RECORD NO. 17-4257

In The
United States Court of Appeals
For The Sixth Circuit

WILLIAM ANDREW WRIGHT,

Petitioner – Appellant,

v.

STEPHEN SPAULDING, Warden,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, D. CT. NO. 4:17-CV-2097 (HON. CHRISTOPHER A. BOYKO)

SUPPLEMENTAL *AMICUS* BRIEF OF LAW AND LINGUISTICS RESEARCH TEAM ON BEHALF OF NEITHER PARTY THE BRIEF TAKES NO POSITION AS TO AFFIRMANCE OR REVERSAL

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INTRODUCTION AND SUMMARY OF ARGUMENT

On July 25, 2019, a motion for leave to file and accompanying amicus brief ("preliminary brief") was submitted to this court by an interdisciplinary law-linguistics[1] team ("research team") to help the court address the following questions posed by the court to the parties in a letter dated May 28, 2019:

"1. What is the original meaning of the Article III Cases or Controversies requirement?
2. How does the corpus help inform that determination?
   a. See https://lcl.byu.edu/projects/cofea/.
3. How does that original meaning relate to the distinction between holding and dicta?
4. How does that ultimate determination relate to which test in *Hill* should govern?"

The team's research findings reported in the preliminary brief suggested that the current interpretation of "cases" in Article III may be more narrow than the ways the term would have been used and understood by those who drafted and ratified the Constitution, a finding that may raise questions about whether the doctrine of dicta is supported by the text of Article III.

In the motion for leave to file, the research team indicated that the preliminary brief contained only a portion of its research due to the 12 ½ page limitation and that the team would be conducting further research over the next month. The research

[1] Linguistics is the scientific study of language, and linguists are scientists who apply the scientific method to questions about the nature and function of language.

team therefore requested further leave to file an additional supplemental brief not to exceed 25 pages on or before August 29, 2019.

By order entered August 2, 2019, this court granted the research team's motion to proceed as *amicus curiae* and directed the amici to file a supplemental brief by August 15, 2019, which deadline was subsequently extended to August 22, 2019.

The preliminary brief, and this supplementary brief,[2] are filed in support of neither party and take no position as to whether the decision of the district court should be affirmed or reversed.

This brief reports the results of a new line of linguistic research conducted after the preliminary brief was filed. A specialized computer tool was used to analyze the complete papers of James Madison; this analysis revealed that "case" and "cases" were frequently used as "shell nouns" to introduce complex information specific to each context of use.[3] When used as a shell noun, *case* does not have <u>any</u> inherent meaning, and thus does not bring to such a context of use the meaning, "injured plaintiff litigation." The team then returned to the *Corpus of Founding Era American English* (*COFEA*), used for the preliminary brief. (A large digitized data set representing actual language use is called a *corpus* -- plural: *corpora*). *COFEA* contains in digital form

[2] *Amici curiae* thank the following who commented on the preliminary brief: linguists Viviana Cortes, Scott Crossley, Edward Finegan, Tammy Gales, Benjamin Lee; law professors Michael C. Dorf, James E. Pfander, and Robert J. Pushaw. Jr.
[3] This terminology will be further explained in the main body of the brief.

over 95,000 texts created between 1760 and 1799, totaling more than 138,800,000 words. https://lawcorpus.byu.edu.

A subsequent linguistic analysis of the complete *COFEA* database indicated that every time the patterns used to define the extent of judicial power in Article III – "all cases arising," "all cases affecting," and "all cases of" --- appeared outside the context of Article III, those patterns indicated that "cases" was being used as a shell noun. Finally, review of foundational texts for the Constitution, the proceedings of the Constitutional Convention, and the ratification debates shows that "cases" was frequently used as a shell noun.

IDENTITY AND INTEREST OF AMICI CURIAE[4]

Clark D. Cunningham is Professor of Law and the W. Lee Burge Chair in Law & Ethics at the Georgia State University College of Law.[5] He is the chair-elect of the American Association of Law Schools' Section on Law and Interpretation.[6] Ute Römer is a professor in the Georgia State University Department of Applied Linguistics and English as a Second Language. She serves on the editorial boards of the *International Journal of Corpus Linguistics*, *Corpora*, and *English Text Construction* and is

[4] This brief was entirely authored by *amici curiae*. No other party or their counsel played any role in its preparation, nor did any party or other person, other than the *amici curiae*, contribute money intended to fund the preparation and submission of this brief.

