The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation

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The Politics of Meaning:
Law Dictionaries and the Liberal
Tradition of Interpretation

by Gary L. McDowell*

INTRODUCTION

At least since John Cowell’s Interpreter was adjudged by the Committee on Grievances of the House of Commons in 1610 to be “very unadvised, and undiscreeet, tending to the disreputation of the honour and power of the common laws” have law dictionaries been objects of occasional controversy.1 Yet legal dictionaries, as well as dictionaries more generally, have remained a constant resource in American law for those seeking to give meaning to the words of both statutes and constitutional provisions. They have appeared in the pages of the reports since the beginning of the republic;2 a majority of the justices of the Supreme Court, at one time or another, have turned to them;3 they have not been simply the refuge of the lesser sorts who have ascended the highest bench, but have been relied upon by those justices generally held in greatest esteem;4 and their use has never been the preserve of any particular

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2. The first reference to a dictionary appears in a case before the Pennsylvania Supreme Court, Respublica v. Steele, 2 U.S. 92 (1785).

3. For a survey of the uses of dictionaries, see Samuel A. Thumma and Jeffrey L. Kirchmeier, “The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries,” Buffalo Law Review 47(1999): 227-296. See especially the three appendices to the article at pp. 303, 397, and 471. Thumma and Kirchmeier point out that as of the 1997-98 term, “sixty-four justices have cited to the dictionary at least once.” Among those who did not rely on dictionaries for meaning were Justices Holmes, Brandeis, and Cardozo, p. 256.

4. Justice Joseph Story, for example, turned to Cowell’s Interpreter in United States v. Smith, 18 U.S. 153, 163 n.8. For one of the most extensive surveys of dictionaries, seeking to establish that “sacrilege” and “blasphemy” are two very distinct matters, see Justice Felix Frankfurter’s concurring opinion and appendix of dictionary meanings in Burstyn v. Wilson, 343 U.S. 495, 506-33, and 533-40.
methodology or jurisprudential view.\textsuperscript{5}

There have always been nagging doubts about the legitimacy of resorting to dictionaries to find legal meaning, the most frequently cited being Judge Learned Hand’s admonition that judges ought “not to make a fortress out of a dictionary.”\textsuperscript{6} Over the past fifteen years or so, however, what had been merely scattered concerns have coalesced into a focused argument against the dangers of dictionaries as tools of interpretation.\textsuperscript{7} Dictionaries, it is argued, suffer from a “fundamental indeterminacy” that can “mask fundamental arbitrariness with the appearance of rationality.”\textsuperscript{8} Another critic sees dictionaries as simply creating an endlessly circular exercise: “Lexicographers define words with words. Words in the definition are defined by more words, as are those words.” As a result, relying on a dictionary “simply pushes the problem back.”\textsuperscript{9} Perhaps most damning is the claim that a judge can scan “dictionaries until he finds the definition that suits his purposes,” thereby undermining the greatest claim for using dictionaries in the first place — their alleged “objectivity.”\textsuperscript{10}

The catalyst of this criticism has been Justice Antonin Scalia and his intellectually powerful resurrection of textualism in statutory interpretation.\textsuperscript{11} As he has denied the legitimacy of relying on legislative history as

\textsuperscript{5} See the general survey provided by Thumma and Kirchmeier in their three appendices, “The Lexicon has Become a Fortress.”

\textsuperscript{6} \textit{Cabell v. Markham}, 148 F. 2d. 737, 739 (2d. Cir., 1945).


\textsuperscript{9} “Looking it Up,” pp. 1445, 1446.

\textsuperscript{10} Randolph, “Dictionaries,” p. 72.


a guide to statutory meaning, he has turned frequently to dictionaries as
one means of establishing the intention of the legislature through the
words by which it chose to express that intention. By one count, since his
elevation to the Supreme Court of the United States in 1985, Justice
Scalia has "relied on the dictionary more times than any other Justice in
the history of the Court."12

At the same time that the new textualists have been turning to diction-
aries to establish statutory meaning, so has there also been a growing
reliance on dictionaries to help establish the original meaning of pro-
visions of the Constitution. As Justice Scalia has led the way for statutory
textualists, Justice Clarence Thomas recently has taken the lead for consti-
tutional originalists. In his concurrence in United States v. Lopez,13
Justice Thomas sought to undermine Justice Stevens's dissenting claim
that the majority's holding that the Commerce Clause did not extend to
the prohibition of firearms near school houses was "radical"14 by recourse
to dictionaries extant at the time of the American founding.15 His purpose
in recovering the meaning of "commerce" as that would have been under-
stood to the founders was to demonstrate just how far "our case law has
drifted . . . from the original understanding of the Commerce Clause."16

In one of the most politically interesting but seemingly least consti-
tutionally controversial cases of recent terms, Justice Thomas wrote
another concurring opinion in order to stake out yet another area of con-
stitutional law in which he intends to push for a return to the original
understanding.17 While he was willing to join the opinion that held that
the act-of-production doctrine (where the Fifth Amendment's privilege
against self-incrimination can only be invoked to bar papers or other
physical evidence ordered to be produced by a subpoena duces tecum

M. Green, and Jeffrey P. Kaplan, "Plain Meaning and Hard Cases," rev. of Lawrence M.
Merrill,"Textualism and the Future of the Chevron Doctrine," Washington University Law
Quarterly 72(1994): 351-75; Frank H. Easterbrook, "Text, History, and Structure in Stu-
Roger Colinvaux, "What is Law? A Search for Legal Meaning and Good Judging Under a
235-83; Jane S. Schacter, "The Confounding Common Law Originalism in Recent Supreme Court Statutory Inter-
1-57.

15. The dictionaries Justice Thomas drew to support his argument were Samuel Johnson,
A Dictionary of the English Language (4th ed.; London: W. Strahan, 1773); N. Bailey, An
Universal Etymological English Dictionary (26th ed.; Edinburgh: Charles Elliot, 1789); and
Young, Mills & Son, 1796). Ibid.
16. Ibid.
where the act of producing such evidence would contain "testimonial" features) was properly applied in the instant case on the basis of existing case law\(^\text{18}\) (which invalidated indictments against Webster Hubbell that had been brought by the Office of Independent Counsel in its Whitewater investigation), he wrote to express his willingness to reconsider the matter in a future case. In the case of the Fifth Amendment in Hubbell, as in the case of the Commerce Clause in Lopez, Justice Thomas believes that prevailing case law may be "inconsistent with the original meaning" of the Constitution.\(^\text{19}\)

Once again, what is of greatest interest in Justice Thomas's concurrence in Hubbell, beyond the substantive questions of the law, is his reliance on dictionaries "published around the time of the founding"\(^\text{20}\) to determine what the original understanding of the Constitution might be. In showing that "witness" originally meant more than merely someone who might give testimony, he looked among other sources to such law dictionaries as Giles Jacob's A New Law Dictionary (two separate editions) and Timothy Cunningham's New and Complete Law Dictionary.\(^\text{21}\) As his opinions in both Lopez and Hubbell make clear, Justice Thomas believes that the original meaning of the Constitution can be found with the aid of those law dictionaries with which the American founding generation itself would have been familiar. And there is much historical evidence to believe that he is right in that assumption.

