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Supreme Court Litigators in the Age of Textualism

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Abstract

The Supreme Court's approach to statutory interpretation has moved in a textualist direction over the last several decades, but there is little systematic information on how litigators' briefing practices have changed during this era of textualist ascendancy. This Article examines thirty-five years' worth of party briefs (over 8,000 briefs total), explores the briefs' use of interpretive tools (including differences across categories of attorneys), and compares the briefs to the Court's opinions.

This examination yields several valuable findings. Although the briefs show a textualist shift, they differ from the Court's opinions in a few ways. The magnitude of the textualist shift is smaller in the briefs than in the opinions, as legislative history remains an important force in briefs (especially those of the Solicitor General) despite decades of criticism from judicial textualists and steep declines in the Court's use of that tool. The briefs instead reflect the rise of textualism through the supplementation of legislative history with characteristically textualist tools and a shift in which tools the briefs emphasize. Disaggregating different types of litigators shows that, although there is some evidence that elite litigators responded more quickly to changes in the Court's practices, elites and nonelites have today come to resemble each other in their interpretive styles.

The findings contribute to our understanding of the Court's informational environment and reveal a divergence between the Court's pro-textualist rhetoric and the more pluralistic practices of litigators. This divergence may serve the Court's informational needs better than a world in which the practicing

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bar emulated the Court's text- and dictionary-dominated opinions.

INTRODUCTION

Over the last several decades, the U.S. Supreme Court's approach to statutory interpretation has shifted in a textualist direction. We know, for example, that the Court cites legislative history less than it used to.[1] And the Court now uses textualist tools such as dictionaries and "whole code" textual inferences

1. *See, e.g.*, Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 57–58 (2018) (identifying a downward trend in the Supreme Court's use of legislative history from 1975 to 2016); 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, 369–70 (1999) (noting a decreased use of legislative history and tracing that decrease to the opinions of Justice Antonin Scalia); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1716 (2010) (studying trends in the Supreme Court's use of legislative history from 1953 to 2006).

more often than it did a few decades ago.[2] The story is more complicated in the courts of appeals and district courts, but similar trends toward textualist tools appear to exist there too.[3]

This is not to say that disagreements about methodology no longer exist, that textualism is now the exclusive interpretive mode, or that judges always honor their professed commitments, but notice the form that arguments over methodology typically now take. When Justice Elena Kagan recently qualified her much-noticed declaration that "[w]e're all textualists now," she did so not by endorsing the intentionalist approach of some of her predecessors but rather by criticizing the Court's conservatives for their inconsistent commitment to text.[4] "When [textualism] would frustrate broader goals, special canons . . . magically appear as get-out-of-text-free cards," she wrote.[5] Granting that the Justices' opinions and other public pronouncements may not tell the whole story, the terms of the public debate over methodology have substantially shifted.

Less is known about changes in litigators' interpretive arguments. That is regrettable because litigators play a part in creating the shared norms of an interpretive community, and, just in terms of numbers, attorneys predominate over judges.

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2. *See, e.g.*, 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, 486 (2013) (arguing that the Supreme Court's increased use of dictionaries is linked to the Court's growing use of textualism); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 30–36 (2005) (analyzing the Court's use of dictionaries and interpretative canons from a statistical perspective); Bruhl, *supra* note 1, at 58–60 (showing an increase in the Supreme Court's use of "dictionaries, holistic-textual tools, and linguistic canons" from 1975 to 2016); *see also* Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1936–37 (2005) (finding increasing use of textualist tools in tax cases beginning in the 1970s, before Justice Scalia joined the Court).

3. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 184–89 (2009); Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823, 849 (2019); Bruhl, *supra* note 1, at 66; Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, N.Y.U. L. REV. 363, 378–79 (2020); John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 515–16 (2014); *see also* Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1068, 1082 (2020) (finding a more complex pattern for citations to legislative history in lower courts, in which the appointment of Scalia had partisan effects and changed which kinds of legislative history were cited).

4. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

5. *Id.*

Observers report that attorneys have adopted a more textualist approach to how they brief and argue cases, at least in the Supreme Court.[6] Nonetheless, we currently lack details and systematic information about when, how much, and how fast attorneys' practices have changed and how those changes compare to the last several decades of changes in judicial practices. Remedying that deficit in our understanding is this Article's goal.

Viewed in broad terms, the study of briefing practices contributes to our understanding of the Supreme Court's informational environment. The flow of information to the Court comprises formal submissions such as briefs and oral arguments as well as more informal, out-of-court contributions such as op-eds or even tweets aimed at influencing the Justices.[7] Briefs occupy a privileged position in the information flow,[8] and so learning more about them is particularly valuable.

Knowing more about the practices of litigators would allow us to investigate several specific questions of interest. To start with, one could test the present-day descriptive accuracy of Professors William Eskridge and Philip Frickey's influential claim, now a few decades old, that persuasive interpretive arguments are built like cables rather than chains.[9] A cable weaves together multiple strands of argument toward a common goal[10]—the strands here being modes of interpretive argument and interpretive tools such as purpose, text, and

6. *See, e.g.*, Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) ("The days when lawyers could routinely . . . make no distinction between words in the text of a statute and words in its legislative history are surely over.") (internal quotation marks omitted); Marty Lederman, *Supreme Court 2015: John Roberts' ruling in* King v. Burwell, SLATE (June 25, 2015, 4:26 PM), https://slate.com/news-and-politics/2015/06/supreme-court-2015-john-roberts-ruling-in-king-v-burwell.html [https://perma.cc/ES5Z-GZQF] (referring to the "fundamental transformation in the way statutory cases are litigated" in the Supreme Court).

7. *See* Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85, 88–89 (2019).

8. *See* MORGAN L.W. HAZELTON & RACHEL K. HINKLE, PERSUADING THE SUPREME COURT: THE SIGNIFICANCE OF BRIEFS IN JUDICIAL DECISION-MAKING 13–14 (2022).

9. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 350–52 (1990); *see also* Anuj C. Desai, *Text is Not Enough*, 93 U. COLO. L. REV. 1, 3 (2022) (stating that, in hard cases, "statutory interpretation is unavoidably a multimodal enterprise that involves consideration of, at least, text, semantic context, statutory purpose, history (statutory, legislative, social, and political), social context, precedent, moral judgment, and consequentialist reasoning").

10. Eskridge & Frickey, *supra* note 9, at 351.

statutory evolution. A chain, by contrast, uses a single modality, such as inferences from the text alone, making it only as strong as its weakest link.[11] Eskridge and Frickey's account was primarily meant to describe the Supreme Court's practice of statutory interpretation, as seen from their vantage point in 1990, but their article also passingly referred to attorneys' practices.[12] Their implicit lesson for attorneys was to write cable-like briefs.

Much has changed at the Court since Eskridge and Frickey wrote. Since then, the Court's opinions have used textualist tools more heavily, sometimes to the exclusion of intentionalist strands of argument.[13] But even in a textualist age, Eskridge and Frickey's account would seemingly advise attorneys to keep their arguments cable-like. If attorneys have done that, but the Court's opinions are more cable-like, then briefs and opinions would differ in an important way, an interesting divergence between judicial inputs and outputs. If briefs today instead parallel the Court's more chain-like, textualist practice, these briefs may neglect information that some judges find important and that even textualist jurists may value in reaching their decisions, though not in publicly explaining them.[14]

Another unanswered question is whether interpretive practices differ across different kinds of litigators. The last several decades have seen not only the rise of textualism but also the ascendance of an elite group of Supreme Court regulars.[15] It would be valuable to know if these experts' interpretive arguments are tethered particularly closely to the shifting patterns of the Justices' practices, responding more quickly to new trends in the Court and possibly even influencing the Court's practices.

This Article tackles these and other questions about change and continuity in briefing practices during the textualist era.

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11. *Id.*

12. *Id.* at 321, 352.

13. *See, e.g.*, United States v. Woods, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous."); Jesse D. H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 433 (2019) (observing that reliance on the text alone has "displace[d]" use of other sources); *infra* Section III.B (comparing briefs and opinions).

14. *See infra* text accompanying notes 35–41 (describing covert use of legislative history).

15. *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491–94, 1501 (2008).

To do so, it examines several decades' worth of opinions and briefs at the Supreme Court level. There are several interesting findings. For one, the Supreme Court's opinions have diverged from litigants' briefs, with the briefs remaining cable-like even as the opinions come to resemble textualist chains. Regarding differences across categories of attorneys, there is some evidence of more sophistication in the interpretive approaches of Supreme Court experts, but the primary impression is rough convergence across most classes of litigators, though with the Solicitor General standing out in some respects.

This Article is organized as follows. Part I sets out hypotheses about the interpretive content of briefs, the relationship between opinions and briefs, and differences across attorney types. Part II describes methods. Part III presents findings about briefing practices and their relationships to the Court's opinions. Some of the findings confirm suspicions, but others may surprise or provoke still more questions. The Conclusion briefly summarizes the findings, presents implications, and suggests lines for future research.

I. HYPOTHESES: PARALLELISM AND LIMITED DEPARTURES FROM IT

Based on the existing theoretical and empirical literature on statutory interpretation, anecdotal accounts from well-placed observers, and some basic facts about the legal system, we can generate some expectations about the interpretive practices of litigators and how those practices will compare to judicial practices. This part of the Article sets out several hypotheses concerning that relationship.

The hypotheses divide into three groups. Section I.A sets out a general expectation of *rough parallelism*, the expectation that litigators' and courts' practices will generally move in parallel. The next two groups of hypotheses involve anticipated departures from parallelism. Section I.B considers whether the textualist revolution might take somewhat different forms in courts' opinions versus litigators' briefs—more specifically, whether we should expect briefs to feature cable-like *supplementation* with additional textual sources as opposed to a *substitution* of intentionalist and purposivist tools with textual sources. Finally, and in recognition that attorneys are a diverse group, Section I.C sets out several hypotheses about variation across different kinds of litigators.

A. *Rough Parallelism*

It is reasonable to expect at least rough parallelism between those judicial interpretive practices and the practices of litigators in their briefs.[16] Several factors support this hypothesis.

First, judicial practice should influence attorney practice. Litigators want to persuade judges, and if they can discern what kinds of arguments the judges find persuasive and what kinds of interpretive tools they value, litigators will provide them. "Know your audience" is as good advice in law as elsewhere. (Some attorneys may be better than others at picking up on these signals and reflecting them back, as addressed in Section I.C below.)

Second, rough parallelism can also arise through the opposite causal mechanism, that is, because attorneys influence judges' interpretive practices. Influence from attorneys to judges can plausibly operate at multiple levels. Although there is no rule or even norm requiring judicial discussion of *everything* a party says, there is a loose norm of responsiveness to party arguments.[17] At the level of a particular case, citations of a source (a precedent, a piece of legislative history, etc.) in a brief can therefore cause citations of that source in the resulting opinion.[18] At the same time, the absence of a source in the brief should reduce the odds that it shows up in the opinion. Though courts are not strictly limited to the arguments and authorities the litigants present, the party-presentation model of adjudication holds that judges should decide cases based on the

16. Here I study briefs, but one could also examine whether oral arguments have become more textualist in recent decades. *Cf.* Sam Ehrlich, *Analyzing the* Alston *Oral Arguments through a Citations-Focused Perspective*, ABOVE THE LAW (May 21, 2021, 1:13 PM), https://abovethelaw.com/2021/05/the-alston-oral-arguments-a-citations-focused-perspective [https://perma.cc/UK8 U-L6JY] (examining and categorizing sources cited during an oral argument).

17. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978); Chad M. Oldfather et al., *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189, 1213–16 (2012).

18. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1332 (2018) ("[O]ur random study of opinions from the [appellate] judges we interviewed revealed that many canons used in the opinions were introduced by the briefs.").

materials and arguments the litigants provide.[19] And even without any norms disfavoring independent judicial research, if attorneys do not provide briefing on (say) legislative history, the judges may not have the time or expertise to research it themselves.[20]

In addition to case-level influences running from briefs to opinions, there are broader channels through which influence flows from attorneys to judges. The practices of attorneys provide information about the prevailing interpretive approaches of the communicative community and the kinds of arguments that are valued. Providing an example of this sort of influence, Professor Nicholas Parrillo persuasively argues that the expert, insider lawyering of federal agencies largely explains the Supreme Court's increased reliance on legislative history during the New Deal era.[21] A judge who learns of a canon or technique from a brief may add it to his or her toolkit for use in later cases in which the parties did not invoke it.[22] Conversely, if litigants stop using a source, or use it apologetically, judges may get the opposite impression about the source's currency and acceptability. We should expect cues from briefing practices to be more influential when they come from ideological allies or high-prestige litigators such as the Solicitor General.[23]

A third mechanism for the development of rough parallelism, which does not rely on a clear direction of influence

19. Fuller, *supra* note 17, at 388; *see also* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 455–61 (2009) (describing this model and its limits); Brian N. Larson, *Endogenous and Dangerous*, 22 NEV. L.J. 739, 767–73 (2022) (summarizing and contributing to the empirical literature on how often courts generate their own case citations outside of the briefing).

20. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1869–71 (1998).

21. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 315 (2013).

22. Previous work on the canonization of the "no elephants in mouseholes" rule shows that most early uses of it in the courts of appeals came in cases in which the litigants presented it in the briefs. 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, 545–46 (2015). As the canon became more established, it appeared more often without the litigants suggesting it. *See id.*

23. *See generally* RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS (2012) (showing that the Solicitor General exerts influence on the Supreme Court's selection of cases, case outcomes, language used in decisions, and treatment of precedent).

one way or the other, comes from the fact that judges and litigators are all part of American legal culture. At any particular time, the culture is characterized by a set of views about what sorts of things are desirable or acceptable. For example, lawyers were not supposed to wear a brown suit when arguing in Chief Justice William Rehnquist's Supreme Court.[24] Some interpretive moves may acquire the same status as the brown suit: not unlawful, but simply *not done* among those in the know.[25] Whatever internal or external forces drive changes in the legal-interpretive culture,[26] we can expect all of its members to participate in those changes to some degree.

To be sure, the U.S. legal community is not a monoculture. A deputy to the Solicitor General, a federal district judge in California, and a divorce lawyer in a small Midwestern town are all members of the legal profession, but they differ in many respects. Differences across courts and litigators are taken up in Section I.C below.

In sum, due to a mix of attorney incentives, broader cultural patterns, and other factors, we should expect at least a rough parallelism between the interpretive practices displayed in judicial opinions and in attorneys' briefs. That is the basic, background hypothesis. The following Sections consider reasons why the parallelism is only rough. That is, in what ways might we expect opinions and briefs to differ?

B. *Cables vs. Chains: Supplementation Rather than Substitution*

The general expectation of parallelism means that the textualist shift in the judiciary should manifest itself in attorneys' practices too. But it may manifest itself differently. Indeed, there is good reason to expect it would.

The story of textualism in the judiciary, especially in the Supreme Court, is a story of one set of sources seeming to displace another. The Court cites legislative history less, and it

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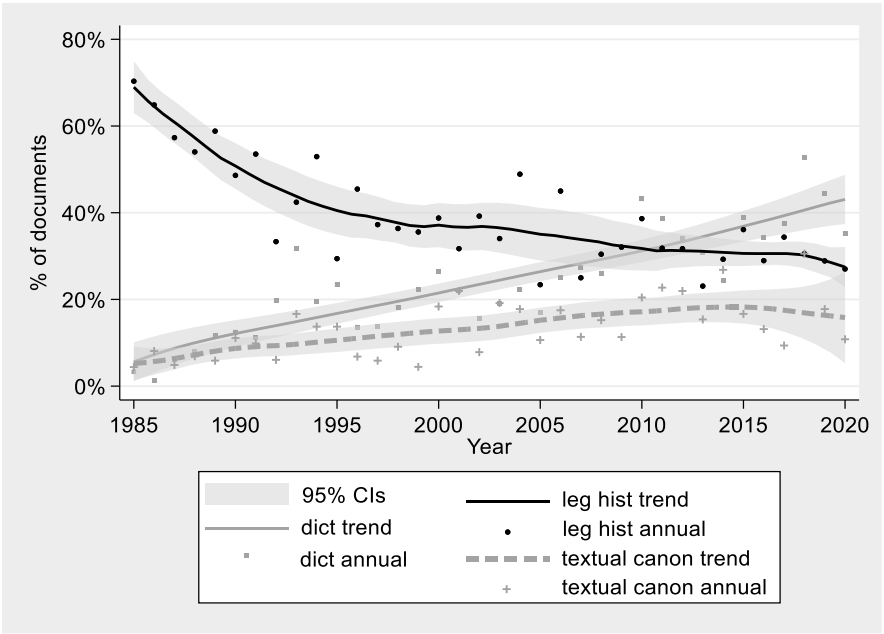
24. *See* Joan Biskupic, *Enforcing the Sartorial Code*, WASH. POST, Dec. 6, 1999, at A25 (recounting the experience of a female lawyer who was chastised for wearing a brown suit in the Supreme Court).

25. *Cf.* Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 514 (2000) (observing that "citation to this rather than that [source] may . . . say a great deal about changes in the culture that makes certain citations respectable at certain times rather than others").

26. This is a complicated topic, but agents for change in the legal culture probably include prominent entrepreneurial judges and professors, official positions of the Department of Justice, and elected officials. *See* Bruhl, *supra* note 22, at 504 & n.55.

cites textualist tools (dictionaries, textual canons) more. Figure 1 shows the Court's use of several interpretive sources over time in its majority opinions.[27] The dots represent the citation rate for each year; the lines smooth out the variation to illustrate trends, with confidence bands around them.[28]

Figure 1: Supreme Court's use of interpretive sources in majority opinions, 1985–2020



27. Figure 1 shows Supreme Court majority opinions. The trends are broadly similar if one considers all of the opinions in a case, though the curves for all opinions are generally a bit higher than the curves for majority opinions only. *See, e.g.*, Bruhl, *supra* note 1, at 58–60.

28. The smoothed trend lines and confidence bands in this figure and others throughout this Article were generated using local regression as implemented in Stata 17's *lpoly* function, with default specifications except for selecting *degree = 1* (i.e., linear). *See generally* JIANQING FAN & IRENE GIJBELS, LOCAL POLYNOMIAL MODELLING AND ITS APPLICATIONS (1996) (describing this smoothing technique). The precise position and the sensitivity (or "wiggliness") of the smoothed curves reflect choices about the smoothing parameter, the form of the function (e.g., linear vs. quadratic), and other matters, so the curves should be judged on their ability to aid visualization and not taken as reflecting a uniquely correct depiction of the data. *Cf.* Choi, *supra* note 3, at 377 n.64 (using LOESS with bootstrapping to generate smoothed lines and confidence intervals). The figures preserve the annual data points so the reader can see through those choices. All that being said, one obtains similar curves using other functional forms or other methods, including Stata's *lowess* and *npregress*. Note that the 95% confidence bands refer to uncertainty about the location of the local regression curve; they are not predictions of the location of the annual data points. Additional information on sources and methods is provided in Part II.

The pattern shown in Figure 1—one kind of source up, another kind down—is not the only way for a system to undergo an interpretive shift. One kind of source could increase without another decreasing; that is, one source could supplement the other rather than replacing it. As an illustration of the difference, consider again Eskridge and Frickey's helpful metaphor of the multi-modality cable versus the single-modality chain.[29] Their account of interpretive practice was meant to be both descriptive and normative.[30] That is, they contended that the multi-stranded approach to argumentation represents how courts decide statutory cases and how attorneys think about statutory problems, and they thought this multi-threaded approach was better than single-source foundationalist approaches such as textualism or intentionalism.[31] Experts on legal writing agree that the best briefs weave together multiple registers of argument to strengthen and broaden their appeal.[32]

There are several reasons to hypothesize that briefs will account for the rise of textualism in a more cable-like, supplementing way as opposed to through displacing legislative history with dictionaries. Eliminating references to legislative history is a risky move for an advocate. Not every judge is a

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29. Eskridge & Frickey, *supra* note 9, at 351–52; *supra* text accompanying notes 9–12. For inspiration, they credit Charles Peirce's pragmatic philosophy. *Id.* at 323. Peirce wrote:

> Philosophy ought to imitate the successful sciences in its methods, so far as to proceed only from tangible premisses [*sic*] which can be subjected to careful scrutiny, and to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.

5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 157 (Charles Hartshorne & Paul Weiss eds., 1963).

30. Eskridge & Frickey, *supra* note 9, at 321.

31. *Id.* at 321–22, 325, 345, 352, 362–63; *see also* Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 850 ("A legal argument that is a cable is one that weaves together the different kinds of legal argument. A brief or judicial opinion that cites text, intent, precedent, tradition, and policy, all tending toward a single interpretation of the law, is far more persuasive than one that utilizes a single modality.").

32. *See, e.g.*, Bryan A. Garner, *Tips on Organizing Your Table of Contents for Statutory and Contractual Interpretations*, ABA J. (Oct. 1, 2015, 7:55 AM), https://www.abajournal.com/magazine/article/tips_on_organizing_your_table_of_contents_for_statutory_and_contractual_int [https://perma.cc/9F4P-GCZA].

Justice Scalia, and not even he completely shunned legislative history.[33] Another common textualist position is that legislative history is impermissible when the text is clear.[34] But whether the judge is going to see the text as clear is often hard to predict, so any sensible attorney would include legislative history and other backup sources as insurance if nothing else.

Moreover, legislative history likely plays a bigger role in decisions than the opinions reveal. A judge who finds textual clarity and then eschews recourse to legislative history may find the text clear because of the context or comfort provided by evidence of text-confirming legislative intent. A finding of ambiguity, likewise, could result from the knowledge that what initially looked like clear textual meaning would thwart the legislature's goals. In that regard, consider these comments from an appellate judge, writing in 1994, remarking on a potential rule that would foreclose recourse to legislative history when the text is clear:

> Nearly every brief I see in cases involving issues of statutory construction contains a discourse on legislative history. This is a wise precaution on the part of appellate advocates. Counsel can never be sure that the court will find the words plain, and stop there. To be safe, in the event the court takes two steps instead of one, counsel must include a backup argument addressing the meaning of the statute in light of the legislative history. Judges read those briefs from cover to cover, or at least they are supposed to. I do. Somewhere during the reading, preliminary views begin to form. When the reading is done and the case has been analyzed and argued, how can it be said that the judge turned to the legislative history only after finding the statutory language ambiguous? The judge himself often cannot identify exactly when his perception of the words actually jelled. Through self-discipline, judges might be able to skip past the legislative history portion of the briefs. To put some real teeth into the two-step plain meaning rule, however, perhaps the portions of the briefs discussing legislative history ought to be placed under seal—to be opened if, and

33. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 726–30 (1995) (Scalia, J., dissenting) (using legislative history to rebut the majority's account of the statute's aims); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring in the judgment) (endorsing the use of legislative history to confirm apparent textual absurdity).

34. *See* Adam M. Samaha, *If the Text is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 163–66 (2018).

> only if, the judge certifies that the statute appears ambiguous after three readings.[35]

Systematic experimental evidence accords with the judicial self-reports. Like other people, judges have difficulty ignoring inadmissible material to which they are exposed.[36] And hearing inadmissible evidence can shape how one views the admissible evidence.[37] With regard to statutory interpretation in particular, a recent experiment by Professor Adam Samaha gave judges in the treatment groups information about interpretive sources that were, according to the interpretive method the judges were told to follow, prohibited unless the text was unclear.[38] The judges in the control groups did not receive the sources or the methodological instructions.[39] The judges in the experimental groups achieved mixed success in following the instructions.[40] In one scenario (a trademark case), judges seemed to be able to ignore the lower-tier source (legislative history) when the text was clear, but the judges were less able to ignore a lower-tier source (an agency interpretation) in a scenario involving a more politically charged topic (election law).[41] Litigators may not be aware of the results just described, but they get the common-sense point that there is still, even in a textualist age, something to gain and relatively little to lose by including legislative history after one's textual arguments.