[5] Employers are provided for identification only; this brief is not filed on behalf of any of the identified employers.

[6] Cunningham's CV is available at: http://www.clarkcunningham.org/

General Editor of the book series *Studies in Corpus Linguistics*.[7] Jesse A. Egbert is a linguistics professor at Northern Arizona University. He is founder and General Editor of the international scholarly journal *Register Studies*.[8] Haoshan Ren is a PhD student in applied linguistics at Georgia State University. Noor Abbady, MA applied linguistics, is Professor of English as a Second Language at the Savannah College of Art & Design. Margaret Wood is a PhD student in applied linguistics at Northern Arizona University. Heather Kuhn, JD 2019, is a Data Privacy and Security Consultant, Cox Communications. These lawyers and linguists submit this brief as the Law & Linguistics Research Team ("research team").[9]

ARGUMENT

I. The relationship of the doctrine of dicta to Article III

As discussed in greater detail in the preliminary brief, the U.S. Supreme Court has interpreted "cases" in Article III, Section 2, of the Constitution as meaning "the claims of litigants … submitted to the court for adjudication," *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), and even more specifically "injured plaintiff litigation," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Disregard of dicta -- a judicial statement "that is unnecessary to

[7] Römer's CV is available at https://shared.cas.gsu.edu/profile/ute-romer/.
[8] Egbert's CV is available at: http://oak.ucc.nau.edu/jae89/
[9] Additional information on Cunningham, Egbert, Abbady and Kuhn is provided in the first amicus brief. Römer and Ren have joined the research team since the first amicus brief was filed.

the decision in the case," a mere "advisory opinion,"*Asmo v. Keane*, Inc, 471 F.3d 588, 599, 600 (6th Cir. 2006) -- could therefore be considered a constitutional imperative on the theory that any judicial statement not necessary to the issue of redressing a plaintiff's particularized injury exceeds the court's lawful authority under Article III to decide "cases." *See* Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2000-01 (1993-94).

II. A new linguistic analysis of the original meaning of "cases" in Article III

In the preliminary brief the research team reported evidence that, for those involved in drafting and ratifying the Constitution, "cases" had a "broader meaning" than "injured plaintiff litigation" or even "adversary litigation" generally. To gain a greater understanding of how the Founders might have used "cases" with a "broader meaning," after filing the preliminary brief, the team initiated a new research strategy, looking for phrases that recurred frequently. The team considered a phrase to be "high frequency" if it appeared in a corpus being analyzed more than 50 times and in more than 10 different texts.[10]

To find such patterns the team first executed a computer search employing a linguistic analytic tool called AntConc[11] for all uses of either "case" or "cases" in a

[10] The second criterion excludes phrases that appear more than 50 times but only in a few documents.

[11] AntConc is a program for analyzing electronic texts (that is, corpora) in order to find and reveal patterns in language. Laurence Anthony, *AntConc* (Version 3.5.8) (2019), available from https://www.laurenceanthony.net/software.

database containing all public papers of James Madison downloaded from Founders Online (27,416 files, 10,876,580 words).[12] This search produced 8900 examples of "case" and 3024 of "cases." Analysis showed that uses of both "case" and "cases" were highly patterned, meaning both words occurred repeatedly in the same phrases. Over 79% of all occurrences of "cases" (7066/8900) appeared in one of 23 highly frequently recurrent phrases; 36% of all occurrences of "cases" (1088/3024) appeared in one of 10 frequently recurrent phrases.[13] Random samples respectively for "case" and "cases," each containing one fifth of the total examples of each word, were then subjected to line-by-line manual review.

The manual review brought to mind the term "shell noun," introduced by Hans-Jörg Schmid. *English Abstract Nouns as Conceptual Shells* (2000). Schmid developed this terminology to help explain why many of the most commonly used nouns in English can be hard to define. *Id.* at 13. In listing such nouns, Schmid twice begins the list with *case.*[14] *Id.* at 3, 6. Schmid explains how a word like *case* can be used either as a "full-content noun" or as part of a "shell noun phrase," and how the meaning of that word will be very different between these two usages.

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[12] *The Papers of James Madison*, Founders Online, https://founders.archives.gov/about/Madison

[13] Tables listing all these patterns are posted in Clark D. Cunningham, *The Original Meaning of "cases" in Article III of the US Constitution,* Resources on Law & Linguistics, www.clarkcunningham.org/Law-Linguistics.html ("Meaning of Cases Website")

[14] When italicized, *case* includes both the singular and plural form.

