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Law Versus Ideology: The Supreme Court and the Use of Legislative History

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LAW VERSUS IDEOLOGY: THE SUPREME COURT AND THE USE OF LEGISLATIVE HISTORY

DAVID S. LAW* & DAVID ZARING**

ABSTRACT

Much of the social science literature on judicial behavior has focused on the impact of ideology on how judges vote. For the most part, however, legal scholars have been reluctant to embrace empirical scholarship that fails to address the impact of legal constraints and the means by which judges reason their way to particular outcomes. This Article attempts to integrate and address the concerns

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** Assistant Professor of Legal Studies, Wharton School of Business. B.A., Swarthmore College; J.D., Harvard Law School. © 2010, David S. Law & David Zaring. Preliminary versions of this Article were presented at the 2009 Annual Meeting of the Midwest Political Science Association in Chicago; the 2009 Annual Meeting of the Western Political Science Association in Vancouver; the Conferences on Empirical Legal Studies held at Cornell Law School in September 2008 and the University of Southern California in November 2009; the 2008 Annual Meeting of the American Political Science Association in Boston; and a junior scholars workshop at American University. The authors are deeply grateful to Ryan Black and Josh Fischman for invaluable methodological help. We also wish to thank Lawrence Baum, James Brudney, Charles Cameron, Frank Cross, Michael Dorf, James Fowler, Dan Ho, Jeff Lax, Paul Quirk, Anthony Stenger, Justin Wedeking, and Jeff Yates for their thoughtful and perceptive suggestions, and to all those who attended our presentations of this Article for their engaging feedback. Brianne Blakey, Dana Buckman, Nikki Cho, Samir Mehta, and Chris Rogers provided patient and meticulous research assistance.

of both audiences by way of an empirical examination of the Supreme Court's use of a particular interpretive technique—namely, the use of legislative history to determine the purpose and meaning of a statute. We analyzed every opinion in every Supreme Court statutory interpretation case from 1953 through 2006 that involved a frequently interpreted federal statute. We also collected original data on the characteristics of each statute, including its age, length, complexity, obscurity, and the number of times that it had been amended. We then used our data on these statutory characteristics—together with information on the ideological tilt of the Justices, the case outcomes, and the legislators who enacted the statute—in a logit regression analysis to determine the relative impact of each variable on the likelihood that a Justice would cite legislative history in a given opinion.

*We find that the use of legislative history is driven by a combination of legal and ideological factors. On the whole, the legal variables have a significantly larger impact on the likelihood of legislative history usage than the ideological variables, but the impact of the ideological variables cannot be dismissed. Statutes that are longer or more complex increase the likelihood of legislative history usage, whereas frequent amendment of a statute decreases that likelihood. The age of the statute also matters, but its effect is neither linear nor monotonic: very new and very old statutes are more likely to elicit legislative history usage than statutes of intermediate age. Majority opinions are significantly more likely to cite legislative history than dissenting opinions, which in turn are more than twice as likely to cite legislative history as concurring opinions. Our findings also suggest that the use of legislative history by one Justice prompts other Justices to respond in kind with legislative history arguments of their own. We found no evidence, however, that the Court's adoption in *Chevron v. Natural Resources Defense Council* of the doctrine that reviewing courts should defer to reasonable agency interpretations affected the overall propensity of the Justices to cite legislative history.*

With respect to the impact of ideological factors, liberal Justices are generally more likely than conservative Justices to cite legislative history. In addition, the Justices are more likely to consult legislative history when they are ideologically sympathetic to the purposes of the

enacting Congress. At the same time, however, legislative history usage is not correlated with more ideological decision making. Although the decision to use legislative history is influenced by ideological factors, the actual use of legislative history does not make it more likely that a Justice will arrive at his or her preferred outcome. Moreover, contrary to what some scholars have suggested, we also found no evidence that Justice Scalia has persuaded other Justices to refrain from citing legislative history in their own opinions. Rather, the decline in the overall use of legislative history since the mid-1980s reflects a rightward shift in the ideological composition of the Court, as liberal Justices who were inclined to cite legislative history have been replaced by conservative Justices who are not so inclined.

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INTRODUCTION

There are two principal, and conflicting, views as to why judges turn to legislative history when interpreting statutes. One view—often associated with Justice Scalia, but also consistent with a wealth of judicial behavior literature that depicts judges as ideological and strategic decision makers—is that they do so cynically, as a means of securing for themselves the interpretive flexibility they need to arrive at the substantive outcomes they prefer.¹ A different and long-popular view, which in recent years has been most visibly championed by Justice Breyer, is that judges should and do cite legislative history for the innocuous reason that it is a useful aid to interpreting statutes that lack clear meaning.²

Both views rest upon descriptive assertions about judicial behavior that have, for the most part, gone untested. But it is not simply the motivations behind legislative history usage that remain shrouded in mystery. More generally, relatively little is known empirically about the determinants of judicial opinion content and the reasons for which judges employ particular materials and techniques in the course of reaching their decisions.³ To what extent does law matter, and to what extent does ideology matter? This Article tackles these questions by way of an empirical analysis of the reasons for which Supreme Court Justices have resorted to legislative history over the last fifty years. We engage in the most comprehensive examination of the Court's use of legislative history to date, in light of both the variety of explanations that we consider and the range of data that we analyze. In the course of investigating legislative history usage, we also study the formal and linguistic characteristics of a broad range of federal statutes. The results of our efforts to measure various substantive aspects of these statutes in an objective manner may be of interest in their own right to many scholars.

Our conclusion is that the Justices use legislative history for both legal and ideological reasons, but the legal reasons are predominant.

1. See *infra* note 25 and accompanying text.

2. See *infra* note 9 and accompanying text.

3. See *infra* Part II.E.

On the one hand, the Justices appear to resort to legislative history partly for reasons having to do with the form and content of the statutes themselves. In particular, they are more likely to consult legislative history when faced with statutes of a certain age, level of complexity, or degree of amendedness. On the other hand, the propensity of Justices to cite legislative history is significantly correlated with the ideology of the Justices themselves: liberal Justices are more likely than conservative Justices to use it. In addition, the fact that a Justice is of the same ideological bent as the legislators who enacted the statute increases the likelihood that he or she will turn to legislative history. At the same time, however, the fact that a liberal Justice cites legislative history in a particular opinion does not render it more likely that the opinion in question will arrive at a liberal outcome.

Finally, we reject the oft-expressed hypothesis that Justice Scalia's vocal criticism of legislative history helps to explain the overall decline in legislative history usage since the Burger Court.⁴ The decline is more likely attributable to the overall rightward shift in the composition of the Court, for which no single Justice can be assigned either credit or blame. Liberal Justices who were inherently predisposed to use legislative history have, on the whole, been replaced by conservative Justices who are not. Controlling for such factors as the ideology of each Justice, we found no evidence that Justice Scalia has influenced the legislative history usage of other members of the Court.

I. THE NORMATIVE DEBATE OVER THE USE OF LEGISLATIVE HISTORY

For much of the twentieth century, the Supreme Court embraced the use of legislative history in statutory interpretation cases with growing enthusiasm. From the 1930s to the 1980s, legislative history appeared in the Court's opinions with increasing frequency, reaching a high of 450 citations in the 1974 term.⁵ It was during this time that the Court came to adopt what is now the conventional

4. See *infra* Part II.D.

5. Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 297-306 (1982).

view that “proper construction” of a statute “frequently requires consideration of [the statute’s] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.”⁶ In more recent years, the Court has taken the opportunity to reaffirm that the practice of consulting legislative history is deeply rooted and likely to endure into the future.⁷

The use of legislative history has long enjoyed influential champions and friends on the bench,⁸ with perhaps none being more visible today than Justice Breyer. To consider legislative history, he has argued, is akin to “find[ing] out the purpose of an action taken by a group” by “ask[ing] some of the group’s members about it”⁹; given a purposive approach to statutory interpretation, it is sensible and unobjectionable to consider legislative history.¹⁰ Nor, in his view, must the use of legislative history be confined to discerning the purpose of an enactment. It can also help judges to “avoid[] an absurd result,” “explain[] specialized meanings,” “choos[e] among reasonable interpretations of a politically controversial statute,” and even “illuminate drafting errors ... that courts should correct”¹¹—as the Court itself has demonstrated on various occasions.¹²

In recent decades, however, the use of legislative history has occasioned a sharp and perhaps effective critique from influential

6. *Wirtz v. Bottle Blowers Ass’n*, 389 U.S. 463, 468 (1968).

7. *See* *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610-12 n.4 (1991) (“Our precedents demonstrate that the Court’s practice of utilizing legislative history reaches well into its past.... We suspect that the practice will likewise reach well into the future.”).

8. *See, e.g.*, Abner J. Mikva, *A Reply to Judge Starr’s Observations*, 1987 DUKE L.J. 380, 386 (arguing that judges “cannot afford to ignore those obvious tools [such as legislative history] which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute”).

9. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864-65 (1992).

10. *Id.*

11. *Id.* at 848-56.

12. For controversial examples of the correction of drafting errors on the basis of legislative intent, see *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting) (“[T]oday’s decision is nothing other than the elevation of judge-supposed legislative intent over clear statutory text.”); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (“In such cases, the intention of the drafters, rather than the strict language, controls.”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (“[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.”).

corners of the judiciary. Justice Scalia, in particular, has waxed critical of the Court's use of legislative history, which he has condemned in memorable terms as "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction."¹³ In his view, legislative history materials provide "increasingly unreliable evidence of what the voting Members of Congress actually had in mind," and their use by the Court merely undermines the "reasoned, consistent, and effective application" of federal law.¹⁴

But Justice Scalia is by no means the only prominent critic of legislative history; nor are his criticisms the only criticisms. Some have taken issue with the notion that legislative history is capable of revealing legislative intent. Judge Easterbrook, for one, has insisted that no such "intent" can be divined¹⁵: "The meaning of statutes is to be found not in the subjective, multiple mind of Congress," he has argued, for the simple reason that a multimember body such as Congress cannot formulate or act upon a single intent as if it were a unitary entity.¹⁶ There is only a text, and to look to Congress for further guidance is, in his view, unproductive.¹⁷

13. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring); *see also* *Johnson v. United States*, 529 U.S. 694, 723 (2000) (Scalia, J., dissenting) ("Our obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and no further. We stop where the statutory language does, and do not require explicit prohibition of our carrying the ball a few yards beyond.").

14. *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring) ("It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."); *see also, e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring).

15. Accordingly, Easterbrook suggests that "[w]e should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words." Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65-66 (1988). Along these lines, a study of the aides that draft legislation and legislative history concluded that "the standard judicial story of the legislative drafting process may be flawed in important respects [T]here may be important institutional differences between the judicial and legislative branches when it comes to the values that shape the drafting process—differences we characterize in terms of 'interpretive' versus 'constitutive' virtues." Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 578 (2002).

16. Easterbrook, *supra* note 15, at 65.

17. *See id.* at 60-66. Judge Easterbrook's position is directly opposed to that of Justice Breyer, who has taken the position that one can in fact ascertain the intent and purpose of a multimember body such as Congress, and that legislative history can help judges to achieve

Others, meanwhile, have shared Justice Scalia's suspicion that legislative history helps judges to decide cases on the basis of their "policy preferences, rather than neutral principles of law."¹⁸ Judge Leventhal of the D.C. Circuit famously likened the selective use of legislative history by judges to "looking over a crowd and picking out your friends."¹⁹ That is to say, given the vast quantity and range of legislative history materials from which they have to choose, it is all too tempting for a judge to take only what is convenient—namely, that which helps to achieve the desired result—and to ignore the rest.²⁰ Another former jurist has gone so far as to suggest a constitutional problem with the use of legislative history. Building upon the Court's reasoning in *INS v. Chadha*,²¹ Kenneth Starr has argued that ascertaining congressional intent by reference to materials beyond the scope of the duly enacted statute is anathema to the requirements of bicameralism and presentment found in Article I.²² To rely on statements that have neither been voted upon in both

that interpretive goal:

[O]ne can ascribe an "intent" to Congress in enacting the words of a statute if one means "intent" in its, here relevant, sense of "purpose," rather than its sense of "motive." One often ascribes "group" purposes to group actions. A law school raises tuition to obtain money for a new library. Obviously, one of the best ways to find out the purpose of an action taken by a group is to ask some of the group's members about it.

Breyer, *supra* note 9, at 864-65.

18. Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 HOUS. L. REV. 565, 576 (2005) (internal quotations omitted).

19. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal).

20. If the use of legislative history is a way of picking out one's friends in a crowd, however, then the refusal to use legislative history might similarly be characterized as a convenient way of avoiding one's enemies. The nonuse of legislative history may be as useful a tool for securing outcomes as its active use. Albert Lin has argued, for example, that the Court's increasing refusal to use legislative history in environmental cases has led to more conservative outcomes:

What makes textualism particularly troubling is that it allows judges to avoid taking responsibility for these judgments by asserting claims of neutrality. Notwithstanding suggestions that more moderate members of the Court ... have turned back Justice Scalia's efforts to establish textualism as the dominant theory of statutory interpretation, the Court's 2003-04 environmental docket reflected a strong textualist influence.

Lin, *supra* note 18, at 580-81.

21. 462 U.S. 919 (1983).

22. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376; *see also* Mikva, *supra* note 8.

houses of Congress nor signed by the President, he contends, is tantamount to giving effect to legislative language that has not gone through the required constitutional process of passage by both houses of Congress and signature by the President.²³

In the face of these criticisms, the Court itself has, on occasion, adopted a skeptical stance toward the use of legislative history. Justice Kennedy, writing for the Court, recently characterized legislative history as “murky, ambiguous, and contradictory” and emphasized that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”²⁴ The Court has also recently voiced concern that the use of legislative history rewards strategic efforts by lobbyists to achieve by subterfuge what they could not achieve via the constitutionally ordained legislative process.²⁵ Hints and statements of this nature have prompted some to conclude that “nowadays [legislative history] is eschewed a bit more often than it is used.”²⁶

Nevertheless, the federal courts are far from eschewing the practice completely. The Court itself made a point of proclaiming its support for legislative history in the early Rehnquist-era case of *Wisconsin Public Intervenor v. Mortier*, in which all of the Justices except Justice Scalia signed onto a footnote that specifically defended the use of legislative history as an interpretive tool.²⁷ Since then, legislative history has hardly disappeared from the pages of the *United States Reports*.²⁸ What can also be found in those same

23. Starr, *supra* note 22, at 376.

24. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

25. *See id.* (“[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.”).

26. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 131-32 (2000); *see also* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1837-39 (1998) (espousing a critical view of legislative history).

27. 501 U.S. 597, 599, 610-12 n.4 (1991); *id.* at 621-23 (Scalia, J., concurring).

28. Indeed, following the *Mortier* decision, Jane Schacter found that the Court’s 1996 term featured more citations to legislative history than did earlier terms. 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, 9-17 (1998) (noting an increase in the Court’s use of legislative history during the 1996 term); *see also*, e.g., Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The*

pages, however, is a public debate over its appropriateness.²⁹ Not surprisingly, given the mixed signals emanating from the Court, that debate has spilled into the pages of the *Federal Reporter* as well: the courts of appeals have expressed a growing range of views on the value and role of legislative history.³⁰

The ongoing debate over the use of legislative history shows no signs of subsiding. At the same time, much is at stake: the embrace or rejection of legislative history has the potential to shape not only the outcomes that judges reach,³¹ but also the way in which

Impact of Justice Scalia's Critique, 36 HARV. J. ON LEGIS. 369, 395 (1999) (arguing that, although "there has emerged a clear and unmistakable pattern of decline in the use of legislative history by the Supreme Court ... it is premature to conclude that legislative history will cease to be a tool of statutory interpretation"). Nor does it appear that Justice Scalia's critique has led to a substantial decline in the Court's use of any particular type of legislative history: its relative propensity to cite various types of congressional materials—from committee reports to floor statements and hearing records—has remained constant, with committee reports and congressional debates remaining the sources of legislative history most likely to be consulted. *See id.* at 390.

29. A recent exchange between Justices Stevens and Scalia illustrates the current state of affairs. Per Justice Stevens, "[a]nalysis of legislative history is, of course, a traditional tool of statutory 'construction' that can make the purpose of a statute 'pellucidly clear.'" Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring). Justice Scalia, in dissent, argued that "[l]egislative history can never produce a 'pellucidly clear' picture, of what a law was 'intended' to mean, for the simple reason that it is never voted upon—or ordinarily even seen or heard—by the 'intending' lawgiving entity." *Id.* at 117 (Scalia, J., dissenting) (internal citation omitted). For his part, Justice Scalia accused the Court of using legislative history to reach a decision that could not have been justified by sole reliance on the plain text of the statute. *See id.* at 108-09, 116. Yet Justice Stevens—and a majority of his colleagues—remained unbowed. *See id.* at 89-93, 97, 100 (majority opinion); *id.* at 104-07 (Stevens, J., concurring).

30. *Compare, e.g.*, Am. Fed'n of Gov't Employees v. Gates, 486 F.3d 1316, 1326 (D.C. Cir. 2007) ("Although the snippets of legislative history are largely in accord with our reading of the statutory text, we do not rely on them to shape our interpretation; the Supreme Court has cautioned against such use of this kind of legislative history."), *with, e.g.*, Harding v. Dep't of Veterans Affairs, 448 F.3d 1373, 1377 n.3 (Fed. Cir. 2006) ("[S]ensible caution does not prevent us from relying upon the remarks of the sponsor of legislation describing his purpose in introducing that legislation as an indicator of Congressional intent, at least in the absence of contradictory evidence in the legislative history."), OfficeMax, Inc. v. United States, 428 F.3d 583, 592 (6th Cir. 2005) (observing that a search of the statute's legislative history might be appropriate in cases of statutory ambiguity), and AD Global Fund, LLC v. United States, 67 Fed. Cl. 657, 676-77 (2005) (concluding that "[i]f a statute remains ambiguous even after consideration of its plain meaning, a court may rely on legislative history to interpret the meaning of the ambiguous terms," but also noting that "[n]ot all legislative history is entitled to equal regard," and that "[t]he most persuasive sort of legislative history are the reports from the committees that studied, drafted, and proposed the legislation").

31. *See supra* note 20 and accompanying text.

Congress writes statutes. If we are to sort our way intelligently through the arguments that have been made for and against the use of legislative history, we must have a clear and empirically grounded understanding of the actual reasons for which judges use legislative history and the conditions under which they are most likely to do so. A review of the relevant empirical literature reveals, however, that we remain woefully far from enjoying such an understanding.

II. THE STATE OF THE EMPIRICAL LITERATURE

A. Trends in the Supreme Court's Usage of Legislative History over Time

There does not exist a large body of empirical research on legislative history usage. To the extent that such literature does exist, it has tended to focus, not surprisingly, upon the Supreme Court, and much of it has sought simply to piece together trends in the Court's overall use of legislative history over time.³² The picture that emerges from the existing research, moreover, is fragmentary and at times contradictory.

Scholars agree that, on the whole, the Court has made fairly frequent use of legislative history. From the late nineteenth century through the late twentieth century, it cited congressional reports in approximately one-third of its statutory interpretation cases, congressional debates in another 17%, and congressional hearings in another 13% of cases.³³ These aggregate statistics, however, conceal significant differences across both time and areas of law. With respect to variations by area of law, an early study by Beth Henschen of the interpretive techniques employed by the Court in labor and antitrust cases from 1950 through 1972 found that nearly

32. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 & tbl.1, 356-67 (1994) (describing the decline in the Supreme Court's use of legislative history between 1981 and 1992); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 97-102 (1998) (contending that the Supreme Court rarely used legislative history before the New Deal); Wald, *supra* note 19, at 195 (analyzing the Supreme Court's use of legislative history in the 1981 term).

33. See Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093 (1992).

all of the Justices were more likely to resort to legislative history in the labor context than in the antitrust context.³⁴

A handful of studies have sought to describe trends and patterns in the Court's use of legislative history over specific periods of time. An early but informative effort by Carro and Brann evaluated the Court's use of legislative history from 1938 through 1979 and found a "continual increase" over that period.³⁵ A subsequent study by Nicholas Zeppos of the Court's use of "originalist sources other than text" in statutory interpretation cases—a category of sources that includes both "contemporaneous legislative history" and "the history and circumstances of the time of enactment"—suggests that reliance upon such sources waxed and waned dramatically over the twentieth century.³⁶ Charting the Court's citations to "[n]on-text[] original sources" as a proportion of all citations found in its statutory interpretation decisions, he reports that this proportion underwent a sharp increase beginning in the early 1930s and peaking in the mid-1940s, then experienced a gradual decline until approximately 1950.³⁷ The proportion of citations to "[n]on-text[] [o]riginalist [s]ources" rose precipitously to a peak in approximately 1980 before plunging dramatically by approximately 1987 to lows not seen since the 1930s.³⁸ Zeppos also found evidence to suggest that textualist

34. Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 LEGIS. STUD. Q. 353, 360-62 & tbl.2 (1985) (finding legislative history cited in 15% of antitrust and 38% of labor decisions in "222 cases in which the Supreme Court interpreted federal labor and antitrust statutes in its 1950 through its 1972 terms").