Finally, there are strategic reasons for opinions to underplay the role of legislative history, namely that some textualists will object to fully concurring in opinions that use it. This "Scalia Effect," as Professors James Brudney and Corey Ditslear called it, likely reduces the citation of legislative history among

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35. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 76 (1994); *see also* Gluck & Posner, *supra* note 18, at 1302 (finding that the judges in their non-random sample consulted legislative history). In the era during which English courts were supposedly barred from consulting legislative history, some admitted to doing so anyway. *See, e.g.*, Davis v. Johnson, [1979] A.C. 264 (C.A.) 276–77 (Denning, L.) (U.K.).

36. Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1260, 1262 (2005).

37. *Id.* at 1270.

38. Samaha, *supra* note 34, at 198.

39. *Id.*

40. *Id.* at 209.

41. *Id.* at 209–10. Samaha explains that the different results across the two kinds of cases could have stemmed from the stakes of the election case overwhelming the instructions or from judges' greater difficulty ignoring an agency view as opposed to legislative history. *Id.* at 210–11.

Justices who are in fact using it.[42] That provides a reason for litigants to provide it despite the absence of supportive signals in opinions.

C. *Differences Across Kinds of Litigators*

"Litigators" is a large and heterogeneous category. At the Supreme Court, litigation has become the province of a rather small collection of specialists.[43] And even among these experts, the Solicitor General's office stands apart for its unique institutional role and repeat-player status.[44] When it comes to statutory-interpretive arguments, does anything distinguish the briefs of the Solicitor General and other experts from the briefs filed by nonspecialists? Experience and existing research suggest several potential differences.

One way in which the specialists may differ from the nonspecialists is that the specialists may track the Supreme Court's practices more closely than do the nonspecialists. Recall our main hypothesis, that of rough parallelism between courts and attorneys. All the factors supporting that hypothesis likely operate more strongly for elite advocates, suggesting closer tethering between their practices and the Court's. The elite specialists who read all the Court's opinions and regularly appear before the Court are likely to be more closely attuned to the Justices' tastes and shifts in those tastes than are the nonspecialists. If the causation runs the other way and it is the lawyers who are causing changes in the Justices' behavior, the lawyers with the best shot at having such an effect are the elites.[45] And if parallelism comes from the common influence of the broader legal culture, the Justices and the elite D.C. litigators are neighbors in that professional culture.[46] For all of these reasons, we should expect the interpretive practices of

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42. James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY. J. EMP. & LAB. L. 117, 163, 166 (2008).

43. *See* Lazarus, *supra* note 15, at 1497–1501.

44. *Id.* at 1496–97.

45. *See* Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RSCH. Q. 468, 474–77 (2008) (finding that elite litigators have a significant influence on the Supreme Court's opinion language); NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 23 (2019) (discussing the importance to the Justices of esteem from elite audiences).

46. *See* DEVINS & BAUM, *supra* note 45, at 25; KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 128–32 (1993).

elite attorneys to be more closely tethered to the Court's practices than are the practices of other attorneys.

Due to the position's unique role, the Solicitor General merits particular comment. To the extent that any attorney could influence the interpretive practices of the Court, the most likely candidate for exerting such influence is the Solicitor General. We know that the Justices are more likely to derive the language of their opinions from the Solicitor General's briefs than from other briefs.[47] Beyond those case-level effects, the office appears to exert a broader influence on the Court's interpretive practices, as suggested by Merrill's account of how the office helped to make *Chevron* into an unanticipated landmark decision by urging a broad reading of it in litigation.[48]

Another, but potentially countervailing, force also acts on the Solicitor General, however. Existing accounts from well-placed observers suggest that a distinguishing feature of the Solicitor General's briefs may be that they are reliably cable-like. Writing in 2015, Professor Bryan Garner advised a four-part protocol for statutory-interpretation arguments—text, structure, purpose, and statutory/legislative history—and noted that "the Solicitor General's Office has all but enshrined the approach in its brief writing."[49] The Solicitor General is uniquely positioned to provide a full and accurate picture of the legislative history and subsequent legislative developments due to its government-wide research abilities and privileged access to agencies, which are often involved in legislative drafting and which regularly interact with the relevant congressional committees.[50] These considerations provide grounds to expect the Solicitor General's briefs to continue to provide extensive and expert explications of statutory and legislative history even as the Court becomes more textualist.

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47. BLACK & OWENS, *supra* note 23, at 111; HAZELTON & HINKLE, *supra* note 8, at 175–78; Corley, *supra* note 45, at 468, 475 fig.3, 476 fig.4; Paul M. Collins, Jr. et al., *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 936 (2015).

48. Thomas W. Merrill, *The Story of* Chevron*: The Making of An Accidental Landmark*, 66 ADMIN. L. REV. 253, 277 (2014).

49. Garner, *supra* note 32.

50. *See* RICHARD L. PACELLE, JR., BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 35 (2003); 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, 1173, 1197–98 (2008); Parrillo, *supra* note 21, at 282.

Further, one would anticipate the Solicitor General to use legislative history in both Republican and Democratic administrations, even though Republican appointees may have personal objections to it. True, the Solicitor General is a political appointee, and Solicitors General of different administrations certainly take different substantive positions on high-profile matters of constitutional and statutory law.[51] But given the office's felt duties to promote stability in the law and assist the Court by providing full information,[52] it would be surprising to find the Solicitor General taking the lead in pushing a methodological agenda, like the new textualism, that seeks to exclude a source that the office can wield with unusual expertise. The drive behind the new textualism (or other interpretive movements) is more likely to come from scholars, from other components of the Department of Justice such as the Office of Legal Policy, or from entrepreneurial judges like Justice Scalia.[53]

D. *Summary*

We can summarize the hypotheses as follows:

- *Rough parallelism*: Briefs will show a shift toward textualist sources over the last several decades that generally parallels the shift in the Supreme Court's practices.
- *Supplementation rather than replacement*: As compared to Supreme Court opinions, briefs will manifest the rise of textualism through supplementation with textualist sources rather than through replacement of nontextualist sources.
- *Elite tethering*: As compared to non-elites, the briefs of elite litigators should more closely parallel shifts

51. *See generally* PACELLE, *supra* note 50 (documenting contrasting positions of Republican and Democratic Solicitors General in civil rights cases); Thomas G. Hansford et al., *Locating U.S. Solicitors General in the Supreme Court's Policy Space*, 49 PRES. STUDS. Q. 855 (2019) (measuring ideology of SGs based on positions taken in amicus briefs).

52. PACELLE, *supra* note 50, at 22, 45.

53. *See, e.g.*, OFF. OF LEGAL POL'Y, U.S. DEP'T OF JUST., USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION i, v (1989) [hereinafter OLP MEMO] (criticizing the use of legislative history); *see also* Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 275–82 (providing an account of the political and ideological context of the 1980s rise of textualism and canons in particular).

in the Court's practices.

- *Solicitor General briefs as cables*: Notwithstanding the rise of textualism, the Solicitor General's briefs should remain distinctively high in use of legislative history.

Note that the last two hypotheses point in slightly different directions when it comes to the Solicitor General. As an elite litigator, the Solicitor General's briefs should match the Supreme Court's trends toward textualism, but the office's special institutional role may temper the shift away from the use of legislative history.

II. METHODS AND SOURCES

This Part explains the methods and sources used to investigate the hypotheses described above. Some detail is appropriate, both for the sake of transparency and to describe some approaches that other researchers may find useful.

For those readers less interested in methods and more eager to get to the results in Part III, the short version of the methodology is this: My general approach is to use searches in Westlaw's databases of Supreme Court opinions and briefs to determine how often, and how intensely, various interpretive tools are used over time. I selected the interpretive tools under study because they are closely associated with competing interpretive schools: textual canons and dictionaries for textualism and legislative history for intentionalism and purposivism. Several tests for the validity and robustness of the measures were conducted, and this provides confidence in the results.

The next several Sections elaborate on these methodological points. Search protocols and results are on file with the author.

A. *General Approach*

There are two basic approaches to content analysis of a document, and both have been employed in studies of statutory interpretation. The first approach is for researchers to read the documents and use judgment to code the documents for characteristics of interest, which for a study of interpretive methods would include whether the documents invoke certain styles of argument (e.g., pragmatism) or rely on particular

sources (e.g., legislative history or substantive canons).[54] The second approach is to use some form of automation. There are many such approaches, the most familiar of which to those with legal training is searching databases such as Westlaw, Bloomberg, or CourtListener for the existence or prevalence of various terms within the documents under study.[55] Other automated approaches that have been used to study legal documents, though not necessarily in connection with statutory interpretation, include using plagiarism-detection software to compare the similarity of documents[56] or using machine learning to score or sort documents with or without human training.[57]

Each approach has its own benefits and limitations. Automated approaches allow the study of huge numbers of documents but at the risk of losing nuance, while the manual approach brings expert judgment to bear on each document at the cost of reducing the number of documents that can realistically be assessed.[58] Automated approaches may foster reproducibility across researchers, though practitioners of

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54. *See, e.g.*, Brudney & Ditslear, *supra* note 2, at 23–24; Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 231 (2010); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 90–95 (2018).

55. *See, e.g.*, CROSS, *supra* note 3, at 184; Benjamin & Renberg, *supra* note 3, at 1057–59; Bruhl, *supra* note 1, at 30; Calhoun, *supra* note 3, at 493–96; Kevin Tobia et al., Is Originalism Orthodoxy? (Sept. 13, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4551776 [https://perma.cc/D45C-2AFX]).

56. *See, e.g.*, Corley, *supra* note 45, at 474–77; Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 GEO. L.J. ONLINE 135, 139 (2017).

57. *See, e.g.*, Keith Carlson et al., *Style and Substance on the U.S. Supreme Court*, *in* LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS 83, 88–93 (Michael A. Livermore & Daniel N. Rockmore eds., 2019) (providing sentiment analysis of Supreme Court opinions); *id.* at 104–10 (using latent topic modeling of appellate opinions); Choi, *supra* note 3, at 386–88 (identifying a court based on interpretive tools used in decisions); Elizabeth C. Tippett et al., *Does Lawyering Matter? Predicting Judicial Decisions from Legal Briefs, and What That Means for Access to Justice*, 100 TEX. L. REV. 1157, 1157 (2022) (predicting summary-judgment wins based on citation patterns and stylistic features of briefs).

58. Oldfather et al., *supra* note 17, at 1194–95; Shane A. Gleason & Joseph L. Smith, *The Foundation of Text Analysis: Corpus Planning & Construction*, 32 L. & CTS. NEWSLETTER 5, 5 (2022).

manual methods can bolster reproducibility through careful code books, tests of inter-coder reliability, and the like.[59]

The approach taken here is to track the use of interpretive sources through searches of electronic databases. This allows analysis of tens of thousands of documents, many of them lengthy, which would be impracticable with reading and hand coding. Moreover, the searches have the benefit of being highly reproducible. Of course, this approach still requires debatable judgment calls, particularly when it comes to choosing the research questions, search techniques, search terms, and data sources. One should therefore be transparent about those choices and check the validity and robustness of one's strategy against other approaches.

The specific strategy used here involves searching briefs and judicial opinions for the frequency and intensity of use of particular sources and tools associated with different approaches to statutory interpretation. Interpretive methodologies manifest themselves through their use and prioritization of various sources and tools.[60] One behaves in a textualist way in statutory interpretation by, among other things, using dictionaries as sources of ordinary meaning, using textual canons to parse text, and minimizing the use of legislative history.[61] That is, although it is true that not all textualists or textualisms are alike,[62] the elevation of certain sources rather than others does distinguish textualism and other approaches at a gross level. Happily, many of the

59. *See, e.g.*, Brudney & Ditslear, *supra* note 2, at 23 n.92; Krishnakumar, *supra* note 54, at 232 n.54.