What has been missing in the debates over the role of dictionaries in judicial interpretation has been any consideration of how they arose, what might have been the underlying assumptions of the legal lexicographers who saw fit to produce them, and what place such dictionaries might have in the broader literature of political and constitutional thought. When those foundational elements are examined, it is clear that there was more going on in the creation and evolution of law dictionaries than merely providing convenient word lists for practising lawyers or horn books for struggling students.\(^\text{22}\) They were, from the beginning, part of the legal profession's contribution to the language of the modern liberal tradition and were meant for laymen as well as lawyers.\(^\text{23}\)

The relationship of law dictionaries to the broader tradition of constitutional and legal liberalism is seen most clearly in the life and work of Giles Jacob. Although he is dismissed by some today as merely a writer


\(^{19}\) 120 S. Ct. 2037, 2050.

\(^{20}\) Ibid.

\(^{21}\) Ibid., at 2051.


of "undistinguished works." Jacob was in fact one of the most prolific and widely known compilers of legal texts in his day. In addition to his New Law Dictionary, Jacob published no fewer than 33 legal texts, many of them running to several editions. His treatises, along with the dictionary, were to be found in many early American libraries, including those of John Adams and Thomas Jefferson. In particular, Jacob's dictionary was in twice as many law libraries as the second most popular legal lexicon, Cowell's Interpreter, and in colonial Virginia, it was the fourth most popular of all law books available. It was simply "the most widely used English law dictionary" in the early republic.

Little is known of Giles Jacob beyond the few biographical strands he chose to weave into his various works. From his non-legal works it is clear that he aspired to a literary life, fancying himself both a poet and a playwright; he was thus outraged when he found himself the target of Alexander Pope's scorn in the Dunciad (1729) as nothing more than a "blunderbuss of law." But it was the law and not literature that ultimately earned him his living and reputation. Indeed, he claimed he had been "bred to the law", and

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25. "Few men have left behind them more ample testimonies of their industry than Mr. Giles Jacob; his publications have been very numerous." His New Law Dictionary in particular was deemed a "very valuable work." Richard Whalley Bridgman, A Short View of Legal Bibliography (London: W. Reed, 1807), pp. 165, 169.

Jacob's prodigious outpouring was undoubtedly as much a matter of sales as scholarship and, as a result, many of his works do have the marks of haste. See Holdsworth, History of English Law, XII: 340. For a glimpse of Jacob's successes, see the account book for one of his publishers, Bernard Lintot, in John Nichols, Literary Anecdotes of the Eighteenth-Century. 9 vols. (London: Nichols and Son, 1814), VIII: 296-97.


29. He was born in 1686 in Romsey, one of eight children of Henry and his wife Susanna, from the Thornburgh family of Wiltshire. His father was a maltster who died in 1734 leaving Jacob a modest inheritance. In 1733 Jacob married Jane Dexter in the parish church of St. Andrew in Holborn.

30. Pope summed him up this way:

Jacob, the Scourge of Grammar, mark with awe,
Nor less revere him, Blunderbuss of Law.

at the age of 25 embarked on his career as a legal scrivener.\textsuperscript{31}

By 1720 when Jacob began work on what would become an “entirely new departure in legal literature” when his \textit{New Law Dictionary} finally appeared in 1729, he had already published 16 of his legal tracts and 10 volumes of plays, poetry and other non-legal works.\textsuperscript{32} But the originality of Jacob’s own work and the political implications of his motives must be viewed in light of the evolution of law dictionaries down to his time. For over the course of the two hundred years that separated Jacob’s dictionary from the first such volume to be published in the early sixteenth-century, the political and philosophical worlds had undergone tumultuous changes. It is within that context of Enlightenment liberalism and its concern with language that the rise of law dictionaries is best understood.

\textbf{THE RISE OF LAW DICTIONARIES}

The first law dictionary to be published, Rastell’s \textit{Exposiciones Terminorum Legum Anglorum} (1527), which came to be known simply as the \textit{Termes de la Ley}, ran to seven editions by 1667.\textsuperscript{33} Although Rastell’s work had been preceded by something akin to dictionaries, the glossaries or vocabularies of Anglo-Saxon words, his law dictionary was distinguished by aspiring to be more.\textsuperscript{34} It contained definitions of words and placed them in alphabetical order. But the most interesting thing about this early effort to define with some degree of precision the meaning of legal language is the extent to which Rastell anticipates the more theoretically sophisticated arguments that will eventually come from the founders of modern constitutional liberalism, Thomas Hobbes and John Locke. Rastell’s purpose in creating his law dictionary was, at the deepest level, political.

While men are bound in their conduct by “the order & law of Nature,” Rastell wrote, that law is not sufficient to the ultimate goal of civil peace. The fact is that “there is no multitude of people in no realm that can continue in unity and peace without they be thereto compelled by some good law & order.” In Rastell’s view, it is “a good reasonable common law” that ultimately will make “a good common peace.” The emphasis on the commonality of law is essential in Rastell’s view, given the nature of mankind. As he points out, “as every man is variant from the other in visage, so they be variable in mind and condition, therefore one law & one governor for one realm and for one people is most necessary.”

\begin{footnotesize}
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\item Cowley, \textit{Abridgments}, pp. lxxix-lxxx.
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The alternative, "diverse rulers & governors & diverse orders or laws one contrary to another," will only lead to conflict and division within society. One governor under one law will be able to "bringeth diverse & much people to one good unity." 35

The essence of public order is law; it is both necessary "& a virtuous and good thing." It keeps people from committing wrongs "willingly" and guides them from doing so by negligence. In short, the law has an educating role to play. If the law is to fulfill its important social role, and be both "virtuous & good," it is essential that "every man . . . have the knowledge of the law." 36 Rastell makes one of the earliest cases for the necessity of written law:

[I]t is necessary for every realm to have a law reasonable & sufficient to govern the great multitude of the people, ergo it is necessary that the great multitude of people have the knowledge of that same law, to which they be bound, ergo it followeth that the law in every realm should be so published, declared, & written, in such wise that the people so bound to the same, might soon and shortly come to the knowledge thereof or else such a law, so kept secretly in the knowledge of a few persons & from the knowledge of the great multitude, may rather be called a trap and a net to bring the people to vexation and trouble than a good order to bring them to peace & quietness. 37

Rastell understood that if the law is indeed to be successful in its purpose, that is, as having been "ordained and devised for the augmentation of justice," then it is essential that those who are to be bound and governed by it must know what it says. One cannot be bound by the law, one cannot be restrained and guided by it, unless one knows what it commands and prohibits. Thus did he see his task in the dictionary as educating those who might otherwise be "ignorant of the law" by undertaking to "declare & to expound certain obscure and dark termes concerning the laws of this realm." For Rastell, it is only by knowledge of the law that "the true execution of the same law" is to be enjoyed, and thereby the preservation and increase of the fortunes of the commonwealth. 38

The next major development in law dictionaries came in 1607 with the publication of Cowell's Interpreter, a work by a distinguished professor of the civil law that caused outrage among the common lawyers of his day, including the powerful Sir Edward Coke who thought Cowell to be "a profest enemy to the Westminster courts." 39 Cowell's particular sin

36. Ibid., p. Aii.
37. Ibid., p. Aiii.
38. Ibid., pp. Aiii, Aiv.

Cowell was a man of substance and accomplishment. In 1594 he had been named Regius Professor the Civil Law at Cambridge University. In 1598 he had become master of Trinity Hall, Cambridge, and from 1603-4 had served as Vice-Chancellor of Cambridge. From 1608 he served as vicar general to the Archbishop of Canterbury. For an account of Cowell's life generally as well as the controversy over the Interpreter in particular, see Chrimes, "The Constitutional Ideas of Dr. John Cowell."
was to attack Thomas Littleton, Coke’s much admired oracle of the common law, but his most serious political error came in his definition of the King’s prerogative.

