

AAAL 2023, Portland, Oregon



Applied corpus linguistics and legal interpretation: A rapidly developing field of interdisciplinary scholarship

Clark D. Cunningham | School of Law

www.clarkcunningham.org

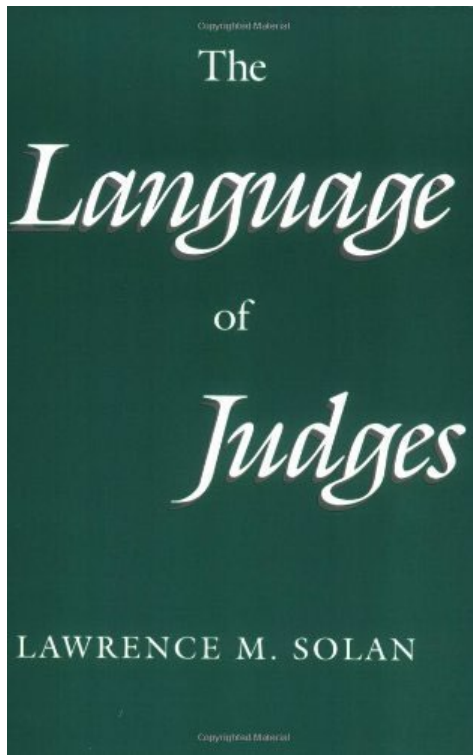
Ute Römer | Department of Applied Linguistics and ESL

<https://uteroemer.weebly.com/>

This presentation can be downloaded at www.clarkcunningham.org/L2-PPT.html



Law & Linguistics: Early Success Stories



Univ of Chicago
Press 1993



Law & Linguistics: Early Success Stories



The Yale Law Journal

Plain Meaning and Hard Cases

by
Clark D. Cunningham, Judith N. Levi,
Georgia M. Green, and Jeffrey P. Kaplan

103 YALE L.J. 1561

Plain Meaning and Hard Cases

The Language of Judges. By Lawrence M. Solan.^{*} Chicago: University of Chicago Press, 1993. Pp. xii, 218. \$45.00 (cloth), \$16.95 (paper).

Clark D. Cunningham,[†] Judith N. Levi,^{††} Georgia M. Green,^{†††} and
Jeffrey P. Kaplan^{††††}

If the language of a statute is plain, how can interpreting that statute create a hard case? And if a case is hard, how can recourse to the statutory language help resolve the case? This essay will explore the apparent paradoxes raised by these questions. In his recent book, *The Language of Judges*, Lawrence Solan, a lawyer first trained as a linguist, uses linguistics to critique a variety of opinions in which he believes the Supreme Court has erroneously claimed that its decision was based on the plain meaning of a statute. After examining Solan's conclusions, this essay will use his book to show how linguists can provide very useful information as to whether a text is ambiguous. In doing so, we hope to go beyond Solan's intentionally narrow undertaking—using linguistics to critique judicial decisions after the fact for treating ambiguous texts as if they were plain—to experiment with ways that analysis of ambiguous texts by linguists could actually assist judges in identifying and choosing among possible interpretations in a principled and objective way that remains grounded in the textual language.



Law & Linguistics: Early Success Stories

LAW LIBRARY
APR 07 1994

THE NATIONAL LAW JOURNAL

VOL. 16, NO. 15 • THE NEW YORK LAW PUBLISHING COMPANY

The Weekly Newspaper for the Profession

PRICE \$1.00 • MONDAY, APRIL 11, 1994

Monday, April 11, 1994

THE NATIONAL LAW JOURNAL

A11

WASHINGTON BRIEF

High Court Relies On Linguistic Sleuths in Case

A TEAM OF LAW and linguistic sleuths recently offered the U.S. Supreme Court some clues to the meaning of disputed language in the 1988 federal Anti-Drug Abuse Act—clues that may have contributed to a rare high court victory for a criminal defendant.

The clues were contained in an upcoming Yale Law Journal article by Prof. Clark D. Cunningham of Washington University School of Law and linguistic Prof. Georgia Green of the University of Illinois. Judith Levi of Northwestern University and Jeffrey Kaplan of San Diego State University. Last summer, the linguistic detectives selected four high court cases this term that seemed amenable to linguistic analysis, did their investigation and presented their results to the justices and counsel in the cases.

In one of the cases, *U.S. v. Granderson*, 92-1662, the federal government and Gregory S. Smith, an Atlanta federal defender representing Ralph S. Granderson Jr., clashed over the meaning of "original sentence" in a provision that says a court that has revoked a defendant's probation must resentence the defendant to "not less than one third of the original sentence."

On March 22, the high court, led by Justice Ruth Bader Ginsburg, agreed with Mr. Smith's interpretation that the minimum revocation sentence for Mr. Granderson was one-third of the maximum imprisonment for the original offense—two months instead of the 20 months in prison he received. Justice Ginsburg's analysis contained a footnote citing the Yale article.

The high court linguistic study, says Professor Cunningham, is the first time academics from law and linguistics have worked together to analyze pending Supreme Court cases and have presented their findings to the justices and parties before decisions have come down. "Our tentative plan is to do it again."

—MARCIA COYLE



Justice Ruth Bader Ginsburg

- *Communicating and Commenting on the Court's Work*, 83 *Georgetown Law Journal* 2119, 2127 (1995)
- "...articles accessible and useful to judges remain in vogue.
- Last Term, for example, a Yale Law Journal article sensibly discussing "Plain Meaning and Hard Cases" received credit lines in three Supreme Court opinions (two of them mine).
 - *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2251, 2255 (1994) (O'Connor, J.)
 - *Staples v. United States*, 114 S.Ct. 1793, 1806 (1994) (Ginsburg, J., concurring in judgment)
 - *United States v. Granderson*, 114 S.Ct. 1259, 1267 n.10 (1994) (Ginsburg, J.)."



Law & Linguistics: Early Success Stories

WASHINGTON UNIVERSITY LAW QUARTERLY



VOLUME 73

NUMBER 3

1995

WHAT IS MEANING IN A LEGAL TEXT?