60. Bruhl, *supra* note 1, at 29; Choi, *supra* note 3, at 368.

61. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 652–53, 656–57, 663–64, 669 (1990) (describing features of the "new textualist" approach associated with Justice Scalia's elevation to the Supreme Court); Randolph, *supra* note 35, at 72 (observing that "the frequency of these citations [to dictionaries] reflects a tilt toward textualism").

62. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (comparing different approaches to textualism); *see also* Victoria F. Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–22*, 38 CONST. COMMENT. 1, 49 (2023) (describing textualists' intramural disputes over which text to construe, whether it is clear, and other matters). Features of an interpretive approach are not immutable. In a decade, sophisticated textualists might shun dictionaries and instead use corpus linguistics or other techniques. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 788 (2018) (discussing corpus linguistics); James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 9 (2021) (using experimental data); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734 (2020) (discussing experimental approaches).

operational manifestations of interpretive methodology can be readily tracked because they are associated with searchable terms ("ejusdem generis," "Senate committee report," "dictionary") or citation forms ("Cong. Rec."). Of course, interpretive methods and concepts are not always tightly linked to verbal formulations that lend themselves to easy searching—consider the difficulty of searching for interpretive pragmatism, for example[63]—and so some aspects of interpretive methodology are hard to study in this way.

My method cannot get at the true causes of a judge's decision, and maybe no one can, not even the judge. In observing that an opinion cites certain sources and engages in certain argumentative moves rather than others, I do not claim that commitment to the tenets of an interpretive approach is causing the result or that the approach is being applied correctly or sincerely. The way judges present their reasoning and justify their decisions is nonetheless important, in particular to attorneys appearing before them, even if the outcomes are often generated primarily by other factors.[64] One might lose a winnable case by failing to provide the right materials for a court to reach a decision it might already be inclined to reach for other reasons.

The main source used here is Westlaw, but other data sources and other existing research were consulted to check the validity of my measures and the robustness of my results. These checks are described in Sections II.B and II.E below.

The period under study is 1985 to 2020 inclusive. The beginning of that thirty-five-year period coincides with Justice Scalia's appointment to the Supreme Court.[65] Although studying pre-Scalia years would be valuable, databases'

63. There are ways to get at pragmatism, though with significant slippage between the concept and the search terms. *See* CROSS, *supra* note 3, at 143–44 (using invocations of *Chevron* and the absurdity doctrine as evidence of interpretive pragmatism).

64. *See, e.g.*, Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 13 (1998) ("[U]se of particular argumentative resources in opinions does not tell us how the writer of the opinion actually reached her decision, only how she decided to present and justify it. . . . The interpretive resources . . . appear[ing] in Supreme Court opinions help to set . . . boundaries for statutory interpretation by legitimating particular . . . approaches.").

65. Justice Scalia was appointed to the Supreme Court in 1986. *Antonin Scalia*, OYEZ, https://www.oyez.org/justices/antonin_scalia [https://perma.cc/RPX4-DRMW].

coverage of briefs is not as reliable in earlier years.[66] The data for 1985 to 2020 includes over 8,000 party briefs.

B. *The Denominator*

For the most part, I present results in terms of percentages, such as the percentage of briefs that use a source or that use it in the argument headings. Reporting absolute numbers rather than percentages would be uninformative for several reasons. Most obviously, the size of the Supreme Court's docket has changed markedly during the years under study.[67]

Calculating a percentage requires a denominator, and the denominator used here is designed to capture only opinions and briefs that meaningfully engage with statutory interpretation.[68] This denominator is designed to exclude documents that, for example, use textual canons to interpret an insurance agreement or that cite the legislative debates surrounding a constitutional amendment. The choice to focus on statutory interpretation reflects its place as a distinct practice with potentially distinctive interpretive norms.[69] Using different search terms would generate different denominators and therefore different rates, of course, so it would be a mistake to make precise claims about exactly what percentage of cases or briefs use various tools. The aim is instead to provide a measure that facilitates comparisons across time by adjusting for varying caseloads and other confounding factors such as the changing prominence of statutory versus other kinds of cases on the docket.[70]

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66. HAZELTON & HINKLE, *supra* note 8, at 224–25.

67. *See* LEE EPSTEIN ET AL., SUPREME COURT COMPENDIUM: TWO CENTURIES OF DATA, DECISIONS, AND DEVELOPMENTS 69–70 (7th ed. 2021) (recording the total number of docketed cases and new cases docketed during the studied period).

68. The search string I used to generate the denominator is "(statut! or legislat! or congress! or U.S.C.) /s (interpret! or constru! or meaning or reading)." For judicial decisions, I restricted the search to the Court's opinion (using the OP field restriction in Westlaw) in order to exclude headnotes, the syllabus, and other parts of the documents that court staff or database providers generate.

69. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 30 (2012) (describing rules particular to statutes versus other texts); *see also* Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020) (addressing the interpretation of executive orders and other presidential directives); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012) (addressing the interpretation of agency rules).

70. I do not include variables aimed at controlling for the subject areas in which statutory interpretation cases arise (e.g., employment law, patent law) or formal

For the briefs, the results reported in this Article reflect party briefs only. I omit amicus briefs for a few reasons. First, they are multifarious in their approaches and goals, and the mix of approaches might change over time. If more (or fewer) amicus briefs consist of conventional legal argument at different points in the decades under study, that could skew the results. Second, it is hard to ensure complete coverage of amicus briefs in the databases.[71] Subject to those caveats, I can say that the trends in the use of tools in amicus briefs appear similar to the trends for party briefs. That is, although it is true that sophisticated parties and the amici supporting them often coordinate on arguments,[72] I do not see evidence that tools have migrated from party briefs to amicus briefs to compensate for their greater or lesser use in the party briefs.

As a check on the validity of my denominator, I compared the number of cases identified by my denominator to the number of cases in the Spaeth Supreme Court Database in which the primary or secondary legal authorities were coded as statutory.[73] The Spaeth variable does not measure exactly the same concept as my denominator, but the two data series showed the same rising, falling, and leveling-off patterns over

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features of the statutes being interpreted (e.g., the length or age of the statutes). These features conceivably affect the usefulness of different interpretive tools. *See* James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 704–07 (2017) (finding that the Supreme Court uses dictionaries more frequently in criminal cases than in commercial or labor/employment cases); Law & Zaring, *supra* note 1, at 1720–25 (finding that the Court's citations to legislative history increase with statutory length and complexity and initially decrease and then increase with statutory age). Systematic changes over time in the kinds of statutes on the docket could therefore increase or decrease the use of some tools without any underlying change in the interpretive propensities of the courts or litigants. However, such changes in the kinds of statutes on the docket would apply to both the Court and the litigants, so such changes would not explain differences between the two interpreters, which is of interest here.

71. *See* HAZELTON & HINKLE, *supra* note 8, at 25 fig.1.2, 224–25.

72. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1906 (2016).

73. Specifically, these are the Supreme Court Database cases in which the variables *authorityDecision1* or *authorityDecision2* were coded as 4. The figure derived from the Database is not measuring exactly the same thing as my denominator because the former includes cases interpreting federal treaties and court rules and is oriented toward the nature of the source at issue in the case rather than the activity undertaken. *See* HAROLD SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK 55 (2017), http://scdb.wustl.edu/_brickFiles/2017_01/SCDB_2017_01_codebook.pdf [https://perma.cc/A7WC-HEEM]; *cf.* Parrillo, *supra* note 21, at 36 n.346 (using the Database coding to construct a denominator for statutory-interpretation cases).

the period under study and yielded a reassuringly high correlation coefficient of 0.88. Other comparisons are similarly reassuring.[74] These comparisons provide confidence that the denominator used here is a good measure. Other tests of the robustness and validity of the methods and results are described in Section II.E below.

C. *Presence, Exclusivity, and Intensity*

The most basic way to search in a database such as Westlaw is to look for the presence of a term (or set of terms) in a document. That is, one searches for whether an opinion or brief contains a citation to a dictionary, committee report, or other source. A limitation of this sort of presence/absence searching is that it often fails to reveal a source's significance. It cannot distinguish between, for example, a document that repeatedly relies on a tool and a document with one insignificant or even negative reference to it. Presence/absence searching is nonetheless informative. Even a passing or negative reference shows that the item being distinguished or rejected is a part of the community's interpretive vocabulary.[75] Opponents of legislative history do not want it to be cited, even when it only confirms or marginally contributes to meaning.[76] An opinion that says something like, "The petitioner points to some

74. My denominator figures are also very similar to the denominator that Eskridge derived for the 1986 to 1988 Terms by reading the Court's opinions and counting "any opinion with a substantial (i.e., more than a paragraph or two) discussion of a statutory issue." Eskridge, *supra* note 61, at 656–57, 656 n.136. Our denominators differ by about 5%.

75. Bruhl, *supra* note 1, at 32; *see also* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 182 (2018) (acknowledging the usefulness and limits on frequency of citation as a measure of a canon's acceptance in the legal community); Mendelson, *supra* note 54, at 94–95 (endorsing the consideration of when a canon is considered but ultimately not followed); *cf.* Choi, *supra* note 3, at 389 (reporting that negative citations were not a problem in his dataset of IRS documents and Tax Court decisions).

76. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and concurring in the judgment) (objecting to a confirmatory use of legislative history because the reference "maintain[s] the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds"); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (objecting to a confirmatory use of legislative history because "[i]t says to the bar that even an 'unambiguous [and] unequivocal' statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted"); *cf.* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting) (crowing over the majority's failure to mention the possibility of *Chevron* deference).

comments from the bill's sponsor in the *Congressional Record*, but such evidence cannot overcome the clear enacted text," is therefore meaningfully different from an opinion that does not even acknowledge the legislative history.

But presence/absence searches can take us only so far, and so other search techniques are valuable, too. One way to achieve greater nuance is to measure the *intensity* with which a tool is used, and Westlaw has features that allow one to make intensity-based distinctions. First, one can measure intensity as *frequency of use* by requiring that a term appear a minimum number of times in a document.[77] Second, to measure intensity as *prominence of use*, one can search especially important parts of a document, such as a brief's argument headings.[78] Experts in legal writing and advocacy agree that the headings of the argument sections of a brief are a crucial part of making the brief's argument.[79] Both of these techniques for discerning intensity of use are employed here, along with the more typical presence/absence searches. All search strings and resulting data are on file with the author.

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77. In Westlaw, this is accomplished through the ATLEAST operator. *See, e.g.*, *Westlaw Edge tip: What is the "at least" function, and how do I use it?*, THOMSON REUTERS (Nov. 5, 2019), https://legal.thomsonreuters.com/blog/westlaw-edge-tip-what-is-the-at-least-functional-and-how-do-i-use-it/ [https://perma.cc/EG5N-D9BQ]. For example, ATLEAST5("committee report") returns documents in which the term "committee report" appears at least five times. Note that this strategy does not capture all repeat citations, such as consecutive citations of the same source using "*id.*" A risk of frequency searching is that terms may become more frequently used simply because the documents being studied have become longer and more exhaustively explained (briefs have word limits, but opinions do not). However, the risk that frequency of use within a document merely reflects length rather than intensity is ameliorated if the prevalence of one source increases while another decreases, which is what we in fact see in the Court's opinions, where length limits do not require tradeoffs. *See supra* Section I.A; *infra* Part III (showing increase in textualist tools and decrease in intentionalist tools in opinions).