Prerogative of the King (Praerogitiva regis): is that especiall power, preeminence, or privilege that the king hath in any kind, over and above other persons, and above the ordinary course of the common law, in the right of his crowne.

And this word (Praerogitiva) is used by the civilians in the same sense.

The reaction to Cowell’s book no doubt caught the “meek and well intentioned professor” whose motives were most assuredly “purely academic” by surprise. He seems even to have been detained in custody for a period during the height of the controversy. But to an age as increasingly leery of such talk of prerogative power as that in which he lived and wrote, it was unlikely that Cowell’s pledge to contribute to the “advance-ment of knowledge” by resort to the civilian tradition as against that of England’s own common law would find much favour. His insistence that even the statute of the king’s prerogative “an.17, Ed.2, containeth not the summe of the king’s whole prerogative” but rather his “prerogative reacheth much farther” was unlikely to warm the hearts of those in Parliament. When it came to his general catalogue of powers, Cowell argued, “there is not one that belonged to the most absolute prince in the world, which doth not also belong to our king.” He was confident: “I hold it incontrollable, that the king of England is an absolute king.” It was for such views that the Committee of Grievances concluded that Cowell’s lexicon was indeed “very unadvised, and undiscreet, tending to the disreputation of the honour and power of the common laws.”

Coke—through his connections with both the King and the House of Commons—a later editor of the Interpreter explained, was able to represent “Dr. Cowell as an enemy of both.” But it was not just Coke that constituted Cowell’s problem. He had in fact innocently stumbled into the crossfire between King and Commons over issues seemingly far removed from his law dictionary. Both sides of the debates then raging over revenue policies and efforts to reform feudal tenures found Cowell’s Interpreter a useful tool. In the end, Francis Bacon urged James I to join with Lords and Commons in a joint attack on Cowell, rather than allow the Commons alone to attack Cowell on the idea of prerogative and thereby, the monarchy. In a masterful political manoeuvre, James “terminated the episode by an astute exercise of the prerogative power.” The book was banned by royal proclamation.

On 25 March 1610, James I issued his proclamation against the Interpreter, condemning Cowell who was “only a civilian by profession” and thus guilty of “meddling in matters above his reach.”

44. The proclamation is reprinted in Kennet, ed., Interpreter, pp. v-vii.
arguments were too clever, seeming to support the king’s prerogative power while truly putting forward views that were “in some points very derogatory to the supreme power of this crown.” It was, the King pointed out, “utterly unlawful to any subject to speak or write against that law under which he liveth, and which we are sworn and are resolved to maintain.”45 The conclusion was foregone:

[We] do hereby not only prohibit the buying, uttering or reading of the said book, but do also will and straitly command all and singular persons whatsoever, who have or shall have any of them in their hands or custody, that upon pain of our high displeasure, and the consequence thereof, they do deliver the same presently upon this publication to the Lord Mayor of London . . . or otherwise to the sheriff of the county where they or any of them shall reside, and in the two universities to the Chancellour or vice-chancellour there, to the intent that further order may be given for the utter suppressing thereof.46

One of the more important facts about Cowell’s Interpreter is that he had exposed a “medieval constitutional ambiguity” that would have to be resolved.47 His defense of the royal prerogative drew attention to the fact that in the notion of prerogative “was an element . . . not amenable to the ordinary rules of law.” Cowell’s logic was simple: “it was the manifest duty of the king to govern, and to that end he was vested with a discretionary power, the exercise of which could not be subject to legal rules or restrictions.”48 Implicit in Cowell’s “honest but impolitic zeal for definition” lay one way of resolving the tension present in the royal prerogative between the desire for the rule of law and the necessity of the rule of men.49 For as Salisbury argued during the debates over the Interpreter, “it was dangerous to submit the power of a king to definition.”50 But as S. B. Chrimes has put it, Cowell’s “interpretation was not to be suppressed so easily as his Interpreter.”51 What would later emerge from notions such as those implicit in Cowell’s work was the idea of constitutionalism in the modern sense.

When the times changed and the Interpreter was once again published twenty-seven years later, the offending passages were still present.52 It retained an important place in the history of English law, running to seven editions by 1727.53 One of its later editors was Thomas Manley, who followed Cowell in the belief that any truly learned man of

45. Ibid., p. vi.
46. Ibid. See also the speech of James I to “the Lords and Commons of the Parliament at White-Hall” of March 21, 1609, in Charles H. McIlwain, ed., The Political Works of James I (Cambridge: Harvard University Press, 1918), pp. 306–325; the controversy surrounding the Interpreter and his “censure” of Cowell is discussed on p. 307.
48. Ibid., p.482.
49. Ibid.
50. Ibid., p.471.
51. Ibid., p.483.
52. Ibid., p.474.
the law simply had to know those "intermixtures of the civil law" that had originally been Cowell's plan.54

Around the same time Manley was updating Cowell in his Nomosethetes (1672), Thomas Blount undertook to produce a new law dictionary, which he entitled Nomolexicon (1670).55 Blount's intention was to turn legal dictionaries back to the common law and away from the misguided reliance on the civil law tradition that Cowell had begun and Manley was seeking to perpetuate. But Blount saw his new law dictionary as more than merely the definition of terms; he thought it useful as "a repertory, or common-place; since many statutes, law-books, charters and records are cited, or referr'd to in most words."56 In this way, Blount produced a scholarly work "devoted far more to etymology and the description of ancient customs than to the explanation of common law terms."57

The works of Rastell, Cowell, Manley and Blount would be surpassed in the first half of the eighteenth century by Jacob and his New Law Dictionary. But to understand his new effort, attention must first be paid both to his other legal works (for, as he said, all his other works had been in the nature of "trial trips, and gave him the experience he needed to produce his dictionary")58 and to the political and theoretical context within which he understood himself to be working. For Jacob's age was one more concerned with securing the rights and liberties of the people than with bolstering claims of the King's prerogatives.

A decade before he published his dictionary, Jacob compiled a treatise on the common laws the purpose of which was to enable the people not only "to judge of the powers and prerogatives of the governors to whom our obedience is due; but also, of the rights and liberties of the people."59 What stood between Cowell and the King's prerogative and Jacob and the rights of the people, of course, was the new philosophy of Hobbes and Locke. The politics of meaning that lay at the heart of the legal lexicographers' craft had come to be informed by the political thought of modern liberalism.

