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Contents

Jinshi Chen*

Chunks in Information Flow: a Corpus-based Analysis of Legal Discourse

Abstract: Chunks promoting discourse development appear in the discourse information flow as they do in the sentences. The present study, guided by Discourse Information Theory (DIT) and discourse information flow, analyses some legal data from "the Corpus for the Legal Information Processing System (CLIPS)". Starting with information levels, information knots, key words and sharing categories, the paper explores the structure of information chunks and information chunking in the discourse development, and analyses the features of information chunks and their effects on information flow.

Keywords: discourse information, information flow, information chunks, tree information structure

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1 Introduction

Chunk is an information-based meaning unit and closely-connected information integration (Gobet et al 2001). Chunk analysis can be made to go deep into the inner of words, for example, 'anticipation' can be divided into five chunks 'an-', 'ti-', 'ci-', 'pa-' and '-tion'. Lexical chunks in a sentence can also be analysed, which are kernel words surrounded by groups of functional words (Abney 1991), such as noun chunks, verb chunks, noun phrase chunks and so on (Zhao & Huang 1999; Zhou et al 2000). The theoretical exploration and practical application of chunk theory involve information processing (Miller 1956; Rubensson & Rudberg 2014), language acquisition and teaching (Ellis 2003; Song 2002), and psychological research (Cowan 2001, 2011; Gilchrist et al 2009). Therefore, chunk has become one of hot topics in language studies with much importance attached to lexical chunks in a sentence, but further research on chunk itself is still of necessity (Huang & Wang 2011). However, few researches on chunks at the discourse level have been conducted so far, particularly from the perspective of discourse information. Thus, this paper, guided by Discourse Information Theory (DIT hereafter) (Du 2007, 2014), focuses on the study of chunks in discourse information flow.

2 Theoretical framework

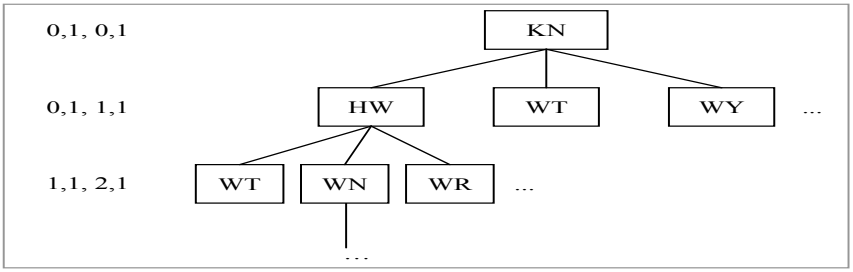
2.1 Discourse information theory

Different from the binary approach, e.g. old and new information in discourse (see Halliday 1985) or other nonlinguistic information theories, DIT (Du 2007, 2014) takes information processing as the core of a discourse. Discourse information is based on cognition and expressed through language. Discourse information structure refers to the mechanism in which the overall discourse information system in a discourse is formed by the embodiment of discourse information, basic information units, relationships and connections between information units. Discourse information structure is a tree network with information units at various levels, serving the kernel information in a discourse. Discourse information shares the common information features in that discourse information can be counted, stratified, identified, processed, transmitted and shared (Du 2007; Zhao 2011), which is of convenience to identify, classify, analyse and count discourse information units. From this new perspective, a discourse information unit has been endowed with different values or properties, like information knots, information levels, sharing categories and key words, making it easier to further the exploration of chunks in discourse information flow.

Based on the application of DIT in legal discourse studies (see Du 2007, 2015; Chen 2011, 2015; Ge 2014; Guan 2015), information units are represented by key words, which can be used to analyse the information content in a legal discourse. There are hierarchical relationships between information units in which the information at the lower levels can be developed to that at the higher levels. Those relations are called information knots, labelled by 15 *Wh*- phrases (Du 2007), for example, WT (what thing), WN (when), WF (what fact), WY (why), HW (how), WR (where), WI (what inference), WJ (what judgment), WB (what basis), WA (what attitude) and so on, which actually denote from what aspect subordinate information units specify their superordinate ones in a discourse, such as thing, time, fact, reason… (Chen 2011).

In each discourse, the kernel proposition (KN) and its subordinate information units can be identified, which correspond to information knots and level codes in the tree diagram (see Figure 1). Level codes are composed of level number and position number of the information unit or information knot and its superordinate ones. In Figure 1, the information focus KN is at the top of the tree structure, with the level code ‘0,1,0,1’. It is developed into subordinate information knots HW, WT and WY at the first lower level with the level codes ‘0,1,1,1’, ‘0,1,1,2’ and ‘0,1,1,3’ respectively. HW has its own subordinate knots WT, WN and WR with the level codes ‘1,1,2,1’, ‘1,1,2,2’ and ‘1,1,2,3’. ‘1,1,2,3’ means knot WR takes up the third position (tagged as 3) at level 2. It is subordinate to HW at the first position (tagged as 1) at level 1 (Chen 2011: 75-76).

Figure 1 Discourse Information Levels (from Chen 2011: 75)



Information sharing categories reflect the degree to which participants in the communication share the information to some degree for information transmission. The more information the participants share, the fewer details they need to provide in the communication. In DIT, there are six types of sharing categories, including A-events (Known to A, but not B), B-events (Known to B, but not A), C-events (Known to both A and B), E-events (Known to neither), O-events (Known to everyone) and D-events (Known to be disputable) (Du 2007). The use of sharing categories, together with concrete legal context, is helpful to study legal discourse from the cognitive and social aspects in that particular shared knowledge of participants forms the basic mechanism of requests, rejections and even rules (Chen, 2011).

2.2 Discourse information flow

Du (2009) believes that the core issue of discourse information flow is information development, information transmission, information flowing conditions and various phenomena in the process. Information development ranges from such local-discourse levels as inner-sentence level and inter-sentence level to global-discourse level. The more levels the discourse has, the more deeply the information develops. Discourse mainly serves as information transmission which refers to information processing between information senders and information receivers, involving a series of factors like participants, transmission purposes, transmission means, information content and so on. Information flow occurs in information development and information transmission, with one important condition as information potential energy. The amount of such potential energy relies on the degree of information surplus between information source and information destination, i.e. the information gap between information surplus and information vacancy. The larger the information gap is, the greater information potential energy is, and the more smoothly the information flows. Information flow takes on such phenomena as information hyperplasia, information loss, slow information, information vortex, etc.

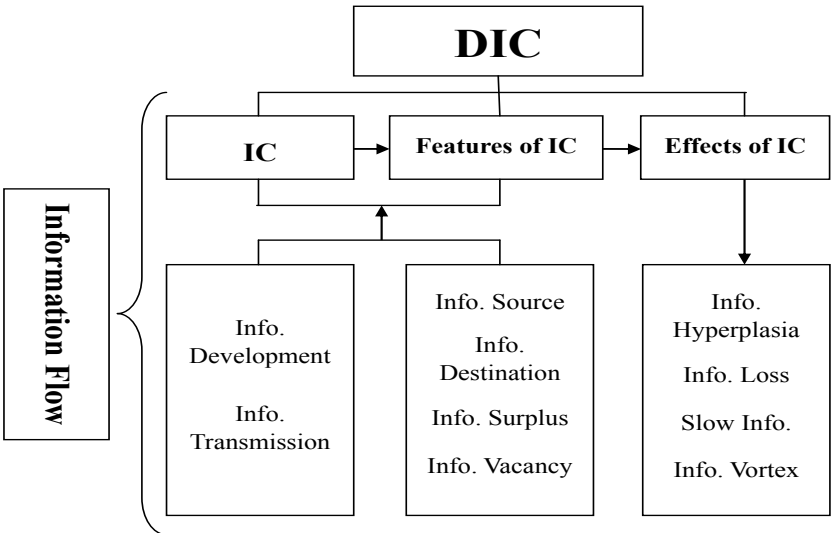
2.3 Analytical framework

In accordance with the exploration of lexical chunk (Abney 1991) and phrase chunks (Zhao & Huang 1999; Zhou et al 2000), a working definition in this paper will be

given as follows: Discourse Information Chunk (DIC hereafter) takes a grouped information units as a chunk unit, i.e. a combination of no less than two information units in discourse information flow, and it is a information cluster surrounding the head information unit, with relatively independent meaning and regular flow.

This paper, guided by the theory mentioned above, focuses on the study of DIC at both the inter-sentence level and the discourse level. A framework has been put forward for the chunk analysis in discourse information flow (see Figure 2). Three questions will be discussed in details. (1) How are information chunks formed in discourse information flow? (2) What are the features of discourse information chunks? (3) What is the influence of information chunks on discourse development?

Figure 2 An Analytical Framework for Chunks in Discourse Information Flow[1]



Discourse information flow, including information development and information transmission, is realised under the conditions that there have been clear information source and clear information destination, and that information surplus and information vacancy have already been formed. Accordingly, information chunks will be formed, taking on their various features. Then information chunks, in turn, affect such phenomena as information hyperplasia, information loss, slow information and information vortex in discourse information flow. This paper will, taking oral courtroom discourse and written legal English discourse from 'Corpus of Legal Information Processing System' (CLIPS) as examples, conduct a discourse information analysis to answer the aforementioned research questions. The materials from the corpus, having been analysed and labelled in accordance with tree structure of discourse information in DIT (see Appendix), are suitable for the present research.

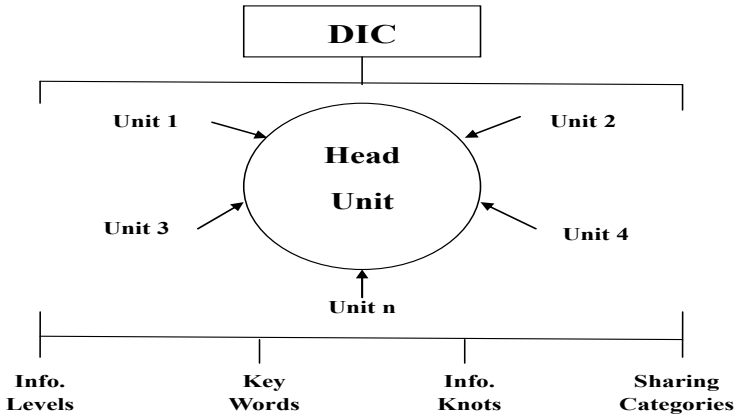
3 Formation of discourse information chunks

3.1 Structures of discourse information chunks

[1] **IC**: information chunk; **Info.**: information

According to the working definitions of tree structure of discourse information and information chunks, a discourse information chunk consists of a head information unit and some subsidiary ones. Information chunks can be explored via such main properties of information units as information levels, key words, information knots and sharing categories. On those grounds, a diagram for structure analysis of information chunks has been established (see Figure 3):

Figure 3 A Model for the Analysis of DIC Structures



When analysing the macro structures of information chunks, the positions or the deepness of head unit and its subsidiary ones in a discourse, or their hierarchical relationship can be investigated from the perspective of information levels, and detailed contents of head unit and its subsidiary ones will be obtained from the point of key words. As for the micro structures, the logic relationship between information units can be explored from the aspect of information knots, and the sharing degrees of information units and their influence on chunks will be analysed from the angle of sharing categories. For example:

Extract 1

<2,7,3,7,WF,A,implied warranties>Implied warranties are such warranties which do not need to be expressed but which the law implies.<3,7,4,1,WF,A,scope of implied warranties>Some of these types of warranties would include warranties of title, fitness for a particular purpose, and quality or merchantability.<4,1,5,1,WF,A,application of the latter two>Many times the application of the latter two types of warranty depends upon the type of sale and whether the seller is a merchant acting in the course of business.

In Extract 1, three information units form an information chunk ‘Implied Warranties’. The properties of every information unit reflect the basic structure of a chunk. Thus the position <2,7,3,7> in the discourse is the head information unit in the chunk ‘Implied Warranties’, in which the superordinate information of the head unit is the seventh unit at Level 2 in the discourse, the head unit itself is the seventh unit at Level 3. The two subordinate information units of the head are <3,7,4,1> and <4,1,5,1>, belonging to the first ones of Level 4 and Level 5 respectively, which means that there exists a hierarchical relation, i.e. the superior and the subordinates.

Therefore, in this chunk three-level units have been formed, with the information becoming deep level by level. From the definition to the classification and then to the application, the three key words <implied warranties>, <scope of implied warranties> and <application of the latter two> make the contents become increasingly concrete and specific. As this discourse is a written introduction to some legal knowledge, the three information knots in this chunk are all <WF>, which refers to some facts. Without any particularly complex logic among them, only an introduction of 'implied warranties' has been made to readers. Sharing categories in this chunk is <A> (known to the author himself) with quite low information sharing degree (Du 2007, 2014), which means that the three information units all are new information and the author hopes that they can be digested and absorbed by the readers.

3.2 Chunking of discourse information

During the process of information transmission and information development, information destination exists due to some communicative needs. One party in the interaction consciously integrates scattered information units into a larger meaningful one, i.e. an information chunk, which gradually reaches the state of information surplus to prepare for the flow of surplus information to the information vacancy. That is the process of information chunking. Chunking is a dynamic process to adjust or organise some new information, and a process of activating chunks. For example:

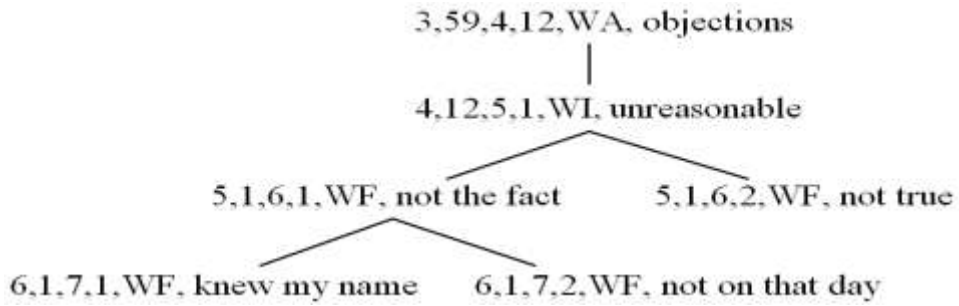
Extract 2

审判长：<3,59,4,11,WA,b,是否有意见>被告人是否有意见？	Judge: <3,59,4,11,WA,b, any objections> Defendant, do you have any objections?
被告人：<3,59,4,12,WA,b,质证意见>有，<5,1,6,1,WF,b,不是实情>她说的不是实情，<4,12,5,1,WI,b,不合理>不是很合理。<6,1,7,1,WF,b,知道姓名>她知道我真实姓名。<6,1,7,2,WF,b,不在那天>不是在1月20日。<5,1,6,2,WF,b,不真实>还有她说的我母亲和爷爷的情况，不是真实的。	Defendant: <3,59,4,12,WA,b, objections> Yes, <5,1,6,1,WF,b, not the fact> what she said is not the fact, <4,12,5,1,WI,b, unreasonable> and not reasonable. <6,1,7,1,WF,b, knew my name> She knew my name. <6,1,7,2,WF,b, not on that day> It was not on January 20. <5,1,6,2,WF,b, unreal> And what she said about my mother and grandfather was not true.
审判长：<3,59,4,13,WA,b,是否有意见>辩护人是否有意见？	Judge: <3,59,4,13,WA,b, any objections> Attorney, do you have any objections?

Extract 2 represents the questions and responses between the judge and the defendant in the phase of burden of proof and rebuttal. Due to the judge's request for the opinion of evidence challenging, here the defendant's answers are all <b> in terms of sharing categories, which means that the answers are the information only known to the defendant himself and reflect the information gap between the judge and the defendant, thus pushing forward the information flow and the courtroom communication (Du 2009). Since the defendant finishes his answers with six information units, information chunking of 'Objections' is realised through the

distribution of information levels and information knots (see Figure 4). Information flows from its information source, i.e. the state of information surplus, to its destination to fill in the judge's information vacancy. Thus the courtroom communicative objective has been achieved.

Figure 4 Information Chunking of 'Evidence Challenging'



In Figure 4, information chunking of defendant's 'Objections' is the process of information reasoning from the bottom information units to the top ones. Among the defendant's answers, the two lowest fact information units <WF> are at Level 7, which has concretised the detailed content of their superordinate information <5,1,6,1,WF,b, not the fact>. Together with an information unit <5,1,6,2,WF,b, unreal> at Level 6, the two fact information units provide the grounds for the inference information unit <4,12,5,1,WI> at Level 5, which proves unreasonableness of the evidence 'what she said' given by the prosecutor. The <unreasonable> inference information unit <WI> is just the prerequisite for <Objections>, so the logical reasoning from facts to inference and then to attitude (WF-WI-WA) has been established. Therefore, the five information units at lower levels serve for the head information unit <3,59,4,12,WA, objections>, and finally the information chunking of 'Objections' has been completed.

4 Features of discourse information chunks

4.1 Integrity and relative independence

Wu (1999) holds an opinion that chunks constitute thinking units, the integrity of chunks means that elements of a chunk are closely connected, and some chunks appear as a whole. Data analysis shows that DIC also boasts the feature of integrity, i.e. the information units inside a chunk, closely related to each other, are indispensible parts of the whole. For example:

Extract 3

审判长：<2,19,3,18,WT,A, 原告举证>首先由原告举证。	Judge: <2,19,3,18,WT,A, evidence submitted by Plaintiff> Plaintiff, submit the evidence first.
原告：<3,18,4,9,WB,A,证据	Plaintiff: <3,18,4,9,WB,A, Evidence I> The evidence written by Yang himself and a working

一>杨某自己书写的证据、**区人民政府网站工作文件，证明.....<3,18,4,10,WB,A, 证据二>第二份证据工资表，证明.....<3,18,4,11,WB,A, 证据三>第三份证据，范某的证言，证明.....
原告：<3,18,4,12,WB,A,证据四>第四份证据，劳动合同书，证明.....
原告：<3,18,4,13,WB,A,证据五>第五份证据，调查笔录，证明.....
审判长：<2,19,3,19,WT,A, 被告举证>下面由被告举证。

document from the website of **District government, which prove that…...<3,18,4,10,WB,A, Evidence II> The second evidence is the pay sheets, which prove..... <3,18,4,11,WB,A, Evidence III> The third evidence, Fan's testimony, proves…
Plaintiff: <3,18,4,12,WB,A, Evidence IV> The fourth evidence, the labour contract, proves...…
Plaintiff: <3,18,4,13,WB,A, Evidence V> The fifth evidence, the record of previous investigation, proves...…
Judge: <2,19,3,19,WT,A, evidence submitted by Defendant> Next, Defendant, submit your evidence.

In Extract 3, what the plaintiff presents and states has realised the chunking of 'Evidence Submitted by Plaintiff'. All the elements of the chunk include the head unit <2,19,3,18,WT,A, evidence submitted by Plaintiff>, five subordinate information units and the omitted parts. As the basis of those proofs, the five information knots <WB>, followed by some main points proved by the evidence respectively, have built the contents of 'evidence submitted by Plaintiff', which highlight the indispensability of each element in the chunk. Meanwhile, the five information units are parallel to each other and are developing in balance, of which all the sharing categories are information <A>, i.e. only known to the plaintiff. Therefore, the continuity and the integrity of information flow are reflected in the phase of evidence submitted by plaintiff in court.

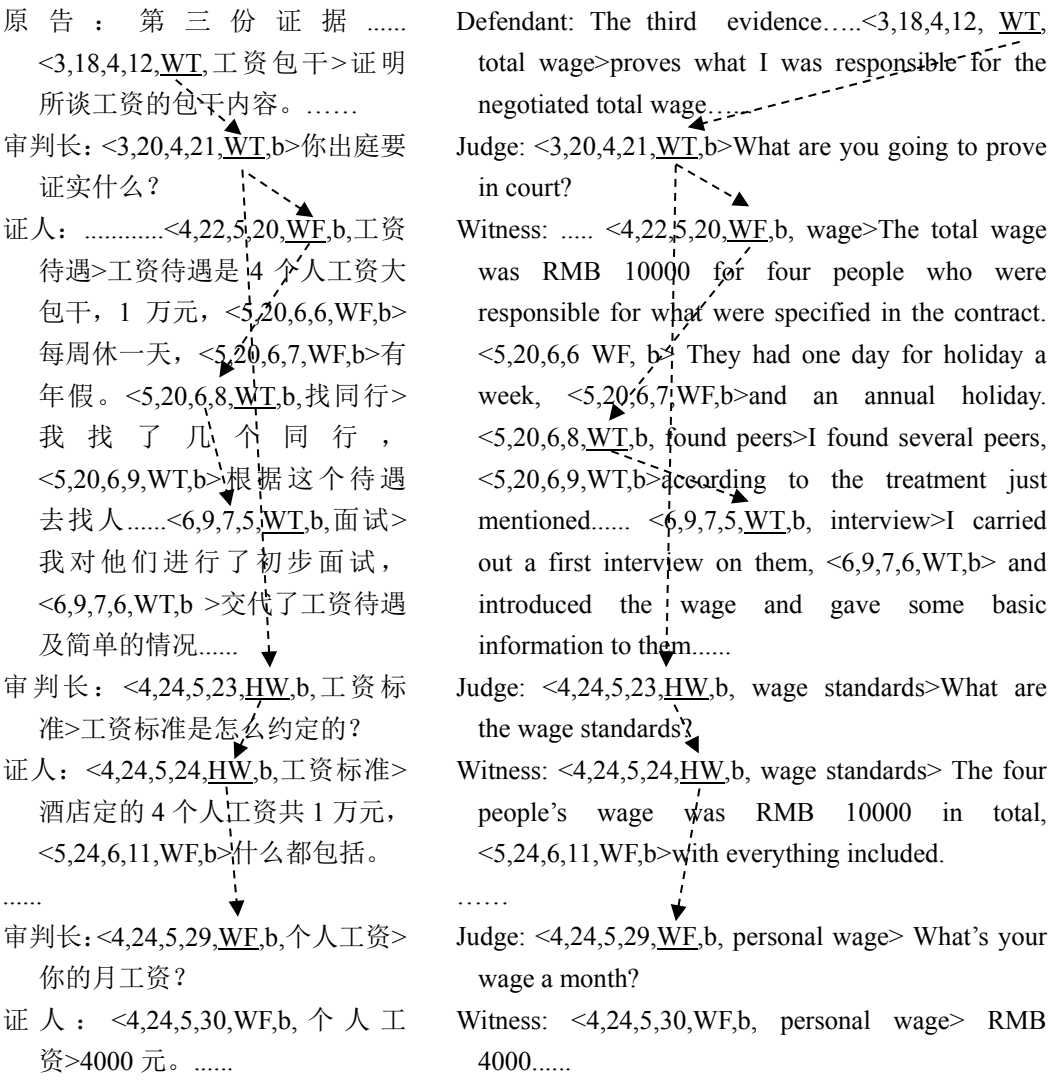
Since it is an aggregation composed of some interconnected information units, a DIC is relatively independent (Yang et al 1999). In Extract 2, the information chunk 'Objections' is a relatively independent process of logical reasoning from facts to inference, and then to attitude (WF-WI-WA). The chunk is drawn forth by the judge's question '被告人是否有意见？(Defendant, do you have any objections?)' and is ended with the judge's question '辩护人是否有意见? (Attorney, do you have any Objections?)' The three information chunks, 'Objections' here, the preceding 'Evidence Submitted by Plaintiff' and the following 'Evidence Submitted by Defendant' are separate from each other. But the three are of the main contents of the phase 'burden of proof and rebuttal' in civil court. Therefore, such independence of chunks is relative. In Extract 3, a relatively independent chunk 'Evidence Submitted by Plaintiff' is composed of a serial of evidence and some key points proved by the evidence, which begins with the judge's instructive words '首先由原告举证。(Plaintiff, submit the evidence first.)' and ends with '下面由被告举证。(Next, Defendant, submit your evidence.)'. This chunk and the following chunks 'Evidence Submitted by Defendant' and the like are part contents of the phase 'burden of proof

and rebuttal' in civil court. Thus the independence of the chunk is also relative. However, although different chunks are independent to each other, both the relatively independent information chunks and the relations among them will be taken into consideration when a certain discourse is being analysed so as to explore all kinds of inner relationships in the discourse.

4.2 Hierarchy and dynamism

Hierarchy of a DIC refers to the mutual relations between different chunks. A chunk at a higher level leads to those at lower levels and then to those at lowest levels, thus forming a tree structure with different levels that is similar to lexical chunks in a sentence (Abney 1991). Then a complete discourse has been constructed. For example:

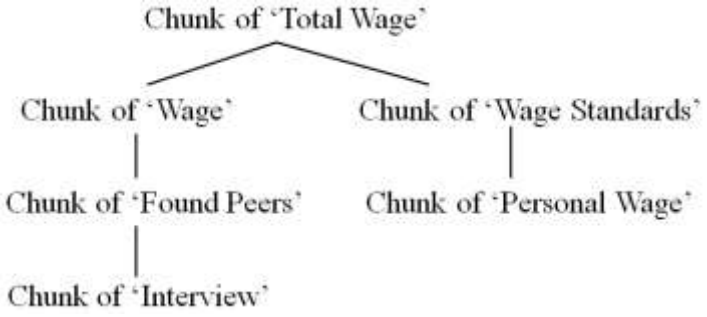
Extract 4



Extract 4 demonstrates that the third evidence has activated the information chunk 'Total Wage' in the phase of burden of proof in a civil trial. Among its subordinate information units, all the sharing categories are information <b>, which is known to the counterpart in the communication. There exists an information gap

between the witness' information source and the judge's information destination, making the information flow continuously. Through several rounds of question and response, information vacancy has been filled, meanwhile another five information chunks have also been activated. The head information units of the five chunks are <3,18,4,12, WT, total wage>, <4,22,5,20,WF, B, wage>, <5,20,6,8,WT,b, found peers>, <6,9,7,5,WT,b, interview>, <4,24,5,24,HW,b, wage standards> and <4,24,5,30,WF,b, personal wage>, which contains many subordinate information units respectively. The hierarchy of all the information chunks is clearly demonstrated, i.e. led by the head information chunk 'Total Wage', an information chunk cluster (see Figure 5) has been shaped like a chunk tree with four levels ---- the information units at Levels 3, 4, 5 and 6.

Figure 5 Hierarchy of the Chunk 'Total Wage'



In addition, as the arrows show in Extract 4, the information knots are constantly changing as information flow requested, due to which some new information chunks are continuously being formed. 'Total Wage' is the upper information chunk activated by the plaintiff's words, and the information knot of its head unit is <WT>, signifying the content being proved. This starts the judge's expectation to ask the witness with a question '你出庭要证实什么？(What are you going to prove in court?)', aiming to ask whether the witness is able to prove 'Total Wage'. So the information knot is also <WT>. Along with the information flow of witness' response, three other information chunks have been activated level by level by the information units <WF, wage>, <WT, found peers> and <WT, interview>. When these answers still cannot meet the needs of the chunk 'Total Wage' at the upper level and the information gap still exists, the judge activates the information chunk 'Wage Standards' with the information knot <HW> signifying the means, then asks further questions with the fact information<WF> to activate the information chunk 'Personal Wage' at the lower level. It is obvious that each independent information chunk, with the discourse information flow, will change its information levels and information knots constantly so as to activate new information chunks and to push forward the discourse. This shows the dynamism of information chunks. (Yang 1999; Wu 1999; Niu & Lü 2005).

In the light of the analysis above, it is known that information chunks at the discourse level, with the same features as lexical chunks in sentences and alphabetic chunks in words, possesses many features which become prominent in the discourse development. Certainly, these features, in turn, make information chunks exert some

influence on discourse information flow.

5 Influence of chunks on discourse information flow

5.1 Information chunks and information hyperplasia

In the discourse information flow, although the development of information hyperplasia is often restricted, speakers or authors sometimes will strive for opportunities to develop hyperplastic information (Du 2009) with certain purposes. When it develops to a relatively complete one, hyperplastic information will be chunking, exerting influence on the information flow. As a consequence, the information hyperplasia will be stopped, or be restricted for it is unacceptable by listeners, or even be truncated (Du 2009). For example:

Extract 5

审判长：.....<4,31,5,43,截车目的>当时你截车的目的是干什么？	Judge: <4,31,5,43, purpose of carjacking>Then what was your purpose of carjacking the car?
被告人：<4,31,5,44,拿刀>因为我不是拿把刀从巷子出来嘛，<5,44,6,25,害怕>我就是害怕，<5,44,6,26, 吸毒>吸毒，<5,44,6,27,感觉要被害>感觉有人要来害我。<4,31,5,45,拿刀>然后就拿把刀，<5,45,6,28, 不准备害人>不准备害人，<5,45,6,29,防备用>是拿来防备用的，然后▲	Defendant: <4,31,5,44, took a knife>Because I came out of the alley with a knife. <5,44,6,25, very scared>I was just very scared. <5,44,6,26, took drugs>I took drugs, <5,44,6,27, felt to be killed>and I felt that someone would kill me. <4,31,5,45, took a knife> Then I took a knife, <5,45,6,28, not to kill someone> and I was not going to kill someone <5,45,6,29, protect myself> but to protect myself, then ▲
审判长：▼<4,31,5,46,截车目的>那又为什么要截车呢？.....	Judge: ▼<4,31,5,46, purpose of stopping a car> So what did you stop a car for? .....

In Extract 5, the defendant fails to give a straight answer to the judge's question <purpose of carjacking>. Instead, his answers produce several hyperplastic information units, like <took a knife>, <very scared>, <took drugs>, <felt to be killed>, <took a knife>, <not to kill someone>, and <protect myself>, which are at superordinate levels or subordinate ones. Among those hyperplastic information units, the two information units of <took a knife> are at the fifth level, i.e. <4,31,5,44> and <4,31,5,45>, the same level as that of the judge's two questions. The rest of the defendant's answers, as the subordinate information of those two information units, are all at the sixth level. Therefore, an information aggregation has been created, with the head information unit <took a knife> surrounded by its subordinate information units. The action 'Took a Knife' has been chunked. Although the word '因为 (because)', from the angle of language surface, seems establishes the surface connection between this information chunk and the judge's question, the judge

eventually interrupts the defendant's answer, showing that the judge regards the defendant's information as hyperplasia. According to the later interrogation in this trial, it is because of the defendant's fear of being arrest for taking drugs that contributes to his carjacking, and the information chunk 'Took a Knife' is the means of his carjacking. So the hyperplastic information for the local discourse may be transferred into non-hyperplastic information in the global discourse (Du 2009).

5.2 Information chunk and information loss

Information loss refers to some information which is valuable to a certain participant in the communication secedes from the information flow because the information has not been processed effectively by that participant (Du 2009). Since information chunks are integrated (Wu 1999), the phenomenon of information loss will appears if relevant information chunks cannot be activated because necessary information has not been produced in the development of discourse information. For example:

Extract 6

审判员：<有无新意见>李**，你有新的意见没有？	Judge: <any new opinions>Li**, do you have any new opinions?
上诉人：有一些。他说，多么，我把多么看管，这，我不赞成。我没有打▲	Appellant: Yes. He said, how, how I kept watch on her. That, I don't agree with that. I didn't stun her▲
审判员：▼<已说过>这个意见你刚才说过，<有无新意见>你还有新的意见没有？	Judge: ▼<already said that>You have already said that. <any new opinions>Do you have any new opinions?
上诉人：<晚上出去>新的意见是在那个我们家**村，那天晚上出去，<打懵>有个人弄个棍把她打懵以后，<背出背回>背出去，背出去又把她背回来，..... ▲	Appellant: <went out that night>My new opinion is that in our Village**, she went out that night. <stunned her>Somebody stunned her with a stick, after that, <carried her out and then returned>he carried her out and then returned..... ▲
审判员：▼<已说过>这都叙述过了..... <发表新意见>辩护人发表新的意见。	Judge: ▼<already said that>You have already described that ..... <deliver new opinions>Attorney, deliver your new opinions.

