William & Mary Law Review

Volume 58 (2016-2017)
Issue 3

Article 2

2-1-2017

Protean Statutory Interpretation in the Courts of Appeals

James J. Brudney

Lawrence Baum

William & Mary
Law Review

VOLUME 58 NO. 3, 2017

PROTEAN STATUTORY INTERPRETATION IN THE COURTS OF APPEALS

JAMES J. BRUDNEY & LAWRENCE BAUM*

ABSTRACT

This Article is the first in-depth empirical and doctrinal analysis of differences in statutory interpretation between the courts of appeals and the Supreme Court. It is also among the first to anticipate how the Supreme Court's interpretive approach may shift with the passing of Justice Scalia.

We begin by identifying factors that may contribute to interpretive divergence between the two judicial levels, based on their different institutional structures and operational realities. In doing so, we discuss normative implications that may follow from the prospect of such interpretive divergence. We then examine how three circuit courts have used dictionaries and legislative history in three subject matter areas over the past decade and compare these findings in

* We received valuable comments on earlier drafts from Bill Eskridge, Aaron-Andrew Bruhl, and participants at a Fordham Law School faculty workshop and a Yale Law School seminar on statutory interpretation. Special thanks to Amy Torres for outstanding research assistance.

detail to the interpretive approach taken by the Roberts Court in the same three fields.

We determine that the appeals courts have followed a protean approach, adapting their usage patterns in ways that differ substantially from patterns in the Supreme Court. Court of appeals judges use dictionaries far less relative to legislative history than do the Justices; we found no semblance of the distinctive dictionary culture that is prevalent on the Roberts Court. In addition, the relative frequency of dictionary usage between the two court levels varies considerably depending on the subject area and the type of dictionary (general or legal). With respect to relative frequency for legislative history, the Supreme Court, far more than the circuit courts, invokes the record of changes in statutory text—either modified over multiple Congresses (statutory history) or developed in successive pre-enactment versions of a bill (drafting history). This "vertical history" is apparently more attractive, or less unattractive, to textualist Justices than is traditional legislative history commentary such as committee reports. More broadly, circuit courts regularly use legislative history to resolve ambiguities, confirm apparent meaning, or simply explicate legislative intent, all without characterizing its legitimacy or systemic value.

For both dictionaries and legislative history, the eclectic approach of the appeals courts differs markedly from the Supreme Court's more self-consciously articulated methodological path. We suggest how certain sources of interpretive divergence contribute to these differences, notably the Justices' interaction with their colleagues in every case and their experience as objects of continuing media and congressional attention, some of which reflects attention that carries over from the judicial confirmation process. We conclude that the eclecticism of the appeals courts is likely to limit judicial discretion more effectively than the Supreme Court's current approach, which favors clear interpretive rules or priorities that are applied on a presumptively consistent basis.

TABLE OF CONTENTS

INTRODUCTION

For the past several decades, debates over statutory interpretation have focused to an extraordinary extent on the rise of textualism in the Supreme Court and the consequent disagreements between textualists and purposivists. Legal scholars have examined the Court's growing appetite for dictionaries and canons,[1] its diminished attention to legislative history and purpose,[2] and its evolving approach to the role of agency deference.[3] Largely overlooked in the debates is whether lower federal courts practice what the Supreme Court has preached, or whether they ought to do so.[4]

We have chosen to examine two prominent interpretive resources, one prototypically textualist—dictionaries—and the other classically purposive—legislative history. Battles between the textualist and purposive schools have been squarely joined at the Supreme Court

---

1. *See, e.g.*, Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

2. *See, e.g.*, Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205.

3. *See, e.g.*, James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497 (2014); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).

4. Leading legislation casebooks focus almost exclusively on Supreme Court decisions. *See generally, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY (5th ed. 2014); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (2d ed. 2013). There have been some instances, however, in which scholars have primarily focused on statutory interpretation issues in lower federal courts. *See, e.g.*, Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (addressing institutional differences between Supreme Court and lower federal court interpretation); Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573 (1996) (examining empirical aspects of lower federal court interpretation); *see also* James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1 (1994) (addressing interpretation of consumer protection laws in state and lower federal courts); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (addressing different approaches to statutory interpretation by elected state judges).

level. Textualist Justices have argued strongly for an interpretive approach that emphasizes the ordinary meaning of words and the semantic structures of statutory text. They rely heavily on dictionaries and language canons to discern statutory meaning,[5] and often discount or reject committee reports and floor debates as superfluous or illegitimate.[6] Purposive Justices have pushed back, contending that text is often less than conclusive and that considerations of congressional intent and purpose require consulting legislative history to help resolve ambiguities[7] and to confirm or reinforce the apparent meaning of text.[8]

This Article explores how judges in the courts of appeals approach statutory interpretation under different terms of engagement. We examine empirically whether circuit court judges embrace, or clash over, interpretive theories as the Justices have so often done, or—alternatively—whether they apply textualist and purposive resources in ways that are more pragmatic, and less dogmatic, than their Supreme Court counterparts. We also address normatively whether courts of appeals ought to follow a more eclectic and adaptable interpretive approach, given the divergent institutional realities under which they decide cases.

In a preliminary consideration of differences between circuit court and Supreme Court approaches, we found that dictionary use in the Supreme Court between 1986 and 2011 was substantially higher than in circuit courts for the very same cases—that is, circuit court decisions on which the Court had granted certiorari and reached

5. *See, e.g.*, Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2001-04 (2012) (Alito, J.) (relying on dictionary definitions); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 218-21 (2008) (Thomas, J.) (relying on ordinary meaning while invoking various language canons).

6. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-16, 119 (2001) (Kennedy, J.) (relying on language canons and declining to consider contrary legislative history in the face of clear text); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-101 (1991) (Scalia, J.) (rejecting consideration of legislative history as illegitimate when text is unambiguous).

7. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704-08 (1995) (Stevens, J.) (relying heavily on committee reports to support contested construction of text); *Casey*, 499 U.S. at 112-15 (Stevens, J., dissenting) (emphasizing that the Court must remove "its thick grammarian's spectacles" and not ignore legislative history when it provides "persuasive evidence of Congress' actual purpose").

8. *See, e.g.*, Carr v. United States, 560 U.S. 438, 457-58 (2010) (Sotomayor, J.) (relying on committee report and drafting history to reinforce meaning of text); Small v. United States, 544 U.S. 385, 393 (2005) (Breyer, J.) (relying on committee and conference reports to confirm meaning of text).

decisions on the merits.[9] We suggested that this difference might be due to both political and institutional factors. The Court's greater political exposure may lead the Justices to invoke dictionaries as part of an effort to deflect charges of judicial activism.[10] In addition, the more routinized aspects of circuit court review, combined with the absence of permanent membership on particular circuit court panels, may result in circuit courts adopting less of an institutional culture regarding the use of specific interpretive resources such as dictionaries.[11]

This Article reports on our more comprehensive and textured effort to compare Supreme Court and appeals court usage of dictionaries and also legislative history. Our analyses are based on a dataset comprised of federal appeals court decisions in three circuits (Second, Seventh, and Tenth) covering three statutory subject areas (criminal law, business and commercial law, and labor and employment law) from September 2005 through May 2015, as well as Roberts Court decisions in the same three fields over the same time period.

To summarize certain key findings at the outset, the Supreme Court uses both dictionaries and legislative history considerably more often than do the courts of appeals. In terms of balance between the two resources, the Court's use of legislative history is only modestly more frequent than its own dictionary use, whereas the circuit courts are far more likely to use legislative history than dictionaries. This substantially higher use of legislative history relative to dictionaries by the courts of appeals is evident in all three subject areas and in all three circuits.[12] As a result, the gap between the Supreme Court and courts of appeals in dictionary usage is much greater than the gap in usage of legislative history. This difference is also considerable for circuit court cases in which the Supreme Court granted certiorari and then used the resource in question: in such cases, the courts of appeals used legislative history

9. *See* James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and the Courts of Appeals*, 125 YALE L.J.F. 104, 105 (2015) [hereinafter Brudney & Baum, *Dictionaries 2.0*].

10. *See id.* at 115-16.

11. *See id.* at 117-19.

12. *See infra* Part II.A.

more often than they used dictionaries.[13] These findings lend strong support to our previously expressed idea that a distinctive dictionary culture is prevalent in the current Supreme Court.[14]

Looking more closely at each interpretive resource, we found that the relative frequency of dictionary use between the two court levels varies considerably depending on the subject area and the type of dictionary. Supreme Court dictionary use in criminal law decisions is notably higher than in business and commercial or labor and employment cases; by contrast, circuit court dictionary use in business and commercial law decisions is more than double that in criminal or labor and employment cases.[15] Moreover, in criminal law cases the circuit courts often invoke dictionaries for de minimis reasons; thus their *reliance* on cited definitions is considerably lower than Supreme Court reliance in criminal law decisions. The Supreme Court also uses general dictionaries over all three fields to a much greater extent than legal dictionaries, whereas the courts of appeals invoke legal dictionaries substantially more than general dictionaries.[16]

With respect to legislative history, there are intriguing differences in how legislative history is applied at the two judicial levels. The Supreme Court is a much heavier user of what we call "vertical" history. This is the record of changes in a statutory text—modified over multiple Congresses (statutory history) or developed in successive versions of a bill preceding enactment by one Congress (drafting history)—as distinct from traditional legislative history commentary that accompanies the development of a statutory text (for example, committee reports and floor debates). Vertical history, based on successive iterations of text rather than narrative explanations from legislative subgroups, is apparently more attractive (or

13. *See infra* Part II.A.3.

14. *See generally* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013) [hereinafter Brudney & Baum, *Oasis or Mirage*] (exploring the Justices' dictionary usage through empirical and doctrinal examination of majority, concurring, and dissenting opinions from 1986 to 2011).

15. *See infra* Table 2.

16. *See infra* Table 5. And, while the appeals courts tilt more heavily toward using dictionaries published close to the time the controversy before the court was initiated, the Supreme Court favors dictionaries published around the date a statute was enacted. *See infra* notes 96-98 and accompanying text.

less unattractive) to textualist Justices than are other types of legislative history. By contrast, the courts of appeals make only modest use of vertical history, invoking traditional legislative history commentary on a far more regular basis.[17] In addition, in criminal law cases the relative frequency of legislative history usage among the circuits is associated with the distinctly higher proportion of white-collar criminal cases in the Second Circuit.

These divergent approaches—with marked variations based on subject area, preference for general versus legal dictionaries, and types of legislative history—undermine any notion that federal courts are moving toward a uniform statutory interpretation approach. Instead, our findings suggest that something more protean occurs in the courts of appeals. In Greek mythology, Proteus, an early sea god, was a shape-shifter, capable of assuming many forms.[18] The adjective "protean" suggests versatility, adaptability, and pragmatism, as distinct from more dogmatic or inflexible interpretive approaches.

As we explain below, the circuit courts display a kind of pragmatic adaptability in their interpretive priorities, linked to factors that we contend are institutional and resource-centric rather than ideological or doctrine-driven. Their protean stance contrasts with the Supreme Court's more self-consciously strategic, and at times dogmatic, approach to statutory interpretation. We believe the appeals court approach reflects sound practical and reasonable normative considerations that offer useful guidance for other lower courts and perhaps for the Supreme Court as well.

In Part I, we propose certain factors that may help to differentiate statutory interpretation in the Supreme Court and the courts of appeals—notably the presence of a repeat player effect at the Supreme Court, and the heightened levels of congressional and media attention directed at the Justices both during and after the judicial selection process. In Part II, we present our empirical findings, summarized above, including the methods we used to assemble our

17. In addition, the circuit courts use Senate committee reports substantially more than their House counterparts, whereas the Supreme Court invokes resources from both chambers to roughly the same extent. *See infra* Table 6.

18. *See* HOMER, THE ODYSSEY bk. 4, at 336-84 (Barry B. Powell trans., Oxford Univ. Press 2015) ("I will tell you all the tricks of this old man.... He will try everything, taking on the form of all creeping things on the earth, and of water, and wondrous blazing fire.").

dataset. In Part III, we analyze our findings using illustrative circuit court and Supreme Court decisions; we then explain why we believe that—in partial contrast to the Supreme Court—the court of appeals findings reflect an approach to statutory interpretation that is protean and eclectic rather than doctrinaire or strategic. We also suggest possible normative advantages to this protean approach—from an epistemological standpoint, for its democratizing influence, and as an ad hoc limitation on methodological stare decisis.

I. THE POTENTIAL FOR INTERPRETIVE DIVERGENCE

A range of factors may contribute to divergent interpretive approaches between the Supreme Court and the courts of appeals. These factors reflect different institutional structures and operational realities at the two judicial levels.

A. The Limited Role of Hierarchical Instruction

Unlike the value of precedent in substantive law, the Supreme Court's approach to interpretive methodology is not likely to dominate or substantially influence the ways that appeals courts construe federal statutes. Initially, in contrast to constitutional doctrine, Congress and agencies have created virtually all federal statutory and regulatory law,[19] and the Court has construed only a very small fraction of these provisions. Lower courts may not receive the same degree of methodological guidance as the Court has provided with respect to constitutional interpretation, where it is viewed as the predominant, if not exclusive, arbiter of methodology, as well as meaning.[20]

---

19. Federal common law plays a rare, interstitial role in relation to this statutory setting. *See, e.g.*, Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 456-57 (1957) (construing federal labor statute to authorize creation of federal common law for the enforcement of collective bargaining agreements); Clearfield Tr. Co. v. United States, 318 U.S. 363, 366-67 (1943) (recognizing federal common law related to rights and duties of United States on commercial paper which it issues).

20. *See, e.g.*, Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420-21 (2013) (vacating lower federal court ruling for failure to apply correct standard of strict scrutiny under Equal Protection Clause); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 299 (1984) (reversing lower federal court ruling and upholding local regulation based on "reasonable time, place,

An absence of explicit guidance for appeals courts might be less important if the Supreme Court made its own methodological preferences clear. But in practice, although the Justices have frequently taken self-consciously methodological positions, they have not set forth a single interpretive methodology. To the contrary, in recent decades they have articulated sharply divided views, ranging from ardent textualism to respect for intentionalism or purposivism and recognition of a consequentialist or pragmatic approach.[21] These diverse methodologies do little to predict, much less dictate, whether, how often, or to what extent judges should rely on dictionaries, canons, legislative history, or a statute's general purpose. Thus, even if interpretive methodologies could be deemed tantamount to precedent,[22] there is nothing like that precedent to be found in Supreme Court pronouncements.

Further, assuming arguendo that the Justices agreed on a constructive role for particular resources, it is hard to fathom how such statutory interpretive methods could be viewed as precedential

---

or manner" standard of First Amendment review); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314-16 (1976) (per curiam) (reversing lower federal court ruling while declaring that rational relation rather than strict scrutiny was the correct review standard under Equal Protection Clause); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (reversing state supreme court ruling for misapplying rational relation standard); Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941) (affirming state supreme court ruling and upholding local ordinance against First Amendment challenge, based on its being a content-neutral, time, place, and manner regulation of public forum). *See generally* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227-28 (2015) (explaining different First Amendment standards for content-based and content-neutral regulation of speech).

21. *Compare* King v. Burwell, 135 S. Ct. 2480, 2492-96 (2015) (Roberts, C.J.) (advancing purposivist approach), *with id.* at 2496-502 (Scalia, J., dissenting) (advancing textualist approach); *compare* Janus Capital Grp. v. First Derivative Traders, 131 S. Ct. 2296, 2301-05 (2011) (Thomas, J.) (advancing textualist approach), *with id.* at 2311-12 (Breyer, J., dissenting) (advancing pragmatic approach); *compare* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-19 (2001) (Kennedy, J.) (advancing textualist approach), *with id.* at 124-29 (Stevens, J., dissenting) (advancing purposivist approach).

22. *See* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607 (2014) (arguing that *Chevron* is an interpretive precedent although no other statutory interpretation doctrines play that role, or even qualify as "law"); *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (demonstrating that interpretive dialogue in this area is characterized by sharp court-legislature divisions more than inter-branch convergence toward a single precedential approach); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J.F. 47 (2010) (criticizing the concept of judicial methodological consensus for statutory interpretation cases).

in the way that doctrine is. Most federal court opinions, at least at appellate levels, employ multiple interpretive tools or resources. They invoke ordinary meaning analysis; Supreme Court, circuit court, or common law precedent; dictionary definitions; language or substantive canons; specific legislative intent or general statutory purpose, typically revealed through legislative history; agency deference; or legislative inaction. The weight of each interpretive method in contributing to a doctrinal result is almost invariably uncertain. A language or substantive canon, or a Supreme Court or common law precedent, or a dictionary definition, may be an exclusive or primary cause, a supporting but ancillary cause, a confirmatory or reinforcing source, or mere window dressing—or it may be used to deflect, dismiss, or rebut reliance by the losing side (represented by the nonprevailing party, a lower court, or the dissent).

Thus, unlike substantive "holdings" that become precedential even if open to debate at the margins, it is not practicable to allocate degrees of authoritative status to interpretive resources on a systemic basis. And given the diversity of linguistic formulations in our thousands of federal statutes, there is seemingly no possibility of arriving at an authoritative hierarchy of interpretive resources that can address the meaning of innumerable ambiguous texts. In sum, the Hart and Sacks caveat set forth over half a century ago remains applicable today:

> Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[23]

One might imagine a limited role for interpretive precedent in negative terms—if, for instance, the Court were to declare that dictionaries or legislative history are irrelevant and start reversing decisions that relied on them in any way. A comparable negative rule was in place for centuries in Britain with respect to legislative

23. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994) (1958).

history: the courts followed an eighteenth-century precedent and refused to consider parliamentary proceedings as an aid to statutory construction.[24] This precedent began to break down in the latter decades of the last century and it eventually was overruled in 1992.[25] Well before then, however, British judges admitted to consulting the parliamentary debates on their own and gleaning guidance from them albeit without references in their actual opinions.[26] This practice of "peeking" at a forbidden resource suggests how even negative interpretive precedent might be difficult, if not impossible, to monitor in practical terms.

For all these reasons, one should expect that circuit court judges have ample room to develop their own methodological approaches when construing federal statutes, perhaps on field-specific as well as case-by-case grounds.[27]

B. The Repeat Player Effect

In the Supreme Court, nine repeat players hear and decide all cases together. In recent decades, there have been prolonged periods of continuous membership without change. Over the first ten terms of the Roberts Court (2005-2014), after Justice Alito succeeded Justice O'Connor midway through the 2005 Term, there were only two changes (Justice Sotomayor for Justice Souter in 2009; Justice Kagan for Justice Stevens in 2010).[28] Prior to the appointment of Justices Roberts and Alito in 2005, the Court's membership had not changed at all for eleven terms—from 1994 through 2004.[29] This level of continuity permits and may encourage methodological convergence, especially if one Justice forcefully stakes out a position

24. *See* Millar v. Taylor (1769) 98 Eng. Rep. 201, 217 (K.B.); 4 Burr. 2303, 2332.

25. *See* Pepper v. Hart [1993] AC 593 (HL) at 644-46 (Eng.).

26. *See* James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 8-9 (2007) (discussing remarks of Lord Denning in a 1979 Court of Appeal decision).

27. *Cf.* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React when the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 492 (2015) (concluding that key impediments to a lawlike approach to statutory interpretation across the federal judicial hierarchy "stem from the Court's own inconsistency and from the inherently slippery, non-lawlike nature of many interpretive rules").

28. *See Members of the Supreme Court of the United States*, U.S. SUP. CT., https://www.supremecourt.gov/about/members.aspx [https://perma.cc/H8D5-ZL6K].

29. *See id.*

on the use or rejection of certain resources. Justice Scalia played that role during his tenure on the Roberts Court (and also on the Rehnquist Court) with respect to the increased reliance on dictionaries and diminished use of legislative history.[30] Other Justices may go along out of collegial respect or for strategic reasons.[31]

By contrast, appeals court judges sit in panels of three, comprising only a fraction (in some circuits a small fraction) of a circuit's total membership. The participation of senior and visiting judges further increases what would be frequent shifts in panel composition in any event.[32] Thus, there is relatively limited opportunity for full-circuit conversation that might lead to consistency in methodological approaches. Moreover, in part because of earlier retirement, there tends to be less continuity of membership in the courts of appeals than in the Supreme Court. Of the three circuits we studied, the Second and Tenth have had considerable turnover during our ten-year period.[33]

The relative lack of participatory continuity hardly means that circuit court judges are incapable of collective reflection about interpretive methodologies. They presumably pay close attention to

30. *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 160-71 (2008).

31. *See id.* at 162-70; *see also* Brudney & Baum, *Dictionaries 2.0*, *supra* note 9, at 117.

32. *See* Brudney & Baum, *Dictionaries 2.0*, *supra* note 9, at 117-18.