**LIBERALISM, LANGUAGE AND LEXICONS**

The epistemological revolution wrought in the science of politics by Hobbes and Locke, a revolution that became the foundation of modern constitutionalism, took as its point of departure the belief that civil society rests only upon the voluntary consent of free and independent individuals. At the center of this understanding of consent lay an appreciation for the

56. Holdsworth, History of English Law, XII:175-76.
necessity of language.\textsuperscript{60} For both Hobbes and Locke it was by language that society was formed and sustained. As Hobbes said, without language there could be "neither commonwealth, nor society, nor contract, nor peace, no more than amongst lyons, bears, and wolves."\textsuperscript{61}

Locke repeatedly made essentially the same argument as to the necessity of language. In both the \textit{Second Treatise of Government} and the \textit{Essay Concerning Human Understanding} he argued that God fitted men "with understanding and language to continue and enjoy" living in society.\textsuperscript{62} The importance of language was as clear to Locke as to Hobbes; it was nothing less than "the great instrument, and common tye of society."\textsuperscript{63}

Both Hobbes and Locke looked upon language as purely conventional, there being no natural connection between particular sounds and ideas; names were arbitrarily imposed by men for their convenience.\textsuperscript{64} The fact that each man by nature could come up with particular and distinctive words or names for certain ideas was, in itself, an insufficient basis for society. In order to engage in their affairs, both public and private, men would eventually have to reach some agreement as to the meaning of certain sounds or words. Such common use, "by a tacit consent, appropriates certain sounds to certain ideas in all languages."\textsuperscript{65} And, generally speaking, the routine affairs of men are carried out with an easy and unofficial kind of agreement; as Locke so bluntly put it, "vulgar notions suit vulgar discourses."\textsuperscript{66} But event he vulgar soon learn that such shared meaning for common use is essential: "He that applies names to ideas, different from their common use, wants propriety in his language, and speaks gibberish."\textsuperscript{67} A general agreement as to meaning is necessary for what Locke called the "civil use" of language, "such a communication of thoughts and ideas by words as serve for the upholding common conversation and commerce, about the ordinary affairs and conveniences of civil life, in the societies of men, one amongst another."\textsuperscript{68}

\textsuperscript{60} For a more complete discussion of these matters see Gary L. McDowell, "The Language of Law and the Foundations of American Constitutionalism," \textit{William and Mary Quarterly} (3d Ser.) 55(1998): 375-98.


\textsuperscript{65} Locke, \textit{Essay}, III.II.8, p.408.

\textsuperscript{66} Ibid., III.XI.10, p.514.

\textsuperscript{67} Ibid., III.X.31, p.506.

\textsuperscript{68} Ibid., III.IX.3, p.476. This civil use of language is less in need of precision than the philosophical use of words in Locke's view.
Following Hobbes, Locke understood that all truth and falsehood in human affairs was a matter of language; it was a matter of the agreement or disagreement of ideas as expressed in words. Thus was it essential that there be some degree of precision in all language by which men intend to make themselves known. Hobbes put it memorably:

Seeing then that truth consisteth in the right ordering of names in our affirmations, a man that seeketh precise truth, had need to remember what every name he uses stands for; and to place it accordingly; or else he will find himself entangled in words, as a bird in lime-twiggs; the more he struggles, the more belimed.69

This concern led Hobbes to argue for the necessity of clear and accurate definitions if men were to find their way in society, moving from primitive to more polished times through the acquisition and dissemination of knowledge amongst themselves. The “first use of speech” he argued, was the acquisition of science which in turn depends upon “the right definition of names.” Failure to get it right in the beginning of any discourse will have disastrous consequences, for “the errors of definitions multiply themselves as the reckoning proceeds.” Thus is it essential that all understand that “words . . . have their signification by agreement and constitution of men.” The reason there must be some agreement is that the entire point of speech or language is to spawn in the reader or listener the same idea the writer or speaker intended to convey; that is what human understanding is all about, in Hobbes’s opinion.70

Locke shared Hobbes’s view of the importance of reaching a general agreement as to precise definitions of words. It is a matter of learning and retaining what meanings have been agreed.71 This is especially critical when it comes to complex ideas and moral words, such as “justice”. A definition, Locke argued, “is the only way, whereby the precise meaning of moral words can be known; and yet a way, whereby their meaning may be known certainly, and without leaving any room for any contest about it.”72 It was precisely the fact that complex ideas and moral words are the contrivances of men that allowed Locke to suggest that morality is as capable of demonstration as pure mathematics.73

This idea is what led Locke to suggest in the Essay Concerning Human Understanding that human discourse and society would be greatly aided by the advent of a dictionary, an authoritative listing of definitions

70. Ibid., pp. 28-31, 283.
71. “Words having naturally no signification, the idea which each stands for, must be learned and retained by those, who would exchange thoughts, and hold intelligible discourse, with others in any language.” Locke, Essay, III.IX.5, p.477.
72. Ibid., III.IX.17, p.517. As Hobbes had put it earlier, “the light of human minds is sparcious words, but by exact definitions first sniffed, and purged, from ambiguity; reason is the pace; encrease of science the way; and the benefit of mankind the end.” Leviathan, p.37.
73. “Upon this ground it is, that I am bold to think, that morality is capable of demonstration, as well as mathematicks: Since the precise real essence of the things moral words stand for, may be perfectly known; and so the congruity or incongruity of the things themselves, be certainly discovered, in which consists perfect knowledge.” Locke, Essay, III.XI.16, p.516.
derived from the "sensible qualities" of things observable upon which men could depend.74 Although Locke thought that such a truly philosophical dictionary as the sort he proposed, what he called a "natural history," would require "too many hands, as well as too much time, cost, pains, and sagacity, ever to be hoped for," he had no doubt there could be a compilation of a lesser sort, with definitions provided in "the sense men use them in."75 Such a compilation would be the foundation of social and political intercourse, and would enhance both civil and philosophical exchanges amongst men. In time Locke's suggestion would come to fruition. The Essay Concerning Human Understanding eventually inspired Samuel Johnson to produce a dictionary of the English language, the principles of which conformed to Locke's own theory of knowledge and language.76

By the time Johnson began work in 1746 on what would become his masterpiece, "Locke's ideas on language and the mind had become commonplace."77 But Johnson did not just share Locke's epistemological assumptions that "words are but the signs of ideas."78 He also employed Locke in some 3,241 quotations in his Dictionary.79 By incorporating works such as Locke's Essay along with numerous poems, histories and other works by such esteemed authors as Addison, Donne, Dryden and Shakespeare, Johnson contributed greatly to the "encyclopaedic tradition of lexicography."80 By adopting a version of a commonplace book of important quotations as the model for his dictionary, Johnson sought to go beyond mere linguistic analysis or etymology; rather, he created the Dictionary for educational and moral purposes.81 This he achieved by "presenting quotations that, besides illustrating the meanings of words, teach fundamental points of morality."82 The encyclopaedic approach of the Dictionary of the English Language would, from the time of its publication in 1755, dominate dictionary makers, including Noah Webster in the United States upon whom Johnson's influence was indeed "considerable."83

74. Ibid., III. XI. 25, p.522.
75. Ibid.
81. Ibid., p.13.
82. Ibid., p. 19. But "just as he sought quotations from certain writers because of their political, moral, or religious beliefs, he rejected others, whatever the passage, because he feared that he would suggest approval of their ideas." Reddick, The Making of Johnson's Dictionary, p.34.
But Johnson was not the first to follow Locke's lead. A quarter-century before Johnson published his monumental work, Jacob published his new kind of law dictionary, one that sought to provide for the legal profession the kind of "natural history" Locke had suggested such dictionaries should be.84 Both Johnson and Jacob were part of a tradition of lexicography that stretched back at least to 1604 in the case of dictionaries of the English language, and to 1527 in the case of law dictionaries.85 Such was the tradition that one might safely argue that "the whole history of English lexicography makes one slow to accept a claim of striking originality for any dictionary maker."86 Yet Jacob, no less than Johnson, did indeed produce a work of striking originality. For his objective was nothing less than to produce "a kind of a library"87 for a new, and largely Lockean, legal age.

