJ's fragile dictionary-based argument is symptomatic of a weak grasp of American constitutional history. The bulk of the government's Rule 12(b)(6) motion to dismiss comprises an extended originalist argument that spans over twenty pages.[161] The argument is remarkably flimsy, bearing many of the marks of "law office history" that make historians and sophisticated originalists wince.[162] These deficiencies do not impugn originalism itself, of course, if

[156] See P.A. Const. of 1776 ("That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular *emolument* or advantage of any single man, family, or set of men, who are a part only of that community") (emphasis added).

[157] See Articles of Confederation (1781) ("[N]or shall any person holding any office of profit or trust under the United States, or any of them, accept any present, *emolument*, office or title of any kind whatever from any King, Prince or foreign State") (emphasis added).

[158] See Jared Sparks (2017) 198–208, 199–200 (authorizing the consuls and vice consuls of each nation "to establish agents in the different ports and places of their departments" who "may be chosen among the merchants, either national or foreign, and furnished with a commission from one of the said consuls" and declaring that it shall be the business of these agents "to render to their respective merchants, navigators, and vessels, all possible service, and to inform the nearest consul or vice consul of the wants of the said merchants, navigators, and vessels . . . without the power to extract from the said merchants any duty or *emolument* whatever, under any pretext whatever") (emphasis added). Benjamin Franklin and Charles Gravier de Vergennes agreed to this provision and signed the convention on behalf of the United States and France on July 29, 1784.

[159] See "Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls between the United States and France" (19701834) 70–82 (declaring that consular agents "shall confine themselves respectively to the rendering to their respective merchants, navigators, and vessels, all possible service . . . without power under any pretext whatever to exact from the said merchants any duty or *emolument* whatsoever") (emphasis added). The language of this provision is nearly identical to its 1784 counterpart, from which it clearly was derived. The convention itself, signed at Versailles by Thomas Jefferson and L. C. de Montmorin on November 14, 1788, was one of the first treaties ever submitted to the Senate of the United States.

[160] See 1 Stat. 65 (1789–1799) ("That no person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use, any *emolument* or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law") (emphasis added).

[161] See DOJ Brief, *supra* note 34, at 26–48.

[162] For a series of thought-provoking essays on the vexed relationship between originalism and constitutional history, see Jonathan Gienapp (2017a); Randy Barnett (2017) (responding to Gienapp); Jonathan Gienapp (2017b) (replying to Barnett); Michael Ramsey (2017) (commenting on the exchange between Gienapp and Barnett); Lawrence B. Solum (2017a) (commenting on Gienapp and Ramsey). See also, e.g., Jack Balkin (2012); Robert W. Bennett and Lawrence

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for no other reason than *ab abusu ad usum non valet consequentia* ("a conclusion about the use of a thing from its abuse is invalid").[163] They do suggest, however, that the government's historical arguments are inadequate and need work, particularly if originalism continues to play a central organizing role in its legal briefs.

IV. Sources, Methods, and Documentation

This section describes the primary sources, methods, and documentation used in this study, all of which are relatively simple and straightforward. In the Online Appendix, Appendix A ("'Emolument' in English Language Dictionaries, 1604–1806") consists of several documents. The first is a table ("Table 1: Definitions of 'Emolument' in English Dictionaries") which lists the core components of every known English dictionary definition of "emolument" published between 1604 and 1806.[164] The list of dictionaries used in compiling this table was generated by drawing upon several authoritative works of dictionary scholarship, including *The English Dictionary from Cawdrey to Johnson, 1604–1755* by De Witt T. Starnes and Gertrude E. Noyes;[165] *English Dictionaries from 1604 through 1900: The Warren N. and Suzanne B. Cordell Collection of Dictionaries* by Robert K. O'Neill;[166] and *Catalog of Dictionaries, Word Books, and Philological Texts, 1440–1900* by David Vancil.[167]

The second document in Online Appendix A ("Figure 1: Statistical and Longitudinal Analyses of Lexical Definitions") provides tabular and graphic representations of these findings, highlighting both the frequency with which specific words are used to define "emolument" and the fluctuation of these *definiens* over time.[168] For the sake of comprehensiveness, a third document transcribes each component of the definitions excerpted in Table 1, including information on etymology, parts of speech, and other miscellany which were left out of that table, in order to keep it as simple and illuminating as possible.[169] Finally, for the benefit of those readers who would like to see the originals with their own eyes, Online Appendix A includes original images of each of these definitions, along with its corresponding title page.[170]

Online Appendix B ("'Emolument' in Legal Dictionaries, 1523–1792") also contains multiple documents. The first is a corollary to Table 1 ("Table 2: Legal

B. Solum (2011); Mary Sarah Bilder (2017); Alison L. LaCroix (2016); Richard Primus (2016); Jack Rakove (2015); Lawrence B. Solum (2017b).