35. Carro & Brann, *supra* note 5, at 297-305 & tbl.I.

36. Zeppos, *supra* note 33, at 1104-05 & fig.7. Zeppos randomly selected twenty different years from 1890 through 1990, then drew from each of those years a random sample of the Court's statutory interpretation decisions. *See id.* at 1088.

37. *See id.* at 1104-05 & fig.7.

38. *See id.* Michael Koby described a similar secular trend in the Court's citations to legislative history. He reports that, from 1980 to 1998, the Court's citations to legislative history fell from 479 to 79, a decrease of 85.5%. Koby, *supra* note 28, at 386-89. Although the number of opinions declined from 156 to 94, this only accounted for a decrease of 39.74%, which led Koby to conclude that the decline in use of legislative history was more dramatic. *See id.* He found that, during the period before the appointment of Justice Scalia, from 1980 to 1986, there were a total of 1208 opinions and a total of 4193 legislative history citations, which represented a ratio of 3.47 citations per opinion. *Id.* During the twelve-year period after the appointment of Justice Scalia, he concluded that there was a total of 1493 opinions and a total of 2720 legislative history citations, which represented a ratio of 1.87 citations per opinion. *Id.* at 386-87. From 1995 to 1998, this ratio further decreased to 1.38 citations per opinion. *Id.* at 387.

analysis and reliance upon legislative history are complementary approaches to statutory interpretation, rather than substitutes for one another.³⁹ References to the plain text of the statute were positively correlated with citations to legislative history: the fact that a particular opinion happened to cite the plain text of the statute in question made it more, not less, likely that the opinion would also reference legislative history.⁴⁰

Other studies, however, have cast doubt upon the notion that legislative history met its demise in the 1980s. In a pair of articles, Judge Patricia Wald of the D.C. Circuit evaluated the Supreme Court's legislative history usage during the 1980s, both before and after Justice Scalia's appointment.⁴¹ Examining the question initially in 1983, she concluded that the Court had adopted the habit of using legislative history in virtually every statutory interpretation case, a development that she generally applauded.⁴² Revisiting the question as of the 1988 term, she praised the Court for its ongoing and "substantive" reliance upon legislative history in "almost three-fourths of [cases] involving statutory construction and over one-third of all the opinions of the Court."⁴³ Judge Wald further observed that, in most cases in which the Court did cite legislative history, it did so either to support its textual analysis or to assure itself that "legislative history simply disclosed nothing to contradict or otherwise undermine the Court's reading of the statute."⁴⁴ A later study by Jane Schacter suggested that, by 1996, the use of legislative history was enjoying "some resurgence" among the Justices, whereas the popularity of textualism, in the form of "citations to the dictionary," was in "apparent decline."⁴⁵ In that year, 49% of the Court's statutory interpretation majority opinions cited to legislative history; references to congressional committee reports, in

39. See Zeppos, *supra* note 33, at 1104-06, 1117-20.

40. See *id.* at 1104-06, 1118.

41. See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 277-29 (1990).

42. See Wald, *supra* note 19, at 197-98.

43. Wald, *supra* note 41, at 288 (emphasis omitted). *But cf.* Merrill, *supra* note 32, at 355-57 (finding between 1981 and 1992 both an increase in textual analyses and a decrease in references to legislative history).

44. Wald, *supra* note 41, at 289-90.

45. Schacter, *supra* note 28, at 5.

particular, were “by far the leading source” of such citations.⁴⁶ Schacter speculated that the addition of Justice Breyer to the Court added impetus to the use of such materials.⁴⁷

B. Reasons for the Court’s Usage of Legislative History

Few scholars have attempted the difficult task of discerning the Justices’ motives for citing legislative history, or of identifying the reasons for which legislative history usage has varied over time and across areas of law. Professors Brudney and Ditslear’s repeated examinations of the Court’s use of legislative history in two specific areas of law—employment and tax—are among the rare exceptions.⁴⁸ In the employment law context, they found that the Justices used legislative history for complex positional reasons, and that its usage “as a whole is not distinctly ideological.”⁴⁹ Throughout the Burger and Rehnquist Courts, legislative history was “as likely to be invoked to help support pro-employee results as pro-employer outcomes.”⁵⁰ Indeed, Brudney and Ditslear noted the existence of a “modest neutralizing effect,” wherein liberal Justices were actually less likely to reach liberal outcomes when citing legislative history than might otherwise have been expected.⁵¹ They also noted specifically that the addition of Justices Scalia and Thomas to the Court exacted a heavy toll on the Court’s use of legislative history: the opinions written by Justices Scalia and Thomas explained nearly one-half of the decline in overall legislative history usage by

46. *Id.* at 15.

47. *See id.* at 17 (positing also that textualism’s limitations may have become more apparent during this time to the Justices).

48. *See* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 229 (2006) [hereinafter Brudney & Ditslear, *Burger and Rehnquist Eras*]; James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008) [hereinafter Brudney & Ditslear, *Scalia Effect*]; James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009) [hereinafter Brudney & Ditslear, *Tax Law and Workplace Law*].

49. Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 137.

50. *Id.*; Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 229 (noting that “legislative history reliance for liberal workplace law statutes is associated with pro-employer results more often than one might expect”).

51. Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 140 (internal quotations omitted).

the Court since 1986.⁵² However, it is unclear to what extent their findings can be generalized beyond the employment law context. Indeed, Brudney and Ditslear themselves offered a variety of reasons to think that employment law cases may be atypical.⁵³

Their subsequent comparison of the Court's employment and tax decisions confirmed that the prevalence of legislative history usage varies across different areas of law.⁵⁴ By way of a partial explanation, they suggested the existence of what they called a "Blackmun effect,"⁵⁵ which refers to the disproportionate impact that a particular Justice with substantive expertise can have on the Court's interpretive practices. As the sole member of the Court with extensive expertise in tax law, Justice Blackmun authored a disproportionate number of the Court's tax opinions during his tenure and, in doing so, was not averse to examining legislative history.⁵⁶ Only after his departure did the Court's use of legislative history in tax cases decline significantly.⁵⁷ Brudney and Ditslear concluded that, "at least for a field perceived as tepid in terms of ideology and also judicial interest, the Justices may be willing to follow the interpretive example of a knowledgeable colleague."⁵⁸

Brudney and Ditslear also concluded that legislative history serves different purposes depending upon the area of law in question.⁵⁹ Tax law, they observed, is the product of a bipartisan, highly technical, expertise-driven process.⁶⁰ Citation to legislative history in the tax context is accordingly driven by the Court's desire to "borrow expertise" from the legislative drafters.⁶¹ By contrast, in the context of workplace law, legislative history is used for the more typical purpose of shedding light upon the political bargains and compromises that were struck in order to secure the passage of the

52. Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 222.

53. *See* Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 172.

54. *See* Brudney & Ditslear, *Tax Law and Workplace Law*, *supra* note 48, at 1253-55 & tbl.1 (reporting that legislative history was cited with significantly greater frequency in tax cases than in workplace law cases).

55. *Id.* at 1300, 1303, 1307-08, 1311.

56. *See id.* at 1270-75.

57. *See id.* at 1273-75, 1307-09.

58. *Id.* at 1311.

59. *See id.* at 1235-36, 1259-60, 1276.

60. *See id.* at 1246-47, 1276, 1280-83.

61. *Id.* at 1246-48, 1261-63, 1278-79, 1283.

law in question.⁶² It is no coincidence, they suggested, that the Justices were more likely to disagree over the meaning of legislative history in employment cases than in tax cases.⁶³ Disagreements over the meaning of legislative history are more likely, they argued, when it is used to shed light upon the nature of a political bargain, as in the employment law context, than when it is used for the purpose of drawing upon relatively technical and uncontroversial expertise, as in the tax context.⁶⁴

In contrast to the in-depth, issue-specific approach taken by Brudney and Ditslear, a newly published book by Frank Cross on the subject of statutory interpretation has tackled the full range of the Court's statutory interpretation practices across the entire legal spectrum.⁶⁵ Professor Cross analyzed a sample of more than 120 cases drawn from the total pool of statutory interpretation cases decided by the Court from 1994 through 2002.⁶⁶ His analysis devoted considerable attention to the Court's use of different "interpretive methods," including one that he calls "legislative intent."⁶⁷ This category of interpretive tools includes not only references to legislative history, but also explicit findings of textual ambiguity, and inferences from congressional action or inaction in response to judicial decisions.⁶⁸

The fact that his analysis focused upon the aggregate category of "legislative intent" largely prevents the reader from drawing conclusions about the Court's use of legislative history in particular. Cross did, however, address the specific question of whether the Justices cite legislative history for ideological or strategic reasons. He hypothesized that "liberal" Justices may be willing to "make greater use of less reliable sources" of legislative history "when necessary to support a liberal outcome."⁶⁹ Cross ultimately found no

62. *See id.* at 1260-62, 1276.

63. *See id.* at 1264-65 & tbl.5 (reporting that legislative history is more likely to be invoked by both the majority and dissenting opinions in nonunanimous workplace law cases than in nonunanimous tax cases).

64. *See id.*

65. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* (2009).

66. *Id.* at 142-43.

67. *Id.*

68. *See id.* at 143.

69. *Id.* at 171 (characterizing, inter alia, conference committee reports as a more "reliable" source of legislative history than statements by the sponsors of a bill); *see also* WILLIAM N.

support for this hypothesis: concluding that usage of “less reliable” sources by “liberal” Justices was not associated with a greater likelihood of reaching liberal results.⁷⁰ Nor did he find evidence of result-oriented, instrumental usage of legislative history by “conservative” Justices⁷¹: to the contrary, “liberal” and “conservative” Justices alike were more likely to reach liberal results when they made use of legislative history.⁷²

C. Legislative History Usage by the Lower Federal Courts

Not all of the empirical literature on the use of legislative history has focused exclusively on the Supreme Court. In a recent article, Professors Abramowicz and Tiller examined citations by lower court judges to a particular form of legislative history—namely, statements by legislators that are included in the Congressional Record.⁷³ They found that judges appointed by Republican presidents cited to the Congressional Record with approximately the same frequency as did Democratic appointees.⁷⁴ Intriguingly, however, they also found that judges appointed by either party were significantly more likely to cite politicians of the party that appointed a majority of judges on the circuit court responsible for reviewing their decisions.⁷⁵ Thus, for example, both Democratic and Republican appointees exhibited a significant tendency to cite the statements of Democratic lawmakers if they knew that their decisions would be reviewed by a circuit court dominated by Democratic appointees, and to cite the statements of Republican lawmakers if they knew that their decisions would be reviewed by a circuit court dominated by Republican appointees.

ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 222 fig.7.1 (1994) (depicting a “[h]ierarchy of legislative history sources”).

70. CROSS, *supra* note 65, at 171-72. Cross categorized Justices Breyer, Ginsburg, Souter, and Stevens as “liberal” but did not expressly list the “conservative” Justices. *Id.*

71. *Id.* at 172.

72. *Id.*

73. Michael Abramowicz & Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEGAL STUD. 419, 427-28 (2009).

74. *See id.*

75. *See id.*

Professor Cross's wide-ranging book on statutory interpretation also addressed the use of legislative history by the circuit courts, albeit not at great length.⁷⁶ On the basis of an electronic search for circuit court references to "legislative history" over the last thirty years, he reported that such references increased dramatically from 1980 through 1992 before declining in equally dramatic fashion.⁷⁷ Cross considered, and rejected, the possibility that the decrease in legislative history usage is attributable to the increasingly conservative composition of the circuit courts themselves; he notes that the increase in references to legislative history occurred at a time when the circuit courts were themselves becoming more conservative.⁷⁸ Nor has the overall decline in legislative history usage been offset by a shift to "more reliable" sources of legislative history: citations to conference committee reports, he observes, have declined in conformity with the overall trend.⁷⁹

D. Scholarly Assessment of the Impact of Justice Scalia on Legislative History Usage

To the extent that the existing literature on judicial use of legislative history contains a recurring theme, it is that the critiques leveled by Justice Scalia and other prominent jurists have exacted a heavy toll on the willingness of judges to cite legislative history. In particular, scholars have found repeatedly that a decline in the Supreme Court's overall use of legislative history roughly coincided with Justice Scalia's appointment.⁸⁰ Legislative history usage declined even more dramatically in the circuit courts following his appointment, albeit with a six-year lag.⁸¹ Professors Brudney and Ditslear put the point bluntly: "Justice Scalia has played an

76. See CROSS, *supra* note 65, at 184-85.

77. *Id.*

78. *Id.* at 186.

79. *Id.* at 185.

80. See ESKRIDGE, *supra* note 69, at 227 fig.7.2 (comparing the relative frequency with which the Court considered "legislative history" and "plain meaning" from 1986 through 1991, and concluding that the Court has been "somewhat more willing to find a statutory plain meaning and less willing to consult legislative history" since Justice Scalia's appointment); Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 222-24; Koby, *supra* note 28, at 386-87.

81. See CROSS, *supra* note 65, at 185.

important role in the Court's declining use of this resource—both through high profile resistance and criticism expressed in his own opinions, and through the influence he seems to have had on the writings of his colleagues.”⁸²

E. Two Overarching Weaknesses of the Judicial Behavior Literature

The weaknesses of the empirical literature on legislative history are not unique but rather reflect those of the empirical literature on judicial behavior as a whole. There are two such weaknesses in particular that are worthy of note. The first is a general lack of either theoretical or empirical understanding as to why judges use particular types of arguments. Although statistical analyses of judicial voting patterns and case outcomes are increasingly common, empirical analysis of the content of judicial opinions remains relatively rare.⁸³ Empirical studies of the reasons for which judges employ certain analytical techniques or justify their decisions in particular ways are rarer still and do not add up to a programmatic body of scholarship.⁸⁴

82. Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 229; *see also* Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 162 (arguing that “Justice Scalia’s regularly voiced absolutist stance has had an impact over time”).

83. *See, e.g.*, Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 266-68 (2006) (criticizing much of the political science literature for, *inter alia*, focusing on the analysis of bare outcomes in lieu of the content of opinions); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 385 (2007) (noting that “large-scale studies of judicial decisionmaking generally lack ... a satisfactory account of the law” as an “independent normative force”); Kirk A. Randazzo et al., *Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior*, 68 J. POL. 1006, 1008-09 (2006) (noting the lack of empirical studies that attempt to examine the impact of “traditional legal concepts” on judicial behavior) (quoting Donald R. Songer & Susan B. Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 979 (1992)); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 885 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)) (urging empirical scholars to turn “toward examining and classifying the content of judicial opinions rather than merely counting outcomes in cases”).

84. *See, e.g.*, Pamela Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 335-36 (2005) (identifying empirically a number of reasons for which the Justices cite the *Federalist Papers*); James F. Spriggs, II & Thomas G. Hansford, *The U.S. Supreme Court’s Incorporation and Interpretation of Precedent*, 36 L. & SOC’Y REV. 139, 140, 154 (2002) (finding empirical evidence that both the ideology of the

In the arena of statutory interpretation, for example, we do not know what characteristics of a statute, if any, increase the likelihood that the Justices will resort to legislative history. Likewise, it remains unclear whether legislative history is used for instrumental, ideologically motivated reasons, or a more benign view of the reasons for which judges use legislative history is warranted. Similar questions can be asked about what leads judges to use or reject specific analytical approaches in other contexts. One might ask why they embrace or spurn the use of cost-benefit analysis in the area of administrative law, for example, or why they might adopt balancing analyses as opposed to bright-line rules in the area of criminal procedure.

A second overarching weakness of the literature is the extent to which it has focused upon ideological explanations of judicial behavior to the exclusion of legal explanations.⁸⁵ The responsibility for this state of affairs is, in all likelihood, widely shared. Political scientists have been criticized for lacking the substantive legal sophistication to devise appropriate hypotheses and test them in an appropriate manner.⁸⁶ Notwithstanding how quick they have sometimes been to criticize the work that political scientists have produced, however, legal scholars have yet to fill this void, for reasons that are not difficult to divine. Many remain handicapped

Justices and considerations of stare decisis influence the likelihood that the Court will cite or accord negative treatment to a particular precedent).

85. See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1904-07 (2009) (acknowledging the formidable “methodological challenges” involved in the empirical study of appellate decision making, and urging scholars to employ methods and analyses that address the impact of legal and deliberative factors); Friedman, *supra* note 83, at 271 (arguing that it has become “old hat” to demonstrate that ideology influences judicial decisions, and that it is necessary to develop “a more balanced picture” that incorporates legal factors); Mark Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002) (noting that “[s]cholars have marshaled impressive evidence” regarding the “political” aspects of judicial behavior but have largely neglected the “jurisprudential” aspects); Sisk, *supra* note 83, at 884 (calling for empirical scholars to dedicate more effort to identifying the impact of “legal factors and legal reasoning” on judicial decision making); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 687-89 (2009) (charging that “[t]he judicial politics field was born in a congeries of false beliefs” that have “warped its orientation and development,” and that it remains characterized by a “distorting slant” that leads scholars “to exaggerate the influence of politics in judging”).

86. See sources cited *supra* note 83.

by a lack of familiarity with empirical methodology, to the point that the very term “methodology” is a mainstay of the social science lexicon yet remains alien to the typical law professor.⁸⁷ One also cannot rule out the possibility that many legal scholars harbor the view, consciously or otherwise, that legal argument is an art that fundamentally cannot be quantified, and that an accurate understanding of the ways in which judges argue their way to particular outcomes can only be acquired on an impressionistic basis by sophisticated legal observers of long experience and nuanced judgment.

III. THE DETERMINANTS OF JUDICIAL OPINION CONTENT: THEORIES AND HYPOTHESES

There are a number of possible explanations for the judicial use of legislative history. In this Part, we state these explanations in the form of empirically testable hypotheses, which we proceed to test below. Our goal in articulating and defining these hypotheses was not simply to answer the specific question of why Justices cite legislative history, however, but also to articulate a theoretical framework for addressing the weaknesses of the judicial behavior literature as a whole.⁸⁸ Accordingly, our hypotheses emphasize legal and deliberative as well as ideological factors and are framed in sufficiently general terms that they might be used to investigate why judges employ other types of arguments or analytical techniques in their opinions.

87. See, e.g., Edwards & Livermore, *supra* note 85, at 1904-07 (acknowledging the “methodological challenges” involved in the empirical study of appellate decision making); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6, 9 & n.22 (2002) (noting that “[t]he sustained, self-conscious attention to the methodology of empirical analysis so present in the journals in traditional academic fields . . . is virtually nonexistent in the nation’s law reviews,” and suggesting that “[l]ack of training may be the primary reason” for the chronic failure of law professors to produce empirical scholarship that satisfies basic social science standards); Peter H. Schuck, *Why Don’t Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 331-33 (1989) (identifying a host of reasons for which law professors fail to produce empirical work, including a lack of relevant training).

88. See *supra* Part II.E.

A. The Inherent Difficulty of the Legal Question: The Guidance-Seeking Hypothesis

All other things being equal, we might expect the Justices to resort to a wider range of techniques and authorities when faced with objectively difficult legal questions that cannot be resolved using a more limited set of tools. In the particular context of statutory interpretation, difficult legal questions are posed by statutes that are, in some objective sense, difficult to interpret. A statute might be difficult to interpret if, for example, it is especially complex or voluminous, or if it is antiquated and its meaning has been obscured by the passage of time. So too might a statute with which the Court has no prior experience, or one that is constantly being amended, such that the Court is constantly faced with novel questions of meaning. In other words, statutes that are inherently difficult to interpret ought to drive the Justices to make greater use of a broader range of interpretive tools and resources, including legislative history. We call this prediction the *guidance-seeking hypothesis*.

B. The Purpose and Function of the Opinion: The Precedent-Crafting Hypothesis

The likelihood that a Justice will cite legislative history in an opinion may depend to some degree upon the purpose that the opinion is being designed to serve. More specifically, legislative history usage may be motivated by the demands of legal craftsmanship inherent in constructing precedent that will provide adequate guidance in future cases. A comprehensive account of the legislative intent behind a statute, including discussion of the legislative history, may increase the precedential value of an opinion by anticipating and addressing future questions about the meaning of the statute.