Extract 6 is some of the questions and responses in the second half of courtroom debate. The judge asks the appellant whether he has any new opinions, but the appellant's answer is not new opinions but the content having been expressed previously in the first half of courtroom debate. After the judge interrupted the appellant with the information unit <already said that> and repeats the question, the information units transmitted by the appellant like <went out that night>, <stunned her> and <carried her out and then returned> are also old information. As a result, the information chunk 'New Opinions' cannot be activated by the appellant's words and the effective control of information flow in a trial (Pan & Du 2011) fails to be realised,

so the judge has to interrupt the appellant with another information unit <already said that> and gives up asking the appellant again. Instead, the judge directs the attorney to deliver new opinions. All these make the judge's interrogation information <any new opinions> secede from the information flow just because 'New Opinions' has not been chunked eventually.

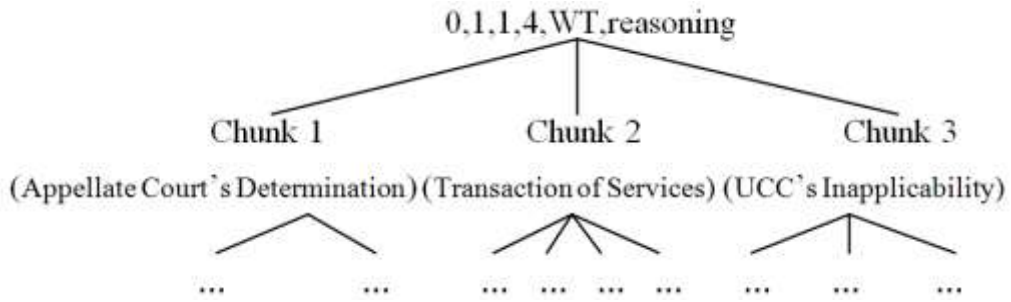
5.3 Information chunk and information slow information

Du (2009) argues that sometimes the information flows smoothly with little backflow, few elements and simple information exchanges in the development of a discourse. That's the phenomenon of slow information. In the process of information flow, information groups may be chunked, with relatively simple inner structures and few subsidiary information units. But many parallel chunks may be activated constantly. The dynamism of chunks pushes discourse information flowing forward slowly and smoothly. For example:

> Extract 7
>
> <0,1,1,4,WT, reasoning>Reasoning: <1,4,2,9,WF, appellate court's determination>First, the state appellate court determined mixed transactions should be analyzed in terms of the transaction's dominant thrust, ... <2,9,3,6,WI>all of the contract should fall within Article 2 of the UCC.... <1,4,2,10,WF,clear-cut>Second, in this case, the transaction here is clear-cut.<2,10,3,8,WF> DPS was retained to design, develop and implement an electronic data processing system to meet Smith's specific needs not selling hardware to Smith.... <2,11,3,12,WF>Third, in this transaction, it is the skill and knowledge of the programmer which is being purchased in the main, ... <1,4,2,11,WJ,UCC not applicable>Thus, the provisions of the UCC do not apply.

Extract 7 is the reasoning part in a legal case brief. From the main information flow of the whole discourse, legal reasoning represents one of the main contents in a legal case brief, with fluency and simplicity as the key factors in evaluating the case analysis (Li 2008). During the process of reasoning here, three information chunks 'Appellate Court's Determination', 'Transaction of Services' and 'UCC's Inapplicability' have been formed in succession, serving their superordinate information unit <0,1,1,4,WT, reasoning> in details. These chunks separate from each other and develop in parallel and in balance. And the subsidiary information units of the three chunks are mainly at Level 3 without subordinate information. Since the reasoning is simple and discourse information flows smoothly (see Figure 6), the quality of case analysis has been guaranteed.

Figure 6 A Series of Information Chunks in Legal Reasoning



5.4 Information chunk and information vortex

In discourse information development and transmission, sometimes information will be processed intensively and information flows lingering around a certain target and the focus concentrated by the relevant communicative parties, resulting in information vortex (Du 2009), which is closely related to information chunking and chunk levels. In Extract 4, with the judge's further interrogation on Evidence III, the defendant enriched the new information continuously. Multi-level information chunks have gradually formed an information vortex there. Some chunks at lower levels have continuously been formed more and more deeply, and then the chunks at different levels have formed nested structures, with the core information of each chunk flowing to the information chunk 'Total Wage' at higher level. Then the function of Evidence III has been highlighted. Another example is as follows:

Extract 8

审判员：<2,6,3,32>其他还有啥*(上诉理由)*没有了？	Judge: <2,6,3,32>Do you have any other grounds for appeal?
上诉人：.....	Appellant: .....
审判员：<3,33,4,53>这不是严格看管嘛，<3,33,4,54>刚才给你总结过了嘛。	Judge: <3,33,4,53>That is to have kept watch on her? <3,33,4,54>and I have just summarised for you.
上诉人：<2,6,3,34>还有，<3,34,4,55>她晚上经常出去，经常出去.....<4,55,6,30>她每天晚上都是一点多到二、两点多，四点多她过来，<4,55,6,31>她出去干啥，问她，<4,55,6,32>她说"你不要管我干啥！".....<4,55,6,36>每天晚上出去，都是一两点出去。	Appellant: <2,6,3,34>And, <3,34,4,55> She often went out at night, very often..... <4,55,6,30>She came here at about one o'clock, two o'clock, four o'clock every night. <4,55,6,31>I asked what she went out for, <4,55,6,32>but she said, "it's none of your business!"..... <4,55,6,36>She went out every night, always at one or two o'clock.
审判员：<2,6,3,35>还有没有了？	Judge: <2,6,3,35>Any other thing?
上诉人：<2,6,3,36>还有，<4,56,5,37>我们在新疆摘那个棉花，<3,36,4,56>也经常出去，<4,56,5,38>晚上都是半夜出去，<4,56,5,39>不知干啥。	Appellant: <2,6,3,36>Yes. <4,56,5,37>When we picked cotton in Xinjiang, <3,36,4,56>she also often went out, <4,56,5,38> always went out at midnight. <4,56,5,39>I don't know what she had done.
审判员：<2,6,3,37>有没有了？	Judge: <2,6,3,37>Any other things?
上诉人：<2,6,3,38>还有，<3,38,4,57>我们那晚上，问她呢，<3,36,4,58>她不	Appellant: <2,6,3,38>Yeah. <3,38,4,57>On that night, I asked her, <3,36,4,58>but she didn't tell me what she had done. <3,36,4,59>She said, "it's none of your

跟我说去干啥，<3,36,4,59>她说：“你不要管我！”<3,36,4,60>我问她呢，她不说，<3,36,4,61>她说：“你管我干啥不干啥呢！”.....

business!” <3,36,4,60>I asked her, but she did not say anything. <3,36,4,61>She said: “it’s none of your business!” .....

In Extract 8, a typical information vortex has been exemplified by the hierarchical information chunk structures at two levels. At the macro level, the chunk ‘The Victim Not Kept Watch On Strictly’ at the higher level with three subordinate chunks and some subordinate information units (see Figure 7) has been activated by the judge’s questions and the appellant’s responses. At the micro level, the core contents of each chunks point to the upper chunk ‘The Victim Not Kept Watch On Strictly’ from the lower information levels (see the arrows in Extract 8). In other words, the information flows from Levels 5 and 6 to the head information unit <3,33,4,53> at Level 4. Although the appellant answers the judge’s question for three times, he always says that he did not keep watch on the victim strictly but the victim herself frequently went out at night without telling the appellant about that. Actually there exist subtle differences between the surface meanings of the appellant’s answers, but the contents all belong to the same chunk ‘Went Out At Night’, repeating virtually the grounds of appeal ‘not keep watch on her strictly’ which has been summarised by the judge. Thus in the discourse information flow, all subordinate information units are developing and transmitted around the core of the information vortex ‘the appellant denied that he kept watched on the victim strictly’.

Figure 7 Hierarchy of the Chunk ‘The Victim Not Kept Watch On Strictly’

6 Discussion and implications

Given discourse information studies attach great importance to the analysis at both macro and micro levels, the characteristics of legal discourse and its influence on information flow have been interpreted effectively. The research on chunks has been changed from the aspect of words, phrases and sentences into the discourse studies at both macro and micro levels.

The bottom-up analysis shows that discourse information chunking is a dynamic process, in which surplus information flows to the information vacancy and necessary information chunks are activated. In the Chunk ‘Total Wage’ in Extract 4, the

information sharing category has always been kept as <b>, which is known to the appellant and unknown to the judge. So the judge's information need results in the information changes, in which the information knots <WT> or <HW> have been converted to the knot <WF>. Then a variety of different chunks are activated by different information combinations, promoting the information flow and the development of discourse.

In the light of the top-down analysis, a head information unit serves as the core in each chunk, with subsidiary units developing level by level. Meanwhile some information chunks contain more subsidiary units than others do, and some chunks are surrounded by more subordinate chunks. In Extract 1, the head information unit in the chunk 'implied warranties' is developing constantly, forming the top-down hierarchy with three levels. And in Extracts 4 and 8, the levels of information chunks have taken on a top-down trend with the information becoming more and more complicated and the content deeper and deeper.

Although the studies on information chunk can be made to explore legal language as above, it will also be practically extended to the relations between chunks and language teaching in that information processing is always involved in the classroom context (Du 2015). The exploration and application of discourse information chunks will promote the expansion of chunks in language teaching for the enhancement of the efficiency of language teaching and language learning. For example, to teach the legal English text in Extract 1, a model for legal reading can be constructed based on chunk studies. Due to integrity and relative independence of information chunks, learners' ability will be improved in such fast reading processes as skimming and scanning; according to hierarchy and dynamism, learners' ability will be enhanced in their logical analysis and micro information access.

In addition, in terms of the features of information chunks, other pedagogical implications for teaching listening, speaking, writing and translation can also be ramified. For example, in interpreting classroom, the efficiency of interpreting training will be developed in that the information content through short-term memory or shorthand information capacity based on integrity and relative independence of information chunks. In teaching writing, learners' ability can be cultivated for their hierarchical, coherent and logical paper design based on hierarchy and dynamism of information chunks.

7 Conclusion

This paper demonstrates that information at the discourse level flows in the same way as that at the inner-sentence level, with the information chunks pushing the discourse forward. A DIC, gradually being formed in discourse information flow, is an aggregation of some information units with a head unit, serving as the core surrounded by its subsidiary units. Through the analysis of information levels, key words, information knots and sharing categories of information units, it is found that information chunks have such features as integrity, relative independence, hierarchy and dynamism, which have an effect on information hyperplasia, information loss,

slow information and information vortex in the discourse information development. This paper has further explored Discourse Information Theory and discourse information flow. However, for the effective processing of discourse information, it is still necessary to study constantly the application of information chunks in various kinds of discourse and to compare discourse information chunks between different languages.

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Appendix: transcription and annotation style

…… ellipsis

▲ ▼ interrupt

( ) annotation

<1,2,2,5,WT,A,宣读起诉书>	1,2,2,5	information level
	WT	information knot
	A	sharing category
	宣读起诉书	key words

Paula Trzaskawka*

Investigating Trademark Terminology and Collocations in Polish, English, Japanese and German

Abstract: The paper deals with the comparison of key terminology in the field of trademark law in the Polish, English, Japanese and German languages. The terminology has been compared in order to reveal similarities and differences in the meaning. The author has extracted the terms from the main acts regulating the field in force in Poland, Great Britain, the United States of America, Japan and Germany that is to say: Polish Industrial Property Act, British Trade Marks Act, American Trademark Act, Japanese Trademark Act and German Trade Mark Protection Law.

The terms have been extracted with the usage of AntConc (corpus linguistics software). The method used in this paper is based on the three categories of equivalence by Šarčević (1997). Moreover, the author has resorted to linguistic, systemic, teleological and contextual legal interpretation (also called construction) of legal texts.

Special attention has been paid to system-bound terminology existing in those five legal systems. The techniques of providing equivalents for non-equivalent or partially-equivalent terms have been used to suggest possible methods of translation within those languages. The conclusions are that as a result of trademark law unification at the international level and the reception of almost world-wide principles in this respect there is a significant convergence of meanings of analyzed terms with slight differences resulting from following deeply ingrained local and national legal traditions.

Keywords: trademark law, legal terminology, collocations, comparative analysis

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1 Introduction

In this paper, the author will deal with legal terminology in the field of industrial property rights, and specifically trademarks, in five languages: Japanese, English (American and British variety), German and Polish. The author focuses on finding equivalents in the above mentioned languages. Trademarks are a subject of global nature and require a sense of unification because they are available in almost every part of the world (e.g. Apple products and their trademark). In previous studies, the author dealt with terminology in the field of copyright. As for the subject of trademarks, it should be expanded in the near future. The author wants to find as many functional equivalents as possible, and if the lack of these equivalents is observed, create new ones that would fit into the legal reality. The method used in this paper is based on the three categories of equivalence by Šarčević (1997) and the other method is corpus based which is essentially statistically based. According to McEnery and Wilson (2001: 1) corpus linguistics is "the study of language based on examples of 'real life'

language use", and also it is "an area which focuses upon a set of procedures, or methods, for studying language" (McEnery and Hardie 2012: 1). The author used five different acts as a corpus material. They can be called a "comparable corporus" (McEnery and Hardie 2012: 19) because they deal with the same subject in four languages – trademark acts. Moreover, "a comparable corpus can thus be defined as a corpus containing components that are collected using the same sampling method, e.g. the *same proportions* of the texts of the *same genres* in the *same domains* in a range of *different languages* in the *same sampling period*." Corpus linguistics tools help analyse such aspects of texts as word frequencies, collocations, etc. My research resorted to corpus linguistics tools in a marginal way as it is qualitative (human evaluation, not machine based) research and the AntConc program only helped with terminology extraction that is to say finding particular terms and collocations. AntConc was used to excerpt the terms with the usage of word list function and collocation for multiword words. The author's findings were based not only on the trademark acts but i.e the Polish language reference corpus – the so-called Polish National Corpus (which also contains some specialist language). The terms and collocations discussed in this paper serve only illustrative purposes as due to the limits of this paper it was impossible to discuss all terminological units extracted from the analyzed acts.

2 Trademark law in brief

In this section the definition of the term trademark will be presented. A trademark, trade mark, or trade-mark[1] is a legally protected, unique and recognizable name, word, phrase, logo, symbol, design, image, or a combination of these elements. There is also a range of non-conventional trademarks comprising marks which do not fall into these standard categories, such as those based on color, smell, or sound (like jingles). Also, melody or signal sounds (used by the entrepreneur in business transactions in order to obtain a clear identification of their goods or services among consumers), designs, or expressions which identify products or services of a particular source are considered trademarks. What is more, a trademark cannot be offensive[2].

The trademark owner can be an individual, business organization, or any legal entity. The owner of trademark may pursue legal action against trademark infringement. Most countries require formal registration of a trademark as a precondition for pursuing this type of action. The United States, Canada and other countries also recognize common law trademark rights, which means that an action can be taken to protect an unregistered trademark if it is in use. Still common law trademarks offer the holder in general less legal protection than registered trademarks. A trademark may be located on a package, a label, a voucher, or on the product itself. For the sake of corporate identity trademarks are also displayed on company buildings.

In most countries of the world a trademark can be registered in a patent office, so other people cannot legally use it without the owner's consent. In numerous texts and commercials we often see the symbol ™ (the trademark symbol) standing next to sign or picture that is regarded as the company's mark, or ® (the registered trademark) symbol indicating that the mark has been registered in the appropriate register of trademarks and represents its level of protection. While ™ can be used with any common law usage of a mark, ® may only be used

[1]Spelling variants: The term *trademark* is predominantly used in the United States and Philippines only, while the term *trade mark* is used in many other countries around the world, including the European Union and Commonwealth and ex-Commonwealth jurisdictions (although Canada officially uses "trade-mark").

[2] See: http://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright and https://www.gov.uk/guidance/unacceptable-trade-marks and http://www.patentamt.de/english/trade_marks/index.html (accessed 06 Nov 2015).

by the owner of a mark following registration with the relevant national authority, such as the U.S. Patent and Trademark Office.
A trademark may be designated by the following symbols:

1. ™ (the "trademark symbol", which is the letters "TM", for an unregistered trademark, a mark used to promote or brand goods),
2. ® (the letter "R" surrounded by a circle, for a registered trademark),
3. ℠ (which is the letters "SM" in superscript, for an unregistered service mark, a mark used to promote or brand services).

To compare trademarks with patents, designs and copyrights we have to be aware that trademark law seeks to protect indications of the commercial source of products or services, whereas patent law generally seeks to protect new and useful inventions, and registered design law generally seeks to protect the look or appearance of a manufactured article. Trademarks, patents and designs collectively form a subset of intellectual property known as industrial property because they are often created and used in an industrial or commercial context. Like patents and copyrights, trademarks can be bought and transferred by one company to another. Unlike patents and copyrights, trademarks may not remain intact through this process. Where trademarks have been acquired for the purpose of marketing generic (non-distinctive) products, courts have refused to enforce them (c.f. Radhakrishnan and Balasubramanian 2008: 131).

3 Research corpus

Research corpus consists of five trademark law acts that is to say: Polish Industrial Property Act (Ustawa *z dnia 30 czerwca 2000 r. – Prawo własności przemysłowej, Dz. U. z 2013 r. Nr 0, poz. 1410*) (tokens: 33, 853, word types: 245,218), British Trade marks Act (Trade marks Act, 1994, Chapter 26) (tokens: 38,412, word types: 231,087), American Trademark Act (The Lanham Act, 15 U.S.C. §§ 1051 et seq., 1946) (tokens: 39,863, word types: 237,078), Japanese Trademark Act (商標法 昭和 34 年 4 月 13 日法律第 127 号。最終改正平成 20 年 4 月 18 日法律第 16 号, Act No. 127 of April 13, 1959) (tokens: 93 336, word types: 95,249) and German Trade Mark Protection Law (Gesetz über Markenschutz (Deutsches Reich) vom 30. November 1874) (tokens: 27,889, word types: 198,517).

4 Research methods

In this paper the author will deal with the key terminology in the field of trademark acts in Polish, English, German and Japanese. The task was to search for functional equivalents, and if there is no equivalence, an equivalent was provided according to a technique of providing equivalents for non-equivalent terms (c.f. Kłos, Matulewska, Nowak-Korcz 2007).

Firstly, the statutory terms from Polish, English, German and Japanese acts will be presented and discussed. Also, a list of functional equivalents (Polish, English, German and Japanese) will be presented. And if there is a partial equivalence or non-equivalence, new terms are provided which will correspond with the reality of the laws in the above mentioned languages.

The method used in this paper is based on the three categories of equivalence by Šarčević (1997). She proposes three categories of equivalence: "near equivalence", "partial equivalence" and "non-equivalence". "Near equivalence" occurs "when concepts A and B

share all of their essential and most of their accidental features (intersection) or when concept A contains all of the characteristics of concept B, and concept B all of the essential and most of the accidental characteristics of concept A (inclusion)" (Sarčević 1997: 238). "Partial equivalence" appears when concepts A and B share most of their essential and some of their accidental features (intersection) or when concept A includes all of the characteristics of concept B but concept B only most of the essential and some of the accidental characteristics of concept A (inclusion). When only a few or none of the essential characteristics of concepts A and B coincide (intersection) or when concept A has all of the characteristics of concept B but concept B only a few or none of the characteristics of concept A (inclusion) "non-equivalence" occurs and the functional equivalent is considered as unacceptable (Sarčević 1997: 238-239).

As it was mentioned above, the research material consists of Polish, English, German and Japanese acts concerning trademarks.

5 Key terminology

In this section a key terminology concerning trademark law will be discussed. The terminology was excerpted from the trademark law acts and only 7 are discussed. Only 7 terms were chosen because detailed analysis would demand much more space. The research corpora includes in total: 233 353 tokens and 1 007 149 word types. The terms were excerpted with the help of word list function of the AntConc program. 5.1 The term "trademark"

The first term that will be discussed is trademark. In the UK law the term "trade mark" is defined under the Trade Marks Act 1994 (UK) which provides protection for the use of trade marks. In the UK, in order to have a trade mark legally protected it must either be registered, or have to be used for a period of time so that it has acquired local distinctiveness (called: "Prior Rights"). According to The Trade Marks Act 1994, an infringement of registered trade mark occurs if a person "uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered" (section 10(1) of the Act). It also happens when there is a confusion of the origin of a product and where a sign is identical but the goods are dissimilar if the trade mark has a reputation in the UK and its use takes unfair advantage of, or is detrimental to, the mark's distinctive character or reputation (section 10(3)).

The table below presents the term "trademark" in languages discussed in this paper (English – American and British version, Polish, Japanese and German). The detailed analysis is provided below.

Table 1. Title

British English	American English	Polish	Japanese	German
trade mark	trademark	znak towarowy	商標 *shōhyō*	das Markenzeiche/das Waarenzeichen

In British English, according to trade mark law interpretation, trade mark is a recognizable sign, design or expression which identifies products or services of a particular source from those of others. We should take into account that the spelling is different from American English, and trade mark is written as two separate words. We may say that the term "trademark" is equivalent for every analyzed language, but in the next table, which is

provided below, there are presented the aspects that are covered or not covered in particular acts of discussed countries concerning trademark law.

When it comes to United States trademark, the goal is to allow consumers to easily identify the producers of goods and services and avoid confusion. United States law has protected trademarks under state common law since colonial times, but it was not until 1870 that Congress first attempted to establish a federal trademark regime. Then, in 1946, Congress passed the Lanham Act (15 U.S.C. §§ 1051-1127). The Lanham Act defines federal trademark protection and trademark registration rules. The Lanham Act grants the United States Patent and Trademark Office ("USPTO") administrative authority over trademark registration. And now, recent developments in U.S. trademark law have included the adoption of the Federal Trademark Dilution Act of 1995, the 1999 Anticybersquatting Consumer Protection Act, and the Trademark Dilution Revision Act of 2006. When it comes to the registration of trademark "The Lanham Act gives a seller or producer the exclusive right to "register" a trademark, 15 U.S.C. § 1052, and to prevent his or her competitors from using that trademark, § 1114(1)." Trademark infringement is measured by the so-called "likelihood of confusion" test. A new trademark will infringe on an existing one if the new one is so similar to the original that consumers are likely to confuse the two marks, and mistakenly purchase from the wrong company.

In Polish, for trademark we have phrase *znak towarowy*. There, trademark is a legally protected, unique element, effectively distinguishing one company's goods and services from the other. In Poland, the concept of trademark is defined by Industrial Property Law as: "any indication presented graphically or such indications which can be expressed graphically, whether such presented indications can distinguish traded goods of one company from the same type of goods of the other company. They may be words, designs, ornaments, combinations of colors, spatial forms, the shape of goods or their packaging/wrapping, as well as melody or another sound signal"[3] used by the entrepreneur in business transactions in order to uniquely identify their goods or services among the consumers. Trademarks in Poland have got the most common form of:

1. words (word, slogan, sentence) without the indicated graphics, colors, etc.,
2. words and graphics (designation in which there are both graphic and word elements),
3. graphics (design),
4. spatial marks (e.g. the form of the packaging/wrapping).

According to the above mentioned specifics Polish trademark is mostly equivalent (near equivalence) to German trademark because, they have those elements (such as: words, graphics and spatial marks) covered in the trademark law (detailed analysis below).

A trademark cannot be reported to the registration if it consists a name or abbreviation of the Republic of Poland or its symbols, names, crests of Polish provinces, cities and towns, marks of the armed forces, reproductions of the honorary badges, etc., unless the applicant has the appropriate authorization for it. Also, it does not consist of abbreviations of names or symbols of foreign states, international organizations, control and guarantee stamps (if such a prohibition stems from international agreements), unless the applicant has the appropriate authorization. Moreover, officially recognized designation adopted for use in trade to the

[3] Polish version: „*każde oznaczenie przedstawione w sposób graficzny lub takie, które da się w sposób graficzny wyrazić, jeżeli oznaczenie takie nadaje się do odróżniania w obrocie towarów jednego przedsiębiorstwa od tego samego rodzaju towarów innych przedsiębiorstw. Może to być w szczególności wyraz, rysunek, ornament, kompozycja kolorystyczna, forma przestrzenna, w tym forma towaru lub opakowania, a także melodia lub inny sygnał dźwiękowy".*

extent that it could mislead as to the nature of such designation, unless the applicant demonstrates that he or she is entitled to use them. Elements that are symbols, especially religious, patriotic or cultural to the extent that it could insult religious, patriotic or national tradition feelings cannot be reported to the registration.

In Japanese, the meaning of the law on trademarks (商標法 *shōhyōhō*), trademark (商標 *shōhyō*) means a sign capable of distinguishing particular goods (商品 *shohin*) or services (サービス *sabisu*, 役務 *ekimu*) of one company from the goods or services of the same type of other companies[4]. There are two types of trademarks:

i)商品 商標 *shohin shōhyō*, which is suitable for goods and
ii) サービス マーク *sābisu māku*, which is suitable for services.

商品 商標 *shohin shōhyō* is generally called "trēdomāku" – a trademark[5]. What is more, the term 商標法 *shōhyōhō* is hyperonymous towords 商品 商標 *shohin shōhyō* and サービス マーク *sābisumāku*. Those two terms are a part of a 商標法 *shōhyōhō*, because the ideogram 法 *hō* means law. According to Japanese trademark law interpretation, trademark is used to enable recognition of the origin of the goods or services (characters, figures, symbols, such as three-dimensional shape). Consumers should be aware of the origin of goods or services by the perception of the mark, to select the services that they wish to receive. If we continue to provide sales and services of products, brands that are used become widely known to consumers. If the quality of products is more than certain, the creditworthiness of the business (brand) is higher and property value is provided.

In German we have two terms for trademark: *das Markenzeichnen* and *das Waarenzeichnen*. Trademark was officially introduced to the Trademark Law Reform in 1995. The trademark as a traditional designation has become no longer as meaningful as it should be for necessary protection of services or products. Now it is extended with a special, legally protected trademark, which mostly distinguishes goods or services of one company from competing goods or services of other companies (as it is in every country mentioned above). Also, a brand can be used to characterize an entire company or the services of an entire geographic location (country, region, city) and can clearly distinguish from competing companies or offers – it is very similar to the Polish trademark law because it covers the same points. Moreover, close contact of the legal brand concept is clearly distinguished from the brand understanding in marketing. While the former names an individual, legally protected trademark, the latter represents the totality of the individual, often patented features of an asset, which is called a brand name.

According to German trademark law, trademark can be a single presentation or a combination of one or more letters, characters, words, names, slogans, logo, icons, images, sounds, sound sequences or manifestations of patterns of various kinds of products. Trademark rights are similar to patents and copyrights rights, often referred to as intellectual property. In Germany we use two terms for trademarks – *das Markenzeichnen* and *das Waarenzeichnen*. *Die Marke* means *mark*, and *die Waaren* means *goods*. In German often we deal with compound nouns, in this case *die Marke* and *die Waaren* are linked with *die Zeichnen* which means *drawing*, or *zeichnen* as a verb (without a capital letter at the beginning) that means *to draw*. In Germany the trademark mostly serves to distinguish goods

[4]人が経済活動を行うにあたって、特定の者が提供する商品やサービスであると個別化する目印のことを商標という。
[5]商標には 2 種類あり、商品に使用されるものを「商品商標」、サービス（役務）に使用されるものを「サービスマーク」という。

or services of one company from competing goods or services of other companies. Moreover, *das Markenzeichen* covers company's marks (also trademarks, e.g. Mercedes star, Apple logo, Audi sign with four circles) and *das Waarenzeichnen* covers trademarks symbols (e.g. ©, ℗).

All in all, the term trademark is present in all countries' trademark law but it carries different definitions. What we can understood by "trademark" we can see in the table below:

Table 2. Title

Trademark	The United Kingdom	The Unites States of America	Poland	Japan	Germany
a word	✓	✓	✓	✓	✓
design	✓		✓		✓
an ornament			✓		
combination of colours			✓		✓
spatial forms			✓		
the shape of goods or their packaging/ wrapping	✓	✓	✓		✓
melody or another sound signal			✓		
a series of musical notes		✓			
a sound	✓			✓	✓
name	✓	✓	✓		✓
logo	✓	✓			
a symbol	✓			✓	
an image	✓				
a signature	✓				
a phrase	✓	✓			
a slogan		✓			
a scent		✓			
three-dimensional marks				✓	✓
characters				✓	
devices	✓			✓	
letters	✓				✓
numerals	✓				✓

As we may notice from the table, when it comes to *words* every country has this term written in the act. Concerning the American English, *trademark* is written together, but British one is written apart as a *trade mark*. Such distinction will be visible in all terms which include word "trademark".

What is different from other regulations, the American trademark law protects a slogan or a scent which is not present in other countries' regulations. When it comes to musical aspects protected by the trademark law it is differently formulated in acts. The American trademark law is talking about a series of musical notes, which is something else than a

melody, which is present in Polish trademark law. Countries such as The United Kingdom, Japan or Germany have distinguished it in a broader way by calling it: "a sound".

It all depends on the receiver of our translation. For those who want to have a very detailed description what is *trademark* we have to explain what is in the act and we have to translate all words which are in the description of the *trademark*. For a receiver who only wants to be informed whether the *trademark* term is equivalent in other languages we can provide a term, but say that there are some differences behind the interpretation and meaning of it.

When it comes to music and sounds it is differently described in acts and it depends on the analyzed language. For example, in Poland there is a phrase "melody or another sound signal" which may be an equivalent to American phrase "a series of musical notes", because such series are a melody. British English, Japanese and German use the broader term – "a sound". For those countries – the UK, Japan and Germany we have near equivalence concerning the term *trademark* and its "sound".

"A name" can be registered as a trademark everywhere except in Japan. Although in Poland, the names together with the surname written in full or in an abbreviated form (e.g. John Smith, John S., J. Smith), if a person's name is commonly used, cannot be registered (e.g. name: Abczakird Owczarbatar can be registered, but Marcin Kowalski cannot). Near equivalence appears between English and German trademark law concerning the term "a name". But, in German we have *die Personennamen* (lit. person's name) and English "name" can have a broader meaning because it can be not only a person's name, but also a name of a thing – not person. In this case Polish and German terms are functionally equivalent because Polish trademark law mentions names and surnames and *die Personennamen* covers also only the names and surnames of a person.

From this analysis it is visible that the term *trademark* has a very broad meaning in every language. Here, this term is present in every discussed language but it carries sometimes completely different meaning and during translation the translator has to be aware of it and be very careful when making the comparison.

5.2 The term "立体的形状 *rittai-teki keijō*"

In Japan, a three-dimensional shape 立体的形状 *rittai-teki keijō* is recognized as an object protected by law. Before 1996, prior to the revision of the trademark law, a trademark was limited to flat shapes and the three-dimensional shape was not ranked among trademarks. However, objects such as dolls or products which are regarded as hallmarks of the company or the label should be protected by law, so three-dimensional shapes are now treated in the same way as the flat shapes. "Three dimensional" means the only form of three-dimensional objects that differ from the "two-dimensional shapes", meaning – flat objects. Examples of trademarks in the three-dimensional shape: Honda Supercube, yakuruto container, Coca-Cola, Peco chan (a kind of doll).

