Linguistics at the Supreme Court: Current Challenges and Potential Solutions

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Abstract. As the United States Supreme Court has become more textualist, it has become increasingly more likely to rely on descriptive linguistic claims about mainstream American English in its interpretive decision-making processes. In this paper I discussed the role that linguists play at the Supreme Court through amicus briefing. I find that engagement with amicus briefs filed by linguists remains limited. I argue that limited understanding of linguistics, the nature of non-governmental amicus filings, and the division of factual and legal issues contribute to this lack of engagement. As a means of improving engagement with linguists in the legal profession, I propose that linguists should turn towards partnerships with the legal academy.

Keywords. linguistics; amicus brief; advocacy; interpretation; linguistics and law

Introduction. In recent decades, textualism, an approach to the interpretation of the law that prioritizes textual over or to the exclusion of legislative history, policy considerations and other extratextual sources, has become the predominant interpretive approach of the justices of the United States Supreme Court (Eskridge et al. 2023). Although textualism has emerged as the Court's preeminent interpretive approach, Eskridge et al. (2023) contend that it is far from a cohesive interpretive philosophy. As the authors note, the Court's textualists often disagree strongly with respect to how the law should be interpreted. Because of this, the authors have termed the current moment in Supreme Courts' jurisprudence on statutory interpretation "textualism's defining moment." Particularly relevant to linguists, Eskridge et al. note that linguistics and linguists might (Eskridge et al. 2023: 1644-1648). Following on their observation, I argue that the current moment is not simply a critical moment for textualism; it is also a defining moment for the relationship between linguistics and law.

Given the importance of language and text to the interpretation of the law, it is no surprise that scholars over time have viewed the relationship between law and linguistics as a natural one (Lawson 1995: 995). As textualism has risen to prominence in the Supreme Court, so, too, has interest in linguistics as in the legal academy (*see generally, e.g.*, Solan (2020), Gries & Slocum 2017; Solan & Gales (2017)).[1] In spite of this, many linguists weighing in on interpretive legal issues have been met with hostility and apathy by some in the courtroom (*see, e.g.*, Ainsworth 2006; Lawson 1995; Poirer 1995).

In this article, I discuss the status of advocacy done by linguists through amicus briefing at the Supreme Court of the United States (SCOTUS). I find that, although the textualist Court often engages in descriptive linguistic inquiry, SCOTUS' engagement with linguistics amicus briefing is limited in both scope and substance. I argue that three factors primarily underlie lack

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[1] Corpus linguistics has been a particular point of interest among those in the legal academy in the last decade, though there has been interest in other areas of linguistics as well, such as pragmatics (Solum 2025).

of engagement, namely lack of understanding of the field, general indifference to non-governmental amicus briefing, and the division of factual and legal issues in law. In support of my argument, I design a database of amicus briefs filed by authors identifying themselves as linguists ("LingBriefs") and track the influence of the briefing on SCOTUS opinions through citation rates. This database is now publicly available. I propose that a pedagogical solution to the challenges outlined in this article. As interest in the intersection of linguistics and law among legal scholars and practitioners continues to grow, linguists must go further than writing amicus briefs — in order to take full advantage of this defining moment, linguists should pursue law and linguistics as a legitimate research area in and of itself, building strong partnerships within the legal profession, educating the general public about linguistics, and striving to introduce linguistics to legal curricula.

I begin my analysis by presenting relevant background about textualist statutory interpretation and its relationship with linguists and linguistics. I then describe the design of LingBriefs and discuss the insights it provides with respect to the influence of linguistics amicus briefing on SCOTUS opinions. Finally, I identify three challenges linguists face as amici and propose that an intensified focus on the legal academy may ameliorate the current state of affairs.

