

Testing Supreme Court precedent about the meaning of the Constitution's Appointments Clause against linguistic analysis of the text

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



Georgia State Course taught since 2018

- Linguistic Analysis of Legal Texts
 - Course website www.clarkcunningham.org/JP/index.htm
- Linguistics grad students mentor law students on use of CL
- This research originated as course project by Abigail Coker (JD 2022) in collaboration with Haoshan Ren as course TA
- “Original Meaning of Public Use,” Brittany Langley (JD 2023) & Haoshan Ren, AACL 2022, also started as course project



Linguistic Analysis of Legal Texts – 2018





Linguistic Analysis of Legal Texts – 2019



Linguistic Analysis of Legal Texts:
Class Presentations, Spring 2019



Legal context of our research

Jan
3
2019

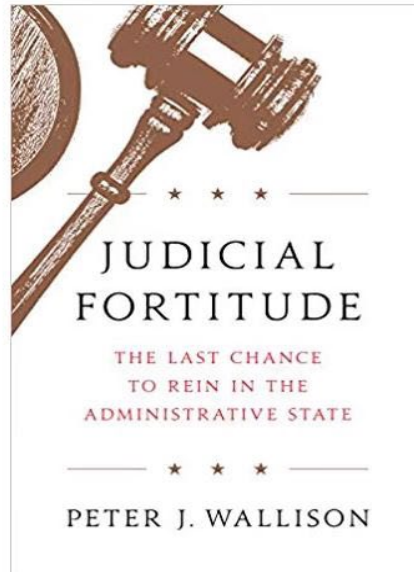


Can and Should the Federal Judiciary Rein In Our Expansive Administrative State?

Federalist Society Review, Volume 20

Topics: Administrative Law & Regulation • Article I Initiative • Separation of Powers

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Appointments Clause

Two parts.

First part is the Default Provision

Requires nomination by President and confirmation by Senate

“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: ...”

U.S. Constitution Article II, § 2, cl. 2.



Appointments Clause

Second part is the Excepting Provision

“...but the 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.”

U.S. Constitution Article II, § 2, cl. 2.



Appointments Clause

The Supreme Court has increasingly used interpretation of the Appointments Clause to limit the independence and authority of Executive Branch officials not confirmed by the Senate.



Example: The Arthrex Case

- Panel of “Administrative Patent Judges” (APJs) invalidated Arthrex’s patent
- Arthrex sues saying APJs are “principal officers” and should have been confirmed by Senate
- 1st court decision (Federal Ct of Appeals 2019)
 - Reversed patent decision against Arthrex
 - Would prospectively change APJs into “inferior officers” by invalidating Congressional action protecting APJs from removal without cause



Example: The Arthrex Case

- 2nd court decision (U.S. Supreme Court 2021)
 - Still reversing patent decision against Arthrex
 - But S.Ct. doesn't like how lower court "fixed" the Appointments Clause problem
 - Instead S.Ct. apparently changes APJs into "inferior officers," by changing law so APJ decisions can be reversed by a Senate-confirmed officer



Example: The Arthrex Case

- Illustrates courts using interpretation of constitutional text to second-guess how Congress legislates decision making authority in the Executive Branch.
- Four of the nine Supreme Court justices dissented, with strongly worded criticism
 - Justices Breyer, Kagan, Sotomayor and Thomas



US v Arthrex – US S.Ct. 2021

- Justice Clarence Thomas, dissenting
“At some point, we should take stock of our precedent to see if it aligns with the Appointments Clause’s original meaning.”
- We ask the same question



Supreme Court interpretation

In its decisions the Supreme Court has focused only on the two words “inferior officers”...

Excepting Provision

but the 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.”

... not the surrounding context

but the 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.”



US v Arthrex – US S.Ct. 2021

- However, Justice Clarence Thomas, dissenting, did try to recognize the context of “inferior officers”

“By using the adjective ‘such’ before ‘inferior officers,’ the Clause about inferior officers could be understood to refer back to ‘all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law’.”



Multifunctional “such”

- “such” can perform multiple functions in a sentence (e.g., pronoun, adverb, determiner)
- In “such inferior officers”, it is used as a **determiner**
- Determiner “such”: a common tool to create links between items in the text (endophoric reference), either **anaphorically** or **cataphorically**
- Anaphoric reference: back to an item mentioned earlier in the text
- Cataphoric reference: forward to an item mentioned later in the text



Examples from Founding Era AmE

Anaphora (back)

It is therefore my opinion that any bond given for duties on goods entered into your district after the 29th of May is considered null. It is however necessary that satisfactory proof be adduced to you that **such goods** were imported into the State of Rhode Island prior to that day.