If this argument is correct, then we should expect majority opinions to cite legislative history at a greater rate than either concurring or dissenting opinions. Because they are establishing precedent, the authors of majority opinions ought to feel a greater need to cover all relevant bases and hold themselves to a higher

standard of thoroughness than the authors of minority opinions. By contrast, a Justice who is writing merely to express reservations, disagreement, or other reactions in the form of a concurrence or dissent need not author an opinion that performs these functions and may even be able to take it for granted that any necessary acknowledgment or discussion of the legislative history can be found in the majority opinion. We call this prediction the *precedent-crafting hypothesis*.

C. The Effect of Precedent: The Jurisprudential-Regime Hypothesis

Another explanation for the content of judicial opinions is that judges may be bound by precedent to employ, or refrain from employing, a particular approach. Professors Richards and Kritzer use the term “jurisprudential regime” to describe a judicially self-imposed structure that is designed to guide subsequent decision making by identifying the relevant factors to be considered or the appropriate level of scrutiny to be applied in future cases.⁸⁹ The existence of a jurisprudential regime that requires judges to use or avoid a particular technique or device, such as legislative history, ought to have an impact on the extent to which judges actually use that approach. The hypothesis that judges write their opinions in a particular way because they are required to do so by precedent might be labeled the *jurisprudential-regime hypothesis*.

In the context of legislative history, one might think that the Court’s landmark decision in *Chevron U.S.A. v. Natural Resources Defense Council*⁹⁰ constitutes a relevant jurisprudential regime. Unfortunately, even if *Chevron* is rightly understood as bearing on the propriety of legislative history usage, it is difficult to say with certainty what the impact of the decision ought to be. The conventional understanding of *Chevron* is that it prescribes a two-step analysis for reviewing agency interpretations of federal statutes. In the first step, the reviewing court is supposed to determine whether Congress has “directly spoken to the precise question at issue.”⁹¹ If

89. Richards & Kritzer, *supra* note 85, at 305-06.

90. 467 U.S. 837 (1984).

91. *Id.* at 842.

not, the second step of the analysis directs the reviewing court to defer to the agency's construction of the statute as long as it is "reasonable."⁹² One view of *Chevron* would be that it ought to curtail the use of legislative history. Step two of the *Chevron* analysis, it might be argued, adopts a rule of deference that would seem to obviate or even preclude resort to legislative history: as long as the agency has behaved reasonably, there should be no occasion for the reviewing court to consider legislative history. Another view of *Chevron*, however, would be that it actually encourages reviewing courts to consider legislative history. *Chevron* itself appears to demonstrate that the correct way to determine at step one of the analysis whether Congress has spoken to a particular question, or to assess at step two whether the agency's interpretation is reasonable, is to examine the legislative history.⁹³

A majority of the cases in our data concerned, directly or indirectly, an agency interpretation of a federal statute. Accordingly, if it is true that jurisprudential regimes change the way in which opinions are written, it should not surprise us to observe a different pattern of legislative history usage in post-*Chevron* opinions than in pre-*Chevron* opinions.

D. The Dynamics of Disagreement: The Outcome-Justifying and Tit-for-Tat Hypotheses

Judicial opinion writing frequently assumes the character of open debate. It is normal, if not almost obligatory, for a dissenting opinion to directly criticize the arguments made in a majority opinion, and vice versa. Judges are expected to defend their own arguments and conclusions and to rebut the arguments made by their opponents. Failure to do so can reasonably be construed as evidence of the weakness of one's position, if not also a degree of intellectual laziness. One might therefore expect that a Justice's

92. *Id.* at 843-44.

93. *See id.* at 851-53 (examining the legislative history for evidence that Congress had a specific meaning in mind when it employed the term "stationary source" in the Clean Air Act Amendments); *id.* at 862-64 (analyzing the legislative history to determine whether EPA regulations constituted a "reasonable" interpretation of the statutory language); *see also* Merrill, *supra* note 32, at 353 (arguing that step one of the *Chevron* analysis calls for courts to discern the "intentions" of the legislature by examining the legislative history).

willingness to make a particular type of argument, such as one based on legislative history, will depend in part upon what other members of the Court have argued.

There are two ways in which the dynamics of disagreement might influence legislative history usage. First, disagreement over the meaning of a statute may drive the Justices to reach for a greater range of tools, including legislative history, both to bolster their own conclusions and to undermine the conclusions of others. In other words, if Justice X and Justice Y disagree over the meaning of a statute, the mere fact that they disagree ought to increase the likelihood that each of them will cite legislative history. We call this possibility the *outcome-justifying hypothesis*. If it is correct, then we would expect to see greater legislative history usage in nonunanimous decisions than in unanimous decisions.

Second, a Justice may feel compelled to respond to arguments of a particular type by making a countervailing argument of the exact same type. Let us call this possibility the *tit-for-tat hypothesis*. If Justice X cites legislative history in support of his conclusion, the tit-for-tat hypothesis predicts that Justice X's use of legislative history will prompt Justice Y to fight fire with fire by fashioning a legislative history argument of his or her own.⁹⁴ If this hypothesis is correct, then the likelihood that a given opinion will cite legislative history ought to rise with the number of other opinions in the same case that cite legislative history.

E. The Impact of Ideology: Sincere Versus Instrumental Ideological Behavior

Needless to say, legal and deliberative factors alone may not adequately explain the content of judicial opinions or the Court's statutory interpretation practices. Political scientists have long emphasized the impact of ideology on judicial behavior.⁹⁵ There are a number of ways in which ideology might influence legislative

94. See Corley et al., *supra* note 84, at 335-36 (hypothesizing, and finding "very strong evidence" of a "dueling citations" dynamic wherein an effort by one Justice to "lay claim to the framers' intent" by citing the *Federalist Papers* drives other Justices to make similar efforts).

95. See sources cited *supra* note 85 and accompanying text.

history usage in particular. For analytical purposes, it may be especially useful to draw a distinction between sincere and instrumental ideological behavior.

1. The Sincere Ideological Behavior Hypothesis

A simple possibility is that liberal Justices sincerely like to cite legislative history, whereas conservative Justices are sincerely averse to doing so. In other words, liberals may be ideologically inclined to use legislative history regardless of whether it helps them to reach liberal results, whereas conservatives may be ideologically inclined to shun legislative history even when it might help them to reach conservative results.

It might be objected that a Justice's views on the propriety of legislative history are more accurately characterized as a matter of judicial philosophy or jurisprudential approach than as a reflection of political ideology.⁹⁶ If we were to find empirically, however, that conservative Justices systematically shun legislative history while liberal Justices systematically embrace it, such a finding would cast at least some doubt upon the notion that a Justice's stance toward legislative history can be neatly separated from his or her ideology. It would suggest instead that holding a particular attitude toward the use of legislative history may simply be part of what it means for a Justice to be ideologically liberal or conservative.

2. The Instrumental Use Hypothesis

As noted previously, critics of legislative history have long voiced the suspicion that the use of legislative history enables judges to reach the results that they prefer on policy or ideological grounds.⁹⁷ This argument rests upon two assumptions. First, it assumes that legislative history is highly manipulable, in the sense that it is always possible for judges to find legislative history that supports

96. See Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 139-40 (2009) (discussing the difficulty involved in classifying a preference for a particular "interpretive method" or the adoption of a particular "judicial philosophy" as either "legal" or "ideological" in character).

97. See *supra* notes 18-20 and accompanying text.

whatever conclusion they would like to reach.⁹⁸ Second, it assumes that judges exploit this manipulability in ideologically motivated ways. If these assumptions are true, then we might expect to see a pattern of liberal Justices arriving at more liberal outcomes and conservative Justices arriving at more conservative outcomes whenever legislative history is cited.

To date, scholars have found little systematic evidence to support this hypothesis. Indeed, their findings appear to suggest the opposite.⁹⁹ In this Article, we test this hypothesis anew on the basis of more comprehensive data, while employing a broader set of control variables.

3. The Ideological Alignment Hypothesis

Another possibility is that judges are more likely to make use of legislative history when the legislative history is inherently favorable to the conclusion that they wish to reach. For example, one might expect the legislative history of a civil rights statute to demonstrate a more liberal animating purpose than that of a statute limiting habeas corpus jurisdiction. If so, then reliance upon legislative history ought to produce different ideological results depending upon the statute at issue: it should promote a more liberal outcome when the Court is interpreting a civil rights statute and a more conservative outcome when it is interpreting a jurisdiction-stripping statute.¹⁰⁰ A liberal Justice might therefore choose to use legislative history only when interpreting the civil rights statute, whereas a conservative Justice might do so only when interpreting the jurisdiction-stripping statute. To frame the hypothesis in more general terms, the Justices should be more likely

98. See Wald, *supra* note 19, at 214 (quoting Judge Leventhal's observation that the use of legislative history is akin to "looking over a crowd and picking out your friends").

99. Professor Cross finds that both liberal and conservative Justices are more likely to reach liberal results when using legislative history, *see supra* notes 69-71 and accompanying text, while Professors Brudney and Ditslear report that, in the employment law context, the use of legislative history by liberal Justices is correlated with more conservative results, *see supra* note 51 and accompanying text.

100. *Cf. Lin, supra* note 18, at 580-81 (arguing that the Court's failure to consult legislative history when interpreting environmental statutes has led to more conservative outcomes).

to cite legislative history when their own ideological preferences are aligned with those of the Congress that enacted the statute at issue.

F. The Possibility of Intellectual Leadership: The “Scalia Effect” Hypothesis

Previous studies have promoted the conventional wisdom that Justice Scalia has succeeded, perhaps singlehandedly, at discouraging his colleagues from using legislative history.¹⁰¹ This conclusion appears to be based largely on the fact that Justice Scalia’s appointment to the Court coincided with an overall decline in legislative history usage on the Court.¹⁰² In order to test correctly for the existence of a “Scalia effect” on other members of the Court, however, it is necessary to control for the effect of other highly relevant variables, such as the increasing conservatism of the Court’s overall membership, or the fact that Justice Scalia himself is responsible for authoring many of the opinions that fail to cite legislative history.¹⁰³ Our data enables us to control for precisely these variables while testing for the existence of a “Scalia effect.”¹⁰⁴

Whether Justice Scalia has discouraged legislative history usage is relevant to the larger question of his overall influence on other members of the Court, which remains the subject of considerable interest and speculation. Lawrence Baum observes, for example, that Justice Scalia’s “personal style ... seem[s] likely to reduce his

101. See *supra* Part II.D.

102. See *supra* Part II.D.

103. See Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 222 (reporting that Justices Scalia and Thomas alone have been responsible for nearly one-half of the decline in legislative history usage in the Court’s employment law decisions since 1986).

104. The “Scalia effect” that is the subject of our hypothesis—namely, the possibility that Justice Scalia has succeeded at discouraging other Justices from using legislative history—is distinct from the more complicated “Scalia Effect” hypothesized by Professors Brudney and Ditslear. Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 122. They raise the possibility that strategic behavior may create an illusion that liberal Justices cite legislative history in order to reach liberal results. Liberal Justices, they argue, may strategically refrain from citing legislative history when they reach pro-employer results in order to win Justice Scalia’s support, but these same liberal Justices have no reason to refrain from citing legislative history when they are reaching pro-employee results that are unlikely to secure Justice Scalia’s support regardless of what interpretive methodology is used. The result, they suggest, is that liberal Justices may appear to use legislative history in result-oriented ways when, in fact, they may be adjusting their opinion-writing approaches in an effort to garner Justice Scalia’s support. See *id.*

influence,” and that his “behavior sometimes creates frictions with other Justices.”¹⁰⁵ The “best example” of the “substantial influence” that Justice Scalia nevertheless exercises, according to Baum, is the support that he has supposedly been able to attract for his views on legislative history.¹⁰⁶ Thus, were it to emerge that Justice Scalia has failed to influence other members of the Court on what is clearly one of his signature issues, such a finding would bode poorly for the view that Justice Scalia is an effective intellectual leader on the Court.

IV. METHODOLOGY AND DATA COLLECTION

A. Data on the Opinions

We sought to compile a far-reaching and comprehensive data set that would enable us to tackle all of our hypotheses about the Court’s usage of legislative history. To that end, we began by identifying all Supreme Court statutory interpretation cases decided from the 1953 term through the 2006 term. We isolated these cases using the United States Supreme Court Judicial Database created by Harold Spaeth, which includes variables that indicate whether a case involved statutory interpretation and, if so, what statute was at issue.¹⁰⁷ Although the manner in which some of these variables are coded has come under increasing scholarly criticism,¹⁰⁸ the

105. LAWRENCE BAUM, *THE SUPREME COURT* 136 (9th ed. 2006).

106. *Id.*

107. The Spaeth database may be downloaded from the Judicial Research Initiative (JuRI) website at <http://www.cas.sc.edu/poli/juri/sctdata.htm>.

108. See, e.g., Fischman & Law, *supra* note 96, at 161-62 (canvassing recent criticisms of the manner in which the Spaeth database purports to measure judicial ideology); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 776-78 (2009) (criticizing, and seeking to correct, the Spaeth database’s coding of the ideological direction of Supreme Court decisions); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L. J. 477, 488-530 (2009) (arguing that scholars who wish to rely upon the variables relating to substantive law in the Spaeth database face two problems: “(1) the impossibility of knowing how many (and which) legal issues arise in a particular case and (2) the difficulty of using the Database to study the way different areas of law interact with or affect each other”); Anna Harvey, What Makes a Judgment “Liberal”?: Coding Bias in the United States Supreme Court Judicial Database (June 15, 2008), available at <http://ssrn.com/abstract=1120970> (questioning the Spaeth database’s coding of the ideological direction of Supreme Court statutory interpretation decisions).

Spaeth database is unsurpassed in comprehensiveness and scope and remains the standard source of raw data for empirical analysis of the Court's decisions.¹⁰⁹

From the initial universe of the 2723 cases that we identified in this manner, we then narrowed the data by focusing on statutes that are interpreted with some frequency by the Court. Specifically, we limited our analysis to cases involving statutes that were interpreted by the Court nine or more times over the period in question. Our decision to budget our finite time and resources in this manner, rather than to analyze a random sample of statutes, was guided by two considerations. On the one hand, the nature of our project required us to generate a wealth of unique data on the statutes that we analyzed, and information about statutes that are most often the subject of controversy is surely of greater interest and value to the legal and academic communities than information about a random sampling of potentially obscure statutes.

On the other hand, we were mindful of the possibility that, in selecting statutes for analysis on the basis of how often they had been interpreted, we might inadvertently introduce a selection bias into our results: if the causes of legislative history usage happen to be correlated with how often a statute is interpreted, then the study of only frequently interpreted statutes can yield a misleading picture of the causes of legislative history usage.¹¹⁰ These concerns are perhaps assuaged, however, by our finding that the Justices do not appear to approach infrequently interpreted statutes any differently than they approach frequently interpreted ones. In particular, we found no evidence that the Justices are either more or less predisposed to consult legislative history when interpreting a statute for the first time.¹¹¹ There is no statistically significant

109. See Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 812 (2003) ("The Spaeth databases are so dominating in [political science] that it would certainly be unusual for a refereed journal to publish a manuscript whose data [about the Supreme Court] derived from an alternate source. Even in the law reviews, virtually no empirical study of the U.S. Supreme Court produced by political scientists fails to draw on them.").

110. See GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 128-38 (1994) (discussing the problem of selection bias and the various forms that it can take).

111. See *infra* note 133 and accompanying text (setting forth the hypothesis that the novelty of a statute affects the likelihood of legislative history usage, and describing how

correlation between the fact that the Court has previously interpreted a statute and the likelihood that a Justice will use legislative history when interpreting that statute. This is the case, moreover, regardless of whether one controls for other variables that do have a significant impact on legislative history usage.

The forty statutes that met the criterion of relatively frequent interpretation ran the entire gamut of federal law.¹¹² The most frequently interpreted statute of all—if one can indeed call it a statute, as opposed to an ongoing agglomeration of enactments—was the Internal Revenue Code, which was the subject of some 373 separately authored opinions over the study period. The least frequently interpreted statute among this group was the Clean Air Act, which barely made the nine-case cutoff. This culling of the data left us with 1479 cases, which in turn yielded 3095 individually authored opinions for analysis.¹¹³ Relying again upon the information in the Spaeth database, we identified each of these opinions as a majority opinion, a regular concurrence, a special concurrence (meaning agreement with the disposition but not the reasoning of the Court), or a dissent.¹¹⁴

Each opinion was then coded with a variable indicating whether the opinion made any reference at all to the legislative history of the statute under consideration.¹¹⁵ Our goal was to identify any and all references in these opinions to legislative history, ranging from the House and Senate reports that accompany legislation to floor debates and the Congressional Record. To do so, we searched the opinions electronically for terms or citations commonly associated with the use of legislative history.¹¹⁶ Our search string expanded

novelty was measured for purposes of empirical testing); *infra* tbl.6 (reporting logit regression results indicating that novelty is not a statistically significant predictor of legislative history usage).

112. See *infra* app. III & tbls.1-3 (listing the relevant statutes).

113. Excluded from this total are seven per curiam opinions, which by definition cannot be attributed to a particular Justice.

114. A very small number of opinions—ten dissents from denial of certiorari, and one jurisdictional dissent—fell into none of these categories.

115. We also excerpted the portion of the opinion citing legislative history for review by other coders and conducted intercoder reliability tests.

116. Specifically, we searched the opinion, as set forth in Westlaw's SCT database, for the following terms. Although Westlaw is not case-sensitive, it was necessary to employ some redundant search terms to ensure that spacing discrepancies did not cause us to miss any references to legislative history: "legislative report;" "legislative history" "committee report"

upon similar strings used in prior research on judicial use of legislative history.¹¹⁷ Each of the opinions flagged by the electronic search was then read multiple times to confirm that each apparent reference to legislative history was genuine and did in fact relate to the statute at issue, as identified by the Spaeth database.¹¹⁸ We found that 1482 of the opinions, or 47.9%, contained some reference to the legislative history of the statute in question. We also sought to track the extent to which the Justices may have used legislative history in response to its use by other Justices. This we did simply by noting, for each opinion, whether any other opinion in the same case had made some reference to legislative history.

It is possible that our electronic search may not have caught every single reference to legislative history. Citations to testimony before a congressional committee would only have been captured if the opinion referred to the usual records of congressional business, such as the United States Congressional and Administrative News or committee hearings, or if the opinion itself characterized the testimony as legislative history. Some opinions may have referred to legislative history without necessarily citing it in such a manner. Furthermore, we relied upon the Court's citation practices to be relatively consistent with the practices outlined in the Bluebook.¹¹⁹

"u.s.c.c.a.n." "floor debate" "committee statement" "committee hearing" "legislative counsel" "h.r." "s.j. res." "cong. rec." "s. res." "h.r.j. res." "s. doc. no." "s. rep." "usccan" "cong.rec." "s.rep.no." "h.r.rep.no." "s.rep. no." "h.r.rep. no." "house report" "senate report" "admin. news" "admin.news" "senate committee" "house committee" "h. r. rep." "sess." "conf." "leg. hist." "leg.hist."

117. For an example of the work that informed the selection of our search terms, see Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 862 n.95 (2006). Professors Abramowicz and Tiller simply searched for references to the Congressional Record. See Abramowicz & Tiller, *supra* note 73, at 427. Older studies, such as that of Professor Zeppos, did not rely upon electronic searches at all. See Zeppos, *supra* note 33, at 1088.

118. All opinions in all cases identified by our electronic search as containing references to legislative history were examined twice, first by a team of research assistants under the supervision of Professor Zaring and then again by a team of law students under the supervision of Professor Law.