1. Statutory Interpretation, Textualism, and Law & Linguistics. Before discussing the relationship between linguistics and statutory interpretation, it is first necessary to understand what the task of statutory interpretation is. Generally speaking, statutory interpretation is "the application of enacted texts to new and often unanticipated circumstances in light of the legislature's design and purpose" (Eskridge 2016: 5). How, precisely, a judge goes about the process of statutory interpretation, however, is a matter of their interpretive approach. Purposivists, on the one hand, believe that the purpose of the statute, as it may be discerned from a variety of sources, including text, precedent, and legislative history, among other authorities (Eskridge et al. 2019: 428-430). For the textualist, the interpretive process is undergirded by the notion that the courts should act as faithful agents of Congress when interpreting a statute, and that the most democratic and reliable way to do so is to rely on the text of the statute (Coney Barrett 2010: 110; Eskridge et al. 2019: 512). Textualists on the Roberts court believe that the text should be the primary authority in the interpretive process, with legislative history relegated to a confirmatory role (Brudney 2010: 902; Eskridge et al. 2019: 512). In recent decades, the textualist approach has grown to be the predominant one, to the detriment of purposive and pragmatic approaches. Textualism's rise to prominence is commonly associated with Antonin Scalia and his brand of the interpretive method.

1.1. ORDINARY MEANING & ANTONIN SCALIA. Antonin Scalia, confirmed as a member of the Supreme Court in 1986, is credited with the proliferation of New Textualism, the predecessor to the current Court's approach. As an interpretive philosophy, New Textualism is characterized by two notions. First, that most interpretive debates can be resolved with a "plain meaning" analysis (Brudney 2010: 906), and second, that the use of legislative history should be eschewed as unreliable and undemocratic (Eskridge et al. 2019: 511). Perhaps the greatest promise of Scalia's approach is its claim that plain meaning analysis would be a simple, democracy-promoting approach to the process of statutory interpretation. Where legislative history is both unreliable and costly in terms of time and resources, Scalia argued, turning to the text would be a simple and sound way to execute statutory provisions when their meaning is at issue.

The natural consequence of Scalia's theory was the rise of "ordinary meaning" analysis in statutory interpretation. In the absence of an indication that a term bears some specialized meaning, textualists construe words in terms of their "ordinary meaning." Although disputed (*see,*

e.g., *Bostock v. Clayton County*, 590 U.S. 644 (2020)), ordinary meaning may be generally understood as the meaning or a word or phrase in Mainstream American English at the time a piece of legislation is passed (Scalia & Garner 2011: 74). It was this notion of ordinary meaning that began to draw scholars of language to the study of law and language in greater numbers.

1.2. LAW AND LINGUISTICS IN THE NEW TEXTUALIST ERA. As the notion of ordinary meaning rose in prominence in statutory interpretation, it became clear that experts in the study of language would have a role to play in the interpretation of legal language. Beginning in the 1980s, linguists joined other social scientists in this growing research area (Levi 1995). This nascent movement among theoretical linguists culminated in the formation of "Law and Linguistics Consortium" in the mid-1990s, as linguists and legal scholars collaborated in conferences, papers, and other projects. Of particular note was the essay "Plain Meaning and Hard Cases," a review of lawyer-linguist Lawrence Solan's book *The Language of Judges* and a piece that would come to influence several cases in the 1993-1994 Supreme Court term (Kaplan et al. 1995).

For all the successes of the law and linguistics movement of the 1980s and 1990s, however, the scholars were met with resistance among scholars and practitioners alike. Some questioned the authority of linguists to weigh in on questions related to ordinary meaning (Poirer 1995: 1027), while others remarked that the very nature of the legal system was an obstacle to collaboration between linguists and practitioners (Lawson 1995: 996). Others still objected to the involvement of linguists because of a belief that linguists are not any better positioned to understand and interpret natural language than non-linguists are (Ainsworth 2006: 664; Poirer 1995: 1032; Lawson 1995: 995). By the turn of the century, the law and linguistics movement lost a great deal of its momentum. While linguistics remained relevant to the interpretation of the law, it would not return to the fore again until textualism as the primary interpretive approach of the Roberts Court.

1.3. TEXTUALISM ON THE ROBERTS COURT. In the years following Antonin Scalia's death in 2016, the Roberts Court became increasingly more textualist, with the appointments of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. As the Court has moved in the direction of textualism, even non-textualist justices have adopted some version of the majority's textualist reasoning (Eskridge et al. 2023: 1615). With the Supreme Court giving greater consideration to text and ordinary meaning than ever before, linguists have once again returned to the Supreme Court, filing amicus briefs and publishing papers applying theories and methods from linguistics to legal interpretation. Has this effort been successful? Analysis of linguistics amicus briefing at the Supreme Court in the Roberts era that the results have been mixed.