78. In Westlaw, many documents are divided into different fields that users can search independently. *Field Searches*, WESTLAW, http://lscontent.westlaw.com/research/ppts/terms%20and%20connectors%20field%20searches.ppt [https://perma.cc/C83P-FSGA]. One field for briefs is the table of contents ("TC"). *Id.* For example, a search for "TC(dictionary)" returns results that use "dictionary" or "dictionaries" in the headings in the table of contents.

79. *See, e.g.*, Margaret Oertling Cupples, *Appellate Briefing: Some Thoughts on Writing Briefs That Can Clear a Path Through the Jungle*, 30 MISS. COLL. L. REV. 1, 6 (2011); Bryan A. Garner, *Good Headings Show You've Thought Out Your Arguments Well in Advance*, ABA J. (Sept. 1, 2015), https://www.abajournal.com/magazine/article/good_headings_show_youve_thought_out_your_arguments_well_in_advance [https://perma.cc/XNY6-JCBB]; Gerald Lebovits, *Getting to the Point: Pointers About Point Headings*, 82 N.Y. STATE BAR ASS'N J. 64, 64 (2010).

One can also examine whether a tool is used exclusively or in concert with others. As stated in Section I.B, one hypothesis is that opinions and briefs reflect the shift toward textualism differently, the former by replacing intentionalist tools with textualist tools and the latter by supplementing their arguments with textualist tools without abandoning intentionalist tools. A good way to study the cable-versus-chain hypothesis is to examine whether documents contain only one type of source rather than both. Westlaw permits these sorts of searches through the BUT NOT operator.[80] An increase in briefs that cite only textualist sources and a decrease in briefs that cite legislative history would suggest substitution of sources. An increase in briefs that cite both sources would tend to show supplementation.

D. *Defining Categories of Attorneys*

Because some of the hypotheses under investigation here involve the "eliteness" of the attorney filing a brief, it is necessary to operationalize that concept. There are a number of ways one could define the category of elite Supreme Court litigators. These include identifying attorneys and law firms that appear regularly before the Court, with a somewhat different list over time to account for entries into and departures from the club. A more tractable approach, which also has support in the literature and which I use here, is to define "elite" Supreme Court litigators as (1) attorneys located in Washington, D.C. (except the Solicitor General of the United States, which is its own category), and (2) state solicitors general. Although there are exceptions,[81] Supreme Court specialists are concentrated in Washington, D.C., and the proportion of attorneys in Washington, D.C. who can be considered Supreme Court specialists is higher than in any other city.[82]

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80. *See, e.g.*, *Choose Boolean Connectors*, THOMSON REUTERS, https://www.thomsonreuters.com/en-us/help/westlaw-edge/searching/choose-connectors.html [https://perma.cc/R6N8 -TJY3].

81. *E.g.*, *E. Joshua Rosenkranz*, ORRICK, https://www.orrick.com/en/People/7/5/2/E-Joshua-Rosenkranz [https://perma.cc/RMN3-Y2S3] (identifying a Supreme Court specialist located in New York City); *Jeffrey L. Fisher*, STAN. L., https://law.stanford.edu/directory/jeffrey-l-fisher/ [https://perma.cc/HRE6-NK59] (showing another Supreme Court specialist located in Stanford, California).

82. *See* MCGUIRE, *supra* note 46, at 38–39, 128–32; Lazarus, *supra* note 15, at 1498–1501. For previous research that uses D.C. location as a proxy for eliteness among Supreme Court litigators, see Corley, *supra* note 45, at 474. *See also*

Regarding the inclusion of state solicitors general in the elite category, many states have established a solicitor general's office, precisely in order to gain the benefits of appellate expertise.[83] The jobs often attract former Supreme Court clerks and propel their alumni to other prominent positions.[84] The Justices perceive an increase in the quality of state advocacy compared to the older model in which a non-specialist, sometimes the local prosecutor, represented the state before the Court.[85] Statistics show that state solicitors general are more likely to win than other state attorneys.[86]

As a check on the validity of my measure of eliteness (Washington lawyers and state SGs), I constructed a composite list of the top Supreme Court outfits of the last decade by combining lists created by Court watchers and others. Most of the entities on these lists are firms with well-known Supreme Court practices, but there are a few entities that do not fit in that category, such as the Stanford Law School Supreme Court

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MCGUIRE, *supra* note 46, at 180–87 (finding that the D.C. location was associated with success in obtaining certiorari even compared to other attorneys with similar experience). Westlaw permits field-restricted searches of the portion of a brief listing the attorneys, which lets one search for attorneys from particular cities, offices, and so on. *Field Searches*, *supra* note 78. The field code and syntax is "AT([search term])."

83. *See generally* Symposium, *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545 (2010) (describing the history and benefits of state solicitor general offices).

84. Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238, 239 (2010); Tony Mauro, *Solicitous Behavior*, AM. LAW., Aug. 2003, at 45.

85. Justice Scalia noted this phenomenon in an interview:

> Another change is that many of the states have adopted a new office of solicitor general, so that the people who come to argue from the states are people who know how to conduct appellate argument. In the old days, it would be the attorney general—usually an elected attorney general. And if he gets a case into the Supreme Court [*pumps his fist*], he's going to argue it himself! Get the press and whatnot. Some of them were just disasters. They were throwing away important points of law, not just for their state, but for the other 49.

Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://nymag.com/ news/features/antonin-scalia-2013-10/ [https://perma.cc/CJU2-DUVA].

86. Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 657, 658–59 (2014).

Litigation Clinic.[87] Comparing this group of current elites against my simpler, but decades-spanning, measure of eliteness on the two key sources used in the results in Part III (i.e., dictionaries and legislative history) for the last decade of the dataset, the correlation coefficients were high, at 0.92 and 0.94 respectively. (The correlations between the top entities and my category of nonelites were lower, as one would expect, at 0.45 and 0.75.)

Consistent with the widespread observation of the rise of the specialist Supreme Court bar,[88] my dataset of statutory-interpretation briefs begins with substantially more briefs filed by nonelites than elites but ends with substantially more briefs filed by elites than nonelites, with the flip occurring in the late 1990s.

E. *Validity and Robustness*

The use of electronic searches and the reporting of percentages may create a sense of objectivity and precision, but the results reflect judgment calls. The judgment calls just occur at a different time and in different forms than the judgment calls that accompany hand coding or qualitative approaches. To have confidence that the results are real and do not merely reflect idiosyncratic choices or biased sources, it is important to check whether one's measures are valid and that the results are robust to other choices.

As described above, I checked my denominator against other researchers' data on statutory cases and compared my measure of eliteness against another measure of that concept, with good results.[89]

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87. I constructed the composite list, which totals around thirty entities, from the following sources: John Shiffman et al., *Elite Law Firms Spin Gold from Rarefied Niche: Getting Cases Before the Supreme Court*, REUTERS, Dec. 8, 2014, at 361, 365 (table titled "Top petitioning law firms"); Adam Feldman, *Advocates Who Drive the Justices' Votes*, SCOTUSBLOG (Apr. 22, 2019, 2:59 PM), https://www.scotusblog.com/2019/04/empirical-scotus-advocates-who-drive-the-justices-votes/ [https://perma.cc/FBY6-GLCC]; Adam Feldman, *Supreme Court All-Stars 2013-2017*, EMPIRICAL SCOTUS (Sept. 13, 2018), https://empiricalscotus.com/2018/09/13/supreme-court-all-stars-2013-2017/ [https://perma.cc/J8LW-7HKC]; *2024 Best Law Firms for Appellate Litigation*, FIRSTHAND, https://firsthand.co/best-companies-to-work-for/law/best-law-firms-in-each-practice-area/appellate-litigation [https://perma.cc/T7RE-7LLC]. The SCOTUSblog list included a few states and the federal defender; these were omitted because those entities may include a number of different offices, not all of which would be elite. Feldman, *Advocates Who Drive the Justices' Votes*, *supra*.

88. *E.g.*, Lazarus, *supra* note 15, at 1501.

89. *See supra* Sections II.B & II.D.

Additionally, to safeguard against possible peculiarities in Westlaw, my primary data source, I reproduced some searches through Lexis. Westlaw and Lexis give slightly different results for several reasons. First, some documents exist in one system but not the other, due in part to differences in their methods of data collection.[90] Second, the two services divide up their universes of sources differently, such that one is not always searching the same collection of documents in databases that, based on their names, seem equivalent.[91] Third, the search logic works slightly differently in the two systems.[92] Yet, while the numbers reported in Part III would differ if Lexis were the primary source, the overall trends and findings would remain.

I also compared my findings to relevant findings of other researchers who use other strategies. Professor Kevin Werbach, in one of the important early studies of the Supreme Court's use of dictionaries, calculated the rates of dictionary use in opinions (not limited to statutory interpretation) from the 1935 to 1992 Terms using Lexis.[93] The last years in his data overlap with the first years in mine.[94] The two series are very similar in shape and magnitude despite the different techniques and databases and my restriction to opinions involving statutory interpretation.[95] Werbach did not examine briefs, which is my primary interest, but the consistency of the results for the opinions tends to validate my approach for the briefs as well.

I also checked my automated results against hand-coding methods. Specifically, I checked the results of my searches against the hand-coded data from William Manz's study of the use interpretive sources in opinions and briefs from the Court's

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90. *See Cost-Effective Electronic Legal Research: Content Differences*, FRANKLIN CNTY L. LIBR. (Sept. 12, 2023, 1:33 PM), https://fclawlib.libguides.com/costeffectivelegalresearch/content [https://perma.cc/3R5Z-7J6U] (explaining the differences between the two services).

91. For example, the Westlaw "U.S. Supreme Court Briefs" database does not contain petitions for certiorari, but the similarly named Lexis database does.

92. One difference of consequence to this research is that the OP field restrictor in Lexis excludes footnotes, while Westlaw's does not. *See supra* note 68 (explaining why I use the OP restrictor).

93. Kevin Werbach, Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, app. at n.b (1994).

94. *See id.*

95. Note that while Werbach's data are organized by term, mine are by calendar year. *Id.* I reran selected years using term dates instead of calendar years—in Westlaw language, "DA(aft9-30-1991 and bef10-1-1992)," for example—but a rough way to eyeball the two series is to compare Werbach's data against mine for the following year (i.e., cases from the 1992 Term roughly correspond to cases decided in calendar year 1993).

1996 Term and Professor Mark Cooney's study of the Supreme Court's use of sources in its 2015 Term opinions.[96] Manz used different categories than I did, but I was able to recreate his categories for two kinds of legislative history plus legal dictionaries.[97] Our results were similar. Cooney used a different method from most, in that he counted every citation to a source, including repeated citations to the same source through "*id.*" citations,[98] which means his citation counts are higher than mine. Nonetheless, it is reassuring that his 2015 Term figures showed near parity between citations to dictionaries and legislative history, with the former just nosing out the latter, and my results for the corresponding time period show the same thing.[99] Of course, Manz and Cooney studied only one year each; the techniques I use allow study of thirty-five years, more than a thousand cases, and thousands of briefs.

III. RESULTS

Returning to the hypotheses from Part I, this Part sees how they fare in light of the evidence from thousands of documents over thirty-five years.

A. *Evidence of a Textualist Shift in Advocacy*

We know from prior research that Supreme Court opinions have shifted toward more textualist modes of analysis.[100] We hypothesized that similar trends would appear in briefs, i.e., *rough parallelism*.[101] Did that happen? Consider Figure 2, which shows the rates at which several interpretive tools are used in party briefs.

96. William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 95 LAW LIBR. J. 267, 268 (2002); Mark Cooney, *What Judges Cite: A Study of Three Appellate Courts*, 50 STETSON L. REV. 1, 1 (2020).

97. Manz, *supra* note 96, at 280 tbl.16, 283 tbl.20. The differences in categories are: Manz had categories for the *Congressional Record* and reports/hearings, while I combine legislative history into one category. Manz divided dictionaries into legal and general, while I do not. Manz used term dates, while I use calendar years.