Source: National Archives Founders Online

Title: From Alexander Hamilton to Sharp Delany, 2 December 1790

URL: <http://founders.archives.gov/documents/Hamilton/01-07-02-0197>

Cataphora (forward)

I shall make them known , whenever they are forwarded to me, in **such a way** as neither to subject myself to Any Mortification by Refusal, nor to A personal Obligation by granting them.

Source: National Archives Founders Online

Title: To Thomas Jefferson from Pierce Butler, [17 August 1793]

URL: <http://founders.archives.gov/documents/Jefferson/01-26-02-0632Year1793>



Multifunctional “such”

- In contemporary English, anaphoric references are by far the more common type (Carter & McCarthy, 2006)
- Speakers of English are hence **primed to expect anaphoric** (rather than cataphoric) **reference** when they come across a determiner like “such” in a text
- This might explain why Justice Thomas (among others) focused on the **preceding context** of “such” in the Appointments Clause



Research Question #1

Does “such inferior officers” in the Excepting Provision

but the 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.”

refer back to “all other Officers of the United States” in the Default Provision?

“[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and **all other Officers of the United States**, whose Appointments are not herein otherwise provided for, and which shall be established by Law:



Reading the text: Two categories of “officers”

Category A: *Default Provision (highlighted section)*

“[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and **all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law:**”

Category B: *Excepting Provision (highlighted section)*

“but the 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.”

Categories A & B are mutually exclusive:

A-Senate confirmation required; B-confirmation NOT required
Therefore B cannot anaphorically refer to A



RQ1 Using corpus methods

Data :

- COFEA (Corpus of Founding Era American English), 1760-1799 (<https://lawcorpus.byu.edu/>); size: 137 mio. words

Query:

- such inferior + NOUN (exhaustive retrieval from COFEA)

Analysis:

- Was there a pattern in texts containing the target phrase for using “such” cataphorically (referring forwards)



Results – RQ1

such inferior + NOUN in COFEA: 113 hits

- 31 hits: Duplicates or mentions of Appointments Clause
- 72 hits: Judicial Vesting Clause (Art III, §1):
 - “The judicial Power of the United States, shall be vested in one supreme Court, and in **such inferior courts as** the Congress may from time to time ordain and establish.”
 - Clearly cataphoric (forward reference)
- Remaining 10 hits: all cataphoric uses
 - Example: There shall be ten shares of every prize, which shall be taken and condemned, set apart to be given to **such inferior officers**, seamen and marines, **as** shall be adjudged best to deserve them.

- Journals of the Continental Congress (1774)



Results – RQ1

- Evidence not supporting Justice Thomas' interpretation:
“such inferior officers” not used anaphorically
- Identification of a pattern: “such inferior N” followed by “as”
- Next step: further explore the context following “such” and analyze “such... as” as a construction



Research Question #2

How does the “such... as” construction inform our understanding of the Excepting Clause?

Excepting clause

but the 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.”



Methods – RQ2 Investigating the “such... as” construction

such inferior officers, as they think proper

Data:

- COFEA (online search returned 69,000 instances of “such... as” → needed to do a more focused POS-based search)
- The Madison corpus: A Founders Online sub-corpus containing James Madison’s papers, 1772-1836; size: 10,876,580 words



Query:

- such + ADJ + NOUN + as
- AntConc (Anthony, 2020)

Analysis:

- Code functions of the as-phrase in relation to the preceding noun phrase



Results – RQ2

- “such + ADJ + NOUN + as” search in the Madison corpus returned 389 concordance lines
- We manually filtered the concordance for true hits and functionally classified the remaining 200 concordance lines:
 1. as-phrase as a descriptive qualifier
 2. as-phrase as exemplification
 3. as-phrase as a discretionary qualifier
- The types we identified map on to categories used by Ghesquière (2012)

Ghesquière, L. (2012). Identifying and intensifying uses of prenominal such: A data-based approach. *International Journal of Corpus Linguistics*, 17(4), 516-545.



Results – RQ2

1. *As-phrase as Descriptive Qualifier* (62%)

- The as-phrase in this category provides an answer to the question “*what kind of noun*”?

... in case the leaders of the federal party should call a state or New-England convention according to their contemplated plan, we solemnly declare that we shall regard such an act as a preparatory step on the part of our domestic enemies to organize a force for the destruction of everything dear to us and that we shall take such decisive measures as so alarming a crisis will imperiously demand.