163 *Cf.* John Mikhail (2002). 164 See Table 1, *supra* note 55.

165 See Rebecca Shapiro (2017). 166 See Robert K. O'Neill (1988).

167 See David Vancil (1993). 168 See Figure 1, *supra* note 56.

169 See Transcript of English Dictionary Definitions, 1604–1806, at A-6.

170 See Original Images, at A-10 to A-89.

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Dictionary Definitions of 'Emolument'"), which documents the complete lack of entries for "emolument" in legal dictionaries published between 1523 and 1792.[171] The list of dictionaries used in this table was generated on the basis of the Tarlton Law Library's Law Dictionary Collection, part of the Jamail Center for Legal Research at the University of Texas.[172]

The second document in Online Appendix B is another table ("Table 3: Other Uses of 'Emolument' in Legal Dictionaries"),[173] which records every instance of "emolument" in legal dictionaries as part of the definition or explanation of another term.[174] Again, for comprehensiveness, a third document transcribes the definitions excerpted in Table 3.[175] Finally, for the benefit of readers who might like to see the originals, Online Appendix B includes a complete set of images for each of these dictionaries, including the pages on which "emolument" would have occurred if it had been defined, the pages where it is used to define other terms, and the corresponding title pages of these volumes.[176]

Online Appendix C ("Emolument' in Synonymy Dictionaries, 1748–1813") is the last of the four appendices to this article. It provides background and context for evaluating the government's reference to John Trusler on pages 29–30 of its brief. The first document in Online Appendix C is a table (Table 4: "Explanations of 'Emolument' in Synonymy Dictionaries") which records usages of "emolument" in four synonymy dictionaries published from 1748–1813.[177] This list was compiled by drawing on Professor Hüllen's scholarship on the history of Roget's Thesaurus, which includes an extensive discussion of Trusler and other British lexicographers responsible for bringing the thesaurus to Great Britain.[178] This table reveals that Trusler's explanation of "emolument" is entirely derived from an earlier volume by the French lexicographer, Abbé Girard, and therefore has little apparent grounding in English usage. The two other writers identified by Hüllen in his discussion of Girard's followers in Britain, Hester Lynch Piozzi and William Taylor, do not offer synonyms for "emolument" in their volumes.[179]

[171] See Table 2: Legal Dictionary Definitions of "Emolument," at A-91.

[172] The Law Dictionary Collection comprises over 200 legal dictionaries from the Americas, the British Isles, and Western Europe, including many Roman law, common law, and civil law volumes. See generally "About the Collection" (n.d.). For the purposes of this study, I focused on the Tarlton Law Library's catalogue of historical common law dictionaries. I am grateful to Emily Kadens for pointing me toward these marvelous resources.

[173] See Table 3, at A-91.

[174] *Id*.

[175] See Transcript of Legal Dictionary Definitions and Uses, 1604–1806, at A-93.

[176] See Original Images, at A-95 to A-120.

[177] See Table 4: Explanations of 'Emolument' in Synonymy Dictionaries, at A-122.

[178] See Werner Hüllen (2003).

[179] Trusler's volume is not included in several authoritative catalogues of English dictionaries, and his preface suggests that his primary objectives may be prescriptive rather than descriptive. See, e.g., O'Neill (1988) (excluding Trusler from his classification); Starnes and Noyes (19911946)

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The second document in Online Appendix C juxtaposes images from Trusler's and Girard's accounts of "emolument" to reveal the formal and substantive similarities between them.[180] Finally, the original images of these four synonymies are reproduced.[181] For the two volumes with an entry on "emolument," images of those pages are provided, along with images of the corresponding title page.[182] For the two volumes absent an entry (Piozzi and Taylor), only an image of each volume's title page is provided.[183]

For all of the foregoing inquiries, the dictionaries themselves were located using various online databases, some freely available and others requiring a library or other subscription. The primary databases used for this purpose were British History Online (BHO), Early English Books Online (EEBO), Eighteenth Century Collections Online (ECCO), Google Books, HathiTrust Digital Library, HAMNET (Folger Shakespeare Library Catalog), Hein Online, JSTOR, The Making of American Law, the Oxford English Dictionary (OED), and the Washington Research Library Consortium, a partnership of nine university libraries located in the greater Washington, DC area.