119. Accordingly, if the Court cited to legislative history in an unconventional way, and did not refer to the congressional activity as "legislative history" or something like it, we may have missed it. This concern arises partly because of the large and comprehensive nature of our data set. The fact that our data spans several decades enabled us to evaluate whether the use of legislative history by the Court has increased or decreased over time, at least with respect to statutes that are interpreted with some regularity. However, because citation practices have become more formal and consistent over time, and accordingly more likely to

Underinclusiveness is a risk inherent to all electronic searches of this nature, however, and our own search terms were more expansive than those employed in earlier studies.¹²⁰ Accordingly, there is little reason to believe that we missed a significant number of references to legislative history by members of the Court. Moreover, we can say with confidence that our data is unlikely to be over-inclusive in the sense of containing false positives, or opinions that are marked as containing legislative history usage when in fact they do not do so. Because all of the opinions that our search flagged as containing some reference to legislative history were examined at least twice, it is unlikely that any false positives escaped our attention.¹²¹

Needless to say, not all references to legislative history can be treated interchangeably for analytical purposes. In particular, there is an important distinction between the practice of using legislative history to interpret statutes, on the one hand, and criticism of that practice, on the other. If our goal is to understand why Justices rely upon legislative history as a tool of statutory interpretation, it becomes important to distinguish between, for example, an opinion by Justice Breyer that relies affirmatively upon legislative history in order to interpret a statute, and an opinion by Justice Scalia that mentions legislative history for the purpose of lambasting Justice Breyer's willingness to rely upon it. In this vein, Professor Cross has opined that up to 25% of the Justices' references to a particular "interpretive method" may in fact be critical of the method in question—a conspicuously high estimate that, if accurate, should give pause to empirical researchers who merely count up references to a particular approach without also coding their valence.¹²² At the same time, however, Cross's own assessment of legislative history usage in circuit court opinions suggests that actual judicial criticism of this particular practice may be very rare.¹²³

be captured by our search string, it is possible that we undercounted earlier references to legislative history that may have taken less conventional forms.

120. *See supra* note 117.

121. *See supra* note 118 (describing our duplicative approach to coding).

122. CROSS, *supra* note 65, at 143. Cross does not, however, specify the extent to which the Justices have been critical of legislative intent as opposed to other interpretive methods. *Id.*

123. *See id.* at 184 (discussing the results of a Westlaw search of all circuit court opinions over a thirty-year period for the term "legislative history," and indicating that "[o]nly about

To address this issue, we coded each opinion that contained some reference to legislative history with an additional variable indicating whether the opinion explicitly questioned or criticized the use of legislative history. We further distinguished between opinions that cited legislative history in a neutral manner, in the sense of not taking any explicit position on the desirability of the practice, and those that contained some explicit endorsement or defense of the practice. To minimize the risk that the coding of this information was dependent upon subjective evaluations that might vary from one person to another, we took the following steps. First, we did not attempt to distinguish between opinions that criticized or praised legislative history usage in a very obvious way, and those that did so only in passing. Instead, we adopted a bright-line rule that any language expressing a view on the usefulness or propriety of considering legislative history was sufficient to qualify the entire opinion as either critical or supportive of the practice.¹²⁴ Second, each opinion was coded by two law students working separately from each other, and the results of their work were compared afterward. Reassuringly, their initial coding decisions were in

1% of the references to 'legislative history' ... were negative").

124. By way of example, consider the following excerpt from Justice Harlan's partial dissent in *Allen v. State Board of Elections*:

The majority is left, then, relying on its understanding of the legislative history. With all deference, I find that the history the Court has garnered undermines its case, insofar as it is entitled to any weight at all. I refer not only to the unequivocal statement of Assistant Attorney General Burke Marshall, which the Court concedes to be diametrically opposed to the construction it adopts. For the lengthy testimony of Attorney General Katzenbach, upon which the Court seems to rely, actually provides little more support for its position. Mr. Katzenbach, unlike his principal assistant, was never directly confronted with the question raised here, and we are left to guess as to his views. If guesses are to be made, however, surely it is important to note that though the Attorney General used many examples to illustrate the operation of § 5, each of them concerned statutes that had an immediate impact on voter qualifications or which altered the manner in which the election was conducted. One would imagine that if the Attorney General believed that § 5 had the remarkable sweep the majority has now given it, one of his hypotheticals would have betrayed that fact.

393 U.S. 544, 590-91 (Harlan, J., concurring in part and dissenting in part) (internal citations omitted). It is clear from this excerpt that Justice Harlan referred to legislative history mostly for the purpose of supporting his analysis on the merits. However, because he prefaced his analysis by casting doubt on whether the legislative history was "entitled to any weight at all," the opinion was coded as critical of legislative history usage rather than neutral. *Id.* at 590.

agreement approximately 96% of the time. The few opinions that generated disagreement among the coders tended to be those that contained a very minor snippet of language—perhaps just a passing phrase—that could be interpreted as either criticism or endorsement,¹²⁵ and the coders generally agreed upon the proper coding of such opinions following further discussion amongst themselves.

B. Data on Characteristics of the Statutes

Our next step was to compile data on the formal characteristics of the forty statutes that were interpreted with some degree of frequency by the Court. We sought in particular to identify statutory characteristics that could plausibly account in an innocent, legal, and nonideological way for variations in the Court's use of legislative history. We identified six characteristics of this type: the age of the statute, its bulk, its complexity, its novelty, its obscurity, and the extent to which it had been amended. In devising ways to measure these characteristics, we were guided by considerations of objectivity, reliability, ease of implementation, and ease of interpretation.

The age of each statute was ascertained using a combination of sources. Our first step was to consult a combination of online sources, including the websites of relevant federal agencies, Wikipedia, and Westlaw. We then reconciled that information with the date that each section of the statute first appeared in the prefatory annotations of the United States Code Annotated or, in some cases, with the first date as of which a public law mentioned the popular name of the statute. The oldest statute in our data proved to be the Bankruptcy Code, which dates back in some form to 1841.

We defined the bulk of a statute as its length in words.¹²⁶ The statutes ranged considerably in length, from under 200 words (in the case of 42 U.S.C. § 1983) to over 3,500,000 words (in the case of the Internal Revenue Code). The resulting word counts reflect the

125. For an example of such an opinion and an explanation of how it was ultimately coded, see note 124 above.

126. We obtained this information by downloading a full-text version of the statute from Westlaw and subjecting it to Microsoft Word's word count feature.

length of each statute net of all amendments as of 2007. We did not attempt to capture changes in the net length of statutes that have occurred between the time they were interpreted by the Court and 2007. Some statutes have changed little in size over time: the shortest of the statutes for which we collected data—namely, 42 U.S.C. § 1983—has scarcely changed in length since its initial enactment in 1871. Others changed significantly, at least in absolute terms: most notably, the Internal Revenue Code grew from around 420,000 words in length to more than 3,500,000 words over the study period. In relative terms, however, it is doubtful that much has changed: the Internal Revenue Code was a heavyweight for the entire period in question, while 42 U.S.C. § 1983 has always been a flyweight.

There are many reasons to think that the sheer bulk of a statute will influence the likelihood of legislative history usage. A priori, however, it is not entirely clear whether one should expect its overall effect to be positive or negative. On the one hand, shorter statutes are not necessarily easier to interpret than longer statutes. They can pose special interpretive challenges of their own that call for judges to consult legislative history: the text of a short statute may offer judges very little in the way of guidance and thereby necessitate resort to external sources of information about the meaning of the law to fill in what are, quite literally, gaps in the statutory language.

On the other hand, longer statutes contain, in a literal sense, more room for ambiguity and inconsistency. It is simply a fact that longer statutes contain more language to be interpreted and more provisions to be reconciled with one another, and it is precisely for such reasons that judicial resort to legislative history would seem most appropriate or necessary from a strictly legal perspective. One might also expect that, *ceteris paribus*, longer statutes are likely to cover more substantive ground and to serve a greater number of policy goals.¹²⁷ It may be harder for judges to discern a relevant purpose or principle capable of guiding the interpretation of a statute when the statute in question contains many provisions that

127. See Randazzo et al., *supra* note 83, at 1016 (using statute length as a proxy for “detail,” and finding that more “detailed” statutes curtail the influence of ideology on judicial decision making by imposing more constraint on judges).

embody a multitude of goals and principles. The sheer scope and ambition of a long statute may thus encourage judges to seek extrinsic help in the form of legislative history. To the extent that longer statutes are indeed more likely to serve multiple functions or advance multiple goals, they should also be more likely to prompt the use of legislative history as an interpretive aid. Length may also be a proxy for the extent to which a given area of law is inherently complicated and requires Congress to devise many moving parts and address an elaborate administrative overlay—as was indeed the case with all of the longer statutes in our data, such as the Internal Revenue Code, the Immigration and Nationality Act, the Clean Air and Water Acts, and ERISA. If statute length does in fact reflect a complex regulatory environment, that is yet another reason to expect that it will tend to increase legislative history usage.

It is much easier to ascertain, *a priori*, what the effect of statutory complexity should be on the likelihood of legislative history usage: more complex statutes are by definition more difficult to interpret and should therefore drive the Justices to consult legislative history more often. The challenge lies, instead, in defining statutory complexity in such a way that it captures what is of underlying interest yet can also be measured objectively and reliably.¹²⁸ Until recently, it would have been difficult to identify an objective and convenient way to rate the complexity of large quantities of text. Fortunately, widely available content-analysis software tools make it possible to execute a linguistic, fully rule-driven approach to the measurement of statutory complexity.¹²⁹ These tools compute the readability of a given text using objective parsing rules that capture how difficult a text is to read from a grammatical and linguistic perspective, with no need for human intervention in the form of subjective coding decisions. In this vein, we measured the complexity of each statute

128. One approach that some scholars have taken, arguably with some success, is to treat the length of a statute as a proxy for the level of detail that it contains, and thus to equate statute length with complexity. *See id.* at 1009. However, it is possible to imagine a statute that is very long, but not especially complex. Accordingly, we treat the length and complexity of a statute as separate concepts to be measured in different ways, notwithstanding the likelihood that length and complexity are correlated.

129. For an introduction to content-analysis software and a discussion of the promise that it holds for the study of law and courts, see Michael Evans et al., *Recounting the Courts? Applying Automated Content Analysis To Enhance Empirical Research*, 4 J. EMPIRICAL LEGAL STUD. 1007, 1008-10 (2007).

in our data by computing its Flesch-Kincaid grade level. This score, a widely used linguistic measure of the readability of a text, is calculated from two ratios: the ratio of words to sentences, and the ratio of syllables to words.¹³⁰ Software for computing such scores is widely available at no cost for a variety of computing platforms.¹³¹

The fact that a statute happens to be novel, from the Court's perspective, might also be expected to increase the likelihood of resort to legislative history. It is reasonable to suspect that the Justices will feel a greater need to resort to a wider range of interpretive aids, such as legislative history, when facing a particular statute for the first time. In such situations, legislative history may serve in particular as a substitute for prior case law. To the extent that the Court has interpreted the statute on previous occasions, those prior interpretations may ease the task of subsequent interpretation. Indeed, principles of stare decisis may require the Court to accept a prior interpretation as controlling, and to treat certain questions of statutory meaning as resolved, without regard to what legislative history might say. In the absence of prior experience with the statute, however, the Justices may feel a greater need to turn to other sources of information about the purpose and meaning of the statute. Our measure of statutory

130. See MICHÈLE M. ASPREY, *PLAIN LANGUAGE FOR LAWYERS* 297-99 (3d ed. 2003); Rudolf Flesch, *A New Readability Yardstick*, 32 J. APPLIED PSYCHOL. 221, 223-26 (1948). We chose the Flesch-Kincaid grade level over a closely related alternative, the Flesch reading ease score, for several reasons. First, although both scores are a function of the same two ratios, the Flesch-Kincaid grade level increases as the difficulty of a text increases, whereas the Flesch reading ease score decreases. In order for the Flesch reading ease score to constitute an intuitive measure of complexity, we would have to first invert its scale, which need not be done with the Flesch-Kincaid grade level score. Second, the scale of the Flesch reading ease scores is ill-suited to the measurement and comparison of extremely complex statutes. Some of the statutes in our data are so complex that they received Flesch reading ease scores of 0. Such statutes are not equally complex; the problem, rather, is that the scale of the Flesch reading ease scores does not allow for scores below 0. There is no such problem with the upper bound of the Flesch-Kincaid grade level scores: none of the statutes in our data received the highest possible score of 100 on that scale. Even the Flesch-Kincaid grade level scores are not designed, however, to measure extremely high levels of reading difficulty. See *infra* note 151 and accompanying text.

131. We used a stand-alone, open-source software package called *Flesh* to compute Flesch reading ease and reading level scores. *Flesh*, Sourceforge.net, <http://sourceforge.net/projects/flesh> (last visited Feb. 18, 2010). The ability to compute both types of Flesch scores is also built into the grammar and proofreading tools that are included with current versions of Microsoft Word.

novelty was simple: a statute that was enacted within the time period covered by our data—namely, from 1953 onward—and had never previously been interpreted by the Court was coded as a novel one.¹³²

To assess whether a statute was particularly obscure—in the sense of attracting little attention from judges and litigants—we collected time-series data on the number of times that the courts of appeals had cited the popular name of the statute.¹³³ For each

132. Statutes enacted prior to 1953 were coded as lacking novelty because we lacked data on whether or how often the Court had interpreted such statutes prior to 1953, and we therefore could not determine which, if any, were truly novel from the Court's perspective. An obvious alternative approach to measuring statutory novelty would have been to measure, for every statute and every case, the exact number of times that the statute had been interpreted by the Court prior to that case. Although such a measure would be more exact and would also cover a greater number of statutes, collection of the necessary data would have been prohibitively difficult. As noted previously, we relied for data collection purposes on Professor Spaeth's Supreme Court database, which only dates back to 1953. To correctly identify all Supreme Court statutory interpretation decisions prior to that time would have required a staggering effort. An initial search on Westlaw suggests, for example, that the Internal Revenue Code had been cited in over 1000 Supreme Court decisions; meanwhile, the Court has resolved countless habeas corpus questions since the Civil War enactment of the Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755. To collect reliable data on the frequency with which each of these statutes had been interpreted by the Supreme Court would have required us to identify and examine every case in which they were cited by the Court. A data collection project of such magnitude was not within our time and resource constraints.

We did, however, have data on the frequency with which statutes enacted from 1953 onward had been interpreted. Using this subset of our data, we used logit regression to estimate a statistical model that employed the exact number of times each statute had been interpreted as a predictor of legislative history usage. *See infra* note 169. This analysis yielded no noteworthy results, but this may be attributable to the fact that it made use of less than one-quarter of our data. *See infra* note 170.

We note also that the question of when the Court first considered a particular statute may in some cases be open to debate, as in the case of Title VII of the Civil Rights Act of 1964. In *Phillips v. Martin Marietta Corp.*, the Court decided, in a brief per curiam opinion, to vacate and remand the case for further fact-finding and did not purport to resolve any questions surrounding the meaning of Title VII. 400 U.S. 542, 544 (1971). Justice Marshall filed a concurrence in which he argued, partly on the basis of the legislative history, that the per curiam opinion left open the possibility of a misreading of the statute on remand. *Id.* at 544-45 (Marshall, J., concurring). In *Griggs v. Duke Power Co.*, handed down two months later, a unanimous Court did tackle the interpretation of Title VII on the merits and cited legislative history in doing so. 400 U.S. 424, 429-31 (1971). Our coding rules led us to code the earlier opinions in *Phillips*, but not the later opinion in *Griggs*, as involving the interpretation of a novel statute.

133. After searching for the popular name in Westlaw's CTA database, we downloaded the results into the Concordance software package and obtained a frequency count for each time in a given year that any federal court of appeals issued an opinion referencing the statute's popular name (as defined by the United States Code's popular name table).

Supreme Court opinion in our data set, we calculated a cumulative count of how often the statute had been mentioned by popular name in the courts of appeals from 1953 through the year in which the Court confronted the statute. As of 2006, this citation count ranged from a high of 55,687 in the case of 42 U.S.C. § 1983 to a low of 4403 in the case of the Foreign Sovereign Immunities Act. The purpose of this exercise was not, of course, to capture every citation to a given statute by the courts of appeals; rather, it was designed to show roughly how often an appellate court might dedicate sufficient attention to a statute to warrant mention of its popular name.

Finally, to measure how much a given statute had been amended, we performed an electronic search of the prefatory annotations to the United States Code Annotated for each section of the statute in question. These prefatory annotations list, by date, all of the public laws that have ever amended a given section of a statute.¹³⁴ We then calculated a cumulative count of how often any section of a particular statute had been amended from 1953 through the year in which the Court interpreted the statute in question. Thus, for example, if Congress decided in a particular bill to amend ten sections of the Immigration and Nationality Act, the amendedness count of the Immigration and Nationality Act increased by ten. By contrast, if Congress chose to amend only one section, then the amendedness count increased by only one. In this manner, our measure of amendedness reflects both the frequency and extent of amendments made to the statute as a whole, albeit imperfectly.¹³⁵ An alternative approach would have been to adjust for the length of the statute, on the premise that a longer statute is inherently more likely to be the subject of more frequent and extensive amendment. When we tried adjusting amendedness in this manner, however, we found that the resulting variable was not a statistically significant predictor of

134. Using the Concordance software package, we then obtained a frequency count for every mention of a year in these annotations. The resulting count captured the number of times that any part of the section at issue was amended.

135. The number of sections amended does not correspond exactly to the importance or extent of the changes being made. Congress might, for example, make a minor change to a single section of a statute that in turn requires purely technical conforming amendments to every other section of the statute. Conversely, Congress might change a single word in a single section of a statute—such as by adding the word “gender” to an antidiscrimination statute—that has an enormous impact on the meaning of the statute as a whole.

legislative history usage and made no substantive difference to our results, regardless of whether it was included in addition to or in lieu of the unadjusted measure.¹³⁶

C. Data on Ideological Factors

Finally, we collected information on the ideological leanings of the Justices themselves, the ideological direction of the Court's decisions, and the ideological character of the Congresses that enacted each of the statutes in our data. For our measure of the ideology of the Justices, we employed the scores devised by Professors Martin and Quinn,¹³⁷ which have become increasingly popular in the empirical literature on the Supreme Court.¹³⁸ Unlike crude proxies for ideology, such as the party of the appointing President, the Martin-Quinn scores are computed from the actual voting records of the Justices and provide a quantitative measure of the ideological preferences of the Justices relative to one another.¹³⁹ At the same time, unlike other sophisticated proxy measures such as the Segal-Cover scores and common space scores,¹⁴⁰ they have the added

136. We adjusted amendedness for statute length by dividing the amendedness measure by the length of the statute. We tried doing so, moreover, with both the regular and natural log versions of both our amendedness and statute length measures.

137. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 138-45 (2002).

138. See Fischman & Law, *supra* note 96, at 205-06. In lieu of the Martin-Quinn scores, we considered using the "judicial common space scores" devised by Professors Epstein, Martin, Segal, and Westerland, which are designed to assess the ideology of lower court judges, Supreme Court Justices, members of Congress, and Presidents on the same scale in a manner that permits direct comparisons. Lee Epstein et al., *The Judicial Common Space*, 23 J. L. ECON. & ORG. 303 (2007) (describing the judicial common space scores); Lee Epstein, *The Judicial Common Space*, <http://epstein.law.northwestern.edu/research/JCS.html> (last visited Feb. 26, 2010) (follow "click here for the data" hyperlink) (offering the scores for download). From a methodological standpoint, for purposes of testing our hypothesis that the ideology of the enacting Congress and interpreting Justice interact, *see supra* Part III.E.3, it would have been preferable to use the judicial common space scores because they are designed to locate Justices and members of Congress on the same scale. We could not use them, however, because they are currently available only as far back as 1937. *See Epstein, supra*.

139. The Martin-Quinn scores, which are calculated using Bayesian simulation techniques, range from the -6.656 score computed for Justice Douglas at the "far left," to the 3.884 score computed for Justice Thomas at the "far right" of the spectrum. *See Martin & Quinn, supra* note 137, at 145.

140. *See* Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan*

advantage of capturing changes in the ideological preferences of the Justices over time.¹⁴¹ A recent head-to-head comparison has demonstrated that the Martin-Quinn scores, and other approaches of the same ilk, substantially outperform other popular measures of ideology at explaining judicial voting behavior.¹⁴² For each opinion in the data, we used the Martin-Quinn score of the authoring Justice as of the year that the case was decided.¹⁴³

To evaluate whether the ideological direction of the Court's decision might influence the propensity of the Justices to cite legislative history in their opinions, we imported information from the Spaeth database on the ideological direction—liberal or conservative—of the Court's outcome in each of the cases in our data.¹⁴⁴ Finally, we wished to test the additional hypothesis that the ideological direction of the Court's decision might affect liberal and conservative Justices differently. For example, one could imagine that liberal Justices might be more likely to cite legislative history when the Court arrives at a conservative outcome. The weight of legislative history may be necessary to motivate a liberal Justice to reach a conservative outcome when writing for the majority, or perhaps liberal Justices may feel the need to reach for legislative history to bolster a dissenting opinion. Alternatively, one could argue that liberal Justices might be more likely to cite legislative

Selection Agendas, 54 POL. RES. Q. 623, 627-31 (2001) (devising the common space scores); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (articulating the basis of what are now known as the "Segal-Cover" scores).