33. In the Second Circuit, of thirteen judges on active status in May 2015, seven were active for the entire 2005-2015 period in which we gathered and analyzed decisions; the six others were on active status for between four and eight years during this same period. *See United States Court of Appeals for the Second Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Second_Circuit [https://perma.cc/68LC-YJTP]. In the Tenth Circuit, of twelve active status judges in May 2015, five were active for the entire 2005-2015 period; the seven others were on active status for between one and nine years in this period. *See United States Court of Appeals for the Tenth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Tenth_Circuit [https://perma.cc/9G4L-FVG4]. Authoritative information on the tenure of judges in the Second, Seventh, and Tenth Circuits is available at History of the Federal Judiciary, *Biographical Directory of Federal Judges, 1789-present*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/judges.html [https://perma.cc/8Q34-2Z44].

To be sure, senior circuit court judges may continue to contribute to jurisprudential developments: the Second Circuit during this period, for example, included distinguished senior judges Calabresi, Kearse, Leval, Newman, Walker, and Winter. *See United States Court of Appeals for the Second Circuit*, *supra*. That said, the more infrequent and intermittent participation by senior judges is likely to have some impact on the self-consciousness and coherence of methodological exchanges when compared to the ongoing dialogue among nine continuously sitting Justices.

the development of substantive precedent within their own circuit; it seems plausible to envision these judges focusing at times on certain aspects of interpretive methodology in similar terms. Interestingly, the Seventh Circuit had the most continuity in membership during our period of study.[34] It also has included, for more than three decades, Judges Posner and Easterbrook—two nationally renowned and widely respected jurists who have expressed persistent methodological reservations about the use of dictionaries.[35] We will explore in Part II whether their presence may have had a special impact on dictionary use in the Seventh Circuit.

C. Resource Imbalance

Compared with the courts of appeals, the Supreme Court has a less demanding caseload, greater access to law clerk and library support, and a wealth of briefs from amici as well as parties. The Court issues seventy to eighty total decisions with written opinions every year.[36] By contrast, in 2015, the active judges on our three circuits participated in a substantially larger number of cases decided on the merits, from a mean of 253 cases per judge in the Tenth Circuit to 430 cases per judge in the Second Circuit.[37] This heavy volume means appeals courts are under pressure to decide

34. In the Seventh Circuit, eight of nine active status judges as of September 2015 were active for the entire 2005-2015 period, and two vacant seats had formerly been filled by judges who were active from 1995 to 2010 and from 2007 to February 2015. *See United States Court of Appeals for the Seventh Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Seventh_Circuit [https://perma.cc/WZ7P-J2T4]. Four of the nine active status judges began serving in the 1980s, and three more have been serving since the 1990s. *See id.*

35. *See infra* notes 151-53 and accompanying text.

36. *See The Justices' Caseload*, U.S. SUP. CT., https://www.supremecourt.gov/about/justicecaseload.aspx [https://perma.cc/3KF3-GC54].

37. The mean was 378 cases in the Seventh Circuit. These figures were calculated from data on participations by active judges in fiscal year 2015. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2015, at tbl.B-11 (2015), http://www.uscourts.gov/sites/default/files/data_tables/B11Sep15.pdf [https://perma.cc/NZT9-DCLQ]. Throughout that year, there were thirteen active judges in the Second Circuit, nine in the Seventh Circuit, and twelve in the Tenth Circuit. In the three circuits, all but two cases terminated on the merits in 2015 had signed or "reasoned, unsigned" opinions. *See id.* at tbl.B-12, http://www.uscourts.gov/sites/default/files/data_tables/B12Sep15.pdf [https://perma.cc/3F8Q-W5BK]. In terms of court-wide comparisons, between 2005 and 2014 our three courts of appeals decided on average almost 600 cases per circuit each year in the three subject fields alone. Complete data on cases and fields are on file with the authors.

cases without spending much time reflecting on or wrestling with methodological approaches. In addition, lawyer participation is often not of the same quality or quantity as in the Supreme Court; for instance, there are comparatively few amicus briefs.[38] Some scholars have suggested that this could lead to a larger differential in the use of labor-intensive resources such as legislative history,[39] although not necessarily in the use of "less expensive" resources like dictionaries.

D. Congressional and Media Attention

The visibility of Supreme Court decisions is high, and Justices may feel obligated, if not constrained, to defend against judicial activism critiques. Scholars have shown that in recent decades, congressional overrides have been especially frequent in the areas of civil rights/workplace equality and criminal law/habeas procedure, responding to liberal Supreme Court decisions in criminal law and to conservative Supreme Court decisions in civil rights.[40] These are fields in which media interest and ideological tensions may make the Justices especially sensitive. Not surprisingly, appeals court judges are less well-known, and their decisions are comparatively less scrutinized. This might lead to less frequent invocation of certain putatively neutral resources like dictionaries (or canons, which we did not examine) in such highly visible fields.

On the other hand, one social science study of congressional responses to circuit court decisions found that congressional overrides came most often (55 percent) in the economic regulatory area, and they occurred more quickly than was true for the Supreme Court.[41] And there is some additional evidence that Congress is not

38. *See* Bruhl, *supra* note 4, at 470-72.

39. *See id.* at 473-75; Nehf, *supra* note 4, at 5-6.

40. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1356-61 (2014); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 343-45 (1991).

41. *See* Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 65 (2001) (reporting that the issue area for 55.5 percent of appeals court cases generating congressional response from 1990 to 1998 was economic activity (environment, bankruptcy, or other), versus 8.6 percent arising in criminal law issue area, and 5 percent in civil rights area). The study reported that 47 percent of all overrides during this period occurred within two years of a circuit court decision, and 81

shy about overriding circuit court decisions construing commercial/economic regulatory provisions.[42] Perhaps legislators, and the regulated communities that lobby them, pay special attention to these types of economic regulatory cases in the courts of appeals, decisions that may have substantial impact even though (or partly because) the vast majority will never reach the Supreme Court. If "judicial activism" is an inherently subjective concept, based on perceptions from some relevant audience, then the most responsive legislative audiences for Supreme Court decisions may differ by field from the audiences for appeals court cases.

E. The Judicial Selection Process

Professors Aaron Bruhl and Ethan Leib have marshaled arguments in support of a certain degree of interpretive divergence between federal court and state court judges when elected state court judges construe statutes.[43] They suggest that a judge's democratically chosen status may justify her in according relatively less weight to stare decisis considerations, and correspondingly more weight to dynamic interpretation—taking greater account of current social values and legislative preferences than may be appropriate for unelected federal judges.[44]

In addition to the institutional and operational differences we have articulated to this point, Bruhl and Leib's focus on divergent methods of judicial selection may be instructive. Differences in the selection of Supreme Court and court of appeals judges are not as stark as those between elected and appointed judges, but they have their own implications for modes of legal interpretation. Just as Supreme Court decisions garner special political and media atten-

---

percent within five years. *See id.* This rate of override was generally faster than what occurred in the Supreme Court in the 1980s, as revealed by the Eskridge Yale study. *Cf.* Eskridge, *supra* note 40, at 345.

42. *See* Eskridge, *supra* note 40, at 424-27 (listing more than twenty court of appeals decisions construing economic regulatory statutes that were overridden by Congress between 1967 and 1990).

43. *See* Bruhl & Leib, *supra* note 4, at 1237-53. Bruhl and Leib recognize that a federal judge's job involves statutory interpretation to a greater degree than a state judge's—the latter deals more regularly with common law issues. *Id.* at 1241. Their focus is on areas of overlap between the two types of judges regarding interpretation of statutes.

44. *See id.* at 1257-59.

tion, so too the Supreme Court nomination and confirmation processes are more ideologically high-profile and politically polarized than those processes are for court of appeals judges.

One possible consequence is that candidates for the Supreme Court are required to articulate and defend "neutral" interpretive philosophies, and to repudiate any dynamic or other "unconventional" interpretive impulses as antidemocratic.[45] These confirmation exchanges—reported in detail by mainstream and specialized media—may contribute to the candidates acquiring methodological labels that follow them, albeit at times subtly, onto the High Court bench.[46] Moreover, once on the Court, Justices in recent times have continued to expound on their interpretive philosophies through extrajudicial speeches and media appearances—at times defending their own neutrality while criticizing colleagues for judicial activism.[47]

---

45. *See* Michael R. Dimino, Sr., *Image Is Everything: Politics, Umpiring, and the Judicial Myth*, 39 HARV. J.L. & PUB. POL'Y 397, 398 (2016) (emphasizing "[t]he important consideration ... that judges (and umpires) who are *believed* to be doing no more than applying the law w[ill] escape some of the controversy and criticism that they might receive if the full scope of their discretion were realized"); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1292 & n.249 (2009) (citing to Senate Judiciary Committee hearing exchanges between senators from both parties and Supreme Court nominees Justice Breyer in 1994 and Justice Ginsburg in 1993, focused on value of legislative history); James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 174 & n.91 (2003) (citing to hearing and floor statements by senators from both parties from 1987 to 2001, related to Supreme Court confirmation processes and emphasizing the importance of neutral interpretation of the law).

46. *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of C.J. John Roberts) (reporting that judges have the limited role of umpires, whose job is to see that everyone plays by the rules, and that "[n]obody ever went to a ball game to see the umpire"; adding that judges have no agenda or platform and simply decide every case based on the record and according to the rule of law); *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 202-03 (2010) (statement of J. Elena Kagan) (reporting that Chief Justice Roberts's umpire metaphor is correct in important respects, including the judge not having a team in the game and judges realizing that their role is a limited one because the real policymakers are in Congress and the executive branch; adding that the calls Justices make are not easy ones and their exercise of judgment requires listening hard to each side and "cast[ing] each argument in the best possible light").

47. *See generally* Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 169-72 (2016).

Appeals court judges are not immune from such confirmation-related attention or post-appointment celebrity. At the same time, their interpretive approaches generally receive far less congressional, interest group, or media scrutiny. This may, in turn, result in their feeling less constrained or self-conscious as they subsequently develop their own approaches to statutory construction problems and challenges—contributing, albeit in ways that would be difficult to measure, to more eclectic and adaptable interpretive perspectives.

Some of these factors may have more explanatory value than others. We will cross-reference or incorporate certain factors as we present and then analyze our results. But one important takeaway at the outset is the likelihood of a genuine divergence between statutory interpretation methods at the Supreme Court and the courts of appeals.

Before we turn to our empirical examination, it is worth identifying possible normative implications flowing from the likelihood of interpretive divergence between the two judicial levels. First, one might contend that courts of appeals have an obligation to not disregard clear Supreme Court methodological priorities because such priorities should serve essentially as rules of recognition in the statutory field. We do not find this contention overly persuasive. Apart from the reality that the Justices have never agreed on such clear priorities,[48] we would be reluctant to endorse a rule-like approach emanating from Supreme Court experience, given that the Court's cases are atypical in their contestation, complexity, and policy implications. These cases are the tip of an enormous appellate decisional iceberg, just as the Justices who decide them operate in an institutional climate that differs substantially from the one facing federal appeals court judges.[49] Accordingly, one should

48. Of course, the Justices and appeals court judges do agree that in a statutory interpretation setting one should start by carefully examining the text. In this respect, Justice Scalia has helped generate a renewed understanding that "we are all textualists now." *See* Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [https://perma.cc/9ZL7-UZZG]. That said, there remain abiding differences among the Justices as to the extent that text may be mediated by considerations of congressional purpose or intent, the relative importance of dictionaries, the varied roles of language and substantive canons, and the weight given to legislative history.

49. *See supra* Parts I.B-E (addressing repeat player effect, resources imbalance, con-

hesitate to adopt an inflexible or prescriptive methodological approach based on this small subset of decisions generated in a unique context.

A more intriguing and important normative question (at least to us) is whether, assuming appeals courts turn out to be pragmatic and adaptable—and less dogmatic—than the Supreme Court in their interpretive methods, such a protean approach is preferable to a more self-consciously strategic or opinionated one. We will defer a response to this question until the end of our next two Parts, which identify the contours of divergence between the two judicial levels in empirical and doctrinal terms.

II. EMPIRICAL FINDINGS

The empirical analyses in this Part provide a range of findings about comparative usage of dictionaries and legislative history. We believe these analyses offer valuable information in themselves, although not all findings are directly relevant to the protean theme set forth in the earlier discussion.

Our findings focus on two types of differences in statutory interpretation approach between the Supreme Court and the courts of appeals. We assess the *comparative magnitude of resources used*. Does the Supreme Court use dictionaries and legislative history more often than the appeals courts do, and how do these differences in usage vary between fields?[50] Likewise, are there differences in magnitude with respect to certain attributes of usage, such as general versus legal dictionaries, or particular types of legislative history?[51] We also assess the *comparative balance between the two resources*. Is the gap between Supreme Court use of dictionaries and legislative history larger or smaller than the gap between circuit court use of those two resources?[52] And does the ratio of legislative history use to dictionary use differ among circuits as well as between the circuits taken together and the Supreme Court?[53]

---

gressional and media attention, and judicial selection process).

50. *See infra* Parts II.A.1-2.

51. *See infra* Parts II.B, II.C.2.

52. *See infra* Part II.A.3.

53. *See infra* Part II.C.1.

Finally, our findings address separately certain differences in dictionary and legislative history use among the three circuits.[54] These differences are not central to our goal of comparing interpretive approaches at the two judicial levels. At the same time, identifying and describing the differences allows us to consider the possibility that individual circuits may be shaped by outspoken appeals court judges acting on their methodological preferences in ways that are analogous to what we have noted is present at the Supreme Court level.

To probe the use of dictionary definitions and legislative history in statutory interpretation, we analyzed opinions in the Supreme Court and three federal courts of appeals in statutory cases over a period of approximately one decade: the 2005-2014 Terms of the Supreme Court and decisions handed down from September 2005 through May 2015 in the courts of appeals. The three courts of appeals that we include in the study are the Second, Seventh, and Tenth Circuits. We selected those circuits largely for their geographical and demographic diversity. However, we were also interested in the Second and Seventh Circuits because of their high prestige and the prominence of some of their judges as advocates for particular approaches to statutory interpretation.[55]

Our study includes three statutory areas: criminal law, business and commercial law, and labor and employment law.[56] These fields, which were also the subjects of our earlier studies of dictionary use,[57] cover a large share of the statutory landscape and include a diverse range of relationships involving government and private parties.[58]

---

54. *See infra* Part II.D.

55. *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES (2014); RICHARD A. POSNER, HOW JUDGES THINK (2008); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

56. For definitions of the three fields, see Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 496 n.25.

57. *See id.* at 488; Brudney & Baum, *Dictionaries 2.0*, *supra* note 9, at 104.

58. Criminal law involves substantial prosecutorial resources brought against individuals, many of whom lack comparable resources. Business and commercial law (hereinafter referred to simply as "commercial law") often involves two well-resourced institutional parties in an arm's length relationship, although government and individuals also appear. Labor and employment law is a more ideologically charged field than the other two; parties' resources in general are more equal than in criminal law, but less balanced than in commercial law.

We analyze two broad issues regarding dictionaries and legislative history: the use *vel non* of these interpretive resources, and certain specific attributes of dictionaries and legislative history when these resources are being used. In Section A, we examine the extent to which the Supreme Court and three appeals courts use dictionary definitions and legislative history in their majority opinions. In Section B, we explore various attributes of the interpretive resources that the courts use, such as types of dictionaries and sources of legislative history. In Section C, we pull together the evidence on differences between the Supreme Court and courts of appeals from the two prior sections and consider the sources of these differences. Finally, in Section D, we present an overview and analysis of similarities and differences among the three courts of appeals that we have examined.

For the Supreme Court, our analysis is based on the universe of cases in the three fields that were decided with full opinions. We identified the majority opinions that used an interpretive resource from a reading of the full set of 231 statutory decisions in the 2005-2014 Terms that met our criteria for inclusion: 94 in the field of criminal law, 50 in the field of commercial law, and 87 in the field of labor and employment law.

For the courts of appeals, the denominator of reported decisions numbered in the thousands for our three circuits over the ten-year period.[59] For each circuit/field combination, we used search terms to identify majority opinions officially published in the West Reporter system[60] in which a court might have cited dictionary definitions or legislative history in the process of resolving a statutory question.[61] We then analyzed a stratified sample of these cases—reading every fourth case that was identified for legislative history and every fourth case identified for dictionary use, in order to determine in which of those cases the majority opinion actually cited that

59. We created the denominator datasets based essentially on reported cases presenting legal issues arising under 18 U.S.C. (criminal law), 15 U.S.C. (commercial law), and 29/42 U.S.C. (labor and employment law). We identified over 1800 Second Circuit reported cases, over 3000 Seventh Circuit reported cases, and over 1500 Tenth Circuit reported cases in these fields.

60. The decisions appear in F.3d volumes from 422 F.3d 1155 (Sept. 2, 2005) to 784 F.3d 1123 (May 1, 2015).

61. Search terms used to locate dictionary and legislative history usage in each of the three circuits and the three fields are on file with the authors.

resource in relation to statutory interpretation in the particular field.[62] When an opinion did not meet the identified criterion, it was replaced with the next case that did so.[63] In calculating the proportions of majority opinions that used dictionary definitions or legislative history, we corrected for imperfections in the search procedure that produced "false positives" and "false negatives."[64]

We examined the majority opinions in our initial samples that actually used either a dictionary or legislative history in order to analyze how courts of appeals employed the two resources. Altogether, we reviewed 182 cases in which a court cited legislative history. Of these cases, 86 were from the Second Circuit, 50 from the Seventh Circuit, and 46 from the Tenth Circuit; 99 cases were in criminal law, 46 in commercial law, and 37 in labor and employment law. For dictionary definitions we reviewed a total of 88 cases.[65] Of these cases, 33 were from the Second Circuit, 24 from the Seventh

62. Our research assistant, Amy Torres, read every fourth case. One of the authors also read more than three-fourths of these numerator cases in order to review and make minor coding adjustments as needed. The other author read a smaller sample of the numerator decisions. The cases were listed by citation in the Federal Reporter, so they were in rough chronological order.

63. Cases did not meet the identified criteria for one of two reasons: either the case did not actually fall into one of our three statutory fields even though a relevant U.S.C. reference appeared somewhere in the majority opinion, or (less often) the case did not actually involve the use of a dictionary or legislative history.

64. False positives were opinions that were identified by the search criteria for a resource but that did not actually involve use of that resource. (Cases that turned out not to fall into one of the three subject matter fields were not used in the analysis of that field, but they were not counted as false positives if they did use the resource in question.) False negatives were cases in which our search terms did not identify use of a resource but in which it was actually used. We identified false negatives by reading cases in which the search terms indicated that one resource was used but not the other. If our reading indicated that the other resource *was* used, as happened in a small proportion of cases, then the case was a false negative.

For each resource, we started out with the proportion of cases in which the search terms indicated that the resource was used. We multiplied this proportion by [one minus the false positive rate] and then by [one plus the false negative rate] to obtain our estimate of the actual usage rate. For each resource, the false positive rates were separately calculated for each combination of circuit and field of law; because of the smaller number of cases on which it was based, a single false negative rate was calculated for each resource. Our estimates of usage rates for the courts of appeals are necessarily inexact, so we do not ascribe any substantive significance to small differences between fields or courts. Of course, the need to estimate usage rates in the courts of appeals has no impact on the analysis of the ways in which interpretive resources are used, including reliance on those resources and other attributes of usage.

65. With respect to both dictionaries and legislative history, the total number of cases using each resource in our three fields is roughly four times the number of cases we reviewed.

Circuit, and 31 from the Tenth Circuit; 51 were in criminal law, 20 in commercial law, and 17 in labor and employment law. Except where noted, our analyses of the practices of courts and individual judges are based solely on majority (or in rare instances, plurality) opinions.

A. Supreme Court Versus Courts of Appeals: Usage and Reliance

1. Dictionary Use and Reliance

As shown in Table 1, the Supreme Court cites dictionaries in a much higher proportion of its majority opinions than do the courts of appeals—nearly four times as frequently.[66] The disparity between the two levels of courts is smallest in commercial law, the field in which dictionary use is most common in the courts of appeals and least common in the Supreme Court.[67] In criminal law and labor and employment, the difference is considerably greater.[68] There are some substantial differences among the three circuits in rates of dictionary citations, both overall and in specific fields—differences that we will discuss later in this Part.[69] But each of the three circuits fell far short of the Supreme Court in overall usage of dictionaries, with the Tenth Circuit having the highest rate at 11.9 percent.[70]

---

66. Throughout this Part, our interpretations of patterns of dictionary and legislative history usage are informed by the statistical significance of differences between the two judicial levels and among circuits and fields of law. We do not refer to significance at these various points, however, in an effort to present and discuss results in a clear and concise manner. Moreover, there is good reason not to rely heavily on tests of significance in interpretation of findings. *See, e.g.*, Ronald L. Wasserstein & Nicole A. Lazar, *The ASA's Statement on p-Values: Context, Process, and Purpose*, 70 AM. STATISTICIAN 129 (2016). All calculations of significance are on file with the authors.

67. *See infra* Table 1.

68. *See infra* Table 1. If we divide the decade in half, the citation rate in the Supreme Court for the 2005-2009 Terms was 27.0 percent, compared with 29.3 percent in the 2010-2014 Terms. Thus, it appears that the growing rate of dictionary citations in the Court has stabilized at its historically high level. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 495-97. Our method for estimating usage rates in the courts of appeals does not allow for a confident judgment about trends within the decade-long period.