NORTHWESTERN UNIVERSITY/WASHINGTON UNIVERSITY LAW AND LINGUISTICS CONFERENCE

Robert W. Bennett
Clark D. Cunningham
William N. Eskridge, Jr.
Charles J. Fillmore
Michael L. Geis
Georgia M. Green

R. Kent Greenawalt
Jeffrey P. Kaplan
Judith N. Levi
Michael S. Moore
Jerrold Sadock
Frederick Schauer

Cass R. Sunstein

COMMENTATORS

Larry Alexander
Paul F. Campos
Jim Chen
Michael C. Dorf
Philip P. Frickey
Craig Hoffman

Laurence R. Horn
Harold J. Krent
Gary Lawson
Jonathan R. Macey
Francis J. Mootz III
Dennis Patterson

Marc R. Poirier
William D. Popkin
Robert K. Rasmussen
Stephen F. Ross
Lawrence M. Solan
Peter M. Tiersma

WASHINGTON UNIVERSITY LAW QUARTERLY



VOLUME 73

NUMBER 3

1995

USING COMMON SENSE: A LINGUISTIC PERSPECTIVE ON JUDICIAL INTERPRETATIONS OF "USE A FIREARM"

CLARK D. CUNNINGHAM
CHARLES J. FILLMORE



Bailey v US 516 U.S. 137, 116 S. Ct. 501 (1995)

Brief for Bailey:

- The error of the government's reading is confirmed by the linguistic analysis of Section 924(c) in a forthcoming article (which has been lodged with the Clerk).
 - See Clark Cunningham & Charles Fillmore, Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm," 73 WASH. U.L.Q. 1159 (1995).
- Cunningham and Fillmore analyze the ordinary meaning of the phrase "uses * * * a firearm" by examining instances where that phrase (or its equivalent) occurs in newspaper articles and in Title 18 of the United States Code.
- They conclude that the government's interpretation is "contrary to linguistic 'common sense.'



THE NEW YORK TIMES NATIONAL TUESDAY, OCTOBER 31, 1995

L+ A19

Justices Explore Elusive Meaning of a Word That Seems So Simple

By LINDA GREENHOUSE

WASHINGTON, Oct. 30 — This was not one of those Supreme Court arguments that deploy the specialized vocabulary of the law, leaving casual spectators in the dark as the lawyers and the Justices carry on in a language of their own. Rather, a case argued before the Justices today turned on the meaning of a common, everyday, three-letter and — this being the Supreme Court — deceptively simple English word: use.

A Federal law imposes a mandatory five-year sentence on anyone who "uses or carries" a gun in connection with a drug offense. Does a defendant use a gun if the gun is kept, unloaded and locked in a box, in a closet in an apartment from which drugs are sold? Does a defendant carrying packets of cocaine under the driver's seat of his car use a gun that is hidden in the trunk under several bags of old clothes?

The United States Court of Appeals for the Federal Circuit answered yes in both instances, but the Justices today appeared far less convinced as they heard the defendants' appeals of the five-year sentences that were added to their sentences for drug violations.

At the least, several Justices suggested, a criminal prosecution should not be based on any law as

shrouded in ambiguity as this 1984 statute, known as Section 924(c)(1).

"The dictionary, at least to me, doesn't answer the question" of what use means, Justice Stephen G. Breyer said to Michael R. Dreeben, a Deputy Solicitor General arguing for the Government's broad interpretation, under which use is essentially synonymous with possess.

Illustrating the ambiguity, Justice Breyer said an advertisement for the sale of a gun that had been kept in a drawer and never fired might, with accuracy, read, "used gun, never used." Justice Ruth Bader Ginsburg illustrated another pair of

meanings: "I bought a gun but I've never used it," versus "It's in my drawer and I use it for protection."

Mr. Dreeben argued that even if a drug-dealing defendant had never used a gun in the ordinary sense of shooting or threatening anyone with it, its hidden presence could provide comfort and security to the dealer during a drug transaction — a use of the gun that comes within the statute, he said.

The Justices were skeptical. Under that theory, the five-year sentence would be an almost automatic addition to any drug conviction as long as the defendant owned a gun,

Justice David H. Souter said, adding, "The jury will always be free to find he was comforted by having a gun."

Justice Antonin Scalia demanded, "Is this a real legal issue, whether he was comforted?"

Justice Anthony M. Kennedy said that under the Government's theory "the 71 percent of rural Americans who have guns use them for almost everything they do." That interpretation "seems strange," Justice Kennedy said.

The case, Bailey v. U.S., No. 94-7448, reached the Court with a history. In a sharply disputed decision in 1993, the Court interpreted the same

law in a different context: whether someone used a machine gun when he traded it for cocaine. The vote in that case, Smith v. U.S., was 6 to 3, with a majority opinion by Justice Sandra Day O'Connor finding that the defendant had used his gun within the meaning of the law.

Justice Scalia dissented in an opinion that Justice Souter and Justice John Paul Stevens joined. "When someone asks, 'Do you use a cane?' he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall," Justice Scalia said in his dissenting opinion. "He wants to know whether you walk with a cane."

Arguing the defendants' appeal in today's case, Alan Untereiner said the Court's acceptance of a broad

meaning of use in 1993 did not hurt his clients' chances in this case. Trading a gun for drugs is an "active deployment" of the gun, Mr. Untereiner said, while his clients' guns had remained passively where they had been placed.

In Mr. Untereiner's view, use requires some activity with the gun, including openly displaying it or, possibly, referring to it. The Court's 1993 decision bolstered his argument for an active-passive dichotomy, Mr. Untereiner said. Then, evidently not wanting to embrace the 1993 ruling too warmly, he said to Justice Scalia, "I think the dissent had a good point."

Justice Scalia laughed, as did Justice O'Connor, who said, "Well, I'm not sure it did."

©1995 Oxford Health Press

THE OXFORD FREEDOM PLAN.