A full-content noun has a stable, inherent meaning such that modification specifies or narrows its meaning but is not necessary for its usage. *Id.* at 15. For example, in this letter received by James Madison in 1803, "cases" is a full-content noun clearly referring to a type of container: "a bill of lading for thirteen cases of wine directed to the care of Thorburn and Donaldson, merchants at Norfolk." 5 *The Papers of James Madison* 143 (David B. Mattern et al.eds 2000), available at https://founders.archives.gov/documents/Madison/02-05-02-0176 ("Madison Papers")

The Supreme Court's interpretation of "cases" in Article III can easily be understood as based on an intuitive assumption that "cases" is also being used as a full-content noun in Article III, as it would be in this sentence: "How many cases does Judge Pandit have on her docket today?" Used as a full-content noun, "cases" brings a particular inherent meaning to the question about Judge Pandit's docket, referring to concrete and specific pieces of litigation, that could for example be counted. ("She has six cases on today's docket.") Under such an interpretation, the phrases that follow "cases" in Article III – arising under, affecting, of admiralty and maritime jurisdiction – serve to limit and narrow a more general category of "cases" meaning "adversarial litigation," as the prepositional phrase "of wine" narrows the meaning of "cases" in the invoice sent to Madison.

In contrast to usage as a full-content noun, when a word is used as a shell noun, it is hard to define because the noun becomes semantically abstract and vague,

and is not used to bring an inherent meaning to the context but instead serves to introduce and characterize what Schmid calls "chunks of information," Schmid at 14, found elsewhere in that context. The noun functions to form a "shell" around such (often complex) "chunks of information," which are "contained" within that "shell" providing the "shell content." *Id.* at 7. Thus, when a noun like *case* is used as a shell noun, it creates in combination with the shell content a complete concept but one that is entirely contingent on the particular context of use.

Consider the following two examples used in the same text, a letter written by Madison in 1805 when he served as Secretary of State in the Jefferson administration:

> "In all **cases** where there may be no special grounds for suspecting an escape of the offender, by the departure of the vessel of war, or the removal of him beyond the reach of your warrant, you are to take no step towards applying the extraordinary force authorized by the law, until you shall receive such further directions as the President shall, in consequence of your report, think proper to be given." 9 *Madison* Papers 414-15 (emphasis added)
> https://founders.archives.gov/documents/Madison/02-09-02-0465
>
> "Whatever may be the result of these proceedings, you are, without delay, to transmit a full and exact report thereof to this department; and even to report for the information of the President, any important circumstance which may occur in the course of them; particularly in **cases** where there may possibly be time for his directions thereon to be received and pursued." *Id.* (emphasis added)

The shell content in each example is underlined and is notably complex, especially in the first example. The meaning of "cases" is clearly different in the first and second example, even though occurring in the same short letter, because the shell content is different for each use of "cases." Looking at the second example, it is particularly

clear that "cases" does not bring any inherent meaning to the sentence; the underlined shell content is necessary to give meaning to "cases." If the shell content is removed, the concluding phrase "particularly in cases" no longer makes sense – a clear indicator that "cases" is not being used as a full-content noun and that the clause beginning "where there may possibly be" is a shell noun phrase that completes meaning rather than being a modifier that narrows an understood inherent meaning.

Schmid conducted a systematic empirical analysis of a very large corpus of contemporary English to identify patterns likely to signal the usage of a shell noun phrase. Schmid at 38-62. One of the strongest patterns he found was "noun" + "wh word" (where, when, why) + clause,[15] *id.* at 22, 44, which is the pattern seen in both examples above. The research team found 82 examples of the pattern "in cases where" in the Madison corpus, typically followed by a clause. It was seeing patterns like this that brought the shell noun theory to mind.