69. *See infra* Part II.D.

70. *See infra* Table 1. In all tabulations of the overall frequency with which courts of appeals cite to resources, criminal cases have a highly disproportionate effect because those cases are far more common in the lower federal courts than are cases that fall in the other two

Table 1. Percentages of Majority Opinions in Statutory Decisions Citing Dictionary Definitions, Supreme Court and Courts of Appeals, 2005-2015

	Criminal	Commercial	Labor & Employment	Total
Supreme Court	34.0	22.0	25.3	28.1
Courts of Appeals	6.9	14.8	5.8	7.6
2d Circuit	9.9	16.5	8.2	10.8
7th Circuit	4.0	7.6	2.9	4.0
10th Circuit	10.0	27.0	12.5	11.9

When a majority opinion cited a dictionary, we determined whether that opinion actually relied on one or more dictionary definitions as a basis for the court's decision.[71] Where the Supreme Court did cite dictionary definitions, it was highly likely to rely on one or more of those definitions as at least a partial basis for its ruling—82 percent of the time. Courts of appeals were somewhat less likely to rely on a definition they cited—73 percent of the time.[72] Thus, the disparity between the two levels regarding reliance on dictionaries as part of decision-making was even larger than the overall rate of citation suggests.

In this respect as well, there was considerable variation across the three fields of law. Supreme Court reliance on a cited definition was highest in absolute terms and relative to the courts of appeals in criminal law (94 percent, versus 71 percent in the courts of ap-

fields and thus, criminal cases appear more often in our samples of cases estimating usage rates for dictionaries and legislative history.

71. We used the same criterion for reliance on legislative history. *See infra* Part II.A.2.

72. These proportions are equivalent (taking rounding error into account) to the percentages of decisions with reliance on dictionaries shown in Table 2 divided by the percentages using dictionaries at all, shown in Table 1. The rate for the courts of appeals is substantially higher than the 40.8 percent reliance rate that we found for courts of appeals in *Dictionaries 2.0*, *supra* note 9, at 112-13. The magnitude of the difference is likely a product of three factors: (1) the universe of *Dictionaries 2.0* cases spanned a much larger period, from 1986-2011, and Rehnquist-era circuit court dictionary cases may well have had a different reliance rate; (2) the cases in the *Dictionaries 2.0* setting arose in all twelve circuits, unlike the narrower range of circuits we coded here; and (3) there were only 24 appeals court cases using dictionaries in the earlier dataset (17 percent of 109, plus 5.2 percent of 106) whereas our universe here is much larger—88 cases using dictionaries. *See generally id.* at 110 tbl.1, 112 tbl.2 (providing scope of earlier research).

peals). The rate of reliance was about the same in labor and employment (73 percent in the Supreme Court, versus 71 percent in the courts of appeals). But in commercial law, courts of appeals were substantially more likely to rely on a cited dictionary definition than was the Supreme Court (80 percent, versus 64 percent). We can calculate the proportions of all majority opinions that relied on a dictionary definition as a basis for decision by multiplying the citation rate by the reliance rate. The results are shown in Table 2.

Table 2. Percentages of Majority Opinions in Statutory Decisions Relying on Dictionary Definitions, Supreme Court and Courts of Appeals, 2005-2015

	Criminal	Commercial	Labor & Employment	Total
Supreme Court	31.9	14.0	18.4	22.9
Courts of Appeals	4.9	11.8	4.1	5.5
2d Circuit	5.8	9.9	5.5	6.5
7th Circuit	2.1	7.6	2.3	2.7
10th Circuit	9.5	27.0	8.3	10.8

Thus, when we take reliance into account, the gap between the two levels of courts remains about the same in labor and employment and grows in criminal law. But the gap narrows in commercial law—enough that there is little difference in rates of dictionary reliance between the Supreme Court and the courts of appeals.[73] The contrast between commercial law and the two other fields is striking.

In addition to comparing overall frequency of dictionary usage at the two judicial levels, we also compared the average number of dictionary citations in majority opinions that use dictionaries at all. The mean number of citations was somewhat higher in the Supreme Court (2.22) than in the courts of appeals (1.78), so use of this measure increased the disparity between the two levels in dictionary use.[74] However, commercial cases were an exception: because the

73. *See supra* Table 2.

74. The ratio between the two levels in total numbers of dictionary citations was 4.6:1, compared with 3.7:1 for proportions of majority opinions using dictionaries. The ratio was

mean number of citations was somewhat higher for the courts of appeals in these cases, the disparity between the two levels was further reduced when the number of citations was taken into account.[75]

The appeals courts' distinctive dictionary approach in commercial law decisions is also evident in legislative history usage, as noted in Table 3 below. The circuit courts invoke legislative history in commercial law decisions well over twice as often as they do in criminal or labor and employment majority opinions. As we discuss in Part III, these findings, in conjunction with some others, suggest that circuit courts may be especially pragmatic (and less formalistic) than the Supreme Court in their quest for the meaning of key terms arising in complex commercial settings.

Among those opinions that rely on dictionary definitions as a basis for their conclusions, a small number treat one or more definitions as conclusive and thus as a barrier to further analysis of the meaning of a statutory provision.[76] Although the use of dictionaries as a barrier is relatively rare in both levels of courts, it is more common and more powerfully applied in the Supreme Court. That difference, which accentuates the larger role of dictionaries in the Supreme Court, will be considered further in Part III.

2. Legislative History Use and Reliance

As Table 3 shows, there was a substantial gap between the Supreme Court and the courts of appeals in citation of legislative history, in the same direction as the gap in dictionary citations. And as with dictionaries, we found that appeals court judges used legislative history far more often in commercial law than they did in the other two fields—and, for legislative history, at the same rate as the Supreme Court.

---

more than five times as high in labor and employment (7.7:1) and criminal law (7.6:1) as it was in commercial law (1.4:1).

75. The ratio between the two levels in total numbers of citations in commercial cases was 1.35:1, compared with 1.49:1 for proportions of majority opinions using dictionaries.

76. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 555-64 (reviewing cases in which the Supreme Court used dictionary definitions as a bar to consideration of certain other interpretive sources).

Table 3. Percentages of Majority Opinions in Statutory Decisions Citing Legislative History, Supreme Court and Courts of Appeals, 2005-2015

	Criminal	Commercial	Labor & Employment	Total
Supreme Court	35.1	36.0	33.3	34.6
Courts of Appeals	14.1	36.5	13.2	16.5
2d Circuit	28.2	45.2	21.6	30.0
7th Circuit	7.6	22.0	7.3	8.8
10th Circuit	14.4	47.3	21.9	18.6

When majority opinions did cite legislative history, they generally relied on at least one piece of that history as a basis for their rulings. The rate for the Supreme Court was slightly higher: 82.5 percent, compared with 77.5 percent for the courts of appeals across all three fields. In the courts of appeals the rate of reliance, like the rate of citation, was highest in commercial cases (84.8 percent), compared with 75.8 percent in criminal cases and 73.0 percent in labor and employment.[77] In the Supreme Court, the rate of reliance varied substantially among fields (unlike the citation rates, which were virtually identical). Reliance was very high for commercial law (94.4 percent) and criminal law (87.9 percent) but considerably lower for labor and employment law (69.0 percent). Thus, in commercial law cases, the proportion of decisions that relied on legislative history was similar in the Supreme Court and the courts of appeals, while the difference in reliance was considerably greater in the two other fields.

77. Data for these calculations are on file with the authors.

Table 4. Percentages of Majority Opinions in Statutory Decisions Relying on Legislative History, Supreme Court and Courts of Appeals, 2005-2015

	Criminal	Commercial	Labor & Employment	Total
Supreme Court	30.9	34.0	23.0	28.6
Courts of Appeals	10.7	31.0	9.6	12.8
2d Circuit	21.5	38.0	17.2	23.7
7th Circuit	5.4	22.0	4.3	6.5
10th Circuit	11.6	33.1	17.5	14.6

When a majority opinion used legislative history, on average the Supreme Court cited more types of legislative history (mean of 1.90) than did the courts of appeals (1.43).[78] This difference occurred in all three fields. Thus, as was true of dictionary citations, the ratio between the two levels in total citations to legislative history by this measure was somewhat higher than the ratio for the proportion of opinions citing legislative history.[79]

3. Legislative History Usage Versus Dictionary Usage

All three courts of appeals in our study cited legislative history more frequently than dictionaries.[80] The ratios range from 1.6:1 in the Tenth Circuit, to 2.2:1 in the Seventh Circuit, to 2.8:1 in the Second Circuit. The Supreme Court also cited legislative history more frequently than dictionaries, but the ratio is much smaller—a little over 1.2:1.

If we compare the frequency with which opinions cite and actually rely on these resources, the ratios favoring legislative history reliance range from 1.4:1 in the Tenth Circuit, to 2.4:1 in the Seventh

78. Data for these calculations are on file with the authors.

79. The ratio between the two levels for this measure of legislative history citations was 2.8:1, compared with 2.1:1 for proportions of majority opinions citing legislative history. The ratio between the two levels was more than twice as high in labor and employment (2.9:1) and criminal law (3.4:1) as in commercial law (1:4.1).

80. *Compare supra* Table 3, *with supra* Table 1.

Circuit, to 3.6:1 in the Second Circuit.[81] Once again, the ratio is lowest, 1.2:1, for the Supreme Court.[82]

The overall difference in usage is largely reproduced when we compare rates for circuit court cases of similar "importance"—those on which the Court granted certiorari and proceeded to invoke legislative history or a dictionary in its majority opinion. For Supreme Court majority opinions in our three fields that used legislative history between 2005 and 2015, the appeals court cases invoked legislative history 37.5 percent of the time.[83] By contrast, for Supreme Court majorities that cited to dictionaries during this same ten-year period of the Roberts Court, appeals court cases used dictionaries 27.5 percent of the time.[84]

On the other hand, the courts of appeals used dictionaries almost four times as often and legislative history more than twice as often in the subset of cases on which certiorari was granted, compared to all cases in our three fields.[85] Moreover, the ratio between the proportion of court of appeals opinions using legislative history and the proportion using dictionaries is smaller for the certiorari-granted cases (1.36:1) than for the sample of all appeals court cases in our three fields (2.17:1).

One possible explanation for the large increase in use of both dictionaries and legislative history is a judicially perceived greater need for interpretive resources than is true for the average case decided by the courts of appeals. Assuming some level of awareness from circuit court judges (as well as attorneys briefing the cases)

---

81. *Compare supra* Table 4, *with supra* Table 2.

82. The ratios for citation and reliance are the same for the Supreme Court because, when the Court did cite one of these resources, it was equally likely to rely on legislative history as it was to rely on dictionary definitions.

83. Of the 80 cases in which Supreme Court majority opinions used legislative history, appeals court majority opinions also invoked legislative history in 10 of 33 criminal law cases, 4 of 18 commercial law cases, and 16 of 29 labor and employment cases.

84. Of the 65 Supreme Court cases in which majority opinions used dictionaries, appeals court majority opinions had also invoked dictionaries in 7 of 32 criminal cases, 3 of 11 commercial cases, and 8 of 22 labor and employment cases. Court of appeals cases in labor and employment law had the highest frequency of both legislative history and dictionary use in our Supreme Court-based sample.

85. The proportions in certiorari-granted cases are 37.5 percent for legislative history and 27.5 percent for dictionaries. *See supra* notes 83-84 and accompanying text. The proportions are 16.5 percent and 7.6 percent, respectively, for the sample of all court of appeals opinions. *Compare supra* Table 3, *with supra* Table 1.

that there is or could be a circuit split resulting in a possible grant of certiorari, judges (and their law clerks) may be especially inclined to look for every interpretive resource that might be helpful. This keener appetite would tend to result in wider net-casting for resource assistance than occurs in run-of-the-mill appeals court cases, leading perhaps to some reduction in the ordinary degree of variation in use of different interpretive resources.

Further, in cases in which a certiorari grant seems like a real possibility, judges may be more drawn—even if subconsciously—to use dictionaries, an interpretive resource in vogue with the current Supreme Court. One might regard this as an adaptation by the circuits to the methodological preferences of the Justices for the small subset of cases in which intercircuit contests are likely to receive Supreme Court attention.

Returning to comparisons involving all appeals court cases, the relative frequencies with which the courts of appeals used dictionaries and legislative histories across the three subject fields did not differ a great deal. Again, there was more use of legislative history than dictionaries—from 2.5:1 to 2.0:1 for citation and from 2.6:1 to 2.2:1 for reliance.[86] As much as the three fields varied in the absolute frequency with which judges used legislative history and dictionary definitions, the tendency to employ one or the other was more or less constant.

B. Supreme Court Versus Courts of Appeals: Attributes of Usage

1. Dictionary Usage Patterns

In this Section and the one that follows, we focus on the cases in which majority opinions actually used a dictionary or legislative history. Our interest is in the specific sources that courts used and in the ways that their opinions employed the resources they used.

Majority opinions that used dictionaries did so for only a single word 63 percent of the time in the Supreme Court and 69 percent in the courts of appeals. It was uncommon to turn to dictionaries to

86. For citation, the ratios are 2.0:1 for criminal, 2.5:1 for commercial, and 2.3:1 for labor and employment. For reliance, the ratios are 2.2:1 for criminal, 2.6:1 for commercial, and 2.4:1 for labor and employment.

define more than two words: 6 percent of the time in the Supreme Court and 9 percent in the courts of appeals.[87]

More significant is the number of dictionaries cited for individual words. Do opinions turn to a single dictionary, or do they look to multiple dictionaries[88] to get a broader picture of the way that a word is defined? In the Supreme Court, a small majority of words were defined on the basis of a single dictionary (52.7 percent); in the courts of appeals, the overwhelming majority of words (82.9 percent) had citations to only a single dictionary. Correspondingly, the mean number of dictionaries cited per word was 1.75 in the Supreme Court and 1.24 in the courts of appeals. These figures suggest that both Justices and judges typically engage in only a limited search for the dictionary meaning of a word in question. It also suggests an especially cursory search process for appeals court judges, although the categories of dictionaries being used at the two judicial levels explain some of the difference in mean numbers.[89]

We divided dictionaries into three categories: general meaning (for example, the various *Webster's* and the *Oxford English Dictionary*), legal meaning (for example, *Black's*), and technical meaning (for example, medical). Citations to technical meaning dictionaries were relatively rare, occurring in less than 10 percent of the opinions that use dictionaries of any type. As set forth in Table 5, general meaning and legal dictionaries are far more frequent at both court levels, but their relative frequencies are quite different. The Supreme Court cited general dictionaries three times as often as legal dictionaries, but courts of appeals cited legal dictionaries somewhat more often than general dictionaries—although Second Circuit judges showed more interest in general dictionaries than their colleagues in the two other circuits.

87. Data for these calculations are on file with the authors.

88. In our analyses, distinct editions of the same dictionary were treated as multiple dictionaries.

89. *See infra* note 91 and accompanying text (explaining part of this gap as due to the courts of appeals' tendency to cite legal dictionaries more often than general meaning dictionaries, noting that the universe of cited legal dictionaries is essentially restricted to *Black's*).

Table 5. Percentages of Dictionary Citations to General and Legal Dictionaries[90]

Court	General Meaning	Legal Meaning
Supreme Court	71.8	23.3
Courts of Appeals	42.0	52.9
2d Circuit	49.1	45.5
7th Circuit	38.9	52.8
10th Circuit	37.9	59.1

Because judges and Justices tend to cite multiple general dictionaries more often than they do multiple legal dictionaries, it is useful to look as well at the frequency with which opinions cite any dictionaries of either type. General meaning dictionaries were used 82 percent of the time in the Supreme Court but only 43 percent of the time in the courts of appeals. In contrast, legal meaning dictionaries were used 69 percent of the time in the courts of appeals but only 38 percent of the time in the Supreme Court.[91] In the Supreme Court, the rate of use for general meaning dictionaries was uniform across the three fields. For the courts of appeals, however, that rate was appreciably higher in commercial law than in criminal law or labor and employment law. Related to this higher rate of general dictionary use, courts of appeals used multiple dictionaries to define a word considerably more often in commercial law than in the other two fields.[92]

When judges and Justices turned to legal dictionaries, it was nearly always to one or more editions of *Black's*, which accounted for 95 percent of the citations to legal dictionaries in our sample of

90. Percentages do not add up to 100 percent because citations to technical dictionaries are not included.

91. Data for these calculations are on file with the authors. As adverted to in *supra* note 89, this difference in the balance between general and legal meaning dictionaries explains part of the difference in the average number of dictionaries cited per word between the two levels, because there is a stronger tendency to cite only a single legal dictionary (typically, one edition of *Black's*) than to cite only a single general meaning dictionary.

92. The rates of use for general meaning dictionaries were 65 percent for commercial law, versus 41 percent in labor and employment and 35 percent in criminal law. Correspondingly, the frequency with which courts of appeals used multiple dictionaries to define a word was 30 percent in commercial law, contrasted with 16 percent in criminal law and 13 percent in labor and employment law. Data for these calculations are on file with the authors.

cases. There is a much wider range of choice among general dictionaries, and usage patterns reflect that range. We kept a count of citations to the *Oxford English Dictionary*, *Webster's Second*, *Webster's Third*, and *American Heritage*, with citations to other general dictionaries placed in an "other" category. No single dictionary accounted for as much as one-third of the citations of general dictionaries in either the Supreme Court or the courts of appeals.

The distribution of dictionaries within this category was similar in the two levels, with one striking exception: appeals court judges used *Webster's Second* only once in our sample of cases, while one-fifth of all general citations in the Supreme Court were to *Webster's Second*.[93] In part, that difference stems from Justice Scalia's preference for *Webster's Second* as a "[p]rescriptive" dictionary that tells readers "how they *should* use words."[94] Justice Scalia was responsible for a little under one-third of the citations of *Webster's Second*, and his fellow conservatives Justices Alito and Thomas together contributed another one-third.[95]

Another choice that judges make is the publication date of the dictionaries they decide to consult. We found that Justices were three times as likely as appeals court judges to cite a dictionary from the time of enactment, while circuit court judges were about one and one-half times as likely as the Justices to cite a dictionary from the time of filing.[96] In part, this difference seems to reflect the preference of certain Justices for the original meaning of statutory language.[97] More generally, the quest for original word meaning

93. The distribution of citations across general dictionaries varied considerably among circuits. The Seventh Circuit stood out in that 86 percent of its citations were to *Webster's 3rd* or to dictionaries in the "other" category.

94. Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 507. The differences between prescriptive and descriptive dictionaries and their use in the Supreme Court are discussed in *id.* at 507-09, 530-31.

95. Data for these calculations are on file with the authors.

96. Justices cited a dictionary from the time of enactment 48 percent of the time, compared with 16 percent for judges; Justices cited a dictionary from the time of filing 35 percent of the time, compared with 56 percent for judges. Data for these calculations on file with the authors.

97. A judge who seeks to ascertain the original meaning of a statutory word might choose a dictionary published around the time of enactment; a judge who seeks to ascertain its contemporary meaning might choose one published around the time the case was filed. For a fuller discussion of the connection between publication data and interpretive approach, see Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 511-12. Justices Scalia, Thomas, and Alito cited at least one dictionary from the time of enactment 67 percent of the time, compared

may be close to institutionally entrenched at the Supreme Court. By contrast, appeals court judges may be drawn to a more practical focus on which dictionary definitions were available to the parties at the time of the dispute.[98]

Finally, on dictionary usage patterns in our prior work, we identified and discussed at some length a set of Supreme Court decisions where the majority opinion deemed a dictionary definition to be virtually dispositive of statutory meaning and accordingly justified expressly discounting or ignoring various larger contextual factors.[99] This use of dictionaries as a barrier to consideration of congressional intent or executive branch understanding has no counterpart in our appeals court dataset.[100] We discuss the implications of this finding in Part III, but we note here the contrast with the Supreme Court's distinctive elevation of dictionary status in an important subset of decisions spanning all three fields.[101]

2. Legislative History Usage Patterns

For opinions that cited legislative history, we focused on the various sources of legislative history. We divided those sources into nine categories: House, Senate, and conference committee reports; House and Senate floor statements; House and Senate hearings; vertical

with 39 percent for other Justices. But the differences between the Supreme Court and the courts of appeals remain substantial even when these three Justices are not included.

98. At an even more pragmatic level, perhaps appeals court judges and their law clerks consult the dictionary closest to hand in chambers, which is likely to be a modern edition rather than one published decades earlier. We are grateful to Aaron-Andrew Bruhl for suggesting this possibility.

99. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 540, 555-64 (discussing eight such decisions from the early 1990s through 2012, four of which were decided by the Roberts Court).

100. We found two majority opinions that could be viewed as barrier cases in that they stopped their analysis after relying on a dictionary definition: a Tenth Circuit criminal law decision, *United States v. Gonzales*, 456 F.3d 1178, 1182 (10th Cir. 2006), and a Seventh Circuit labor decision, *Cler v. Illinois Education Ass'n*, 423 F.3d 726, 731 (7th Cir. 2005). As explained in Part III, these two cases are quite minor in import, and—unlike the Supreme Court barrier decisions—the appeals court majority opinions do not expressly reject other proffered interpretive resources that point in a different direction.