For category of shapes, different laws distinguish it in a different way, e.g. Polish act speaks about "spatial forms", but Japanese and German acts describe it as "three-dimensional marks". However, the phrase "the shape of goods or their packaging/wrapping" is present in every discussed language apart from Japanese. To provide equivalence, we can make a Japanese term 商品やその包装の形状 *shōhin ya sono hōsō no keijō* which literally means the same as in German, English or Polish – "the shape of goods or their packaging".

Japanese and English terms are partially equivalent, but Polish and German terms have some differences. Making a literal translation from Polish into English a *forma przestrzenna* is a *spatial form*. The name differs, it is not a *three-dimensional shape*, but in practice it is the

same object that we are referring to. Moreover, in the Polish language, a three-dimensional shape is sometimes called a visual sign, three-dimensional or 3D trademark. Such designation may be perceived visually or by the sense of touch. Often, it is associated with verbal, graphic, or colors used in relation to a particular shape. The term "shape" is a key term in this context. "A shape" which is present in American and British act is hyperonymous towards Japanese, Polish and German terms.

Also, in German *die Gestaltungen* literally means *design*. German term is the nearest in meaning with the Japanese term **立体的形状** *rittai-teki keijō*. The German system distinguishes between three groups of three-dimensional marks: (1) shapes that do not rely on a product, such as the so-called Mercedes star of Mercedes Benz AG; (2) shapes of a product or of parts of a product, such as the well-known LEGO tools; (3) shapes used in packaging or in parts of a packaging, such as the bottle of Coca-Cola Corp.

Equivalents are provided in the table below:

Table 3. Title

Japanese	British English	American English	Polish	German
立体的形状 *rittai-teki keijō*	shape (lit. translation – three-dimensional shape)	shape (lit. translation – three-dimensional shape)	forma przestrzenna	dreidimensionale Gestaltungen

5.3 The term "application for registration"

The English term *application for registration* is present in both version of English – American and British. In the United States if a person wants to register his/her trademark there are 10 steps to fulfill if the application is done via Internet. Such application is provided by United States Patent and Trademark Office and it is called "Trademark/Service Mark Application, Principal Register". The document is very long, has about 31 pages and includes all specific data concerning application of a new trademark. In contrast, in the United Kingdom to register a trademark via Internet a person has to have an email address and a credit or debit card. On the special website (gov.uk) concerning application form a person has to read a "guide to getting a trade mark". Firstly, a person has to check whether his/her brand qualifies as a trade mark, then he/she applies to register his/her trade mark and respond to any objections. The registration process in the UK takes about 4 months if no-one objects and registered trade marks last 10 years. What is more, registering a trade mark in the UK only protects a brand in the UK. There are different processes for registering EU and international trade marks. All in all, both systems – the UK and the US have an institution where an application for registration of a trademark can be done, however, different points have to be covered if we want to have our application be registered.

In Japan the procedure of the application for trademark registration is strictly described. The term 商標登録出願 *shōhyō tōroku shutsugan* is partially equivalent to English version of *application for registration*, because different points during application for registration must be fulfilled. Those who want to use the trademark in relation to goods or services may apply for registration of the trademark in the Patent Office. First, a person has to determine whether a trademark which intends to obtain registration, is only a sign, or only graphics or only a symbol, or a combination thereof, or it is a three-dimensional shape. A person should

also follow the standard character set by the Patent Office. Then, a person must determine whether the mark is used for goods or services. The trademark rights do not apply to a mark that was previously registered by another entity/company, so a person has to be sure that this mark or a similar mark has not already been registered. A person can register the mark by filling papers electronically, but the following documents should be prepared in writing. The application for registration of the mark is very detailed, it covers 7 points which a registration must meet.

In Poland, the trademark application can be made in person or by his/her agent. *Wniosek o rejestrację znaku towarowego* is partially equivalent to Japanese 商標登録出願 *shōhyō tōroku shutsugan* and English term *application for registration*, because as it was said above, different points should be covered by a person who wants to register his/her mark. In Poland, to make a trademark application successful, you have to fulfill seven points, i.e.: a person must be familiar with basic information about trademarks and the declaration file, a person must fill out the application form, etc.

Also, German term *der Antrag/die Anmeldung [auf Eintragung der Marke]* is partially equivalent to Polish, Japanese and English terms, because for example, only in a German application a person must provide not only the description of trademark but also an illustration of it. In Germany, the list of goods and services that will have a trademark must be specified. Therefore, the list of goods and services is an important component of the trademark application, without such a list the application is incomplete. A correct list of goods and services ensures fast processing of an application. Also, as it is in other countries mentioned above, the application can be done online. The trademark must meet the Nice Classification (the "International Classification of Goods and Services for the Purposes of the Registration of Marks") and Vienna Classification (the international classification for the figurative elements or images of marks). The applicant for a trademark can be a natural person, a legal person or a partnership with legal capacity. What is important, the application must contain a representation (illustration) of the trademark. Such illustration must show the trademark exactly as the person wishes to have it protected in the future. Also, a person must indicate the type of trademark (word mark, figurative mark, sound mark, etc.) and indicate exactly the goods and services for which a person intends to use the trademark he/she is applying for. The same as in every country mentioned – Japan, Poland, the UK and the US, in Germany there are two ways to apply – written applications and online applications.

Equivalents are provided in the table below:

Table 4. Title

British English	American English	Japanese	Polish	German
application for [trade mark] registration	application for [trademark] registration	商標登録出願 *shōhyō tōroku shutsugan*	wniosek o rejestrację znaku towarowego	der Antrag /die Anmeldung [auf Eintragung der Marke]

5.4 The term "The Patent Office"

The term "The Patent Office" is used here to describe all kinds of Patent Offices in languages discussed.

In Japan, the Patent Office 特許庁 *tokkyochō* is one of the external bodies of the Ministry of Economy, Trade and Industry. It aims to achieve economic and industrial development and deals with inventions, utility models, designs (*ishō* 意匠) and trademarks.

The Japan Patent Office is headed by a commissioner and consists of seven departments where one of departments deals with trademarks and designs. They examine trademark right applications, design right application and formalities check of all applications including patent applications.

The English "patent offices are government bodies that may grant a patent or reject the patent application based on whether the application fulfills the requirements for patentability." In the UK we have United Kingdom Intellectual Property Office, which has direct administrative responsibility for examining and issuing or rejecting patents, and maintaining registers of intellectual property including patents, designs and trade marks in the UK. (UK-IPO) and in the US – United States Patent and Trademark Office (USPTO) which mission is to promote "industrial and technological progress in the United States and strengthen the national economy" by i.e. administering the laws relating to patents and trademarks.

The Polish Patent Office is a central government authority created on the 28th December 1918 that is competent in matters of industrial property. The Polish term of Patent Office can be misleading because it deals not only with patents but also with trademarks. The Polish term *Urząd Patentowy* is functionally equivalent with German *das Patentamt*, because *urząd* means *office*, *patentowy* is an adjective and means *patent*.

The German Patent and Trade Mark Office (DPMA) is the central authority in the field of industrial property protection in Germany. It operates within the portfolio of the Federal Ministry of Justice and Consumer Protection. The German term for the Patent Office is also misleading because the reader may deduce that *das Patentamt* (the Patent Office) deals only with patents, because *das Patentamt* is a compound noun – *das Patent* means *patent* and *das Amt* is *office*.

All Patent Offices are governmental bodies which deal with inventions, patents, trademarks in the scope of industrial property. Equivalents are provided in the table below:

Table 5. Title

Japanese	British English	American English	Polish	German
特許庁 *tokkyochō*	United Kingdom Intellectual Property Office	United States Patent and Trademark Office	Urząd Patentowy	das Patentamt

5.5 The term "勲章 *kunshō*"

In Japan since the Meiji Era, to reward achievements and results of people, there are investitures 叙位 *joi*, which are given by the peerage 叙爵 *joshaku* (it was abolished after World War II), the so-called: *medal of honor* 叙勲 *jokun*, *medal of honor* 褒章 *hōshō* and *cup* 賜杯 *shihai* and *insignia* 記章 *kishō* etc. *Kunshō* is a decorative medal that belongs to a category of 叙勲 *jukun*. This is a form of recognition of a merit given to a person or organization. Because there are different legal systems in countries around the world, you cannot find the equivalent for 勲章 *kunshō*, but the English terms "medal, order, decoration" or German terms "Medaille, Orden, Echreizenchen" are closely related to the term *kunshō*. However, *orders, decorations*, etc. they are not protected under the German trademark law. These terms are used in general language. In German there is no-equivalence with Japanese term 勲章 *kunshō*, we can provide an equivalent in accordance with techniques which provide equivalence for terms which are non-equivalent, so that *die Medaille* which is present in general German will mostly be a proper equivalent. British English provides a term

insignia which has its Japanese equivalent 記章 *kishō* that is one of the investiture 叙位 *joi*, but 勲章 *kunshō* is a *medal*. In Polish and German trademark law there is no equivalent for Japanese 勲章 *kunshō*. Polish terms *order*, *odznaka* and *odznaczenie* are closer to American *decorations*, *medals* and *badges*, but it is not the same as Japanese 勲章 *kunshō.* The terms are provided in the table below:

Table 6. Title

Japanese	British English	American English	Polish	German
勲章 *kunshō*	insignia	decorations, medals and badges	order; odznaka; odznaczenie	-

5.6 The term "to cancel a registration of a mark"

Cancellation of registration or *to cancel a registration of a mark* are English terms describing the activity when the Patent Office or a natural person or other entity can discredit the validity of a trademark. Japanese term 商標登録を取り消す *shōhyō tōroku o torikesu* means canceling the validity of a trademark. The Polish term has different connotations. *Unieważnienie uznania znaku towarowego* means canceling not only the validity of a trademark but also canceling the recognition that this is/was a trademark. However, German phrase *Aufhebung der Markenzeichen* means that somebody is ascertaining that a trademark must be cancelled. English terms are broader in meaning than Japanese or Polish phrases. English and German phrases are closer in meaning to each other. The terms are provided in the table below:

Table 7. Title

British English	American English	Japanese	Polish	German
cancellation of registration	to cancel a registration of a mark; cancellation	商標登録を取り消す *shōhyō tōroku o torikesu*	unieważnienie uznania znaku towarowego	die Aufhebung des Markenzeichen

5.7 The term "商標権者 *shōhyōkensha*"

The term 商標 権 者 *shōhyōkensha* consists of 商標 権 *shōhyō-ken* (a right to the mark) and 者 *mono* (*a person*). These characters refer to the person who has the right to the trademark (the owner of a trademark). The near equivalence we have in British English where we have *the proprietor of a trade mark*. In American we have *the holder of the right to use such mark* [trademark] *or designation*. What is the difference between a *proprietor* and *holder*? *Proprietor* is a person who has the ownership of a trademark however, *holder* is a person who has or holds something, has a right to it but does not have an ownership of it. To conclude, Polish *właściciel znaku towarowego* and British *proprietor of a trade mark* is functionally equivalent (there is near equivalence). In this case 商標 権 者 *shōhyōkensha* is

functionally equivalent to the American *holder of the right to use trademark*. German *Inhaber* is equivalent to British *proprietor*, so all in all, British, Polish and German are functionally equivalent. 商標 権 者 *shōhyōkensha* is partially equivalent to British, Polish and German because a person has a right but does not have an ownership of trademark. Equivalents are provided in the table below:

Table 8. Title

British English	American English	Japanese	Polish	German
the proprietor of a trade mark	the holder of the right to use such mark or designation	商標権者 *shōhyōkensha*	właściciel [znaku towarowego]	der [Marken] Inhaber

6 Conclusion and implications

The aim of the study was to analyze comparable texts in terms of Polish, English, Japanese and German trademark law acts. This type of analysis is extremely useful for translator's work because it contains precise use of certain terminology in those languages. The terms that are used in the comparable texts and finding common equivalents are a reliable source of terminological accuracy of the translation. However, we have to be aware that inaccurate translation may lead to misunderstandings and communication failure. Sometimes even to translational scandals (c.f. Melbourne case). Moreover, translators should remember for whom they translate, so the focus is on the receiver of translational product (c.f. Kierzkowska 2002).

It is concluded that terminology selected from the trademark acts were in most cases equivalent. Polish, English, German and Japanese trademark law acts have many features in common, due to the fact that those countries signed many international treaties. Apart from some similarities, there are some differences regarding Polish, English, German and Japanese terminology. First of all, the acts are not the same in those languages and sometimes they do not cover the same aspects or it is not regulated in a particular system. Also, some terms are carrying different meaning despite the fact that they should mean the same when making a translation.

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2. British Trademarks Act (*Trademarks Act, 1994, Chapter 26*)
3. American Trademark Act (*The Lanham Act, 15 U.S.C. §§ 1051 et seq., 1946)*
4. Japanese Trademark Act No. 127 of April 13, 1959 (商標法昭和 34 年 4 月 13 日法律第 127 号。最終改正平成 20 年 4 月 18 日法律第 16 号)
5. German Trade Mark Protection Law (*Gesetz über Markenschutz (Deutsches Reich) vom 30. November 1874*).

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Japanese Patent Office https://www.jpo.go.jp/
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A Better Way to Fail: Teaching Critical Thinking to Chinese Lawyers[1]

Abstract: This article argues that American LL.M. Programs should consider ways to help all foreign lawyers meet their goals of improved English, strong critical thinking and writing skills, and opportunities for work experience needed for global legal practice. In the course described here, using real-time and computer-assisted learning, the Professor and foreign-trained Teaching Assistants help Chinese students bridge this divide in a course that addresses the interaction of racial politics and the law.

Keywords: critical thinking, teaching, Chinese lawyers, English language, racial politics, law

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"Ever tried. Ever failed. No matter. Try again. Fail Again. Fail Better."
-Samuel Beckett,
Worstward Ho, 1983

1 Introduction

In a recent issue of The New Inquiry, novelist Ned Beauman suggests that the phrase "'Fail Better' is now experimental literature's equivalent of the famous photograph of Che Guevara: "flayed completely of meaning and turned into a successful brand with no particular owner…[w]hen Beckett talks of failure he's often talking about how language can't withstand the weight of meaning we want to put into it, and in that sense his unintended ubiquity is ideal. What better argument for the feebleness of determinate meaning than the tawdry afterlife of 'fail better.'" Like Beauman, I reduce this phrase to an aphorism along the lines of "Keep Calm and Carry On." [2]In the present project, I further invoke this pessimism to prepare the reader for a less myopic view of the phrase's seemingly upended meaning that arises when working with Chinese lawyers.[3]

[1] My somewhat presumptuous title suggests that Chinese lawyers lack Western-style critical thinking skills, and that any effort to teach these skills may, at best, produce a somewhat better failure. Although "failing better," as I describe it, cannot ensure predictable assessment outcomes, it stands a better chance of introducing teaching critical thinking skills than many methods that I have tried before. While it is no teacher's desire to see students fail, Beckett's phrase captures something of the recursiveness of U.S. Legal Writing, not unlike the French "reculer pour mieux saute."
[2] Beauman, Ned, "*Fail Worse*," www.thenewinquiry.com
[3] *Id.*

The "failing better" to which I refer can be illustrated with an anecdote relating to 50 students from Temple's LLM Rule of Law Program in Beijing[4] -- an incident that alerted me to a problem completely new after twenty five years of teaching university English and legal writing. The students had been studying U.S. law in English in China for 10 months before travelling to Temple's Philadelphia campus for an intense Summer Semester of Legal Writing, Trial Advocacy, and Legal Ethics. The U.S. law program in Beijing is taught in English by U.S. Law Professors, who must negotiate considerable language difficulties and a heavy syllabus of doctrinal material. They evaluate students by means of one exam at the end of term. Add to this that virtually all the students speak Mandarin outside the classroom (and often to one another in the classroom), and we can assume exposure to U.S. legal culture was entirely second-hand.

Despite this lack of exposure to U.S. style legal communication, the schedule required students to learn legal writing during the Summer Session in Philadelphia, close to the end of their Program. Despite their having studied U.S. law in English for close to a year, students had widely varying levels of U.S. spoken English and comprehension, and minimal grasp of U.S. legal discourse.[5]

Another Professor and I showed the students a documentary film – "The Road to *Brown*." Neither of us spoke more than a smattering of Mandarin. The students concentrated on the film, taking notes, intent on understanding the legal and social history of the pre and post- Jim Crow U.S. Yet, when the film shifted to period cartoon depictions of black children cavorting and dancing Minstrel-style, the students laughed nervously. My colleague and I were distressed. Despite our awareness of the cultural defense mechanism of nervous laughter, we admonished the students sternly, but did not successfully explain why their behavior was inappropriate.[6]

Recognizing that they had offended their Professors, the students became discomfited and withdrawn. The best laid plans for a contextually rich discussion of a deadly serious subject were foiled by their earnest Professors' failure to, if not calibrate, then at least

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[4] Temple's Rule of Law Program in China "Is the first and only foreign law degree-granting program in China… over 260 students have graduated from Temple's LL.M. program for Chinese judges, government officials, and attorneys." Temple Law School International Law and Programs brochure.

[5] In an earlier article, I explained that the students from Temple Law School's Beijing Program "have entry level instruction in Legal English [to] provide them with enough legal terminology to conduct future reading and research in the more specific doctrinal areas of interest, and to develop legal skills such as briefing cases, but … the development of these deceptively complex skills cannot be guaranteed in a pre-program." Robin Nilon, *The Calculus of Plagiarism: Toward a Contrastive Approach to Teaching Chinese Lawyers*, 2 S. C. J. INT'L L. & BUS., note. 14 (2006); Despite adequate qualifications, students come to this prestigious program without a grounding in U.S. legal culture. Students have difficulty adjusting to U.S.-style "classroom conventions" present in the Beijing Program, much as Foreign LL.M. students have trouble adjusting the U.S. classroom culture when they come to the U.S. to study, *see* Julie M. Spanbauer*, Lost in Translation in the Law School Classroom: Assessing Required Course work in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396, 419-20 (2007) (arguing: "Regardless of how knowledgeable nonnative speakers may be about discipline-specific content areas, they may not be able to effectively communicate that knowledge, either in speaking or writing, because of their lack of familiarity with more general communicative patterns in U.S. academic and work environments. One of the communicative environments most unfamiliar to many ESL students when they arrive to study in the United States is, in fact, the American classroom.")

[6] Culturally-specific notions of laughter were taken into consideration, but we reacted before we had a time to think through the reaction. Nervous laughter can be a sign of discomfort in many other cultures, including Western culture. Our discomfort triggered our reaction as much as theirs did their reaction. See e.g. Ed. Wen-Shing Teng, *Handbook of Cultural Psychiatry*, 792, "[While] nervous laughing … is one kind of coping mechanism commonly used by some Asian people. When a person is nervous, particularly in an embarrassing situation, instead of manifesting feelings and gestures of nervousness and embarrassment, he may laugh nervously. By bursting into laughter, a person may save himself embarrassment by concealing his feelings of nervousness. This culturally shaped behavior may look awkward or strange to outsiders, who are not familiar with it, and might interpret it as odd, while actually it is a culturally shaped defense mechanism."

address, students' cultural understanding of the legal and social history of the pre and post Jim Crow U.S.

My epiphany here was to appreciate that the intertwined threads of history, culture, and racial politics should never be expected to be understood in one "teaching moment." In fact, such threads must be woven into the fabric of a student's education. Chinese students draw from an ancient pedagogy that relies on memorization and paramount attention to the teacher's position and opinions with regard to "legal article, legal principle, legal philosophy."[7] The *Brown* documentary thus could not realistically have been understood in context unless that context was fore-grounded, something my colleague and I failed to do. A depressing failure, but also an opportunity to fail better. I determined to use the intersection of race and law as a means by which to cross a distinct and highly marginalized cultural border. Legal writing would serve as the vehicle.

As others have observed, even native speakers of English must acquire a new language when learning U.S. law.[8] It follows, of course, that foreign lawyers must add a "third language" of U.S. legal writing to their standard English and foreign legal writing language.[9] Added to these difficulties is the problem—observed by U.S. law professors – of competing with traditional Chinese pedagogy as they try to impart critical thinking skills.[10]

I argue that for Chinese law students, a lack of awareness of audience expectations in a "target language," leads to a dearth of the contextualized legal analysis and critical thinking common to U.S. legal culture. I am aware that a significant amount of work has been done to promote cross-cultural communication and respect for differences, and that this cannot but help Chinese lawyers and their professors meet their goals. However, this article urges a method of teaching critical thinking skills to students who have had little opportunity to develop them. I believe it could be adapted for any cross-cultural legal writing program offered to foreign lawyers seeking U.S.-style legal study.

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[7] Matthew Erie, *Legal Education Reform in China through U.S.-Inspired Transplants*, 59 J. LEGAL EDUC. 60, 68 (2009), *see also* Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L. J. 117, 126-7, n. 55 (2005) (explaining "[B]eginning in elementary school Chinese students are expected to learn through a system the Chinese call "stuffing the duck" (tianya shi), cramming facts, figures, and theories into hours of classroom lectures, followed by hours of memorization at home.")

[8] *See* Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom,* 47 J. LEGAL EDUC. 161; Erie *supra* note 7, 417 (2007) (explaining that even for native speakers of English, the properties and conventions of U.S. legal writing registers and genres present "a new culture, a new English, and new rhetorical preferences. As such, international students have the additional task of learning the "new language" of U.S. legal writing registers and genres while they continue to build their command of Standard English (arguing that "it is [thus] important for those of us who teach these ESL students to understand that legal analysis in the U.S., which incorporates its own logical structure, adds another layer of cultural logic upon a language which itself incorporates a causal structure or logical organization.")

[9] *Id.*

[10] Erin Ryan, Xin Shua, Yuan Ye, You Ran, & Li Haomei, *When Socrates Meets Confucius: Teaching Creative and Critical Thinking Across Cultures Through Multilevel Socratic Method*, 92 NEB. L. REV. 290, 332, (quoting a Chinese source describing the differences in learning styles as follows: "In China, the underlying assumption shared by law professors and students, consciously or unconsciously, is that students know nothing until teachers tell them. Before students understand the basic theory, it's not worthwhile to hear their premature ideas. Law professors teach us the right ideas and the standard answers. Students with different ideas do not usually have enough courage to express them because they expect them to be of little value. Students don't even bother to critically think through what they are taught because we subliminally assume everything professors teach us is the 'true and only answer.' Chinese law professors often teach with an authoritative tone, suggesting '*This is the only accurate explanation to the problem; all other explanations are wrong.*' For example, one professor highly proficient in international law told us outright that "polluting" his classes with discussion would bring nothing but superficiality and never reach the depth of theory or principle to which he aims his teaching."

In an effort to walk that tightrope between normative cultural views and the cultural relativism that parodies difference and stymies thought, I have experimented with a variety of interdisciplinary approaches based on contemporary writing theory and rhetoric. My essay chronicles my ever evolving efforts to help me, my Teaching Assistants (whom I will refer to as Teaching Assistants, culture brokers, or e-moderators), and my students "fail better"--in virtual time and real time, working on the always unstable platform of critical thinking. These experiments began in the Summer Session 2014, using on-line and real-time critical thinking methods with my students from Beijing. Those methods, discussed here, will be employed on a larger scale during the 15-month distance learning/real-time class that will begin in September of 2014, and be completed by October, 2015.

With little critical thinking in place, students I offered were largely unprepared for a discussion of the institutionalized racism illustrated in the *Brown* documentary. I believe that this lack of focus on critical thinking skills also encumbers Chinese lawyers after they have obtained an American LL.M. In Part II, I argue that with the increased competition for spots in U.S. LL.M. Programs, and the steep drop in J.D. applications, all U.S. LL.M. Programs must consider ways to help Chinese law students meet their key goals: improved English, strong critical thinking skills, and opportunities for work experience in the U.S. Course design must be fine-tuned to help students attain these aims.[11] I explain how Chinese students can be mainstreamed into American legal education and ultimately move graduates from what Matthew Erie refers to as "thin" reasoning to "thick" reasoning, with the goal of reading, writing, and explaining legal materials in the social contexts in which they were written.[12]

Part III displays one effort to "fail better" at imparting critical thinking skills. I detail the course that I taught in the summer of 2014 during which I introduced and promoted critical thinking skills through Blackboard based e-learning and real-time. I based my method on Gilly Salmon's Five Stage model of E-learning' adapted by me for use in e-learning and in real-time.[13] Salmon's five stage model "works through a structured and 'scaffolded' series of "e-tivities designed to encourage creativity and learning."[14] The course can also establish the foundation of a legal research and writing method that will be developed when the students arrive in Philadelphia 10 months through their Program. The scaffolded styles preferred by U.S. law professors are compared to the rhetorical styles that Chinese readers prefer. I demonstrate how students synthesized the scaffolded practice during their "real time" study in Philadelphia when they prepared briefs and oral arguments for a target audience of Federal Judges. It is at this stage that the interaction among the different cultures of the courtroom, the classroom, and U.S. and Chinese argument styles must be navigated with best possible attention to context.

In Part IV I encourage long distance communication using an "inverted" classroom." Catherine Lemmer describes the an "inverted" or "flipped" classroom as "a pedagogical model supported by theories of active learning that replaces the traditional in-class lecture

[11]Carl F. Minzner, *The Rise and Fall of Chinese Legal Education*, 36 FORDHAM INT'L L.J. 393 (2013) (arguing that "[F]or American law schools, the real challenge in the coming years will be to create reasonable priced programs that actually improve the employability of their graduates – both foreign and domestic alike. This requires analyzing the actual needs of Chinese students and employers. It requires customizing existing programs to cater to them. And it requires mainstreaming Chinese students as fully equal customers of American legal education").

[12] Erie, *supra* note 7 at 77-78.

[13] Gilly Salmon, *E-tivities: The Key to Active Online Learning*: 2nd. ed. London: New York, Routledge, (2013).

[14] *Id*. at 12 (describing how "[W]orking with others online can be playful, liberating and releasing. Online participants are often more willing to try things out in a dynamic way than they would be face-to-face, which means that e-tivities can be more fun and still promote learning."

format with predelivered instructional materials and an in-class learning lab[15] I propose predelivering to students in China materials intended to develop thick reasoning skills early in the Program.

I conclude with the aspiration that learning thick reasoning – through stages and repetition—will "fail" far better than modelling exercises so commonly used.

2 "Thick" Reasoning as a Model for Critical Thinking

The failure of Chinese universities to train law students in critical thinking, along with the glut of law school graduates have been recognized as two causes of the graduates' inability to find employment.[16] These domestic employment difficulties compel many young Chinese lawyers to seek an American LL.M. degree, in the hope that it will make them more employable when they return to China. While most Chinese law graduates see the undoubted advantages of an American J.D., they might recognize they lack either the skills or the time to make it a reality.[17] The LL.M. is, then, often the default choice for a Chinese student seeking to improve job opportunities. But, as Carole Silver says, what is more troubling for those of us who teach LL.M. students is that according to some administrators: "[R]ight now, Chinese students are beginning to view LL.M. programs as a 'side door' into J.D. programs. They score too low on the LSAT to be admitted in the front door, so they apply to a school's LL.M. program, burn up the track, and then transfer into the J.D. program."

This is, of course, the hope of the student, not the likely outcome. These students often have insufficient skills to do LL.M. level work, suggesting that even after a year of study they will still be ill-equipped to do J.D. work. In general, program directors do not encourage LL.M. graduates to apply to J.D. Programs and "[I]ronically, the LL.M. graduates likely to do well enough to get admitted to the JD Program will do perfectly fine professionally without it: those who need it most are unlikely to satisfy all the requirements for admission."[18] This insight confirms my own experience, and suggests that the Chinese student well prepared *through* an LL.M. need not depend on the J.D. to increase the chances of success in the global legal market.

Foreign legal education is a requirement for a foreign license under Chinese regulations. In addition to admission to a bar and the LL.M., Chinese students are expected to have

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[15] Catherine Lemmer, *A View from the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student*, 105 LAW LIBR. J. 621 (2013); *See generally* Roberta K. Thyfault & Kathryn Fehrman, *Interactive Group Learning In The Legal Writing Classroom: An International Primer On Student Collaboration And Cooperation In Large Classrooms*, 111 J. MARSHALL L.J. 135, 136 (2009) (providing an overview of techniques for ensuring that students retain the skills learning in a legal writing classroom by providing "… active learning experiences: experiences that allow students to solve problems, complete projects, and discover knowledge and conclusions for themselves….This process of inexorably involving students in their own learning processes can be known as 'experiential learning,' 'kinesthetic learning' or 'active learning.'")

[16] Erie, *supra* note 7 at 35 (arguing "the flood of new law graduates is only one factor behind rising unemployment and underemployment…[P]oor education in the later 1990's and 2000's led to the overnight proliferation of many programs where 'everything from the teachers and students to the training actually provided is characterized by the academic and theoretical focus that does little to prepare students for actual careers."

[17] Carole Silver*, The Variable Value of U.S. Legal Education in the Global Legal Service Market*, 24 GEO. J. LEGAL ETHICS 49 (2010) (quoting a Chinese LL.M student "I'm thinking to get a J.D. at the very beginning. But I'm really too busy and I don't have time to prepare for the LSAT…. I think most of LL.M., they would like to continue for J.D. just because they want to get the same pay, it's unfair. In China there are a lot of LLMs, so it's really difficult to get a job."

[18] *Id*. at 49 n.196

practiced abroad.[19] Theoretically, then, a Chinese LL.M. graduate and member of a bar would have a much better chance for success in China if she were adequately prepared to do legal work in the U.S. by the end of her LL.M. In reality, this goal is not going to be met unless the student has been immersed in English and U.S. legal culture throughout her studies and perhaps after completing her studies. In my model, the immersion might reasonably take hold within the 15 months of on-line and in-class study.

A lack of critical reasoning skills not only encumbers students' understanding of U.S. legal culture, but it may even help fuel the desire for the J.D. and even the S.JD. And that, in turn, devalues the U.S. LL.M. degree. Carole Silver argues "Because of the lack of standardization, the importance of the LL.M. is less about the credential itself and more about particular experiences and lessons that it enables.[20] Given a decidedly optimistic spin to my model, then, an LL.M. program that immerses Chinese students in U.S. legal culture might well improve the fortunes of U.S. administrators of LL.M. Programs, the Professors who teach in these programs, and the students themselves.

To understand the difficulty of Chinese students' immersion in U.S. legal culture, one must understand how legal reasoning is taught in China. Matthew Erie views the LL.M. Program at Tsinghua University School of Law as a test case in teaching critical reasoning to Chinese lawyers.[21] Much contemporary Chinese legal education has been informed by reform-minded Professors who have returned to China from study in the U.S., intent on emphasizing critical reasoning skills.[22] In Matthew Erie's view, however, these efforts fail to move beyond "thin" critical reasoning, e.g., test preparation (yingshi jiaoyu) to far more analytical "thick" reasoning.[23]

> 'Thin' critical reasoning applies to the exercise of analytical reasoning as applied to legal materials to further the client's interests. It has close affinities with formal logic…Thin critical reasoning informs many aspects of lawyering: conducting research including reading cases and statutes as well as examining evidence; developing (multiple and alternative) case theories; drafting memos or contracts; and oral advocacy and client consultation.[24]

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[19] *Id*. at 41 [arguing "Because ***Chinese*** regulations require a ***foreign*** license, ***foreign legal*** education is the crucial entry point." But the ideal candidate for an international firm (who may begin as a ***Chinese*** lawyer) has more: Practice experience outside of China also is important. A lawyer working in the China office of an international firm explained, "If someone has only an LL.M and the bar…there is not big advantage. The advantage comes from working experience in the U.S. In China, then, ***legal*** practice experience outside of China is an essential element of professional capital."]