The team's manual review of the 1/5 samples of "case" and "cases" in the Madison corpus generally confirmed that *case* was used pervasively as a shell noun in

[15] A clause can be extracted from the sentence in which it is embedded and expressed as an independent, complete sentence, and therefore must always include a verb phrase, *e.g.* "There may possibly be time for his directions thereon to be received and pursued" extracted from the second example quoted above. Douglas Biber, Susan Conrad & Geoffrey Leach, *Longman Student Grammar of Spoken and Written English* (2002).

ways consistent with Schmid's analysis of shell noun phrases in contemporary English.[16]

When reading a text from the Founding Era that clearly has a legal context – like Article III – it is possible to think that a usage of *case* is a full-content noun meaning something like "instances of adversarial litigation," only to realize when reading the entire context that the meaning of *case* has to be understood instead as forming a "shell" around content found elsewhere in the text. Take for example this phrase from the Articles of Confederation in the section setting out a very complicated process for resolving disputes between two states: "the judgment or sentence and other proceedings being in either case transmitted to congress." *Articles of Confederation of 1781*, art. IX. Read in isolation and preceded by "judgment," "sentence," and "proceedings," "either case" could easily be interpreted by a 21st century reader as referring to two alternate instances of litigation. But when the fuller context is examined, it becomes clear that "either case" instead refers to two complicated contingencies peculiar to this particular context, which together provide the essential shell content for "either case":

> Contingency 1: "if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the

[16] Addition sample shell noun phrases from the Madison Papers are posted on the *Meaning of Cases Website*.

> judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive" *Id.*
>
> Contingency 2: "and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive" *Id.*

At this point the research team had reached a working hypothesis that there is a plausible alternative to the Supreme Court's interpretation of "cases" in Article III as meaning "injured plaintiff litigation." That alternative interpretation is that "cases" in Article III functions as part of shell noun phrases. "Cases" would thus bring no inherent meaning to its use in Article III and would have different meanings for each differing shell content in that text.

To test this hypothesis, the research team conducted a computerized search of the entire *COFEA* database for every text using one of the three patterns that follow the Article III phrase, "the judicial power shall extend to": (1) all cases arising, (2) all cases affecting and (3) all cases of.[17] This search produced 79 examples of "all cases arising," 50 examples of "all cases affecting," and 608 examples of "all cases of."

Because of the small number of examples for "arising" and "affecting," the team was able to conduct a manual review. First, each example was classified as to

[17] For "arising" and "affecting" the search captured all phrases in which "all cases" preceded the verb by up to five words, accounting for the possibility of intervening words such as the phrase "both in law and equity" which separates "all cases" from "arising" in Article III.

whether it was either an exact duplicate of the Article III text or obviously a discussion of that text, leaving a remainder to be analyzed:

	Duplicate of Article III	Example is discussing Article III	Remainder	Total
arising	49	25	5	79
affecting	42	6	2	50

This result suggests that the formulations "all cases arising" and "all cases affecting" were very unusual in the Founding Era outside the specific context of Article III, though they did occur.

Analysis of the remaining examples, including examination of surrounding text in the original sources, indicated that every use in the full *COFEA* database of either "all cases arising under" or "all cases affecting" that was not derived from Article III was a shell noun phrase.[18] Take for example this excerpt from a medical treatise:

> "It is evident to the most superficial observer, that the sensibility, and irritability of every part of the body, are rendered less susceptible of impressions, by the use of opium. In all *cases* of pain arising from any cause, except that from inflammation, it is a sure and never failing palliative, and generally succeeds in procuring sleep, if given in doses sufficiently large" William Currie, *Observations on the causes and cure of remitting or bilious fevers* 75 (1798) (emphasis added)

[18] Each example was independently classified as a shell noun phrase by Ren, Abbady and Cunningham, using common criteria derived from Schmid. All seven "remainder" examples are posted as charts on the *Meaning of Cases Website*. One of the five examples in the "arising" chart appears twice because it was downloaded from two different sources.

According to this analysis, then, if the Supreme Court's interpretation is applied to "all cases arising" and "all cases affecting" in Article III, Article III would be the only text among the over 126,000 texts in *COFEA* where these phrases were not shell noun usages.

Turning to the much larger set of 608 examples of "all cases of," the first step reduced the number of examples by about 1/3 by removing all texts downloaded from Hein Online. Because identification of whether an example was a shell noun phrase often included viewing the full original contexts in the underlying source, Hein-sourced examples were removed because of the difficulty in *COFEA* of accessing full original texts in Hein. [19]

For the next step, the team extracted from the remaining 336 examples of "all cases of" three random samples of 20 texts per sample, a total of 60 examples.[20]

[19] 242 Hein-based lines were excluded from the total data set of 608. Texts sourced from Hein Online also present far more instances of duplicated lines and severe Optical Character Recognition (OCR) corruption making recourse to the underlying texts all the more necessary. The research team did not believe that exclusion of Hein-sourced lines rendered the remaining examples unrepresentative of Founding Era usage; nonetheless all the excluded Hein concordance lines are posted on *the Meaning of Cases Website*.