Letter from Thomas Shepherd to James Madison (July 24, 1812), in 5 THE PAPERS OF JAMES MADISON 70-78 (J. C. A. Stagg, et al. eds., 2004), <https://founders.archives.gov/documents/Madison/03-05-02-0059>.

There are very important circumstances in which the case of St Domingo differs from that of a province emancipating itself. I confide fully in the wisdom & prudence of the administration on this occasion. Were I however to venture an opinion, it would be that such special Embassy as would flatter the pride of France, should preceed hostilities.

Letter From Robert R. Livingston to James Madison (Jan. 18, 1806), in 11 THE PAPERS OF JAMES MADISON 202–204 (Mary A. Hackett, et al. eds., 2017), <https://founders.archives.gov/documents/Madison/02-11-02-0081>.



Results – RQ2

2. *As-phrase as Exemplification (11.6%)*

- The as-phrase in this category provides examples of its preceding noun

Rejoicing that the public have obtained such faithful servants as Jefferson, Burr, Maddison Dearborne & Gallatin, It is with the greatest pleasure I assure you of my profound esteem.

Letter From Samuel Morse to James Madison (June 4, 1801), in 1 THE PAPERS OF JAMES MADISON 260–61 (Robert J. Brugger et al. eds. 1986), <https://founders.archives.gov/documents/Madison/02-01-02-0340>.

No doubt the spirit of Americans would sacrifice much blood, and expend vast treasures before such valuable cities as New Orleans, Norfolk, New York and Newport, would be yielded to an enemy...

From Edward Clark to James Madison (Abstract) (Apr. 9, 1812), in 4 THE PAPERS OF JAMES MADISON 308–09 (J. C. A. Stagg et al. eds. 1999), <https://founders.archives.gov/documents/Madison/03-04-02-0320>.



3. *As-phrase as a Discretionary Qualifier*

- The as-phrase in this category provides specifying information in the form of descriptors, qualifying their preceding noun by conferring discretion

Resolved that the Proctor be charged with the duty at all times, as the Attorney in fact of the Rector and Visitors, of preventing trespasses and intrusions on the property of the University real and personal, and of recovering its possession from any person who shall improperly withhold the same, and, for this purpose, that he institute such legal proceeding as may be proper.

Minutes of the Board of Visitors of the University of Virginia (Oct. 7, 1825), in 3 THE PAPERS OF JAMES MADISON 614–19 (David B. Mattern et al. eds. 2016), <https://founders.archives.gov/documents/Madison/04-03-02-0638>.

Results – RQ2



*...but the 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.*

- The as-phrase in the Excepting Provision functions as a discretionary qualifier



Conclusion

Senate Confirmation Required? Who decides?

- According to *Arthrex* and preceding S.Ct. cases
 - Courts decide
- Even if Congress authorizes appointment under Excepting Clause,
 - courts can decide that confirmation should have been required
 - because officer was not, in courts' opinion, "inherently inferior"



Conclusion

Senate Confirmation Required? Who decides?

- Linguistic analysis of text
 - Congress decides
- Exception to confirmation requirement applies to “such officers” “as [Congress] think proper”
- “such officers” are not “inherently inferior” but are “inferior officers” because Congress has so designated them as to method of appointment
- “inferior” is used to establish contrast (inferior vs. superior) rather than to limit scope of the noun



Law & Corpus Linguistics – a rapidly growing field

- Over 40 articles in past 5 years, including journals at Harvard, Yale, Stanford, U Chicago, U Mich, U Penn
- Four state supreme court decisions citing CL
- Two federal courts of appeal requested CL briefs
- Friend of court briefs in high profile cases



Law & Corpus Linguistics – a rapidly growing field



Utah Supreme Court Associate Chief Justice Thomas Lee. (Courtesy photo)

NEWS

Utah Supreme Court Justice to Launch Corpus Linguistics Consultancy and Boutique Upon Retirement

"I'm making this leap of faith and betting on myself because the Salt Lake legal market is exploding. But I also want to put my chips in on what I think I have expertise in, and to extend the theory and utility of the tools of corpus linguistics," Justice Thomas Lee said.

June 13, 2022 at 12:00 PM

🕒 4 minute read

Judges



Jessie Yount [↗](#)

Thomas Lee's New "Corpus Juris Advisors"
www.corpusjurisadvisors.com (includes Jesse Egbert)



Thanks for listening! Questions? Comments?

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

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Resources on Law and Linguistics: www.clarkcunningham.org/Law-Linguistics.html