141. See Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1503-04 (2007); Martin & Quinn, *supra* note 137, at 145.

142. See Fischman & Law, *supra* note 96, at 209 (finding that ideology measures calculated on an individual basis from each judge's actual voting history, and therefore of the same variety as the Martin-Quinn scores, are a much better predictor of judicial voting on the federal courts of appeals than either common space scores or party of appointing President); *id.* at 205-09 (finding that the Martin-Quinn scores performed much better at explaining the voting behavior of the Justices in five different areas of law than either party of appointing President or the Segal-Cover scores).

143. A very small number of opinions were jointly authored by more than one Justice. See, e.g., *United Steelworkers of Am. v. United States*, 361 U.S. 39, 44 (1959) (Frankfurter & Harlan, JJ., concurring). In such cases, we averaged the Martin-Quinn scores of the authoring Justices.

144. The manner in which the Spaeth database codes this particular variable has been the subject of some criticism. See Landes & Posner, *supra* note 108, at 821-22.

history in cases that reach liberal outcomes on the ground that the use of legislative history is inherently well suited to reaching liberal outcomes. To detect evidence of such factors at work, we calculated an interaction term by multiplying the Martin-Quinn score of the authoring Justice by the ideological direction of the decision.

For our measure of the ideology of the Congress that enacted each statute in our data, we relied upon the DW-NOMINATE scores of congressional ideology devised by Professors Poole and Rosenthal, which are based on statistical analysis of congressional roll call voting and widely used in the political science literature.¹⁴⁵ Our reason for measuring congressional ideology was to test the ideological alignment hypothesis, or the theory that a Justice will be more inclined to look to the legislative history of a statute if he or she is sympathetic to the aims of the legislators who enacted it.¹⁴⁶ To test for this kind of interaction between the ideology of the enacting Congress and that of the interpreting Justice, we calculated an interaction term. To do so, we first averaged the DW-NOMINATE scores of the median members of the House and Senate in order to arrive at an ideology score for the enacting Congress. We then multiplied that score by the opinion author's Martin-Quinn score. The resulting number can be interpreted in substantive terms as a measure of the ideological proximity between the enacting Congress and the interpreting Justice: the higher the number, the closer the proximity.¹⁴⁷

For a number of reasons, some of which are technical in nature, our measure of ideological proximity was bound to be somewhat

145. See KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Data Download Front Page, <http://www.voteview.com/dwnl.htm> (last visited Mar. 3, 2010). To be specific, we used the dimension-one DW-NOMINATE scores because the dimension of ideological disagreement captured by the dimension-two scores has been largely defunct since Reconstruction. See POOLE & ROSENTHAL, *supra*, at 40-51 (concluding that "a one-dimensional model typically provides a good fit to the data, with a second dimension being needed in periods when race issues are distinct from economic ones").

146. See *supra* Part III.E.3 (setting forth the ideological alignment hypothesis).

147. The scale employed by both the DW-NOMINATE scores and the Martin-Quinn scores assigns negative numbers to liberals and positive numbers to conservatives. Thus, if both the enacting Congress and interpreting Justice are liberal, the number one obtains by multiplying their scores is positive. However, if one is liberal whereas the other is conservative, then the number one obtains by multiplying the scores is negative.

inexact.¹⁴⁸ Accurate measurement of the ideology of the relevant Congress, in particular, is frustrated by the fact that, in many cases, the Justices are asked to interpret a statutory amendment in addition to, or in lieu of, the originally enacted statute, and the amending Congress is of a different ideological tenor and intent than the enacting Congress. In such cases, there is no clear and objective way to choose between the ideology of the enacting and amending Congress, or to weight and combine the two scores. In light of our time and resource constraints, and in order to avoid becoming enmeshed in a substantial number of highly subjective determinations about whether or to what extent the Court was interpreting an amendment in lieu of, or in addition to, the originally enacted statute, we opted to rely exclusively upon the ideology of the Congress that originally enacted the statute. Ultimately, however, although we were forced to make difficult methodological choices that could not be ideal in all respects, these choices were vindicated by the results of our analysis.¹⁴⁹

V. DESCRIPTIVE STATISTICS

A. *Characteristics of the Statutes*

In order to study the impact of various statutory characteristics such as complexity and age on legislative history usage, it was of course necessary for us first to measure each of those characteristics. In the course of measuring characteristics such as statutory complexity and amendedness, however, we generated a number of facts about a wide variety of federal statutes that even those with

148. It is worth noting in particular the DW-NOMINATE and Martin-Quinn scores are not designed to locate Justices and members of the same Congress on the same scale and thus are not directly comparable: for example, a Martin-Quinn score of 0 may imply a different ideological position on a different policy dimension than a DW-NOMINATE score of 0. Accordingly, the interaction term that we calculated is, in a number of ways, not a precise measure of the ideological proximity or similarity between enacting Congress and interpreting Justice. However, other measures of ideology that might have been preferable did not extend back sufficiently far in time to cover the enactment of all the statutes in our data set. *See supra* note 138.

149. *See infra* Part VI.B.2 (describing our finding that our measure of ideological proximity between the enacting Congress and interpreting Justice is a statistically significant predictor of legislative history usage).

no interest at all in the topic of legislative history may find intriguing.

Ours may be the first ever study of the linguistic complexity of a broad range of federal statutes. The Immigration and Nationality Act and the federal habeas corpus statute¹⁵⁰ are, linguistically speaking, the least complex of the forty frequently interpreted statutes that we analyzed. With Flesch-Kincaid grade levels of 9.50 and 9.70 respectively, both statutes are supposedly within the reading comprehension skills of a tenth grader. For purposes of comparison, the Constitution receives a score of 12.35 and is thus appropriate reading for a college freshman. At the opposite extreme, the Robinson-Patman Act earns the dubious honor of being the most complex statute that we analyzed, with a Flesch-Kincaid grade level of 43.11. To put that figure in perspective, the typical judge or attorney, after graduating from university and law school, has only nineteen years of formal schooling and would therefore need to attend school for over twenty-four more years—the equivalent of eight S.J.D. degrees, plus an LL.M.—before attaining the reading proficiency level that the Robinson-Patman Act supposedly demands.

The conclusion to be drawn is not, of course, that judges and lawyers must have eight S.J.D. degrees in order to understand the Robinson-Patman Act, or, for that matter, that tenth graders are capable of navigating federal habeas law. Rather, measures of reading difficulty, such as the Flesch-Kincaid grade levels have their limitations as actual measures of the readability of legal texts, particularly at extreme levels of linguistic complexity that they were not intended to capture.¹⁵¹ Our hypothesis is, instead, that some statutes are truly more complex than others from a linguistic perspective, and that such complexity is likely to create difficulties for a would-be interpreter. The fact that the Flesch-Kincaid scores degenerate at extreme levels should not obscure the fact that some statutes are more difficult to read than others, and it should not be

150. 28 U.S.C. §§ 2241-2255 (2006).

151. The formula underlying the Flesch-Kincaid scores, in particular, was not designed to provide measurements beyond a seventeenth-grade reading level. *See* ASPREY, *supra* note 130, at 297 n.19; *see also id.* at 297-99 (discussing and demonstrating the limitations of the Flesch-Kincaid scores and their ilk in the context of an Australian tax statute).

surprising if such statutes drive judges to seek interpretive help wherever they can find it, including in the legislative history.

*Table 1: Complexity of Each Statute as of 2006,
Measured by Its Flesch-Kincaid Grade Reading Level*

<i>Statute</i>	<i>Flesch-Kincaid score</i>
Immigration and Nationality Act	9.5
Habeas Corpus (28 U.S.C. § 2241 et seq.)	9.7
National Firearms Act	13.26
Social Security Act	13.30
Selective Service Act	13.93
Administrative Procedure Act	14.49
Food and Drug Act	14.83
Bankruptcy Code	15.66
Natural Gas Policy Act	17.01
Age Discrimination in Employment Act	17.03
Individuals with Disabilities in Education Act	17.19
Title VII	17.43
Clean Water Act	17.81
AFDC	18.22
ERISA	18.29
Jones Act (maritime law; seamen's rights)	18.38
Sherman Act (antitrust)	18.82
Freedom of Information Act	19.41
Securities Act; Securities and Exchange Act	19.52
Labor-Management Relations Act	19.75
National Labor Relations Act	19.79
Clean Air Act	20.46
RICO	20.47
Federal Power Act	20.69
Foreign Sovereign Immunities Act	20.75
42 U.S.C. § 1983	20.92
Americans with Disabilities Act	20.96
Clayton Act (antitrust)	22.33
Interstate Commerce Act	22.53
Internal Revenue Code	22.53
Longshore & Harbor Workers' Compensation	22.72

2010]	LAW VERSUS IDEOLOGY	1701
	Federal Employers' Liability Act	22.93
	Labor-Management Reporting and Disclosure	23.02
	False Claims Act	25.26
	Fair Labor Standards Act	25.60
	Federal Tort Claims Act	27.45
	Railway Labor Act	27.48
	Voting Rights Act	29.32
	42 U.S.C. § 1988 (civil rights attorneys' fees)	39.85
	Robinson-Patman Act (antitrust)	43.11

Another characteristic that varied considerably by statute was that of amendedness. On the whole, amendments are a common occurrence: we found 16,413 instances in which a section of a relevant statute was amended during the period under examination. This overall figure is, however, somewhat deceiving. The majority of these amendments—10,301 of them, to be precise—were made to a single massive and atypical statute, the Internal Revenue Code.¹⁵² Most statutes were amended much less frequently. Table 2 lists the cumulative number of times that any section of each statute had been amended as of 2006, the most recent year for which we collected data. The range is considerable. At the high end, the Internal Revenue Code underwent nearly ten times as many amendments as its nearest competitor, the Immigration and Nationality Act. At the opposite extreme, the Jones Act was never amended, whereas 42 U.S.C. § 1983 and the Robinson-Patman Act were each the subject of just two amendments.

152. The Internal Revenue Code occupies an entire volume of the United States Code and is frequently amended both for technical reasons and for the purpose of reauthorizing provisions that would otherwise expire. See Posting of David Zaring to The Conglomerate, <http://www.theconglomerate.org/2008/07/the-most-amende-html> (July 8, 2008).

*Table 2: Amendedness of Each Statute,
Measured by the Total Number of Amendments to All
Sections as of 2006*

<i>Statute</i>	<i>Amendments</i>
Internal Revenue Code	10,301
Immigration and Nationality Act	1109
Food and Drug Act	714
Clean Air Act	531
ERISA	481
Clean Water Act	379
Bankruptcy Code	315
AFDC	232
Federal Power Act	223
Interstate Commerce Act	214
Securities Act; Securities and Exchange Act	174
Longshore & Harbor Workers' Compensation	165
Labor-Management Reporting and Disclosure	130
Social Security Act	127
Fair Labor Standards Act	120
Labor-Management Relations Act	113
Clayton Act (antitrust)	110
Selective Service Act	107
42 U.S.C. § 1988 (civil rights attorneys' fees)	101
Title VII	87
Habeas Corpus (28 U.S.C. §§ 2241 et seq.)	70
National Labor Relations Act	61
Railway Labor Act	59
Voting Rights Act	58
Americans with Disabilities Act	57
Individuals with Disabilities in Education Act	53
Age Discrimination in Employment Act	50
National Firearms Act	44
RICO	43
Federal Tort Claims Act	35
Foreign Sovereign Immunities Act	30
Administrative Procedure Act	27
Sherman Act (antitrust)	25

2010]	LAW VERSUS IDEOLOGY	1703
	Natural Gas Policy Act	23
	Federal Employers' Liability Act	20
	False Claims Act	12
	Freedom of Information Act	9
	42 U.S.C. § 1983	2
	Robinson-Patman Act (antitrust)	2
	<u>Jones Act (maritime law; seamen's rights)</u>	<u>0</u>

B. Which Statutes Generate the Most Legislative History Usage?

In the aggregate, the raw data reveals several unsurprising facts. First, some statutes were significantly more likely than others to elicit citations to legislative history. Second, the Justices varied widely in the frequency with which they made use of legislative history. Third, their overall legislative history usage has declined in recent years. Closer examination of the data, however, reveals a considerable amount of interesting variation and unexpected behavior at the individual level.

An initial glance at Table 3 suggests that the statutes that provoked the most frequent resort to legislative history were a motley group about which it is difficult to generalize. Tied at the top of the list were the Food and Drug Act and the Freedom of Information Act.¹⁵³ Although neither is especially lengthy or the object of especially frequent amendment, both sent the Justices scurrying to the legislative history nearly three-quarters of the time. Other statutes that generated high citation rates to legislative history included the Temporary Assistance to Needy Families statute;¹⁵⁴ the Administrative Procedure Act;¹⁵⁵ 42 U.S.C. § 1988, which governs attorney's fees for prevailing plaintiffs in civil rights suits; the Bankruptcy Code; the Social Security Act;¹⁵⁶ the Federal Tort Claims Act; the Labor-Management Reporting and Disclosure Act;¹⁵⁷

153. 5 U.S.C. § 552 (2006).

154. 42 U.S.C. §§ 601-619 (2006) (formerly known as the Aid to Families with Dependent Children Statute).

155. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

156. 42 U.S.C. §§ 301-1397jj (2006).

157. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

the Longshore and Harbor Workers' Compensation Act,¹⁵⁸ the National Firearms Act,¹⁵⁹ and the Federal Power Act.¹⁶⁰ At the other extreme, the statute that generated the lowest citation rate to legislative history was the Jones Act, which prompted the Justices to invoke legislative history less than 14% of the time, followed by the federal habeas corpus provisions at under 17%.

Among the most complex of the statutes in our data, the Bankruptcy Code was particularly likely to result in a citation to legislative history when interpreted—more so than other mammoth and byzantine statutes like the Internal Revenue Code and the Immigration and Nationality Act, both of which have their own titles of the United States Code, yet neither of which proved more likely than not to trigger a reference to legislative history.

*Table 3: Legislative History Usage by Statute*¹⁶¹

Statute	Percentage of opinions citing legislative history	Number of opinions citing legislative history
Food and Drug Act	73.7%	14/19
Freedom of Information Act	73.7%	42/57
Clean Air Act	71.4%	15/21
42 U.S.C. § 1988 (civil rights attorneys' fees)	70.7%	29/41
Labor-Management Reporting and Disclosure Act	69.0%	20/29
National Firearms Act	68.5%	37/54
Social Security Act	68.2%	15/22
Bankruptcy Code	61.9%	78/126

158. 33 U.S.C. §§ 901-950 (2006).

159. 26 U.S.C. §§ 5801-5872 (2006).

160. 16 U.S.C. §§ 791a-828c (2006).

161. Overall, the differences in frequency of legislative history usage among the statutes were statistically significant at the $p < .001$ level, per a Pearson chi-square test.

2010]	LAW VERSUS IDEOLOGY	1705
Longshore & Harbor Workers' Compensation Act	60.0%	36/60
AFDC	58.1%	18/31
Federal Tort Claims Act	57.6%	34/59
Administrative Procedure Act	57.5%	23/40
Securities Act; Securities & Exchange Act	57.4%	58/101
ERISA	57.1%	44/77
Federal Power Act	57.1%	12/21
RICO	56.3%	18/32
Age Discrimination in Employment	55.3%	21/38
Railway Labor Act	55.1%	27/49
Fair Labor Standards Act	54.3%	25/46
Robinson-Patman Act (anti-trust)	53.8%	21/39
Natural Gas Policy Act	53.3%	16/30
Voting Rights Act	51.4%	57/111
Title VII	50.0%	98/196
Foreign Sovereign Immunities Act	50.0%	11/22
Interstate Commerce Act	49.1%	27/55
Clean Water Act	48.9%	23/47
National Labor Relations Act	48.8%	122/250
Individuals with Disabilities in Education Act	48.5%	16/33
Internal Revenue Code	46.6%	174/373
Immigration and Nationality Act	46.3%	62/134
Labor-Management Relations Act	45.8%	44/96

Selective Service Act	45.0%	18/40
Clayton Act (antitrust)	41.7%	48/115
False Claims Act	41.4%	12/29
42 U.S.C. § 1983	40.4%	57/141
Americans with Disabilities Act	32.6%	14/43
Sherman Act (antitrust)	30.6%	45/147
Federal Employers' Liability	26.5%	18/68
Habeas Corpus (28 USC §§ 2241 et seq.)	16.8%	28/167
Jones Act (maritime law; seamen's rights)	13.9%	5/36
<i>TOTAL</i>	<i>47.9%</i>	<i>1482/3095</i>

Figure 1: Number of Opinions Citing Legislative History, by Statute

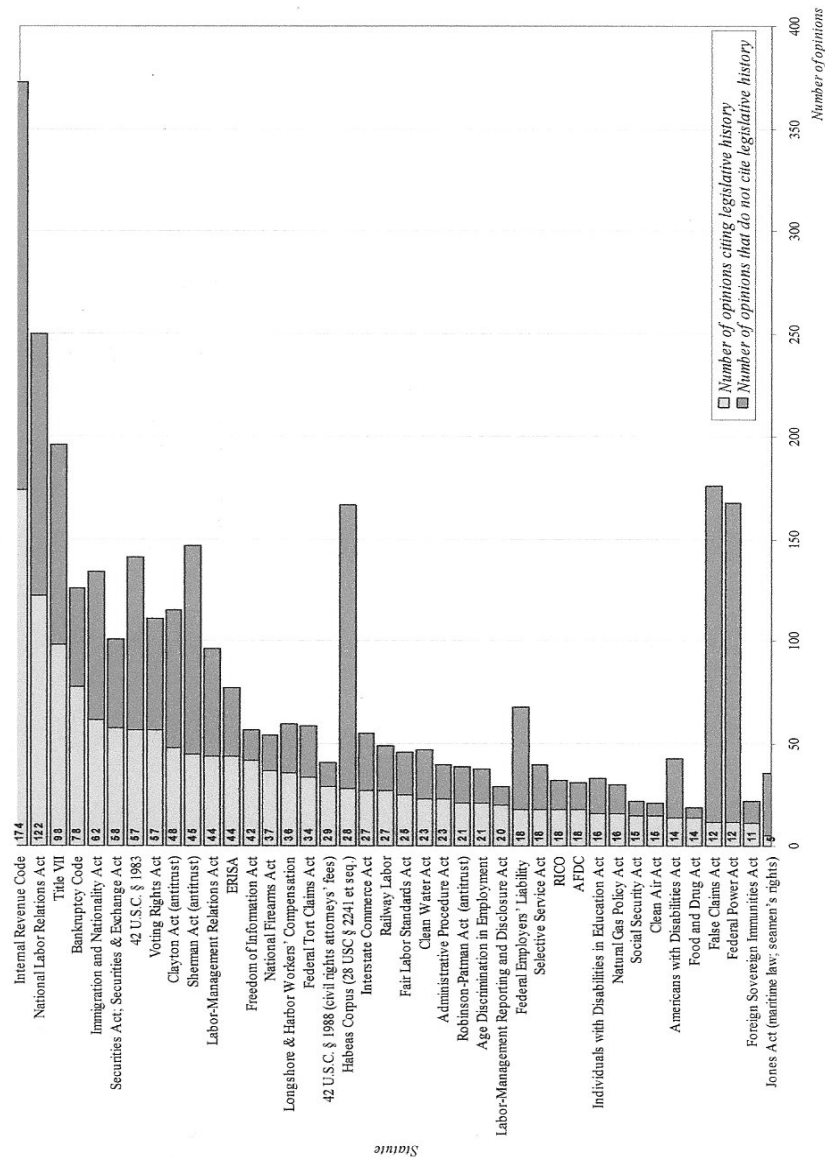
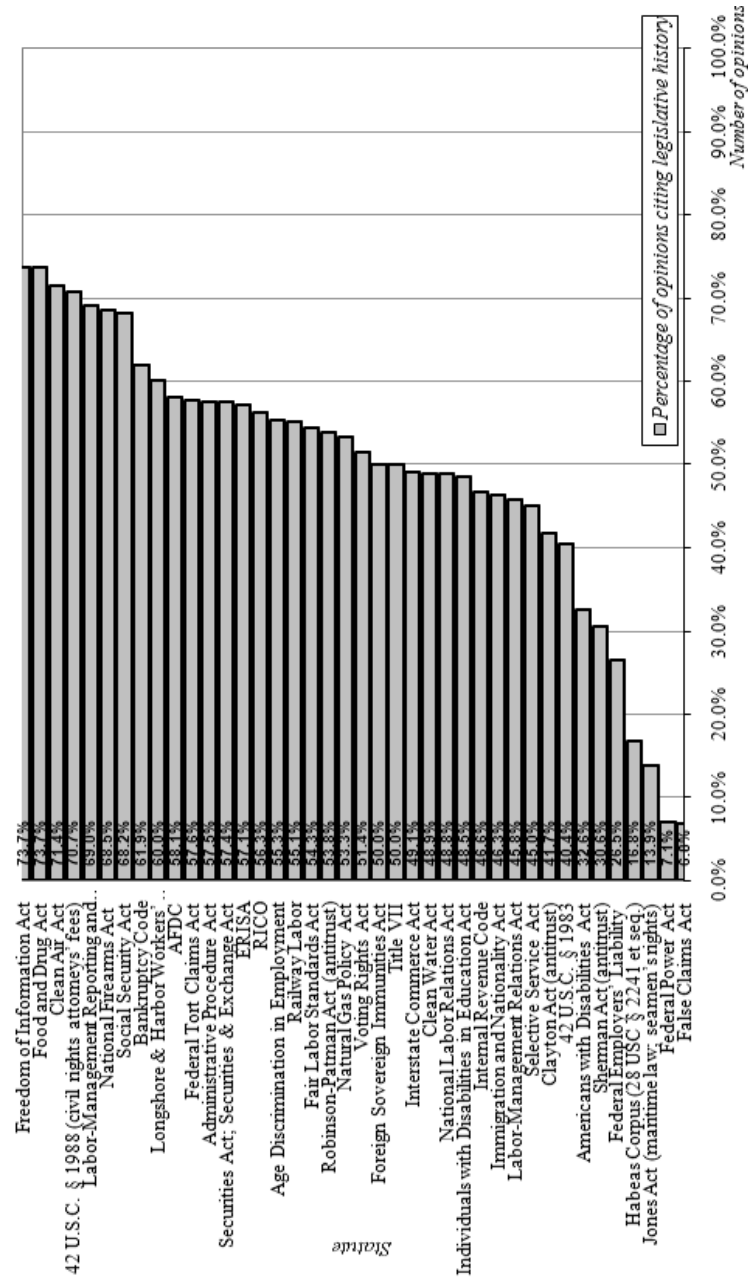