Finally, in order to focus attention on founding era dictionaries and stay within manageable bounds, the study undertaken here was limited to English dictionaries published between 1604 and 1806 and legal dictionaries published between 1523 and 1792. As indicated, a follow-up study of more recent dictionaries is currently underway, which seeks to understand how and why meanings of "emolument" may have changed over time. A key figure in this history appears to be Noah Webster, who defined "emolument" in the standard fashion in 1806, but whose more influential 1828 dictionary of the American language lists two definitions for "emolument," the first of which involves office- or employment-related compensation.[184] Webster thus represents a natural starting point for the next phase of research.

(excluding Trusler from their list of English dictionaries); Vancil (1993) (same). See also Trusler (1766) at 20–23 (explaining the aims and scope of his inquiry including "a thorough reform … [that] will go, a considerable way, towards the improvement of our tongue"). By contrast, Trusler's work plays a significant role in the origins of the modern English thesaurus. See, e.g., Hüllen (2003) at 213–233 (discussing Trusler's role in the evolution of the thesaurus in Great Britain); Shapiro (2017) at 279–281 (same); Starnes and Noyes (1991/1946) (same). For all these reasons, Trusler's book is not classified with the English language dictionaries in Online Appendix A, but rather with the English synonymies in Online Appendix C. See generally A-122 to A-129.

[180] See side-by-side comparison of Girard (1748) and Trusler (1766), at A-123.

[181] See Original Images, at A-123 to A-131.

[182] See A-123 to A-129.

[183] See A-130 to A-131.

[184] See Noah Webster (1828). Webster's two-part definition reads:

1. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office, as salary, feels and perquisites.
2. Profit; advantage; gains in general.

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Conclusion

In interpreting the Constitution, the Supreme Court is ostensibly "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[185] If one applies this principle to the cases here, it follows that one should seek to determine how "emolument" was used in its normal or everyday sense by ordinary citizens during the founding era.

Contemporaneous dictionaries are not dispositive of original meaning, of course, but they normally are a reasonably accurate reflection of it. That at least seems to be the premise underlying those parts of the government's brief to which this article primarily responds. DOJ's use of founding-era dictionaries in its brief, however, is defective. At best, its historical research was shoddy and slapdash. At worst, it may have misled the court by cherry-picking and selectively quoting its preferred definition, ignoring the vast amount of conflicting evidence.

English language dictionaries published between 1604 and 1806 define "emolument" in a remarkably uniform fashion, regularly consisting of one or more of the following terms: "profit," "gain," "advantage," and "benefit." Every definition published during this period, in fact, falls under this sweeping generalization. By contrast, fewer than 8 percent of the definitions published in the same period use the phrase DOJ seizes upon with such alacrity in its brief: "profit arising from office or employ." Presumably, the government's eagerness to adopt this other definition stems from the fact that it lends itself so easily to DOJ's "office-and-employment-specific construction" of "emolument," which, in turn, purportedly enables the president to avoid constitutional jeopardy. Nevertheless, whether this definition actually *is* a favorable one for the president is far from clear. On either a causal or functional analysis of the emoluments clauses, for instance, "profit arising from office or employ" might prove to be an exceedingly difficult test for him.[186] For the moment, however, the more important takeaway from this investigation is simply this: the government's dictionary definition of "emolument" is demonstrably ahistorical and unreliable.

[185] *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 [1931]).

[186] A causal or "but-for" analysis considers "arising from" to be causal language and asks whether the president would have received particular emoluments but for the office he occupies. A functional analysis focuses on the purpose of the emoluments clauses – to prevent corruption or undue influence – and asks whether particular emoluments the president receives have the purpose or probable effect of producing corruption or undue influence. For further discussion of these frameworks, see the essays by Chong (2017), Dorf (2017), Lederman (2017), and Litman (2017).