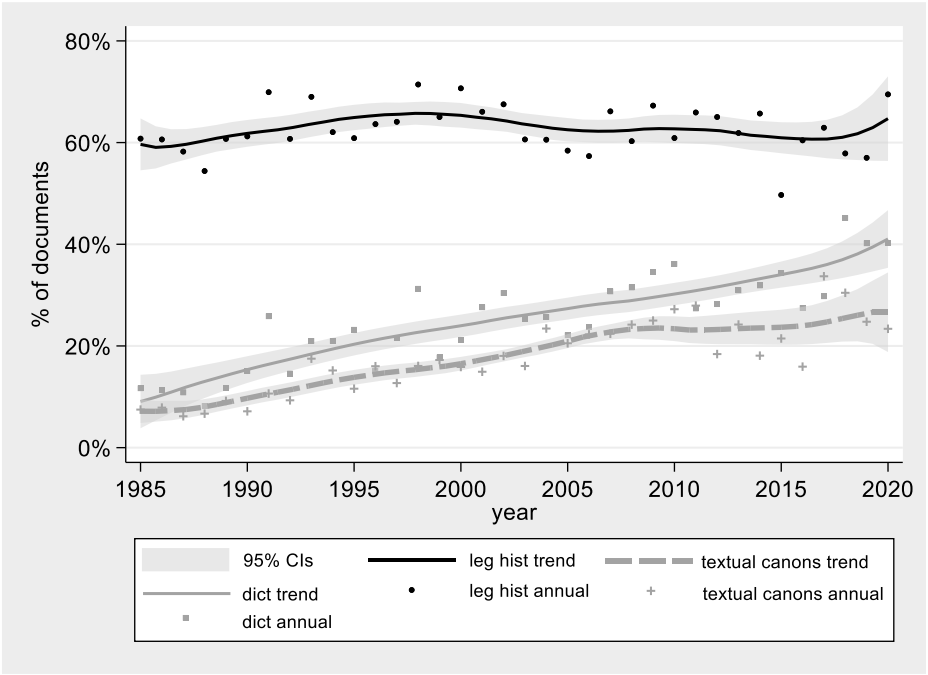
98. Cooney, *supra* note 96, at 3.

99. *Id.* at 41. As when comparing to Werbach, I reran my search to match up with term dates, which Cooney used, rather than calendar years.

100. *See supra* Figure 1 and notes 2–3.

101. *See supra* Section I.A.

Figure 2: Use of interpretive tools in briefs, 1985–2020



This figure shows an increase in the use of dictionaries and textual canons in briefs, a pattern that runs parallel to the pattern in Figure 1, which illustrated the use of interpretive tools in Supreme Court opinions. However, Figure 2 also shows that legislative history remains commonly used in the briefs, a contrast with the decline in legislative history found in Figure 1. This is notable because litigants face tradeoffs due to word limits and limited judicial attention, so retaining legislative history comes at a cost. Yet the briefs still use legislative history at a healthy rate, while the less length-constrained opinions do not.

The picture changes, however, when we consider measures that show how much emphasis parties put on different tools.[102] Figure 3 gets at emphasis by reporting the percentage of briefs that cite legislative history and dictionaries at least three times. (To reduce clutter, this figure and some later ones omit textual canons.) For dictionaries, the increase in citations is matched with a similar increase in intense citation. That is what one would expect from a source on the upswing in

102. *See supra* Section II.C (describing strategies for measuring intensity of tool use).

importance. But for legislative history, the roughly steady rate of citation (previously seen in Figure 2) is accompanied by a declining rate of intense citation.

Figure 3: Intensity of citation of tools in briefs, 1985-2020

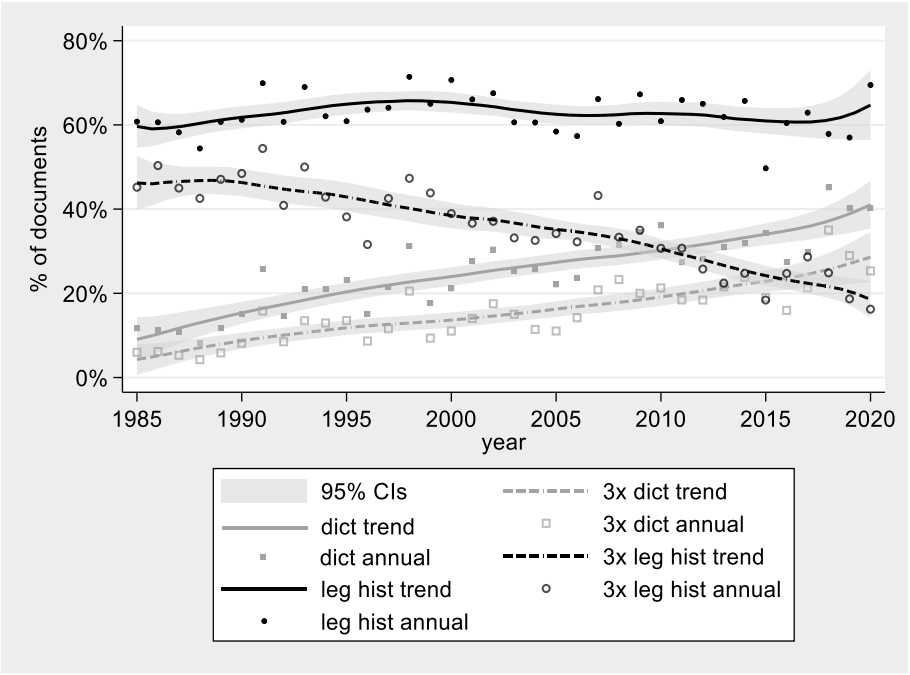


Figure 4: Tools used in briefs' tables of contents, 1985-2020

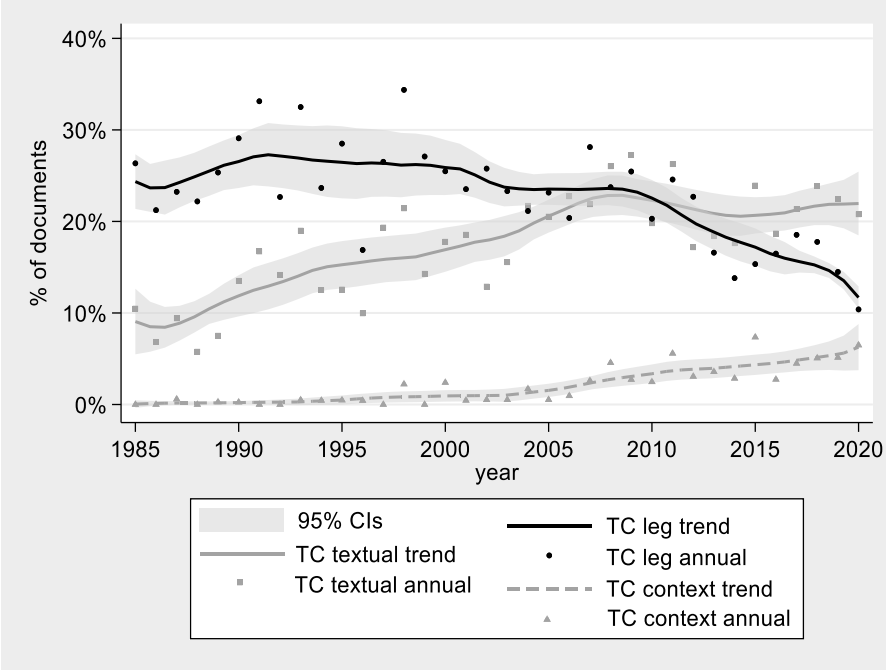


Figure 4 gets at emphasis in another way, by examining the language litigators use in their argument headings.[103] References to text are up, while references to legislative intent are down. Figure 4 also shows the growth of references to statutory "context." While context can refer to textual context (i.e., how one provision fits into surrounding provisions), it also functions as a way to refer to intent, purpose, and legislative history without using those words.[104] In other words, the use of "context" or similar euphemisms may be a way to smuggle in references to intent, a term that is unfashionable in a textualist era.

103. The search terms for this figure differ from those in most of the other figures. It would be unusual to cite a particular piece of legislative history in a heading, and it would certainly be odd to do so using Bluebook citation forms. The terms used here are therefore a bit more conceptual. For example, the terms for legislative intent are (((legislat! or congress!) /3 inten!) or "legislative history").

104. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92–96 (2006) (contrasting semantic context and policy context); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1616 (2014) (urging the replacement of legislative intent with "legislative context").

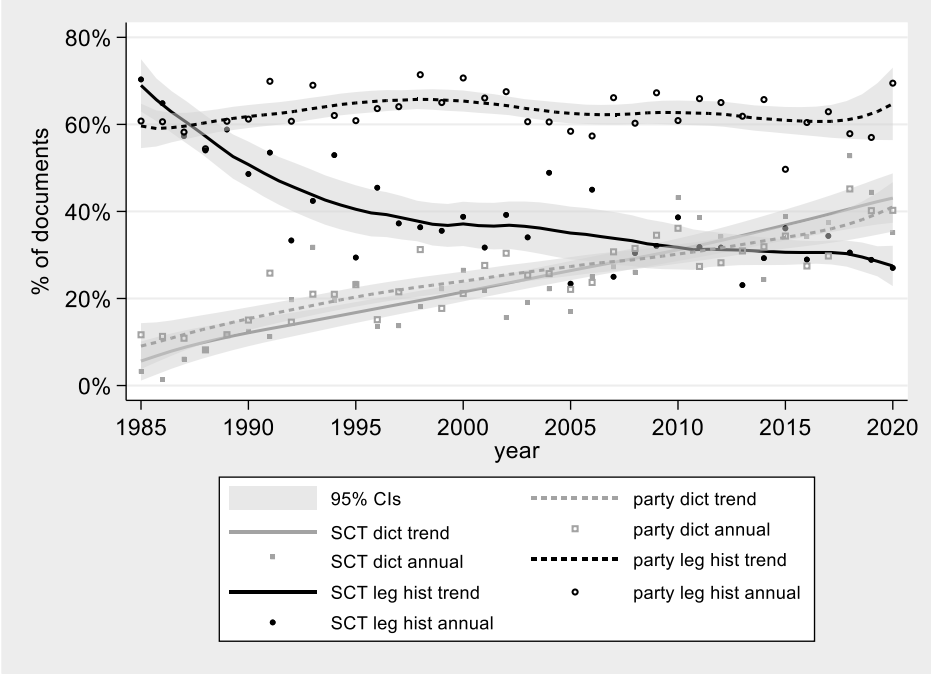
The results in this section support two conclusions. First, the results support the overarching hypothesis of rough parallelism between the Supreme Court's opinions and litigants' briefs. Both kinds of documents display more textualism than they used to. Which caused which is less clear. If one of those changes had very clearly preceded the other, that might suggest a unidirectional causal story, but I do not think these data let us determine which channel of influence is causing the parallelism—i.e., whether the Court is influencing litigants, litigants are influencing the Court, or outside factors in the legal-political culture are acting on both groups (or a mixture of all of those). As noted earlier, there are grounds to suspect all of those channels are plausibly playing a role.

Second, though, the results also hint at something else besides parallelism. The shift in advocates' interpretive approaches does not involve the replacement of legislative history with dictionaries. The briefs' use of dictionaries has gone up more than their use of legislative history has fallen. This pattern of results is consistent with the hypothesis that briefs have manifested the textualist revolution through supplementation rather than replacement. The next Section more directly addresses the matter of supplementation versus replacement—or cables versus chains, to use the metaphor.

B. *Briefs as Cables, Opinions as Chains*

Supreme Court opinions and briefs both reflect the rise of textualism, but they do so in different ways. Consider Figure 5. The use of dictionaries has increased more or less in parallel across the two datasets, as one sees from the roughly overlapping gray lines (solid for the opinions, dashed for the briefs). But the use of legislative history shows a stark divergence, with citations to that source dropping markedly in the Supreme Court's majority opinions without a corresponding collapse in the briefs. This divergence jumps out from Figure 5 in the gap between the solid black line (Court) and the dashed black line (briefs).