[20] *Id*. at 39, 55 (arguing that "Global lawyers become global only in context…Even these are not uniformly relevant in each host country, and will be interpreted differently by foreign and host country firms.") While this essay deals specifically with Chinese students only, the principle of contextual learning is applicable overall not only to the growing numbers of Chinese students seeking the degree, but other cultures as well.

[21] Erie, *supra* note 7 at 64 (explaining TULS is seen as one of the pioneering law schools in China today because of its experimentation with curriculum, teaching, and overseas connections….The U.S. exchange program for which it is most well-known is the LLM Program in U.S. law taught by Temple University's Beasley School of Law, a program supported by a range of private and public donors including the U.S. State Department. Thus, TULS has strong ties to both the PRC government and the international community and, as such, provides fertile ground for the study of the cross-pollination of legal education reforms.") Although Temple no longer receives as sizable a grant from the State Department, it continues to educate many of China's future legal leaders.

[22] Erie, *supra* note 7 at 77 (These educators "spent time in the U.S. either as graduate students or visiting professors and serve as 'culture brokers' who possess both transnational symbolic capital as well as 'local knowledge. However, their effectiveness in adapting U.S. teaching approaches to China depends on a number of factors including the duration the Chinese educator spent abroad and the extent of his or her exposure to an involvement in U.S. law teaching.)

[23] Erie, *supra* note 7 at 70-72.

[24] Erie, *supra* note 7 at 77-78.

Students may be lulled into false confidence with a combination of strong "thin" reasoning skills and high TOEFL scores as they begin studying in a U.S. law school, but the reasoning method taught in China rarely prepares them for law study in the U.S. or critical thinking in general.[25] The confidence that an already confident students may feel may be further boosted if they attend one of the special "pre-Programs" for incoming LL.M.s.[26] But all told, none of this can substitute for a gradual yet intense acquisition of legal culture in context.

To synthesize materials into legal reasoning on a level expected by US lawyers or Judges, a law student must develop a grasp of "thick" critical reasoning:

> 'Thick' critical reasoning widens the purview of analysis by focusing not only on policy per se but further, on politics and institutions of authority more generally, whether governmental, corporate, religious, or ideological. This form of critical thinking is not an explicit objective of instruction in formal educational institutions such as law school; more likely, it is acquired from repeated exposure to and immersion in diverse forms of cultural media outside the walls of the school. Thick critical reasoning forms the basis for political mobilization whether democratic, such as Kangan's "adversarial legalism," or socialist, as in classical Marxist thought.[27]

Chinese students are likely to have internalized a great deal of critical thinking in line with their cultural norms, which dictate that one forgoes criticism for those with greater authority than themselves.[28] Often, they have had little opportunity to showcase even constructive criticism simply because "thin" critical reasoning consistently bears fruit. Put more simply, for most Chinese educators, "thick" critical reasoning is not the chief determinant of their students' successes.

Often, teaching "thin" critical reasoning seems more than enough of a task. Chinese law students learn through civil law inductive reasoning. Erie cites one Chinese law student who planned to follow his studies in China with study at a U.S. law school:

> After Studying the American LSAT, I understand critical reasoning in U.S. law schools to divide legal arguments into evidence, assumptions, and conclusion. Any one of these can be wrong or inaccurate which weakens the legal argument. In critical reasoning as is taught in Chinese law, we are not taught to think like this. In our approach, analysis proceeds by: one, stating the definition and then, two, elaborating a beautiful system (wanmei tixi), but we are not taught to look for flaws.[29]

LSAT test-taking skills favored by Chinese educators draw on "thin" reasoning. Thus, students matriculating in a U.S. law Program, either here or in China, will find it difficult to make the leap into "thick reasoning." Ultimately, most U.S.-trained doctrinal professors teaching in China, like those teaching in Temple's Program, do not stray from their course materials, and don't have the time or training to teach written legal analysis, a key to "thick" reasoning.

Teaching Assistants as "Culture Brokers"

Professors who seek to impart thick reasoning skills unique difficulties." Teaching "thick" reasoning to those who have been rewarded for their "thin" reasoning skills means

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[25] Xiaoye You, *The choice made from no choice: English writing instruction in a Chinese University*, 13 J. SECOND LANGUAGE WRITING 97 (2004) (arguing that despite the development of Western writing pedagogies in China, "English writing is taught under the guidance of a nationally unified syllabus and examination system. Rather than assisting their students to develop thoughts in writing, teachers in this system are predominately concerned with the teaching of correct form and test-taking skills."

[26] *See e.g.*, Teresa Brostoff, Ann Sinsheimer & Megan Ford, *English for Lawyers: A Preparatory Course for International Lawyers*, 7 J. LEGAL WRITING INST. 137 (2001).

[27] Erie, *supra* note 7 at 77-78.

[28] Erie, *supra* note 7 at 79.

[29] *Id.*

crossing the line that separates the social relationship of student and teacher.[30] Erie suggests that this relationship is "politicized in the PRC.[31] As such, Chinese law students face difficulties when learning the expectations of those in positions of authority, e.g., Judges.

Crossing back and forth over the borders of U.S. legal education and Chinese-style legal education thus depends to a great degree on the mentoring provided by a core group of Teaching Assistants I will refer to as "culture brokers," a term that derives from anthropology in the mid-1900's.[32] These students—sometimes U.S. law students, native and non-native born, (and sometimes foreign LLMs and SJD candidates)—are chosen because they share an interest in Chinese law, language, and culture. A foreign legal Teaching Assistant (who may or may not be Chinese), however, is most valuable because she has had to interpret the language and culture of U.S-style legal education, whatever her first language may be. Having graduated with a law degree from a foreign law school followed by an LLM or JD in U.S. law, the Assistant has learned first-hand the value of U.S.-style critical reasoning and teaching, and the difficulty with which both are acquired.[33]

Culture brokering, as I use the term, assumes facilitating communication in English, at least in the "U.S.-law school environment." Just as a Legal Writing Instructor might look for a strong student from the first-year class to serve as Teaching Assistant during her second-year, I look for the student who has succeeded in navigating a new language and legal system.[34]

A non-U.S. Assistant may be best equipped to help students recognize and address the different cultural contexts our Chinese students encounter, both on-line and in real-time, but this method is best approached in what Ulla Conner refers to as "interlocutors."[35] The collaborative nature of the student/Teaching Assistant relationship assures the students that

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[30] Erie, *supra* note 7 at 79

[31] *Id*. (explaining that "Both JM and LLM students told me that most professors prefer questions to be asked one-one-one after class. In these conversations, ideas of respect (zunjing) or "saving face" (ai mainzi) were recurring. Students repeatedly analogized respect for the professor to respect for the judge, law firm partner or other authority figures. These hierarchical relationships determine the extent of "free speech" inside and outside of the classroom and the "thickness" of critical thought.)

[32] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 89 (Basic Books 1973) (observing that culture is "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and their attitudes toward life.").; *See* Michael Michie for a review of the literature by educators as cultural workers. The rule of culture brokers in intercultural science education: A research proposal, http://members.ozemail.com.au/mmichie/culture_brokers1.htm.

[33] *But see id*. "Cultural brokers are not the same as interpreters, although facility in both languages (if there are two languages involved) is almost an essential factor and they can act as language interpreters as well. The most important part in their role is that they can interpret culture for one or both groups." I hold that this is best done in English whether or not the broker speaks Chinese.

[34] Katerina P. Lewinbuk*, Can Successful Lawyers Think in Different Languages? : Incorporating Critical Strategies That Support Learning Skills for the Practice of Law in a Global Environment*, 7 RICH. J. GLOBAL & BUS. 1, 11-12 (2008) (arguing: "In order to learn and comprehend legal skills that are critical to the practice in a global multinational environment, and to improve the form in which oral and written communication is expressed, the students need to think in the same language that they are practicing law."). There is, of course, a rich tradition of using second year law students as Teaching Assistants in the LRW classroom, *see e.g.*, Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems In Using Teaching Assistants: Hard Lessons Learned From Peer Teaching Theory And Experience*, 13 J. LEGAL WRITING INST. 269 (2007).

[35] Lemmer, *supra* note 15 at 31. Ulla Conner's view of culture can be modeled by Teaching Assistants who have studied the law in cultures other than the United States stand as intermediaries because of their own experience in discovering and maintaining good social relations with the Professor. Conner explains: "In addition to maintaining that culture needs to be included in any model of intercultural rhetoric, that small cultures such as disciplinary cultures need to be considered, and that individual variation is a given, intercultural rhetoric considers negotiation and accommodation among interlocutors. In order to understand each other fully, speakers and hearers need to adjust to each other's styles and negotiation meaning.

the Assistants have successfully absorbed the culture of the U.S. LLM Program and encourages them to believe that they can take part in this process as well.

3 E-Tivities as a Method of Front-Loading Critical Thinking and Persuasion

In the summer of 2014, I piloted a method based on Gilly Salmon's Five Stage model of E-learning adapted by me for use in e-learning and in real-time. Despite the misgivings of some critics who object to models like Salmon's as short on "flexibility and reflexivity," I believe that with appropriate adjustments, this model would suit both a combination of on-line and real-time learning, and an on-line course. [36]

The attraction of Salmon's model's lay not only in bringing content to my constituency that was not possible before, nor in the valuable interaction of my Teaching Assistants now functioning as "e-moderators.[37] Rather, the attraction lay in the way the model put these two features into play in different interactions.[38]

Students in the Beijing Program draw on the technical support available through the Blackboard system, but the greater hurdle is the somewhat paradoxical student fears that they will not be able to meet their teacher's expectations, and concern that there is no real benefit in taking part in an on-line course for which they receive no credit. Salmon's on-line model affords different avenues for helping students assimilate to U.S. legal culture and communication.

"Live Controversy"

Salmon's model affords different avenues for helping students assimilate U.S. legal culture and communication. I thought a "real world problem would work better in promoting that assimilation. Especially in light of the reaction to the *Brown* documentary, a problem posed squarely at the intersection of law and race seemed ideal for this purpose. Philadelphia has a long, troubled history of allegations that the police force is insensitive to the civil rights of its citizens. In 1970, actions were brought in the Philadelphia Federal Court, in which various citizens and groups alleged that then Mayor Frank Rizzo's Police Department had engaged in a "pervasive pattern of illegal and unconstitutional treatment [that] was said to be

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[36] *See e.g.*, Bernard Lisewski & Paul Joyce, *Examining the five-stage e-moderating model: designed and emergent practice in the learning technology profession*, 11 ALT-J 55, 59 (2003) (arguing for the dangers of creating a "grand narrative or totalizing explanation" and "commodified higher education environment." The authors conclude that: "as a neophyte profession we need to establish a more self-reflexive, questioning, contestable, and research-based method of practice. Perhaps, given our relative youth as a profession it is understandable that the five-stage model of online interaction has become a dominant paradigm for one area of practice. However, this may simply be one of many that we yet to 'receive' and contest.")

[37] GILLY SALMON, E-MODER@TING: THE KEY TO TEACHING AND LEARNING ON-LINE 4-5 (3rd ed. 2011) (describing the "e-moderator [electronic moderator] presides over an electronic online meeting or conference, though not in quite the same ways a moderator does….The essential role of the e-moderator is promoting human interacting and communication through the modelling, conveying and building of knowledge and skills. An e-moderator undertakes this feat through using the mediation of online environments designed for interaction and collaboration. To learn to undertake an e-moderating role, whether coming to it fresh or as a change to previous teaching, coaching, or facilitating practice, takes a mixture of new insights and some technical skills, but mostly understanding the management of online learning and group working….The tutor, teacher, trainer-whatever you wish to call him, her or them [I call them e-moderators when they work online] – operate in the boundary between the educational establishment [represented by the curriculum and the provided learning technologies] and the learning experience – they adopt a wide variety of roles.)

[38] *Id*. at 31 (describing "three types" [of interaction]: "interaction with 'content' (course materials or references), interaction between tutor and the student (Berge, 2007) and, third, the much wider interaction between groups of peers usually with the e-moderator as the mediator and supporter. It is the third kind that the model focuses on whilst seeking to integrate the other two.

directed against minority citizens in particular.[39] In 1973, after two trials, the District Court required the police "to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct."[40] The Third Circuit "upholding the District Court's finding that the existing procedures for handling citizen complaints were 'inadequate,' affirmed the District Court's choice of equitable relief."[41] A divided Supreme Court reversed on grounds of federalism and "concerns respecting existence of a "live controversy."[42] The problems giving rise to underlying the litigation remained, however, and were debated in Philadelphia political campaigns for decades.[43]

In 2010, a citizen class action suit was brought in Philadelphia Federal Court against the City, the Police Commissioner, and various officers, challenging the Police Department's "stop and frisk" policy. The defendants alleged, *inter alia*, as follows:

> The defendants have implemented and enforced a police and practice of stops, frisks, searches and detentions of persons, including plaintiffs, without probable cause and reasonable suspicion as required by the Fourth Amendment.
> The stops, frisks, searches and detentions by the Philadelphia Police Department officers are often based on constitutionally impermissible considerations of race and/or national origin in violate of the Equal Protection clause of the Fourteenth Amendment. The victims of such racial and/or national profiling are principally Black and Latino men.[44]

The case was subsequently settled with the entry of a consent decree requiring *inter alia*, the appointment of a Police Monitor (Joanne Epps, the Dean of the Temple Law School) and the reformation of the "stop and frisk" policy.

Philadelphia's "stop and frisk" policy was based on Chief Justice Warren's opinion in *Terry v. Ohio*.[45] There, the Supreme Court held that, for their own safety, police could, on less than probably cause, pat down, ("stop and frisk") an individual whose behavior is "suspicious."[46] The decision has spawned a wealth of case law and scholarship focused on whether Terry created a Fourth Amendment loophole that would allow race-based stops.[47]

U.S. v. Thomas Smith

Drawing on this troubling history of race relations and law enforcement in Philadelphia thus seemed the ideal way to lead students into thick reasoning. Throughout the Semester of this pilot Summer Program, students worked on a seemingly simple search and seizure problem. The facts as found by the Court may be paraphrased as follows:

> Thomas Smith, who is African American, stands at 9:30 outside "Norm's" bar in a "high crime" Philadelphia neighborhood with three Caucasian men. As they pass in their marked patrol car, police – who had received numerous citizen complaints of gun and drug crime outside the bar – order the four

[39] *Rizzo v. Goode*, 423 U.S. 362, 366 (1976).
[40] *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. Pa. 1974)
[41] *Id.*
[42] *Rizzo*, 423 U.S. 362 at 378.
[43] *See* generally, Robert Beauregard*, Tenacious Inequalities: Politics and Race in Philadelphia*, Urban Affairs Review, 25 no. 3 420, March (1990); Carolyn T. Adams, Race and Class in George E. Peterson, Ed., Philadelphia Mayoral Elections, 133-32 in Race and Class in Big-City Politics, Governance, and Fiscal Constraints, Institute Press, Washington, D.C.(1994).
[44] Complaint, *Bailey v. Phila.,* (Civ. No. 10-5952) (EDPA 2011).
[45] *Terry v. Ohio,* 392 U.S. 1 (1968).
[46] *Id*. at 24.
[47] *See Fla. v. J.L.,* 529 U.S. 266 (2000) (and cases therein cited); *see also* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Tracey Maclin, *Terry v. Ohio Fourth Amendment Legacy: Black Men and Police Discretion*, 73 ST. JOHN'S L. REV. 1271 (1998).

> to disperse. The three Caucasians immediately run in different directions, one apparently holding something dark in his hand. The police do not pursue any of the three, but drive on, returning 10 minutes later to see Smith still standing outside the bar. As the police stop and get out of their patrol car, Smith begins to run, holding something in his waistband with both hands. With police in close pursuit, Smith continues to run for blocks, disregarding their repeated commands to halt. After hurtling a fence, Smith surrenders to the police, then throws a handgun to the ground, saying "Ok, you got me." Smith is federally charged with possession of a firearm by a convicted felon. 18 U.S.C. §922(g)(1), 924(e)

In adapting the facts of a case from the docket from Eastern District of Pennsylvania, I hoped to preserve the "real world" context of an inner-city setting. I crafted facts to enhance their ambiguity and make it inevitable that students would interpret events, not just recite them. The problem is rife with policy issues, e.g., racial profiling, the balance between individual liberties and governmental interest, and always shifting Fourth Amendment concerns. It is this balance that the students must strike as they take on their roles as prosecutors and defenders.

The students are provided with a series of 4th Amendment decisions – the "closed universe" of legal authority on which they will ultimately rely. *Terry v. Ohio* [392 (US 1 (1968)](4th Amendment allows police to conduct a stop and frisk based on articulable, reasonable suspicion; *Illinois v. Wardlow* [528 US 119 (2000)](defendant's headlong, unprovoked flight from police in high crime area gives rise to reasonable suspicion justifying a *Terry* patdown); .

Florida v. J.L. [529 US 266 (2000)] (anonymous tip to police that a young black man standing at a bus stop was carrying a gun insufficient to warrant a *Terry* patdown); *California v. Hodari D.* [499 US 621 (1991)](seizure occurs when a defendant is physically restrained by police or submits to their show of authority); *U.S. v. Navedo* [694 f. 3d 463 (3rd Cir. 2012)] (mere flight from police insufficient to give rise to *Terry* patdown). Using these cases, students inevitably must discuss the problem of racially biased policing and the notion that racial profiling does not give rise to "reasonable suspicion.'

The Salmon "scaffold" courses are structured in five-week modules or "Stages" of e-learning, with each week devoted to single stage. I altered her model to accommodate the specifications for e-learning and real-time learning, and then adapted it to my problem. Because my students might not be familiar with working on-line in discussion boards, the emphasis during Stage 1 is on making technology accessible to a wide range of students.[48] What I find most challenging in Stage 1 and Stage 2 is trying to convince students that I am not interested in a prepared script: the purpose at this point is nothing more than to establish an on-line identity, and to reach out through a post to at least one other participant.[49]

At Stage 3, some Professor feedback to selective "e-tivities"[50] occurs. In Stages 4 and 5, the potential for discussions both demanding and controversial develops, and e-moderators can facilitate the collaborative efforts of the students by "weaving" and "summarizing" ideas.[51] With proper support from the Professor, e-moderators are engaging in high level

[48] Salmon, *supra* note 37 at 35.

[49] Salmon, *supra* note 37 at 68. In a more sophisticated version of this model, students create on-line identities through avatars. Salmon explains: "Virtual worlds are social environments, not games; their participants each have at least one avatar (a virtual representation of themselves), able to move around in the 3D environment and interact with other avatars."

[50] Salmon, *supra* note 13 at 6 [Explaining (E-tivities) were first developed using text-based computer-mediated environments such as bulletin boards or forums. That's the easiest place to start….Learning resources and materials (what people once called 'content') are involved in the design and delivery of e-tivities, but these are to provide a stimulus or a start (the 'spark') to the interaction and participation rather than as the focus of the activity. So e-tivities give us the final break point from the time-consuming 'writing' of online courses."]

[51] Salmon, *supra* note 13 at 184-185.

("thick") reasoning with students in what Salmon calls a "constructivist" approach to learning.[52] The chief moderator – the Professor – assumes the responsibility to create the "sparks" that allow for more sophisticated and reflective learning.

The facts of *Smith*, with the overlay of U.S. cultural history, force the students into the "thick" areas of race relations and the judicial system. Each Stage is accompanied by ungraded discussion sessions and in-class discussions with culture brokers and me. Students thus have the opportunity to make headway into the social, political, and legal issues that they will confront reading the law. As I said initially, the outline described here will be adapted to a distance model followed by a real-time component, but in the limited set of examples that follow, it can be argued that thick reasoning skills develop – suggesting the methods described are worth the effort. With the vast scope of cultural influences to inform the practice of teaching foreign lawyers, we can begin to envision practices where every stage of the writing process offers opportunities for intercultural communication.

Salmon's Stage 1: Induction Phase – Access and Motivation

The moderator, e-moderators, and technical support staff facilitate early virtual communications. Every effort is made to ensure students have access to Blackboard discussion posts and technology for synchronous and asynchronous communication, as well as all other interactive features available. [53]

During this Stage, discussion messages always clarify the purpose of the activity, or as Salmon renames it, "e-tivity."[54] For instance, I posted this message to the students: "In one or two sentences, describe whether you have any expectations for this legal writing course. For example, what knowledge are you hoping to gain, and what skills are you hoping to develop?" Among the responses I received are the following:

> As an in-house counsel, I expect to get some knowledge about how to do legal research more efficiently and obtain some skills that could help me continuously improve my language capability toward highly professional, precise and persuasive legal analysis and writing.
>
> In the legal research course of many months ago, I always got the comment "less is more" from the professor. So I hope to be concise and to the point in my writing.
>
> I am a public prosecutor and my job requires me to write a lot of legal documents. I want to learn more analyzing skills and writing skills to improve my work in the future.
>
> From my personal angle alone, it is never suspicious that legal writing is greatly significant. Therefore, I would like to learn all of the knowledges about legal writing course.
>
> I want to write materials clearly and sentences with words that don't have to be deleted. But it seems really a long way to go. I hope to shorten my searching time and get relevant information quickly and precisely.
>
> I hope to reinforce my writing skills as a professional legal practitioner. I hope to improve and perfect my English writing skills.
>
> I hope to grasp the essential skills of legal writing in order that I might communicate better with counterpart lawyers by drafting legal memos, opinion and other legal documents more logically and professionally.

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[52] Salmon, *supra* note 38 at 53-54. Salmon's view of social constructivism enable allows participants "to reflect on and discuss how they are networking and to evaluate the technology and its impact on their learning processes. These higher-level skills require the ability to reflect upon, articulate and evaluate one's own thinking. Participants' thoughts are articulated and put on view online in a way that is rarely demonstrated through other media. In that sense, the role of reflection contributes in a unique and powerful way to each individual's learning journey (Hunt 2001).

[53] Every class in Beijing has 2 elected class monitors whose job is to oversee the welfare and academic participation of their fellow classmates. It can be an effective way for a professor to "get the word out" in ways that might not be possible otherwise. So there is no small irony that I have had to resist drawing the Beijing class monitors into the effort of bringing their fellow classmates into the mix when trying to assure group participation. It is surely a mark of ethnocentrism that I refused to have students police students, and it is surely a problem worth studying for its cultural contextual importance.

[54] Salmon, s*upra* note 13 at 5.

> I want to be a better storyteller in professional work. I am quite interested to learn how powerful writing and persuasion can be forged.

This short sampling demonstrates the diversity of responses: from the common but unrealistic wish to "perfect" one's writing, to the far more Western goal of becoming a better "storyteller." I chose to respond to the post regarding the Professor in Beijing who had remarked that the student should remember "less is more." It suggested that students were being given excellent advice, but insufficient practice actually to begin the process of editing. I had students discuss the idea of "less as more" as a goal in writing. After some discussion, they concluded that the class they had just attended focused on finding cases and case briefing. Although the students could "tell" me what skills they had learned, it was not yet clear that they were proficient in "showing". Why should less be more?

The discussion served as good preparation for teaching the skills of summarizing and paraphrasing. The earlier posts had been mandatory, but Teaching Assistants now posted a message to which students could respond or not: "X student responded to professor's message by saying she wanted to "perfect" her English. Do you think this is a realistic goal? What help do you think you could use in improving you own writing"?

These discussion boards addressed concerns students could not easily raise in a conventional classroom setting with a Professor. Some students suggested that they would like to have help correcting grammar and punctuation. In response, the Teaching Assistants stressed that editing and organization were greatly valued in this community, and that getting started writing was often far more difficult than learning grammar and punctuation. But the most common requests were for "models" of writing. E-moderators are usually more successful than moderators in explaining the questionable value of models.

Stage 2: Online Socialization

At this Stage, participants benefit from e-moderators who are particularly suited to helping students work toward the always difficult transition from "telling" to "showing." "E-moderators" use posts to encourage students get to know one another as members of a group that will learn and grow together. In addition, letting an e-moderator post questions helped enormously is dispelling fears that students felt when addressing their teacher directly.[55]

At this stage, e-moderators facilitate socialization in seemingly simple ways. For example, the E-moderator offers the simple instruction: "What are the most popular given names in your culture?" "What is the origin of you name?" "Does it have any special cultural significance?" This question can be broadened a bit, for example, by asking. "Do you have an 'American name'?" "Was it chosen for you or did you choose it yourself?"[56] "Does it have any special significance – cultural or otherwise?"[57] As Salmon argues, however, these kinds of activities depend for their effectiveness on the e-moderators explicit directions and the degree to which she clarifies what does not need to be disclosed.[58]

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[55] Salmon, s*upra* note 37 at 213 (Salmon explaining "Asking direct questions can sometimes be problematic. For instance, in traditional Chinese culture, asking questions (particularly of teachers and parents) is not generally encouraged. So being urged by the e-moderator to ask questions online may not translate naturally into action, and may need active and continuous – albeit sensitive – prompting and support. As a corollary, in some cultures, there can be an expectation that the teacher will "tell" and the students will learn what the teacher says. A preoccupation with assessment and 'getting through the work' can follow. All of these may translate into an expectation of authority by the e-moderator on the part of the participants. It's impossible in a short time to change this. However, creating an atmosphere of equality and the e-moderator setting up structured activities will help.")

[56] This is a common practice for English Language learners in China.

[57]Questions based on those suggested for Stage 2 by Gilly Salmon

[58] Salmon, *supra* note 37 at 213-214, "Salmon explains "Personal disclosure online as part of socialization into the group, which some of us may take for granted if we are used to the Anglo-American style, is again not

In Stage 3, students are introduced to the concept of "stop and frisk," with seminal Supreme Court case *Terry v. Ohio.* In their first graded exercise, they are assigned the role of either defense lawyer or prosecutor, and must persuasively summarize and paraphrase the facts found by the suppression court in *U.S. v. Smith*. Anticipating that students have not yet practiced university or academic paraphrase and summary, Teaching Assistants offer on-line teasers to help orient students to the task. At this Stage, the students are largely unconcerned with the key question of whether the police based their actions on Smith's race. They are far more concerned with general issues of criminal procedure, and the fundamental differences between the Judge's role in the U.S. and in China. Accordingly, a Teaching Assistant's discussion board offered the following post:

> According to *Terry*, how would you determine the standard for a reasonable suspicion or probable cause to stop or/frisk a person walking on street? How much circumstantial evidence is needed for the police to find reasonable suspicion more objectively? Can the police officer make the conclusion depending more upon his own subjective perception? How would a judge be able to determine a subjective perception of the police?

Notably, there was only one response to this post:

> I think there should be some specific guidelines to help the police to decide in each specific situation. This kind of guideline may be made by experts, experienced policeman, also should be comprised with the spirit of criminal procedure law and the constitution. If every policeman performed with the police power according to the guideline rather than his own feeling, it can guarantee the objectiveness in some extent. In general, Judge should pay respect to the police guidelines in each case. But if judge don't agree with the specific rules of the guideline, he can put the rule aside in a specific case.

No one responded to this post, I suspect, because of the ambiguity of the student's message. Yet, the message that the e-moderator posted needed a good bit of unravelling by the students as well. Until very recently, Chinese Judges wrote very little, that might compare to the judicial opinions and orders so common in U.S. legal culture. After reading *Terry*, and certainly after reading *Wardlow* (the next assigned case), students are aware that police, lawyers, and Judges must follow (not make) the law. Additionally, the student who wrote the sole post seems to be wrestling with his own cross-cultural misconceptions about the limits of the police in determining reasonable suspicion. In China, a Judge's role is to gather facts and reach the correct decision. This, in addition to their sketchy grasp of U.S. criminal procedure, leads many students to misunderstand the role of persuasive language in a crafting a statement of facts.[59] One option would have been explicitly to correct those misconceptions. Thick reasoning is much more likely to be acquired, however, by interrogating the cross-cultural implications of procedure in China and the U.S. Accordingly, the e-moderator posed these questions:

> How would a police officer handle a "Terry-like" situation? Can you identify the U.S. Terry standard and compare the two jurisdictions. Are police in China encouraged to use objective or subjective methods of deciding when to question someone?

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necessarily the norm for all cultures. And some will be more generally reticent about articulating the thoughts online. Really good e-tivities exploring cultural differences at Stage 2 will help lay the ground for the valuing of all contributions. Make it clear that people do not need to disclose personal information, and avoid posting your own information based on marital status or career achievements, since they may otherwise 'set the tone.'"

[59] Students will not study criminal procedure, and so, would rather discuss the law than wrestle with the language. We limit the discussion of the law to the cases assigned, and the outline of a motion to suppress evidence as a necessity, not in any desire to stifle their desire to learn. Discussion boards, Lexis CALI lessons, and other materials are available to answer legal questions outside the purview of the problem.

The e-moderator then focused on *Terry* and criminal procedure issues to help students think of ways they could set out the facts that would highlight or minimize the reasons for police suspicion. She was able to weave isolated points with the Terry standard and so lead the students to begin to create a checklist of significant facts. Additional facts were added over the course of several posts, giving students both considerable information to work with and an atmosphere of collaboration and shared knowledge. Students were thus encouraged to harness and refine their language without fear that perfect answers were required.

This experience underscored the differences between the Chinese and American English rhetorical styles. Chinese students understand the role played by persuasive technique in the adversarial system – at least in theory. When faced with a question of rewriting facts to favor one side or the other, however, the demands placed on their language often lead them down the wrong path: what students hope to find is legal answer that will obviate the need to manipulate language. This is where they feel least comfortable and the first place the U.S. legal writer should be going when framing facts persuasively.

The assignment also demonstrated that students have difficulty omitting facts. They resist summary and paraphrase, using as much original language as possible. During their formal study of English, they were not taught the skill of varying language to suit different audiences. They are frustrated by our failure to provide them with models and our insistence that they make (and learn from) their mistakes.[60]

An atmosphere of trust is essential to overcoming these impediments. Examples of poorly expressed facts are placed on Blackboard (for all to review and discuss) and on Powerpoint to aid class discussions. A special effort is made to address the two categories of distortion most commonly found in the students' factual recitations – exaggeration or outright fiction. A typical example of defense counsel exaggeration:

> Some ten minutes later, while Thomas Smith was still standing outside Norm's Bar and enjoying the music spread from the outside, the marked police vehicle suddenly roared back and the two fierce policemen got out of the vehicle, running to Thomas Smith with curses in their mouths.

I witnessed reactions to this exercise in a real-time class. Interestingly, the student laughter that grew as they read the Powerpoint slide was far more confident than the laughter described at the beginning of this essay. This was shared laughter that suggested to me that the students were beginning to learn from their own hyperbole. If this exercise were to take place online, it would have been preceded with a discussion of using emoticons and "Netspeak."[61] This contrasts nicely with the student reaction to "The Road to *Brown*." With proper guidance, students were beginning collaborate to recognize and correct their mistakes. In this way, the subtler tools of persuasion began to be employed.

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[60] *See* Spanbauer, *supra* note 423 (arguing that for students educated in the ideology of collectivism, "It is not enough to simply provide models of examples of written analysis and to instruct students to use deductive or critical analytic paradigms in creating documents and arguments. It is also critical to explain why we use these models and though help students understand the models and instructions we provide by reference to their own system of legal writing and analysis so they can reflect up and consider how the two systems differ.")