101. We analyzed one other question, the frequency with which dissenting opinions cited dictionary definitions when majority opinions had done so. There was little difference between the Supreme Court (39 percent) and the courts of appeals (37.5 percent). But there were only eight dissents in the appeals court cases, so this comparison is not very meaningful. Data for these calculations are on file with the authors.

legislative history; and other. "Vertical" legislative history consists of prior enacted or proposed versions of the statutory provision that a court then compares with the current text being construed. These prior versions appear either as "statutory history" in statutes from a previous Congress or as "drafting history" in bills from the same Congress containing the provision that a court is now interpreting. "Other" is a miscellaneous category that appeared with some frequency.[102] We coded cases for each form of legislative history that appeared in the majority opinion.

Table 6 shows the usage rates for a subset of the categories—those that appeared frequently and for which there were meaningful differences in usage rates between the Supreme Court and the courts of appeals or for which such differences might be anticipated. The differences in use of vertical legislative history are striking: the Supreme Court invokes this form of history more than three times as often as the circuit courts. Also noteworthy are the differences in use of House and Senate committee reports: the Supreme Court used these two sources at similar rates while the courts of appeals invoked Senate committee reports more than twice as often as House reports.[103]

Table 6. Percentages of Majority Opinions Citing Selected Forms of Legislative History

Form	Supreme Court	Courts of Appeals
Senate Committee Report	52.5	58.8
House Committee Report	45.0	26.9
Vertical History	32.5	9.3

102. This category includes legislative record documents such as transmittals from agencies, presidential messages to Congress, and reports of select committees.

103. As with dictionaries, we analyzed the frequency with which dissenting opinions used legislative history when the majority opinion did so. That frequency was considerably higher in the Supreme Court (50 percent) than in the courts of appeals (31 percent). But because of the small numbers of appeals court dissents, the difference was not very meaningful. Data for these calculations are on file with the authors.

C. Supreme Court Versus Courts of Appeals: A Closer Look

1. Rates of Usage and Reliance

The most prominent difference between the Supreme Court and the courts of appeals in the sets of cases we analyzed is that majority opinions in the Supreme Court use both interpretive resources at substantially higher rates than do court of appeals opinions. The most obvious explanation for this difference is that statutory cases heard by the Supreme Court are likely to involve more difficult questions of interpretation than those that courts of appeals hear, even in the unrepresentative sample of appeals court cases in which their opinions are published. In turn, Justices have greater reason to make use of interpretive resources of any type than do circuit court judges.[104]

Undoubtedly, this distinction accounts for much of the gap between the two levels in the rates at which opinions cite and rely on legislative history and dictionary definitions. But it does not provide a full explanation. Even in the same cases, the Supreme Court is still considerably more likely to cite dictionaries than are the courts of appeals—about twice as likely in the 2005-2010 Terms of the Court.[105] And in the eighty cases in which the Supreme Court used legislative history in the 2005-2014 Terms in our three fields, the court of appeals opinions used it only a little more than one-third of the time.[106] Thus, there is a real difference in practices between the two levels.

We found that both the Supreme Court and the courts of appeals cited legislative history more than they cited dictionary definitions. But, with the exception of the Tenth Circuit, the ratio of legislative

104. *Cf.* Bruhl, *supra* note 27, at 505-06 (finding that the rate of language canons usage in Supreme Court cases is substantially higher than the rate in reported cases for courts of appeals).

105. *See* Brudney & Baum, *Dictionaries 2.0*, *supra* note 9, at 112.

106. The rate was 37.5 percent. *See supra* note 83 and accompanying text. We would underline the fact that this does not mean the Supreme Court used legislative history three times as often as did the courts of appeals in these cases because there undoubtedly were cases in which the appeals court opinion used legislative history but the Supreme Court opinion did not. In the 1986-2010 Terms, courts of appeals were more than six times as likely to cite dictionaries in cases in which the Supreme Court did so than in other cases, but they also cited dictionaries when the Court did not 5.2 percent of the time. *See* Brudney & Baum, *Dictionaries 2.0*, *supra* note 9, at 110 tbl.1.

history use to dictionary use was much higher in the courts of appeals than it was in the Supreme Court.[107]

The relatively high magnitude of the ratios for the Second and Seventh Circuits seems unremarkable. For judges who accept legislative intent as a legitimate basis for statutory interpretation, legislative history is an important element of legal analysis, along with plain meaning, precedent, and agency deference. In contrast, dictionaries are only one means to discern the plain meaning of statutory language—along with canons and judicial common sense[108]—and the Supreme Court scarcely invoked dictionaries at all until recent times.[109]

From this perspective, the low ratios in the Supreme Court and the Tenth Circuit are intriguing. For the Supreme Court, the low ratio can be understood as a product of two developments: (1) the strong opposition voiced by one Justice in particular to invoking evidence of legislative intent—opposition that has reduced the Court's use of legislative history in statutory interpretation[110]—and (2) a substantial growth in the Court's collective interest in dictionary definitions.[111] It is an open question whether the death of Justice Scalia will alter the Court's approach to legislative history and result in more prevalent use, even if the reliance rate does not return to levels experienced during the Burger Court era.[112]

Although the Tenth Circuit uses both resources much less frequently than the Supreme Court does, it may be that one or both of the same forces have operated in that court as well. Possible indicators of the Tenth Circuit's special affinity for dictionaries are

---

107. *Compare supra* Table 1, *with supra* Table 3.

108. For examples of judicial "common sense" or introspective plain meaning analysis, see *Flores-Figueroa v. United States*, 556 U.S. 646, 650-52 (2009); and *Watson v. United States*, 552 U.S. 74, 79 (2007); *see also* James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 907 n.26 (2011) (citing cases).

109. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 494-95 (relying on data from Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77 (2010); and Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999)).

110. *See* Brudney & Ditslear, *supra* note 30, at 161-62.

111. *See* Brudney & Baum, *Oasis or Mirage*, note 14, at 494-97.

112. *See* Brudney & Ditslear, *supra* note 1, at 30 (reporting Court reliance on legislative history in over 45 percent of majority opinions for labor and employment decisions from 1969-1986).

its exceptionally high use rate for labor and employment cases and commercial cases, and its extraordinary reliance rate compared to the two other circuits.[113]

2. Attributes of Usage

Beyond the overall rates at which the two levels of courts used and relied on dictionary definitions, the most striking difference between them in dictionary usage lies in the choice between general and legal dictionaries. Supreme Court Justices were about twice as likely to cite legal dictionaries in their majority opinions as were court of appeals judges. But they were about eight times as likely to cite general dictionaries.[114]

One source of this difference may lie in the fact that legal dictionaries, and particularly *Black's*, draw their definitions primarily from court decisions.[115] Appeals court judges may find legal dictionaries attractive as analogous to precedent. In contrast, Supreme Court Justices may be less interested in such precedent—primarily drawn from opinions of lower courts—and more interested in determining the "ordinary meaning" of statutory language. From that perspective, dictionary usage in the Supreme Court may represent a stronger inclination to treat dictionaries as an independent source of information to use in determining the meaning of statutory language.[116] Alternatively, Supreme Court usage of general dictionaries

113. For comparatively high usage rates in the two fields, see *supra* Table 1. The overall reliance rates were 90 percent for the Tenth Circuit, compared with 61 percent in the Second Circuit and 67 percent in the Seventh Circuit. Data for these calculations are on file with the authors.

114. These ratios were determined by multiplying the overall rates of dictionary use in *supra* Table 1 by the proportions of dictionary-citing opinions that used these two types of dictionaries in the text accompanying *supra* notes 91-92.

115. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 509.

116. It might be, then, that as Supreme Court Justices became more inclined to cite dictionaries beginning in the 1980s, they departed from a traditional practice of focusing on legal dictionaries—a practice that the courts of appeals have maintained. But in each decade from the 1950s through the 1970s, Supreme Court opinions cited substantially more general dictionaries than legal dictionaries. This is true of the 1950s whether or not we include the thirty-eight dictionaries that Justice Frankfurter cited in his opinion in *Joseph Burstyn, Inc. v. Wilson*—nearly two-thirds of all dictionary citations in the 1950s. 343 U.S. 495 app. at 533-40 (1952) (Frankfurter, J., concurring). Our count was based on lists in Thumma & Kirchmeier, *supra* note 109, app. B, at 397-425.

may reflect a penchant for cherry-picking supportive definitions from among various options.[117]

In our first analysis of dictionary usage in the Supreme Court, we identified several functions that dictionary reliance seems to serve for the Justices.[118] Among those functions are ensuring that ordinary citizens have adequate notice of what the criminal law prohibits[119] and reinforcing textualism as a method of statutory interpretation.[120] Although we cannot compare the functions of dictionary citations in the two court levels in precise terms, two of our findings offer hints of differences in approach between the Supreme Court and the courts of appeals.

The first is our finding that, in the courts of appeals, dictionary use and reliance are far more common in commercial cases than in the other two fields in our study.[121] No such pattern appeared in the Supreme Court—indeed commercial use and reliance there involved the lowest frequency among the three fields.[122]

The second finding is the prominence of decisions involving interpretation of the Employee Retirement Income Security Act of 1974 (ERISA)[123] among the labor and employment cases in which courts of appeals cited dictionary definitions—eleven of seventeen. In contrast, only two of the twenty-two Supreme Court opinions using dictionaries in the labor and employment field were ERISA cases. It is possible that ERISA cases constitute a higher proportion of the labor and employment agenda in the courts of appeals than of the Supreme Court's agenda, but the difference could not be nearly large enough to account for the intercourt disparity in dictionary use in ERISA cases.[124]

Together, these two findings suggest that the trigger for dictionary usage in the courts of appeals may be more functional than it is in the Supreme Court. As we explain in Part III, court of appeals

117. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 566-67.
118. *See id.* at 539-40.
119. *Id.* at 541-43.
120. *Id.* at 572-74.
121. *See supra* Tables 1 & 2.
122. *See supra* Tables 1 & 2.
123. 29 U.S.C. § 1001 (2012).
124. The Supreme Court decided thirteen ERISA cases after oral argument in the 2005-2014 Terms, so the rate of dictionary use in those cases (15.4 percent) was distinctly lower than in other labor and employment cases or statutory cases in general. *See supra* Table 1.

judges often employ dictionaries in these complex civil contexts to help resolve interpretive uncertainties in conjunction with a review of purposive and pragmatic factors. This approach appears to be less self-consciously textualist than the patterns of dictionary use we have identified in the Supreme Court.[125]

With respect to legislative history, one difference that stands out is that in cases using legislative history of any type, the Supreme Court was far more likely to cite vertical legislative history than were the courts of appeals: in 32 percent of the cases in which the Supreme Court used legislative history, versus 9 percent in the courts of appeals.[126]

Although vertical legislative history may be understood as one means of ascertaining legislative intent, it also might be viewed as an acceptable proxy for textualist interpretation by Justices who discount or reject traditional legislative history commentary. In an era when even legislative history proponents on the Supreme Court have recently prefaced their discussion with qualifying or apologetic lead-ins such as "for those who care about legislative history" or "for those who find legislative history useful,"[127] it is notable that the Court's vertical legislative history discussions do not include such diminutive prefatory phrases.[128]

For our three fields, there were twenty-six majority opinions in the Roberts Court that cited vertical legislative history.[129] Nineteen of these majorities referred to statutory history while seven invoked drafting history.[130] Ten of the eleven Justices who served for at least

125. *See generally* Brudney & Baum, *Oasis or Mirage*, *supra* note 14.

126. *See supra* Table 6. Because the Supreme Court used some form of legislative history at a little more than twice the rate of the courts of appeals, the proportion of all Supreme Court opinions using vertical legislative history was about seven times as high as the proportion in the courts of appeals. Although court of appeals opinions that used legislative history cited a version of horizontal legislative history more often than the Supreme Court (98.9 percent versus 86.3 percent), the small size of that difference means that the Supreme Court still used horizontal legislative history at about twice the rate as the courts of appeals.

127. *See infra* notes 233-36 and accompanying text (identifying nine such instances since the 2010 Term).

128. See *supra* Part III.B for elaboration.

129. In addition, in the cases during this ten-Term period in which majority opinions cited legislative history, there were ten other opinions (dissents or concurrences) in our three fields that cited vertical history.

130. Of the twenty-six majorities, twelve were in criminal law, four in commercial law, and ten in labor and employment law.

a full term in the first decade of the Roberts Court, including legislative history skeptics Justices Scalia and Thomas, cited vertical legislative history at least once in a majority opinion. There were no strong patterns in the frequency with which Justices cited vertical history, but it should be noted that textualist Justices Kennedy and Alito were among the ones who did so most frequently.[131]

The second notable difference is in the use of Senate and House committee reports. The Supreme Court cited the two in a comparable number of cases (42 and 36, respectively, out of 80 cases using legislative history). In contrast, courts of appeals cited Senate committee reports more than twice as often as House reports (in 107 and 49 cases, respectively, out of 182 cases using legislative history).[132] While our effort to account for these results is admittedly speculative, one possibility is that differences in citation or reliance are a function of the comparative briefing resources available to the Justices and judges. In the Supreme Court, briefs (including amicus briefs) typically set forth legislative history with ample nuance and granularity, identifying in detail the order in which bills were taken up between chambers, the alterations that occurred during progress through each chamber, and the ways in which House-Senate disagreements were resolved. This kind of in-depth briefing background—often not available in the courts of appeals—might well encourage the Justices and their law clerks to draw on reports from both chambers in roughly equal measure on a case-specific basis.[133]

131. All but Justice Kagan invoked vertical history in majority opinions; Justice Ginsburg did so five times while Justices Alito and Kennedy invoked this resource on four occasions.

132. *See supra* Table 6. The dramatic tilt toward Senate reports is evident in all three circuits, although strongest in the Seventh Circuit and weakest in the Tenth Circuit. The proportions of majority opinions using legislative history that cited Senate reports were fairly uniform across the circuits (ranging from 55 percent in the Second Circuit to 66 percent in the Seventh Circuit). But the proportion citing House reports was considerably higher in the Tenth Circuit (37 percent) than in the other circuits (24 percent in the Second Circuit and 22 percent in the Seventh Circuit). Data for these calculations are on file with the authors.

133. *See* Bruhl, *supra* note 4, at 470-72. Another possibility is that circuit court judges—especially if they are not regularly provided with the same rich briefing background as the Justices receive—are more influenced by the traditional "textbook" understanding of how Congress functions to enact laws. Senate action often requires a supermajority in order to overcome real or threatened filibuster activity, and actual or threatened filibusters have been an increasingly frequent occurrence in the past several decades. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 136 tbl.6.1 (4th ed. 2012). Perhaps court of appeals judges inferred that Senate committee reports would more closely reflect the contours and particulars of a bill's final or enactable version; hence

D. Comparing the Circuits

Because our primary interest is in comparing interpretive practices of the Supreme Court with the practices of the courts of appeals, we have focused thus far on that comparison. Differences among the three circuits are also of interest, and here we turn to those comparisons.

The use of dictionaries was not uniform across the three circuits. The Second and Tenth Circuits were close to each other in citation rates, at 10.8 percent and 11.9 percent, respectively. The citation rate in the Seventh Circuit, 4.0 percent, is distinctly lower. The rate of reliance on cited dictionary definitions was distinctly higher in the Tenth Circuit than in the other two circuits.[134] Thus, the proportion of opinions that cited and relied on dictionary definitions was highest in the Tenth Circuit (0.108), lower in the Second Circuit (0.065), and lowest in the Seventh Circuit (0.027). It was genuinely rare for a Seventh Circuit majority opinion to rely on a dictionary definition as even a partial basis for its decision. Along with their higher reliance rate, Tenth Circuit opinions that cited dictionaries were also much more likely to define multiple words with dictionaries than were opinions in the other two circuits.[135]

Variation across the three circuits in use of legislative history was also substantial. The citation rates were 30.0 percent for the Second Circuit, 18.6 percent for the Tenth Circuit, and 8.8 percent for the Seventh Circuit. In cases in which opinions cited legislative history, the rates of reliance on that history were similar across the circuits.[136] The proportions of all majority opinions that relied on

---

they tended to rely more heavily on the explanatory value of those reports. Of course, in order to begin to test this hypothesis or the one set forth in text, we would need to review at least a sample of briefs to the Supreme Court and the courts of appeals—a project that is beyond the scope of this Article.

134. That rate was 60.6 percent in the Second Circuit, 66.7 percent in the Seventh Circuit, and 90.3 percent in the Tenth Circuit. *See supra* note 113 and accompanying text.

135. That proportion was 48 percent for the Tenth Circuit, compared with 21 percent for both the Second and Seventh Circuits. However, the Tenth Circuit did not stand out for the mean number of dictionaries cited per word: the mean was 1.31 in the Second Circuit, 1.12 in the Seventh Circuit, and 1.26 in the Tenth Circuit. Data for these calculations are on file with the authors.

136. Those rates were 79.1 percent for the Second Circuit, 74.0 percent for the Seventh Circuit, and 78.3 percent for the Tenth Circuit. Data for these calculations are on file with the authors.

legislative history ranged from 23.7 percent in the Second Circuit to 6.5 percent in the Seventh Circuit.[137] Once again, the Seventh Circuit stands out for its limited use of an interpretive resource. In subject matter terms, the gap between Second Circuit legislative history use and use by the other two circuits was especially wide in criminal law cases.[138] We explore this gap further in Part III.

The most important differences that we found were the low usage rates of both resources by the Seventh Circuit, highlighted in Table 7. Those differences merit closer examination.

Table 7. Proportions of Majority Opinions Citing Dictionaries and Legislative History, Three Circuits, 2005-2015

	2d	7th	10th
Legislative History			
All Cases	30.0	8.8	18.6
Criminal	28.2	7.6	14.4
Commercial	45.2	22.0	47.3
Labor and Employment	21.6	7.3	21.9
Dictionaries			
All Cases	10.8	4.0	11.9
Criminal	9.9	4.0	10.0
Commercial	16.5	7.6	27.0
Labor and Employment	8.2	2.9	12.5

The data in Table 7 reinforce the impression that the Seventh Circuit stands out from the other two circuits, in that the differences between them span all three fields of law in the use of each resource.[139]

137. *See supra* Table 4.

138. The difference between the Second and Seventh Circuits was 3.71:1 on criminal law cases, 2.05:1 on commercial cases, and 2.96:1 on labor and employment cases. The difference between the Second and Tenth Circuits was 1.96:1 on criminal law cases, 0.96:1 on commercial cases, and 0.99:1 on labor and employment cases.

139. There were also differences between the Seventh Circuit and the other two circuits in the specific resources they used. Three of those differences were quite substantial: the Seventh Circuit cited the *Oxford English Dictionary* and the *American Heritage Dictionary* less than the other circuits, and it cited vertical legislative history less. The difference for legislative history was considerable—a 2 percent citation rate, versus 12 percent for the other two circuits. Data for these calculations are on file with the authors.

One possible explanation derives from the fact that our analyses were of officially reported decisions. The proportion of decisions that are reported during this period is much higher in the Seventh Circuit than in the other two circuits: the mean of the annual rates of publication for fiscal years 2005-2014 was 13.0 percent in the Second Circuit, 23.9 percent in the Tenth Circuit, and 41.6 percent in the Seventh Circuit.[140] Assuming that the distinctions made for publication purposes are comparable in all three circuits,[141] Seventh Circuit judges, compared with their colleagues in the other two circuits, are publishing more decisions in which the legal questions are relatively simple and straightforward or the contested issues are fact-specific and comparatively routine. Undoubtedly, judges are less prone to invoke any kind of interpretive resource in these cases than in cases with more complex and difficult issues.

Yet, differences in publication rates are unlikely to account for all the differences in use of resources between the Seventh Circuit and the other two circuits. Of the decisions that the Seventh Circuit publishes but that the other two circuits would not publish, we are reluctant to assume that the overwhelming majority of them are unsuitable for any citations to interpretive resources such as dictionary definitions and legislative history. Moreover, the low publication rate in the Second Circuit very likely results in part from the large numbers of immigration cases that its judges hear.[142]

---

140. These figures were calculated from data in the ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2005-2013, at tbl.S-3 (2005-2013); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2014, at tbl.B-12 (2014) [hereinafter JUDICIAL BUSINESS 2014]. The Reports can be accessed online via http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts.

141. In general, courts of appeals choose not to publish a decision when they determine that it simply reiterates settled legal principles or is otherwise without precedential value. *See* Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 480 (2004). That said, there are differences among circuits both in the criteria and methods they identify for determining publication and in the application of those criteria and methods. *See* Thomas F. Kibbey, *Standardizing the Rules Restricting Publication and Citation in the Federal Courts of Appeals*, 63 OHIO ST. L.J. 833, 835 (2002); *see also* Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 642 (2009) ("One internal study conducted by the D.C. Circuit found that forty percent of the Circuit's unpublished decisions presented issues that warranted publication according to the Circuit's publication rules.").