THE THEORETICAL CONTEXT OF JACOB'S LEGAL LEXICOGRAPHY

Jacob's intellectual world was dominated by Locke, and Jacob's own career hovered around the edges of Locke's world. William Blathwayt, for whom Jacob worked for example, served with Locke as a Commissioner of Trade and was a rival during Locke's control of the Board of Trade (1696-1700).88 Upon his retirement, Locke was succeeded by Matthew Prior, an acquaintance and occasional correspondent of Jacob. Jacob also dedicated one of his legal tracts to Peter King, Locke's nephew and close friend during his last years.89 At a minimum, Jacob moved in a world where Locke's ideas were commonplace, and it is the influence of Locke on the ideas expressed in Jacob's various essays that provides the political context for the dictionary maker's legal thinking and his desire to render the law accessible through his new method of organisation. The point was to enable the people to defend their rights and liberties.

The most clearly Lockean work Jacob produced is a small work

entitled *Essays Relating to the Conduct of Life*. In many ways, the *Essays* is an unremarkable work. But there are two reasons why it is of interest. First, the teachings Jacob seeks to instill through his essays very clearly take their bearings from the ideas one finds in Locke’s *Essay Concerning Human Understanding* and his various tracts on education. The second reason Jacob’s essays are of some interest is the light they shed on his possible motives in publishing his other works, especially his legal compilations and law dictionary.

Locke’s purpose in constructing his *Essay Concerning Human Understanding*, it is worth recalling, was a reasonably modest one. “Our business here,” Locke wrote, “is not to know all things, but those which concern our conduct. If we can find out those measures, whereby a rational creature put in that state, which man is in, in this world, may, and ought to govern his opinions, and actions depending thereon, we need not be troubled, that some other things escape our knowledge.” In his later works on education, it is precisely this objective that moves Locke. He seeks through education to make men fit for civil society, that is to say, to make them capable of being free. In a letter entitled “Instructions for the Conduct of a Young Gentleman” published in *The Remains of John Locke* the author argues that it is by “knowing men and manners” that gentlemen can come to be guided by prudence, a quality he deems to be rightly “reckon’d among the cardinal virtues.” One can be expected to learn

90. There are in the British Library three editions of this work. The first edition (1717) was published by Edmund Curll; the second (1726) by T. Cooke; and the third (1730) by J. Hooke. The case for attributing this work to Jacob is made in Gary L. McDowell, “Giles Jacob’s *Conduct of Life*,” *Notes and Queries* 242 (1997): 190-193, from which this section draws heavily.

91. Locke, Essay, I.1.6, p.46.

92. [Anon.], *The Remains of John Locke, Esq.* (London: E. Curll, 1714), p. 10. It is probably no coincidence that the first edition of *Essays Relating to the Conduct of Life* was published by the infamous publisher Edmund Curll just three years after he had published (also anonymously) *The Remains of John Locke, Esq*. Included in this collection of Locke’s tracts, apparently given to Curll for publication by “R.K”, described as “a near relative of Mr. Locke’s,” was a letter entitled “Instructions for the Conduct of a Young Gentleman, as to Religion and Government, etc.” While it bears some similarity to Locke’s other writings on education, especially that recently reprinted as “Some Thoughts Concerning Reading and Study for a Gentleman”, it is not the same. The latter correspondence was acknowledged in a letter of 23 August 1703 from Samuel Bold thanking Locke on behalf of Roger Clavel who had sought Locke’s guidance in such matters. The letter included in Curl’s *Remains of John Locke* was dated 25 August 1703 and apparently written to “R.K”, the Reverend Richard King, a relation through Peter King. See James Axtell, ed., *The Educational Writings of John Locke* (Cambridge: Cambridge University Press, 1968), pp.397-404; and Locke to [Richard King], 25 August 1703, letter no. 3328 in E.S. De Beer ed., *The Correspondence of John Locke* (8 vols.; Oxford: Oxford University Press 1976-1989), VIII: 56-59.

Although there is no textual evidence to support it, it is at least possible that the anonymous editor of Curl’s *Remains of John Locke* was indeed Jacob who had written anonymously at least once before for the infamous publisher. The book was a “treatise” on hermaphrodites, oddly enough. *Tractatus de Hermaphroditis* (London, 1718). See Pat Rogers, *Grub Street: Studies in a Subculture* (London: Methuen, 1972), pp.288-9. On Curl’s reputation see Ralph Straus, *The Unspeakable Curll* (London: Chapman & Hall, 1927).
what one needs to know especially through the study of the history, institutions and laws of one’s own country. The lessons one gleans will be a safe guide to his conduct.

These sentiments serve as Jacob’s point of departure in the Essays Relating to the Conduct of Life. For Jacob, the “great art and accomplishment of mankind is that of prudence,” and by his little book he sought to establish a method whereby “particular virtues are illustrated, and vices detected.” The fact was that “the liberality of nature in the person, is frequently attended with a deficiency in the understanding.” Thus was it necessary to “subdue passion,” bringing it under the control of “true sense and right reason,” for in human affairs “unruly passion is destructive to interest, and the greatest author of present and future misery.” Jacob set out to impart moral instruction in order to provide for “a man’s decent guidance through a difficult and capricious world.” He was as modest in his expectations as Locke had been in the Essay. “To be perfectly just,” he cautioned, “is beyond the attainment of human capacity; but to be so in some degree, is in every one’s power, and to be so to the utmost of our power, is the greatest commendation of man.” Jacob’s sketch of what such an education in worldliness for a gentleman should be closely followed Locke’s prescriptions in Some Thoughts Concerning Education. The concerns were with history, geography, European languages, and “the laws, government, customs, and manners of other countries, as well as his own.”

Another glimpse of Locke’s influence on Jacob is in the revision that occurs for the second edition of the Essays in which Jacob undertakes to add “some essays on the government of society.” In those additions Jacob moves, as it were, from the Locke of the Essay Concerning Human Understanding and Thoughts on Education to the Locke of Two Treatises of Government. And in so doing, he follows Locke’s clear teaching that there is an intimate connection between the conduct of the understanding and what may be called the moral foundations of legitimate government.