[61] Salmon, *supra* note 38 at 64 (Explaining "I've used the term 'Netspeak' in this book for the kind of action-based communications I've tried to harness….Talking online, sometimes called 'Netspeak,' lacks the facial expressions, gestures and conventional that can be important in communicating face-to-face and in conveying personal opinions and attitudes. In most online platforms participants and e-moderators alike must always be alert to the potential for ambiguity. This phenomenon led to the development of 'smileys' or 'emoticons' as a substitute… [for example Netspeak uses <> to indicate an action, such as a giggle or a look. Get everyone to show an action in their own networds. Abbreviations for actions are fine if everyone understands them: for example, <g> for grin. It would be a good idea to explain new networds at least for the first two or three times you use them. If this exercise were to take place online, it would have been preceded with a discussion of using emoticons and "Netspeak.")

During Stage 3, Teaching Assistants concentrate on those who might need more guidance or support. Students are required to write a short bench memo applying the five assigned cases. Simple sequenced assignments ask students to summarize cases and weave together a growing analysis. Salmon points to two techniques that support the five-stage model:

> Weaving captur[es] key aspects of an earlier task that have not been discussed in sufficient depth and encourages additional exchanges…. Summarizing acknowledges participants' input and brings to discussion to an end, highlighting its key contributions. It may be produced by participants.[62]

Students will be unsure of what makes writing clear and persuasive. Although it might seem preferable to suggest the "IRAC" rubric earlier in the Semester, efforts to use facts to scaffold persuasive writing helps students cross boundaries between the legal argument style they have been taught in China and what they are learning in the U.S. [63] My goal here is to work students through the tiers of assembling an argument (without resorting to models) that the instructor can then edit.[64] At the same time, the Teaching Assistants and I continue to create discussion posts and exercises that allow the students to interact and understand the links between theory and practice.

Although most of my students will be competent speakers, only some students will be proficient at structuring an essay.[65] From an earlier but still very useful article discussing, among other things, Chinese writers' developmental style, I infer that my students frequently desire models of organization to practice -- or even copy --and strive for formal perfection in language because their competence in writing, organized units of thought is so delayed.[66] U.S. composition teachers must be mindful that many Chinese students have been taught to value correct sentences level writing over organized, revised writing.[67] Given that the students have a fundamental respect for judicial hierarchy, and are hard pressed to argue that published opinion should be distinguished, it is no surprise that the essays generated through

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[62] Salmon, *supra* note 38 at 64.

[63] Contrastive rhetoric scholars have long debated how language culture translates into discourse. Among the most controversial is Robert Kaplan's 1966 article "Cultural thought patterns in inter-cultural education. In T. Silva & P. K. Matsuda [Eds], Landmark essays in ESL writing. (11-25). Mahweh, New Jersey: Lawrence Erlbaum Associates, Inc. (2002). Here Kaplan categorized style by culture and geography, arguing that "Oriental" languages "would strike the English reader as awkward and unnecessarily indirect." (3). Criticism was plentiful and often harsh. Still, Kaplan's conclusions ushered in contrastive rhetoric as one way to approach how cultures learn argument and persuasion. More recently, scholars have asserted that Chinese pedagogy does value "conciseness" but those who embrace Intercultural rhetoric, e.g., Ulla Connor, see other facts less important in explaining Chinese writing style as "cultural orientations toward self, other, society, and social interactions." See Ulla Connor, Contrastive Rhetoric: Cross-Cultural aspects of second language writing. Cambridge: Cambridge University Press, 1996.

[64] See Spanbauer *supra* note 5, 420-421 citing to Benson & Heidish, *note* 72 at 317-318 (noting "[R]esearchers assert that 'teaching writing as a manageable and changeable process can be a powerful idea for many ESL students; the problem however, for writing teachers in getting ESL composition students to adopt a broader view of writing is in finding was to loosen their grip on the focus on the written product and its form, that which is so often viewed as the immediate measure of success in many writing classes.'" *See* also

[65] Bernard A. Mohan & Winnie Au-Yeung-Lo, *Academic Writing and Chinese Students: Transfer and Developmental Facts*, 19 TESOL QUARTERLY 515, 522 (1985) ("While English-speaking students may be competent speakers of the language, they are not necessarily competence at the discourse level is widespread.")

[66] *See Id.*

[67] *See* Bernard A. Mohan & Winnie Au-Yeung-Lo, *Academic Writing and Chinese Students: Transfer and Developmental Facts*, 19 Tesol Quarterly 515, 528 (1985) ("Thus, the difficulties of Chinese students writing in English may be better understood in terms of developmental factors: Ability in rhetorical organization develops late, even among writers who are native speakers, and because this ability is derived especially from formal education, previous educational experience may facilitate or retard the development of academic writing ability. In other words, be should be aware of the late development of composition ability across the board and pay particular attention to students' previous educational experience.")

Stage 3 are likely to contain elements of more traditional Chinese as well as Western learning techniques. In any case, ambiguities must be embraced and negotiated throughout.

Stage 4: Knowledge Construction

By Stage 4, students should no longer ignore policy issues as they search to find legal answers to questions. Yet they are reluctant to address race. For instance, a student in the role of a prosecutor argued:

> The Prosecutor is content to note that the case is controlled by Wardlow. Flight from police in a high-crime area at nighttime is enough for reasonable suspicion. Mr. Smith and Mr. Wardlow do the same thing. Both run from police for unprovoked reason.

Students in the role of defense counsel seek refuge in *J.L.* and *Navedo:*

> Fla. V. J.L. also can be applied in the present case. The core facts of J.L. case is an anonymous tip. Smith was seized because police received an anonymous tip.
> There are some reasons for applying United States v. Navedo in the present. Like in Navedo, Smith ran from the police. This is not suspicious.

This failure to address race suggests strongly that the students' thin reasoning is still at work. The Professor's goal here is to encourage students' thick reasoning so that they will understand on their own (not by copying models) that race is at the heart of this 4th Amendment problem.

These exchanges help students to explain, among other things:

1) Unlike in Smith, in *Wardlow* only one suspect fled.
2) How *Florida v. J.L.* addresses the questions of race,
3) Why the Court in *Navedo* stated that its decision would be the same regardless of whether or not the actions that gave rise to *Navedo*'s arrest took place in a "high-crime neighborhood."

During Stage 4, students must begin to manage their own construction of persuasive language.[68] The principles of critical analysis are engaged through active thinking and online interaction and include "critical analytical thinking including judging, evaluating, comparing and contrasting and assessing.[69] As Salmon envisions it, the Professor as e-moderator create "sparks" to promote independent thought.[70] The culturally provocative sparks "can introduce the idea that there may be multiple perspectives and solutions.[71]

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[68] Salmon, *supra* note 13 at 30.
[69] *Id.*
[70] Salmon, *supra* note 37 at 44. It is at this point that I recognized the wisdom of Salmons words: You may feel tempted to skip to Stage 4 from the start of your online programme! However, the previous stages are an important scaffold for success.
[71] *Id.; see* Salmon *supra* note 7 at 77-78. A telling example of improved skills occurred when the students viewed a video of Xi Jinping's 2014 New Year's Speech. I was confident that they would find his speech dull and unpersuasive and his manner wooden. I fully expected them to see their President as a speaker not to be emulated. I could not have been more wrong. Indeed, as students laughed during parts of the speech, I had not the slightest idea why. (Any more than I did not fully understand when they laughed at portions of "The Road to Brown.") They told me that it was a very Chinese speech and a very modern one. They were laughing because it was indicative of the kind of inclusiveness the President was seeking, which they found sophisticated, but, at the same time, a bit heavy-handed. He wanted to convey how much he disapproved of the rest of the world's war-mongering, but did so subtly. When I poked fun at the stiffness of this delivery, one student jumped up and gave a brilliant impromptu rendition of Chairman Mao's animated style, suggesting that if I preferred that kind of presidential rhetoric, then I could have it! After a brief rendition of a bit of President Ronald's Reagan

The students' final Smith assignment is the preparation of a persuasive memo or brief for the prosecution or the defense. Before their persuasive memoranda have been finalized, the students must present oral arguments to a panel of Federal Judges. Preparing for oral argument provides an opportunity for the students to prepare their language and hone their thick reasoning skills. Students can benefit by expressing their concerns about the final product, but their ideas need not be seen as complete and correct. Although they know that the issue of race will arise, they seem to be unprepared to respond to the question that puts the issue most starkly:

> How can it be reasonable to pursue the African American suspect but not the Caucasian suspect?

Students now readily discuss the race issue in class, in small groups, and on Blackboard's discussion board. By this Stage, they plainly understand that racial profiling could not comprise reasonable suspicion to stop and frisk Smith. And still, quite predictably, the discussions continue to reveal reluctance to discuss race in what was supposed to be a purely "legal" argument:

> Police stop only Smith, who is black. But if his behavior is suspicious how does race matter?

Or a question directed to the inflexibility of "legal law":

> American judges must follow legal law only. Why should judge care if Smith is not white?

To address their insecurities, a Teaching Assistant's discussion board offered the following post entitled "Feeling Confident"

> Take turns sharing a strategy you have used to feel more confident in public speaking, and also point to a strategy one of your fellow students has described and why it might be useful.

Many students responded to this post by capturing the very ambiguity of "thick reasoning":

> My classmate says that she must believe her story but the story I want to tell cannot be proved 100%. Imagine, when you believe you are telling a truth to someone. What will be in your mind? I am not lying. I must prove that. Let them know the real story. They should believe me. Then you will have no time to be nervous.

The cultural implications of this post include the question: how certain does one have to be before making an argument?

Stage 5: Finding the Audience

Presenting oral argument proved to be enormously helpful in moving students from thin to thick reasoning by requiring them to address issues of argument and audience expectations. This final section includes samples from draft briefs that students finalized after oral argument.[72] These materials, as well as discussion board postings, demonstrate the value of acquiring cultural dimension gradually, in a fully immersed English setting with Professor as moderator and Teaching Assistants as co-moderators.

"There you go again!" speech, we were able to come to terms with the relative successfulness of different styles of the rhetoric of politicians. Another student suggested rather gently that if I were more aware of Chinese rhetorical style, I would understand how much had been conveyed from the way the President used his fingers and tapped the table. A new understanding was being built.

[72] Using oral argument as a stage of the brief writing process will be discussed in a separate article.

As I reviewed the students' final drafts, it was apparent that the race issue gave rise to abundant examples of thick reasoning. Once again, absent racial profiling, the police plainly had a reasonable basis to stop and frisk Smith. The question of whether race played a role in their decision to stop only Smith (and not his Caucasian counterparts) touches on law, policy, and equity, but only now was it addressed.

As I have shown, employing "thin" reasoning, students initially were reluctant to tread into deeper, more charged waters. By the time they wrote their final drafts, however, this had changed. As might be expected, those students in the role of defense counsel made greater use of the race issue:

One student offered the following "Question Presented":

> Is the flight from polices of an African American defendant, with failure to pursue three Caucasians by polices [a] sufficient [basis to suppress].

In reciting the facts, one student pointedly noted that although the police pursued Smith because he held something in his waistband:

> 10 minutes before [the officer] also saw my client's white friend holding something dark in his hand [while he] ran [but] does not do anything.

In arguing that the gun should be suppressed, a student stated that he:

> cannot explain why [the officer] chased my client and not Caucasian holding something dark in his hand.

Another student asked:

> If reasonable suspicion is based from the experiences of the officers, why was the behavior of my client suspicious, not the Caucasians?

Another student put it more succinctly:

> The Terry investigation stop of a defendant by the police is not supported by reasonable suspicion if it is because of race.

Although the students assuming the prosecutor's role had greater difficulty with the race issue, they understood that they could not ignore it. One student stated the Question Presented as follows:

> Whether the police pursuit of the defendant was based on race?

The same student sought to answer this question in his factual statement:

> The Caucasian ran when the police told him to do so. The defendant run only when he thought the police might be searching him.

Another student argued as follows:

> By waiting to run until the police walked toward him, the Defendant acted more suspiciously than the three Caucasian friends.

Finally, a prosecutor offered the following policy argument:

> This case is about the general interests of crime prevention. The court needs to balance the interest against intrusion of undivided rights and the safety of the community.

Although not free of error, these analyses are both adversarial and reflective of thick reasoning–both essential to persuasion.

Over the course of the Semester the students have thus become more comfortable in the realm of uncertainty and "thick reasoning." Students are taught paraphrase and synthesis through multiple opportunities to put legal language into their own words. Although this method may not produce U.S. legal writers, it will likely produce Chinese lawyers with a commitment to improving their communication in English. Perhaps it will produce many Chinese lawyers with a modestly raised consciousness about adversarial argument, written and spoken.

From their readings and discussions in class with "culture brokers" and with me; from conferences; from exchanges with Judges; and from their own discussion groups on-line, the students have drafted arguments that reflect thoughtful and original analysis through their exercises in critical thinking.

Part IV: Towards a Better Failure – The "Inverted" Classroom

If there was single moment that I saw as the point of embarkation for my next failure, I would pick the post to which I referred earlier:

> My classmate says that she must believe her story but the story I want to tell cannot be proved 100%. Imagine, when you believe you are telling a truth to someone. What will be in your mind? I am not lying. I must prove that. Let them know the real story. They should believe me. Then you will have no time to be nervous.

To recognize the level of ambiguity that comes with a system that can come to different conclusions with identical facts suggests a powerful moment of "thick" reasoning. It further suggests that the scaffolded approach serves a real pedagogical purpose. It would not have been possible for the student to appreciate the purpose of adversarial writing without the earlier Stages.[73] While I think that Salmon's model can certainly be incorporated into a part-technology driven and part real-time curriculum, it might easily be incorporated into other methods with greater success.

The examples and ideas expressed here simply serve to shine light on the need for greater cultural context for Chinese students before they come to study in real-time in the United States. If our goal is to help students toward a necessarily gradual immersion in "thick" reasoning U.S.-style, then, I hold that it is the responsibility of Professors in China to take part in a collaboration of on-line and real-time "thick" reasoning exercises. The best vehicle for this, I believe, may be found in the model of an "inverted classroom" mentioned earlier.[74] An inverted classroom could offer just that opportunity for "negotiation" and "accommodation" in language and the law.[75]

In making my proposal, I assume a course of study in China followed by a shorter period of study in the U.S. Typically, legal research is taught early in the Semester by a U.S. instructor in China. The course consists of Lexis research and classroom lectures. Students are given a research plan for most legal problems. The instructor identifies the problem, moves to search terms, searching legal encyclopedias, ALR, and law reviews, then on to statutes, cases, and shepardizing. By the time the students come to the U.S., they need a refresher because they have done very little research in the intervening months.

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[73] Salmon *supra* note 38 at 44 (explaining that: "Most studies show that you can get students to exchange information [Downing et. Al., 2007] but a learning and interaction scaffold and skilled e-moderation intervention are essential for high-level constructivist collaboration.")

[74] Erie, *supra* note 7 at 35.

[75] Erie, *supra* note 7 at 31.

I propose introduction of cultural critical thinking at a very early stage. Students would thus have more time to develop the skills of "thick" reasoning," something that I hope have demonstrated is very difficult to do over a summer course. Some argue that the students have not used English long enough to acquire "thick" reasoning skills. But by coordinating the materials throughout the students' course of study in China and the U.S.— with a recurring focus on the question of race relations and U.S. law-- students may gain a nuanced and sophisticated background. Because instruction will be "inverted" using pre-delivered materials from the U.S. based summer instructor, the real-time Professor in China could conduct his class as a laboratory for research in the context of critical thinking.

Support for this method is well established, particularly by librarians who teach legal research and see the importance of legal information literacy.[76] Chinese law students presently have the far less demanding task researching the country's civil code. The sheer vastness of the U.S. legal system is bound to make their legal research exercises perplexing, at the very least.[77] My strategy, then, might be quite easily employed by the Professor introducing the research agenda in the context of the Fourth Amendment, Supreme Court case law, and secondary materials that allow for a gradual immersion in the social realities of stop and frisk.

With the "inverted" method, the Summer instructor might send students documentary films, such as *Pull of Gravity,* described as an "intimate portrait of three men in different stages of reentry from prison to society, offering compelling insights that can help shape responses from family members, parole officers, law enforcement officials, and the social networks upon which reentry is dependent."[78] The students might also view that website, and find reviews from sources heralding the importance of such a documentary, and a video from Philadelphia Mayor Michael Nutter including a description of the film: "This is real. This is Philly. It's real life. They didn't pull any punches. But they're telling a real story."[79] In addition, Hollywood fare like, "Anatomy of a Murder" might be included on a voluntary "movie night," (that already exists in Temple's Beijing Program). Again, these additions would be offered on a voluntary basis for now, but might serve as "sparks" for students' later study in the U.S.

There are limitations to how well a "flipped" legal writing classroom can work. Nevertheless, the Professor facilitating lab work in real time and the Professor offering "thick reasoning" materials can work together to help students learn in a more active environment. For instance, Evidence and Criminal Procedure Professors could almost certainly use some of their course time to guide general discussions that would support students' growing critical reasoning skills. Again, the critical thinking materials would be pre-delivered. These might include research hypotheticals that focus on areas that students are then studying.

Once so much groundwork has been laid, by the time students arrive in the United States, they will be far better equipped to take full advantage of their study here. With the inverted class, students' socialization in "the American tradition with its bristling adversarialism" will be far more attainable.[80] In the smaller culture of the U.S. classroom,

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[76] Lemmer, *Supra.* note 15.

[77] *Id*. at 463 (explaining "[T]he goal for those of us who teach legal research to international graduate law students is to develop their legal information, preventing this debilitating frustration and preparing them to successfully complete legal research using a broad array of U.S. legal and nonlegal materials."

[78] Amy Rosenberg*, Pull of Gravity* www.pullofgravity.com. "(U.S. Attorney) Memeger said the relationship with Sawyer and Kaufman grew out of the U.S. Attorney Eric Holder's mandate in 2010 to address violent cri me in cities through prevention and a focus on reentry as well as prosecution. 'You can't arrest your way out of the problem,' Memenger said…." Most offenders will get back into the community."

[79] *Id.*

[80] Erie, *Supra* note 7 at 78 and note 64. (noting "It is received knowledge that this is a learned behavior derived from the socialization process of law school. When I was pursuing my LLM at TULS, a woman from

students will have time to engage with Professors and decide what they truly need to know to be proficient in thinking critically and making a persuasive argument.

4 Conclusion

To help Chinese students begin to understand the foundations and purposes of U.S. models of legal communication, a classroom manner that is frank and pragmatic is a start. We must, however, make available to Chinese foreign nationals all the resources available to their U.S. counterparts. We must help them pass through the boundaries of culture with appropriate guides. Further, through new ways of delivering information – like those offered by Gilly Salmon and Ulla Conner in an inverted or "flipped" classroom – we may help our students realize their goals as writers and communicators in a space that is "post – ideological." In this way, "Failing better" might benefit the global legal community.
References (You may use footnote , but references should also be provided.)

Switzerland comments that the American students were exceptional to the extent that they challenged the professor. After studying in a U.S. law school for three years and comparing my interactions there with those at TULS, it seems the American classroom grooms its students to be assertive, outspoken, and argumentative. The cauldron of the U.S. law school classroom, through the Socratic Method, mock trials, mooting and like exercise, places a premium on oral confidence in making legal arguments. This suggests that Americans are the outlier in this regard. It is not that the Chinese lack this mode of engagement with the material and those who teach it, but in fact, most countries value less antagonistic approaches.")

Stefan Wrbka*

The European Case Law Identifier Search Engine and Multilingualism: A Legal Certainty Perspective on Business-to-Consumer Situations

Abstract: This paper focuses on the European Case Law Identifier Search Engine, which the European Commission launched in May 2016 as a central gateway to national and EU case law. At the centre of the project stands the wish to improve the accessibility and transparency of case law to stimulate cross-border trade. The study links these considerations to the pluralistic legal certainty concepts introduced by Canaris and Bydlinski and by doing so aims to evaluate the search engine potential from the viewpoint of multilingualism of its implications for legal predictability, the practicability of the application of law and legal accessibility. The focus is put on the relevance for cross-border business-to-consumer situations, which constitute one of the most essential challenges for strengthening the internal market.

Keywords: European Union, legal certainty, consumer law, ECLI, European Case Law Identifier search engine, linguistic diversity

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1 Introduction

In May 2016 the European Commission (Commission) launched the European Case Law Identifier Search Engine (ECLI-SE) on the e-Justice Portal.[1] According to accompanying Commission press releases, the ECLI-SE aims to facilitate European access to justice by providing a user-friendly instrument to search for case law from the EU Member States (Member States) and some supra-/international courts centrally with the help of one single interface (European Commission, 2016a; European Commission, 2016b). All relevant stakeholders, i.e., the judiciary and other representatives from the legal profession, legal

[1] https://e-justice.europa.eu/content_ecli_search_engine-430-en.do.

academics, businesses and consumers should, so the Commission, be able to benefit from this new gateway. If that were true, the ECLI-SE could eventually contribute to the strengthening of EU cross-border trade and the internal market in general.

With this paper I would like to take a closer look at the impact of the ECLI-SE. More precisely, I intend to comment on the ECLI-SE from a legal certainty perspective. In this context I will primarily focus on cross-border B2C situations and try to answer the question as to whether (and to what extent) the ECLI-SE will meet the requirements of enhancing the accessibility and simplifying the understandability of foreign case law (as defined by the Commission and other EU stakeholders).

The paper will commence with background information on the ECLI before outlining the ECLI-SE and its most relevant features. It will then continue with a look at legal certainty in general and legal certainty in the EU and the Member States in particular. Comments on the ECLI-SE from a legal certainty perspective with a special focus on B2C transactions in the EU and recommendations for further steps will round off this paper.

2 The European Case Law Identifier (ECLI) and consumer law

Over the last roughly four and a half decades initiatives to enhance EU cross-border trade and the internal market have resulted in various instruments with the aim to simplify transactions within the EU. With respect to EU consumer law, the development of more general rules on the one hand and more specific B2C concepts on the other have run more or less parallel ever since.

From a private international law point of view, for example, the Rome I Regulation and its predecessor, the 1980 Rome Convention, deserve extra mentioning. Rules on international civil procedure, in particular the Brussels regime and the Lugano Convention add important procedural frameworks. All of them contain special consumer provisions. In the context of B2C transactions numerous more specific directives and regulations have introduced tailor-made, to some extent harmonised specific substantive and procedural law norms and standards. At a different occasion I already dealt with the latter group, i.e., special B2C instruments in more detail and tried to identify what kind of substantive and procedural law framework(s) would be most suitable to stimulate cross-border B2C transactions in the EU (Wrbka 2015). My observations there as well as a development at the EU level which has not gained a degree of attention comparable to the discussions in the fields of substantive and procedural consumer law yet—the creation of the European Case Law Identifier (ECLI)—have added one more interesting layer to the Europeanisation debate of consumer law in the EU. In the following I would like to outline and discuss the ECLI and the recently introduced accompanying search engine—the ECLI-SE—with a special focus on consumer law.

The first question that needs to be answered is a quite obvious one: “What is the

ECLI?". Over the years a mix of several factors has shown the need to introduce a mechanism that would allow for an easier identification of case law in the EU. Policymakers at the EU level had intensified their endeavours to standardize B2C law in the Member States. Although they have partially accomplished this goal, national policymakers have successfully managed to reserve a considerable degree of legislative self-determination by limiting the extent of full harmonisation and keeping the material scope of EU legislation under control. Most recent EU legislation in the field of consumer law follows full targeted harmonisation (at best) and regularly takes a narrower approach than originally envisaged by the Commission. Overall one can justifiably argue that attempts to extend EU consumer legislation have come to a certain standstill.

At the same time, however, the wish to enhance cross-border transactions in the EU has further gained momentum. The Commission started to shift its priorities in the B2C sector to electronic sales and services—e-commerce seems to rank high on the legislative agenda. Online Dispute Resolution (ODR) and the Digital Single Market (DSM) initiative can be listed as examples. In addition to the e-commerce debate, substantive (consumer) lawmaking has generally and increasingly been accompanied by stronger procedural law efforts to simplify and speed up dispute resolution. Initiatives that include specially crafted injunctions, shortened procedures for small claims as well as alternative means of dispute resolution (including the just mentioned ODR) illustrate this. The Europeanisation debate has transcended the substantive law border and has constantly been extended to procedural law. Another recent project, the e-CODEX initiative constitutes an additional pillar of strong practical relevance, as it aims to facilitate cross-border information exchange in procedural matters. Most of these examples show that EU stakeholders have increasingly taken account of new technologies, most notably the internet.

In the midst of attempts to take the consumer acquis to the next level, additional considerations emerged. It had became obvious that a growing cross-border market would—in addition to advanced substantive and procedural law rules to regulate cross-border situations—necessitate an easier identification and enhanced research of case law. Initiatives of a more technical nature were considered as being the most suitable supplementary tool. Several pertinent online projects have been launched. Some of the more prominent examples include Caselex, Dec.Net, Jurifast and JURE. The EUPILLAR database, launched in early 2017, is one of the latest additions to this list. Collections by academic research groups should not be left unmentioned. With respect to consumer law, for example, the case law database installed in the framework of the EC Consumer Law Compendium has to be pointed out. Admittedly, most of these projects were quite ambitious and—within a relatively narrow scope—useful. But none of them was sophisticated and comprehensive enough to offer a system that could significantly improve the accessibility of case law.

In 2008 initiatives to take the issue of simplified case law identification to the pan-EU

level reached their first "official" peak. EU and Member State protagonists stressed the need to enhance the knowledge of case law throughout the EU in the European Parliament (Parliament) and at workshops (co-)initiated by the EU (European Parliament, 2008; Van Opijnen, 2008a; Van Opijnen, 2008b). Ultimately it might have been a report of the Working Party on Legal Data Processing (e-Law WG) (installed by the by the Council of the EU [Council]) that convinced EU stakeholders to take more concrete action.[2] The e-Law WG deliberated on and elaborated a possible framework for an enhanced case law identification mechanism. Based on the research work of the e-Law WG, the Council published a statement in early 2011 (ECLI Council conclusions)—the idea to introduce and institutionalise the ECLI as an alternative tool to improve access to justice was born (Council 2011).[3] Not only the Council, but also the Commission stressed the importance of the ECLI from an accessibility perspective and—after the launch of the ECLI—explained that the ECLI was introduced "to facilitate easy access to … national, foreign and European case law."[4] The "Building on ECLI" project (BO-ECLI), initiated by the EU to enhance the ECLI (and its accessibility), adds that the ECLI serves the function of increasing the overall transparency of case law and links both ideas—improved accessibility and transparency—to the pivotal rule of law concept. In the words of BO-ECLI this sounds as follows:

> In the light of article 6 of the European Convention on Human Rights, accessibility of case law is necessary to ensure scrutiny of the judiciary by the public. By improving this accessibility, both in qualitative and quantitative sense, transparency of the judiciary will be reinforced and the rule of law strengthened.[5]

Summarising these statements one should note that the ECLI aims to strengthen both the transparency of and accessibility to case law and by doing so should—as will be explained briefly—contribute to legal certainty at a pan-EU and inter-Member State level.

Without going into technical details—this is not the intention of this paper and should be reserved for legal informatics commentators—the instrument, i.e., ECLI, can be described as a code that identifies case law, in principle, at the Member State and EU levels. The ECLI code consists of a set of five components:

(1) The term "ECLI" (to identify the label as a ECLI-reference);
(2) A code to link the decision to a certain country, the EU or an international organization (country code);
(3) A code to identify the court that issued the decision (court code);
(4) The year of the ruling;

[2] http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017377%202009%20INIT.
[3] On the issue of accessing case law see, in particular, its § I.2, § I.3 and § 4.2.(d) of its Annex.
[4] https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do?init=true.
[5] http://bo-ecli.eu/ecli/benefits.

(5) An intelligible ordinal number to distinguish the decision from other decisions of the same court and published in the same year (ordinal number).

The five components are separated by colons as follows: [ECLI]:[country code]:[court code]:[year]:[ordinal number]. A judgment by the General Court of the Court of Justice of the European Union (CJEU) could, for example, look as follows: ECLI:EU:T:2013:257. This ECLI would refer to the 257th document of the General Court (abbreviated with "T") of the CJEU published in 2013.

With respect to items 3 (court code) and 5 (ordinal number) above, the participating Member States and institutions enjoy—within a predefined range—certain freedom. Although the use of the ECLI clearly identifies court decisions, the court code and ordinal number components are not fully standardized in a way that national, international and supranational stakeholders (ECLI-users) would have to fundamentally align their traditional approaches to the identification of case law. Stakeholders are free to abbreviate their courts in any unambiguous way and to apply ordinal numbers of their choice (only limited by some outer ECLI parameters that most notably relate to the maximum number of digits to be used for the ordinal number).

As a supplement to the ECLI code, ECLI-users are further asked to introduce a set of metadata. This standardized metadata aims to facilitate the search- and accessibility of ECLI case law in particular by supporting the introduction of a searchable online database that is fed with ECLI data (Council 2011, § 2 Annex).

Applying the ECLI is not mandatory. Recent data of 2015 shows that (only) approximately half of the Member States are either already actively using the code or at least preparing its launch at the national level. At an supra-/international level, the Court of Justice of the EU (CJEU) as well as the European Patent Office and the European Court of Human Rights have already introduced the ECLI (Van Opijnen and Ivantchev, 2015: 166).

3 The European Case Law Identifier search engine (ECLI-SE) in brief

The ECLI project would not have been complete without the possibility of finding case law easily, fast and without costs. In this respect the ECLI Council conclusions—in §§ 3 and 4 of their Annex—set the basis for potentially important ECLI supplements. To increase the viability of the ECLI the Council asked to set up both an ECLI website (§ 3) and an ECLI search interface / engine, i.e., the ECLI-SE (§ 4). While the first shall aim to disseminate knowledge about the ECLI in general (including a link to the ECLI-SE on the ECLI website), the ECLI-SE had to be designed to offer a user-friendly gateway to ECLI case law to guarantee that the end-users (ECLI-SE end-users) had an actual chance to access ECLI data easily. By aiming to improve the access to case law the ECLI-SE has to be considered as a key factor in improving the level of legal certainty throughout the EU. I will return to this

concept at a later point.

The ECLI-SE, presented to the public on 4 May 2016, is crafted as a search interface that is supplied with ECLI data by the ECLI-users. Being a centrally accessible database, the ECLI-SE intends to offer the ECLI-SE end-users a one-stop shop when looking for case law from the EU, its Member States and some additional institutions (as shown in the previous chapter). To maximize the operability of the ECLI and the ECLI-SE, the Commission (the central institution in charge of the functionality of the ECLI-SE) and the Court of Justice of the EU (the ECLI co-ordinator) were chosen to monitor and—if and where found necessary—enhance the project.

The Commission decided to embed the ECLI-SE into the e-Justice portal, an interface that had been developed as an electronic tool to facilitate the involvement of EU citizens in EU-related topics offering information on selected substantive and procedural law issues. The actual launch of the ECLI-SE benefitted from preparatory work that was carried out by authorities in a handful of Member States and some institutions. Spain, the Netherlands, Slovenia, the Czech Republic, Germany as well as the CJEU and the European Patent Office took the leading role, contributing the vast majority of ECLI data to the ECLI-SE. One month after its launch the ECLI-SE offered already more than 3.5 million links to ECLI case law. The total number of published links has been increasing ever since and—at the time of writing this article—stands at more than 5.2 million results.[6] The ECLI-SE is free of use and—as of February 2017—can (with the exception of Irish) be accessed in all official languages of the Member States. The interface offers three types of searches: A simplified search where—as is the case with most online search engines—it suffices to input a term or a phrase into a search bar, a semi-advanced search tool (accessible via the "Wizard" button) that allows for a more refined search and an advanced search (accessible via the "More criteria" button).