2. Linguistics Amicus Briefing at the Supreme Court. In order to understand the effectiveness of linguistics amicus briefing at the Supreme Court, I identified and collected SCOTUS amicus briefs involving at least one amicus identifying themselves as a linguist. I then assessed the impact of the briefs by tracking citations to linguistics amicus filings. I find that SCOTUS' engagement with linguistics amicus briefing is limited in scope and in substance.

2.1. LINGBRIEFS: A DATABASE OF AMICUS BRIEFS FILED BY LINGUISTS. Amicus briefs filed by linguists were identified and collected from two different sources, Westlaw's U.S. Supreme Court Briefs, Petitions & Joint Appendices database and LexisNexis' Briefs, Pleadings and Motions collection. Although neither database offers an complete collection of Supreme Court briefing, the two sources together supply the most comprehensive coverage of amicus briefing at the Supreme Court available to researchers. Westlaw's coverage of amicus briefing since 1931 is

comprehensive and LexisNexis' coverage of linguistics amicus briefing begins in January 1979. Linguistics amicus briefs were identified by searching the text and titles of briefs in each database with the following prompt: "linguist! AND amic!" Results were then manually evaluated. Briefs involving at least one individual or organizational amicus identifying themselves as a linguist were included in the database. Twenty-nine linguistics amicus briefs were identified with this method.

2.2. CITATION DATA INDICATES LIMITED ENGAGEMENT LINGUISTICS BRIEFING. Once relevant amicus briefs were identified, the opinions in cases in which the briefs were filed were assessed for engagement with linguistics briefs. This was primarily done by identifying citations to amicus briefs filed by linguists. It should be noted here that it is possible that a brief impacts an opinion in a case even if the author does not cite it. As Kearney & Merril note, citations in judicial opinions is the only publicly available measure of amicus brief impact (Kearney & Merril 2000: 757). Thus, citation rate should be understood as a conservative, yet reliable, measure of amicus brief impact.

Using citation rate as a measure of impact, I find that most linguistics amicus briefs go uncited in the Supreme Court Cases in which they are filed. Out of twenty-nine linguistics amicus briefs, only six are cited one or more times in any judicial opinion in the case in which they were filed.

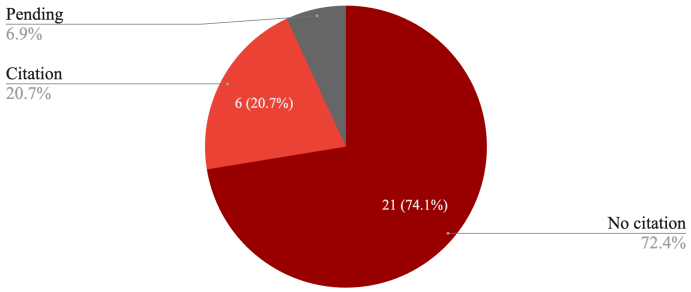

Figure 1. SCOTUS does not cite most linguistics amicus briefs

In addition, most citations to linguistics amicus briefs do not occur in majority opinions. In fact, dissenting opinions feature the greatest number of citations to amicus briefing filed by linguists. Moreover, not every citation to a linguistics amicus brief indicated acceptance of the positions taken by the amici. Several citations to linguistics amicus briefs appear to have been made for the purpose of disagreeing with the filers.

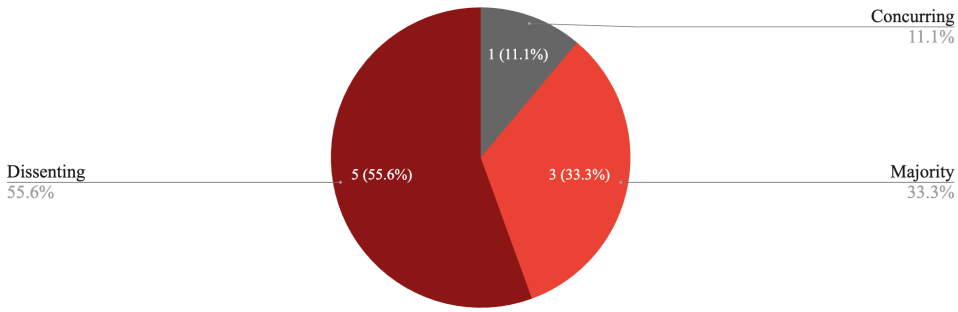

Figure 2. Most citations to linguistics amicus briefs are in non-majority opinions

Citation data also reveal that justices cite linguistics amicus briefs more often in certain areas of the law. Seven out of nine total identified citations occurred in Second Amendment Cases.