For more details on collaboration in mid-1990s

- Clark D. Cunningham & Jesse Egbert (2020). Analyzing Legal Discourse in the United States. In *Routledge Handbook of Corpus Approaches to Discourse Analysis* 462-480 (Eric Friginal & Jack A. Hardy eds.)
- Working paper version published on the Social Science Research Network at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554023
- Also available at <http://clarkcunningham.org/L2-Articles.html>



Corpus linguistics in a court decision

Stephen C. Mouritsen

2007, M.A., Brigham Young University,
Linguistics (Mark Davies)

2010, J.D., Brigham Young University

*The Dictionary Is Not a Fortress: Definitional
Fallacies and a Corpus-Based Approach
to Plain Meaning*, 2010 BYU Law Review
1915



Thomas Rex Lee

1997 – 2010 Law professor, Brigham Young
University

2010 Appointed to Utah Supreme Court,
hires Mouritsen as law clerk

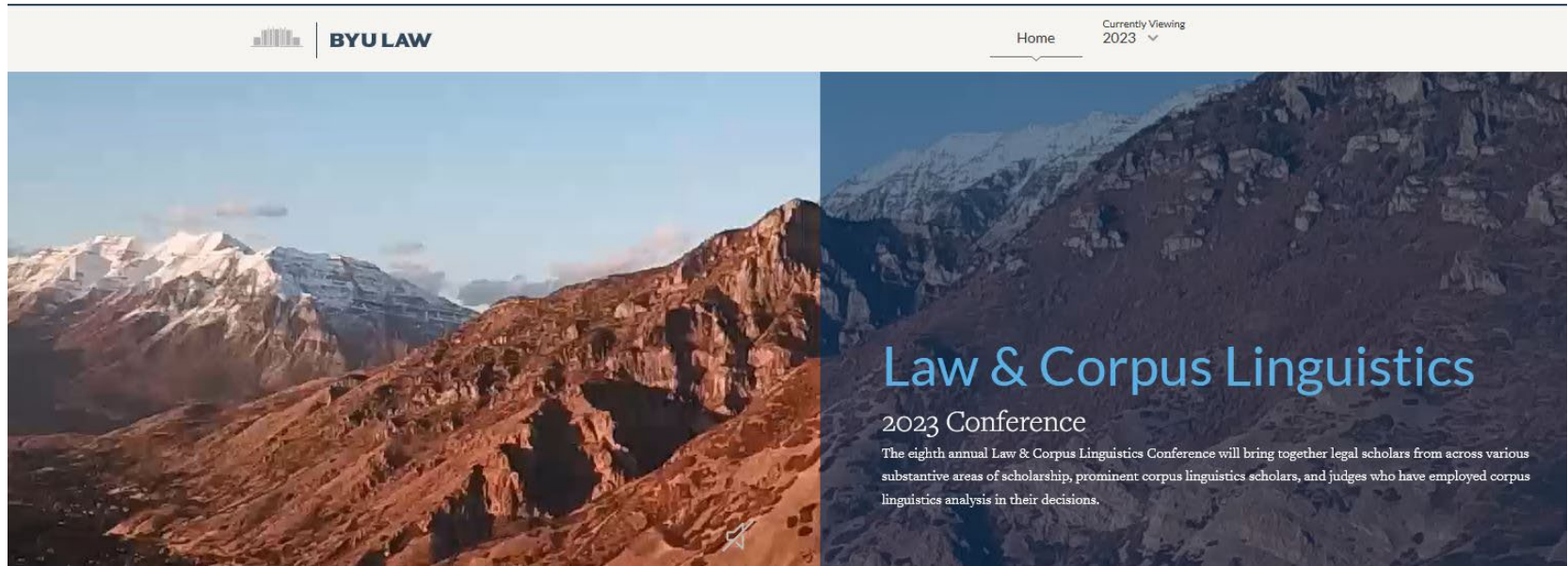
In the Matter of the Adoption of Baby E.Z.,
266 P.3d 702, 715-32 (Utah 2011) (Justice
Thomas Rex Lee, concurring)





2016 – BYU Law hosts first LCL Conference

- 8th iteration this October
<https://corpusconference.byu.edu/2023-home/>





2016 – BYU Law launches COFEA

- Corpus of Founding Era America English
<https://lcl.byu.edu/projects/cofea/>
<https://lawcorpus.byu.edu/cofea/concordances/>

Corpus of Founding Era American English (COFEA) Version: 6.2.1

misdem* ✕ Concordances Frequencies/Dispersions Collocates Texts Ngrams 970 results in 0.349

Corpus Filters

Collocates

Columns

Sort

Additional Options

Export

Concordance	Text ID	Year	Primary Author	Genre
--	--	--	--	--
1 ment for, and conviction of, treason, bribery, or . other high crimes and misdemeanors . Article III . - Section 1 . 1 . The judicial power of the United States shall be	HeinR185	1790	--	Legal
2 rom Ceuta or Spain, to avoid the hand of justice for some capital crime or misdemeanors -- commonly, indeed, murder, I met with many of these people at Morocco	evans.N20724	1794	--	--
3 to the cognisance , prosecution , and punishment , of the said crimes and misdemeanors , if the same have been perpetrated , as is suggested and charged by the	HeinR191	1790	--	Legal
4 nities, without the least hazard of being ever called to an account for their misdemeanors . For if the case be so, 'tis needless to prove a general redemption from h	evans.N14020	1782	--	--
5 achment for, and conviction of, treason, bribery, or other high crimes and misdemeanors . *Art. III.--Sect. 1. The judicial power of the United States, both in law and	elliots.v1.section158	1787	--	--
6 es to be subscribable to the loan of the United States. 3d. That this was a misdemeanors , in violation of his duty. The first of these positions, is the basis of the wh	evans.N20663	1795	--	--
7 the offenders must escape with absolute impunity . The power to punish misdemeanors , is originally and frtify a common law power ; of which , I think , the Unite	HeinR301	1781	--	Legal
8 of Pennsylvania, on the articles of accusation and impeachment, for high misdemeanors , exhibited against him by the House of Representatives of the commonw	evans.N20927	1794	--	--
9 United States. and indicted in the district court of the United States. for a misdemeanors in sending a threatenino letter to Benjamin Holland. for the purpose of ob	caselaw.a.580982	1797	--	Legal