The focus of Jacob’s excursion into political theory is tyranny and the role of law in preventing it. The line between tyranny and order, for Jacob no less than for Locke, was the idea that political power must be authorized. “Our king, altho’ great,” Jacob observes, “is bound by the laws, as well as his subjects; as we must not on the one hand transgress

95. Ibid., p. 41.
96. Ibid., p. 69.
97. Ibid., p. 2.
100. Ibid., 2nd ed., title page.
them, so he may not on the other incroach [sic] upon them." 101 The reason even the king must be deemed bound by the law is that the power he wields is held only by a grant from the people, a grant originally made to secure that political liberty that "makes the people of England more flourishing and formidable, than those of any other kingdom." 102

For Jacob as for Locke, no king or governor worthy of the name can act "without authority of the law of the land." 103 To exceed the bounds of legality, to overleap the fences of the law, is for a ruler to roam at large in the trackless fields of his own will, sacrificing the public good to his private advantage. As Jacob put it, "a tyrannical prince . . . treats his subjects as a huntsman doth his game, and sets his ministers on the people, like unto other his hounds upon the prey, who are sure to worry them to death, or hunt them to dens and corners, whence they dare not stir abroad but for the sustentation [sic] of life, to give fresh pleasure to their cruel keeper." 104 To so behave, in Jacob's estimation, is to descend from legitimate rule into tyranny which of all the "publick violences and oppressions" one can imagine is the most destructive to society. 105 "[I]f kings and princes abuse the authority repos'd in them: if instead of cherishing, they oppress their subjects, they are then no longer kings, but enemies to mankind." 106

The intersection of Jacob's pedagogical and political concerns was at the point where it was understood that it is "by easy steps and loppings of liberty" that "tyranny is accomplished." 107 Thus is it of critical importance to a true "country of liberty" to educate its people in their laws and institutions so that the first move against them, that first easy step or lopping of their liberty, will be the more easily detected and resisted. 108

Jacob's contributions to law have tended to be ignored by virtue of their being primarily compilations of black-letter law put into alphabetical order. Yet in his various prefaces to those works, Jacob touches repeatedly on the issues raised in Essays Relating to the Conduct of Life—the importance of educating the people in the laws of their country. As Jacob said elsewhere, "the subject of our law cannot be made too familiar," for it is by it that "rights and properties" of the people find protection. 109

102. Ibid., 2nd ed., p. 111. "To keep up order, rule and decorum, in the actions of men one towards another, and preserve them from violating each other, kings and governors were originally ordained. When they act as they ought, and make justice the pursuit of their power, they are the bulwarks of right and property, the promoters of virtue, piety, and humanity; and the fathers of their country: they deserve the highest reverence and obedience; and everything next to adoration is paid to them."
104. Ibid., p. 114.
105. Ibid., p. 112.
106. Ibid., p. 111.
107. Ibid., p. 112.
108. Ibid., p. 114.
109. Jacob, Every Man His Own Lawyer: or A Summary of the Laws of England in a New and Instructive Method (London: J. Hazard, S. Birt, and C. Corbett, 1736), p. iii. This was
Jacob’s understanding of politics began with the view that law was the only alternative to the barbarity of the state of nature. He knew, as Locke had taught, that “inclination has no law, and nature no restraint.”

Outside of civil society and government by consent there is only the “primitive power” of self-defense, that “right of inflicting punishments” held by every man by virtue of his equality and independence. Although there is most assuredly a law of nature which is, in and of itself, “just and good and binding in all places . . . being from God himself,” without the “arbitrary laws” of the commonwealth, there is no means of enforcement. While “all things proceeding from nature are not only respected in philosophy, but also in [the] law,” it is only by the force of the civil law—those “arbitrary laws”—that reason is brought to bear on an otherwise unruly world. It is the natural desire for self-preservation that moves men to create the institutions of government necessary for the maintenance of public order. The only legitimate exercise of the legislative power is to give effect to those laws of nature that come to be known to human reason.

The civil law that each nation has “peculiarly established for itself” is essential to the protection of each man’s “life, liberty, and property.”

This law, this “well ordering of civil society,” is a rule that goes beyond any private judgment of right or wrong. All laws passed by the legislative power “are in their nature binding, and lay an obligation,” an obligation of each member of that society to obey. “All lawful authority,” Jacob argues, “is to be submitted to, and resisting it, is resisting the justice of the commonwealth.” For those necessary obligations to be met, it is essential that those governed by the laws are able to understand them.

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one of Jacob’s most popular titles, the seventh edition of which was published in New York in 1768 and reprinted in Philadelphia in 1769. See Levy, “Origins of the Fifth Amendment and its Critics,” p.855, n.192.


13. Ibid.


17. Ibid., pp. 1; 54.

18. Jacob, Lex Mercatoria, p.2.

19. The Student’s Companion, p.128. Since not all men are honest and decent, it is necessary that civil law be built upon an abiding truth of human nature, that “evil men fear to offend, for fear of pain;” as a result, “tis necessary that pains should be ordained for offences.” Ibid., p.206.
While the common law of England was the very "perfection of reason,"\textsuperscript{120} even there "statutes have been introduced on a deficiency of the common law."\textsuperscript{121} In fact, as a general matter, the law was a mess. Jacob found the common law to be "lying confus'd in our books."\textsuperscript{122} The abridgments were characterized by "great perplexity, confusion, and tautology."\textsuperscript{123} Moreover, in many of the books of the law there was "a great deal of pedantick and affected stuff" with the result that the average reader was more likely to be confounded than instructed.\textsuperscript{124} When confronting the tangle of the law, the average reader was "like a traveler in a wood without a guide, who, when once he is got in, is sure to be lost, and not find his way out."\textsuperscript{125} Jacob's solution was his new method which was a matter not of "laying the ax to the root" but only of "skilful and judicious pruning, so as the law may remain an art and science, and justice at the same time be obtained on easy terms, not oppressive to the people."\textsuperscript{126} His "good and easy method"\textsuperscript{127} would allow him to clear "the plainest and easiest road"\textsuperscript{128} whereby the people could come to know their law.

A proper public understanding of the law was essential to that great end of civil society—political liberty. Liberty was a "sacred thing . . . the sum of all our happiness here." Should it be lost, Jacob warned, "we should miserably find a Hell upon earth."\textsuperscript{129} In all forms of government, liberty is constantly threatened by the encroachment of tyranny—no less to be expected from rulers of free states than from kings—and there is "no other fence or security against it but . . . [the] laws."\textsuperscript{130} Liberty was not simply freedom in some limited sense; it was nothing less than the essence of "the welfare of mankind."\textsuperscript{131} By it men were spurred to action and gained their property; it was essential that both be secured by the law of the land.\textsuperscript{132} In particular, it was by the law of the land that the king's prerogative and the people's liberty were bound together, each with

\textsuperscript{120} Jacob, \textit{Treatise of Laws}, p.115.
\textsuperscript{121} Jacob, \textit{The Statute Law Common-Plac'd} (London: B. Lintot, 1719), p. i.
\textsuperscript{122} Ibid., p.2.
\textsuperscript{124} Jacob, \textit{City Liberties: or, the Rights and Privileges of Freemen}, (London: W. Mears, 1732), p.viii.
\textsuperscript{125} Jacob, \textit{The Student's Companion}, p.iv.
\textsuperscript{126} Giles Jacob to G------e C--------by, Esq., 30 October 1730, in Giles Jacob, \textit{The Mirrour: or, Letters Satyrical, Panegyrical, Serious and Humorous on the Present Times} (London: J. Roberts, 1733), pp. 67-68.
\textsuperscript{128} Jacob, \textit{The Compleat Chancery-Practiser}, p.vii.
\textsuperscript{130} Ibid., p.iii.
\textsuperscript{131} Ibid., p.i.
\textsuperscript{132} Ibid., p.iii.
"certain limits beyond which they may not venture."133 When it came to the monarchy, "the king can do no wrong, for he has not the power to do it, he having no power but by law, and there being no law to do wrong."134 Citing William Prynne as his authority, Jacob insisted that "the laws to which the king assents are more the people's than the king's. . . it is the . . . people only that make it a law to bind them. And . . . the chief legislative power is in the people and Houses of Parliament, not the king."135 Confusion in the law, a disregard for its language and its meaning, would endanger the rights and liberties of the people.