[20] The random samples were extracted from Excel file by using the function EXCEL "= RAND( )" . A column containing this function was inserted in the original spreadsheet of 335 lines, then, to extract three samples, the sorting function was used with each time a new random number was automatically assigned to each row by the function = RAND().

Manual review of each randomized sample set indicated that every example was a shell noun phrase.[21] Take for example:

> "the court of wardens shall and may have, hold, and exercise, the same powers and authorities in all *cases* of debt or damage, by whatever means sustained, and which do not exceed in value 20 /(except where the title to lands may come in question) as the judges of the court of common pleas or admiralty have, hold, or do exercise, in their respective jurisdictions" *Zylstra v. Corporation of Charleston*, 1 S.C.L. (Bay) 382, 394 (1794) (S. Car.) (emphasis added)

III. Applying new linguistic analysis to Founding Era texts

A. Predecessor texts to the Constitution

During the drafting process the Constitutional Convention relied significantly on the Articles of Confederation and state constitutions. Max Farrand, *The Framing of the Constitution of the United States* 127-29 (1913). *Case* appears six times in the Articles and is used each time as a shell noun, and not as a reference to adversarial litigation.[22]

The famous 1776 Constitution of Virginia, adopted even before the Declaration of Independence, uses *case* a number of times, but always as part of a shell noun phrase that is obviously not referring to adversarial litigation. In the section stating that trial by jury "ought to be held sacred," the Virginia Constitution uses the words "controversies" and "suits" rather than "cases."[23] *Va. Const.* of 1776, sec. 11

[21] Each example was initially classified as a shell noun phrase by Ren, then double-checked by Abbady; Cunningham provided occasional consultation. Tables displaying each randomized sample set are posted on the *Meaning of Cases Website*.
[22] Highlighted and annotated copy posted on the *Meaning of Cases Website*.
[23] Highlighted and annotated copy posted on the *Meaning of Cases Website*.

The state constitution considered to have the greatest influence on the drafting of the U.S. Constitution was the 1780 Constitution of Massachusetts, largely written by John Adams. *John Adams and the Massachusetts Constitution*, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution [24] In a provision apparently based on the Virginia protection of the right to trial by jury, Adams also used "controversies" and "suits" and added the word "causes." *Mass. Const.* of 1780, Part I, Art. XV. The word "cases" also appears once in this provision, which is part of a prefatory "Declaration of Rights," but can be seen as functioning as part of a shell noun phrase. When later in the Massachusetts Constitution its Article III establishes the judicial power, it uses a laundry list of words but does not include "cases":

> The general court shall forever have full power and authority to erect and constitute judicatories and courts of record or other courts … for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes, and things whatsoever" *Id.*, Ch. I, Art III (emphasis added)

B. Proceedings of the Constitutional Convention

Article III has its origins in the 9th of 15 resolutions introduced on May 29, 1787, during the first week of the Constitutional Convention by Virginia Governor Edmund Randolph on behalf of the Virginia delegation ("the Virginia Plan").

[24] Highlighted and annotated copy of the constitution posted on the *Meaning of Cases Website*.

Resolution Nine proposed that "a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature." *The Records of the Federal Convention of 1787* (ed. Max Farrand 1966) (hereinafter "*Records*"), vol. I, 21-22. The "jurisdiction of the inferior tribunals" was to hear and determine in the first instance: (1) all piracies & felonies on the high seas, (2) captures from an enemy; (3) cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; (4) impeachments of any National officers, and (5) questions which may involve the national peace and harmony. *Id.* The supreme tribunal would have jurisdiction to hear and determine such matters "in the dernier resort." *Id.* The Virginia Plan used full-content nouns – piracies, felonies, captures, impeachments – for the 1st, 2nd and 4th jurisdictional categories. The only use of *case*, for the 3rd category, occurs in a very typical shell noun pattern – noun + in + which – and appears to form a "shell" around two very different complicated ideas: (a) situations of interest to foreigners and "citizens of other states applying to such jurisdiction" and (2) situations "respect[ing] the collection of the National revenue." Neither concept particularly suggests "injured plaintiff litigation." For the last category, the Virginia Plan uses "questions." According to Schmid, *question* is very commonly used in contemporary English as a shell noun, Schmid at 4, 62, and "questions" in the 5th category certainly appears to be a vague and abstract noun which functions to form a shell around a complex set of ideas: "may involve the national peace and harmony."

