

Historical Semantics and Legal Interpretation: Applications

ABSTRACTS

FRIDAY, APRIL 13

Brian Slocum and Stefan Th. Gries: “The Potential and Limits of Corpus Linguistic Analysis for Legal Interpretation”

Corpus analysis, and similar empirically based methods of language study, can help inform judicial assessments about language meaning. Corpus analysis does not, however, transform statutory interpretation into an empirical question or eliminate judicial discretion. Rather, corpus analysis can provide empirical evidence about systematicities of language that must be considered along with other non-empirical determinates of meaning (e.g., legislative history) in order to fix the meaning of a provision. It is essential, however, that corpus analysis is done with a proper understanding of its limits, but also its opportunities; using corpus-linguistic examples and methods, we will argue that the former are usually overstated, while the latter are understated.

Lawrence Solum: “Pragmatics and Semantics in Constitutional Interpretation”

Public meaning originalism aims to recover the communicative content of the constitutional text. That content (meaning) is a function of both semantics (the conventional semantic meanings of the words and phrases structured by syntax) and pragmatics (including contextual disambiguation and enrichment). Understanding the role of pragmatics in public meaning sheds light on several important issues in constitutional theory, including (1) the extent to which constitutional meaning is “thick” or “thin,” (2) the role of so-called “structural arguments” from an originalist perspective, and (3) the relationship between original public meaning and the original “purpose” or “function” of constitutional provisions.

Tammy Gales and Lawrence Solan: “Historical Semantics and Statutory Interpretation”

A number of well-studied cases of statutory interpretation in American legal history concern the meaning of terms changing over time, typically during the period between enactment and the controversy in litigation, but also between the time of the litigation and the present, making it difficult for contemporary scholars and judges to understand the cases’ precedential value. In this paper, we look at three U.S. Supreme Court cases that require historical analysis of word meaning: *Holy Trinity Church v. United States* (1892); *McBoyle v. United States* (1931); and *Moskal v. United States* (1990). We use historical and contemporary corpora to uncover the range of meanings of the disputed statutory terms in each instance, and comment on the Court’s analyses.

SATURDAY, APRIL 14

Richard Fallon: “Inventing Legislative Intent”

Debates about statutory interpretation typically proceed on the assumption that the meaning—or communicative content—of statutes can be identified in roughly the same way as the meaning of conversational utterances. Nearly all further agree that statutory interpretation based on a model of conversational interpretation requires an ascription of communicative intentions (of either a subjective or an objective character) to the legislature. But the idea of the legislature’s acting with a communicative intent when it passes a statute is a fiction. Because it is a fiction, debates about how to give content to the idea of legislative intent are concealed normative debates, typically about the nature and conditions of the political legitimacy in judicial interpretation. While pretending that their debates are substantially linguistic, interpreters seek interpretive methodologies (including conceptions of legislative intent) and case outcomes that will promote the political legitimacy of the U.S. legal system. But they frequently disagree, of course, about the relevant standards for gauging political legitimacy.

Jonathan Gienapp: “Historical Knowhow and the Original Meaning of the Constitution”

What is required to decipher the original meaning of the United States Constitution? Indispensable to this task is the reconstruction of something specific, yet easily missed: historical knowhow—the kind of tacit judgment that cannot be reduced to a set of algorithmic steps and that eighteenth-century readers drew on to interpret what they read. To explain why recovering knowhow is essential to the interpretation of historical language, this paper will: first, draw on helpful philosophical work to sketch out what knowhow is; second, explain why knowhow is foundational to the recovery of historical meaning in particular; and, third, elucidate how grasping the importance of knowhow sharpens up the task of discovering the original meaning of the Constitution.

John Mikhail: “‘Ex post facto’: A New Look at an Old Controversy”

The Constitution forbids both the federal government and the states from making ex post facto laws. In *Calder v. Bull*, Justices Chase, Iredell, and Paterson maintained that the phrase “ex post facto” was a legal term of art, which refers exclusively to retroactive criminal laws. Although their opinions on this point were arguably dicta, *Calder* has come to stand for this proposition, and a narrow or “criminal-only” interpretation of the ex post facto clauses is now settled law. Significant doubts have long persisted, however, about whether this interpretation of “ex post facto laws” is historically accurate. My talk takes a fresh look at this old controversy in light of new evidence supporting a broader reading of this phrase and draws out some implications of these findings for historical semantics and constitutional interpretation.

Dennis Baron: “Guns and grammar: Linguistic Authority and Legal Interpretation in *District of Columbia v. Heller*”

How nine justices, who spend their professional lives parsing law, come to two opposite readings of the 27-word sentence that is the Second Amendment reveals legal meaning making with a linguistic twist: the justices consulted dictionaries and grammars, deploying what they found in these reference works when it suited their purpose, rejecting that evidence when it conflicted with what they thought the amendment meant. This shouldn't surprise us. Determining legal meaning is a contingent, subjective, and ongoing process similar to how we interpret literature, sacred texts, conversations, even tweets. The text is important, but so is what we bring to it. To paraphrase the National Rifle Association, which brought *Heller* to the Court, words don't make meanings, people do.

Jill Anderson: “Concreteness Effects and Legal Interpretation”

Concreteness effects—a preference in the processing of concrete over abstract linguistic forms—have been observed in studies of memory, language pathology, neurolinguistics and, I will argue, legal interpretation. This project aims to weave together findings from diverse branches of the cognitive sciences to show that lawyers, judges, and academics need to be on their guard against concreteness effects that may skew our understanding of legally texts. A preference for concreteness should be troubling in law, where much of the language we are called upon to interpret necessarily involved the exercise of abstraction and imagination on the part of speakers or drafters, such as in the creation of statutes, court opinions, contracts, and constitutions. When a gap in time further complicates interpretation of a text, the pull of concreteness may be especially pronounced and will call for heightened vigilance on the part of all legal readers.