142. In the 2010-2014 fiscal years, 23.3 percent of the cases filed in the Second Circuit came from the Bureau of Immigration Appeals, compared with 3.6 percent in the Seventh Circuit and 3.4 percent in the Tenth Circuit. These figures were calculated from data in JUDICIAL

With some caution, then, we can explore possible additional reasons for the low rate of usage of dictionary definitions and legislative history in the Seventh Circuit. One place to start is the continuity of the court's membership. Of the nine active judges on the court in 2015, all but one had served throughout the preceding decade.[143] Seven of the nine had been appointed in 1999 or earlier, and four were Reagan appointees who joined the court between 1981 and 1987.[144] The two judges who retired in the decade from 2005 to 2015, and who continue to serve as senior judges, were also Reagan appointees.[145] That continuity of membership, in combination with the court's moderate size, creates conditions favorable to the development of an institutional perspective or culture within the limitations that result from shifting panel membership.[146] It is possible that the court collectively has adopted a perspective that makes judges more sparing in their use of legislative history and dictionary definitions as interpretive resources.

Moreover, two of the court's long-standing members, Judges Richard Posner and Frank Easterbrook, are also among the most prestigious of all court of appeals judges.[147] Thus, their own practices are of particular interest as possible role models for circuit court colleagues. In our sample of opinions using legislative history, Easterbrook was about average in the number of opinions, and Posner ranked second on the court.[148] In contrast, they were the

---

BUSINESS 2014, *supra* note 140, at tbl.B-3, http://www.uscourts.gov/sites/default/files/statistics_import_dir/B03Sep14.pdf [https://perma.cc/4WLS-98FL].

143. *See United States Court of Appeals for the Seventh Circuit*, *supra* note 34. The exception was David Hamilton, who joined the court in 2009. *See id.*

144. *See id.* Richard Posner was appointed in 1981, Joel Flaum in 1983, Frank Easterbrook in 1985, and Michael Kanne in 1987. *See id.*

145. *See id.* Kenneth Ripple was an active judge from 1985 to 2008, Daniel Manion from 1986 to 2007. *See id.*

146. *Cf. supra* note 33 and accompanying text (describing much higher turnover rates on Second and Tenth Circuits).

147. *See* Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 50 tbl.4 (2004) (ranking Posner first and Easterbrook second for numbers of citations by judges in other circuits from 1998-2000); *id.* at 60 tbl.8 (ranking Posner first and Easterbrook second, far ahead of other judges, for citations to them by name in opinions from 1998-2000).

148. Among the eight judges who were in active service throughout the 2005-2015 period, the mean number of opinions citing legislative history in our sample of cases was about three. Easterbrook cited legislative history in three opinions, Posner in six opinions (one coauthored with Judge Hamilton). Cases are on file with the authors.

least likely to cite dictionary definitions, each doing so only once in our sample of cases.[149] In Posner's case, even that one citation was not an actual use of a dictionary definition to define a word.[150] Thus, it may be that one or both of the Circuit's most visible and respected judges have helped to limit the use of dictionary definitions through their own examples.

We delved deeper into these two judges' dictionary usage rates and found that, over the past thirty years, they used dictionaries well under 1 percent of the time in nearly 1900 majority opinions authored in reported cases across our three statutory fields.[151] And in terms of actual reliance, Posner and Easterbrook each relied on a dictionary definition exactly once. Moreover, both judges have been critical of dictionary use to construe statutory text in their academic writings,[152] and each has shared that critical perspective in one or more Seventh Circuit majority opinions.[153] Accordingly, it seems at least plausible to infer that part of the extraordinarily low Seventh Circuit rate of dictionary usage reflects the influence of these two prominent members of the circuit.

In addition to the low rates of resource usage in the Seventh Circuit, some other differences among the circuits were sufficiently

---

149. *See* United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010) (Posner, J.) (examining the definition for the word "cause"); George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 816 (7th Cir. 2012) (Easterbrook, J.) (examining the definition for the word "inquiry"). The mean for the other six judges who served throughout the ten-year period was about three. Data for this calculation are on file with the authors.

150. *See Hatfield*, 591 F.3d at 948 (reporting that "*Black's Law Dictionary* (8th ed. 2004) lists 26 terms in the entry for 'cause'").

151. Judge Posner cited a dictionary in seven cases out of 1004 majority opinions from 1985 to 2015 in our three statutory fields; Judge Easterbrook did so in four majorities out of 878 in the same time period. Data for these calculations are on file with the authors.

152. *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 179-81 (2013); Easterbrook, *supra* note 55, at 67.

153. *See* Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 643-44, 643 n.3 (7th Cir. 2014) (Hamilton & Posner, JJ.) (quoting skeptical views from Judge Easterbrook and Justice Jackson when urging that "judges and lawyers must take care not to 'overread' what dictionaries tell us"); United States v. Costello, 666 F.3d 1040, 1043-44 (7th Cir. 2012) (Posner, J.) (emphasizing that because "[d]ictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings," these definitions are inadequate as "'a means to decode the work of legislatures'" (quoting Easterbrook, *supra* note 55, at 67)); Country Mut. Ins. Co. v. Am. Farm Bureau Fed'n, 876 F.2d 599, 600 (7th Cir. 1989) (Easterbrook, J.) (characterizing dictionaries as "word museums," of little value for understanding words in context because "[s]peakers choose from a menu of meanings or nudge the language toward a new one by striking out on their own").

large to merit attention. The Tenth Circuit, which ranked highest in citation of dictionaries, stood out for its high rate of reliance on dictionaries when it did cite them.[154] The Tenth Circuit also was distinctive for the frequency with which it used dictionaries and legislative history in commercial cases, compared with the other two fields.[155] This heavier use of both resources appears consistent with an approach to interpretive ambiguities that combines textual and purposive analyses.[156] It also may be due in part to the more complex nature of these business controversies, or to the greater lawyering resources offered on both sides of such cases when compared to criminal and labor cases arising in the circuit.

Like the other two circuits, the Second Circuit used both resources most frequently in commercial cases.[157] But the frequency with which it cited legislative history in criminal cases is noteworthy: about twice as often as the Tenth Circuit, in contrast with the similar rates at which the Second and Tenth Circuits used legislative history in the other two fields.[158] We would expect legislative history to be cited more often in white-collar cases than in other statutory criminal settings, both because the statutory crimes tend to have a more complex legislative background and because the lawyers who represent white-collar defendants tend to have more resources at their disposal to research and argue the merits of possibly relevant legislative history.[159] The Second Circuit has a substantially higher rate of white-collar cases than the Seventh Circuit and a much higher rate than the Tenth Circuit; this difference probably helps to account for the Second Circuit's more frequent usage of legislative history.[160]

---

154. *See supra* Tables 1 & 2.

155. *See supra* Table 7.

156. *Cf. supra* Part II.C.2 (discussing notable aspects of appeals court dictionary use in commercial cases and ERISA decisions).

157. *See supra* Table 7.

158. *See supra* Table 7.

159. *See generally* Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 487-89 (1999).

160. *See* JUDICIAL BUSINESS 2014, *supra* note 140, at tbl.B-7 (2014), http://www.uscourts.gov/sites/default/files/statistics_import_dir/B07Sep14.pdf [https://perma.cc/FX6F-EE4C]. In fiscal year 2014, charges of embezzlement, fraud, forgery, counterfeiting, and regulatory offenses together constituted 26 percent of all criminal filings in the Second Circuit, compared with 18 percent in the Seventh Circuit and 9 percent in the Tenth Circuit. Calculated from data in *id.*; *see also* Robert J. Anello & Miriam L. Glaser, *White Collar Crime*, 85 FORDHAM

The distinctive pattern of resource usage for the Seventh Circuit and the subject matter variations for the Second and Tenth Circuits are reminders that it is not just the Supreme Court that can stand out from other courts in its collective approach to statutory interpretation. To be sure, other circuit court judges in our dataset, besides Judges Posner and Easterbrook, may have taken individualized approaches to our two interpretive resources, perhaps exhibiting high rather than low regard for dictionaries, or even expressing Scalia-like hostility to legislative history. By describing eclectic differences in circuit-wide interpretive approaches, we do not dwell on the possibility that each circuit culture may reflect a mix of intense individual judicial preferences, analogous to the way that the Supreme Court during this period reflected a mix of outspoken textualists and purposivists.

The reason we do not dwell on this possibility is that we did not find evidence to support it. We revisited opinions from the judges in our three circuits who authored the highest number of majorities using either dictionaries or legislative history.[161] While there were occasional instances of a judge emphasizing the presumptively preclusive primacy of ordinary-meaning textual analysis,[162] we found no examples of dictionaries being invoked to reject consideration of legislative history or agency deference arguments offered by a losing party or dissent (as in the Supreme Court's barrier cases).[163]

L. REV. 39 (2016) (reviewing Second Circuit's major contributions to the development of white-collar criminal jurisprudence since the early twentieth century).

161. For dictionaries, we reviewed opinions from eleven judges who authored three or more majorities that invoked dictionary definitions in our sample of cases (four judges from both the Second Circuit and Tenth Circuit, and three judges from the Seventh Circuit). For legislative history, we reviewed opinions from thirteen judges who authored four or more majorities that made use of that resource (five judges from the Second Circuit and four each from the Seventh and Tenth Circuits). The only judges to appear on both lists were Judge Katzmann (Second Circuit), Judge Williams (Seventh Circuit), and Judge Kelly (Tenth Circuit).

162. For examples of majority opinions emphasizing ordinary-meaning textual analysis, see, for instance, *United States v. Sabhnani*, 599 F.3d 215, 255-56 (2d Cir. 2010) (Livingston, J.); and *United States v. Montgomery*, 468 F.3d 715, 719-20 (10th Cir. 2006) (Kelly, J.).

163. For discussion of Supreme Court barrier cases, see *supra* note 76 and accompanying text and *infra* Part III.A.4. The two judges identified in *supra* note 162 have relied on legislative history in addition to dictionary definitions as part of other majorities. *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 68-69 (2d Cir. 2011) (Livingston, J.); Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1163-64 (10th Cir. 2011) (Kelly, J.); *see also Sabhnani*, 599 F.3d at 256-57 (considering but rebutting as inapposite government's reliance on deference

Similarly, while circuit judges varied in the frequency with which they used legislative history, we found no examples of majorities that foreclosed resort to such history as illegitimate or superfluous. We are persuaded that the circuit cultures we describe reflect reasonably consistent, albeit nonuniform, judicial practices, as opposed to mosaics made up of dogmatic contributions from individual judges with sharply divergent interpretive approaches.

That said, we believe it is valuable to consider interpretive approaches taken by other circuits as well. As a very preliminary effort, we reviewed majority opinions from the same ten-year period in our same three fields, authored by three prominent textualist judges from other circuits: Judge Jay Bybee in the Ninth Circuit, Judge William Pryor in the Eleventh Circuit, and Judge Jeffrey Sutton in the Sixth Circuit.[164] We found that Judges Bybee and Pryor relied as much or more on legislative history as on dictionaries in our three fields.[165] Judge Sutton relied on dictionaries substantially more often than on legislative history in the three fields, but his treatment of legislative history was regularly nuanced and respectful.[166] In short, each of these three judges invoked the two resources as a means to decide particular cases rather than to express interpretive philosophies.

We hope other scholars will be stimulated to examine statutory interpretation in additional circuits, in ways comparable to our analysis of these three appeals courts. Still, because of the Supreme Court's unique role, its differences with the courts of appeals are of

---

to agency's interpretation of text).

164. Each judge was appointed by President George W. Bush, and each is affiliated with the textualist camp. *See* DENIS RUTKUS ET AL., CONG. RESEARCH SERV., RL31868, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS BY PRESIDENT GEORGE W. BUSH DURING THE 107TH-109TH CONGRESSES, apps. 1-2 (2007).

165. Judge Bybee relied on legislative history in six majorities and on dictionaries in four; Judge Pryor relied on legislative history in four majorities and on dictionaries in five. Copies of all opinions are on file with the authors. *See also* Lawrence M. Solan, Response, *Opportunistic Textualism*, 158 U. PA. L. REV. PENNUMBRA 225, 229-31 (2010) (discussing Judge Bybee's frequent use of legislative history in statutory opinions).

166. Judge Sutton relied on dictionaries in nine majorities and on legislative history in three. For examples of opinions in which both resources received thoughtful analyses, see *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 335, 339 (6th Cir. 2014 2014) (Sutton, J.) (declining to rely on either resource); *American Financial Group. v. United States*, 678 F.3d 422, 424, 426-27 (6th Cir. 2012) (Sutton, J.) (relying on both resources); and *Barrett v. JP Morgan Chase Bank*, 445 F.3d 874, 878, 880 (6th Cir. 2006) (Sutton, J.) (relying on both resources).

particular importance. In the next Part, we focus primarily on those differences.

III. PRAGMATIC ADAPTABILITY IN THE CIRCUIT COURTS: A PROTEAN APPROACH

A. Dictionary Use: Text, Purpose, Pragmatism

1. Commercial Law Examples

We noted earlier that while the Supreme Court uses dictionaries substantially more than appeals courts, the differences between the two judicial levels in dictionary use, and especially dictionary reliance, become much smaller in the commercial law field.[167] We also found that courts of appeals use and rely on dictionaries far more frequently in commercial cases than in our two other fields, and that in doing so these courts use general dictionaries more often, and use two or more dictionaries per word considerably more often, than they do in criminal or labor and employment cases.[168]

These findings invite further examination into how appeals court judges may be applying dictionaries in distinctive ways in the commercial law area. Does the more frequent use of dictionary definitions in commercial law controversies reflect resolution of contested issues on a primarily textual basis in that field? Or is dictionary use integrated with other interpretive considerations—such as legislative purpose or pragmatic consequences—to develop a more nuanced understanding of statutory meaning? A sample of commercial law cases from all three circuits can shed light on these questions.

In *Vincent v. The Money Store*, the issue was the scope of consumer protections under the Fair Debt Collection Practices Act (FDCPA).[169] Defendant, a mortgage lender, had hired a law firm to send allegedly deceptive letters on its behalf to plaintiff mortgagors. Creditors are not generally considered debt collectors subject to the FDCPA, but a creditor will be considered a debt collector (subject to

167. *See supra* Tables 1 & 2.
168. *See* text accompanying *supra* Table 5.
169. 736 F.3d 88, 90 (2d Cir. 2013).

liability under the statute) if "in the process of collecting his own debts, [he] *uses* any name other than his own which would indicate that a third person is *collecting or attempting to collect* such debts."[170]

The Act does not define either "use" or "collect," and Chief Judge Katzmann for the Second Circuit panel majority looked to three general meaning dictionaries for guidance.[171] But he did so only after recognizing that the FDCPA is a remedial statute whose "terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated."[172] Judge Katzmann applied the definition of "use" in this context to mean "employ for some purpose."[173] Liability for "use" under the false name exception thus required some affirmative involvement in the misrepresentation by the creditor (that is, not simply deceptive practices by the collection actor).[174] In this instance, that involvement took the form of retaining a law firm for the purpose of effectively impersonating The Money Store by sending mortgage-breach letters that appeared to be attorney collection letters.[175]

As for whether the law firm was deceptively "collecting or attempting to collect" The Money Store's debts, the Second Circuit found the dictionary definition of "collect" in the context of debts to be ambiguous because "[i]t does not define how involved a debt collector must be before [the court] can fairly say it is gathering money on behalf of the creditor."[176] Looking to the evidence below, and to Federal Trade Commission guidance on an analogous statutory provision, the appeals court concluded that a jury could find that the law firm was no more than a conduit for a debt collection process controlled by the creditor.[177] In deciding that a cause of

170. 15 U.S.C. § 1692a(6) (2012) (emphasis added).

171. *See Vincent*, 736 F.3d at 98-99.

172. *Id.* at 98 (quoting N.C. Freed Co. v. Bd. of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973)).

173. *See id.* at 99.

174. *See id.*

175. *Id.*

176. *Id.* at 100.

177. *See id.* at 101-02, 104. Accepting the facts as presented by plaintiffs for purposes of reviewing a summary judgment grant below, the court found that the law firm printed and mailed letters but did nothing else, directing subsequent phone calls from debtors to The Money Store. *See id.* at 101. Thus, when the law firm's letters represented that it had been "retained" in order to "collect a debt for [its] client," a jury could well find that this falsely

action survived under the false name exception, the Second Circuit's reliance on dictionary definitions was leavened with an invocation of statutory purpose and an appreciation for practical consequences.

In *Lotes Co. v. Hon Hai Precision Industry Co.*, the key issue was whether anticompetitive conduct of defendant electronics companies had a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce under the Foreign Trade Antitrust Improvements Act (FTAIA).[178] The Second Circuit invoked two leading general dictionaries to identify alternative definitions of "direct": "[s]traight; undeviating in course; not circuitous or crooked" and "[p]roceeding ... from cause to effect."[179] The court opted for the second, less stringent notion of a direct effect, invoking both the FTAIA's purpose (the antitrust laws' traditional reliance on proximate causation to determine what types of injuries are subject to redress) and the untoward practical effects of adopting the "immediate consequence" definition (to make the FTAIA's domestic effects exception virtually identical to the FTAIA's separate provision on import exclusion).[180] Once again, the Second Circuit's reliance on dictionary definitions was combined with consideration of purposive and practical factors.[181]

There are similar instances in commercial law decisions from the two other circuits we studied. The appeals courts in *Gillespie v. Equifax Information Services, L.L.C.* and *Thomas v. Metropolitan Life Insurance Co.* both determined that reliance on dictionary definitions was influenced or constrained by invocation of statutory purpose or pragmatic consequences.[182]

In *Gillespie*, the outcome hinged on the meaning of a credit reporting agency's duty to "clearly and accurately disclose ... [a]ll information" in the plaintiffs' consumer files under the Fair Credit

implied the firm was attempting to collect The Money Store's debts. *Id.* at 104.

178. 753 F.3d 395, 398 (2d Cir. 2014) (quoting 15 U.S.C. § 6a(1) (2012)).

179. *Id.* at 410 n.6 (quoting from 4 OXFORD ENGLISH DICTIONARY 702 (2d ed. 1989) (alterations in original)); *see also id.* at 410 (quoting from parallel definition in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)).

180. *See id.* at 411-12.

181. *See also* SEC v. DiBella, 587 F.3d 553, 570 (2d Cir. 2009) (noting general dictionary definition of "meaningful" but declining to find error in district court's refusal to instruct jury on the definition of "meaningful work" because the term "meaningful" was "intelligible enough to be understood by a lay jury for its plain definition").

182. *See* Gillespie v. Equifax Info. Servs., L.L.C., 484 F.3d 938, 941 (7th Cir. 2007); Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1162 (10th Cir. 2011).

Reporting Act (FCRA).[183] There is no statutory definition of "clearly and accurately," but Judge Kanne for the Seventh Circuit panel consulted a general dictionary definition only after stating that plain meaning should not be allowed to frustrate the overall purpose of the statutory scheme.[184] The court emphasized that a primary purpose of the FCRA disclosure requirement is to enable consumers to identify inaccurate information in their credit files and then correct this information through a separate statutory grievance procedure.[185] In this context, the reporting agency's current disclosures—while accurate and set forth "in a clear manner" consistent with one dictionary definition—provided information that was unclear from a practical standpoint. Because this information did not allow consumers to effectively review their credit files, it did not meet applicable statutory requirements.[186]

In *Thomas v. Metropolitan Life Insurance Co.*, the issue was whether a life insurance broker's advice to plaintiffs regarding allocation of their funds under a 401(k) account was actionable under the Investment Advisors Act of 1940 (IAA) or instead was exempt from liability because the advice was given "solely incidental to" his conduct as a broker-dealer who "receives no special compensation" for the advice.[187] Judge Kelly for the Tenth Circuit panel, noting that the IAA does not define "solely incidental to," relied on general and legal dictionary definitions of "incidental" as meaning both secondary in importance and connected to the primary activity.[188] He emphasized the relational dimension, concluding that "solely incidental to" means "solely in connection with," as opposed to "solely a minor part of."[189] Judge Kelly then invoked the SEC's

183. *See Gillespie*, 484 F.3d at 940-41 (second alteration in original) (quoting 15 U.S.C. § 1681g(a)(1)).

184. *See id.* at 941.

185. *See id.*

186. *See id.* at 941-42; *see also* Acosta v. Target Corp., 745 F.3d 853, 859-60 (7th Cir. 2014) (holding that retailer sending holders of store credit cards unsolicited upgraded store cards while deactivating the old cards was a "substitution" not covered under the Truth in Lending Act, 15 U.S.C. § 1637(c)). The Seventh Circuit determined that the new cards merely changed an existing account rather than opening a new account, and in doing so the court invoked the practical measures Target took and also the expansive definition of "account" under *Black's Law Dictionary*. *Id.*

187. 631 F.3d 1153, 1160 (10th Cir. 2011) (quoting 15 U.S.C. § 80b-2(a)(11)(C) (2006)).

188. *See id.* at 1162 & n.2.