On June 13 Governor Randolph and James Madison (also a member of the Virginia delegation) offered a revised version of Resolution Nine, which was passed unanimously by the Convention functioning as a Committee of the Whole: "the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the National revenue, impeachments of any National Officers, and questions which involve the national peace and harmony." *Records* I, 223. This resolution seems to use one full-content noun – impeachments – and two shell noun phrases, introduced respectively by "cases" and "questions."

On June 15 William Patterson introduced a set of resolutions on behalf of the New Jersey delegation (the "New Jersey Plan") as an alternative to the Virginia Plan. The New Jersey Plan eliminated the provision for "inferior tribunals," giving "a supreme Tribunal … authority to hear and determine in the first instance on all impeachments of federal officers , & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue." *Records* 1, 243 (emphasis added). The New Jersey Plan apparently introduced the idea of beginning each category of jurisdiction with the phrase "all cases."

According to Madison's notes,[25] on June 16 James Wilson of Pennsylvania, an accomplished lawyer and one of the most influential delegates at the Convention,[26] rose to compare the June 13 resolution by Randolph and Madison with the June 15 resolution by Patterson. He said: "Here [the Randolph/Madison resolution] the jurisdiction is to extend to all cases affecting the National peace and harmony; there [the Patterson resolution], a few cases only are marked out." *Records* I, 252 (emphasis added). It is very notable that Wilson paraphrased the June 13 resolution as "all cases affecting the National peace and harmony" when the actual language was "questions which involve the national peace and harmony." Wilson apparently treated "cases" and "questions" to be interchangeable; a usage best explained if both words were being used only as shell nouns.

On June 19, 1787, the Convention again formed itself into a Committee of the Whole and voted to reject the New Jersey Plan and report out the resolutions offered by Governor Randolph on June 13. *Records* I, 312-13.

According to the rather cryptic official Journal of the Convention, on July 18, 1787, the Convention unanimously passed a motion to strike "impeachments of

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[25] James Madison took "full and careful notes of the proceedings in the Convention," but did not allow them to be published until after his death in 1836. I *Records* xv. "[A]ll other records paled into insignificance" once Madison's notes were published. *Id.*

[26] Wilson was one of the original signers of the Declaration of Independence and served on the Convention's Committee of Detail, discussed below. He was one of the first persons appointed to the Supreme Court by George Washington and also served as the first professor of law at the College of Philadelphia (the predecessor of the University of Pennsylvania.). *See* Farrand 21.

national Officers" from Randolph's June 13 resolution. *Journal, Acts and Proceedings of the Convention* 101 (1819). The next official action on July 18 was to amend the June 13 resolution to read: "the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." *Id.* (emphasis added); s*ee also Records* II, 39.The official Journal did not record who made this second motion, which also passed unanimously, but Madison's Notes indicate that it was his proposal, in response to "several criticisms having been made" on the definition of the jurisdiction of the national judiciary. James Madison*, The debates in the Federal Convention of 1787* 279 (2007) (*Madison's Notes*).

As detailed in the first brief, linguistic analysis of the *COFEA* database indicated that the pattern "*a* and such other *b*" occurred frequently and always implied that (1) *a* and *b* were the same type, and (2) that *b* was the more inclusive term.[27] The use of "and such other questions" in the July 18 resolution passed by the Convention can now be seen as consistent with Wilson's use of "cases" and "questions"

[27] In response to suggestions from several linguists who reviewed the preliminary brief, the research team replicated the prior study of the "such other" syntactic structure with three additional sets of 100 examples taken from *COFEA* through random sampling. Wood manually reviewed all 300 examples to confirm that they showed the same patterns as the sample used for the preliminary brief. She flagged a number of examples to be double-checked by either Kuhn or Cunningham, who verified her analysis. The results of the replicated study were entirely consistent with the study cited in the preliminary brief. Three annotated charts listing all the new examples in sets of 100 are available on the *Meaning of Cases Website.*

interchangeably. "Cases arising under the law" could be expressed as an example of "questions as involve the National peace and harmony" because both "case" and "questions" were being used in the same way, to form shell noun phrases.