Law & Corpus Linguistics takes off

- Over 40 articles including journals at Harvard, Yale, Stanford, U Chicago, U Mich, U Penn
 - <http://clarkcunningham.org/L2-Articles.html>
- Over 18 court decisions mentioning CL
 - <http://clarkcunningham.org/L2-Cases.html>
- Law-Linguistics collaboration in friend of court briefs
 - <http://clarkcunningham.org/L2-Briefs.html>



Law review articles using or discussing corpus-based linguistic analysis www.clarkcunningham.org/L2-Articles.html

- Stephanie H. Barclay, Brady Early & Annika Boone, [Original Meaning and the Establishment Clause](#), 61 *Ariz. L. Rev.* 505 (2019), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295239
- Barton Beebe & Jeanne C. Fromer, [Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion](#), 131 *Harv. L.Rev.* 945 (2018)
- Jacob Crump, [Corpus Linguistics in the Chevron Two-Step](#), 2018 *BYU L.Rev.* 399 (2018)
- Clark D. Cunningham & Jesse Egbert, [Using Empirical Data to Investigate the Original Meaning of "Emolument" in the Constitution](#), 36 *Georgia State Law Review* 465 (2020).
- Clark D. Cunningham & Jesse Egbert, [Analyzing Legal Discourse in the United States](#), in *Routledge Handbook of Corpus Approaches to Discourse Analysis* 462-80 (Eric Friginal & Jack A. Hardy eds. 2020)
- William N. Eskridge Jr., Brian G. Slocum, & Stefan Th. Gries, [The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning](#), 119 *Mich. L. Rev.* 1503 (2021), available at: <https://repository.law.umich.edu/mlr/vol119/iss7/3>
- Edward Finegan, [Comments on James C. Phillips & Jesse Egbert, Advancing Law & Corpus Linguistics](#), 2017 *BYU L.Rev.* 1297 (2017)
- Tammy Gales & Lawrence Solan, [Revisiting a classic problem in statutory interpretation: Is a minister a laborer?](#), 36 *Georgia State Law Review* 491 (2020)
- Neal Goldfarb, [A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics](#), 2017 *BYU L.Rev.* 1359 (2018)
- Stefan Th. Gries & Brian Slocum, [Ordinary Meaning and Corpus Linguistics](#), 2017 *BYU L.Rev.* 1417 (2017)
- James A. Heilpern, [Temporary Officers](#), (Nov. 8, 2018) *Geo. Mason L.Rev.* (forthcoming) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281292)
- James A. Heilpern, [Acting Officers](#), 27 *Geo. Mason L. Rev.* 263 (2019)
- Carissa Bryne Hessick, [Corpus Linguistics and the Criminal Law](#), 2017 *BYU L.Rev.* 1503 (2017)
- Thomas R. Lee & Stephen C. Mouritsen, [Judging Ordinary Meaning](#), 127 *Yale L.J.* 788 (2018)
- Thomas R. Lee & James C. Phillips, [Data-Driven Originalism](#), 167 *U. Pa. L.Rev.* 261 (2019)
- Thomas R. Lee & Stephen C. Mouritsen, [Testing Ordinary Meaning](#), 88 *Univ of Chicago L. Rev.* 275 (2021)



Law review articles using or discussing corpus-based linguistic analysis www.clarkcunningham.org/L2-Articles.html

- Jake Linford, [Datamining the Meaning\(s\) of Progress](#), 2017 BYU L. Rev. 1531 (2018)
- Jennifer L. Mascott, [Who are "Officers of the United States"?](#), 70 Stan. L.Rev. 443 (2018)
- Jennifer L. Mascott, [The Dictionary as Specialized Corpus](#), 2017 BYU L. Rev. 1557 (2018)
- Eleanor Miller & Heather Obelgoner, [Effective But Limited: A Corpus Linguistic Analysis of the Original Public Meaning of Executive Power](#), 36 Georgia State L. Rev 607 (2020)
- Stephanie Nicole Miller & Mary Kay Bacallao, [Justice Alito's Question: "Can it be said that the right to abortion is deeply rooted in the history and traditions of the American people?" Corpus linguistic evidence suggests the answer is "No." Harvard Journal of Law & Public Policy - Per Curiam \(May 18, 2022\)](#)
- Stephen C. Mouritsen, [The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning](#), 2010 BYU L.Rev. 1915 (2010)
- Stephen C. Mouritsen, [Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning](#), 13 Col. Sci. & Tech. L.Rev. 156 (2012)
- Stephen C. Mouritsen, [Corpus Linguistics in Legal Interpretation: An Evolving Interpretive Framework](#), 6 Int'l J. Lang. & Law 67 (2017)
- Stephen C. Mouritsen, [Contract Interpretation with Corpus Linguistics](#), 94 Wash. L. Rev. 1337 (2019)
- Daniel Ortner, [The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics](#), 25 B.U. Pub. Int. L.J. 101 (2016)
- James C. Phillips, Daniel M. Ortner & Thomas R. Lee, [Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical](#), 126 Yale L.J.F. 20 (2016)
- James Cleith Phillips & Sara White, [The Meaning of the Three Emolument Clauses in the U.S. Constitution: A Corpus-Linguistic Analysis of American English from 1760-1799](#), 59 S.Tex.L.Rev. 181 (2017)
- James C. Phillips & Jesse Egbert, [Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis](#), 2017 BYU L.Rev. 1589 (2017)
- James C. Phillips, Benjamin Lee & Jacob Crump, [Corpus Linguistics and "Officers of the United States"](#), 42 Harv. J. L. & Pub. Pol'y 871 (2019)



Law review articles using or discussing corpus-based linguistic analysis www.clarkcunningham.org/L2-Articles.html