With the help of the semi-advanced search function the search can be subdivided into the search for a group of words (in any order), an exact word / phrase or interchangeable alternative words. It is rounded off by the possibility to exclude search results that contain particular words / phrases. Explanations (accessible via "tip" buttons) guide the ECLI-SE end-user through the process.

The advanced search function goes even further. It introduces 14 additional search criteria that range from the ECLI of the case and the issuing institution to criteria such as language of the decision, its abstract or description and date of the decision or the relevant field of law. Explanations (again accessible via "tip" buttons) simplify also the advanced search. In practice, specifying search parameters is advisable in a variety of cases. A simple search for "consumer", for example, will—as of February 2017—lead to more than 19,000

[6] ECLI-SE search conducted by the author on 7 February 2017.

search results.[7]

The results page lists ECLI cases with their most relevant data. The following is an actual, random result example of a search I conducted on 8 June 2108 on "consumer law" and shall explain how the ECLI-SE works:

> ECLI:NL:GHDHA:2015:3876 NL
> ECLI provider: Raad voor de rechtspraak (Council for the Judiciary)
> Issuing country or institution: Netherlands
> Issuing court: Gerechtshof Den Haag
> Decision/judgment type: Judicial decision
> Date of decision/judgment: 26/05/2015
> Date of publication: 09/02/2016
> Wording of decision/judgment: This metadata is available in the following language(s) only: NL
> Field of law: Civil law
> Abstract: This metadata is available in the following language(s) only: NL
> Description: This metadata is available in the following language(s) only: NL

This data refers to a decision of one of the four Dutch Appellate Courts, i.e., the second highest courts in the Netherlands, the *Gerechtshof Den Haag*—more precisely to its decision with the judgment number 3876 (of 2015). Supplementary case law data, e.g., information on the publisher / creator of the ECLI data, can be found when one clicks on the ECLI in the first line of the result. Clicking on one of the language abbreviations in the main result screen will—depending on where one clicks—lead directly to either the decision / judgment itself, its abstract or a short description in the available language(s). In our case all three are limited to the Dutch language.

The ECLI is undeniably an ambitious project and at first sight seems to provide users with sheer infinite possibilities to locate, find & research on case law. In the following I would like to focus on the EU's belief that the ECLI and its search engine will strengthen legal certainty in the EU. In particular, I will discuss the ECLI-SE in the context of consumer law from a legal certainty perspective and try to answer the question if, and if yes to what extent, it is of actual benefit in B2C situations. Before doing so, however, I will take a brief look at the core concept(s) of legal certainty in general to define the parameters for my later commentation.

4 Legal certainty

4.1 Legal certainty in general

[7] ECLI-SE search conducted by the author on 7 February 2017.

At first sight legal certainty seems to constitute a precise concept. A closer look, however, reveals that the term shows various facets. The notions of legal certainty might differ depending on the context in which it is discussed.

In legal academia legal certainty has been the subject of an abundant number of contributions. It would clearly go beyond the purpose and scope of this paper to pay due tribute to all of them. I would like to limit my discussion to two commentators: Canaris and Bydlinski. Both break the certainty concept into pieces and show that it refers to several key ideas behind law in general and the rule of law in particular.

In the late 1960s Canaris presented his view on legal certainty in his *Systemdenken und Systembegriff in der Jurisprudenz*. Canaris argued that depending on the context legal certainty could be understood in different ways. He introduced the following certainty subdivisions: Legal firmness and predictability (*Bestimmtheit* and *Vorhersehbarkeit*), legislative and judicial stability and continuity (*Stabilität* and *Kontinuität*) and practicability of the application of law (*Praktikabilität der Rechtsanwendung*) (Canaris 1969: 17). Roughly two decades later Bydlinski (with his *Fundamentale Rechtsgrundsätze*) re-conceptualised the construct and added some more certainty features. According to Bydlinski one can distinguish between the following: Legal clarity (*Rechtsklarheit*), legal stability (*Rechtsstabilität*), legal accessibility (*Rechtszugänglichkeit*), legal peace (*Rechtsfriede*) and legal enforcement (*Rechtsdurchsetzung*) (Bydlinski, 1988: 293; Bydlinski, 2011: 325).

These examples can be used to illustrate that legal certainty has to be considered as a multi-faceted concept that encompasses important theoretical and practical issues. On a different occasion I explained that the certainty expressions identified above serve, in principle, either of two key goals and could be summarised in two groups. First, legal clarity, stability, predictability and transparency contribute to the general clarification of a legal situation. I referred to this certainty manifestation as “legal clarification” (Wrbka, 2016: 13). Legal accessibility, enforcement and the practicability of the application of law could, however, be understood as adding ideas of practical fairness. I called this function “legal rationalisation” (Wrbka, 2016: 13).

4.2 Legal certainty in a EU context

In EU policy- and lawmaking legal certainty is usually found in different contexts than in the Member States, where the general certainty notions of legal clarification and legal rationalisation dominate the agenda. The reason for this is obvious. Unlike Member States’ governments and legislators, EU stakeholders have to concern themselves primarily with the question of how to enhance the internal market, i.e., how to get rid of perceived trade barriers between the Member States. This attributes both a new meaning and additional challenges to exploring and defining legal certainty at the EU level. The two larger sub concepts of legal clarification and legal rationalisation do not fully suffice to explain this endeavour.

When looking at EU consumer law- and policymaking one can primarily identify two issues that relate to legal certainty: Harmonisation on the one hand and the impact of linguistic peculiarities on the other.

Harmonisation of domestic law might arguably be the most obvious expression of legal certainty at the EU level. Related strategies have been revolving around endeavours to standardize rules that Member States had autonomously and diversely enacted at the domestic level. Traditionally, EU policymakers have considered the resulting fragmentation of national laws as an impediment to the growth of the internal market. In this sense legal certainty has (in particular in a B2C context) to be understood as attempts to simplify cross-border transactions by flattening differences in the level of national consumer protection (Wrbka 2015, pp. 217–221 with further references). Based on the belief that the older technique of introducing minimum standards and leaving Member States significant legislative discretion (by basing EU consumer law largely on minimum harmonisation) had not been sufficient to create a market free of national legal deviations, EU policymakers have gradually shifted their focus towards increased full harmonisation.

A number of pertinent EU consumer laws include statements that can be used to illustrate this. One of the most recent examples is the new Package Travel Directive of 2015 (2015 Package Travel Directive) that in a (targeted) full harmonisation way replaced the older minimum harmonised Package Travel Directive of 1990. The new regime does not simply aim to enhance the legal protection of travellers by revising the existing provisions and—additionally—by regulating some new issues that were left outside the scope of the older directive. Reading between the lines, it becomes obvious that the (targeted) full harmonisation structure of the 2015 Package Travel Directive is based on the quest to maximize legal certainty for the involved stakeholders.[8]

A more explicit reference of full harmonisation to legal certainty can be found in the Timeshare Directive of 2009 (2009 Timeshare Directive), which—just like it is the case with the more recent Package Travel Directive—was the result of an attempt to replace the minimum harmonised consumer acquis with a fully harmonised regime. Recital 3 2009 Timeshare Directive explains this as follows: "In order *to enhance legal certainty* and fully achieve the benefits of the internal market for consumers and businesses, the relevant laws of the Member States need to be approximated further. Therefore, certain aspects of the marketing, sale and resale of timeshares … should be *fully harmonised*" (emphasis added).

In a similar vein was the Proposal for a Regulation on a Common European Sales Law (CESL Regulation Proposal). Its Article 1(2) read as follows: "This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty." The accompanying Explanatory Memorandum (CESL Explanatory

[8] See, in particular, Recital 2 of the 2015 Package Travel Directive.

Memorandum) added the following: "[A] Directive setting up *minimum standards* of a non-optional European contract law would not be appropriate since it *would not achieve* the level of *legal certainty* and the necessary degree of uniformity to decrease the transaction costs" (European Commission, 2011: 10; emphasis added). With a focus on consumers the CESL Explanatory Memorandum further explained that consumers "would also enjoy more certainty about their rights when shopping cross-border on the basis of a single set of mandatory rules" (European Commission, 2011:4)

The most specific and comprehensive full harmonisation reference to legal certainty might arguably be found in the 2011 Directive on Consumer Rights (CRD). Its Recital 7 reads as follows:

> Full harmonisation … should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level.

Even from a legal certainty perspective the value of full harmonisation of consumer law has, however, not remained undisputed. In legal academia and the Member States, in particular, opposition has grown over the years. Several commentators have been arguing that the Commission's harmonisation plans would actually decrease the level of legal certainty (at least in the Member States). Three references shall exemplify this.

The first two examples, comments by Stürner and Loos, date back to the debate on the CRD Proposal, which—in a fully harmonised way—covered a broad range of the consumer acquis. Stürner explains that the use of full harmonisation might cause the necessity to make some difficult and potentially far-reaching policy decisions at the domestic level, and warns of possible negative effects as a result of legal "friction" (*Friktion*) (Stürner, 2010: 20). According to Stürner domestic legislators would have to choose between prioritising legal stability / continuity or legal clarity / predictability. In either case legal certainty might be at risk. His main argument rests on the fact that the material scope of EU consumer law is usually narrower than its national counterparts, which often are applicable also to scenarios that are not covered by EU consumer law. In case of full harmonisation national lawmakers would have to opt for one of two solutions. One could either choose to implement EU law narrowly, i.e., limit its effect to those cases covered at the EU level. Other scenarios would still fall under the traditional national regime. If the national legislator opted for this solution, legal clarity (and predictability) might be impaired, because predicting the legal consequence in a concrete case would become more difficult. Various questions might arise, such as: Is the affected party a consumer or a business? If it is a consumer, is the case at hand covered by the

implemented EU solution or still covered by the unaffected traditional solution at the national level? The other legislative choice would be to extend the applicability of the concept introduced at the EU level to cases that do not fall under the fully harmonised scope. This, however, would stand in contrast with the wish to strengthen the certainty notions of legal stability and continuity with respect to well established domestic rules.

Loos agrees with Stürner and explains that national legislators would have to identify and opt for the lesser of two evils. In Loos's words the critique is framed as follows: "The [national] legislator is not to be envied in making its choice [note: in the just outlined scenario], as both approaches bring clear disadvantages, will require extensive legislation and may bear unexpected consequences" (Loos, 2010: 70).

Shortly after the adoption of the CRD Grundmann reaffirmed the sceptical voices by focusing on Canaris and Bydlisnki's certainty notions of stability and continuity. He argued that attempts not to allow for domestic solutions that would surpass the EU standards, i.e., not following minimum harmonisation, would stand in clear contradiction to century-long national efforts to search for the best suitable solution for citizens. In Grundmann's words the concerns read as follows: "The more broadly the full harmonization mode is used, the more frustrated become the advantages that the national systems of law have achieved because of centuries of scholarship and practice—advantages in substantive justice and in legal certainty" (Grundmann, 2013: 126). Pursuant to this view, citizens who rely on their home Member States' protective regime would be met with disappointment if the domestic rules had to be abandoned as a consequence of fully harmonised standards.

With its 24 official languages the EU is a multilingual community—some authors use the term "plurilingual" (Jacobs, 2003). Paunio stresses the importance of this to live up to the European motto "united in diversity", arguing that "[m]ultilingualism constitutes one of the very cornerstones of the European project" (Paunio, forthcoming[2017]). However, multi-/plurilingualism presents further challenges for legal certainty in the EU—in principle regardless of the harmonisation level.

For the sake of stabilising and further enhancing the internal market, Member States and national stakeholders need to understand, apply and implement EU law uniformly (unless Member States are left legislative discretion). In this context several authors have pointed out that linguistic diversity might complicate the process and could put legal certainty at risk, because terms might be understood in different ways depending on the language used. In this respect translation and translators play a decisive role in securing a high level of consistency. Reaching a sufficiently high level of consistency can, however, be difficult. Paunio, for example, succinctly refers to the translation process as "[l]ost in translation" (Paunio, 2013: 5).

Cosmai takes a closer look at the implications of language from a legal certainty perspective. Referring to actual examples of terminology used in EU legislation, Cosmai

explains that the risk of getting translations wrong is high as a consequence of linguistic nuances. He emphasizes the importance of EU guidelines to simplify the wording used in EU materials. The 2003 Joint Practical Guide [of the European Parliament, the Council and the Commission] for the drafting of legislation within the Community institutions (note: Now available in a 2013 version)[9], in particular, would deserve appreciation, as it calls for special care when using terminology and concepts that could be understood in different ways throughout the EU. To reduce the risk of misunderstandings and improper translations, the language used in original sources should be as simply and unambiguous as possible (Cosmai, 2014: 85–88). As an alternative (or ideally as a supplementary step) Baaij asks for a stronger involvement of legally trained translators. This, so Baaij, would further increase the consistency of legal translations (Baaij, 2015: 119).

But even the use of legally trained translators could not guarantee a perfect situation. One complicating factor in endeavours to safeguard legal certainty with the help of legal translation is the fact that language is limited and linguistic differences exist. The linguistically most suitable expression might still have a narrower or broader meaning than in other languages or might represent a vaguer / more unambiguous legal concept. Concrete examples are given by a number of commentators. Sage-Fuller, Prinz zur Lippe and Ó Conaill, for example, use the phrase "obstacles to translatability" (Sage-Fuller et al., 2013: 506-509) and show with the help of just 3 out of 24 official languages—French, English and Irish—how difficult it is to find absolutely suitable legal translations. Authors including Kjaer (Kjaer, 2015), Felici (Felici, 2015), Strandvik (Strandvik, 2015) and Filipowski (Filipowski, 2014) provide for examples from additional languages. Against this background Van der Jeught confirms the view that linguistic diversity can create practical certainty / consistency problems (Van der Jeught, 2015: 131–132). Taking reference to the CJEU's decision in *Kerry Milk*[10] Van der Jeught explains that in addition to merely translating, comparisons of different language versions and eventually interpretation of potentially confusing expressions might be necessary to clarify a situation—a task that is time consuming and difficult to be achieved, likely also for legally trained translators. Overall, there is a thin line between satisfying the call for legal certainty by offering legal translations of EU law materials and causing legal uncertainty as a consequence of "inherent imperfections of legal translations" (Pozzo, 2016: 142).

Hence, despite its undeniable benefits, legal translation is not seldomly stretched to its limits (Conway, 2012: 149). This could eventually have an impact on the concrete legal treatment of situations in the Member States, as (even fully) harmonised provisions could be understood in different ways. Some civil procedure law authors use this argument to stress

[9] http://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf.

[10] Case C-80/76, *North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries* (1977) ECLI:EU:C:1977:39.

the importance of the CJEU in safeguarding legal certainty and enabling EU integration. Storskrubb, for example, emphasizes the importance of "creating a genuine judicial space" (Storskrubb, 2008: 67) to enable companies and citizens to engage in cross-border activities without the risk of falling subject to diverse legal treatment (that could also result from different legal translations). In this respect the CJEU plays a key role to clarify the meaning of ambiguous legal terminology and concepts and by doing so facilitates the consistent application of EU law in the Member States. Cloots is one of the authors who stress the CJEU's "supervisory and guidance function" (Cloots, 2015: 260). She explains that Member States might—(also) as a consequence of linguistic peculiarities—understand the parameters introduced at the EU level in different ways or implement EU law in a nuanced / unique way (that from a translation / linguistic perspective would still be acceptable). Like already Storskrubb, she points out that the CJEU undertakes to ensure that the terminology used by the EU legislator is understood in the same way throughout the EU. I will return to the language issue later in this paper.

5. A look at the ECLI-SE from a legal certainty perspective

5.1 Law databases and legal certainty in general

Likely compelled by the findings that harmonisation efforts had not fully succeeded to exploit the potential of cross-border trade, the Commission had to look for supplementary tools to improve legal certainty. Differences in national law were—despite stronger harmonisation—unavoidable. The CJEU and national courts have been playing important guiding roles, but finding case law has remained complex. An important result of the Commission's efforts was the introduction of the ECLI and the ECLI-SE. In particular with the latter one the Commission aimed to take the legal certainty discussion to the next level. This becomes obvious when one recalls the earlier mentioned calls for improved transparency of and accessibility to case law that both relate to the general certainty notions as defined by Canaris and Bydlinski.

The use of case law databases is a key example of how to improve legal certainty. It primarily addresses the earlier discussed certainty notions of legal predictability, clarity, accessibility and law enforcement. This becomes particularly obvious and important in an environment like the EU, where the market consists of a large number of jurisdictions, each with their own legal peculiarities and nuances. Without the possibility to access and compare domestic and foreign case law efficiently and time effective, even the most advanced legal certainty strategies (as discussed earlier) would have a significantly limited effect.

The importance of case law databases has been repeatedly emphasized by EU stakeholders—in particular from a legal certainty perspective. Two examples shall illustrate this. In the framework of the CESL Regulation Proposal the Commission repeatedly referred

to case law databases in the context of legal certainty. In the CESL Explanatory Memorandum, for example, the Commission expressed the following view:

> In order *to enhance legal certainty* by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, *the Commission should create a database comprising the final relevant decisions*. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission (European Commission 2011, recital 34; emphasis added).

Also in the CESL Explanatory Memorandum the Commission discussed the financial consequences of a possible CESL case law database and arrived at the conclusion that on a short- and mid-term basis significant costs might indeed arise. One would have to create a distinct interface and feed the instrument with decisions from a multitude of jurisdictions. Long-term, however, the costs should decrease and the investment could pay off, because stakeholders would become more and more familiar with the CESL and its provisions (European Commission,2011: 10-11). This in return would—so the Commission—boost the internal market, because contractual parties could rely on one common set of sales rules for cross-border sales (European Commission, 2011: 4).

The CESL Regulation Proposal itself contained a provision to facilitate the introduction of a CESL case law database in its Article 14 ("Communication of judgments applying this Regulation"). Its first paragraph asked the Member States to notify the Commission immediately about CESL decisions issued by domestic courts. Collecting court decisions centrally should—so Article 14(2) CESL Regulation Proposal—enable the Commission to install a publicly accessible database of national and supranational CESL judgments.

In its feedback to the CESL Regulation Proposal the Parliament's Legal Affairs Committee (JURI) reaffirmed the importance of a CESL case law database. Embedding this idea in a catalogue of "flanking measures", JURI referred to the Commission's plan and added that a possible interface should "be fully systematized and easily searchable" (European Parliament 2013, Article 186a[2]).

The JURI reference, in particular, highlights two general legal certainty aspects of a case law databases: First, case law databases should be centrally supervised and uniformly conceptualised. Second, databases should be user friendly in a sense that they are easy to use / browse. One could refer to these two features as "operationality." In addition to this, one could identify two supplementary challenges (which are of less technical nature): First, search results should actually (and not only theoretically) be useful ("usefulness"). Second, the database visibility must be secured ("visibility"). In the following I would like to take a look at the ECLI-SE from the perspective of legal certainty and will aim to answer the question whether all three parameters—operationality, usefulness and visibility—are

sufficiently taken account of and reflected by the instrument (in its current format). The absence of a Member State obligation to use the ECLI for national judgments will be left aside in the analysis, but undeniably has a negative impact on the overall viability of the ECLI-SE.

5.2 The ECLI-SE from the viewpoint of legal certainty

5.2.1 Operationality

Facilitating the accessibility of foreign and supranational case law with the help of a centrally accessible database has the advantage of (possibly) enhancing legal certainty—more precisely primarily its predictability notion—without concerning itself with legal harmonisation. The operationality parameter refers to this issue of a more technical nature. Put into a question, one could ask how the relevant database is principally conceptualised.

In my outline of the ECLI-SE I showed that from an operationality perspective the ECLI-SE looks promising. Although the database is fed by individual stakeholders, two EU institutions—the Commission and the CJEU—act as monitoring and guiding regulators. The widely standardized ECLI (Note: Differences are—in a relatively narrow range—only permissible with respect to the court code and the ordinal number) should guarantee that the actual identification of ECLI case law is easily done. On top of that the multilingual search interface allows ECLI-SE end-users to access the database in their mother tongues—or at least in a language that the end-users would be capable of.

5.2.2 Usefulness

When it comes to the question of the actual usefulness of the ECLI-SE, language—in several ways—plays in important role. In particular two issues deserve a slightly closer look: Language in its literal meaning and language understood as (professional, i.e., legal) terminology. To understand the conclusions in this sub chapter better, one should briefly return to the phenomenon of multilingualism and the actual consequences of linguistic diversity. The EU treasures the languages spoken by its citizens. Various language projects aim to strengthen multilingualism, here understood as the ability to speak (or at least: understand) more than one's mother tongue. Most notably they include study and training programs ("Lifelong Learning Programs"), such as *Erasmus*, *Leonardo da Vinci* and *Comenius*.

Since 2001 the Commission has mandated four "Eurobarometer" studies (Eurobarometer language studies) to assess the interrelationship between the EU and its languages (European Commission, 2001; European Commission, 2005; European

Commission, 2006; European Commission, 2012). Some of the results reveal some important data for the present analysis.

Questions covered by the most recent Eurobarometer language study, the 2012 Eurobarometer language study, addressed a number of key issues such as languages other than the mother tongue spoken in the EU; the level of spoken language ability in the EU; passive language skills in the EU; the frequency and situations of use of language in the EU; and the citizens' perspective on multilingualism in the EU and language translation. The answers to the questions related to (foreign) language skills and multilingualism, in particular, deserve a closer look.

The 2012 Eurobarometer language study showed that the ability to understand and speak foreign languages is widely believed as being advantageous and important throughout the EU. Almost all survey participants (98%) would encourage their children to study a foreign language (European Commission, 2012: 7). An overwhelming majority (88%) agreed that being capable of foreign languages would benefit also their own personal development (European Commission, 2012:7). A comparable majority of respondents (84%) expressed the opinion that every European citizen should be able to be capable of at least one foreign language (European Commission, 2012: 8).

Despite the common conviction that all official EU languages should enjoy equal treatment, most survey respondents (69%) believe that having one common European language would be of high value for the Europeanisation process (European Commission 2012, p. 9). In terms of ranking the official EU languages according to their perceived importance, English was by far the most often mentioned one (79%) (European Commission, 2012: 75). The runner-ups finished with a significantly lower score. French and German reached only 20% each and Spanish in fourth place 16 % (European Commission, 2012: 75). Multiple indications were possible, but all remaining languages reached only low one-digit percentage points.

The 2012 Eurobarometer language study further revealed data on the actual language skills of EU citizens. The results show great room for improvement. Only slightly more than half of the respondents (54%) answered that they could communicate in at least one foreign language. The numbers for those who could speak at least two / three non-native languages were expectedly even much lower (25% and 10% respectively)—multiple indications were again possible (European Commission 2012, p. 12). This left 46% of the respondents with no foreign language skills. When asked which foreign language the study participants could either speak well enough to communicate, follow when used on the TV or radio or read a newspaper or book in, English was (again) the most popular answer with 38% (speaking) (European Commission, 2012: 19) and 25% (both with respect to listening and reading) (European Commission, 2012: 29 & 32) of those who were capable of at least one non-native language. Remarkably (but maybe not unexpectedly) no other language scored higher than

12% (speaking) (European Commission, 2012: 19) and 7% (listening and reading) (European Commission, 2012: 29 & 32) with non-native speakers. The study put the results also into a historical context and showed that multilingualism had, in general, not been on the rise over the years. English and Spanish were the only two notable exceptions that had shown a significant increase in the number of non-native users compared to the predecessor study of 2005 (European Commission, 2012: 142).

What should be concluded from this data for the ECLI-SE? Put differently: Could the language issue be of importance for the success of the ECLI-SE—and if yes: Why and how? All relevant language studies (incl the 2012 Eurobarometer language study) indicate that the number of people who understand at least one foreign language might be higher than in many other regions of the world. At the same time it would be an illusion to think that every EU citizen (or at least an overwhelming majority) is bi- or even multilingual.

What does this imply for the actual usefulness of the ECLI-SE? Multilingualism—if understood as linguistic diversity—exists in the EU. To date one can count 24 official languages and more than twice as many indigenous regional and minority languages (European Commission, 2012: 2). If one uses multilingualism, however, in a way to refer to being capable of foreign languages to make full use of the internal market (as a consequence of—from a linguistic perspective—enhanced cross-border transaction opportunities), then the picture is far from being perfect (or at least satisfactory). With the exception of English (which is understood by slightly more than half of the non-native English speakers in the EU) no other European language is commonly understood—let alone spoken—by non-native speakers in the EU.

With this fact in mind it should be helpful to stress that older EU(-wide) databases of any kind, e.g., CELEX, have traditionally been offering not only searches, but also search results in a variety of official EU languages. To facilitate the translators' jobs and further facilitate the general understandability of search results, the EU has also been providing a range of terminology databases. Furthermore, to enhance legal clarity and access to legislation, EU directives and regulations are usually published in all official languages. CJEU decisions can be accessed in a multitude of official languages as well, at the very least in English, but in many cases in all main or even all official languages. In his earlier mentioned analysis of the language impact on legal certainty Cosmai confirms that translations of EU materials are a significant certainty enhancement and adds some more examples, such as administrative acts (i.e. materials other than EU legislation) and information materials (for businesses and EU citizens) (Cosmai,2014: 114–116).

In the case of the ECLI-SE the starting point for usefulness considerations is not much different. As shown further above, the database was introduced to improve the level of legal certainty in the EU and its Member States. The interface is clearly and simply designed and offers a wide range of search parameters—a fact that serves operationality requirements. The

search results immediately reveal the languages that court decisions, abstracts and descriptions are available in.

However, when taking a closer look, one will realise that language questions pose arguably the biggest issue with the ECLI-SE. Member States are not required (thus far not even encouraged) to offer translations of their domestic case law, case abstracts and descriptions. The only explicit reference to multilingualism found in the ECLI Council conclusions refers to the translation of the name of the decision issuing court. § 4(2)(a)(iii) of the Annex of the ECLI Council conclusions asks for translations of the court names "in[to] all [official EU] languages, according to the multilingual thesaurus of names of organizations as set up to be used within the e-[J]ustice portal, and with hyperlinks to the descriptions of these courts as comprised on the e-Justice portal."

However, unlike it is the case with the names of the courts, the ECLI Council conclusions missed the chance to ask for the introduction of a truly multilingual database in a sense that the search results (and not only the names of the courts) could be accessed and read in a multitude of languages. When randomly looking at search results, one will see that in the vast majority of cases national case law is available only in the official language of the particular Member State. More than that, even the case abstracts and descriptions are in the vast majority of cases available only in the language of the source country. Unless the data comes from a Member State with English as the official language (which thus far is rather the exception), the published cases would not be understandable by the average ECLI-SE end-user. As explained above, no other language than English is spoken / understood by more than twelve percent of non-native speaking EU citizens. This in combination with the limited availability of results in the English language shows that only an insignificant percentage of possible ECLI-SE end-users would actually be able to read the court decisions, case abstracts and descriptions.

An additional linguistic fact complicates the situation. Results contain a high level of special (legal) terminology. With respect to the average non-legal professional ECLI-SE end-user it is justified to argue that in many cases legal concepts might be too complex and not commonly understandable—regardless of the end-user's language proficiency. Legal terminology databases and easily understandable case annotations are, however, not integrated into the ECLI-SE. From a legal certainty perspective this has to be regretted, because it would need a legally trained intermediary to clarify and interpret the legal implications of uploaded court decisions. Hence, consumers could (at best) benefit only indirectly from the ECLI-SE.

5.2.3 Visibility

The third parameter of the analysis concerns the visibility of the ECLI-SE or—from an end-user's perspective—the awareness of the existence of the search engine. Undeniably, the

stakeholders' awareness is generally of prime importance for the viability of any instrument introduced at the EU level. I already dealt with this issue more extensively elsewhere (Wrbka, 2015: 269–270 & 298). In the context of the present analysis the key question is whether the ECLI-SE is visible enough to call it a successful tool.

Data with respect to the ECLI-SE itself is still pending, which might be best explained by the fact that the database was introduced only recently. In absence of pertinent data it might be helpful to take a look at awareness studies that focused on comparable instruments. One example is the European Judicial Network in civil and commercial matters (EJN-civil) launched in late 2002. Conceptualised primarily as a platform to facilitate the judicial cooperation between the Member States, the ECJ-civil introduced the European Judicial Atlas in civil matters (European Judicial Atlas) that contains information on procedural EU law. With the launch of the e-Justice portal (i.e. on the same platform that hosts the ECLI-SE), the European Judicial Atlas was integrated into said e-Justice portal.

In 2014 the Commission published an external evaluation of the EJN-civil activities (2014 EJN-civil report). One prominent question covered by the report was the overall visibility of the network. The 2014 EJN-civil report drew a worrisome picture. According to the national EJN-civil contact points, i.e., the national institutions that monitor EJN-civil activities at the domestic level, the general awareness of EJN-civil activities was insufficient. Even among the legal profession the contact points assessed the visibility at a low level—70% of representatives from the legal profession were said not to be aware of EJN-civil (European Commission, 2014: 84). The report arrived at the conclusion that "EJN-civil seems not to be known enough among the legal professions and the general public … [and that] steps need to be taken to increase the visibility of the EJN-civil among the legal professionals and the general public" (European Commission, 2014: 56).

The 2014 EJN-civil report suggests the assumption that improving the visibility and raising awareness still remains one of the most urgent challenges to enhance the viability of instruments introduced at the EU level including the ECLI-SE. Data processed in my earlier mentioned commentary on the latter one supports this view. Even if one considered the (still low) awareness among the legal profession as somewhat satisfactory, awareness among non-legally trained / experiences stakeholders (from the business and consumer sides) would have to be called insufficient. Without strong efforts to change this situation the ECLI-SE might (at best) remain a tool exclusively to be used by the legal profession and legal academics.

6 Concluding remarks: And now?

The ECLI and the ECLI-SE were introduced to take legal certainty to the next level. Indeed, with the ECLI-SE the EU achieved something unique. For the first time ever, domestic and EU case law can now be comprehensively accessed via one search portal. Thanks to the

(largely) standardized case law identifier (ECLI), the ECLI-SE offers a promising instrument in terms of enhanced accessibility of case law. With every additionally contributing Member State this value will further rise.

However, the ECLI-SE (in its current format) shows some significant flaws. This paper pointed out the arguably two most striking drawbacks (in addition to the absence of a Member State obligation to use the ECLI)—the low awareness of potential ECLI-SE end-users and linguistic issues. Both mean a major impediment from a certainty perspective. With respect to the latter one, this paper showed that the vast majority of court decisions, case abstracts and descriptions uploaded to the ECLI-SE are available only in the source language. None of the actively contributing Member States have English—the only really widely understood language in the EU—as an official language. Hence, the understandability and usefulness of ECLI data is hampered. The absence of explanations of special (legal) terminology and the low general awareness of EU instruments further complicate the situation, in particular with respect to consumers, who—in principle—should be considered as layerpersons, both in terms of legal and linguistic knowledge. Likely positive effects for consumers would merely be of indirect nature, i.e., consumers would, in principle, only benefit from the ECLI-SE if competent, linguistically and legally experienced / trained third party stakeholders assisted them. Hence, from a legal certainty perspective the ECLI-SE fails to adequately satisfy some core expectations of the Commission. To take recourse to Canaris and Bydlinski's pluralistic certainty concepts, the ECLI-SE in its current state—primarily as a consequence of language and awareness issues—does neither significantly increase legal predictability nor the practicability of the application of law, its overall clarity or legal accessibility.