The preliminary brief discussed in detail what Madison's Notes reported was said by him at the Convention when it was moved that "this Constitution and" be inserted between "The Jurisdiction of the Supreme Court shall extend to all cases arising under" and "laws passed by the Legislature." This motion passed, adding "arising under the Constitution" to what became Article III. *Records* II, 431. As discussed above, the "cases arising under the laws" provision was language proposed by Madison himself on July 18. Why then would he put in his own notes that he said: "[he] doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." *Records* II 431. This puzzle is resolved if both "cases arising the Constitution" and "cases arising under the laws" were implicitly understood by Madison to be shell noun phrases. For example, if "questions" is substituted for "cases" - as the "and such other" provision and Wilson's speech suggest would be permissible – then it becomes more understandable that "questions arising under the constitution" could seem to be a very different exercise of judicial power than "questions arising under the laws." Also Madison's assumption that "cases arising under the constitution" might not be "cases of a

judiciary nature" would make sense if "cases" does not refer to adversarial litigation but serves only to introduce and characterize its shell content, "arising under the constitution."

C. Virginia Governor Edmund Randolph's Opposition to Ratification

Madison's Notes conclude by saying the motion to add "arising under the constitution" was agreed to "nem: conn" (literally "no-one contradicting") "it being generally supposed that the jurisdiction was constructively limited to cases of a Judiciary nature." *Id.* However, this page from Madison's handwritten notes[28] is the only time the phrase "cases of a judiciary nature" can be found among all the 138,800,000 words recorded from the Founding Era in the *COFEA* data base, raising a question whether it was a phrase even known to those who ratified the Constitution. In fact the phrase "judiciary nature" only appears in *COFEA* five times – all in documents written by James Madison.

Madison's effort in his notes to provide assurance that everyone at the Convention "supposed" that jurisdiction "arising under the constitution" was "constructively limited to cases of Judiciary nature" seems questionable when placed against the words and actions of Governor Randolph. Despite having proposed the Virginia Plan and serving on the critical Committee of Detail that turned the

[28] A photographic image of this page from Madison's handwritten notes is posted on the *Meaning of Cases Website*.

Convention's resolution into the format we now see in the Constitution, Randolph famously refused to sign the Constitution.

In a letter to the Speaker of the Virginia House of Delegates dated October 10, 1787, Randolph explained his position that the Constitution should be not ratified until, among other conditions, "all ambiguities of expression … be precisely explained" including "limiting and defining the judicial power." Edmund Randolph, *A Letter of His Excellency, Edmund Randolph, Esq. on the Federal Constitution* (1787).

In a subsequent speech at the Virginia Ratifying Convention, which he chaired, Randolph made clear that his concerns about ambiguity mirrored what Madison said at the Convention about adding "arising under the constitution":

> there are defects in its construction, among which may be objected too great an extension of jurisdiction. … It is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right, arising from this Constitution? Notwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe; if it had been more clearly expressed. What do we mean by the words arising under the Constitution? What, do they relate to? I conceive this to be very ambiguous" 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 571-72 (Jonathan Elliot, ed. 1836)[29]

[29] *See also* the statement of William Grayson, immediately preceding Randolph's speech to the Virginia ratifying convention: "My next objection to the federal judiciary is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude. It is impossible for human nature to trace its extent: It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained." *Id.* at 565.

Randolph, who later became the country's first Attorney General, interpreted "all cases, in law and equity, arising under the Constitution" as extending the federal judicial power to "inchoate right[s]." It is difficult to find an interpretation more at odds with the Supreme Court's interpretation of "cases" as meaning "injured plaintiff litigation."

CONCLUSION

The *amici curiae* are honored to have the opportunity to share their research results with a court that has requested briefing on the application of corpus-based analysis to the understanding of original meaning, perhaps the first court in the country to do so.

As indicated in their Unopposed Motion to File Amicus Brief, the Law & Linguistics Team will continue their work on this issue, to be presented at the Workshop on Law & Linguistics to be hosted by Georgia State University on October 18, 2019. The workshop paper in turn will be turned into an article to be published early next year, along with other papers from the workshop, in a special issue of the *Georgia State Law Review*. The *Meaning of Cases Website* will therefore continue to be updated with the team's work on the original meaning of "cases" in Article III.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 24 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Dated: August 22, 2019

/s/ Clark D. Cunningham
Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of August, 2019, I caused this Supplemental Amicus Brief of Law and Linguistics Research Team to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all of the registered CM/ECF users.

Dated: August 22, 2019

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