- John D. Ramer, [Corpus Linguistics: Misfire or More Ammo for the Ordinary-Meaning Canon?](#), 116 Mich. L.Rev.303 (2017)
- Haoshan Ren, Margaret Wood, Clark D. Cunningham, Noor Abbady, Ute Römer, Heather Kuhn & Jesse Egbert, [“Questions Involving National Peace and Harmony” or “Injured Plaintiff Litigation”? The Original Meaning of “Cases” in Article III of the Constitution](#), 36 Georgia State Law Review 491 (2020).
- Brian Slocum & Stefan Th. Gries, [Judging Corpus Linguistics](#), 94 S. Cal. L. Rev. Postscript 13 (2020)
- Lawrence M. Solan, [Can Corpus Linguistics Help Make Originalism Scientific?](#), 126 Yale L.J.F. 57 (2016)
- Lawrence M. Solan, [Patterns in Language and Law](#), 6 Int'l J. Lang. & Law 46 (2017)
- Lawrence M. Solan and Tammy Gales, [Corpus Linguistics as a Tool in Legal Interpretation](#), 2017 BYU L. Rev. 1311 (2018).
- Lawrence B. Solum, [Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record](#), 2017 BYU L.Rev. 1621 (2018) (<http://ssrn.com/abstract=3019494>)
- Abigail Stout, Diana Coetzee & Ute Römer, [“We the Citizens?”: A Corpus Linguistic Inquiry into the Use of “People” and “Citizens” in the Founding Era](#), 36 Georgia State Law Review 665 (2020)
- Lee J. Strang, [How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions](#), 50 U.C. Davis L. Rev. 1181 (2017)
- Lee J. Strang, [The Original Meaning of Religion in the First Amendment: A Test Case of Originalism's Utilization of Corpus Linguistics](#), 2017 BYU L.Rev. 1683 (2017)
- Kevin P. Tobia, [Testing Ordinary Meaning](#), 134 Harv. L. Rev 726 (2020), see also [Appendix](#) detailing experiments, data and analysis



Court decisions mentioning CL

www.clarkcunningham.org/L2-Cases

In the Matter of the Adoption of Baby E.Z., 266 P.3d 702, 715-32 (Utah 2011) (Justice Thomas Rex Lee, concurring)

State v. Rasabout, 356 P.3d 1258, 1271-90 (Utah 2015) (Associate Chief Justice Thomas Rex Lee, concurring)

People v. Harris, 885 N.W.2d 832 (Mich. 2016) (Opinion for the court by Justice Brian K. Zahra) (Justice Stephen J. Markman, concurring) (both opinions use data from the Corpus of Contemporary American English, but come to opposite conclusions as to whether statute prohibiting admission of "information" provided by a law enforcement officer under threat of employment sanction applied to providing false information)

Fire Ins. Exch. v. Oltmanns, 416 P.3d 1148, 1163 n.9 (Utah 2018) (Justice Christine M. Durham, concurring)

Carpenter v. United States, 138 S.Ct. 2206, 2235, 2238-39 (2018) (Justice Clarence Thomas, J. dissenting)

Wilson v Safelite Group, Inc., 930 F.3d 429 (6th Cir. 2019)

-- Concurring opinion by Judge Amul R. Thapur, 930 F.3d at 438-45 ("corpus linguistics is a powerful tool for discerning how the public would have understood a statute's text at the time it was enacted")

-- Concurring opinion by Judge Jane B. Stranch, 930 F.3d at 445-48 ("the use of corpus linguistics is a difficult and complex exercise ... I would leave this task to qualified experts, not to untrained judges and lawyers. See, e.g., *Brief for Professor Clark D. Cunningham, et al. as Amicus Curiae on Behalf of Neither Party, In Re: Donald J. Trump, President of the United States of America*, No. 18-2486 (4th Cir. Jan. 29, 2019) (discussing use of corpus linguistics by professor of applied linguistics to help determine the meaning of "emoluments" during the founding era).")

Caesars Entertainment Corp. v. Int'l Union of Operating Engineers, 932 F.3d 91, 95 (3rd Cir. 2019) (using data from Corpus of Historical American English regarding use of "previously") (Opinion for the court by Judge Thomas Hardiman)

State of Idaho v. Lantis, 447 P.3d 875, 880-81 (Idaho 2019) (Opinion for the court by Justice G. Richard Bevan) (using data from Corpus of Historical American English regarding use of "disturbing the peace" in 1887)



Court decisions mentioning CL www.clarkcunningham.org/L2-Cases

State v Misch, 256 A.3d 519 (Vt. 2021) (meaning of "bear arms" in Vermont constitution) (citing D. Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 *Hastings Const. L.Q.* 509, 510 (2019), J. Jones, *Comment: The "Weaponization" of Corpus Linguistics: Testing Heller's Linguistic Claims*, 34 *BYU J. Pub. L.* 135, 161 (2020), J. Blackman & J. Phillips, *Corpus Linguistics and the Second Amendment*, *H.L. Rev. Blog* (Aug. 7, 2018), <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/>)

Facebook v Duguid, 141 S.Ct. 1163, 1174 (2021) (Alito, J. concurring) (suggesting that corpus linguistics could be used to test the strength and validity of interpretive canons).

Jones v Bonta, 34 F.4th 704 (9th Cir. 2022), vacated and remanded, 47 F.4th 1124 (2022)

-- Order for supplemental briefing to be filed in 21 days on whether corpus linguistics helps inform the determination of the original public meaning of 2nd amendment (March 26, 2021)

34 F.4th at 714 n.6 ("Corpus linguistics "is a powerful tool for discerning how the public would have understood a statute's text at the time it was enacted," and "[c]ourts should consider adding this tool to their belts." [Citing **Wilson v. Safelite Grp., Inc.**, 930 F.3d 429, 439-40 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment)]) We asked the parties to file supplemental briefing addressing in part the applicability of corpus linguistics to this case. We thank the parties for their hard work. Because neither of them asks us to apply corpus linguistics here, we decline to consider it further.")