189. *See id.* at 1161-62.

consistent guidance and the IAA legislative history to confirm that the IAA's purpose and its agency application did not reach broker-dealers whose advisory services were in connection with the brokerage services they provided to the same account.[190]

The decisions summarized above reflect certain distinctive aspects of our findings on dictionary usage in appeals court commercial law decisions—notably the more frequent use of two or more dictionaries, and of general, as opposed to legal, dictionaries, than is true for the criminal and labor and employment fields.[191] It is possible that the overall heavier dictionary use in commercial law cases is due to the greater complexity of the subject matter. Compared to criminal law, there are notably fewer routine appeals in commercial law cases. Compared to both criminal and labor law, there is more often highly resourced lawyering on each side.[192] The greater focus on dictionaries may also be due in part to a more frequent and rapid rate of congressional overrides for these types of cases, as discussed in Part I.[193] Insofar as circuit judges are aware of heightened congressional concern in the business law field, they may invoke dictionaries more often as a putatively objective or neutral source for construing ambiguous text.[194]

What also emerges from the decisions discussed above is a fairly nuanced reliance on dictionaries. When invoking dictionary definitions to help clarify textual ambiguity, judges in all three circuits integrate that reliance with serious consideration of the statutory purpose behind the ambiguous text and the practical consequences that flow from applying a specific definition. As we suggest below,

190. *See id.* at 1162-64 (relying on SEC opinions and rules from 1940s forward and on IAA legislative history indicating that brokers and dealers, who were already regulated by the Securities Exchange Act of 1934, were not the target of the IAA); *see also* FTC v. Accusearch Inc., 570 F.3d 1187, 1197-99 (10th Cir. 2009) (applying general dictionary definitions, tempered by clear statutory purpose, to hold that website operator was in part "responsible" for "development" of information provided through the Internet and was therefore a covered information content provider under the Communications Decency Act, 47 U.S.C. § 230).

191. This Section discusses seven commercial law examples out of the twenty dictionary usage cases in our commercial law field. We do not suggest that they are perfectly representative in all respects.

192. *See supra* note 58.

193. *See supra* notes 41-42 and accompanying text.

194. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 499-501.

this adaptable application of definitions differs in certain respects from the recent Supreme Court record on dictionary usage.[195]

2. ERISA Examples

We noted in Part II.C that within the labor and employment field, more than half the appeals court decisions invoking dictionaries involved disputes arising under ERISA.[196] As with commercial law decisions, court of appeals dictionary usage in ERISA cases incorporates purposive and pragmatic considerations accompanying application of this complex statute.

In *George v. Junior Achievement of Central Indiana*, the Seventh Circuit panel had to decide whether an employee terminated after he complained about his employer's failure to fund his retirement and health savings accounts could be protected under ERISA's antiretaliation provision.[197] The relevant statutory language prohibits retaliation because a person "has given information or has testified or is about to testify in any inquiry or proceeding relating to this ... Act."[198] Writing for the panel, Judge Easterbrook characterized this provision as "a mess of unpunctuated conjunctions and prepositions," but he invoked purposive implications to add that when construing an ambiguous antiretaliation provision, "we are supposed to resolve the ambiguity in favor of protecting employees."[199]

Judge Easterbrook then focused on the nub of the parties' textual disagreement: whether an "inquiry" means something formal or official (such as a Labor Department investigation) or could also mean something informal like simply raising a question.[200] Emphasizing the importance of not "discarding definitions that would make sense in the statutory context,"[201] Easterbrook chose the general

195. *See infra* Part III.C.

196. By contrast, less than 10 percent of Supreme Court dictionary usage cases in the labor field implicated the interpretation of this statute. *See supra* text accompanying notes 123-24.

197. 694 F.3d 812, 813-14 (7th Cir. 2012).

198. 29 U.S.C. § 1140 (2012).

199. *George*, 694 F.3d at 814.

200. *See id.* at 814-15. It was not disputed that plaintiff had "given information" to company executives regarding the lack of funding of his retirement and health savings accounts. *See id.* at 813.

201. *Id.* at 815.

dictionary definition of "inquiry" that embraced informal usage.[202] In doing so, he again emphasized the purpose of this antiretaliation provision, borrowing as well from broad Supreme Court applications of similar (though differently worded) provisions in other federal workplace statutes.[203]

In *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.* and *Rasenack ex rel. Tribolet v. AIG Life Insurance Co.*, two Tenth Circuit panels considered appeals from the denial of disability plan benefits based on the plan administrators' interpretation of particular plan terms.[204] In both cases, the Tenth Circuit emphasized the practical significance of using a definition that captures ordinary meaning as it would be understood by a reasonable plan participant.[205]

In *Flinders*, the issue was whether the availability of benefits "arranged by the Company for its employees generally" extended benefits to a group of unionized employees. The court invoked a general dictionary definition to conclude that "generally" here meant not "universally" but "for the most part"; thus the existence of certain specific exclusions from plan coverage did not taint the availability for employees generally in this setting.[206] In *Rasenack*, the plaintiff was denied benefits because the plan interpreted "paralysis" (a qualifying condition for benefits) to mean the total absence of movement, and the effects of plaintiff's accident was to leave him with substantial but not total loss of motor function and sensation in his arm and leg. The court relied on medical dictionary

202. *See id.* at 816 (quoting 7 OXFORD ENGLISH DICTIONARY 1010 (2d ed. 1989)). This is the only time we have found Judge Easterbrook to rely on a dictionary definition in nearly 900 majority opinions in the criminal law, commercial law, and labor and emplyment law fields. *See supra* Part II.D.

203. *George*, 694 F.3d at 814-15 (relying on analysis from Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011), that interpreted antiretaliation language of FLSA and Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271 (2009), that interpreted antiretaliation language of Title VII).

204. *See* Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co., 491 F.3d 1180, 1184 (10th Cir. 2007), *abrogated on other grounds by* Spadley v. Owens-Ill. Hourly Emps. Welfare Benefit Plan, 686 F.3d 1135 (10th Cir. 2012); Rasenack *ex rel.* Tribolet v. AIG Life Ins. Co., 585 F.3d 1311, 1313 (10th Cir. 2009).

205. *See Flinders*, 491 F.3d at 1194; *Rasenack*, 585 F.3d at 1318; *see also* Paese v. Hartford Life & Accident Ins. Co., 449 F.3d 435, 450-51 (2d Cir. 2006) (stating that "culpability" is distinct from "bad faith" when determining award of attorney's fees under ERISA statutory language, relying on legal dictionary definition).

206. *See Flinders*, 491 F.3d at 1195-96.

definitions to conclude that there was more than one reasonable meaning of "paralysis" and that the plan's term should be strictly construed against AIG as its drafter.[207]

As with commercial law cases, the ERISA decisions reflect dictionary use adjusted or tempered in light of both legislative purpose and practical consequences.[208] This integrated use of dictionary definitions is a fairly straightforward idea, but its express aspects stand in some contrast to what we identified as a more strictly linguistic or textualist strand of dictionary reliance in the Supreme Court.[209] One further interesting aspect of the ERISA dictionary cases in the courts of appeals is how often the majority defined terms not contained in the statute itself—generally either a medical condition or some other qualifying arrangement that a plan administrator had construed differently from the plaintiff participants.[210] In a long and complex statute like ERISA, one that borrows concepts from the common law of trusts and also implicates a range of health and disability issues, it is perhaps not surprising that disputes often focus in part on the meaning of terms beyond the statutory text. This will occur in the Supreme Court as well, but given that the Court almost always decides to review statutory cases based on circuit court interpretations of the meaning of *textual* provisions, Supreme Court ERISA cases involving dictionaries may hew closer to the terms of the statute itself.

3. Criminal Law Examples of De Minimis or Minor Use

In contrast to the commercial law and ERISA fields, we found a higher proportion of de minimis dictionary usage by the circuit courts in criminal law majority opinions, where the cases tend to be more straightforward and even routine. The frequent citation of dictionaries for purely background purposes distinguishes this appeals court approach from the Supreme Court's more sophisti-

207. *See Rasenack*, 585 F.3d at 1319-20.

208. This Section discusses four of the eleven ERISA cases using dictionaries.

209. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 555-64.

210. Three of the four ERISA cases discussed above, and eight of the eleven in our dataset, fall into this category. Of the two Supreme Court ERISA majority opinions using dictionary definitions, one seeks guidance in defining a statutory term and the other involves defining a concept (conflict of interest) closely related to a statutory term (fiduciary). Cases are on file with the authors.

cated reliance on dictionaries in criminal cases, where definition and ordinary meaning analysis often serve a "notice" function for criminal defendants, and by extension, the citizenry at large[211] in cases that are more than routine. One finding that arguably supports this distinction is the level of dictionary reliance in the criminal law field. When the Supreme Court cited a dictionary definition in a criminal law majority opinion, it relied on that definition 94 percent of the time; in the courts of appeals, the reliance rate was much lower, at 71 percent.[212] This was the only field in which the Supreme Court had a substantially higher reliance rate than the courts of appeals.[213]

Once again, a sample of appeals court cases is illustrative. There are numerous decisions from all three circuits where the dictionary definition is cited for de minimis reasons, with no reliance at all.[214] Many other cases involve a minor element of reliance where dictionary definitions are invoked in a distinctly peripheral or secondary fashion.[215] To be sure, the courts of appeals also rely on dictionaries in a more meaningful way to help resolve an interpretive issue.[216]

---

211. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 541-43 and cases cited therein.

212. *See supra* Part II.A.1 (paragraph preceding *supra* Table 2).

213. *See supra* Part II.A.1 (paragraph preceding *supra* Table 2).

214. *See, e.g.*, Akinsade v. Holder, 678 F.3d 138, 146 (2d Cir. 2012) (using *Black's* to define "embezzlement"); *In re* Basciano, 542 F.3d 950, 954 n.3 (2d Cir. 2008) (using *Oxford English Dictionary* to define the religious cult "Santeria"); United States v. Amato, 540 F.3d 153, 160 (2d Cir. 2008) (using *Black's* to define "ejusdem generis"); United States v. Natale, 719 F.3d 719, 725 n.1 (7th Cir. 2013) (using a medical dictionary definition of "replantation"); United States v. Watson, 766 F.3d 1219, 1244 (10th Cir. 2014) (using *Black's* definitions of "substantive evidence" and "impeachment evidence"); *see also* United States v. Hatfield, 591 F.3d 945, 948-49 (7th Cir. 2010) (Posner, J.) (citing *Black's* definition of "primary cause" as a straw man, dismissing any value for the dictionary approach).

215. *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 68 (2d Cir. 2011) (invoking *Black's* with respect to "transportation" of a minor with intent to commit criminal sexual activity; issue on appeal involved jurisdiction over conduct occurring outside the United States); United States v. Gordon, 642 F.3d 596, 599 (7th Cir. 2011) (per curiam) (invoking *Black's* with respect to "robbery" offense as including a taking by force or intimidation; appeal failed on obvious fact that defendant used intimidation in getting bank teller to hand over the money); United States v. Hernandez, 568 F.3d 827, 830 (10th Cir. 2009) (invoking *Black's* definition of "physical force" to support that firing a gun in the direction of another person constitutes a violent felony for purposes of the Armed Career Criminals Act).

216. *See, e.g.*, United States v. Gravel, 645 F.3d 549, 551 (2d Cir. 2011) (invoking *Black's* to help support lower court decision that a stolen firearm "designed" to shoot automatically warrants enhanced prison sentence); Welch v. United States, 604 F.3d 408, 418 (7th Cir. 2010) (invoking general dictionary to support conclusion that state law conviction for

Such reliance appears to be more frequent in Tenth Circuit decisions, which is not surprising given that this circuit's rate of reliance on cited definitions in criminal law cases is far above both the Second and Seventh Circuits.[217] Still, even in the Tenth Circuit, the cases of reliance do not seem to perform anything like the "notice" function we identified in certain Supreme Court decisions. Instead, these instances of meaningful reliance invoke definitions as a valuable factor in reviewing a conviction or sentence, but a factor that is neither effectively dispositive for the parties nor especially instructive for a broader audience of defendants or citizens.[218]

4. Small Number and Limited Import of Barrier Cases

In our previous work, we identified eight Supreme Court decisions since the 1990s in which the majority opinion invoked dictionary definitions *not* in conjunction with traditional interpretive resources such as legislative history, statutory purpose, or agency deference, but rather *to foreclose in explicit terms* any serious consideration of such contextual resources.[219] Of these decisions, four were issued during the Roberts Court, out of the sixty-five cases in which the majority cited a dictionary.[220] Each majority opinion

---

aggravated "fleeing" contains an implied requirement of intentional conduct for sentencing purposes within the meaning of Armed Career Criminal Act).

217. *See supra* Table 2. The Tenth Circuit relied on cited dictionary definitions in 94.7 percent of the criminal law majority opinions that refer to dictionaries. By contrast, the reliance rate was 58.8 percent for the Second Circuit and 53.3 percent for the Seventh Circuit. Data for these calculations are on file with the authors.

218. *See, e.g.*, United States v. Cope, 676 F.3d 1219, 1227 (10th Cir. 2012) (invoking *Black's* to help affirm conviction); United States v. Rendon-Alamo, 621 F.3d 1307, 1309 (10th Cir. 2010) (invoking general dictionary to help affirm sentence); United States v. Hays, 526 F.3d 674, 677 (10th Cir. 2008) (invoking *Black's* to help reverse conviction).

219. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 555-64.

220. Those four cases were *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170-71 (2012) (Alito, J.); *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002-04 (2012) (Alito, J.); *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (Thomas, J.); and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175-76 (2009) (Thomas, J.). The four others we identified as barrier cases are *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 367 (1998) (Scalia, J.); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575-76 (1995) (Kennedy, J.); *Deal v. United States*, 508 U.S. 129, 131-32 (1993) (Scalia, J.); and *Smith v. United States*, 508 U.S. 223, 229, 237-38 (1993) (O'Connor, J.). *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 555-64, 564 n.332.

emphasized that the clarity of the text—established to a considerable extent by dictionary definitions—rendered further interpretive analysis unnecessary and indeed improper.[221] We referred to these decisions as "barrier" cases, in that the Court, despite strong objections from dissenters, invoked dictionary definitions as essentially dispositive in conjunction with related ordinary meaning arguments—thus precluding inquiry into or reliance on contextual resources derived from Congress (legislative history and purpose) or the Executive (agency guidance).[222]

In our dataset of eighty-eight appeals court majority opinions invoking dictionary definitions, we found two instances we could describe as barrier-type uses: decisions that ceased interpretive analysis because the ordinary meaning—established through or buttressed by dictionary definitions—was conclusively clear.[223] However, unlike the Supreme Court cases discussed above, neither appeals court decision involved a dissent, and neither addressed or expressly rejected other proffered interpretive resources that might point in a different direction. Moreover, the two cases are of distinctly minor importance. In *Cler v. Illinois Education Ass'n*, the Seventh Circuit invoked *Black's* to support its plain meaning determination that the phrase "prepaid legal services" in the ERISA definition of "employee welfare plan" included legal services on employment-related matters, not simply personal legal services.[224] In reversing a district court dismissal of plaintiff's claim, the court of appeals remanded without deciding if the welfare plan in question is actually covered under ERISA.[225] In *United States v. Gonzales*, the Tenth Circuit invoked a general meaning dictionary to support affirming a lower court conviction by concluding that "removal" of the contents of U.S. mail did not require a jury

221. *See Christopher*, 132 S. Ct. at 2170 (5-4 decision, rejecting longstanding agency regulations and guidelines); *Taniguchi*, 132 S. Ct. at 2002-04, 2006 (6-3 decision, disregarding legislative history and also district court practice pointing in opposite direction); *Janus Capital Grp.*, 564 U.S. at 141-48 (5-4 decision, disregarding contrary arguments based on agency's consistent interpretation of text in prior adjudications and briefs); *Gross*, 557 U.S. at 175-77 (5-4 decision, disregarding contrary indications based on Congress's evident intent and Court's own well-settled precedent).

222. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 483-84, 555-64.

223. *See* United States v. Gonzales, 456 F.3d 1178, 1182 (10th Cir. 2006); Cler v. Ill. Educ. Ass'n, 423 F.3d 726, 731 (7th Cir. 2005).

224. *See Cler*, 423 F.3d at 731.

225. *See id.* at 730-32.

instruction of intent to convert the removed contents to one's personal use.[226]

In sum, we have not found the same judicial support for considering dictionaries as barriers to further interpretive inquiry as has been evidenced by a persistent group of textualist-oriented Supreme Court Justices. Admittedly, these barrier cases are relatively rare even at the Supreme Court level, and we do not view the difference from appeals court occurrences as substantial in quantitative terms.[227] At the same time, the Supreme Court dictionary barrier cases are part of a larger set of barrier decisions in which a majority's strict textualist analysis—relying on ordinary meaning and language canons as well as dictionaries—has precluded consideration of interpretive resources associated with the politically accountable branches, notably legislative history and agency interpretation.[228] By contrast, the absence of any indication that circuit courts engage in dictionary barrier analysis of this kind is consistent with the commercial and ERISA case law examples discussed above, in which dictionary usage is integrated with serious attention to legislative purpose and practical consequences.[229] In this respect, the barrier cases—though limited in number—suggest a qualitative difference between the two judicial levels regarding how textual analysis is marshaled or imposed.

---

226. *See* 456 F.3d at 1182.

227. That said, the difference between 4 of 65 barrier cases in the Supreme Court (6.2 percent) and none at all in our court of appeals sample of 88 dictionary-using decisions is noteworthy.

228. In the labor and employment area, see, for example, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768, 2772 (2014) (5-4 decision); *Ricci v. DeStefano*, 557 U.S. 557, 581-83 (2009) (5-4 decision); and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258-59, 259 n.6 (2009) (5-4 decision). For similar textualist barrier decisions in the labor and employment field during the Rehnquist Court, see, for example, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-16, 119 (2001) (5-4 decision); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484-87 (1999) (7-2 decision); and *Mertens v. Hewitt Associates*, 508 U.S. 248, 255-59 (1993) (5-4 decision).

229. *See supra* Parts III.A.1-2.

B. Legislative History: Strategic and Functional Approaches

1. The Supreme Court's Strategic Perspective on Legislative History

We noted in Table 6 that in opinions that cite legislative history, Supreme Court Justices use vertical history more than three times as often as appeals court judges do. In contrast, circuit court judges invoke traditional legislative history commentary (committee reports, floor debates, et cetera) on more than nine out of every ten occasions when they cite to legislative history, compared with less than 70 percent for the Supreme Court. The explanation for this stark difference lies with the distinctively polarized nature of the legislative history debate in the Supreme Court—a debate stimulated over several decades by Justice Scalia.

From the time he joined the Court, Justice Scalia authored dozens of separate opinions expressly attacking or questioning the majority's reliance on legislative history, including numerous concurrences where he declined to join all or part of the majority opinion.[230] These extended critiques are associated with diminished use of legislative history in the Supreme Court, dating especially from the Rehnquist Court era.[231] As part of the overall decline in the Court's legislative history use, liberal Justices at times refrained from using legislative history in majority opinions, seemingly in order to help secure Justice Scalia's support.[232]

More recently, liberal Justices who endorse legislative history as an interpretive resource have been inserting diminutive or quasi-apologetic phrases as a preface to their reliance on committee reports, floor debates, and hearing records. We noted nine instances in our three fields since the start of the 2010 Term in which opinion

---

230. *See* Brudney & Ditslear, *supra* note 30, at 161-62 (citing and discussing more than twenty concurrences authored between 1987 and 2006).

231. *See generally* Koby, *supra* note 2, at 390-95; James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222-24 (2006).

232. *See* Brudney & Ditslear, *supra* note 30, at 163-67 (reporting that in labor and employment decisions between 1987 and 2002, Justices White, Stevens, and Breyer—all outspoken advocates of reliance on legislative history—did not cite to it at all in a dozen pro-employer majority opinions joined by Justice Scalia, even though the prevailing litigants relied seriously on legislative history evidence in their briefs).

authors made prefatory remarks such as "For those who take legislative history into account,"[233] "For those of us for whom [legislative history] is relevant,"[234] or "[F]or those who accept [legislative history]."[235] All such remarks are authored by liberal Justices.[236] Justice Scalia joined most of these opinions and never criticized their qualified reliance on legislative history. On the two occasions of such majority-qualified use when Justice Scalia was on the dissenting side, he also did not address the majority's reliance on legislative history.[237] The Justices have invoked this form of diminutive preface in other substantive areas as well, to similar effect.[238]

One might explain these recent developments in both collegial and strategic terms. Given Justice Scalia's well-documented hostility to committee reports and floor debates, the liberal Justices apparently decided to accommodate a colleague, and avoid his sharply critical concurring remarks, while not abandoning their interest in relying on such legislative record materials for confirmatory purposes. This approach also enabled them to retain Justice Scalia's unreserved support, which was perhaps a special advantage in efforts to preserve unanimity or to anchor a fifth vote for majority status.[239]

---

233. Abbott v. United States, 562 U.S. 8, 24 n.7 (2010) (Ginsburg, J.).

234. Pepper v. United States, 562 U.S. 476, 500 n.13 (2011) (Sotomayor, J.).

235. Hertz Corp. v. Friend, 559 U.S. 77, 95 (2010) (Breyer, J.).

236. Justice Breyer has used a version of this diminutive preface in three majority opinions besides *Hertz Corp.*: *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2234 (2013); *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1361, 1369 (2013); and *United States v. Tinklenberg*, 563 U.S. 647, 659 (2011). Justice Sotomayor used such prefatory remarks in one majority opinion besides *Pepper*: *United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014). And Justice Kagan has invoked similar prefatory wording in two opinions joined by Justice Scalia: *Tapia v. United States*, 564 U.S. 319, 331 (2011) (majority) ("Finally, for those who consider legislative history useful"); and *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting) ("And legislative history, for those who care about it").