Awareness raising, the inclusion of a terminology database and translations could improve the situation. With respect to the latter one, one must, of course, note that translating case law comes at a price and is not problem-free in itself. Translations could—due to linguistic peculiarities—lead to ambiguous, imprecise results. At a more general level it should further be noted that DG Translation, the directorate general in charge of official translations at the EU level, is already now stretched to its limits, handling approximately two million pages per year in 2015 (European Commission, 2015: 3). Taking into consideration that already now the ECLI-SE comprises several million cases (not "just" pages), time, money and linguistic feasibility are big concerns (even if case translations were not centralised, but outsourced to the Member State level), in particular if one would expect the cases to be translated into all official EU languages—as is, e.g regularly the case with documents published in the Official Journal (OJ).

Yet, if one really intends to significantly enhance legal certainty with the help of the ECLI-SE, there is no way around translations (in addition to awareness raising and explaining legal terminology). Data about language abilities of EU citizens shows that

multilingualism—here defined as being capable of foreign languages—is still a big challenge in the EU. One notable exception is the English language, which is the only official EU language that a majority of non-native speakers in the EU understands. Ideally, data published in the ECLI-SE would be readable in all official EU languages. But this, as just explained, might remain wishful thinking. One (at least) temporary solution could be translating case abstracts and descriptions—if not the whole case—into English. These efforts would truly mean a significant step towards improved legal certainty.

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Law, language, and corporatehood: corporations and the U.S. Constitution

Abstract: The discourse regarding the status and standing of corporations vis-à-vis the Constitution has consistently been misdirected by the Supreme Court. The issue that has caused so much consternation concerns whether a corporation is a "person."[1] The reason the discourse regarding the status and standing of corporations vis-à-vis the Constitution has been misdirected is the consequence of the very nature of the question: "is a corporation a person in the constitution?" The question preconditions the answer with the fundamental assumption that the discourse can take place using person-centered terms. To ask whether a corporation is a "person" in the Constitution places the cart before the horse. Before the question whether a corporation is a "person" in the Constitution is asked, the question "what is a person in the Constitution" must first be asked and answered. This paper asks the question that must be asked first, "what is a person in the Constitution," and answers the question using a critical linguistic analysis and exegesis of "person" in the Constitution as a whole and the canons of statutory and Constitutional interpretation adopted by the Supreme Court. While the Supreme Court has analyzed whether a corporation is a "person" in the Constitution, it has done so on a piecemeal basis. In cases in which the Supreme Court has ruled that a corporation is a "person" in the Constitution, it has disregarded, twisted, and distorted the basic rules of English grammar and syntax and its own canons of statutory and Constitutional interpretation. This paper recommends argues that the terms "corporate person" and "corporate personhood" be abandoned because they are, grammatically and syntactically, nonsense.

Keywords: legal translation, legal terminology, legal settings, walking on thin ice, the Constitution

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1 Introduction

Not unlike the illusionist's "lovely assistant" who misdirects the attention of the audience while the illusionist performs his magical acts, the discourse regarding the status and standing of corporations vis-à-vis the Constitution has consistently been misdirected by the Supreme Court.The issue that has caused so much consternation concerns whether a corporation is a "person." The solution of the Court is that a corporation is a "person," at least for parts of the Constitution. This solution, however, is the result of the failure of the Court to conduct a critical linguistic analysis and exegesis of the use of the term "person" in the Constitution as a whole.

[1] "Person" is set in quotes throughout this article to identify it as a specific term used in the Constitution and Supreme Court rulings in order to differentiate it from the word person which has a broader meaning in general language.

Various terms such as “fictitious person”and “artificial person” have been used by the Court to describe corporations with respect the status and standing of corporations vis-à-vis the Constitution. Yet, in spite of these person-centered terms, there has been a remarkable failure by the Supreme Court to establish what is a “person”in the Constitution as a whole.

The reason the discourse regarding the status and standing of corporations vis-à-vis the Constitution has been misdirected is the consequence of the very nature of the question. The question asked is, “is a corporation a person in the constitution?”Thequestion preconditions the answer with the fundamental assumption that the discourse can take place using person-centered terms. Because the Supreme Court has failed to conduct a critical linguistic analysis and exegesis of the use of the term “person” in the Constitution as a whole the discourse is misdirected.

To ask whether a corporation is a “person” in the Constitution places the cart before the horse. Before the question whether a corporation is a “person” in the Constitution is asked, the question “what is a person in the Constitution” must first be asked and answered. That question, and therefore the answer, has been consistently ignored by the Supreme Court.

This paperasks the question that must be asked first, “what is a person in the Constitution,” and answers the question using a critical linguistic analysis and exegesis of “person” in the Constitution as a whole, rather than piecemeal as the Supreme Court has done using the Supreme Court’s canons of construction and interpretation. With the first question answered, the question whether a corporation is a “person” in the Constitution has a context and is easily answered without resorting to the linguistic gymnastics and legal acrobatics that has been employed by the Supreme Court

Amazingly, the Supreme Court has ruled that a corporation is a “person”in the Constitution without first having conducted acritical linguistic analysis and exegesis of theuse of “person” in the Constitution as a whole.While the Supreme Court has analyzed whether a corporation is a “person” in the Constitution, it has done so on a piecemeal basis. That is, it has analyzed “person” inarticles and amendments in isolation but not ionthe Constitution as whole. In cases in which the Supreme Court has ruled that a corporation is a “person” in the Constitution, it has disregarded, twisted, and distorted the basic rules of English grammar and syntax. The terms and language used to frame the discourse of the status and standing of corporations in the Constitution are critically important because language determines how we construct the social world and its legal institutions and therefore what we believe about the status and standing of corporations in the Constitution.

The rest of this article is organized as follows. First, the method and limitations are explained. Second, the roleand importance of language in constitutional interpretation, including rules of grammar and syntax, the way language directs our view of the world and our discourse about corporations, and how language is used to construct reality, is examined. Third, the relationship of the Supreme Court, language, and the social construction of corporations is discussed. Here, the focus is on Supreme Court rulings where the Court has ruled that corporations are persons or citizens in the Constitution and the methods and language the Court uses to support its rulings. Fourth I present a case for abandoning the use of “corporate personhood” and adopt the term “corporatehood” in order to realign our thinking about what a corporation is, and what it is not. Conclusions follow.

2 Method and Limitations

This paper does not trace the historical development of theories of the corporation, corporate law, or Supreme Court rulings on the status and standing of corporations vis-à-vis the Constitution over time. The historical development of theories of the corporation, corporate law, or Supreme Court rulings on the status and standing of corporations vis-à-vis

the Constitutionover time is beyond the scope of this article.While various theories of corporations have been relied on by the Court over 160 years, the end result has always been the same—corporations are persons and citizens. They are different routes to the same destination so to speak. This paper, however, is concerned only with the result and how the Court twisted the basic rules of English grammar and syntax and ignored its own canons of construction and interpretation.

Furthermore, this paper is not concerned with whether corporations should, or should not have, constitutional rights. Its only focus is on the Supreme Court's social construction of corporations as persons. It thus is not concerned with the various theories of corporations or corporate personhood. It presents no philosophical arguments regarding the nature of corporations.

To achieve that purposeI applywhat can be considered as the parol evidence rule[2] to the Constitution andconduct a thorough textual analysis of the meaning of "person" in the Constitution. That is, rather than looking outside the Constitution to determine what "person" means in the Constitution, it treats the Constitution as the final, complete document and extrinsic sources are unnecessary to explain or determine what the term "person" means in the Constitutions.While there are many things in the Constitution that justify resorting to external evidence for their interpretation (what constitutes unreasonable searches and seizures in a technological age, for example), "person" is not one of them. The Constitution speaks for itself and the meaning of "person" is abundantly clear when the Constitution as a whole is examined.

Second, I conduct a critical linguistic analysis and exegesis of the Constitution as a whole with respect to how "person" is used in the Constitution. Exegesis, from the Greek meaning "to lead out," is "the process of drawing out the meaning from a text in accordance with the context…and tends to be objective,"[3]The linguistic analysis includes an examination of the grammar and syntax used in the articles and amendments.

Third, I adopt the Supreme Court's canons of statutory and constitutional construction and analysis.The Supreme Court's canons of statutory and constitutional construction are

> "the starting point for interpreting a statute is the language of the statute itself. Absent a *clearlyexpressed* legislative *intention to the contrary*, that *language must ordinarily be regarded as conclusive*." Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al., 447 U.S. 102, (1980) (emphasis added).

Twelve years later, the Court reiterated its principles.

> "[I]n interpreting a statute a court should always turn to one cardinal canon before all others . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. (citations omitted)…when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete." Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992).

The same canon necessarily applies to interpreting the Constitution. That is, the starting point for interpreting the Constitution is the language of the Constitution itself. Absent a clearly expressed intention to the contrary, that language of the Constitution must be "regarded as conclusive." Furthermore, in interpreting the Constitution the cardinal canon is that the what Constitution says is what it means and,since the term "person" in the

[2] The parol evidence rule states "where the parties to a contract intended for their written agreement to be the full and final expression of their bargain (i.e., the writing is an integration), other written or oral agreements that were made prior to or simultaneous with the writing are inadmissible for the purpose of changing the terms of the original agreement" https://www.law.cornell.edu/wex/parol_evidence_rule (Last visited on ?).

[3]https://en.wikipedia.org/wiki/Exegesis (Last visited on ?).

Constitution is unambiguous, absent a clearly expressed legislative intention to the contrarythe inquiry is complete.

Fourth, I look for "textual clues" in the words surrounding "person." For example, in Samantar v Yousuf et al. 130 S.Ct. 2278 (2010) the Court analyzed the Foreign Sovereign Immunities Act of 1976 "as a whole" by searching for textual clues in the Act for the meaning of the term "person" as used in the Act. Based on the textual clues in the Act, the Court found that the Act did not include a person acting on behalf of a foreign state. In like manner, I search for textual clues by considering the words surrounding the term "person," but also how "person" is used elsewhere in the Constitution; i.e., in the Constitution as a whole.

Fifth, I use the Supreme Court's practice of taking the words in their ordinary meaning. For example, in Federal Communications Commission et al v. AT&T Inc., et al,, 562 U.S. ___ (2011).the Supreme Court made a linguistic inquiry into the meaning of "person" in the Freedom of Information Act where the Court noted that, "When a statute does not define a term, we typically give the phrase its *ordinary meaning* [citation omitted, emphasis added]...The construction of statutory language often turns on context." The Court went on to acknowledge that its practice when interpreting a statute is that the "language should be construed 'in light of the terms surrounding it.'"

In its various rulings that "person" means not only natural persons but also corporations which it has labeled "fictitious" and "artificial," the Supreme Court abandoned these two fundamental principles of interpretation. Rather than employing the principles of exegesisto the Constitutional text, the Supreme Court has instead opted to engage in eisegesis.Eisegesis is the opposite of exegesis. Eisegesis is "the process of interpreting a text or portion of text in such a way that the process introduces one's own presuppositions, agendas, or biases into and onto the text. This is commonly referred to as reading into the text. Eisegesis is regarded as highly subjective."[4]

3 The Role and Importance of Language in Constitutional Interpretation

Language is probably the most powerful tool for shaping abstract thought and exerts a strong influence over how one thinks about abstract domains (Boroditsky, 2001)Language not only shapes our view of the world and what we (think we) know about it, it also strongly influences perceptions of identity.Goodrich (1986) does not find it not surprising that the legal profession has recently taken an interest in interpretation and the linguistic dimensions—language and text—of discourse on legal institutions. The dominant strategies of legal interpretation are exegesis and hermeneutics (Goodrich, 1986).Goodrich points out that "One of the most interesting developments within contemporary legal theory has been the increasing importance accorded to the concept of interpretation." Only recently have lawyers and the legal academy taken a serious interest in discourse and language according to Goodrich,

Therefore, a brief review of the relationship of language toculture and the social construction of reality will serve as a prelude to, and foundation for, understanding the relationship of language and "person" in the Constitution. This will include a brief review of basic rules of English grammar and syntax since grammar and syntax are "geared to the organization of the semantic fields"(Berger &Luckmann, 1966;Searle, 1995).Using the Supreme Court's canons of construction, I will then present a critical linguistic analysis and exegesis of how "person" and "citizen" are used in the Constitution and compare how "person" and "citizen are used in the Constitution with the Supreme Court's construction of

[4]https://en.wikipedia.org/wiki/Eisegesis.

corporations as persons and citizens to demonstrate that the Supreme Court's construction corporations as persons and citizens has not validity.

3.1 Language, Culture, and the Social Construction of Reality

Social reality has been described as"ontologically subjective in that the construction and continued existence of social constructs are contingent on social groups and their collective agreement, imposition, and acceptance of such construction." (Frankenberg, 1993).In the case of Supreme Court rulings, the Supreme Court's construction of corporations is, in essence, imposed by law rather than by collective agreement. That is,American society, and lawyers in particular, are required to accept the Supreme Court's construction of corporations.[5] In the words of Berger and Luckmann (1966), "what is known as human knowledge and human societies includes the processes by which any body of knowledge comes to be socially established as reality" (Berger &Luckmann, 1966). Here, however, the social process is also a legal process.

Searle (1995) contends that human language provides the foundation for institutional ontology (Searle, 1995).Human language, he argues,has the capacity not only to represent reality but also to create new reality by representing that reality as existing. For example, language creates institutional reality such asgovernment and corporations and represents that reality as existing (Searle, 1995).The representations which constitute institutional reality are essentially linguistic; i.e., language does not just describe, it creates (Searle, 1995).

Searle (1995) further describes institutional facts as legal concepts for which there is a connection to language; viz, there cannot be institutional facts without language. With a shared language institutional facts can be created at will (Searle, 1995). Institutional facts in turn create institutional, or social, reality.

A type of institutional fact that creates an institutional or social reality by "brute force"is the creation of a corporation (Searle, 1995).Creating such institutional facts out of brute force is seen by Searle as a "conjuring trick" or "sleight-of-hand" (Searle, 1995)A limited liability corporation, says Searle, is created out of thin air, so to speak, as no pre-existing object was operated on to transform it into a corporation. A corporation is created by fiat, by simple declaration (Searle, 1995), Moreover, the process of creating institutional facts often proceeds without the participants being conscious that they are creating a new social reality (Searle, 1995).

That the problem of the status and standing of corporations vis-à-vis the Constitution is both epistemological and ontological is well-recognized, as is the fact thattheir status and standing vis-à-vis the Constitution have been socially constructed. According to Mark (1987), the epistemological challenge of establishing corporations as personswas "enormous," the result of historical and abstract arguments attempting to reconcile the meaning of "person," "artificial," "natural," and "corporation."

However, it is not just the content of what is socially constructed and accepted as reality,but also the processes by which reality comes to be socially established as reality (Berger &Luckmann, 1966)."All socially meaningful definitions of reality must be objectivated by social processes" (Berger &Luckmann, 1966).But, as noted, the social process for constructing corporations as persons is also a legal process.

As Foucault (2010) states, the production of discourse in any society is "controlled, selected, organized and redistributed according to a certain number of procedures." Another way of looking at it is that "The limiting power of a discursive field is that it engenders or

[5] "This Constitution…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby…" Constitution Article IV.

assumes consensus on particular ways of producing discourse" (Ezzamel, 2012).Constructing and (mis)directing the discourse of corporations as persons is controlled by the Supreme Court.

As pertains to corporations, the social processes and procedures that create and objectivatethe socially meaningful definition of corporations as personsis the legal process. The legal processlimits the power of the discursive field by not just assuming consensus on particular ways of producing discourse on corporations, but requiring acceptance in that the process culminates in Supreme Court rulings that corporations are persons.

Benjamin Whorf's Linguistic Relativity Hypothesissupports a causal relationship between language and consciousness (Clarke, Losoff, Dickenson McCracken, & Rood, 1984)."Language," says Whorf, "is inextricably intertwined with our perceptions of reality"and is a part of the matrix of presuppositions that determines our world view(Clarke, Losoff, Dickenson McCracken, & Rood, 1984).

Zlatev and Blomberg (2015) have shown that it is "clearly possible" that language affects thinking and note that "what Whorf …dubbed the principle of linguistic relativity appears to find a substantial degree of support in interdisciplinary research from the past two decades." They found in Whorf's (1956)principles of linguistic relativitythat there are particular aspects of language that will influence thinking, at least in particular domains.

Two such examples oflanguage as part of the matrix of presuppositions that determines our world vieware gender identity and race. The relationship of language to gender identity and race provide powerful examples of the capacity of language to influence and form our social reality which will then be used as a background for establishingthe way language influences and forms the social reality which comprises the status and standing of corporations vis-à-vis the Constitution.

3.2 Language, Gender Identity, Race, and Culture

> "I am whatever you say I am." Marshall Mathers

The discussion of the relationship of language to gender identity and race is not meant to suggest there is a relationship between gender identity and race and "person" in the Constitution. Rather, the purpose of this discussion is to illustrate the power of how language is used to construct the social reality of legal institutions.

Language and Gender Identity

Language is used to build up classification schemes in order to differentiate objects by gender among other things (Berger &Luckmann, 1966).Chew and Kelley (2007) observe that lawyers understand the power of language and "language can be a potent vehicle for subtle sexism." Furthermore, empirical evidence supports the proposition that language influences gender perceptionand can perpetuate gender stereotypes and status differences(Everett, 2013).

McConnell-Ginet (2011) also finds that attributes that make up particular characterizations such asheterosexual and woman "draw on reification's that emerge from and constitute conventional maps of social reality."This accords with Berger and Luckmann's (1966) proposition that, "language builds up semantic fields or zones of meeting that are linguistically circumscribed. Vocabulary, grammar and syntax are geared to the organization of the semantic fields. Language builds up classification schemes to differentiate objects by gender among other things."

At the same time,language can also be used as a constructive tool for redirecting perceptions and discourse (Chew &Kelley, 2007).For example, the belief that language not only has the power to form perceptions of gender but refraining from using gender-specific

language has the power to reframe perceptions of gender was recently demonstrated by the announcement by Princeton University that it will cease using gender-specific language(Li, 2016).

It is understood that "The most 'real' or actual aspect of language is that of discourse…which will be constrained by the grammatical and semantic norms of the particular language" (Zlatev&Blomberg, 2015; see also Foucault, 2010,and Ezzamel, 2012). Goodrich (2006) explains:

> Particularly in the case of the text and the discourse…the object and outcome of interpretation is the result of carefully regulated techniques and strategies of construction. The object of interpretation is most commonly circumscribed, unified and then given a meaning by means of one of several possible interpretative methodologies which will not only define what it is that has to be interpreted but will generally also legitimate or "authorize" the meaning produced. In terms of legal interpretation, the historically dominant strategies are those of exegesis and hermeneutics."

Goodrich adds that "the exegetical technique is still the strongest argument legitimizing (or authorizing) both text and interpretation."

Moreover, according to Stewart (1994), language"is the nexus, the actual and concrete expression of the language-culture-society relationship" and therefore discourse is the embodiment of both language and culture."Supreme Court opinions thus become "cultural texts" which are "a sub-group of texts that are constantly taken up and reproduced by a whole society (Assmann, 2006).Cultural texts are more than just texts as a linguistic unit (Assmann, 2006).Cultural texts refer to "every semantic unit [and] exert a binding energy on the community in a normative and a formative sense. Normative cultural texts codify the norms of behavior" (Assmann, 2006). There are few things more binding on society and behavior than Supreme Court rulings.

Berger and Luckmann (1966) are more emphatic.While institutions are socially constructedinstitutions, by the fact they exist theycontrol human conduct. They setup predefined patterns of conduct, and therefore discourse, which channels conduct one direction against many other possible directions (Berger &Luckmann, 1966). Thus, if conduct is controlled by socially constructed institutions such as corporations, discourse concerning those socially constructed institutions is likewise directed by the nature of the socially constructed institutions.

Language and Race

Kramsch(1998) argues that, as with gender, race is a social construction and thus a function of language.Frankenberg(1993) adds that, understandingrace as a social construct is vital to understanding the capacity race has to affect all other domains of society. As with any social construct, the existence of race depends on people collectively agreeing and accepting that race exists(Frankenberg, 1993).In like manner, understanding corporationsas persons is vital to understanding the capacity corporations have to affect all other domains of society.

Pertinent tothe analysis of the relationship between language and corporations and the inclusion of "person" in relation to corporations, is Frankenberg's astute observation that the very use of a term such as "race," directs the discourse. That is, race is an ontological marker which "underlies other cultural conceptualizations"(Frankenberg, 1993).The same principle applies to the ontological maker "person" with respect to corporations. That is, "person" underlies cultural conceptualizations of corporations and directs the discourse about corporations' status and standing vis-à-vis the Constitution.

Language and Interpretation

According to Benjamin Whorf, co-originator of the Sapir-Whorf Hypothesis (also known as the Linguistic Relativity Hypothesis), the "real-world," i.e., the world we perceive that has been socially constructed, is built on language (Whorf, 1956).Losoff, Dickenson McCracken, andRood(1984) explain that,"a basic assumption of phenomenology [is] that reality is individually and socially constructed, an artifact of our consciousness."

There are two forms of the Linguistic Relativity Hypothesis. The strong form, which posits that language determines how and what we think, is no longer accepted (Kramsch, 1998).Language can guide and contribute to our world view, but it does not predetermine it.However, the weak form is supported by empirical findings and is today generally accepted and suggests that there are cultural differences in semantic associations of common concepts(Kramsch, 1998).

In the English language, thesemantic associations of common concepts of "person" and corporation has been embedded within the American culture (Mark, 1987).Language is bound up with culture in multiple and complex ways (Assmann, 2006). The use of particular language is a factor in American cultural and legal institutions not only with respect to race and gender, but also with "person" and corporation. The result is that "personhood…is unquestionably central to American legal culture" (Fagundes, 2011).

Grammar and Syntax. Grammar is a part of linguistics that includesthe structural rules that govern the composition of clauses, phrases, and words (Grammar, 2016).Syntax is the part of linguistics that deals withthe basic rules of a language, i.e., the arrangement of words and phrases to create well-formed sentences in a language (Oxford Dictionaries, 2016).Grammar is related to syntax in that both dictate how words combine to form meaningful phrases and sentences.

In English, the rules of grammar and syntax are that the adjective is placed before the noun. In English, "person" and "personhood" are nouns. Words such as "natural," "fictitious," and "corporate" are adjectives.For example, in the term "natural born Citizens"[6] in the Constitution the adjective "natural born" modifies the noun citizen to distinguish natural born citizensfrom foreign born citizens who have been naturalized according to the naturalization process enacted by Congress pursuant to Article I, Section 8 (See Appendix B).Combining "fictitious" or "artificial" with "person" results in "fictitious person"or "artificial person" where, like "natural born," the adjective "fictitious" or "artificial" modifiesthe noun "person."

"Corporate" is an adjective. In the term "corporate person" "corporate" necessarily modifies "person" as required by the rules of English grammar and syntax, just as in the term "fictitious person" the adjective "fictitious" modifiesthe noun "person" and "natural born" describes the noun "citizen."But by adopting the term "corporate person" the Supreme Court has contorted the basic rules of English grammar and syntax and inverted the relation of adjective and noun. That is,in adopting the term "corporate person" the noun "person" is used to modify the adjective "corporate." By using the term "corporate person" the Court has transformed and socially constructed corporations into persons.

To extend Bourdieu's (1993) concept of symbolic violence which, while much more complex, basically holds that symbolic violence is committed by the establishment of a canon, a universally valued cultural inheritance established in order to guarantee the continued reproduction of its legitimacy by those with power to do so. As a Supreme Court

[6] "No Person except a *natural born Citizen*…shall be eligible to the Office of President." U.S. Constitution, Article II, Section 1, emphasis added).

ruling, the acceptance of the canon is required by the Constitution.[7] It can thus be said that the Supreme Court has on numerous occasions committed "syntactical and grammatical violence."The language the Court has used to establish a corporation as a "person," and the terms it has used in its pseudo-analysis of the Constitution and its use of "person" to justify its conclusion, is so beyond the semantic field of legal interpretation and standard rules of English that one is hard pressed to find a more accurate description than "syntactical and grammatical violence."

Seen from another perspective the term "corporate person" presents a dilemma. The dilemma is that either "corporate" is merely an adjective modifying the noun"person" (like "company man"), which does nothing to address the issue of the status and standing of corporations vis-à-vis the Constitution; or, "person"modifies "corporate" which transforms corporations into persons as the Supreme Court intends, but is a corruption of the English language.

Personhood is defined as, "The quality or condition of being an individual person" (Personhood, 2016). The Supreme Court has also coined the term "corporate personhood"where, like "person,"the noun "personhood" must modify the adjective "corporate"in order to transform corporations into persons. Else, like "corporate person," if corporate modifies "personhood," we are left with merely the adjective "corporate" modifying the noun "personhood" which again does nothing to answer the question "is a corporation a person?" Thus,the term "corporate personhood," like "corporate person" corrupts the basic rules of English grammar and syntax when used to transform corporations into persons,

Exegesis. Exegesis is the critical explanation or interpretation of a text (Merriam-Webster, 2016).Exegesis is a rigorous form of textual analysis (Goodrich, 1986).Its application to legal analysis is well accepted. It has "encompassed the entirety of practical legal method [and] is still the strongest argument legitimizing (or authorizing) both text and interpretation"Goodrich, 1986).

In spite of its power, however, the Supreme Court has never engaged in the exegesis of "person" in the Constitution as a whole, although it has, on occasion, embarked on the exegetical analysis of certain amendments of the Constitution. (As discussed in the following section, there are cases that arose under articles, but most involved amendments.)

Hermeneutics. Hermeneutics is the methodology of interpretation of texts and the process of text interpretation is at the center of hermeneutics (Hermeneutics, 2016).The theory of hermeneutics involves "complex cognitive process."While a critical discussion of the theory of hermeneutics is beyond the scope of this article, a brief discussion is necessary.

Hermeneutics postulates that there is nothing beyond understanding a text other than understanding the sentences which compose the text, and there is nothing beyond understanding other than understanding the words which compose the sentences (Hermeneutics, 2016).The meaning of a complex textual expression is therefore determined by its structure and the meanings of its words and sentences (Hermeneutics, 2016).Words only have meaning within complete sentences.

Applying the principles of hermeneutics to the Constitution and its use of "person," i.e., the meaning of a textual expression is determined by the structure and meaning of its words and sentences, "person" must be understood exactly as and limited only to how the Constitution uses it—a natural person.Extrinsic evidence is not necessary.

A. Summary

[7] In this context, "canon" does not refer to the canon of construction and interpretation, but of corporations as persons.

The purpose of the prior analysis concerning language and gender, language and race, language and culture, and language and interpretation was to demonstrate the power and importance of language in creating perceptions of reality. Language is used to construct our beliefs. It shapes our view of the world and directs our discourse about it. In like manner, the language used to describe corporations will controlwhat we think about corporations and direct the discourse about corporations.Because of the role corporations have in law, economics, and society,[8] the social construction of the status and standing of corporations vis-à-vis the Constitution is certainly as important as the social construction of gender and race.

With an understanding of the role and importance of language in forming our view of the world we can now turn our attention to how language is used in the Constitution to describe "person." This section presents a criticallinguistic analysis, including grammar and syntax, and exegesis of the Articles, Bill of Rights, and subsequent Amendments. The Articles and Amendments will be examined exhaustively *in seriatim* in order to provide the complete understanding of the meaning of "person" in the Constitution. This is necessary not only because the Supreme Court has neglected conducting acritical linguistic analysis and exegesis of "person" in the Constitution as a whole, but also because the Court has seen fit to interpret "person" in isolation; i.e., in individual amendments according to what it considered the purpose of the amendment, rather than in the Constitution as a whole and the purpose of the Constitution as a whole which is to protect the unalienable rights of the persons identified in the Declaration of Independence and the Constitution—natural persons. Interpreting "person" on an amendment-by amendment basis has led to anomalous results.

4 The Constitution – Person and Citizen

Who is a "person" in the Constitution?The Supreme Court knows how to conduct a linguistic analysis and exegesis and one may wonder why it has refrained from such an undertakingall these years with respect to "person" in the Constitution as a whole. Nevertheless, I begin my analysis with the Supreme Court's canons of statutory construction and apply them to constitutional construction: (1) the starting point for interpreting the Constitution is the language of the Constitution itself, (2) absent a clearly expressed intention to the contrary, that language must ordinarily be regarded as conclusive; and (3) the use and meaning of the term "person" in the Constitution will be examined with the surrounding words in the Constitution "as a whole" Textual clues such as those the Supreme Court searches for will be discerned along the way.

Gerber (1996) sees the Constitution as a logical extension of the Declaration of Independence. The unalienable rights embodied in the Declaration are at the heart of the Constitution(Gerber, 1996).Since the rights and protections grantedby the Constitution, and the rights and protections to whom they are granted(persons and states)are grounded in the Declaration of Independence(Gerber, 1996),it is necessary to present here the relevant portionsof the Declaration of Independencein their entirety:

> "When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation…

[8] "Corporations help structure and facilitate the activities of human beings." Justice STEVENS, Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), concurring in part and dissenting in part.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.… that these united colonies are, and of right ought to be free and independent states…
>
> . . . .
> We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world…"

The first thing to notice is that "people," "men," and the "governed" from whose consent governments derive their just powers are, and can only be, natural persons. Although not numerous, corporations existed in the coloniesat the time of the Declaration of Independence but it is only natural personswho can dissolve political bonds with one another.[9] Only natural persons can consent to be governed. Only natural personscan be considered to be "endowed by their Creator;" i.e., "the Supreme Judge of the world."Corporations are not created by the Supreme Judge of the world. The Supreme Judge of the worlddoes not endow corporations or any other organizational form with unalienable rights. Only natural personshave a right to "life, liberty and the pursuit of happiness" according to the Declaration of Independence.That is, by the parameters established by the Declaration of Independence, it is self-evident that men, and only men, are endowed by their Creator with the unalienable right to life;only men are endowed by their Creator, the Supreme Judge of the world, with the unalienable right to liberty; and only men are endowed by their Creator with the unalienable right to the pursuit of happiness. Corporations have can have no life, no liberty, and certainly no happiness.

"Person" is not explicitly defined in the Constitution.But we can conclude with certainty that the framers of the Constitution did not consider that either "person" or "people" needed to be defined in the Constitution.Otherwise, they obviously would have done so as they did with Representative and Senator, for example.

They likewise expected that everyone who read the Constitution would know what "person" meant. After all, they meticulously described the apportionment of Representatives and taxes based on "the Number of Free Persons" and three-fifths of non-free ("all other") personswithout having to resort to explaining free vs. non-free persons. Everyone simply knew, had to know, what "person" meant,whether free or non-free, since voting and taxation were a function of what constituted a "person," whether free or non-free.

It has been suggested that since the Framers knew about corporations, they intended the First Amendment to apply to corporations as well as individuals. But to so conclude requires going outside the Constitution. However, by appealing to extrinsic evidence, an opposite and equally compelling argument can be made that they knew about corporations and did *not* intend the Constitution to apply to corporations.