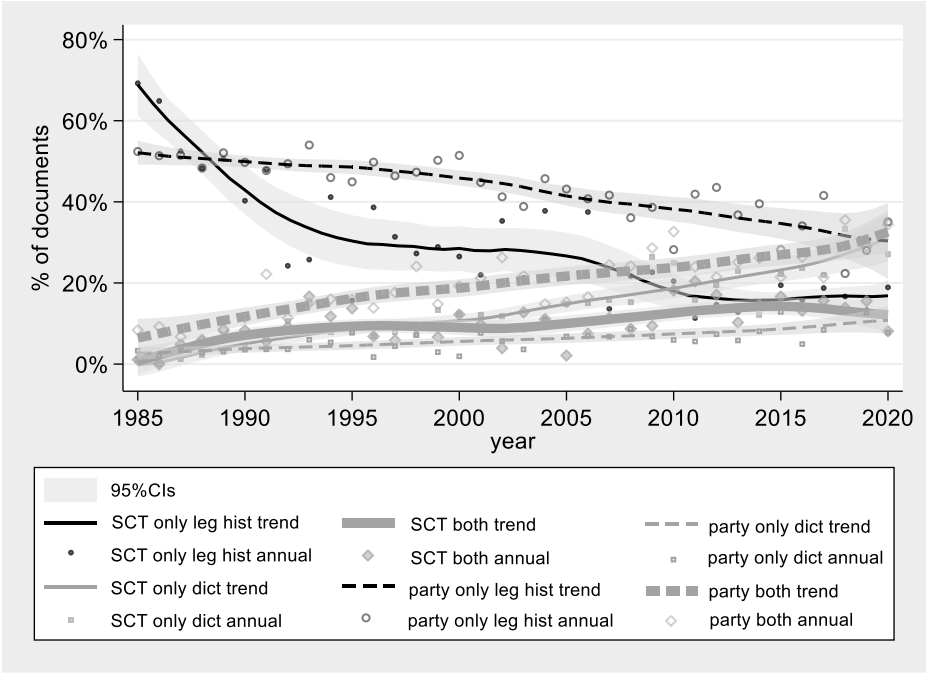
Figure 5: Citation to dictionaries and legislative history in opinions and briefs, 1985-2020



Other search strategies more directly reveal the differing patterns in the briefs versus the opinions. In particular, the BUT NOT form of searching, which looks for documents that have one source but not another, is helpful here.[105] Figure 6 shows the percentages of majority opinions (solid lines) and party briefs (dashed lines) that cite dictionaries but not legislative history (thin gray lines), that cite legislative history but not dictionaries (thin black lines), and that cite both (thicker lines).

105. *See supra* Section II.C.

Figure 6: Opinions and briefs citing only one source or both, 1985-2020



The briefs are more cable-like than the opinions. Specifically, briefs are more likely than opinions to combine both dictionaries and legislative history (that is, the thick dashed line is above the thick solid line). And opinions are more likely than briefs to cite only dictionaries (thin solid gray line above thin dashed gray line).

C. *Similarities and Differences Across Kinds of Litigators*

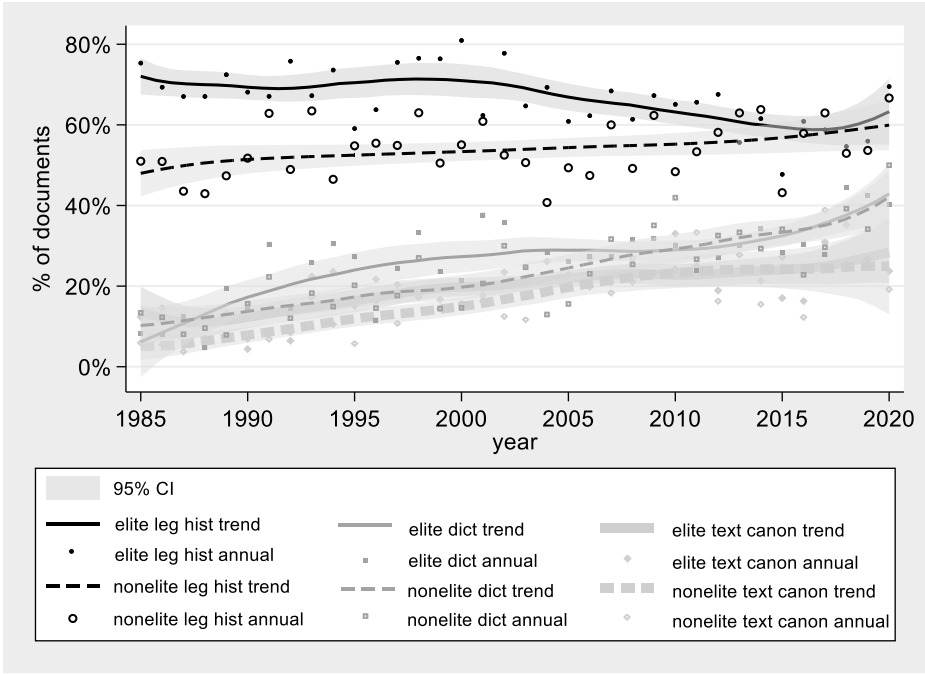
We hypothesized that there would be some differences in the interpretive approaches of different kinds of litigators.[106] In particular, we hypothesized that the practice of elite litigators would more closely parallel the practices of the Supreme Court. Further, with respect to the Solicitor General in particular, we expected the tendency toward alignment between the office and the Court to be offset by a countervailing institutional impulse toward the retention of a cable-like style that prominently employs legislative history.

Those expectations are substantiated, though only in part. Consider Figure 7, which shows usage rates of various tools for

106. *See supra* Section I.D.

briefs filed by non-elite litigators and elite litigators (here excluding the Solicitor General, who is taken up below). Recall that eliteness is operationalized by whether an attorney has a Washington, D.C. address or is a state solicitor general.

Figure 7: Elites and Nonelites, Use of Tools, 1985-2020



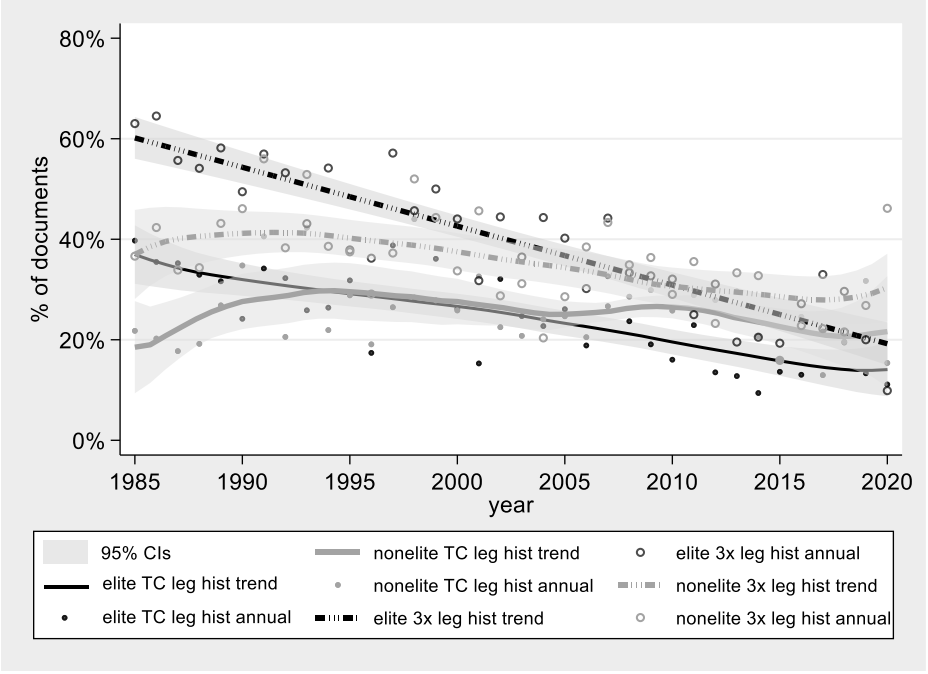
The most discernible difference across attorney types concerns the use of legislative history. Nonelite litigators used to cite legislative history less than elites, possibly reflecting D.C. lawyers' greater familiarity with such history and proximity (literal and experiential) to government.[107] However, the gap between nonelites and the more elite lawyers has narrowed over time. Regarding dictionaries and textual canons, there is at most a small difference in some periods and no discernible difference today. By the end of the study period, the two groups are hard to distinguish on any of these measures.

Because the use of legislative history showed some divergence between elite and nonelite attorneys, it was worth looking a bit deeper by examining the intensity measures for legislative history. Figure 8 uses two intensity measures, namely the presence of multiple citations in a brief and

107. Parrillo, *supra* note 21, at 379–81.

placement in the table of contents, to compare the behavior of elite and nonelite litigators.[108]

Figure 8: Elites and Nonelites, Emphasis on Legislative Intent, 1985-2020

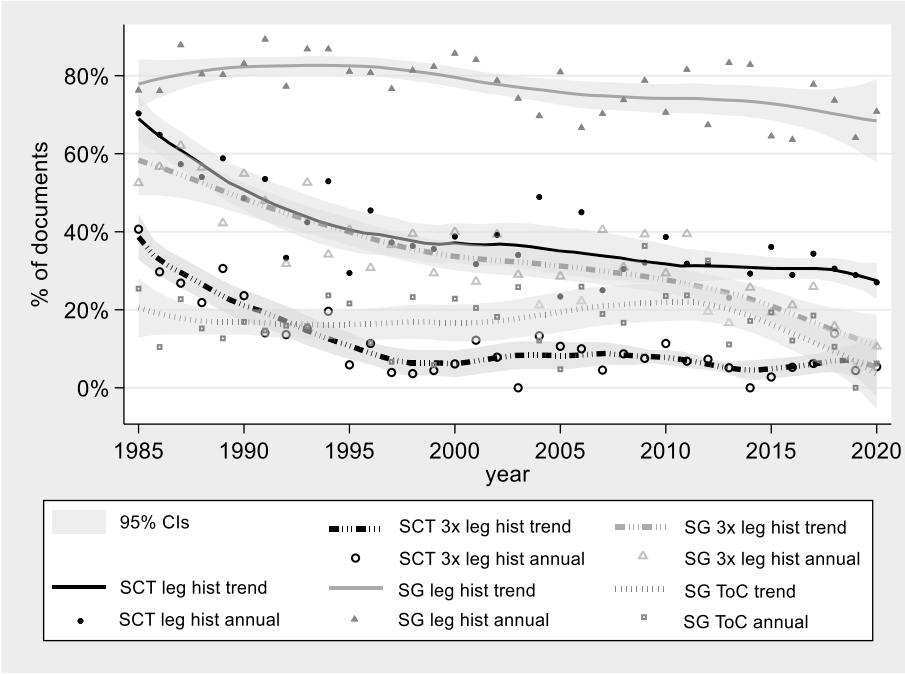


The results illustrated in Figures 7 and 8 provide only modest support for the hypothesis of elite tethering. It does appear that the nonelites are less responsive to the Court's changing attitude toward legislative intent, as shown by the steeper declines for elites versus nonelites. Indeed, the nonelites' use of legislative history suggests if anything that they were late to the party and kept dancing after the music stopped.

Finally, consider the Solicitor General. The office increased its use of textual sources, as did the Court and other litigators. More distinctive is the office's use of legislative history. Figure 9 plots the use of legislative history in the Solicitor General's briefs and the Supreme Court's majority opinions.

108. *See supra* Section II.C (explaining these measures of intensity).