237. *See Actavis*, 133 S. Ct. at 2238-47 (Roberts, C.J., dissenting); *Kirtsaeng*, 133 S. Ct. at 1373-80, 1383-86, 1388-91 (Ginsburg, J., dissenting).

238. *See, e.g.*, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2561 (2013) (Alito, J.) (7-2 decision construing Indian Child Welfare Act provision; Justice Scalia dissenting without reference to legislative history); Hall v. United States, 132 S. Ct. 1882, 1888 n.3 (2012) (Sotomayor, J.) (5-4 decision construing bankruptcy code provision; Justice Scalia joining the majority).

239. *See, e.g.*, Abbott v. United States, 562 U.S. 8, 24 (2010) (Scalia joining unanimous opinion); *Hertz Corp.*, 559 U.S. at 95 (same); *Pepper*, 562 U.S. at 500 (Scalia joining as fifth member of 5-4 majority); *Hall*, 132 S. Ct. at 1888 n.3 (same).

At the same time, the decision by a number of Justices to imply that legislative history is of limited interest and qualified importance to the Court conveys a sense of second-class status in the pantheon of interpretive resources. Such judicial conduct may seem puzzling given that ten of the eleven Justices who have served on the Roberts Court for at least one full term have relied on legislative record evidence in the three fields we analyzed at various points. It may even be regarded as disturbing, in light of recent scholarly demonstrations of how highly this evidence is credited and respected by members of Congress and their staffs as part of the lawmaking process.[240]

However one evaluates the liberal Justices' recent characterizations of legislative history, we found no evidence of such diminutive or qualifying language in court of appeals majorities. Rather, their approach typically involves a neutral or unqualifiedly supportive use of, or reliance on, legislative history. Thus, majority opinions in all three circuits and all fields regularly invoke committee reports or floor debates as a means of resolving textual ambiguities;[241] of demonstrating that the text is not devoid of ambiguity (justifying resort to agency deference);[242] of confirming the apparent meaning of the text;[243] or simply of explicating Congress's specific intent with no prefatory phrase at all.[244] Although there are doubtless some

240. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 965-70 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 606-09 (2002).

241. *See, e.g.*, Velez v. Sanchez, 693 F.3d 308, 328 (2d Cir. 2012); Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 643-45 (7th Cir. 2014); New Process Steel, L.P. v. NLRB, 564 F.3d 840, 846-47 (7th Cir. 2009), *rev'd and remanded*, 560 U.S. 674 (2010); James v. Wadas, 724 F.3d 1312, 1317 (10th Cir. 2013); Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1262-64 (10th Cir. 2013), *vacated*, 134 S. Ct. 2818 (2014); *see also, e.g.*, Kerber v. Qwest Pension Plan, 572 F.3d 1135, 1145-47 (10th Cir. 2009) (regarding clear legislative history as trumping an agency definitional guideline).

242. *See, e.g.*, Hackworth v. Progressive Cas. Ins. Co., 468 F.3d 722, 728-29 (10th Cir. 2006); Toomer v. City Cab, 443 F.3d 1191, 1194-95 (10th Cir. 2006).

243. *See, e.g.*, SEC v. Rosenthal, 650 F.3d 156, 161-62 (2d Cir. 2011); United States v. Arenburg, 605 F.3d 164, 169 n.2 (2d Cir. 2010) (per curiam); Singh v. City of New York, 524 F.3d 361, 369 n.5 (2d Cir. 2008); United States v. Gotti, 459 F.3d 296, 335 (2d Cir. 2006); United States v. Mohamed, 759 F.3d 798, 809 (7th Cir. 2014); Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 734 F.3d 708, 726-27 (7th Cir. 2013); Volkswagen of Am., Inc. v. SUD's of Peoria, Inc., 474 F.3d 966, 975-76 (7th Cir. 2007).

244. *See, e.g.*, *In re* New Times Sec. Servs., Inc., 463 F.3d 125, 128-29 (2d Cir. 2006); Coan

appeals court judges who use legislative history more than others,[245] we did not see anything resembling methodological reservations or debates about legislative history's inherent value of the kind that have regularly surfaced in Supreme Court opinions.

The obvious question is whether such legislative history debates will continue among the Justices following Justice Scalia's death. In that regard, it will be interesting to see whether the liberal Justices cease using qualifying or diminutive prefatory phrases when relying on legislative history. Initial indications are that such phrases may cease to be part of the framing of discussions or disagreements about the applicability and value of such history.[246]

Intriguingly, the Supreme Court's frequent use of vertical legislative history is not accompanied by the types of diminutive prefaces discussed above. When the majority invoked simply earlier "bill" versions of the ultimately enacted text,[247] or previously enacted versions of the text that have since been adjusted,[248] no effort was made to qualify or diminish the nature of the evidence being used.[249] This silence suggests that the concerns voiced by Justice Scalia, and shared at certain times by other Justices endorsing primarily textualist analyses, are focused on narrative commentary rather

---

v. Kaufman, 457 F.3d 250, 259-61 (2d Cir. 2006); Appert v. Morgan Stanley Dean Witter, Inc., 673 F.3d 609, 620-22 (7th Cir. 2012); United States v. Yancey, 621 F.3d 681, 683-84, 686 (7th Cir. 2010) (per curiam); United States v. Nagel, 559 F.3d 756, 760-61 (7th Cir. 2009); Johnson v. Riddle, 443 F.3d 723, 728 (10th Cir. 2006).

245. Given our sampling approach and the number of sitting judges on our three circuits, we did not attempt to code for proportionate use by individual judges.

246. *See* Lockhart v. United States, 136 S. Ct. 958, 967-68, 973-75 (2016) (Justice Sotomayor for the majority and Justice Kagan for the dissent vigorously debate the probative significance of committee report materials).

247. *See, e.g.*, Corley v. United States, 556 U.S. 303, 318-20 (2009) (Souter, J.); United States v. Hayes, 555 U.S. 415, 428-29 (2009) (Ginsburg, J.); Hamdan v. Rumsfeld, 548 U.S. 557, 579-81 (2006) (Stevens, J.). This is often referred to as "drafting history."

248. *See, e.g.*, United States v. Quality Stores, Inc., 134 S. Ct. 1395, 1401 (2014) (Kennedy, J.); FAA v. Cooper, 132 S. Ct. 1441, 1452 (2012) (Alito, J.); Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 412-13 (2011) (Thomas, J.); Skilling v. United States, 561 U.S. 358, 401-05 (2010) (Ginsburg, J.); Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 904-05 (2007) (Kennedy, J.); James v. United States, 550 U.S. 192, 200-01 (2007) (Alito, J.). This is sometimes referred to as "statutory history."

249. Of the 26 cases where the majority makes use of vertical history (12 criminal, 4 commercial, 10 labor), the majority invokes a qualifying preface on 3 occasions; each opinion also relies on committee reports, floor debates, and/or hearing testimony. *See, e.g.*, United States v. Castleman, 134 S. Ct. 1405, 1415 (2014); Abbott v. United States, 562 U.S. 8, 29 n.7 (2010); Hertz Corp. v. Friend, 559 U.S. 77, 86-88, 95 (2010).

than textual iterations, even iterations by the same subgroups that produce the commentary.

Admittedly, there are certain differences between statutory history, which has already been enacted by prior Congresses, and drafting history, which has not been enacted and according to some textualist critiques can be manipulated in the way reports and floor statements allegedly are.[250] But even the earlier bill versions that comprise drafting history are "text," organically linked to the final enacted version of text and in that regard quite different from narrative commentaries. In six of the seven instances of drafting history usage by the majority in our three fields, Justice Scalia is silent as to its use[251]—this during a period when he continues to criticize sharply the Court's invocation of traditional legislative history.[252]

Perhaps as a consequence, the Justices have made greater use of this "more textual" form of legislative history, recognizing that its use does not require disclaimers and will not stimulate sharp criticisms. By contrast, as court of appeals judges do not inject methodological critiques of legislative history into their opinions, or object in principle to any particular forms of that history, these judges seem to approach the use of legislative history generally on more functional and less strategic grounds. Accordingly, their use of

---

250. On one occasion, Justice Scalia in dissent sharply criticized the majority's use of drafting history on grounds similar to his general indictment of legislative history. *See Hamdan,* 548 U.S. at 667-68 (Scalia, J., dissenting). On a second occasion, he concurred in part, refusing to join the section of the majority opinion addressing statutory history. *See* United States v. Ressam, 553 U.S. 272, 277 (2008) (Scalia, J., concurring). However, on numerous occasions Justice Scalia joined majority and dissenting opinions that invoked vertical history, with no disclaimers. *See, e.g.*, cases cited *supra* notes 247-48.

251. *See, e.g.*, *Castleman*, 134 S. Ct. at 1415-16 (Scalia, J., authoring separate concurrence); Jones v. Harris Assocs. L.P., 559 U.S. 335, 340-41 (2010) (Scalia, J., joining unanimous decision); *Corley*, 556 U.S. at 329-30 (Scalia, J., joining dissent, which also invokes drafting history); *Hayes*, 555 U.S. at 428-29 (Scalia, J., joining dissent).

252. *See, e.g.*, Carr v. United States, 560 U.S. 438, 458-59 (2010) (Scalia, J., concurring); Samantar v. Yousuf, 560 U.S. 305, 326-29 (2010) (Scalia, J., concurring); Zedner v. United States, 547 U.S. 489, 509-11 (2006) (Scalia, J., concurring). On several other occasions, Justice Scalia joined majority opinions that invoked vertical history with no disclaimers. *See, e.g.*, Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1977 (2015) (statutory history); *Schindler Elevator Corp.* 563 U.S. at 412-13 (statutory history); Abuelhawa v. United States, 556 U.S. 816, 822 (2009) (statutory history). Justice Scalia also made use of vertical history himself—in a majority opinion, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (statutory history), and a dissent, *Dorsey v. United States*, 132 S. Ct. 2321, 2343 (2012) (Scalia, J., dissenting) (drafting history).

vertical history is not disproportionate, as they also invoke committee reports or floor statements, unaffected by considerations of collegiality or risk-avoidance.

2. Second Circuit Reliance in Criminal Law Cases

We reported in Table 7 that, among the courts of appeals, the Second Circuit's legislative history use is especially heavy in the criminal law field—twice as frequent as the Tenth Circuit (versus roughly equivalent in the two other subject matter fields) and four times as frequent as the Seventh Circuit (compared to two to three times more frequent in the two other fields). One factor that we believe helps to explain this difference is the relatively high number of white-collar criminal cases in the Second Circuit.[253] As noted earlier, there are at least two possible reasons why legislative history might be used more often when construing statutes creating white-collar crimes. One is that white-collar defendants receive higher quality legal representation, and their briefs may therefore provide a more complete or challenging presentation of legislative record evidence.[254] The other is that at least some of the white-collar statutes under which defendants were charged are more complex in structure and history than other federal criminal statutes involving violence or substance abuse.[255] Accordingly, there may be a more developed or focused legislative history to examine and invoke. Several examples illustrate the ways that the Second Circuit has utilized such history in white-collar criminal cases.

In *United States v. Aleynikov*, the defendant appealed his conviction for stealing and transferring computer source code for the Goldman Sachs high frequency trading (HFT) system, in violation of the Economic Espionage Act (EEA).[256] Writing for the Second Circuit panel, then-Chief Judge Jacobs reversed the conviction on the grounds that the operative section of the EEA (unlike a companion section addressing foreign espionage) requires the relevant

253. *See supra* note 160 (reporting data on 2014 white-collar crime categories, indicating that a higher proportion of criminal filings in the Second Circuit charged embezzlement, fraud, forgery, counterfeiting, and regulatory offenses).

254. *See supra* notes 158-59 and accompanying text.

255. *See supra* notes 158-59 and accompanying text.

256. *See* 676 F.3d 71, 73 (2d Cir. 2012).

products to be "produced for" or "placed in" interstate or foreign commerce, which Goldman's HFT system was not. In reaching its conclusion, the court relied heavily on legislative history, including prior bill versions as well as the Senate and House reports.[257] The initial Senate bill did not have the key commerce-related limiting language, but instead simply applied to persons who stole proprietary economic information above a certain monetary value ($100,000).[258] The limiting language was introduced in the House bill, and the court relied on this drafting history to conclude that "[t]he words of limitation ... were deliberately chosen."[259]

In *United States v. Capoccia*, an issue on appeal involved the scope of the district court's forfeiture order, following defendant attorney's conviction on thirteen counts related to his debt-reduction services targeting consumers.[260] Writing for the panel, then-Judge Sotomayor concluded that the government was not entitled to forfeiture of funds the defendant obtained from transfers prior to the transactions for which he was convicted.[261] Judge Sotomayor relied on both the House committee reports and a Senate floor statement specifying that the statute was aimed at preventing abuses of the civil forfeiture process by encouraging the government to "seek forfeiture through criminal proceedings, where it would have to link targeted property to a specific criminal conviction."[262]

In *United States v. MacPherson*, the government appealed from a district court judgment of acquittal, setting aside a jury's guilty verdict in a money-laundering case.[263] The appeal addressed the requisite mens rea elements of the charged offense. Judge Raggi for the Second Circuit panel reviewed the extended history of the relevant prohibitions on structuring cash transactions, and concluded that Congress's rapid override of a 1994 Supreme Court decision established that willfulness was not an element necessary for

257. *See id.* at 79-82.

258. *See id.* at 79-80. The Senate bill did include a statement asserting that the development and production of economic proprietary information automatically implicates interstate commerce, but the Second Circuit emphasized that this was a finding within the bill rather than a separate textual requirement. *See id.* at 79.

259. *See id.* at 80.

260. *See* 503 F.3d 103, 105 (2d Cir. 2007).

261. *See id.* at 117-18.

262. *See id.* at 116.

263. *See* 424 F.3d 183, 184 (2d Cir. 2005).

conviction.[264] The panel accordingly reinstated the conviction after establishing that the evidence supported defendant's knowledge of and intent to evade currency reporting requirements.[265]

Finally, in *United States v. Milstein*, the defendant challenged the district court's order that he pay more than three million dollars in restitution to drug manufacturers whose trademarks he misappropriated.[266] The issue on appeal was whether the Victim and Witness Protection Act, which provided for "lost income" in cases of bodily injury, but was silent regarding recovery for loss or destruction of property, covered defendant's misconduct. In affirming the order of restitution, District Judge Rakoff (sitting by designation) reasoned that nothing in the text or legislative history precluded restitution for lost profits, and that the Act's primary aim as set forth in the Senate report (requiring "the wrongdoer ... to the degree possible to restore the victim to his or her prior state of well-being") would be thwarted if such economic injuries were excluded.[267]

There are numerous other Second Circuit decisions relying on legislative history to support resolution of interpretive issues in white-collar criminal settings.[268] To be sure, the two other circuits also have cases involving white-collar offenses in which the appeals court invoked legislative history as part of its analysis.[269]

---

264. *See id.* at 188-89.

265. *See id.* at 195.

266. *See* 481 F.3d 132, 133 (2d Cir. 2007).

267. *See id.* at 136 (omission in original).

268. *See, e.g.*, United States v. Lauersen, 648 F.3d 115, 117-18 (2d Cir. 2011) (per curiam) (regarding delinquency and default penalties following businessman's recurrent violation of supervised release conditions); United States v. Gray, 642 F.3d 371, 377 (2d Cir. 2011) (holding the destruction or falsification of documents is covered by the Sarbanes-Oxley Act, 18 U.S.C. § 1519 (2012)); United States v. Amato, 540 F.3d 153, 159 (2d Cir. 2008) (regarding mail and wire fraud, and restitution under Mandatory Victims Restitution Act, 18 U.S.C. § 3663); United States v. Gotti, 459 F.3d 296, 335-36 (2d Cir. 2006) (holding receipt of funds is covered by "transaction" as part of conviction under Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1956); *see also* Gordon v. Softech Int'l, Inc., 726 F.3d 42, 50-51 (2d Cir. 2013) (regarding pattern of threats and harassment under Drivers Privacy Protection Act, 18 U.S.C. § 2721); Doe v. Bin Laden, 663 F.3d 64, 67-70 (2d Cir. 2011) (per curiam) (holding nation of Afghanistan is not immune under noncommercial tort exception to Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (2012), in action brought by estate of a victim of September 11 attacks).

269. *See, e.g.*, DirecTV, Inc., v. Barczewski, 604 F.3d 1004, 1007-08 (7th Cir. 2010) (regarding the unauthorized interception of encrypted satellite system signals); United States v. Speakman, 594 F.3d 1165, 1176 (10th Cir. 2010) (regarding the scope of restitution requirements incident to wire fraud conviction); United States v. Wittig, 528 F.3d 1280, 1288 (10th

Nonetheless, the proportion of appeals involving white-collar offenses is considerably greater for the Second Circuit in our dataset, and it seems likely that this is an important element in the substantially higher level of legislative history use for criminal law cases.[270]

C. A Protean Approach to Statutory Interpretation

1. Empirical and Doctrinal Comparisons Summarized

We have attempted to demonstrate various ways in which the courts of appeals embrace eclectic, situation-specific positions when construing federal statutes. Their use of dictionaries is more substantial in commercial decisions and certain complex labor and employment cases, and less so in routine criminal appeals. But even in the substantial commercial and ERISA cases, circuit court judges tend to invoke dictionaries as part of a broad palette of interpretive resources, notably including reliance on legislative purpose and practical consequences. Relatedly, and unlike Supreme Court Justices during this period, appeals court judges seem to eschew reliance on dictionaries as part of a hard textualist barrier. We found no evidence that circuit courts are disposed, over the objections of their panel colleagues, to use ordinary meaning as a basis for precluding consideration of less textual elements such as legislative history or agency deference.

With respect to legislative history, appeals court judges again seem versatile and functional in their approach. They invoke legislative record evidence in straightforward fashion for a range of traditional ambiguity-resolving and text-confirming purposes. They do so without reference to, or apparent interest in, the clashes over the legitimacy and desirability of legislative history that for decades have characterized Supreme Court statutory decision-making. Appeals court judges also seem to turn to legislative history more

---

Cir. 2008) (regarding an occupational restriction incident to money-laundering conviction). Interestingly, there appear to be more of these white-collar cases in the Tenth Circuit than the Seventh, and the Tenth Circuit has a higher level of legislative history usage in criminal law cases—14.4 percent versus 7.6 percent. *See supra* Table 3.

270. Data for this calculation are on file with the authors. The overall rates of white-collar cases in the three circuits are presented in *supra* note 160.

often in criminal law cases that involve white-collar prosecutions, which may reflect the lawyering resources produced on both sides or the complexity of the statutory provisions regulating these kinds of offenses.

We do not mean to characterize as "protean" the mere absence of a consistent methodological approach across different fields and under particular circumstances. Rather, these variations operate as evidence of, and perhaps also a precondition to, the pragmatic adaptability that we identify as protean. What underlies the varied degrees of emphasis accorded to dictionaries and legislative history in case-specific settings is circuit judges' apparent understanding that when engaged in the "practical reasoning"[271] of construing statutes, they must work with any and all recognized tools at their disposal. Their efforts often yield thin applications when simple textual analysis leads to easy results. But in numerous other instances, they result in thicker applications, based on judicial perceptions that sufficient textual clarity, or conclusive statutory meaning, cannot be achieved without reference to non-text-based resources—such as indicia of general purpose and specific intent—as well as practical considerations. Regardless of the density, appeals court judges seem to apply their layers of interpretive analysis unfettered by the dogmatic constraints of competing interpretive theories.

We also do not mean to imply that the Supreme Court's statutory interpretation approach has been exclusively or even predominantly rigid. Our prior research indicates that the Court's use of dictionaries is often functional and combined with other resources.[272] Similarly, we know that the Justices' patterns of legislative history usage suggest their appreciation for how committee reports are more valuable interpretive guides in some subject fields, while floor statements are more reliable in others,[273] and for how even "liberal"

271. *See generally* William N. Eskridge, Jr. & Philip F. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990).

272. *See, e.g.*, Mac's Shell Serv., Inc. v. Shell Oil Products Co., 559 U.S. 175, 182-87 (2010) (commercial law); Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271, 276-79, 281 (2009) (labor and employment law); Begay v. United States, 553 U.S. 137, 142-48 (2008) (criminal law). *See generally* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 548-54 (discussing eleven Court decisions—including five from the Roberts Court—where majority used dictionary definitions along with practical or purposive considerations).

273. *See generally* Brudney & Ditslear, *supra* note 45, at 1260-65.

pro-employee statutes are accompanied by certain "conservative" pro-employer legislative history on which both liberal and conservative Justices regularly rely.[274] There is also some recent evidence to suggest that the Court may be increasingly interested in tempering textual considerations with an appreciation for statutory purpose and practical consequences.[275] And with the death of Justice Scalia, who did so much to encourage and establish bright methodological lines, the Court may shift further toward a more flexible interpretive approach to construing statutes.