3. Challenges for Linguists as Amici. I identify three factors as contributing to the limited engagement with linguistics amicus briefing.

3.1. LIMITED UNDERSTANDING AND RECEPTION OF LINGUISTICS.
A major challenge linguists face as legal advocates is hostility to linguists as experts on natural language and general anti-empiricism. Rooted in the belief that linguists possess no more knowledge of natural language than non-linguists, legal practitioners have demonstrated a reticence to acknowledge the usefulness of linguistics as an interpretive tool, much less to actually implement it into a legal analysis (Ainsworth 2006: 644; Lawson 1995: 995). In the sense that this challenge is rooted in a fundamental lack of understanding about what linguistics can contribute to textual analysis, this challenge is very much like the one discussed in the above section. Similarly, then, this challenge calls for linguists to clearly communicate the particular contribution of their expertise and to delimit the limitations of linguistic analysis as a tool for legal interpretation.

Beyond hostility to linguists as experts in natural language, a general disinterest in the contributions of external expertise among the Supreme Court justices may also be a contributing factor to the limited impact of linguistics in textualist Supreme Court decisions. For one thing, some believe that the Court may not actually read or seriously consider the amicus briefs filed in the cases it decides (Primus 2015). As amicus filings have dramatically increased in number in recent decades (Kearney & Merril 2000: 749), substantive engagement with each brief may be impracticable for justices and their staff.

3.2. NON-GOVERNMENTAL AMICUS BRIEFS ARE CITED LESS.
In addition to the challenges effective communication with non-linguists, it should be noted that amicus briefs filed by non-governmental parties are generally cited less often than governmental amicus filings (Franze & Anderson 2020: 2). In fact, where Franze and Anderson find that non-governmental amicus briefs are cited 5-12% of the time per term (Franze & Anderson 2020: 2), the linguistics brief citation rate of 20.7% is actually an indicator of above average engagement.

3.3. THE DIVISION OF FACTUAL AND LEGAL ISSUES IN LAW.
Finally, the division of factual and legal issues may be having an impact on the reception of linguistics amicus briefing, particularly that related to interpretive issues. As linguists well know, descriptive linguistic work is guided by empirical inquiry. Empirical matters are typically understood as issues of fact and thus viewed as topics on which non-legal experts may properly weigh in. The interpretation of the law, however, is a legal issue, even as ordinary meaning doctrine places an empirical question at the center of the matter. This incongruity may be underlying some of the hostility which linguists have encountered in the interpretive domain.

4. Three Potential Solutions. To the extent that the impact of linguistics amicus briefing remains limited, I argue that linguists should consider alternative means of delivering linguistic information. I propose three measures to advance this goal: effective collaboration, scholarly communication, and pedagogy.

4.1. COLLABORATION AT THE LAW-LINGUISTICS INTERFACE. Linguists and legal practitioners interested in advancing linguistics as an interpretive tool must approach their goals with close collaborative relationships. The successes of the 1990s were not achieved by linguists acting on their own, but rather by linguists working in close collaboration with legal scholars and

practitioners. Today, these relationships exist, and have been highly generative as a result (*e.g.*, Eskridge et al. 2021; Solan & Gales 2017). Although they exist, collaborative relationships between legal professionals and linguists are relatively few in number.