Court decisions mentioning CL www.clarkcunningham.org/L2-Cases

New York State Rifle & Pistol Association v Bruen, 142 S.Ct. 2111, 2178 (2022) (Breyer, J. dissenting) ("The majority in [*District of Columbia v Heller*] rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. [554 U.S. at 586, 128 S.Ct. 2783](#). Linguistics experts now tell us that the majority was wrong to do so. See, e.g., Brief for Corpus Linguistics Professors and Experts as *Amici Curiae* (Brief for Linguistics Professors); Brief for Neal Goldfarb as *Amicus Curiae*; Brief for Americans Against Gun Violence as *Amicus Curiae* 13–15. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase "bear arms," and they concluded that the phrase was overwhelmingly used to refer to "war, soldiering, or other forms of armed action by a group rather than an individual." Brief for Linguistics Professors 11, 14; see also D. Baron, [Corpus Evidence Illuminates the Meaning of Bear Arms](#), 46 *Hastings Const. L. Q.* 509, 510 (2019) ("Non-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent"); [id.](#), at 510–511 (reporting 900 instances in which "bear arms" was used to refer to military or collective use of firearms and only 7 instances that were either ambiguous or without a military connotation).)

Health Freedom Defense Fund v Biden, 599 F.Supp.3d 1144, 1180 (M.D. Fla. 2022) (court used Corpus of Historical English (COHA) to explore uses of "sanitation" between 1930 and 1944).

United States v Seefried, __ F.Supp.3d __, 2022 WL 16528415 (D.D.C. 2022) (concluding that certification of electoral votes on January 6, 2021, did not involve "administration of justice" for purposes of sentencing a January 6 protester, using among other sources searches of the Corpus of Caselaw Access Project (COCAP) and the Corpus of Historical American English (COHA)).



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

Lucia v SEC, 138 S.Ct. 2044 (2018)

Amicus Brief of Corpus Linguistics Scholars in *Lucia v. SEC* (U.S. 2018) (Laurence Anthony, Waseda University (Japan), Ronald Butters, Duke (emeritus); Malcom Coulthard, Aston University (emeritus); Mark Davies, BYU; Jesse Egbert, Northern Arizona University; William Eggington, BYU; Edward Finnegan, USC (emeritus); Tammy Gales, Hofstra; Tim Grant, Aston University; Stefan Th. Gries, UC Santa Barbara; Jack Grieve, University of Birmingham (UK); Tony McEnry, Lancaster University (UK); Jeffrey Parker, BYU; Rui Sousa-Silva, University of Porto (Portugal); Sara White, BYU. Filed by James Heilpern, BYU.

Rimini Street v Oracle, 139 S.Ct. 873 (2019)

Amicus Brief of Corpus Linguistics Scholars in *Rimini Street v. Oracle* (Laurence Anthony, Waseda University (Japan), William Eggington, BYU; Tammy Gales, Hofstra; Tim Grant, Aston University; Stefan Th. Gries, UC Santa Barbara; Benjamin Lee, BYU; Tony McEnry, Lancaster University (UK); Jeffrey Parker, BYU; Rui Sousa-Silva, University of Porto (Portugal); Lawrence Solan, Brooklyn Law School; Sara White, BYU). Filed by James Heilpern, BYU



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

Wright v. Spaulding, 939 F.3d 695 (6th Cir. 2019)

--Letter from the court to lawyers for the parties requesting supplemental briefs on original meaning of the Article III Cases or Controversies requirement (May 28, 2019) (**asking "How does the corpus help inform that determination? See <https://lcl.byu.edu/projects/cofea/>."**).

-- Amicus brief filed by Law & Linguistics Research Team (July 25, 2019)

--Supplemental amicus brief filed by Law & Linguistics Research Team (August 22, 2019) (Prof. Clark D. Cunningham, GSU; Prof. Ute Roemer, GSU; Professor Jesse E. Egbert, NAU; Haoshan Ren, PhD student, GSU; Noor Abbady, MA Applied Linguistics, GSU; Margaret Wood, PhD student, NAU; Heather Kuhn, J.D. GSU.)

--See 939 F.3d at 700 n.1 (**"We asked the parties to file supplemental briefs on the original meaning of Article III's case-or-controversy requirement, specifically whether the corpus of Founding-era American English helped illuminate that meaning. A team of corpus linguistics researchers submitted two amicus briefs as well. We are grateful to both the parties and the amici for their hard work."**)

--See also *The Original Meaning of "Cases" in Article III of the Constitution*, 36 Georgia State Law Review 491 (2020), available at <https://readingroom.law.gsu.edu/gsulr/vol36/iss5/8/>.



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

Blumenthal v. Trump, 949 F.3d 13 (D.C. Cir. 2020)

Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert in Support of Neither Party, *Blumenthal v. Trump*, also published on the Social Science Research Network at <https://papers.ssrn.com/abstract=3475650>

In re Trump, 958 F.3d 274 (4th Cir.2020) (*en banc*), dismissed as moot *sub nom Trump v District of Columbia*, 141 S.Ct. 1262 (Mem) (Jan. 25, 2021).

Brief for Professor Clark D. Cunningham & Professor Jesse Egbert as Amici Curiae Supporting Neither Party, 2019 WestLaw 366218, also published on the Social Science Research Network at, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334017.

--See 958 F.3d at 286 ("**The President's insistence that "emoluments" indisputably include only "profit arising from office or employ" (that is, payment for services rendered in performance of a formal job), while possible, is certainly not indisputable. See, e.g., Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert on Behalf of Neither Party**")."

--See also Using Empirical Data to Investigate the Original Meaning of "Emolument" in the Constitution, 36 Georgia State Law Review 465 (2020).