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Conclusion

It is hard to believe that Professor Mikhail's and my work would reach far outside of our respective fields of law, philosophy, and the history of language. I certainly would not have imagined several years ago that my work on old dictionaries would play any part in a lawsuit. Nor would I have thought that I would find myself in a rather large scholarly conversation with lawyers, historians, and linguists, as mostly I and my writings are generally focused on a narrow circle of colleagues and work related to the history of English or eighteenth-century language and literature. But that is what happened when a friend shared that my book, *Fixing Babel: An Historical Anthology of Applied English Lexicography* had been cited by John Mikhail in an article connected to one of the lawsuits against President Donald Trump. While I did not experience the massive amounts of attention that Professor Mikhail received – my work is literally just a footnote – I was lucky enough to be considered an expert by people outside of my field and respected for my arcane knowledge. Academics, especially in the humanities, are often accused of not producing work of value to the "outside world" (whatever that is), so being recognized, for good or ill, was important to me. Finally, what I love to do, besides teaching, reading books about old words and writing about them, was relevant.

Despite the divisive context of a suit accusing the president of the United States of illegally using his office for gain, the fact that many people were discussing how or whether language changes over time, who or what is the arbiter of the meanings of words, and the history of dictionaries was exciting to me as a professor because, as with my students, people are more likely to understand a subject when there is a connection to current events or something of which they are already aware. Suddenly civics was connected to the work that I do that is not related to teaching, but it soon became clear, that many readers and commentators on this subject did not understand how government, politicians, and the language written into laws affect our daily life. Closing the circle, I therefore began to add more discussion of civics to my assignments and assessments. So, while I have taught about language used in society for decades, I have asked students to study the language of citizenship tests, argue for and against free speech, and write dictionaries of their own communities in authoritative voices as if in preparation for publication. These assignments, and others like them, are important to my students because not only are they members of Generation Z, the most demographically diverse in US history, but they are typically immigrants or the children of immigrants; knowing more intimately the political workings of the United States is crucial to their well-being. Now

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my students have a better understanding that words have different meanings to different people at different times and have used these assignments as opportunities to understand the practical applications of their course work. For example, a student wrote about how Haitian Kreyol was being considered an official language of the court system, another learned how a parent's difficulty with learning English meant that they were not able to take a citizenship test, a third explored what happens when places like New York City, Quebec, France, and elsewhere ban certain words (they fail spectacularly). Most important, however, is the connection that John Mikhail and I made that can bring respective interests together in this volume, which might find its way in way into classrooms, or otherwise be useful in educating people about an important period in United States history.

John Mikhail, as a result of his work on the history of the definition of emolument, has found yet another use of his philosophy Ph.D., and his assistant and law student Genevieve Bentz likewise benefited from her English B.A.; but to them, the applied nature of their work has been essential to the success of their project. Bentz told the Georgetown University Law School publication "In the News" (2018) that "Our research has really shown that law can be both academic and really useful at the same time." Professor Mikhail has been able to speak about his project numerous times as well as share the relevance of using primary, historical sources for current work that is effective in people's lives. He commented that "Over time, it became clear to us that our dictionary research really might matter to the outcome of these cases, and that was exciting. It wasn't just an academic question" ("In the News" 2018).

Ultimately, many of us who have chosen academia – scholarship and teaching – as our profession would like to know how the effects of our work have impacted anyone other than our immediate families or a few other academics and librarians and the examples recounted in this volume suggest clearly how and why historical dictionaries can have a significant impact on our lives. The fact that my book was referenced in John Mikhail's article and that his work would subsequently affect legal history means that in fact there are, gratifyingly, immediate applications for what we do. Thus, the last word goes to Noah Bookbinder, the director of CREW, reflecting on the work of academics and the law: "we needed to go back to the Nation's first anti-corruption provisions – the Constitution's emoluments clauses – which no prior president had ever risked significantly violating. Given how infrequently the clauses were used, their terminology largely fell out of public use, requiring CREW to investigate the original meaning of the terms as used in dictionaries contemporary with their drafting, and to examine applications of the clauses throughout the years in order to revive the clauses and bring them to bear in a modern

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context. The work of scholars like Professor Mikhail was immensely helpful to make sure we discerned the correct definition of the term and avoided the trap of cherry-picking a favorable definition from a single dictionary or contemporary use."[187]

[187] Bookbinder, Noah. Personal communication. August 28, 2023.

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Cambridge Elements

Applied Linguistics

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