The difficulty of all law, Jacob knew, was that it would inevitably require interpretation. What was essential, if law was to fulfill its important role in civil society, was that the words of the law had to be understood as they were intended, just as in ordinary speech. In every case, "the sense of the words is to be collected from the cause of the speech, and the subject of the matter."136 When it comes to law, that demand translates into the necessity that judges called upon to interpret the law must never forget the essential distinction between "private knowledge and . . . judicial knowledge."137 Judges are not permitted to give effect to the law on the basis of their "own fancy, nor according to [their] own will," but only on the basis of the meaning of the law as created.138 Hardly original, Jacob was just following the great tradition that held that "judges have not the power to judge according to what they think fit, but that which by the law they know to be right and consonant to the laws."139

It was by the rules of grammar that law was to be given its true meaning. The art of grammar and language is "the portal by which we enter into the knowledge of all acts and whereby we communicate ourselves and our studies to others."140 When it came to the written law, judges, said Jacob, siding with Coke, "ought not make any interpretation against the express letter of the statute, for nothing can so well express the intent of the makers of the act as their direct words themselves."141 By limiting themselves to the cause of the law and the subject of the matter, judges would be able to chain themselves to the law and not wander off

133. Ibid., p.53.
134. Ibid.
135. Jacob, Lex Constitutionis, p.122.
137. Ibid., p.64.
138. Ibid.
139. Ibid. This was a common theme to Jacob's works: "A judge is to pronounce sentence according to the law, and what is alledged [sic] and proved and not according to his own will and fancy. He hath no power to judge according to what he think fit, but that which by the law he knows to be right." The Laws of Liberty and Property, p. 57.
140. Jacob, Law Grammar, p.11.
141. Jacob, Treatise of Laws, p. 15. As Coke had reported, "The judges said that they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of an act as their own direct words, for index animi sermo." Edrich's Case, 5 Co. Rep. 118a.
into the wilderness of their own fancy. It is adherence to the law that constitutes judicial, as opposed to merely private, knowledge. That is to say, "statutes are to be interpreted reasonably, according to the meaning of the makers." This was true of the old as well as of the new law, for "the strength of expression in ancient records should be preserved, which is often preferable to our modern refinements."142

The triumph of Jacob's effort to secure the liberties of the people by securing the language and meaning of the law, as well as his effort to bring the law into a "much narrower compass,"143 was his "masterpiece,"144 A New Law Dictionary. It was an attempt to give an account of the whole law, and this he did by combining three things into one law book—"a dictionary, an abridgment, and a vocabulary."145 It was nothing less than a "legal encyclopedia," in which he "based upon the definition of each term a statement of the whole law on the subject."146 It was not enough simply to define the words; he strove to put the meaning in context. Thus did he seek to include the forms and writs of the law in order to "contribute to the right understanding of the law."147 So, too, did he take to include "from the most ancient authors treating the British, Saxon, Danish, and Norman laws, such information as explain the history and antiquity of the law, with our manners, customs, and original form of government."148 By his method would the "difficulty and disagreeableness" of the study of the law be overcome and the law be made manageable.

Jacob's belief that the true meaning of the law was to be found in the meaning of the words used by the makers of the law was the received tradition of his day, a juridical view with intellectual roots reaching back hundreds of years; it was also a view that would continue to flower and flourish until only relatively recently.149 It was a view that was embraced by those who created the American republic,150 and it continued to hold sway among the best minds of the next century.151 Those who turned their

143. Jacob, Treatise of Laws, p.iv.
144. Cowley, Abridgments, p. xc.
146. Cowley, Abridgments, pp. xci; xc.
148. Ibid.
150. See, for example, the opinions of Chief Justice John Marshall in Marbury v. Madison, 1 Cranch 137 (1803); Sturges v. Crowninshield, 17 U.S 122, 202-203 (1819); and Barron v. Baltimore, 32 U.S. 243, 250 (1833).
attention to the problem of interpretation, especially the interpretation of the written law and Constitution, embraced the common-sense notion that the law means what it says and that it says what those who framed it intended.152 As Francis Lieber put it, "no . . . form of words can have more than one 'true sense,'" and it is this meaning that is "the very basis of all interpretation."153

CONCLUSION

When Justice Scalia and Justice Thomas turn to dictionaries to try and determine the original meaning of constitutional provisions and statutes, they embrace a tradition of interpretation that is anchored in the liberal foundations of modern constitutionalism. This tradition has both common law and philosophic roots. One sees on the legal side, for example, as early as the fifteenth century a belief that "in our dayes, have those that were the penners & devisors of statutes bene the grettest lighte for the exposicion of statutes" where they have given the "declaracion of theire myndes."154 So, too, did Lord Chancellor Hatton believe that "when the intent is proved, that it must be followed."155 The same view was taken by Sir Edward Coke, who argued that "in Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed."156 John Selden would also argue that "a man's wryting has but one true sense; which is what the author meant when he writ it."157 The portal to that original meaning is the words chosen by which that meaning or intention of the lawmaker was expressed.

On the philosophic side of the tradition, one sees as early as Hobbes's writings an understanding that good laws are those that are "Needfull, for the Good of the People and withall Perspicuous" by which

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156. Magdalen College Case, 11 Co. Rep at 73b.

he meant that a good law was one that revealed "the Causes, and Motives, for which it was made . . . the meaning of the legislature." In his view, there was "only one sense of the law" and that one sense "is not the Letter, but the Intendment, or Meaning; that is to say, the authentique Interpretation of the Law (which is the sense of the Legislator) in which the nature of the law consisteth." Should the law "be made to beare a sense contrary to that of the sovereign," the interpreter would, in effect, become the legislator.158

More abstractly, Locke understood words to be sounds that "stand as marks for the ideas within [a man's] own mind, whereby they might be made known to others, and the thoughts of men's minds be conveyed from one to another." Properly used, words will elicit in the mind of the hearer the same idea that is in the mind of the speaker: "When a man speaks to another, it is that he may be understood; and the end of speech is, that those sounds, as marks, may make known his ideas to the hearer." Thus it is essential that "the same sign stands for the same idea." Put most bluntly, "Words in their primary or immediate signification, stand for nothing, but the ideas in the mind of him that uses them."159

Others followed this same path toward meaning. Thomas Rutherforth, for example, offered a theory of interpretation in his Institutes of Natural Law that carried great weight with those involved in the creation of the American constitutional order.160 "The end, which interpretation aims at," Rutherforth wrote, "is to find out what was the intention of the writer; to clear up the meaning of his words, if they are obscure; to ascertain the sense of them, if they are ambiguous; to determine what his design was, where his words express it imperfectly."161 What must be sought by those interpreting laws is "the intention of the legislator [but] not merely as this intention as an act of mind; but as it is declared or expressed by some outward sign or mark, which makes it known to us."162 What that means, more deeply, is that the "meaning of the law is the design of the lawmaker in respect to what he commands or forbids. The reason of a law is his design in respect of the end or purpose, for which he commands or forbids it."163 The point of interpretation is to learn "the true sense" of the law, and that means understanding it as it was understood by those who made it. An understanding of "contemporary practice, that is, . . . the practice which the law produced in the first instance" will allow the interpreter to see the sense in which it was