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

Bostock v Clayton County, Georgia, 140 S.Ct. 1731 (2020)

Brief for Amici Curiae Corpus-Linguistics Scholars Professors Brian Slocum, Stefan Th. Gries, and Lawrence Solan in Support of Employees, (Brian Slocum, University of the Pacific McGeorge School of Law; Stefan Th. Gries University of Cal. Santa Barbara; Lawrence Solan, Brooklyn Law School) See also William N. Eskridge Jr., Brian G. Slocum, & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 Mich. L. Rev. 1503 (2021), available at: <https://repository.law.umich.edu/mlr/vol119/iss7/3>

Young v Hawaii, 992 F.3d 765 (9th Cir. 2021)

Brief of Corpus Linguistics Professors and Experts as Amici Curiae Supporting Appellees, *Young v. Hawaii* (filed June 20, 2020) (Dennis Baron, University of Illinois; Alison LaCroix, University of Chicago, Stefan Th. Gries University of Cal. Santa Barbara; Jason Merchant, University of Chicago), http://home.uchicago.edu/~merchant/pubs/2020-06-04_CorpusLinguisticsAmicusBrief.pdf



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

Nelson v State, 312 Ga. 375, 863 S.E.2d 61 (2021)

--[Order Granting Appeal](#) (Jan. 7, 2021) ("**The Court is particularly concerned with the following: When is a search warrant for the contents of an electronic device 'executed' under the Fourth Amendment to the United States Constitution?**")

--[Amicus Brief of Law-Linguistics Research Team in Support of Neither Party](#) (filed April 19, 2021) (Prof. Clark D. Cunningham, GSU; Amanda R. Black & Maria Kostromitina, PhD students, NAU; Megan Wells & Bradford Poston, law students, GSU)

--[Order for Oral Argument](#) (Apr. 29, 2021) ("**following appellant's opening argument, the Court will then immediately hear from neutral amicus counsel who shall have 10 minutes to argue**")

--[Oral Argument](#) (Aug. 26, 2021), <https://www.gasupreme.us/oral-arguments-august-26-2021/>

--- [Partial Transcript of Oral Argument](#) --[Slides for amicus oral argument](#)

See 863 S.E.2d at 64 n.4 ("**We thank the amicus curiae for its brief and oral argument regarding the application of corpus linguistics to some of the questions presented.**")

See also *What Does it Mean to "Search a Cell Phone?"*, presentation, 7th Annual Law & Corpus Linguistic Conference, Feb. 4, 2022 [ppt](#) [pdf](#)



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

Jones v Bonta, 34 F.4th 704 (9th Cir. 2022), vacated and remanded, 47 F.4th 1124 (2022)

-- [Order for supplemental briefing](#) to be filed in 21 days on whether corpus linguistics helps inform the determination of the original public meaning of 2nd amendment (March 26, 2021)

-- [Plaintiff-Appellants' Supplemental Brief](#) (April 23, 2021) ("The methodology of corpus linguistics suffers from several fatal conceptual difficulties that make it an unreliable guide to the original public meaning of the Second Amendment.")

-- [Appellees' Supplemental Brief](#) (April 23, 2021) ("Corpus linguistics is a new and emerging tool that presents opportunities and challenges in the search for original public meaning. Corpus linguistics may be of limited value, particularly at this stage of the case.")

-- [Appellees' Response to Appellants' Supplemental Brief](#) (May 3, 2021) ("Corpus linguistics is unlikely to assist in resolving this interlocutory appeal and should be approached with caution [but] may prove to be a useful addition to the jurist's toolbox in future cases.")

-- [Plaintiff-Appellants' Responsive Supplemental Brief](#) (May 3, 2021) ("Corpus linguistics' flaws make it an unreliable guide to the Second Amendment's original meaning.")

-- [Motion of Neal Goldfarb for Leave to File a Reply Brief as Amicus Curiae Supporting Neither Party](#) (May 3, 2021) ("much of the information about corpus linguistics in the parties' supplemental briefs is false or misleading")(motion denied, May 4, 2021)

34 F.4th at 714 n.6 ("**Corpus linguistics** "is a powerful tool for discerning how the public would have understood a statute's text at the time it was enacted," and "[c]ourts should consider adding this tool to their belts." [Citing *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 439-40 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment)]) We asked the parties to file supplemental briefing addressing in part the applicability of corpus linguistics to this case. We thank the parties for their hard work. Because neither of them asks us to apply corpus linguistics here, we decline to consider it further.")



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

New York State Rifle & Pistol Association v Bruen, 142 S.Ct. 2111 (2022)

-- [Brief for Corpus Linguistics Professors and Experts as *Amici Curiae*](#) (Dennis Baron, Univ. of Illinois; Alison LaCroix, Univ. of Chicago; Stefan Th. Gries Univ. of Cal. Santa Barbara; Jason Merchant, Univ. of Chicago)

-- [Brief for Neal Goldfarb as *Amicus Curiae*](#)

142 S.Ct. at 2178 (Breyer, J. dissenting) ("The majority in [*District of Columbia v Heller*] rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. [554 U.S. at 586](#), [128 S.Ct. 2783](#). **Linguistics experts now tell us that the majority was wrong to do so. See, e.g., [Brief for Corpus Linguistics Professors and Experts as *Amici Curiae*](#) (Brief for Linguistics Professors); [Brief for Neal Goldfarb as *Amicus Curiae*](#); [Brief for Americans Against Gun Violence as *Amicus Curiae*](#) 13–15. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase "bear arms," and they concluded that the phrase was overwhelmingly used to refer to " 'war, soldiering, or other forms of armed action by a group rather than an individual.' " [Brief for Linguistics Professors](#) 11, 14; see also D. Baron, [Corpus Evidence Illuminates the Meaning of Bear Arms](#), [46 Hastings Const. L. Q. 509, 510 \(2019\)](#) ("Non-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent"); *id.*, [at 510–511](#) (reporting 900 instances in which "bear arms" was used to refer to military or collective use of firearms and only 7 instances that were either ambiguous or without a military connotation).)**



Briefs using CL

<http://www.clarkcunningham.org/L2-Briefs>

State of Utah v. Planned Parenthood Association (Utah Supreme Court)

[Amicus Brief of Pro-Life Utah](#) (Dec. 9, 2022) (filed by Thomas R. Lee, Lee Nielsen)

[Amicus Brief of Neal Goldfarb](#) (Feb. 3, 2023) ([abstract](#))



3 Case Studies – U.S. Constitution

1. “Cases” in Article III

- “The judicial power shall extend to **all cases**, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority”

2. “Such inferior officers” in the Appointments Provision

- Congress may by Law vest the Appointment of **such inferior Officers, as they think proper**, in the President alone, in the Courts of Law, or in the Heads of Departments.”