There are two risks resulting from the paucity of joint law-linguistics groups of scholars pursuing law and linguistics work. First, they are constrained in the amount they can achieve. There is a great deal of research to be done at the law-linguistics interface. As things stand now, there are far fewer active researchers in this area than needed. The result of this is that existing law-linguistics collaboratives cannot keep pace with the rate at which relevant questions emerge, thus leaving interpreters to make their decisions without relevant background from linguistics. Second, the work of the few may be taken to be representative of all of linguistics and thus obfuscate the diversity and breadth of the field. Linguistics is an extremely broad field. Without representation of as many subfields as possible, the view of the field presented to legal scholars and practitioners will be incomplete. The only way to counter this challenge is to promote greater involvement on the part of linguists across the field in the process of interpretation.

Perhaps one of the most effective ways to bridge gaps between legal and linguistic researchers is to encourage students to pursue training in both fields. While relatively few in number, some academics hold both JDs and PhDs in linguistics, such as Lawrence Solan, Jeffrey Kaplan, and Brian Slocum.[2] These professors have been greatly influential in the effort to make linguistics a workable tool for legal interpretation. As advanced degree holders in both law and linguistics, they have the ability to facilitate collaborative relationships between legal professionals and linguistics. Moreover, they are particularly well-suited to participate in such partnerships.

4.2. SCHOLARLY COMMUNICATION. A major issue facing linguists seeking to weigh in on textualist debates is a lack of understandings of the key ideas behind linguistics. Indeed, many non-linguists do not understand why and how the field is distinct from other fields dedicated to the study of language. Many linguists have had the experience of being asked questions that they simply cannot answer because the question is based on a fundamental misunderstanding of what linguistics is. Disputes over legal interpretation are no exception to this generalization. While some may feel inclined to express frustration with non-linguists, it is essential to recall that it is the responsibility of linguists to communicate pertinent information about the field to broader audiences.

The key point linguists should illustrate to non-linguists interested in using linguistic evidence in the process of legal interpretation is that the field presents a powerful means of better understanding possible interpretations of disputed terms. It must be made clear that linguistics is a descriptive field designed to describe language as it is used, not to prescribe meaning. The result of this is that linguists will be likely to take a capacious view of disputed terms, highlighting how the term is used in different situations and by whom it is most often used. Thus, knowledge of linguistics tends toward building upon the knowledge possessed by non-linguists, not replacing it. As linguist Carl Vogel has aptly put it, "a difference between a semanticist and a lawyer is that the semanticist is not on retainer to find a desired interpretation, but to enumerate the possibilities" (Vogel 2009: 25). Considering this point, linguists may adopt the role proposed by Lawrence Solan as "semantic tour guide[s]" rather than "arbiter[s] of meaning" (Solan 1999: 1184). Promoting understanding of this point may alleviate some of the hostility linguists face in the legal context.

[2] This list is not exhaustive. Rather it is intended to highlight some scholars who have mobilized their joint law-linguistics expertise for the purpose of interpreting the law. Other academics with doctoral degrees in both law and linguistics include Sheila Jasanoff and Henry Smith.

4.3. PEDAGOGY. Finally, pedagogy is the third proposed solution to the challenges faced by linguists in the legal sphere. Where fundamentally changing the interpretive approach of the Supreme Court is a goal that is likely out of reach, introducing linguistics to legal curricula may have the effect of producing a generation of legal practitioners who are well-suited to engage with linguistics and benefit from it as a tool. Indeed, incorporating linguistics into legal education may be the most potent solution, given the number of prospective legal professionals it would reach and the greater likelihood that the information will be internalized. Students, unlike judges and attorneys, are tasked primarily with learning the information presented to them. Thus, curricular changes incorporating linguistics will have the powerful effect of equipping future generations of legal professionals with a competency in linguistics, potentially leading to a fundamental shift with respect to how the language of law is discussed and understood.

5. Conclusion. The interface of law and linguistics is in an unusual position. As the Supreme Court continues on its ultra-textualist trajectory, debates over natural language have become all the more important to legal decision making. In spite of this, linguists and linguistics have remained at the margins of such debates. While this finding is concerning, there is no reason for linguists to believe that the current state of affairs is one which must persist. By pursuing meaningful collaborations with legal scholars and practitioners, engaging in wide-reaching scholarly communication about the goals, methods, and contributions of the field, and taking steps to introduce linguistics into legal education, it may be possible to render linguistics a more impactful tool for the interpretation of the law.

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