Figure 2: Percentage of Opinions Citing Legislative History, by Statute



C. Which Justices Use Legislative History the Most?

It is much easier to discern a pattern among the Justices in terms of their propensity to cite legislative history. Overall, the Justices cited legislative history in just under half, or 47.9%, of their statutory interpretation opinions. As expected, more liberal Justices were, on the whole, more frequent users of legislative history than conservative ones, although the data contained a few mild surprises. Table 4 sets forth the raw data on legislative history usage by each of the Justices included in our study. The third column lists the number and percentage of statutory interpretation opinions in which each Justice referred to legislative history. The fourth column offers some indication of the extent to which each Justice was explicitly critical of legislative history usage: it reports the number and percentage of each Justice's opinions that contained at least some criticism of the practice.¹⁶² Such criticism turns out, on the whole, to be very rare. Only 1.1% of all the opinions in our data contained any language that could be deemed critical of legislative history usage, either in general or in the context of a specific case. It thus appears that such criticism is no more common on the Supreme Court than on the federal courts of appeals.¹⁶³ The majority of the Justices in our data—eighteen out of thirty-one, to be precise—never voiced any such criticism, and of the remaining thirteen Justices, eight did so on just one occasion.

162. Use of legislative history and criticism of legislative history usage were not mutually exclusive. *See, e.g., supra* note 124 (discussing Justice Harlan's opinion in *Allen v. State Board of Elections*, which was coded as both citing legislative history and criticizing legislative history usage).

163. *See supra* note 123 (describing Professor Cross's finding that only "about 1%" of circuit court statutory interpretation decisions contain negative references to the practice of citing legislative history).

*Table 4: Legislative History Usage by Individual Justice*¹⁶⁴

<i>Authoring Justice</i>	<i>Total number of statutory interpretation opinions authored</i>	<i>Number (and percentage) that cited legislative history</i>	<i>Number (and percentage) that criticized legislative history usage</i>
Alito	6	2 (33.3%)	0
Black	100	28 (28.0%)	0
Blackmun	202	110 (55.9%)	1 (0.5%)
Brennan	238	166 (69.7%)	1 (0.4%)
Breyer	69	27 (39.1%)	0
Burger	75	45 (60.0%)	0
Burton	30	13 (43.3%)	0
Clark	72	39 (54.2%)	1 (1.4%)
Douglas	204	83 (40.7%)	0
Fortas	23	6 (26.1%)	0
Frankfurter	67	28 (41.8%)	0
Ginsburg	53	26 (49.1%)	1 (1.9%)
Goldberg	32	14 (43.8%)	0
Harlan	168	58 (34.5%)	1 (0.6%)
Jackson	4	1 (25.0%)	0
Kennedy	87	29 (33.3%)	5 (5.7%)
Marshall	159	114 (71.7%)	1 (0.6%)
Minton	13	5 (38.5%)	0
O'Connor	133	66 (47.4%)	2 (1.5%)
Powell	125	66 (52.8%)	1 (0.8%)
Reed	12	5 (41.7%)	0
Rehnquist	136	72 (52.9%)	4 (2.9%)
Roberts	9	1 (11.1%)	0
Scalia	151	28 (18.5%)	13 (8.6%)
Souter	77	37 (48.1%)	0

2010]	LAW VERSUS IDEOLOGY		1711
Stevens	296	148 (50.0%)	1 (0.3%)
Stewart	143	75 (52.4%)	0
Thomas	80	15 (18.8%)	3 (3.8%)
Warren	64	40 (62.5%)	0
White	227	125 (55.1%)	0
Whittaker	33	8 (24.2%)	0
Per curiam	7	2 (28.6%)	0
<hr/>			
<i>OVERALL</i>			
<i>TOTAL (AND</i>	<i>3095</i>	<i>1482 (47.9%)</i>	<i>36 (1.1%)</i>
<i>PERCENTAGE)</i>			
<hr/>			

164. The overall differences in frequency of legislative history usage among the Justices were statistically significant at the $p < .001$ level, once again per a Pearson chi-square test.

Figure 3: The Frequency with Which Each Justice Cited
Legislative History, by Number of Opinions

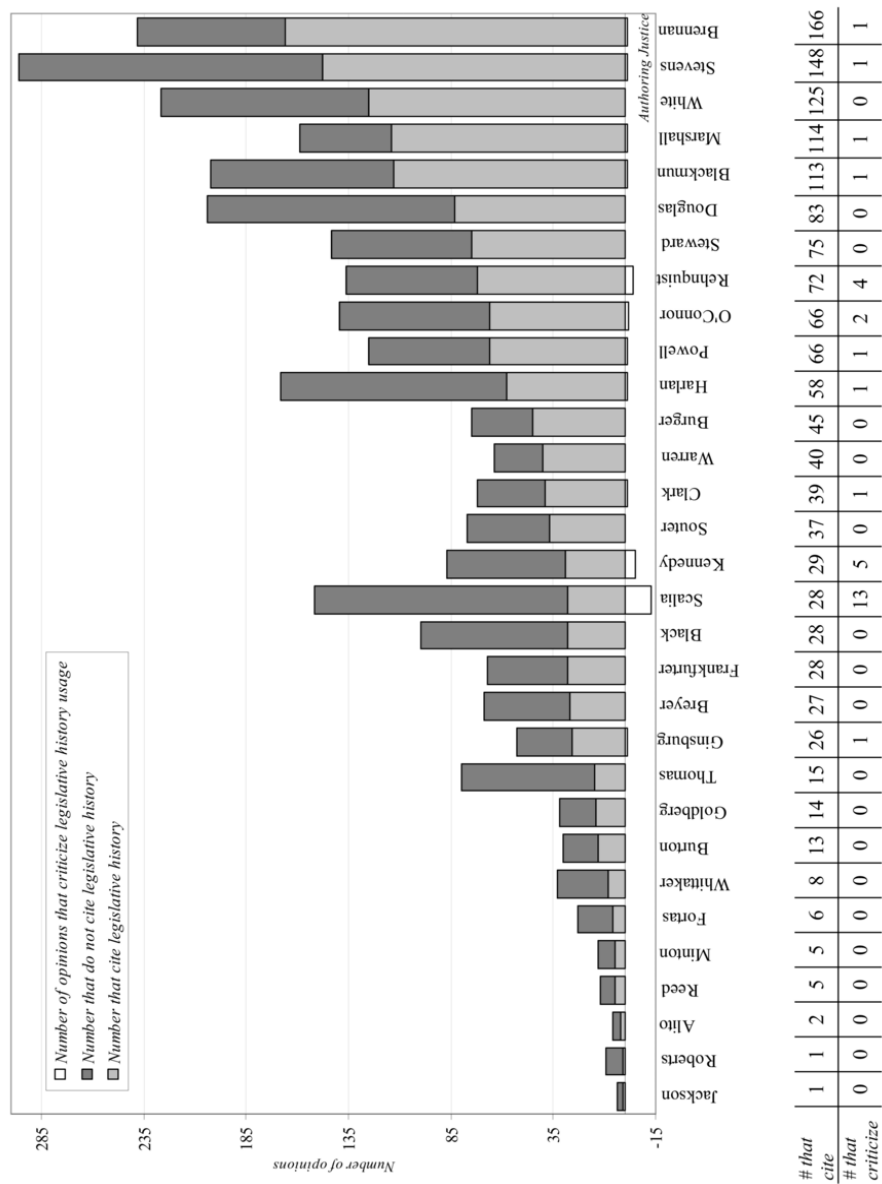
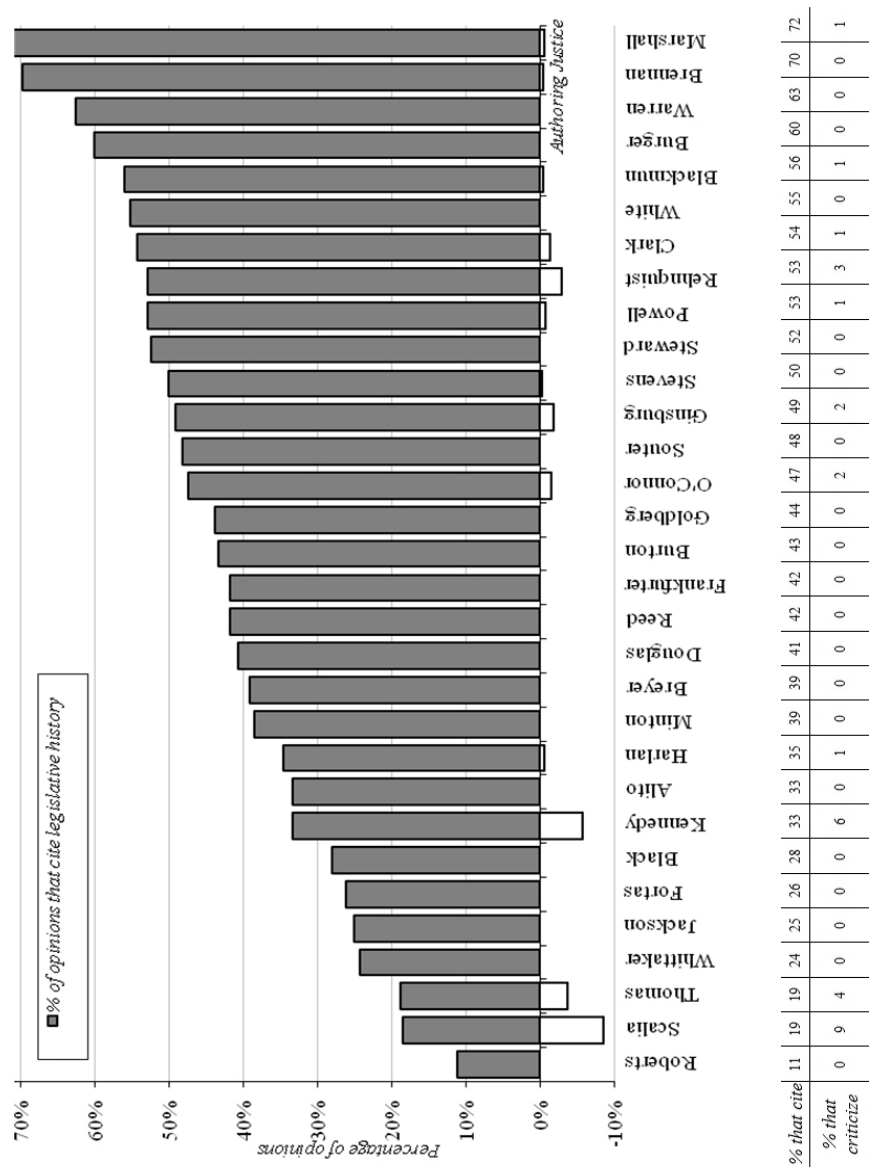


Figure 4: The Frequency with Which Each Justice Cited Legislative History, by Percentage



Two of the Court's most liberal Justices—namely, Justices Brennan and Marshall—also led the Court in the use of legislative history; Justice Marshall, in particular, topped the charts with a legislative history usage rate of over 70%. Chief Justice Warren, another renowned liberal, cited legislative history in over 60% of his statutory interpretation opinions. The most liberal Justice in our data set as measured by the Martin-Quinn scores, Justice Douglas, referred to legislative history a relatively paltry 34.8% of the time, but this may be attributable more to the brevity of his opinions¹⁶⁵ and the speed with which he produced them¹⁶⁶ than to any aversion to legislative history per se. Justice O'Connor lived up to her reputation as a middle-of-the-road Justice, with a legislative history usage rate (47.4%) that almost exactly equaled the overall average. Likewise, Justice Souter's propensity to use legislative history (48.1%) was decidedly average.

Among those with a reputation for conservatism, Chief Justice Rehnquist was perhaps surprisingly prone to using legislative history: he did so in his statutory interpretation opinions more often than not (52.9%), a rate that exceeded the overall average and made him a more frequent user of legislative history than moderate Justices such as O'Connor, Powell (52.8%), and Stewart (52.4%) and, indeed, decidedly liberal ones such as Douglas and Goldberg (43.8%). However, the Court's most vocal critic of legislative history, Justice Scalia, behaved true to his word, for the most part. Only 18.5% of his statutory interpretation opinions made any reference to legislative history. For all practical intents and purposes, he and Justice Thomas, who referred to legislative history only 18.8% of the time, have been the least likely to cite legislative history. Although Chief Justice Roberts's raw rate of 11.1% is lower, the very limited number of statutory interpretation opinions that he has authored makes it impossible to draw conclusions about his behavior with confidence. Moreover, Justice Scalia's behavior did not vary significantly as between his majority opinions, concurrences, and

165. See, e.g., Ronald Dworkin, *Dissent on Douglas*, N.Y. REV. BOOKS, Feb. 19, 1981, at 2 (characterizing Justice Douglas's opinions as short and often "sloppy").

166. See ARTEMUS WARD & DAVID WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 42 (2006) (quoting Justice Douglas on his tendency to write opinions more quickly than other members of the Court, and to receive more writing assignments as a result).

dissents. At the same time, Justice Scalia was somewhat sparing in overt criticism of the practice: only 8.6% of his statutory interpretation opinions contained such criticism. In a sense, one might say that he preferred to lead by example rather than by criticism. Whether he actually succeeded in influencing other members of the Court, however, is an important question that we address below, on the basis of a regression analysis that controls for other variables.¹⁶⁷

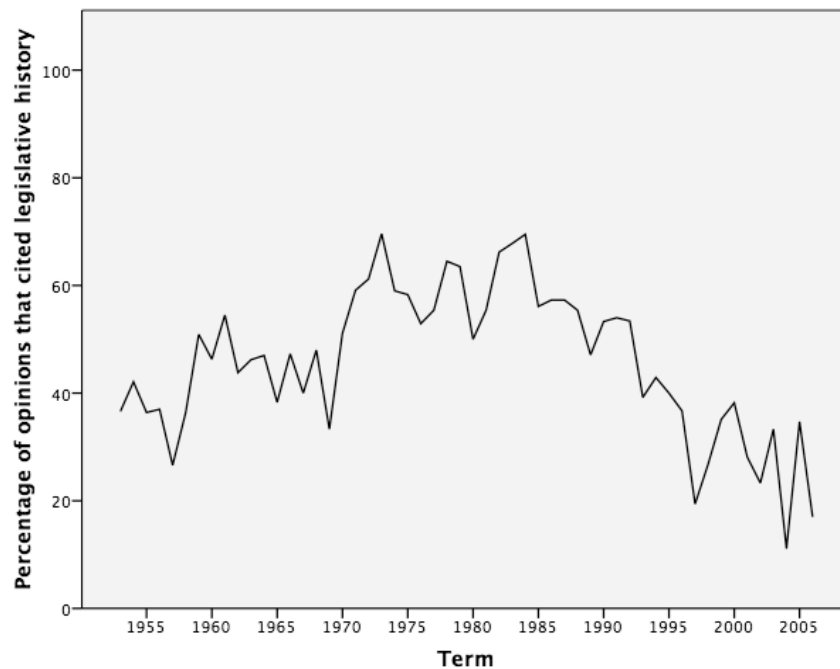
D. Is Legislative History Usage on the Decline?

Figure 5 depicts the percentage of statutory interpretation opinions that cited legislative history in each of the years covered by our data. The result is a much needed update to the existing literature on trends in the Court's usage of legislative history, much of which reports now-outdated conclusions based on data from the mid-1990s or earlier.¹⁶⁸ Figure 5 shows, consistent with the existing literature, that from the 1950s through the early 1970s, the Court became increasingly enamored of legislative history. Its use then reached a plateau of sorts for approximately a decade: legislative history usage hit its overall peak of nearly 70% twice—once in 1973 and again in 1984. By the mid-1990s, however, it had dropped sharply. Although the overall level of legislative history usage experienced a rebound in the late 1990s, it never recaptured the lofty heights of the 1970s and early 1980s, and the rebound proved short-lived. By the 2004 term, legislative history usage had reached its nadir, with only 11.1% of the Justices' statutory interpretation opinions making reference to legislative history.

167. See *infra* Part VI.B.3.

168. See *supra* Part II.A.

Figure 5: Proportion of Supreme Court Opinions Citing Legislative History, 1953-2006



VI. EMPIRICAL ANALYSIS AND RESULTS

A. Description of the Regression Model

Without further analysis, it is impossible to say why some statutes, and some Justices, were associated with more frequent use of legislative history than others. In order to test various explanations for these differences, and to identify more generally the determinants of legislative history usage, we employed logit regression with robust standard errors to estimate a model of legislative history usage.¹⁶⁹ Our model used a variety of variables to predict the presence or absence of legislative history in a given opinion. The model took the following form:

169. The model was estimated in Stata 11.0 using the “logit, robust” command.

$$\begin{aligned} Pr(\text{opinion cites legislative history}) = & B_0 + B_1(\text{bulk}) + B_2(\text{complexity}) \\ & + B_3(\text{obscurity}) + B_4(\text{amendedness}) + B_5(\text{first-time interpretation}) \\ & + B_6(\text{age}) + B_7(\text{age}^2) + B_8(\text{year}) + B_9(\text{year}^2) + B_{10}(\text{age} * \text{year}) + \\ & B_{11}(\text{age} * \text{year})^2 + B_{12}(\text{dissent}) + B_{13}(\text{concur}) + B_{14}(\text{special concurrence}) + B_{15}(\text{unanimous}) + B_{16}(\text{author ideology}) + B_{17}(\text{outcome ideology}) \\ & + B_{18}(\text{author ideology} * \text{outcome ideology}) + B_{19}(\text{author ideology} * \text{legislative ideology}) + B_{20}(\text{Scalia authorship}) + B_{21}(\text{Scalia on Court}) + B_{22}(\text{post-}Chevron) + e \end{aligned}$$

The dependent variable in our model, “opinion cites legislative history,” was coded as a 1 if the opinion contained any reference to the legislative history of the statute at issue, and 0 otherwise. The model contained a total of twenty-two independent variables, some of which were interactions or transformations of other variables.¹⁷⁰ Preliminary goodness-of-fit analyses suggested that some variables—for example, frequency of amendment and time-related variables such as statutory age and year of decision—might be related in nonlinear fashion to legislative history usage. Accordingly, we used the natural log, or the square of certain variables in addition to, or in lieu of, the raw versions of those variables, as guided by the results of those preliminary analyses.