3. “Misdemeanors” in the Impeachment Clause

- “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or **other high Crimes and Misdemeanors.**”



U.S. Constitution

- Drafted by a small group:
The Constitutional Convention meeting in Philadelphia in 1787
- But its authority comes from the ratification process
- Thousands involved in ratification conventions held in each of the 13 states from 1787-1790
- “The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning” US Supreme Court, *United States v. Sprague*, 282 U.S. 716, 731 (1931)





3 Case Studies – Common features

- Law professor/linguistics professor collaboration
- Use of *AntConc* to explore phraseological patterns, shifting focus from just individual words to phrases or constructions
- Our linguistic analysis resulted in reframing the legal interpretation question
- Also: grad students in both law and linguistics served as co-collaborators in 2 of 3 case studies





Meaning of “cases”

Collaborators: Haoshan Ren, Margaret Wood, Clark Cunningham, Noor Abbady, Ute Römer, Heather Kuhn & Jesse Egbert

Originated as course project at GSU law school

Filed as friend of the court brief and cited, *Wright v Spaulding*, US Court of Appeals, 6th Circuit (2019)

Published in *Georgia State Univ. L. Rev* 36, 5 (2020)



**“QUESTIONS INVOLVING NATIONAL PEACE
AND HARMONY”
OR “INJURED PLAINTIFF LITIGATION”?
THE ORIGINAL MEANING OF “CASES” IN
ARTICLE III OF THE CONSTITUTION**

**Haoshan Ren, Margaret Wood, Clark D. Cunningham,
Noor Abbady, Ute Römer, Heather Kuhn, & Jesse
Egbert***

INTRODUCTION

If a federal official is deliberately violating the Constitution, is it possible no federal court has the power to halt that conduct? Federal judges have been answering “yes” for more than a century—dismissing certain kinds of lawsuits alleging unconstitutional conduct by ruling the lawsuits were not “cases” as meant in the phrase “[t]he Judicial Power shall extend to all Cases” in Article III, Section Two, of the Constitution.¹



Meaning of “cases” study

- Corpora:
 - COFEA (Corpus of Founding Era American English, <https://lawcorpus.byu.edu/>, 126,000 texts, 137 mio. words)
 - Madison Corpus (Founders Online subset, 11 mio. words)
- Analytic steps:
 - Concordance analysis (“such other”, identification of “a ... such other b” pattern)
 - Construction analysis (meaningful patterns around “case” and “cases”, e.g., case(s) *wh*-clause, all cases arising, all cases of)
 - Conceptualizing “case” as a shell noun (Schmid, 2000)



Meaning of “cases” study: Results

- “cases arising under laws” understood by Constitution drafters as subcategory of “questions as involve the National peace and harmony”
- “cases” as used in final draft of Constitution functioned as a shell noun
 - Did not have inherent meaning but
 - Indicated differing complex ideas “shelled” by “cases”



Meaning of “such inferior officers”

Collaborators: Haoshan Ren, Abigail Coker, Ute Römer & Clark Cunningham

Originated as course project at GSU law school

Results presented at 15th American Association for Corpus Linguistics Conference (AACL 2022)

Article in preparation



Meaning of “such inferior officers” study

- Corpora:
 - COFEA (Corpus of Founding Era American English, <https://lawcorpus.byu.edu/>, 126,000 texts, 137 mio. words)
 - Madison Corpus (Founders Online subset, 11 mio. words)
- Analytic steps:
 - Concordance searches (“such inferior N”, “such ADJ N”)
 - Determination of endophoric reference (anaphoric vs. cataphoric uses of “such”)
 - Construction analysis (“such ADJ N as...”), functional classification of the *as*-phrase (in relation to the preceding noun phrase)



Meaning of “such...”: Results

1. “such inferior officers” in Constitutional provision used cataphorically, not anaphorically
2. In “Congress may by Law vest the Appointment of such inferior Officers, as they think proper”, “such ADJ N as...” functions as a discretionary qualifier



Meaning of “misdemeanors”

Collaborators: Clark Cunningham & Ute Römer

Results presented at BYU Law & CL Conference 2021,
ICAME 2022, GSU Law School Lecture 2023

Article currently under review



Meaning of “misdemeanors” study

- Corpora:
 - Founders Online Corpus (180,000 texts downloaded from <https://founders.archives.gov/>, 67 mio. words)
 - COFEA (Corpus of Founding Era American English, <https://lawcorpus.byu.edu/>, 126,000 texts, 137 mio. words)
 - COCA, COHA, COEME for reference purposes
- Analytic steps:
 - Concordance, collocates, and cluster searches, distribution analysis
 - Construction analysis (form-meaning pairings with “misdem*”)
 - Close reading of historical source texts (from all corpora)



Meaning of “misdemeanors”: Results

1. “other” and “high” modify both “crimes” and “misdemeanors” (Impeachment clause interpreted as “other high crimes” and “other high misdemeanors”)
2. “high misdemeanor(s)” has largely disappeared from AmE usage, but “high misdemeanors” occurs repeatedly in founding era texts
3. “high misdemeanor(s)” is used as a non-compositional compound (not “severe ms.” but referring to misconduct that affects governance)
4. “high misdemeanors” are not necessarily crimes



Potential relevance of these studies

- “cases” analysis could be used to question current Supreme Court hostility to public interest lawsuits, even if authorized by Congress
- “such inferior officers” analysis might limit courts’ ability to promote the growing conservative “war on the administrative state”
- “misdemeanor” analysis could be used to refute arguments that impeachment is limited to criminal conduct

AAAL 2023, Portland, Oregon



Thank you!

Clark D. Cunningham | School of Law
www.clarkcunningham.org

Ute Römer | Department of Applied Linguistics and ESL
<https://uteroemer.weebly.com/>

This presentation can be downloaded at www.clarkcunningham.org/L2-PPT.html