Figure 9: Use of Legislative History by the Supreme Court and the Solicitor General, 1985-2020



The SG's citation rate for legislative history (solid gray line) has been relatively high and stable over the period of study. It exceeds the rate for other litigators (compare Figure 7), and the SG's rate exceeds the Court's rate. But the office's *emphasis* on legislative history, as shown through repeated citations (gray dashed with dots), has decreased markedly. In the last decade, references to legislative intent in the SG's tables of contents have declined as well. This combination is consistent with the view that the office adheres to norms of comprehensiveness in service to the Court but also shapes its arguments to appeal to the Court's sensibilities.

CONCLUSIONS AND FUTURE DIRECTIONS

We can conclude by summarizing the key results and their implications and then addressing some future lines of inquiry.

The first hypothesis was rough parallelism between briefs and opinions, and the results lend strong support to that hypothesis. Party briefs filed in the Supreme Court have moved in a more textualist direction since 1985 as measured by the kinds of interpretive sources they cite and, even more so, which ones they emphasize. This pattern—dictionaries and textual

canons increasing in relative importance compared to legislative history and references to legislative intent—runs parallel to the trend in the Supreme Court's opinions. The changes are contemporaneous, and the data do not permit one to make confident claims about the direction of causation, but it remains plausible that there are multiple and partly reinforcing directions of influence.

The briefs and the opinions did not, however, change to the same degree or in the same way. Recall the distinction between cables and chains, or supplementation versus substitution. The Supreme Court's reasoning is now relatively more chain-like, with textual sources replacing legislative history. But the briefs retain a more cable-like character, with textual sources supplementing legislative history and taking precedence over it rather than driving it out. As a descriptive matter, Eskridge and Frickey remain generally correct as to briefs but are no longer as accurate when it comes to the Court's interpretive practices—or at least the Court's self-presentation through its opinions. This divergence may reflect litigators' awareness that at least some of the Justices still care about legislative history, even if the Court's opinions rarely disclose it. The opinions, that is, are not necessarily a model for attorneys. (Cite Scalia but follow Stevens, in other words?) A divergence between the Court's outward presentation of its decision-making and the actual determinants of decisions raises questions about judicial candor.[109] If litigants disbelieve the Court's rhetoric, that is probably beneficial for them and for the Court.

With regard to differences across categories of attorneys, there are some differences, but they are fairly modest on the whole. There is some evidence that elites are more closely tethered to the Court's practices than nonelites, in particular when it comes to the declining role of legislative history, as the slopes tracking the elites' use and emphasis of legislative history more closely parallel the Court's trends. But by the end of the dataset, the two groups look similar. The Solicitor General's briefing practices remain distinctive, in particular in the office's relatively high use of legislative history, albeit with declining emphasis on it.

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109. *See* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 61 (2010), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1097&context=faculty_scholarship [https://perma.cc/R87T-2PK2] (worrying that some forms of textualism may drive contestation underground and produce "a cleavage between actual judicial thought processes and their outward manifestations in opinion-writing").

The modesty of the differences between elites and nonelites, especially at the end of the period under study, may reflect a few factors. With sources such as SCOTUSblog[110] and institutions such as Georgetown's Supreme Court Moot Court Program,[111] it may be that nonelites understand the Court and its ways better than they did decades ago in a less connected era. And even when an elite litigator is not listed on the brief, thus making them invisible to researchers, they sometimes consult or otherwise assist.[112] Finally, it may be that my proxy for eliteness is dampening differences that a more precise measure would reveal, though, as noted, a finer-grained measure of eliteness gave very similar results over the last decade.[113]

Several future extensions of this research suggest themselves. One is to study briefing practices in other courts. We know that the lower federal courts have shifted in a somewhat more textualist direction in the last several decades, though less so than the Supreme Court.[114] But there is little systematic knowledge of the interpretive arguments used by attorneys in those courts, in part due to limitations on data.[115] To the extent that different circuits have somewhat different interpretive approaches, one could look for corresponding differences in advocacy in those circuits. One suspects that litigators in the D.C. Circuit, with its semi-specialized docket and bar, would differ in various ways from advocates in other lower courts.[116] But would Seventh Circuit litigators (or at least the most expert of them) take cues from dictionary-denigrating judges on that court and use dictionaries less than attorneys

110. SCOTUSBLOG, https://www.scotusblog.com/ [https://perma.cc/T6SC-XZV3] (providing "independent news & analysis of the U.S. Supreme Court").

111. *Supreme Court Institute*, GEO. UNIV. L. CTR., https://www.law.georgetown.edu/supreme-court-institute/ [https://perma.cc/4B5G-PZTV] (stating that "[i]n recent years, [the program has] conduct[ed] moot courts for advocates in nearly every case on the Court's argument docket").

112. *See* MCGUIRE, *supra* note 46, at 112–15; Tony Mauro, *Why Top Advocates Are Ghostwriting SCOTUS Briefs*, BLOOMBERG L. (Aug. 9, 2017), https://www.bloomberglaw.com/document/XAL03MGG000000?jcsearch=hdd45fd#jcite [https://perma.cc/8CM4-QF33].

113. *See supra* Section II.D (describing methods for identifying elite litigators).

114. *See supra* note 3.

115. *See* Bruhl, *supra* note 1, at 34.

116. Glenn Bridgman, One of These Things Is Not Like the Others: Legislative History in the U.S. Courts of Appeal 42, 44–45 (unpublished manuscript) (on file with Yale Law School, Student Prize Papers), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17825/Emerson___One_of_these_Things___bridgman_citation_legishist_.pdf?sequence=2&isAllowed=y [https://perma.cc/N2X8-BUH4].

elsewhere?[117] One might also examine whether the linkages between judicial practices and advocates' practices are tighter for appellate specialists and attorneys who have more experience before the particular circuit. The federal district courts offer valuable opportunities to see whether attorneys tailor their interpretive arguments to the particular judge to whom the case is assigned, where the judge has a discernible style.[118]

Another fruitful line of inquiry would be to study briefing practices further into the past. The period under study here begins with the birth of the new textualism and Justice Scalia's appointment to the Supreme Court. As one goes back to the 1970s and earlier, Westlaw and Lexis coverage of briefs is less consistent, though there are other sources that one can employ.[119] Looking back into prior eras could reveal other transformations in briefing style. Parrillo, for example, has already shown that government lawyers are largely responsible for the rise of legislative history in the mid-twentieth century.[120] My preliminary examinations suggest that dictionary use may show an interesting pattern when one looks deeper into the past. Today, dictionaries are an accepted tool, and even sophisticated litigators do not hesitate to use them.

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117. For examples of antipathy toward dictionaries from some current and former Seventh Circuit judges, see Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 67 (1994) (calling the dictionary "a museum of words, an historical catalog rather than a means to decode the work of legislatures"); Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism [https://perma.cc/3Z84-SGGK] ("Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless.").

118. Buried under sentencing hearings and discovery disputes, and hemmed in by precedent, most district judges do not expound a discernible interpretive philosophy, but a few do. *See, e.g.*, Turner v. Astrue, 790 F. Supp. 2d 584, 587–88 (E.D. Ky. 2011) (Thapar, J.) (discussing statutory interpretation and the legitimacy of different approaches), *rev'd sub nom.* Turner v. Comm'r of Soc. Sec., 680 F.3d 721 (6th Cir. 2012). Judge-specific briefing is generally not possible in the courts of appeals, as the panel members are not known when the briefs are filed. *See* Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 686 (2000). In the D.C. Circuit, however, the identity of panel members is announced early, which allows somewhat more precise targeting of arguments. *Id.* at 700–01.

119. *See, e.g.*, *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978*, GALE, https://www.gale.com/c/making-of-modern-law-us-supreme-court-records-and-briefs-1832-1978 [https://perma.cc/BJ4M-YYE6] (providing coverage of Supreme Court briefs from 1832 to 1978).

120. Parrillo, *supra* note 21, at 315.

My suspicion is that before the rise of the new textualism, dictionaries had no positive association with appellate specialization or even had a negative relationship.[121] After all, if not for the love lavished on dictionaries in the Court's opinions, many would think that using dictionaries in an argument would be an unsophisticated approach. Consider the cliché of the trite student essay that begins by explaining that "*Webster's* defines __ as __."[122]

Further, it would be valuable to examine statutory-interpretive practices in other kinds of lawyering contexts besides litigation. When lawyers today advise clients on the law, do they reason differently than they used to, and does it matter whether they expect the matter to be litigated? Lawyers' advice is generally not publicly available, but one particularly consequential legal advisor, and one for whom we can access and study some of the advice, is the Department of Justice's Office of Legal Counsel (OLC).[123] The OLC's infamous August 2002 "torture memo" was full of interpretive canons,[124] and the OLC is generally keen to advance executive-empowering constructions,[125] but I am not aware of any systematic empirical study of the OLC's interpretive practices and how they compare to judicial practices. From the normative perspective, Professor Trevor Morrison has argued that executive-branch interpreters such as the OLC should behave differently, in particular by taking a different approach to the canon of constitutional avoidance.[126] Given that many executive actions are not subject to judicial review—due to lack of standing, secrecy, exceptions to the Administrative Procedure Act, or otherwise—there is

121. The influential Office of Legal Policy document on interpretive methodology, one of the early manifestos of conservative textualism, was lukewarm on dictionaries, for what it's worth. OLP MEMO, *supra* note 53, at 16–17.

122. *See* Brian Wasko, *Please Quit Starting Papers with Dictionary Definitions!*, WRITE AT HOME (June 22, 2012), http://blog.writeathome.com/index.php/2012/06/please-quit-starting-papers-with-dictionary-definitions/ [https://perma.cc/R27H-Y5SC].

123. *Opinions*, U.S. DEP'T OF JUST. (Dec. 23, 2020), https://www.justice.gov/olc/opinions-main [https://perma.cc/KYU2-F2UX]; *The OLC's Opinions*, KNIGHT FIRST AMEND. INST., https://knightcolumbia.org/reading-room/olc-opinions?&page=7 [https://perma.cc/L8XP-NZVN].

124. Memorandum from the Off. of Legal Couns., U.S. Dep't of Just., to Alberto R. Gonzales 5–6, 10, 12, 16–17, 33–34 (Aug. 1, 2002), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf [https://perma.cc/6R9U-8VGU].

125. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 452–55 (2012).

126. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196 (2006).

some breathing room for a distinctive interpretive practice to flourish.

Finally, although there are countless issues one could track as they develop in future years—including whether dictionaries give way to other textualist tools such as corpus linguistics[127]—a topic of particular importance is the approach of the Solicitor General's office. Although the Solicitor General is a political appointee, and positions on the merits of sensitive cases can change from one administration to the next, the office's style of formulating statutory-interpretive arguments has not shown major partisan differences over the period under study.[128] (In my Legislation and Statutory Interpretation class, I show students briefs from several expert litigators in statutory cases; those from President George W. Bush's SG, Paul Clement, and President Barack Obama's SG, Don Verrilli, are remarkably similar.) As explained already, the Solicitor General's office has expertise in legislative history and high credibility, both of which contribute to making it an especially valuable expositor of legislative history.[129] If the office's practices were to become more variable based on partisanship, such as with Republican administrations reducing their presentation of legislative history, that would be a real loss for the Court so long as any Justice cares about legislative intent or purposes, even if only behind the scenes. The textualist revolution, despite its successes, has not triumphed that far, and one imagines that one of the places it would triumph last would be the somewhat staid briefs of the Solicitor General.

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127. On the potential value of corpus linguistics, *compare* Lee & Mouritsen, *supra* note 62 (providing grounds for hope), *with* Jonathan H Choi, *Measuring Clarity in Legal Text*, 91 U. CHI. L. REV. (forthcoming 2024) (throwing some cold water on the hope that corpus linguistics can resolve textual indeterminacy).

128. *See supra* text accompanying notes 49–50. Note that my dataset does not go back far enough to see if President Ronald Reagan's SGs used legislative history less than predecessors.

129. *See supra* text accompanying note 50; *cf.* Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224, 231–35 (2009) (showing that increased politicization in the Solicitor General's positions is associated with reduced influence on the Court).