170. We also estimated an expanded model on a subset of our data for the purpose of testing the hypothesis that a statute that has rarely or never been the subject of prior interpretation by the Court is more likely to elicit legislative history usage. The expanded model was identical to the main model, save for the addition of a variable reflecting the exact number of times that the statute in question had previously been interpreted by the Court. We further estimated an alternative version of the expanded model using a simple dummy variable that was coded 0 if the statute had never been interpreted by the Court, and 1 if it had ever been the subject of interpretation by the Court. We lacked reliable data, however, on the frequency with which the Court interpreted statutes enacted prior to 1953. Accordingly, methodological considerations compelled us to estimate both versions of the expanded model using only the data we had collected for statutes enacted in 1953 or later. This move greatly reduced the amount of data available for analysis, from 3095 opinions to a mere 696.

In light of these severe data limitations, it is not surprising that we found no statistically significant evidence of a relationship between the number of times that the Court had previously interpreted a statute and the likelihood of legislative history usage. It would be premature, however, to reject the hypothesis that such a relationship does exist. Many of the variables that proved to be significant predictors of legislative history usage when we estimated the main model using the full data set, such as the length of the statute and the ideology of the authoring Justice, failed to reach statistical significance in the context of the expanded model—a fact that is most likely explained by the loss of over three-quarters of the data.

The components of the independent variables were defined as follows:

- (1) bulk = the natural log of the statute's length in words as of 2007;
- (2) complexity = the natural log of the Flesch-Kincaid reading grade level of the statute;
- (3) obscurity = the frequency with which the statute in question had been cited by the federal courts of appeals, measured as of the year in which the opinion was authored;
- (4) amendedness = the natural log of the number of times that any section of the statute in question was amended, from 1953 through the year in which the opinion was authored;
- (5) first-time interpretation = a dummy variable coded 1 if the statute in question was enacted within the time period covered by our data and had not previously been interpreted by the Court, 0 otherwise;
- (6) age = the age of the statute in years, measured as of the year in which the opinion was authored;
- (7) year = the term in which the Supreme Court decided the case, as indicated in the Spaeth database;
- (8) dissent = a dummy variable coded 1 if the opinion in question was a dissent, 0 otherwise, as indicated in the Spaeth database;
- (9) concur = a dummy variable coded 1 if the opinion in question was a concurrence that agreed with both the disposition and the opinion of the Court, 0 otherwise, as indicated in the Spaeth database;
- (10) special concurrence = a dummy variable coded 1 if the opinion in question was a concurrence that agreed with the disposition but not necessarily the opinion of the Court, as indicated in the Spaeth database;¹⁷¹

171. Per Professor Spaeth's explanation in the documentation that accompanies the database, this category includes any opinion that both concurs in part and dissents in part, if the Justice "votes to dispose of the case in a manner more closely approximating that of the majority than that of the dissenter(s)." Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-2007 Terms: Documentation 66* (2008), available at http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf (last updated Sept. 9, 2008).

- (11) unanimous = a dummy variable coded 1 if the opinion in question was the opinion of a fully unanimous Court and there were no other opinions in the case, 0 otherwise;
- (12) author ideology = the Martin-Quinn score of the authoring Justice;
- (13) outcome ideology = the ideological direction of the result reached by the authoring Justice, as coded from information in the Spaeth database;
- (14) legislative ideology = the average of the DW-NOMINATE scores of the median members of the House and Senate that enacted the statute;
- (15) Scalia authorship = a dummy variable coded 1 if the opinion was authored by Justice Scalia, 0 otherwise;
- (16) Scalia on Court = a dummy variable coded 1 if Justice Scalia was on the Court at the time the case was decided, 0 otherwise; and
- (17) Post-*Chevron* = a dummy variable coded 1 if the opinion in question was authored after the Court decided *Chevron U.S.A. v. Natural Resources Defense Council*,¹⁷² 0 otherwise.

B. The Results of the Regression

The results of the regression are described below in Table 5 and Table 6. For those with an appetite for technical detail, the raw coefficients and standard errors are reported in Appendix I. Overall, the model proved relatively effective at predicting the use of legislative history. Simply by always choosing the most common outcome—namely, that legislative history is not used—we would correctly predict 52.1% of the time whether an opinion will in fact use legislative history. A worthwhile model should offer more predictive power than guesswork of this type. Our model does so: it correctly predicts the use of legislative history 69.5% of the time and achieves a healthy 36.5% proportional reduction in error.¹⁷³ That is to say, we are more than one-third more likely to predict legislative

172. 467 U.S. 837 (1984).

173. Those cases in which legislative history was actually used were correctly predicted by the model 70% of the time, whereas those cases in which legislative history was not used were correctly predicted by the model 69% of the time.

history usage correctly by relying on our model than by simply guessing the modal outcome. Many, but not all, of the individual variables in our model proved to be significant predictors of legislative history usage at the $p \leq .05$ level.

*Table 5: Statistically Significant Predictors of Legislative History Usage*¹⁷⁴

	<i>Variable</i>	<i>Increases or decreases legislative history usage?</i>	<i>p-value</i>
<i>Statute characteristics:</i>	<i>bulk</i>	+	<0.001
	<i>complexity</i>	+	<0.001
	<i>age</i>	-	<0.001
	<i>age</i> ²	+	<0.001
	<i>amendedness</i>	-	0.015
<i>Opinion characteristics:</i>	<i>dissent</i>	-	<0.001
	<i>concurrence</i>	-	<0.001
	<i>special</i>	-	<0.001
	<i>concurrence</i>	-	<0.001
<i>Ideological and personal factors:</i>	<i>author ideology</i>	<i>being liberal: + being conservative: -</i>	0.026
	<i>author ideology *</i>		0.049
	<i>legislative ideology</i>		
	<i>Scalia authorship</i>	-	<0.001
<i>Time trends:</i>	<i>year of decision</i>	+	<0.001
	<i>(year of decision)</i> ²	-	<0.001

174. Because the coefficients from a logit regression, unlike those from a regular linear regression, lack any straightforward substantive interpretation, we do not report them here.

*Table 6: Variables That Were Not Statistically Significant
Predictors of Legislative History Usage*

	<i>Variable</i>
<i>Statute characteristics:</i>	obscurity novelty (first-time interpretation)
<i>Jurisprudential factors:</i>	post- <i>Chevron</i>
<i>Opinion characteristics:</i>	unanimity
<i>Ideological and personal factors:</i>	outcome ideology author ideology * outcome ideology Scalia on Court
<i>Time trends:</i>	age of statute * year of decision (age of statute * year of decision) ²

1. Formal and Legal Variables

On the whole, the results offer a measure of vindication both for those who emphasize the importance of formal and legal factors, and for those who insist that ideology matters. It is clear that the formal and legal characteristics of a statute do influence the likelihood that Justices will resort to legislative history. Four of the six statutory characteristics that we included in our model—namely the bulk, complexity, age, and amendedness of the statute—were statistically significant predictors of legislative history usage. These findings offer strong support for what we have termed the guidance-seeking hypothesis: they suggest that the Justices turn to legislative history as a source of guidance when faced with statutes that are, in some objective sense, difficult to interpret.¹⁷⁵ Indeed, it is difficult to identify any other motivation on the part of the Justices that might explain these findings.

The fact that the relationship between amendedness and legislative history usage was negative instead of positive ran contrary to our initial expectations but can easily be explained. It was our hypothesis that the Justices would use legislative history

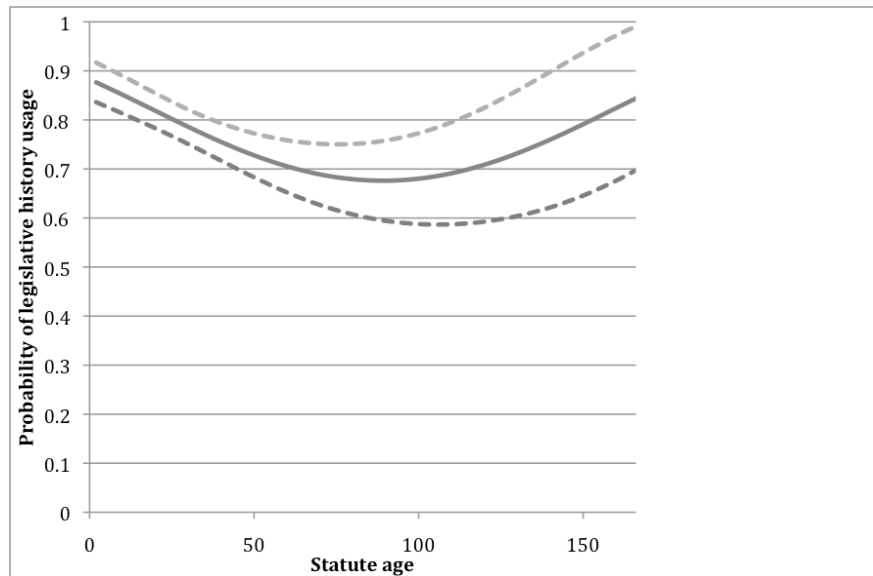
¹⁷⁵. *Supra* Part III.A.

more often in order to make sense of a frequently changing statute. Our results indicate, instead, that more frequent amendment leads to less legislative history usage. Insofar as amendments are enacted to clarify and fill gaps in previously ambiguous or incomplete statutory language, however, it is not difficult to see how more amendments might obviate rather than necessitate resort to legislative history.

Particularly noteworthy is the nature of the relationship between legislative history usage and statute age. The fact that the coefficients on both the regular and squared versions of the age variable are statistically significant means in practical terms that the relationship between statute age and legislative history usage is nonlinear. Moreover, the fact that the coefficients point in opposite directions indicates that the nature of the relationship switches over time: Initially, the probability of legislative history usage decreases with age and bottoms out when a statute is approximately ninety years old. Beyond that age, however, the likelihood of legislative history usage begins to increase as the statute gets older.¹⁷⁶ Figure 6 illustrates this pattern. The solid line depicts how the predicted probability that an opinion will cite legislative history varies with the age of the statute, when all other variables (such as amendedness, length, and the author's ideology) are held constant at their median values. The dotted lines represent the upper and lower bounds of a 95% confidence interval, which is to say that it is 95% likely that the true impact of statute age on the probability of legislative history usage lies within these bounds.

176. We further note that the squared version of the interaction term between statutory age and year of decision approached statistical significance ($p = 0.133$). In practical terms, this suggests the possibility that statutes of different vintages may exhibit distinct legislative history usage trends over time: there is at least some reason to suspect that the relationship between statutory age and legislative history usage may be different for newer statutes than for older statutes. By conventional social science standards, however, the evidence is not strong enough to be considered statistically significant.

Figure 6: Impact of Statute Age on Predicted Probability of Legislative History Usage, Holding All Other Variables at Their Median Values



Why might the probability of legislative history usage exhibit a waning then waxing trend over the life of a statute?¹⁷⁷ This pattern

177. It might also be asked whether the pattern seen in Figure 6 is real and does not merely reflect the limitations of our data or methodology. One possibility, in particular, is that the pattern might be the illusory byproduct of a skew in the distribution of the underlying data. The fact that the confidence interval becomes wider for the oldest statutes, denoting greater uncertainty as to the true probability of legislative history usage, might give cause for suspicion that the upward trend for statutes older than 90 might be the result of a few extreme observations at the high end of the statute age range, combined with an overall lack of data on the interpretation of older statutes.

When we examine the distribution of our data, however, the results assuage these concerns. Appendix II graphs the number of opinions in our data against the age of the statute at issue and reveals that our data contains a considerable number of opinions involving the interpretation of older statutes. The graph reveals a roughly bimodal distribution: there is a mass of data centered on a statute age of approximately 30, and a smaller but still considerable mass of data centered on a statute age of approximately 120. Thus, although we have more data on the interpretation of statutes that are less than 90 years old, our analysis nevertheless included a meaningful amount of data on the interpretation of statutes ranging in age from 90 up to nearly 145.

may reflect how challenges in the interpretation of a statute unfold, and are eventually solved by the Court, over time. It is not surprising that, as they become older, statutes might attract decreasing use of legislative history. When a statute is first enacted, the Court has little experience with it yet faces the widest range of unanswered questions about its meaning. Its inexperience with the statute and the novelty of the questions posed may combine to encourage resort to legislative history. The older the statute becomes, however, the more substantial the body of precedent the Court develops, thus reducing the need for resort to legislative history.¹⁷⁸ The fact that legislative history usage is high for new statutes but declines with age is consistent with the possibility that questions of statutory meaning are increasingly solved by resort to accumulated precedent in lieu of legislative history.

There is also, however, a countervailing trend that might cause statutes beyond a certain age to attract more, not less, legislative history usage. As time passes, a statute is increasingly applied to circumstances that are increasingly alien from those prevailing at the time of its enactment, while many of the precedents that previously offered guidance to the Court may themselves become obsolete. The result is increased uncertainty about the proper application of the statute that may compel the Justices to cast about for interpretive aids such as legislative history. It may be that, beyond a certain age, the guidance of precedent and the benefit of experience can no longer compensate for the interpretive uncertainty that surrounds an increasingly antiquated statute.

Another possible explanation is that an excess accumulation of precedent may ultimately stimulate rather than obviate legislative history usage. In the short to medium run, the accumulation of precedent renders the use of legislative history unnecessary by providing the Justices with an alternative source of guidance as to a statute's meaning. As the number of decisions continues to proliferate, however, the Justices may find themselves increasingly

178. See Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 225 ("As a statute matures and its original legislative history fades further into the past, the Court may come to view the detailed pre-enactment record as less relevant, in part because new sources of authority have arisen to clarify the meaning of the enacted text.... [O]ne such source is Supreme Court precedent: the Court's own intervening interpretations may create a baseline understanding of certain provisions or concepts.").

hemmed in by case law that strikes them as unmanageable, incorrect, or otherwise in need of repair. At that point, legislative history may constitute a useful tool for overcoming the restraint of *stare decisis*, pruning the precedential thicket, or rediscovering the original meaning of the statute.

Like statutory age, the year in which the opinion was rendered also had a nonlinear impact on legislative history usage. Once again, the coefficients on both the regular and squared versions of the year variable were statistically significant and pointed in opposite directions. In practical terms, this means that the likelihood of legislative history usage initially rose over time but eventually began to sink. This is precisely the trend depicted in Figure 5, which graphs the overall percentage of actual legislative history usage over time. The results of our regression confirm that the waxing then waning trend seen in Figure 5 is genuine and does not simply reflect random fluctuation over time or the impact of other variables.

Our estimation of the model also revealed that the Justices were significantly less likely to cite to legislative history when authoring dissenting or concurring opinions than when authoring majority opinions. Holding all other variables at their median values, the probability that a majority opinion would refer to legislative history was a relatively healthy 0.66. For dissenting opinions, the probability of citation to legislative history was only 0.35, and for concurring opinions, the probability was lower still, 0.15 for regular concurrences, and 0.25 for special concurrences. The fact that majority opinions were more likely to cite legislative history than minority opinions supports what we have called the “precedent-crafting hypothesis”—namely, the hypothesis that authors of majority opinions make a deliberate effort to “cover all relevant bases,” such as legislative history, in order to fashion durable and comprehensive precedent that will “provide adequate guidance to the lower courts” in future cases.¹⁷⁹

Finally, we found no evidence that the Court’s decision in *Chevron* has affected the propensity of the Justices to cite legislative history. The fact that *Chevron* was not a statistically significant predictor of

179. See *supra* Part III.B.

legislative history usage does not prove, however, that the Justices feel free to disregard precedent when deciding whether to employ legislative history. First, as previously discussed, it is unclear whether adherence to the *Chevron* doctrine ought to result in greater or lesser use of legislative history.¹⁸⁰ Second, not all of the cases in our data involved agency interpretations of statutes. As a result, even if *Chevron* has actually restrained or encouraged legislative history usage on the Court in those cases where it is applicable, its effect may have been diluted to the point of statistical insignificance by the presence in our data of numerous cases in which *Chevron* was simply irrelevant.

2. Ideological Variables

It may come as little surprise to political scientists who study judicial behavior that ideology also appears to play a significant role in the decision to use legislative history. A Justice's personal ideology, as measured by the Martin-Quinn scores, proved to be a statistically significant predictor of his or her propensity to use legislative history. Consistent with what one might intuit from an examination of Table 4, liberal Justices were significantly more likely to cite legislative history than conservative ones. Our results are also consistent with what we have called the ideological alignment hypothesis: the Justices were more likely to consult legislative history when they were ideologically in agreement with the Congress that enacted the statute.¹⁸¹

What we did not find, however, was evidence that legislative history usage biases outcomes in a systematic way or leads to more ideological decision making. First, controlling for such variables as the ideology of the opinion author, there was no statistically significant relationship between whether an opinion cited legislative history and whether the opinion arrived at a liberal or conservative result. Second, consistent with earlier studies,¹⁸² we found no

180. See *supra* notes 90-93 and accompanying text.

181. See *supra* Part III.E.2.

182. See Brudney & Ditslear, *Burger and Rehnquist Eras*, *supra* note 48, at 226-27 & tbl.4 (finding that "liberal justices are basically outcome-neutral in their pattern of reliance on legislative history, although conservative justices are less so"); *supra* note 99 and accompanying text. Of course, it is possible to argue, and even to model, reasons that justices

evidence that legislative history usage causes or enables the Justices to reach their ideologically preferred outcomes more often than they otherwise would. The variable that measures the interaction between the ideology of the author and the ideological direction of the opinion was not a statistically significant predictor of legislative history usage. In substantive terms, this means that the likelihood that a liberal Justice will arrive at a liberal result, or that a conservative Justice will reach a conservative result, is the same regardless of whether he or she happens to cite legislative history.

The fact that the ideological direction of an opinion was not correlated with legislative history usage, either on its own or when interacted with the ideology of the authoring Justice, is open to different interpretations. On its face, this finding would seem to directly undermine Justice Scalia's charge that legislative history is a tool that judges freely manipulate in order to reach the results that they favor as an ideological matter.¹⁸³ We sought, and failed to find, evidence that Justices use legislative history to reach their ideologically preferred outcomes. Our pattern of findings suggests instead that the Justices cite legislative history in the course of arriving at outcomes that they would reach even if they had not cited legislative history. Thus, for example, our results tell us that Justice Stevens is more likely to cite legislative history than Justice Scalia, and that the difference between the two only increases if the statute at issue was enacted by a liberal Congress. But our results also tell us that the likelihood that Justice Stevens will ultimately arrive at a liberal outcome is the same regardless of whether he decides to cite legislative history. In other words, although the decision to cite legislative history is influenced by ideological factors, there is little to suggest that this decision carries much consequence for the outcome of the case.

Nevertheless, it remains difficult to reject conclusively the argument that the Justices make strategic use of legislative history in pursuit of ideological goals. To some extent, our null finding

might turn to one interpretive technique when others prove too constraining. See, e.g., Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 795, 805-09 (2008) (expounding such a model).

183. See Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 122.

might reflect problems in the coding of the “ideological direction of outcome” variable in the Spaeth database, which has come under some scholarly criticism for mislabeling substantively conservative outcomes as liberal and vice versa.¹⁸⁴ An alternative explanation of our null finding might be that the Justices resort to, or avoid, legislative history only when they cannot otherwise reach their preferred results. Imagine, for example, that liberal Justices confront two types of cases, those in which they can easily reach liberal outcomes without resort to legislative history, and those in which liberal outcomes are difficult to justify without the help of legislative history. Assume further, and plausibly, that they prefer not to use legislative history, all other things being equal, because it requires extra work on their part. A reasonable strategy would therefore be to refrain from citing legislative history in the first type of case while relying upon it in the second type of case. If liberal Justices were to employ such a strategy, they would indeed be making instrumental, ideologically motivated use of legislative history. Yet we would observe only that liberal Justices reach liberal outcomes at roughly the same rate regardless of whether they use legislative history—just as we have, in fact, observed of our actual data. In other words, it is possible to fashion an account of strategic legislative history usage that is consistent with our null finding.

3. The Impact of Justice Scalia

As other scholars have noted, the chronology of events suggests that Justice Scalia’s appointment may have contributed to the Court’s eschewal of legislative history in more recent years.¹⁸⁵ As Figure 5 illustrates, overall legislative history usage peaked in the 1970s, after the Warren Court’s revolution in individual rights had been implemented, but before the retirement of Justices Marshall and Brennan, both devotees of legislative history usage. The probability of the use of legislative history was lower before that era and declined after it, and continues to decline today.