162. Ibid.
163. Ibid., p.415.
originally understood, and "a view of this practice will be a means of removing any doubts about the sense of it, which are owing only to our remoteness from its original establishment."\(^{164}\)

Rutherford was not alone. Samuel Pufendorf was of a similar mind, noting that the "true and design of interpretation is, to gather the intent of the man from the most probable signs . . . [either] words or other conjectures which may be considered separately or both together." When it comes to words, as a general rule, "they are to be understood in their proper and most known significations; not so much according to grammar, as to the general use of them." That which helps most "in the discovery of the true meaning of the law, is the reason of it, the cause which moved the legislator to enact it."\(^{165}\) When it comes to the language of the law, "the meaning of the law is such, and no other."\(^ {166}\)

Another near contemporary of Pufendorf and Rutherford, Emerich de Vattel, insisted along similar lines that there needed to be "certain fixed rules" designed to help determine the meaning of laws and treaties.\(^{167}\) Indeed, the central rule, "the sole object of lawful interpretation is the discovery of the original meaning of the law in question.\(^{168}\) The reason for this rule is simple enough: "Words are only designed to express thoughts; thus the true signification of an expression in common use is the idea which custom has affixed to that expression."\(^{169}\) There is an obligation to define words in such a way as "the party whose words we interpret probably had in contemplation."\(^ {170}\) When that intention is known, "it is not allowable to wrest [the] words to a contrary meaning."\(^ {171}\) Again, like Rutherford, not even the changes in language that time inevitably brings is sufficient to change the meaning of the law. The terms of any legal document must be understood as they were understood "at the time when it was written."\(^ {172}\) Without that original meaning, words are simply "nothing."\(^ {173}\)

These strands of the liberal interpretive tradition, common law and philosophic, were taken up by those who fashioned the Constitution and thus informed their understanding of how written laws and constitutions were to be interpreted. When it came to construction of the laws, Alexander Hamilton argued the "rules of legal interpretation are the rules

164. Ibid. p.419.
166. Ibid., I.VI.XIII, p.66.
168. Ibid., p.247.
169. Ibid., p.249.
170. Ibid., 250.
171. Ibid, p.249.
172. Ibid.
173. Ibid.
of common sense." \(^{174}\) The thing to be sought was simply the "intention of the people" as expressed in the Constitution. \(^{175}\) This was the result, as Chief Justice Marshall put it, of the fact that the most basic premise of popular government is that "the people have an original right to establish for their future government, such principles as, in their opinion, shall most conduce to their own happiness." Because the exercise of this original right cannot be frequently repeated, those principles once established are "deemed fundamental" and are "designed to be permanent." This was why he considered the written constitution as nothing less than "the greatest improvement on political institutions." \(^{176}\)

Marshall had no doubt that anything the people intended to include in their Constitution they had "declared ... in plain and intelligible language." \(^{177}\) Thus did he hold to the maxims of interpretation that had filtered down through the ages: "The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers." To interpret instruments "fairly" was simply "to give effect to their intention." On this he was not ambiguous: "intention is the most sacred rule of interpretation." \(^{178}\) When it came to the language used to express that intention, Marshall argued that if a word "was so understood ... when the Constitution was framed ... [t]he convention must have used it in that sense." \(^{179}\)

This common sense notion of interpretation as the search for the original meaning of the Constitution was perhaps best explained and defended by Justice Joseph Story in his magisterial Commentaries on the Constitution of the United States. \(^{180}\) Strongly influenced by both Hamilton and Marshall, as well as Rutherforth and Vattel, Story set out in his treatise an entire chapter on "The Rules of Interpretation" in which he sought to make the case that constitutions are "instruments of a practical nature, founded on the common business of human life, adapted to

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175. Ibid., no. 78, p. 525.
179. Gibbons v. Ogden, 22 U.S. 1, 190 (1824). He was of a similar mind when it came to understanding those common law terms that had been used by the Founders in drafting the Constitution. When it came to understanding what was meant by the word "treason" in the Burr case, he was blunt: "It is scarcely conceivable that the term was not employed by the framers of our constitution in the same sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning." United States v. Burr, 25 F. Cas (no.14,693) 55, 159 (C.C. Va. 1807).
common wants, designed for common use, and fitted for common understandings."\textsuperscript{181} They did not demand the "exercise of philosophical acuteness" to grasp their meaning. Story was straightforward: "The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and they cannot be presumed to admit in them any recondite meaning or extraordinary gloss."\textsuperscript{182} Moreover, they are immune to what one of the founding generation called "the rude storms of time."\textsuperscript{183} In Story's view "the policy of one age may ill suit the wishes or policy of another. The Constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be . . . not dependent upon the passion of parties of particular times, but the same yesterday, to-day, and forever."\textsuperscript{184}

The first effort to fashion a science of interpretation was Francis Lieber's influential \textit{Legal and Political Hermeneutics}.\textsuperscript{185} In Lieber's view, "interpretation, in its widest meaning, is the discovery and representation of the true meaning of any signs used to convey ideas."\textsuperscript{186} Those signs most often used by men to convey their ideas are, of course, words."\textsuperscript{187} Since all human communication is by the medium of words, interpretation "has [never] been dispensed with; never can it be dispensed with."\textsuperscript{188} To Lieber, as to Story, Marshall, Hamilton and all those who preceded them, it was a matter of "common sense": "Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and enabling others to derive from them the same ideas which the author intended to convey."\textsuperscript{189} Any other effort at interpretation will lead to a supplanting of that original intention or meaning with nothing more than the "subjective view of the judge," his private opinions of right and wrong.\textsuperscript{190} And that would be "the worst of all justice."\textsuperscript{191} For law is to be an "immutable rule—a rule above the judge, not one in his breast."\textsuperscript{192}

Reliance on dictionaries or law dictionaries published at the time of the writing and ratifying of the Constitution is one way to try and establish its meaning that also shies away from any reliance on the subjective

\textsuperscript{181} Ibid., I: 322.
\textsuperscript{182} Ibid.
\textsuperscript{183} [Theophilus Parsons], \textit{The Essex Result} (Newburyport, 1778), in Charles S. Hyneman and Donald S. Lutz, eds., \textit{American Political Writing During the Founding Era, 1760-1805} (2 vols.; Indianapolis: Liberty Fund, 1983), I: 491.
\textsuperscript{185} See note 152 supra.
\textsuperscript{186} Ibid., p. 1896.
\textsuperscript{187} Ibid., pp. 1899; 1900.
\textsuperscript{188} Ibid., p. 1915.
\textsuperscript{189} Ibid., p. 1900.
\textsuperscript{190} Ibid., p. 1919.
\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid., p. 1920, n. 23.
intentions of those who were involved in its creation. Far from being at odds with the tradition of interpretation to which the Constitution gave rise, it is part of an antecedent tradition, both legal and philosophic, that gave rise to the Constitution itself. The belief that the language of the law means something, and that its meaning is intended to bind down those who would interpret it, it nothing less than the essence of American constitutionalism.