Still, the Court's use of dictionaries and legislative history in recent decades has been influenced more by strategic thinking and methodological messaging than what we have seen occurring in the courts of appeals.[276] It is worth pondering how our findings relate to the possibility that Supreme Court Justices may *inevitably* be more inclined than their appeals court colleagues to articulate consistent methodological approaches, or to deploy interpretive resources for strategic or policy-related ends. We identified that possibility in Part I when we discussed five factors that might give rise to interpretive divergence between the Supreme Court and courts of appeals: the role of hierarchical instruction; the repeat player effect; resource imbalance; congressional and media attention; and the judicial selection process. Applying these "interpretive divergence" factors to our empirical results and doctrinal analyses can help formulate a response to the question of inevitability.

2. Interpretive Divergence Factors Reconsidered

One distinctive factor is the status of Supreme Court Justices as repeat players, which has encouraged self-conscious exchanges, heated disagreements, and strategic conduct regarding preferred methods of statutory interpretation. Since the late 1980s, statutory

274. *See* Brudney & Ditslear, *supra* note 30, at 146-57.

275. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480 (2015); Yates v. United States, 135 S. Ct. 1074 (2015); Bond v. United States, 134 S. Ct. 2077 (2014). *See generally* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407 (2015).

276. In addition to the examples discussed in this Section, we have shown in our prior work that the Court's use of dictionaries in criminal law decisions may convey a larger message about the importance of providing adequately clear notice as to what the criminal law prohibits and the extent to which it punishes. *See* Brudney & Baum, *Oasis or Mirage*, *supra* note 14, at 541-43.

interpretation debates among the Justices have reflected sharply expressed differences as to the proper way to respect legislative supremacy.[277] Judicial pronouncements and disagreements about preferred methodologies seem most likely to arise and flourish when the Court's membership remains relatively stable—as it has been in recent decades.

Our Roberts Court dataset provides ample evidence of these methodological assertions and disputes. The dictionary barrier cases involve Justices disagreeing on whether ordinary meaning analysis should foreclose consideration of factors such as pre-enactment legislative history and purpose or post-enactment agency interpretive practice. The liberal Justices' introduction of politely pejorative prefaces when they rely on legislative history reflects a strategic judgment to accommodate a colleague by effectively relegating the resource to lesser importance. And the remarkably frequent use of vertical history in the Roberts Court suggests that the Justices have become more comfortable invoking textualist forms of legislative history, which do less to roil the waters.

In all of this self-conscious methodological dialogue, it would be hard to overstate the role played by one forcefully articulate member of the repeat-player Court. Justice Scalia's rhetorically powerful, rule-based beliefs about the role of ordinary textual meaning, dictionaries, canons, and legislative history and purpose helped elevate statutory interpretation to a prominent place in Supreme Court discourse. While Justice Scalia's untimely departure is not likely to end methodological disagreements at the Court,[278] it seems plausible to anticipate that the exchanges may become less intense and colorfully expressed, and that the Justices may abandon certain strategic interpretive gambits.[279]

---

277. *See supra* notes 5-8, 21 and accompanying text; *see also* Bank One Chi., N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 276-79 (1996) (Stevens, J., concurring) (defending legislative history as probative evidence regarding statutory meaning); *id.* at 279-83 (Scalia, J., concurring) (dismissing legislative history as illegitimate and nonprobative).

278. *See, e.g.*, Ali v. Fed. Bureau of Prisons, 552 U.S. 214 (2008) (featuring disagreement about the relevance and primacy of ordinary meaning, the *ejusdem generis* canon, drafting history, and legislative purpose in separate opinions by Justice Thomas (majority), Justice Kennedy (dissent), and Justice Breyer (dissent)).

279. *See, e.g.*, Lockhart v. United States, 136 S. Ct. 958, 967-68, 973-75 (2016) (criminal law statutory decision in which Justices Sotomayor (majority) and Kagan (dissent) disagree at length over weight and implications of a Senate committee report and Justice Department letter to House committee, with no diminutive references to status or role of legislative

Similar methodological debates have not occurred among circuit court judges in our dataset, and they are very unlikely to take place on a court of appeals panel. Specific sets of three appeals court judges sit together infrequently, and—as evidenced in our three circuits—they often do not have their regular offices in the same city or even state.[280] We suggested that on the Seventh Circuit, where Judges Posner and Easterbrook have been relatively outspoken in their criticisms of dictionaries as an interpretive resource for appellate judges, the influence of these two longstanding leaders on the appellate bench may contribute to the unusually low level of dictionary usage in that circuit.[281] But our suggestion is necessarily speculative when compared to what we know has occurred at the Supreme Court level.

Although we concluded in Part I that the Supreme Court's role as a hierarchical instructor on methods of statutory interpretation was likely to be extremely limited, there is one finding that suggests the possibility of appeals court attention to Supreme Court methodology, even if not adherence to that methodology as precedent. We found that for court of appeals opinions on which certiorari was granted, the ratio between legislative history use and dictionary use in all appeals court cases (more than two to one favoring legislative history) was substantially reduced (to 1.36 to 1).[282] We speculated that if appeals court judges recognize when circuit conflicts are likely to attract Supreme Court attention, as they surely do, these judges may well be drawn (even if subconsciously) to invoke interpretive resources that are favored by the Supreme Court when contributing to or creating such a circuit conflict.[283] In particular,

---

history).

280. Second Circuit judges sit in panels in lower Manhattan, but five of the eleven active judges have their chambers elsewhere—in Connecticut, Vermont, or other parts of New York. For information on court of appeals judges and chambers, see the directory available at 2 ALMANAC OF THE FEDERAL JUDICIARY, Westlaw (database updated July 2016). Seventh Circuit panels convene in Chicago, but three of the nine active judges have their chambers in Indiana or Wisconsin. *Id.* And the Tenth Circuit, which sits in Denver, encompasses district courts in six states—nine of the twelve active judges have their chambers outside of Colorado. *Id.*

281. *See supra* notes 147-53 and accompanying text.

282. *See supra* text following note 85.

283. This process is not necessarily unconscious. According to one Eleventh Circuit judge,

> The audience of a dissenting opinion often includes another entity—the United States Supreme Court. When drafting a dissenting opinion, I often consider whether the parties will file a petition for a writ of certiorari to the Supreme

appeals court judges may be more inclined to invoke dictionaries—a favored resource among the Justices—if the judges anticipate that their majority opinion could become the subject of Court review on the merits.

The factor of resource imbalance between the Supreme Court and courts of appeals appears to have less explanatory value than projected, at least when comparing interpretive techniques. As noted earlier, some scholars hypothesized that because legislative history research and analysis in particular require a special investment of time and reflection, this investment should be made more regularly by Supreme Court Justices, who have the benefit of extensive amicus briefs, high quality lawyering on both sides, and a far lighter merits docket than their circuit court colleagues.[284] But while the Supreme Court did invoke legislative history twice as often as did the courts of appeals in our dataset,[285] the Justices invoked dictionaries nearly four times as often as their circuit court colleagues.[286] Put differently, circuit court judges cited legislative history more than double the number of times they cited dictionaries—and they relied on legislative history at a slightly higher rate as well.[287] Given that dictionaries are readily accessible to these judges, it would seem that the labor-intensive aspects of consulting legislative history play little if any role in explaining differential uses of the two interpretive assets.

Resources may be more relevant when considering appeals courts' substantially greater use of both legislative history and dictionaries in commercial law cases compared with criminal and labor and

---

> Court. If I believe that the parties will, I write the dissent with the Supreme Court in mind.

Hon. Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 266 n.102 (2003).

284. *See supra* Part I.C.

285. *See supra* Table 3.

286. *See supra* text accompanying note 66.

287. The reliance rate for appeals court judges was 77.5 percent for legislative history and 73 percent for dictionary definitions (Supreme Court reliance rates were 82.5 percent for legislative history and 82 percent for dictionaries). *See supra* text accompanying note 91 and Part II.A.2. The difference in circuit court reliance rates is small; our point is simply, contrary to the predictions of some scholars, that appeals court judges were prepared to "separate the wheat from the chaff, the reliable from the opportunistic, the real deals from the cheap talk" regarding legislative history resources as often or slightly more often than they delved into the nuances or contextual relevance of dictionary definitions. *See* Bruhl, *supra* note 4, at 474.

employment cases. The commercial subject area tends to involve higher levels of lawyering resources on both sides at the appeals court level than is true for the other two fields, where resource imbalance is often a reality. In addition to the parties' financial capacity and willingness to underwrite lawyering efforts, the complexity of commercial law subject matter may encourage more extensive research and analysis, particularly when compared with criminal law appeals that are very often routine and fact-based.

Beyond the factor of resources, a more focused level of congressional and interest group attention may help explain the markedly higher use of dictionaries and legislative history in commercial law cases. As discussed earlier, prior research indicates that congressional overrides of Supreme Court decisions are most frequent in criminal and civil rights cases; by contrast, overrides of circuit court decisions occur more often in the economic regulatory area.[288] Relatedly, it appears that substantially fewer commercial law cases are decided by the Supreme Court than either criminal or labor and employment cases.[289] This is perhaps in part because certiorari grants in the two other areas more often reflect the urging of the Solicitor General on behalf of the federal government as an interested party or amicus.[290]

Absent extensive Supreme Court attention, commercial law cases in the circuits—in which heavy regulatory and financial burdens are often at stake—attract the special interest of a corporate audience. This audience of business attorneys and company executives has ample resources to lobby Congress for adjustments or fixes. In addition, circuit judges may have a particular desire to "look good" before the sophisticated attorneys who brief and argue these commercial cases, especially given that many judges came from that

288. *See supra* notes 40-42 and accompanying text (reporting results of scholarly studies).

289. *See supra* text preceding note 59 (identifying 94 criminal law cases, 87 labor and employment law cases, and 50 commercial law cases in Roberts Court dataset). Our selection was based on cases arising under prominent titles of the U.S. Code (18 U.S.C., 29 U.S.C., 42 U.S.C., and 15 U.S.C.); while we do not contend that this represents all statutory cases in the three fields, the disparity between commercial law and the two other fields is striking.

290. The United States is a party in virtually all criminal cases arising under 18 U.S.C., and is a party or amicus in many if not most civil "prosecutions" arising under 29 U.S.C. and 42 U.S.C. By contrast, commercial disputes under 15 U.S.C. are often between two private parties. On the impact of the Solicitor General on cert. grants, see RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS 49-71 (2012).

practice setting.[291] This form of reputational interest also might contribute to judges writing more extensive and thorough opinions that encompass multiple interpretive resources.

In sum, the business community and its congressional allies are likely to pay special attention to important appeals court decisions in the commercial law area. It is reasonable to assume that circuit judges have some sense of this attentiveness, based on awareness of more frequent overrides and perhaps also on an enhanced interest in their reputations before the corporate bar. That awareness, along with the investment of lawyerly resources, seems likely to contribute to a greater use of dictionaries and legislative history by circuit court judges seeking to explain and justify their decisions in textual or purposive terms.

Finally, the judicial selection factor appears relevant in this interpretive setting, but with an important extension. We suggested earlier that the Justices, as part of their high profile confirmation proceedings, are susceptible to articulating theories of neutral interpretation.[292] As we noted, this effect is minimal for appeals court judges, whose confirmation hearings draw little or no attention from the national media and usually attract only minimal interest from the legal community and Congress.[293]

Differences in the levels of attention that nominees for the Supreme Court and courts of appeals receive are reproduced once they are settled on the bench. Supreme Court Justices receive extraordinary scrutiny among attentive audiences—including the legal media, academics, and legislators. Because they stand below the top level of the courts and because they are far more numerous, with over 200 active and senior judges, members of the courts of appeals receive considerably less scrutiny. By the same token, Justices have a much better opportunity to cultivate their reputations among attentive audiences.[294]

For both reasons, Justices have stronger incentives to adopt distinctive interpretive methods. In particular, when Justices

---

291. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR, 97-99, 114-16 (2006).

292. *See supra* notes 45-46 and accompanying text.

293. *See supra* text following note 47.

294. On interest in reputation among judges, and especially Supreme Court Justices, see BAUM, *supra* note 291, at 32-45.

essentially self-identify as textualist, purposivist, or pragmatist in their interpretive orientations, they express an approach to construing statutes that is philosophical rather than ideological. By doing so, they can communicate that whichever interpretive method they follow is neutral rather than political, is respectful of legislative supremacy, and is nonactivist. Moreover, the philosophical self-identification contributes to fostering a judicial image as principled and thoughtful.[295] These considerations help to create individual predilections such as an affinity for dictionaries or avoidance of legislative history, and the repeat player status of Justices enhances the impact of those predilections on the Court as a whole.

Appeals court judges do not interact with the same audience on a national stage. Further, they have less time for methodological articulations given their more onerous caseloads. There are a handful of notable exceptions (such as Judges Katzmann, Posner, Easterbrook, and also Justice Breyer when he was on the appellate bench) who opine and interact publicly about the relative values of legislative history, canons, or dictionaries as part of the judicial toolkit.[296] But for the most part, circuit court judges offer interpretive guidance that is inflected through case-specific settings as part of their dialogue with parties, not extrajudicial audiences.[297] As we have demonstrated with our data, this guidance can be highly situational and pragmatic, based on subject matter variations, differing legislative purposes or related contexts, diverse litigation postures, and a range of practical and policy consequences.

---

295. This consideration is reflected in the books by Justices Breyer and Scalia: STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

296. *See supra* note 55 (citing to works by Katzmann, Posner, Easterbrook); *see also* Hon. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). *See generally* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 379; Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386; *see also generally* William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1013 (2008) (distancing himself from Judge Posner's "pragmatic approach" to judging, and briefly characterizing his own approach as formalist or legalist).

297. *But see* BAUM, *supra* note 291, at 36.

3. Normative Implications

At the end of Part I, we raised the question whether, assuming the circuit courts' methods of statutory interpretation are, as an empirical matter, more pragmatic and adaptable—and less self-consciously doctrinaire—than the Supreme Court's, this protean approach has anything to recommend it in normative terms. Having established that there are in fact salient differences in interpretive approach between the two judicial levels, we now identify several possible benefits to the pragmatism and adaptability favored by the courts of appeals.

One benefit is epistemological. The protean approach assumes that, except for disputes where a law's directive is unassailably clear, consideration of more resources rather than fewer tends to expand judicial knowledge and sophistication when resolving even arguably ambiguous or inconclusive statutory language. This idea dates back at least to Chief Justice Marshall's tenure,[298] but it currently resonates more in the circuit courts than the Supreme Court. While text remains the starting point and the most authoritative source for appeals court judges, purpose, intent, and practical impact may all become relevant under a given set of facts and circumstances. Considering these additional sources of potential insight also minimizes the risk of subjective detours—at least for judges who approach each interpretive dispute on its own terms rather than as part of a larger doctrinal construct.

A second benefit of the protean approach is its democratizing influence. In appropriate circumstances, a degree of skepticism about textual certainty is accompanied by attention to what the politically accountable branches have said regarding the meaning of disputed text—through potentially relevant legislative history and agency constructions. Consideration of these resources may in the end prove less than helpful. But the exercise of doing so represents an integration (as opposed to a reordering) of authority sources from the three branches; in that subtle respect, it is a humbling process for the judiciary.

298. *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.").

A final benefit of the protean approach is that its ad hoc qualities serve as a check on the prospect of methodological stare decisis power from the Supreme Court. We noted earlier that appeals court judges do move more toward the Justices' current interpretive priorities and penchants when perceiving that the dispute before them is likely to fall within the Court's jurisdictional purview. But the vast majority of appeals court fare involves statutory disputes that are not close to certworthy. And in those instances, the range of distinguishing factors between Supreme Court and appeals court cases—stemming from factors such as dissimilarities in workload, legal complexity, policy implications, lawyering resources, and repeat-player culture—justify the divergent approach.

To be clear, the benefits of a protean approach need not be limited to appeals court decision-making. If the Supreme Court were to announce its own commitment to such an approach—a pragmatic and adaptable standard rather than a prescriptively fixed set of rules—such a standard could well serve as flexible guidance for lower federal courts. We assume that circuit court judges would accord respect to this type of guidance, both because it integrates the importance of situation-specific methodological analysis and because it reinforces circuit judges' predilections to approach statutory interpretation in this adaptable way. For now though, the Supreme Court has issued no such guidance; instead, the Justices remain largely divided along textualist and purposivist lines.[299]

CONCLUSION

Our inquiry in this Article has addressed a wide range of issues related to the resources that the federal courts of appeals use when interpreting statutes. We have identified important differences between the appeals courts and the Supreme Court in their use of,

299. *See supra* notes 5-8, 20-21 and accompanying text. For evidence of tensions between lessons drawn from these current rule-based Supreme Court approaches, compare *U.S. v. Hinckley*, 550 F.3d 926, 940 (10th Cir. 2008) (Gorsuch, J., concurring) (invoking 1997 Supreme Court precedent for interpretive approach that begins and ends with plain meaning unless text is ambiguous), with *Elgharib v. Napolitano*, 600 F.3d 597, 601 (6th Cir. 2010) (invoking a different 1997 Supreme Court precedent for three-step interpretive framework featuring natural reading of full text, common law meaning of statutory terms, and consideration of statutory and legislative history).

and reliance on, two key resources—dictionary definitions and legislative history.

Most broadly, we have found evidence that judges on the courts of appeals are more pragmatic and eclectic than the Justices in their use of these resources. That pragmatic eclecticism is reflected in differences in usage patterns both between and within fields defined by their subject matter. It is also reflected in appeals courts' straightforward reliance on legislative history to resolve ambiguities, confirm apparent meaning, or simply explicate legislative intent—all without characterizing the legitimacy or systemic value of that record evidence.

Related to this protean approach is a lack of explicit self-consciousness about the use of interpretive resources. Circuit court judges focus in their decisions on resolving disputes brought by the parties before them. They have not found it necessary or useful to that task to elevate a single interpretive resource or propound a unified interpretive theory. Moreover, animated at least in part by the hydraulic pressures of their large dockets, these judges follow a multi-resource interpretive path without apparent collegial strains or even second thoughts.

At first glance, this approach to statutory interpretation may seem less advisable than the more distinctive and self-conscious methodological path that characterizes some Supreme Court Justices and, to a degree, the Court as a whole. Although the Justices disagree with each other—at times fiercely—about priorities in the use of interpretive resources, there appears to be acceptance at both the appeals court and Supreme Court levels of the underlying norm that judges perform best in statutory interpretation when they have less discretion.[300] One possible implication from this norm is that adopting clear, rule-like principles as to the use of particular resources and applying those principles consistently is desirable because it reduces judicial discretion.[301]

---

300. *Compare* KATZMANN, *supra* note 55, at 41, 48, *with* Scalia, *supra* note 295, at 38.

301. For a recent spirited debate between two federal court of appeals judges regarding the rules versus standards approach to statutory interpretation, compare Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing KATZMANN, *supra* note 55), with Robert A. Katzmann, *Response to Judge Kavanaugh's Review of* Judging Statutes, 129 HARV. L. REV. F. 388 (2016).

We think, however, that a better case can be made for a protean approach. No practice in the use of interpretive resources can eliminate subjectivity. Substitution of dictionary definitions for legislative history might appear to be a way of avoiding biased selectivity in the use of legislative history, as Justice Scalia rightly worried about. But our own empirical analysis of Supreme Court dictionary use indicates rampant cherry-picking in the invocation of that resource as well. Further, interpretive theories can reinforce judges' ideological positions rather than blunting the impact of those positions, and there is considerable evidence that this has been true at the Supreme Court in the use of legislative history and also the canons.[302]

Thus we tend to agree with Judge Katzmann that the more resources a judge believes she must seriously examine and honestly evaluate for impact on a contested statutory provision, the more likely the resulting decision will minimize judicial subjectivity, which is a useful proxy for avoiding undue judicial discretion.[303] By the same token, it is valuable for judges to adapt their use of interpretive resources to the different angles of vision called for in different fields of law and even individual cases.

Recent decisions that we alluded to earlier suggest some movement toward a more pragmatic stance on statutory interpretation in the Supreme Court.[304] Although this may signal the early stages of a new interpretive cycle for the Justices,[305] the Court's current approach has become acculturated over an extended period, and one should not expect a change to take place overnight. Still, for the reasons we have discussed, it would be a positive development if the Court moved closer—both practically and self-consciously—to the protean approach we have identified in the courts of appeals.

---

302. *See, e.g.*, Brudney & Ditslear, *supra* note 30 (reporting on ideologically linked uses of legislative history); Brudney & Ditslear, *supra* note 1 (reporting on ideologically linked uses of canons).

303. *See* Katzmann, *supra* note 301, at 398.

304. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489-96 (2015); Yates v. United States, 135 S. Ct. 1074, 1081-89 (2015); Bond v. United States 134 S. Ct. 2077, 2088-94 (2014); *see also supra* text accompanying note 275.

305. *See generally* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001).