According to Berle's, (1928) historical analysis corporations were feared because corporations were taintedwith royal power and therefore smacked of government tyranny. Using extrinsic evidence it is just as logical, therefore, to interpret the absence of any reference in the Constitution to corporations to mean that the drafters intended to exclude corporations from the rights and protections of the Constitution in order to limit their power.

Furthermore, one of the canons of construction is to take the words in their ordinary meaning and to use the textual clues of the surrounding words.We can ask, therefore, what is the ordinary meaning of "people" as ascertained by the words surrounding "people" in the

[9] It is understood that the use of the term "men" does not mean "males," but is the old English in which "men" meant "humankind." This usage found its way into 1 U.S. Code § 1: "words importing the masculine gender include the feminine as well."

Declaration of Independence? The answer is obvious. What is the ordinary meaning of "person" as ascertained by the words surrounding "person" in the Constitution? That is equally obvious.

The parol evidence rule treats the Constitution as a completed document. Considering the Constitution as complete, applying the parol evidence and the canons of construction, the principles of exegesis and hermeneutics, and engaging in a critical linguistic analysis, the meaning of "person" in the Constitution is as clear as it is undeniable. Extrinsic evidence is unnecessary to determine the meaning of "person" in the Constitution as a whole.

The Supreme Court has determined that corporations are persons for certain constitutional purposes but not for others. But that conclusion was reached not by an exegesis of the Constitution as a whole, but by cherry-picking certain amendments and determining that corporations are "persons" based solely on what the Court interpreted as the purpose of the amendment (Mayer, 1990; Robinson, 2016),ignoring the plain language of the Constitution that the purposes of the amendments were targeted to natural persons as demonstrated in the following sections and to protect the unalienable rights of those who declared their . As will be seen, such an interpretation of corporations as "persons" is inconsistent with the meaning of "person" in the Constitution as a whole.

Article I – Legislative Branch

Article I deals with the legislative branch which defines the eligibility, election, terms, and powers of Representatives and Senators.

"Person"[10] and its derivativesis mentioned two times in Article I, Section 2. Only a person who is 25 years old and a citizen of the United States is allowed to be a Representative.

In Article I, Section II, "Person" obviously means only natural persons, i.e., only a natural person can be a Representative. "Three-fifths of all other persons" also necessarily refers only to natural persons since "other persons" refers to non-free persons; i.e., those in involuntary servitude (slaves).

"Person" and its derivatives are mentioned two times in Article I, Section 3. "No *Person* shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizens of the United States." As with Section 2, "person" here refers to a natural person. Only a natural person can be a Senator.

"Person" and its derivatives are mentioned two times in Article I, Section 6,which outlines term limitations of Senators or Representatives.

"Persons,"[11] plural, is referred to in Section 7 where "the Names of the Persons voting for and against the Bill shall be entered on the Journal." Persons, as referring to Representatives and Senators, are natural persons.(It is interesting to note that while both "people" and "persons" are the plural of "person," and the Supreme Court has ruled that a corporation is a "person," it has never referred to a group of corporations as either "persons" or "people.")

"Person" and its plural, "persons" are mentioned three times in Article I, Section 9. "The Migration or Importation of such *Persons* as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress... Tax or duty may be imposed on such Importation, not exceeding ten dollars for each *Person*"The migration (voluntary) or

[10] "Person" and its derivatives are italicized in the quoted sections of the Constitution here and in the following sections for emphasis.

[11] Both "persons" and "people" are the plural of "person," the distinction being "people" refers to an unspecified a group while "persons," is used in a more official or formal contexts and refers to unspecified individuals in a group. See https://en.oxforddictionaries.com/definition/person (Last visited on: ?).

importation (involuntary, i.e., slaves) of "such *Persons*" and the tax on each "person"refer only to natural personsalthough slaves are counted as only three-fifths of a person for apportionment purposes. Titles of nobility obviously refer only to natural persons.

There can be no debate that every time the word "person" is used in Article I it is limited to a natural person. The context, the ordinary meaning of the term "person," and the textual clues all point to only one interpretation. They permit no other interpretation. All references in Article I refer only to natural persons.

Article II – Executive Branch

In Article II, Section 1, which defines the eligibility, election, terms, and powers of the President, "person" or "persons" is usedten times. All such references are to natural persons.In particular, in the fifth paragraph "natural born Citizen" is emphasized in order to differentiate a "natural born Citizen" frommere "Citizen" which is aforeign born naturalized citizen under Article II, Section 1. As with Article I, there is no doubt that every time the word "person" is used in Article II, it is limited to a natural person.

Once more, there can be no debate that every time the word "person" is used in Article II it is limited to a natural person. The context, the ordinary meaning of the term "person," and the textual clues all point to only one interpretation. They permit no other interpretation. All references in Article II refer only to natural persons.

Article III – Judicial Branch

Article III governs the Supreme Court and lower courts. Judges, of course, refers to natural persons. "Person" is mentioned twice in reference to treason, thus obviously a natural person since only a natural person can commit treason.

In Section III, Article III, a "person" may not be convicted of treason unless on the Testimony of two Witnesses and no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. Only a natural person may commit treason.

Yet again, there can be no debate that every time the word "person" is used in Article II it is limited to a natural person. The context, the ordinary meaning of the term "person," and the textual clues all point to only one interpretation. They permit no other interpretation. All references in Article II refer only to natural persons.

Article IV – States

Article IV deals with persons charged with crimes who flee to another state and their extradition, and the return of escaped slaves to their owners. "Person" here can only meannatural person since only a natural person, whether natural born, nationalized, or involuntarily imported (slave) can be extradited or returned to his owner.Without controversy, only a natural person, or in the case of slaves, three-fifths of a person, is the subject of Article IV.The context, the ordinary meaning of the term "person," and the textual clues all point to only one interpretation. They permit no other interpretation. All references in Article II refer only to natural persons.

Bill of Rights and Subsequent Amendments

The Amendments are analyzed in numerical.

First Amendment. The First Amendment is the foundation of American democracy. The First Amendment states simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Except for the clause "theright of the people peaceably to assemble," "person" is not explicitly mentioned. But strangely, while the First Amendment has been litigated multiple dozens of times, and as discussed below the Supreme Court has ruled that the First Amendment applies to corporations as persons, the First Amendment itself does not contribute to the understanding of "person" in the Constitution other than the "people" whose rights peacefully to assemble are necessarily the same "people" as in the Declaration of Independence and the Preamble, and therefore refer only to natural persons.

Second Amendment. The Second Amendment states in relevant part, "the right of the *people* to keep and bear Arms, shall not be infringed." "People" as plural of "person" refers only to natural persons."People" here cannot include corporations since only natural persons can bear arms. Furthermore, neither corporations nor any other organization, can be part of a militia thereby further limiting the term "people" to natural persons."People" in Second Amendment are necessarily the same "people" as in the Declaration of Independence and the Preamble.

Fourth Amendment.[12]The Fourth Amendmentstates, "The right of the *people* to be secure in their *persons*…shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized."

Since the Fourth Amendment begins with the plural of person ("the right of the *people*"), "People" is the antecedent of the "*Persons*" who have a right to be secure. Therefore "persons" defines "people."The grammar and syntax, textual clues, and ordinary meaning of "person" and 'people"in the Fourth Amendment is such that the set of the domain of"the *people*" contains only natural persons.

Fifth Amendment. The Fifth Amendment states, "No *person* shall be held to answer for a capital…crime… nor shall any *person* be subject for the same offence to be twice put in jeopardy of life or limb…nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.The antecedent of "who shall not be deprived of life, liberty or property" is "person."

Only a natural person can commit a capital crime. Furthermore, the grammar and syntax support no other interpretation.If nonatural person shall be deprived of life, and no natural person shall be deprived of liberty, the textual clues require thatno natural person shall be deprived of property without due process of law.The set of (life, liberty or property) belongs to the domain of the same "person" who not shall be held to answer for a capital crime except on indictment which must not only be logically, but also grammatically and syntactically, in the same domain as the"person" who shall not be subject for the same offence to be twice put in jeopardy of life or limb; i.e., natural person.

The words surrounding "property" are "no natural person shall be deprived of life," and "no natural person shall be deprived of liberty."Therefore, no natural person shall be deprived of property.

Sixth Amendment. Amendment VI deals with trials and the rights of those accused of crimes. Neither "person" nor "citizen" is used. However, the personal pronouns "him" and "his" are used thereby, according to the rules of grammar, the application of the Sixth

[12] Amendment III prohibits the quartering of soldiers and is not relevant to the issue of persons in the Constitution.

Amendment is limited to those to whom the pronoun and possessive pronoun apply—natural persons.

Seventh Amendment. Amendment VII, as an extension of Amendment VI,also deals with trials, albeit civil trials. Again, neither "person" nor "citizen" is used but here no personal pronouns are used either.However, as an extension of trials, the parties in Amendment VII must be the same as those in Amendment VI – natural persons.

Eighth Amendment, Amendment VIII prohibits excessive bail or fines, or the imposition of cruel and unusual punishments. Based on the grammar and syntax used ("bail" and "cruel or unusual punishment")– Amendment VIIIcan only be applied to natural persons.Sincethe words surrounding "fines" are "bail" and "cruel and unusual punishments" which apply only to natural persons, the implications is clear that fines likewise apply only to natural persons.

Ninth Amendment. The language of Amendment IX is highly enlightening. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others [i.e., other rights] retained by the *people*." As previously noted, "people" is the plural of natural persons and is the same as "people" in the Preamble, Articles, and Amendments and therefore necessarily refers to the plural of natural persons.

Tenth Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."The "people" is the plural of natural person. Regardless whether they have rights, corporations certainly have no power. Corporations, therefore, are excluded from the power reserved to the people. Therefore, "the people" are natural persons andthe same people as in the Preamble, Articles, and Amendments referred to in Article IX.

Eleventh Amendment. Amendment XI limits the power of the federal judiciary. Amendment XI prohibits the exercise of the federal judiciary in cases involving citizens of one state suing another state in federal courts. This amendment was adopted following the much criticized ruling in Chisholm v. Georgia, 2 U.S. 419 (1793)[13]that allowed individual, private citizens (natural persons) of one state to sue another state in federal court pursuant to Article III, Section 2. The citizens of the Eleventh Amendment and the citizens of Article III, Section 2 are therefore one and the same citizen—natural persons.

Twelfth Amendment. Amendment XII controls the electors for President and Vice-President. "Person" is referred to ten times. Since the Amendment deals with elections, all references to "persons"are to natural persons.

Thirteenth Amendment. The Thirteenth Amendment abolished slavery and involuntary servitude, neither of which is defined in the Constitution but both of which, like person, were understood, without the necessity of defining it, according to the ordinary meanings of those words. Slavery and involuntary servitude, of course, refer only to natural persons and relate back to Article I Sections 2 and 9.

Fourteenth Amendment. The Fourteenth Amendment necessarily refers back to and is framed by the Thirteenth Amendment which ended slavery and involuntary servitude. But were slaves, and those who were involuntarily imported, citizens just because the Thirteenth Amendment ended slavery and involuntary servitude? No. They were not even persons. They were only three-fifths of a person. Enter the Fourteenth Amendment.

The most important amendment for the critical linguistic analysis and exegesis of "person" in the Constitution as a whole is the Fourteenth Amendment. "Citizen" is referred to five times in two sections. It has one overall purpose—to make citizens out of non-citizens (slaves) by creating a person out of three-fifths of a person (slaves) consistent with the

[13] Even in this early case, the Court stated, "The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense."

singular purpose of the Constitution—to secure the unalienable Rights of Life, Liberty and the pursuit of Happiness endowed by the Creator, the Supreme Judge of the world, to all natural persons who are created equal: "All *personsborn* or *naturalized* in the United States*are citizens* of the United States and of the State wherein they reside."Not only did the Thirteenth Amendmentprohibit slavery but, three years after the adoption of the Thirteenth Amendment,those who had previously been involuntarily imported,and descendants of the involuntarily imported,were now no longer three-fifths of a person and no longer non-citizens.They were persons and citizens.

The Fourteenth Amendment is the most important for an understanding of "person" for three reasons. The first reason is thatit is a clear and explicit definition of citizen: "All persons born or naturalized in the United States…are citizens."

As a result of the definition, the second, equally important reason for understanding "person" and citizen in the Constitution as a whole is that this is at once the creation of a "person" out of three-fifths of a person and therefore also the definition of "person" as explained below.

First, it is a mathematical identity: A is B and therefore B is A.[14]If all persons*born*in the United States or *naturalized* in the United States are citizens, then the converse must necessarily also be true. A personwho is either *born*in the United States or foreign-born and *nationalized* in the United States, is a citizen. Furthermore, a citizen,as a person who is either born in the United States or foreign-bornand nationalized in the United States, is limited to those who are actually born, i.e., natural persons.

Neither the Congress, nor the President, nor the Supreme Court can create a natural born person.[15] But Congress, and only Congress, can create a citizen through the formal naturalization process delegated to it exclusivelypursuant to and required by Article I Section 8.

Slavery and involuntarily servitude was so institutionalized in the American legal and constitutional system that only a Constitutional amendment could resolve the condition in which slaves were placed by the Constitution. That is, Congress could not create a naturalization process for the involuntarily imported because the Constitution already designated them three-fifths of a person and non-citizens.

The second reason the Fourteenth Amendment is important for the definition of "person" is that it is exclusive. Since "All persons born or naturalized in the United States…are citizens," the Fourteenth Amendment explicitly excluded from citizenship by the Fourteenth Amendment are all persons who are neither born in the United States nor foreign born and nationalized in the United States (tourists, for example). Only natural persons can either be born in the United States or be foreign-born and nationalized in the United States The grammar and syntaxadmits no other interpretation.

The third reason the Fourteenth Amendment is important for understanding "person" in the Constitution as a whole is that it defines "person" for the entire Constitution. The Fourteenth Amendment clarifies the meaning of person beyond doubt, a principle of interpretation that was corroborated by the Supreme Court itself more than 20 years prior to the adoption of the Fourteenth Amendment..

In United States v. Freeman, 44 U.S. 556 (1845)the Supreme Court stated, with respect to statutory interpretation, that

> "The correct rule of interpretation is that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing anyone of them, and it is an established rule of law that all acts

[14] As a mathematical expression it can be written as A ≡ B, therefore B ≡ A. An example is Theodor Geisel is Dr. Seuss, therefore Dr. Seuss is Theodor Geisel.

[15] Well, they can, but…. [Note to reviewers, this is supposed to be humorous]

> *in parimateria* are to be taken together, as if they were one law…If a thing contained in a subsequent statute be within the reason of a former statute, It shall be taken to be within the meaning of that statute…and if it can be gathered from a subsequent statute *in parimateria*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute…"

It is untenable and unacceptable to limit the principle of *in parimateria* only to statutes and not to the Constitution and constitutional amendments. If it can be gathered from a subsequent amendment what meaning is attached to the words of a former amendment or article, that amounts to a declaration of its meaning. Therefore, applying *in parimateria*to constitutional amendments and its use of "person" and citizenall former references to "person" and citizen must be interpreted in conformity with the Fourteenth Amendment. If "person" in the Fourteenth Amendment means natural person, then the "correct rule of interpretation" requires, according to the Supreme Court,that "person" is defined as natural person in all amendments and the entire constitution.

The Fourteenth Amendment, also known as the Due Process and Equal Protection Amendment, prohibits any state, present or to later be admitted to the Union of states, from depriving any person of life, liberty, or property without due process of law or denying to any person within its jurisdiction the equal protection of the laws. The syntax of the language lends itself to only one logical interpretation, which is: "No State shall make or enforce any law which shall abridge the privileges or immunities of persons born or naturalized in the United States,""States shall not deprive any person born or naturalized in the United States of (life, liberty, or property)." and "States shall notdeny to any person within its jurisdiction the equal protection of the laws." The set of (life, liberty, or property) belong to the same domain of "persons" whoare born or naturalized in the United States; i.e., natural persons.

The textual clues are unmistakable, and unavoidable. The textual clues support no other interpretation. "Person" in the Constitution means natural person and only natural person.

Fifteenth Amendment. The Fifteenth Amendment extends additional rights to citizens; i.e., to all persons born or all personsnaturalized in the United States. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." We again ask, who are the citizens whose rights to vote shall not be denied or abridged? Those citizens are the same citizens created by the Constitution and later by the Thirteenth and Fourteenth Amendments; i.e., those who were born or naturalized in the United States—natural persons.

Since it is the right to vote that is addressed, it is obvious that "citizen" refers to natural persons. Furthermore, only natural persons can have a race, a color, or a previous condition of servitude which condition was prohibited by the Thirteenth Amendment.

Sixteenth Amendment. The Sixteenth Amendment gives power to Congress to "lay and collect taxes on incomes" and is not relevant to the issue of "person" in the Constitution

Seventeenth Amendment. Amendment XVII addresses the composition of and vacancies in the Senate and is not relevant to the issue of "person" in the Constitution.

Eighteenth Amendment. Amendment XVIII deals with the enactment of the Prohibitionand is not relevant to the issue of "person" in the Constitution.

Nineteenth Amendment. Similar to the Thirteenth and Fourteenth Amendments, the Nineteenth Amendment extends the right to vote to certain persons born or naturalized in the United States; i.e., to citizens.

Unless expressly prohibited by the Constitution, states retain the right to determine which of their citizens have, or do not have, the right to vote. For example, prior to the Nineteenth Amendment, women were not allowed to vote in some states. With the Nineteenth Amendment. the right of citizens to vote is now extended explicitly to women,which are, of course, natural persons.

Twentieth Amendment. Amendment XX deals with the terms of president and vice-president and is not relevant to the issue of "person" in the Constitution.

Twenty-first Amendment. The Twenty-first Amendment repeals the Prohibition and is not is not relevant to the issue of "person" in the Constitution.

Twenty-second Amendment. Amendment XXII limits the terms of the President. While not specifying "natural born person," Amendment XXII does reference "person," which, as applied to the President, of course means not only "natural person" but"natural born person"and not naturalized person.

Twenty-third Amendment. Amendment XXIII deals with the District of Columbia and its representatives in Congress and is not is not relevant to the issue of "person" in the Constitution.

Twenty-fourth Amendment. The XXIV Amendment addresses the right to vote in primaries which prohibits the imposition of a poll tax on the right of citizens to vote.Citizens in the Twenty-fourth Amendment are the same citizens as in Amendments XIII, XIV, and XIX—natural persons.

Twenty-fifth Amendment. Amendment XXV deals with vacancies in the office of President and the chain of succession and is not is not relevant to the issue of "person" in the Constitution.

Twenty-sixth Amendment. Another prohibition in the Constitution is the Twenty-sixthAmendment. While not explicit, since it deals with the right to vote here it is again understood that Amendment XXVI refers back to Amendments XIII and XIV; i.e., the citizens in question are those born or naturalized in the United States because the right to vote is now, as in Amendment XIX, extended explicitly to those citizens who are 18 years of age or older,which are, of course, natural persons.

Twenty-seventh Amendment. Amendment XXVII deals with Congressional compensation and is not is not relevant to the issue of "person" in the Constitution.

With the critical linguistic analysis and exegesis of the Constitution pertaining to "person" we can now turn our attention to corporations as"person" in Supreme Court rulings.

5 The Supreme Court, Language, and the Social Construction of Corporations

Robinson(2016) comments that "[Th]ere is no consistent, unified approach across the Court's corporate constitutional personhood cases."Fagundes (2001) further remarks that the Supreme Court's "doctrinal distinctions reflect the absence of a theoretically unified judicial approach to legal personality" and that Supreme Court rulings that a corporation is a person "results largely from the lack of a coherent theory of the person" (Fagundes, 2001; Rivard, 1992). Pollman (2011), too.finds that the Supreme Court has expanded the doctrine of corporate personhood "without a coherent explanation or consistent approach" and that the Court has never grounded thedoctrine of corporate personhood "into a coherent concept of corporate personhood."

Ultimately, nevertheless, that "a corporation is a person is well entrenched in American law" (Pollman, 2011). In fact, John Dewey (1926), in Humpty Dumpty like fashion, dismissed the debateof corporate personhood as pointless because "person signifies what law makes it signify."[16]But that, of course, is the result of the Supreme Court's construction of corporations as persons. Mark (1987) notes that from the Second World War on the legal

[16] Humpty Dumpty is a character in the book *Through the Looking Glass*, a sequel to *Alice in Wonderland*. In a conversation with Alice, Mr. Dumpty tells Alice, "When I use a word,it means just what I choose it to mean—neither more nor less."

nature of corporationsceased to be controversial or even of interest.Lawyers today know only that a corporation is considered a person (Mark, 1987).

In this section, a sample ofSupreme Court opinions that have held corporations are persons are reviewed, beginning in 1844 and ending in 2010. There were many others sandwiched between 1844 and 2010 but the conclusions, although based on different parts of the Constitution and relying different theories of the corporation, have always resulted in the same ruling – corporations are persons. The sample selected is sufficient to demonstrate that by its language the Supreme Court has for over 150 yearssocially constructed corporations as persons by violating the rules of grammar and syntax and its own canons of construction and interpretation.

First, in Louisville, Cincinnati, and Charleston Railroad v.Letson,43 U.S. 497, 558, (1844), the Supreme Court stated

> "a corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, *seems to us to be a person*, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be *deemed a citizen* of that state" (emphasis added).

The issue did not focus on corporations as persons, but on corporations as citizens for purposes of jurisdiction under Article III, Section 2of the Constitution. In essence the ruling "killed two birds with one stone ("person" and citizen).

The nation was barely 50 years old, and the Court relatively inexperienced at least insofar as corporations and the Constitution are concerned, so it can be overlooked, even forgiven, for failing to conduct an analysis of either "person" or citizen in the Constitution, although it considered its ruling the result of its "maturest deliberation" and "a sound and comprehensive course of professional reasoning." "Seems to us" and "deemed to be a citizen" can scarcely be considered mature deliberation or sound and comprehensive professional reasoning. Nevertheless, the allusion to corporations as persons begins a long chain of cases holding that corporations are both citizens and persons in the Constitution.

Some consider County of Santa Clara v. Southern Pac. R. Co., 118 U.S. 394 (1886).as "the watershed…for the personification of the corporation inits own right and can be considered the beginning ofcorporate personhoodas we understand it today" (Kaeb,' 2015) But, as seen in the *Letson* ruling, that is not entirely accurate.Arising in 1886, the circumstances surrounding the ruling would be amusing if the ramifications were not so serious. It could be said that the Court's analysis was sloppy, ill-conceived, and illogical. Except there was no analysis.

The main issues concerned the constitutionality of taxes imposed by the state of California. Counsel for the defendant argued that "Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." As officially reported, "Before argument Mr. Chief Justice Waite said: 'The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.'"Yet, the ruling did not appear in the case. It was inserted in the headnotes prepared by the reporter (Piety, 2015). As noted by Horwitz (1985), "For such a momentous decision, the opinion in the Santa Clara case is disquietingly brief - just one short paragraph - and totally without reasons or precedent."

In spite of this, ninety years later, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Supreme Court recognized the importance of Santa Clara as it had dozens of time before: "It has been settled for almost a century that corporations are persons within the

meaning of the Fourteenth Amendment. Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886)."

Continuing into the 21st century, in is Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010) the Supreme Court reiterated its previous constructions of corporations as persons by "recognize[ing] that First Amendment protection extends to corporations."[17]

So the reasoning boils down to something like this:

- Corporations are persons.
- The purpose of the Fourth Amendment is to protect persons from searches and seizures without a warrant.
- Therefore, corporations are protected from searches and seizures without a warrant.

At the same time:

- The purpose of the Fourteenth Amendment is to guarantee persons due process and equal protection.
- Corporations are persons.
- Therefore, corporations are guaranteed due process and equal protection.

And:

- Persons have rights to speak guaranteed by the First Amendment.
- Corporations have rights to speak guaranteed by the First Amendment because the First Amendment does not exclude corporations.
- Therefore, corporations are persons.

The circularity cannot be ignored. It is an example of the hermeneutic circle wherein the whole and the parts are interdependent. The whole is only understood through its parts and the parts are only understood through the whole(Hirsch, Jr., 1967).

6 Corporatehood

The Constitution is unambiguous in what is a"person" and what constitutes a citizen. Since the Constitution is unambiguous in itsuse of what is a "person" and what constitutes a citizen, there is no need to resort to sources extrinsic to the Constitution to determine the meaning of "person" in the Constitution. The Constitution itself explains what "person" means.

The only term that makes sense when discussing a corporation is corporation. As an adjective, "corporate" may be used to modify an organization or an entity (e.g., corporate organization) but it cannot modify "person" in order to transform a corporation into a "person."Grammatically and syntactically there is no such thing as a corporation as a "corporate person."

Likewise, there is no such thing as "corporate personhood." "Corporate personhood" is nonsensical and violates the rules of English grammar and syntax. Yet, the Gospel of "corporate personhood" abounds, becoming an ideology of modern American corporate law.

[17]The interpretations by the Supreme Court expanding or limiting the establishment of religion, prohibiting the free exercise of religion, abridging the freedom of speech or the press, or the right of the people peaceably to assemble under the First Amendment is beyond the scope of this paper. These clauses have been litigated multiple dozens of times. Rather, the issue considered here is limited to how the Supreme Court has socially constructed corporations as persons, not on constitutional rights they may or may not have.

"Personhood" is "the quality or condition of being an individual person" (Personhood, 2016).Placing the adjective "corporate" before "personhood" is a misdirection of discourse and serves no purpose other than to reinforce a social construction of corporations that have no support in the language of the Constitution. To continue the use of "corporate person" and "corporate personhood" isplaying with smoke and mirrors and merely perpetuates the (false) reality constructed by the Supreme Court that corporations are persons.

Therefore, the only term to use when discussing "the quality or condition of being a corporation" is "corporatehood." "Corporatehood removes any reference to "person" and allows discourse to proceed unencumbered with human terms.

7 Conclusion

This paper asked the questions "what is a person in the Constitution" and its concomitant question, "what is a citizen in the Constitution?" After a critical linguistic analysis and exegesis of the Constitution, and applying the Supreme Court's canons of constructions and interpretation,it answered the questions: a"person in the Constitution is a natural person., and a citizen is a natural person born or naturalized in the United States. There is no other meaning of citizen in the Constitution. If the "person" in the Constitution means natural person in one place, it means natural places in all places.

With those questions answered, the question,"is a corporation a "person" is easily answered. The answer is, "No."

Language shapes our view of the world and directs the nature of discourse. In ruling that a corporation is a "person" in the Constitution the Supreme Court the Court violated the basic rules of English grammar and syntax, did not interpret "person" consistent with the words surrounding it, and did not interpret "person" or according to its ordinary meaning. The Court has consistently disregarded its practice of construing the constitutional language of "person" in light of the terms in the Constitution surrounding it and has not given the term "person" its ordinary meaning.

Natural persons are endowed by their Creator, i.e., the "Supreme Judge of the world,"with the unalienable rights of "Life, Liberty and the pursuit of Happiness." But, these unalienable rights do not exist in the air. These unalienable rights are secured by government which is instituted among Men and whose *raison d'êtr*e is to secure the unalienable rights of Life, Liberty and the pursuit of Happiness.But how are these rights secured?

If, as Gerber (1996) rightly contends, the Constitution is an expression of the Declaration of Independence, the former is an extension of the latter and therefore they may be considered as having one purpose. There is a singularpurpose of the Constitution, the Bill of Rights, and all other amendments. That one purpose is"to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity" in furtherance of securing the unalienable rights of natural persons enumerated in the Constitution: the rights toLife, Liberty and the pursuit of Happiness.

But how is that one, singular purpose fulfilled? The Declaration of Independence explains. "By Authority of the good People of these Colonies [who] solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States….and as Free and Independent States, they have full Power to… do all other Acts and Things which Independent States may of right do."Therefore,as Free and Independent States doing acts which Independent States may of right do, "We the People of the United States… do ordain and establish this Constitution for the United States of America" in order to secure the rights of Life, Liberty, and Happiness endowed by their Creator to natural persons.

There is but one purpose for the Constitution as a whole. There is not one purpose for

each amendment.So for the Supreme Court to isolate different purposes for each amendment without considering the Constitution as a whole ignores thesingular purpose of the Constitution; i.e., to secure the rights of natural persons to Life, Liberty, and Happiness which are endowed by their Creator, the Supreme Judge of the World. The purpose of any right cannot be understood without first understanding "person."

For the Supreme Court to say that the Constitution's meaning of "person" includes non-natural persons it can only say so legitimately after a critical linguistic analysis and exegesis of "person" in the Constitution and explicitly stating that after its analysis and exegesis there is no support in the Constitution that limits persons to natural persons. The Supreme Court will have to declare that non-natural persons are endowed by the Supreme Judge of the world with unalienable rights to Life, Liberty, and Happiness.

As it stands now, the Supreme Court has socially constructed corporations as persons thereby creating a culture, or perhaps more accurately, a cult, of corporations as persons.

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Appendix A. Declaration of Independence

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness…

. . . .

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

APPENDIX B. U.S. Constitution[18]

The Constitution of the United States

We the ***People*** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings

[18] All forms of "person" are highlighted for emphasis.

of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I: Legislative

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

The House of Representatives shall be composed of Members chosen every second Year by the ***People*** of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No ***Person*** shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free ***Persons***, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No ***Person*** shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no ***Person*** shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day,

and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no ***Person*** holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To establish Post Offices and post Roads;
- To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- To constitute Tribunals inferior to the supreme Court;
- To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
- To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And
- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each ***Person***.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no ***Person*** holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II: Executive

Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress:

but no Senator or Representative, or ***Person*** holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The ***Person*** having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no ***Person*** have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the ***Person*** having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No ***Person*** except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any ***Person*** be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

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.

Article III: Judicial

Section 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

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; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No ***Person*** shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the ***Person*** attainted.

Article IV: States

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A ***Person*** charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No ***Person*** held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Article V: Amendment

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI: Supreme Law

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII: Ratification

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the ***people*** peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the ***people*** to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the ***people*** to be secure in their ***persons***, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the ***persons*** or things to be seized.

Amendment V

No ***person*** shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any ***person*** be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the ***people***.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the ***people***.

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the ***person*** voted for as President, and in distinct ballots the ***person*** voted for as Vice-President, and they shall make distinct lists of all ***persons*** voted for as President, and of all ***persons*** voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The ***person*** having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no ***person*** have such majority, then from the ***persons*** having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. — The ***person*** having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no ***person***have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no ***person*** constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

Section 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1

All ***persons*** born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any ***person*** of life, liberty, or property, without due process of law; nor deny to any ***person*** within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of ***persons*** in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No ***person*** shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2

The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the ***people*** thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the ***people*** fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

Section 1

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

Section 1

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such ***person*** shall act accordingly until a President or Vice President shall have qualified.

Section 4

The Congress may by law provide for the case of the death of any of the ***persons*** from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the ***persons*** from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

Section 1

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2

The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

Section 1

No ***person*** shall be elected to the office of the President more than twice, and no ***person*** who has held the office of President, or acted as President, for more than two years of a term to which some other ***person*** was elected President shall be elected to the office of President more than once. But this Article shall not apply to any ***person*** holding the office of President when this Article was proposed by Congress, and shall not prevent any ***person*** who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

Section 1

The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

Section 1

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

Section 1

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge

the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Section 1

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.