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

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Law & Corpus Linguistics – a growing field in U.S.

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

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





Georgia State course taught since 2018

- *Linguistic Analysis of Legal Texts* taught by law professor Clark Cunningham
 - 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** (law degree 2022) in collaboration with Haoshan Ren as course teaching assistant
- Developed into working paper co-authored with Professor Ute Römer and Prof Cunningham



U.S. Constitution: Appointments Clause

“[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: 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.*”



Appointments Clause

First part - 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 - 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

Hot topic in U.S. law:

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



Congress authorizes Patent Trial and Appeal Board

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

“but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in ... the Heads of Departments.”

- “There shall be .. a Patent Trial and Appeal Board. ... The administrative patent judges shall be persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce]”
- 35 U.S. Code Sec. 6(a)



United States v Arthrex (S.Ct. 2021)

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

“but the Congress may by Law vest the Appointment of such **inferior Officers**, as they think proper, in ... the Heads of Departments.”

Court’s Decision:

- Appointment of Administrative Patent Judges [APJs] without Senate confirmation violates Appointment Clause
- Decisions by APJ panels are final and not subject to review by a Senate-confirmed officer
- Therefore, in Court’s opinion, APJs are not “inferior officers”



The Arthrex Case

- Illustrates courts using interpretation of constitutional text to second-guess how Congress legislates decision making authority in the Executive Branch.
- Unusual combination of four of the nine Supreme Court justices dissented
 - 3 liberal justices – Stephen Breyer, Elena Kagan, Sonia Sotomayor
 - 1 conservative justice – Clarence 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.”

but 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



RQ#1 Justice Thomas dissent in Arthrex

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

- “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 precede 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?

- Supreme Court precedent
 - Courts decide
- Linguistic analysis of text
 - Congress decides



Thank you for listening! Questions or Comments?

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Resources on Law and Linguistics:

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