Our regression analysis suggests, however, that Justice Scalia’s influence on other members of the Court has been limited or

184. See *supra* note 108 and accompanying text.

185. See sources cited *supra* note 80 and accompanying text.

nonexistent. Controlling for the other variables in our model, we found that his mere presence on the Court did not render it less likely that other Justices would cite legislative history. In other words, we looked specifically for evidence of a “Scalia effect,”¹⁸⁶ and we found none. In this respect, our findings contradict the conclusions drawn by other scholars.¹⁸⁷ Although Justice Scalia has been vocally opposed to the use of legislative history, we found no evidence that he has successfully persuaded others to follow his lead. Our findings suggest, instead, that any decline in legislative history usage has more to do with the repeated appointment of relatively conservative Justices to the Court than the influence of Justice Scalia.¹⁸⁸

On the other hand, our findings do suggest that Justice Scalia’s personal resistance to the use of legislative history has been more intense than that of Justices who are otherwise comparably conservative. Our model included both a special variable indicating whether Justice Scalia authored the opinion in question, and a measure of the authoring Justice’s ideology as measured by his Martin-Quinn score, which is calculated from the votes that Justices cast on the outcomes of cases. The fact that Justice Scalia’s special variable was a statistically significant and negative predictor of legislative history usage, even controlling for his overall conservatism as measured by his Martin-Quinn score, means that Justice Scalia’s opinions were significantly less likely to cite legislative history than those authored by similarly conservative Justices. In fact, the only Justice who was nominally less likely to use legislative history is a relatively new appointee, Chief Justice Roberts, about whom statistically meaningful conclusions cannot yet be drawn.

186. See *supra* Part III.F (setting forth the “Scalia effect” hypothesis).

187. See Brudney & Ditslear, *Scalia Effect*, *supra* note 48, at 117-18; Koby, *supra* note 28, at 369.

188. See *supra* tbl.5 and Part VI.B.2 (noting that a Justice’s ideology is a statistically significant predictor of his or her legislative history usage).

C. Evaluation of the Relative Impact of Legal and Ideological Factors

The regression results reported thus far tell us which variables have a statistically significant impact on legislative history usage. They do not, however, tell us which of these variables have a greater practical impact than the others. One way of evaluating their real-world impact relative to one another is to measure the change in the predicted probability of legislative history usage when we vary one variable within a realistic range—say, for example, the actual range observed in our data—while holding all other variables constant at a typical level. This is precisely the approach employed above in Figure 6, which illustrates in graphical terms the impact of statute age on the predicted probability of legislative history usage when all other variables are held constant at their median levels. The results of this approach, extended to all of the other statistically significant variables in the model, are summarized in Table 7.

Table 7: Impact of Changes in Each Variable on the Predicted Probability of Legislative History Usage, Holding All Other Variables at Their Median Values

		Predicted probability of legislative history usage	95% confidence interval
The “average” statute interpreted by the “average” Justice (i.e., all variables held at their median values):		.73	(.69, .78)
<i>LEGAL VARIABLES:</i>			
Type of			
opinion:	Majority:	.73	(.69, .78)
	Concurrence:	.20	(.14, .26)
	Special concurrence:	.32	(.25, .39)
	Dissent:	.47	(.41, .52)
	<i>Impact on probability of legislative history usage:</i>	.53	

Statute length:	Shortest statute (179 words):	.61	(.52, .70)
	Longest statute (3,500,000 + words):	.85	(.80, .90)
	<i>Impact on probability of legislative history usage:</i>	.24	
Statute complexity:	Least complex statute (10th grade reading level):	.64	(.57, .71)
	Most complex statute (44th grade reading level):	.81	(.77, .86)
	<i>Impact on probability of legislative history usage:</i>	.18	
Amendedness:	Least amended statute (amended 0 times):	.80	(.74, .85)
	Most amended statute (amended 10,301 times):	.63	(.52, .74)
	<i>Impact on probability of legislative history usage:</i>	.17	
Statute age:	Newly enacted statute:	.87	(.83, .92)
	Statute that is 90 years old:	.68	(.59, .76)
	Oldest statute (166 years old):	.85	(.70, .99)
	<i>Impact on probability of legislative history usage:</i>	.19	
IDEOLOGICAL VARIABLES:			
Ideology of author:	Most conservative (Rehnquist):	.67	(.60, .75)
	Most liberal (Douglas):	.81	(.74, .88)
	<i>Impact on probability of legislative history usage:</i>	.14	

Ideological alignment between author and enacting Congress:	Smallest ideological gap between author and enacting Congress:	.79	(.73, .86)
	Biggest ideological gap between author and enacting Congress:	.60	(.46, .75)
	<i>Impact on probability of legislative history usage:</i>	.19	

The variable with the biggest impact on the likelihood of legislative history usage is opinion type. To establish a baseline for comparison, let us specify that the statute is typical or average by holding all of its other characteristics at their median values. Let us further assume that the author of the opinion is ideologically moderate, and that he or she is authoring an opinion of the most common type—namely, a majority opinion. The resulting baseline scenario is a majority opinion by Justice White interpreting a forty-seven-year-old statute enacted by an ideologically moderate Congress that is 14,273 words long and has been amended fifty-five times. Under these assumptions, the model predicts that an opinion has a 0.73 probability of citing legislative history. If the same Justice facing the same statute is authoring a concurrence instead of a majority opinion, however, the predicted probability of legislative history usage falls to just 0.20. In other words, the difference between the probability that a majority opinion will cite legislative history and the probability that a concurrence will do so is a whopping 0.53.

The next most important variable is the length of the statute. For a statute as concise as 42 U.S.C. § 1983, which weighs in at just 179 words, the predicted probability of legislative history usage would fall to just 0.61. At the opposite extreme, that likelihood increases to 0.85 if the statute is as long as the Internal Revenue Code. That is, the predicted probability of legislative history usage increases by 0.24 when we move from the shortest statute in our data to the longest, holding all other variables at their median values.

The effect of a statute's age on the likelihood of legislative history usage is somewhat harder to describe because it is not linear. As Figure 6 illustrates, that likelihood reaches its nadir for statutes that are at approximately the ninety-year mark, but is higher for statutes that are either older or newer. If we compare a statute that is ninety years old with one that is newly enacted, our model predicts that an opinion interpreting the new statute has a 0.87 likelihood of citing legislative history, as opposed to just 0.68 for an opinion interpreting the older one. Thus, by these calculations, it is realistic for the age of a statute to affect the probability that an opinion will cite legislative history by up to 0.19.

The complexity and amendedness of a statute have roughly the same impact on the predicted probability of legislative history usage. As noted above in Table 1, the least complex statute in our data is the Immigration and Nationality Act, which is written at roughly a tenth-grade reading level,¹⁸⁹ whereas the most complex statute is the Robinson-Patman Act, with a Flesch-Kincaid score that is effectively off the scale. Holding all other variables at their median levels, the predicted probability that an opinion interpreting a statute as simple as the Immigration and Nationality Act will cite legislative history is 0.64, but that probability increases to 0.82 for a statute as complex as the Robinson-Patman Act. The effect of variations in statutory amendedness is similar: an opinion interpreting a statute that has never been amended, such as the Jones Act, has a 0.80 probability of citing legislative history, whereas an opinion interpreting a statute that has been amended more than ten thousand times, such as the Internal Revenue Code, has only a 0.63 probability of doing so. Our model and data suggest, in other words, that real-world variations in statutory complexity and amendedness can increase or decrease the probability of legislative history usage by up to 0.18.

This brings us to the effect of ideology on the use of legislative history. The use of predicted probabilities enables us to compare the relative impact of ideological and legal variables in an intuitive manner. The result may fuel the skepticism of many legal scholars as to the relative importance of ideology in shaping judicial

189. 15 U.S.C. §§ 13-13b, 21a (2006).

behavior. The model predicts that a Justice with a Martin-Quinn score as extreme as that of Chief Justice Rehnquist, whose score identifies him as the most conservative Justice in our data, has a 0.67 probability of citing legislative history, when all other variables are held at their median values.¹⁹⁰ By contrast, a Justice as liberal as Justice Douglas, the most liberal Justice according to the Martin-Quinn scores,¹⁹¹ has a 0.81 likelihood of doing so. That is meaningfully higher, to be sure, but the 0.14 difference in predicted probabilities between a very conservative Justice and a very liberal Justice pales next to the impact of other variables such as opinion type or statute length. Indeed, although the ideology of the authoring Justice certainly has a sizable impact on legislative history usage, it has less impact than any of the legal variables discussed above.

Ideology appears to have a slightly more pronounced effect on legislative history usage, however, when we consider the effect of ideological alignment between the authoring Justice and the Congress that enacted the statute at issue. The most extreme values of our measure of the interaction between author ideology and legislative ideology both involved opinions by the most liberal Justice in our data, Justice Douglas: in one case, he interpreted the Clayton Act, which was passed in 1914 by the most liberal Congress in our data,¹⁹² while in the other, he was faced with the Food and Drug Act, which was originally enacted in 1906 by a Republican-controlled Congress.¹⁹³ Our model predicts that, holding all other

190. As Table 4 suggests, Chief Justice Rehnquist was perhaps unusually willing for a Justice of his ideological timbre to resort to legislative history. However, it is important to bear in mind that we are not predicting how Chief Justice Rehnquist in particular would behave. Rather, we are using the results of our regression model to predict how a Justice with a Martin-Quinn score *as extreme as that of Chief Justice Rehnquist* would behave. Accordingly, the hypothetical comparison being made here between a very conservative Justice and a very liberal Justice is not swayed by the idiosyncrasies of Chief Justice Rehnquist in a way that might lead us to understate the practical impact of ideology on the probability of legislative history usage.

191. Martin & Quinn, *supra* note 137, at 146.

192. *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 691-92 (1975) (Douglas, J., concurring).

193. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 612 (1973). If we were to judge the impact of ideological alignment anecdotally by comparing just these two extreme cases, we would draw the wrong conclusion, as Justice Douglas did cite legislative history when faced with the Food and Drug Act but declined to do so when considering the Clayton Act. The biggest problem with such a primitive comparison is that it does not control for the sizable difference between majority and concurring opinions: Justice Douglas's citation to legislative history occurred in the context of a full-length majority opinion in *Weinberger*,

variables at their median values, a difference in ideological alignment of this magnitude changes the probability of legislative history usage by 0.19. In other words, the practical impact of a Justice's ideological agreement with the enacting legislature on the probability of legislative history usage appears to be roughly comparable with that of the statute's age and complexity. Thus, at least when it comes to the use of legislative history, it is fair to say that ideology has a meaningful impact on judicial behavior, but certainly not to the exclusion of legal factors. On the contrary, law-related variables appear to have a stronger impact on the whole.

D. Is Legislative History Usage Motivated by Disagreement Among the Justices?

1. The Outcome-Justifying Hypothesis: The Impact of Disagreement on the Merits on Legislative History Usage

There is one question that remains to be explored—namely, to what extent, if any, do the Justices cite legislative history in order to respond to the arguments and positions of other Justices? In Part III, we hypothesized that disagreement over the meaning of a statute should increase the likelihood of legislative history usage: when Justices disagree with one another on the merits, we might expect them to resort to legislative history as a means of bolstering their own arguments, and undermining those of their opponents. An initial examination of the Court's legislative history opinions yields little support for this hypothesis. Indeed, the opposite would appear to be the case: opinions for a unanimous Court are significantly *more* likely to cite legislative history than other types of opinions.

whereas his failure to cite legislative history occurred in the context of a 200-word concurrence in *Gordon*. Compare *id.* at 619 (interpreting the Food and Drug Act, and quoting the Senate Report), with *Gordon*, 422 U.S. at 691-92 (Douglas, J., concurring) (concurring in the majority's conclusion that the system of fixed commissions charged by the securities exchanges is immune from antitrust attack under the Clayton Act).

*Table 8: Likelihood of Legislative History Usage
in Unanimous Versus Nonunanimous Cases*

	... the Court was unanimous.	... the Court was divided.
Number and percentage of opinions that cited legislative history when ...	260 out of 432 (60.2%)	1222 out of 2663 (45.9%)

Closer examination reveals, however, that this finding is deceptive. It is a mistake to conclude that unanimity increases legislative history usage. Rather, the results in Table 8 reflect the fact that concurrences and dissents are significantly less likely than majority opinions to cite legislative history, as our regression analysis revealed. Most majority opinions are unanimous opinions, and majority opinions—unanimous or otherwise—are more likely to cite legislative history than are minority opinions. In order to isolate the effect of substantive disagreement, it is necessary to control for opinion type and compare only apples with apples: unanimous opinions must be compared with nonunanimous majority opinions. Once we do so, we discover that unanimous opinions are no more likely than nonunanimous majority opinions to cite legislative history: unanimous majority opinions cited legislative history 61.5% of the time, whereas nonunanimous majority opinions did so 64.9% of the time. The difference between the two percentages is not statistically significant.¹⁹⁴

2. The Tit-for-Tat Hypothesis: The Impact of Legislative History Usage on Legislative History Usage

It is also important to recognize that the above results tell us only about whether disagreement *over the meaning of a statute* prompts legislative history usage. They shed no light, however, on the validity of what we have called the tit-for-tat hypothesis: perhaps it is not disagreement over the meaning of the statute, but rather the fact that some other member of the Court has made a legislative

194. Statistical significance is determined per a Pearson chi-square test ($p = 0.22$).

history argument, that truly motivates the Justices to use legislative history.¹⁹⁵ When one Justice cites legislative history, do other Justices feel the need or desire to respond in kind with legislative history arguments of their own?

Examination of this question poses a methodological challenge. The reciprocal influence that Justices have upon one another cannot be analyzed using a regression model because such models presuppose unidirectional causation. For example, a regression model that treats a Justice's decision to use legislative history as the dependent variable and statutory complexity and age as the independent variables embodies the assumption that the length and age of the statute may influence legislative history usage, but not vice versa. In this case, the assumption of unidirectional causation is inarguably correct; the length and age of the statute may influence a Justice's decision to use legislative history, but the Justice's decision cannot possibly affect the statute's length or age. By contrast, consider the hypothesis that Justice X and Justice Y influence one another: the fact that Justice X chooses to employ legislative history in a given case increases the likelihood that Justice Y will do so, and vice versa. In this case, neither Justice's behavior can be used in a regression model to predict the other Justice's behavior. To do so would violate the assumption of unidirectional causation upon which all regression models are based.

In lieu of a regression model that assumes unidirectional causation, we can instead look for evidence of something much simpler, namely correlation. If Justices are more likely to cite legislative history in a given case when someone else has done so in the same case, the existence of that correlation lends conditional support to the hypothesis that legislative history usage is driven, in part, by interaction among the Justices. The substantive meaning of such a correlation should not, of course, be overstated. Drawing causal inferences from correlations is far from foolproof. If it so happens that all of the Justices in a given case cite legislative history, that may have more to do with some other variable—say, the nature of the factual and legal questions presented, or the

195. *See supra* Part III.D.

inherent salience of legislative history in that particular case—than with the fact that each Justice feels the need to fight fire with fire. Regression models are especially useful because they offer a way of controlling for other explanations, but they cannot be employed here because the underlying assumption of unidirectional causation would be violated. Thus, we are left to fall back upon the simple approach of looking for statistically significant correlations in the legislative history usage patterns of the Justices. In addition, logic compelled us to exclude unanimous cases from the analysis because it is not possible in such cases to compare the behavior of Justices who must face a legislative history argument made by another Justice with that of Justices who face no such argument.

Our findings, reported in Table 9, support our initial hypothesis: the fact that another Justice has written an opinion citing legislative history is indeed correlated with a higher likelihood of legislative history citation. When at least one other Justice has written an opinion that cites legislative history, the authoring Justice will cite legislative history 52.3% of the time. Conversely, when none of the other Justices has cited legislative history in their opinions, the authoring Justice will cite legislative history only 35.9% of the time.¹⁹⁶ The correlation is even stronger if we set aside majority and concurring opinions and narrow our focus to dissenting opinions. When at least one other opinion has cited legislative history, dissenting opinions cite legislative history nearly half of the time. By contrast, when no other opinion has cited legislative history, dissenting opinions cite legislative history only about one-fifth of the time.¹⁹⁷ In other words, dissenting Justices are much more likely to cite legislative history if someone in the majority has done so than if no one else has made a legislative history argument. These findings suggest that Justices are sensitive to the types of arguments made by their colleagues and feel an obligation or desire to respond in kind, especially when they disagree with one another on the merits.

196. The difference is statistically significant at $p < 0.01$, per a Pearson chi-square test. If opinions that contain criticism of legislative history usage are excluded from the analysis, the results remain largely unchanged (52.1% versus 35.6%), and the difference remains statistically significant at the $p < .01$ level.

197. The difference is statistically significant at $p < 0.001$, per a Pearson chi-square test.

*Table 9: Likelihood of Legislative History Usage
When Another Opinion Has Cited Legislative History*

	... no other opinion cited legislative history.	... at least one other opinion cited legislative history.
Number and percentage of opinions that cited legislative history when ...	375 out of 1045 (35.9%)	847 out of 1618 (52.3%)
Number and percentage of <i>dissenting</i> opinions that cited legislative history when ...	68 out of 321 (21.2%)	357 out of 722 (49.4%)

CONCLUSION

This Article has sought to identify the reasons for which members of the Supreme Court do, or do not, turn to legislative history when interpreting statutes. Using various statistical methods, we explored the impact of a variety of factors, including the formal characteristics of the statutes being interpreted, the ideological leanings of the Justices themselves, and, indeed, even whether Justice Scalia's mere presence on the Court has discouraged other Justices from mentioning legislative history. Our results offer support for what we have called the guidance-seeking, precedent-crafting, and tit-for-tat hypotheses, all of which suggest that the Justices are motivated by legal and deliberative factors. The evidence indicates that Justices tend to cite legislative history when faced with statutes that are in some objective sense difficult to interpret, when crafting majority opinions, and when other Justices have also cited legislative history.

At the same time, we found evidence that legislative history usage is influenced by ideological factors, and in more ways than one. As previous studies have reported, liberal Justices are generally more inclined than conservative Justices to make use of legislative history. But we also found evidence of a form of ideologically motivated, instrumental legislative history usage that no

previous study has either investigated or documented. Consistent with what we have called the ideological alignment hypothesis, it appears that the Justices are more likely to consult legislative history when it favors their ideologically preferred outcomes: when a Justice is ideologically aligned with the Congress that enacted the statute at issue, he or she is more likely to cite the legislative history of the statute.

We found little support, by contrast, for the outcome-justifying hypothesis: disagreement over the meaning of a statute does not, by itself, make it more likely that the Justices will cite legislative history. Whether another member of the Court has cited legislative history is a much better predictor of legislative history usage than whether the Justices disagree with one another over the actual meaning of the statute. It also appears that legislative history is one area in which Justice Scalia's powers of critique exceed his powers of persuasion: we found no evidence that his vocal objections to legislative history have caused his fellow Justices to behave any differently than they would have in his absence. Nor do our findings suggest that the Court's decision in *Chevron* has done anything to whet or diminish the appetite of the Justices for legislative history.

These findings reveal much about the nature of judicial behavior and judicial reasoning more generally. They illustrate in an empirical way that both ideological and legal factors have a meaningful impact on the choices that judges make about the interpretive techniques that they will use. Overall, the hermeneutic choices that the Justices make are not purely technical in nature. Nor, however, are they simply outgrowths of judicial philosophy or personal preference. Rather, such choices typify judicial decision making insofar as they reflect a combination of competing influences.

The widespread adoption of a theoretical vocabulary that pits the "legal model" against the "attitudinal model" has perhaps encouraged a tendency to view the two ways of explaining judicial behavior as mutually exclusive.¹⁹⁸ But they are not. The notion that judicial

198. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44-97, 279-311 (2002) (defining and contrasting the "attitudinal" and "legal" models of Supreme Court decision making, and finding "virtually no evidence for concluding that the Justices' decisions are based on legal factors"); Frank B.

behavior is the product of either law or ideology, each to the exclusion of the other, does not accurately capture mainstream thought among either political scientists or law professors.¹⁹⁹ No legal scholar today is so naïve as to believe that the behavior of the Justices is never influenced by either political or ideological considerations.²⁰⁰ Conversely, no political scientist is so cynical as to believe that legal materials and legal reasoning exert no influence whatsoever on the manner in which the Justices decide cases.²⁰¹ In

Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252-53 (1997) (contrasting the attitudinal and legal models, and arguing that legal scholars have been “remarkably oblivious” to the former while political scientists have been “correspondingly unconscious” of the latter); Czarnezki & Ford, *supra* note 117, at 854 (citing SEGAL & SPAETH, *supra*, for the proposition that “[p]olitical scientists speak of two basic models of judicial behavior: the legal model and the attitudinal model”).

199. See, e.g., Sisk, *supra* note 83, at 884 (identifying the use of “[m]ore sophisticated statistical models that include legal factors and legal reasoning as variables” as “perhaps the greatest priority in continued quantitative examination of the federal judiciary”); Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models 3* (2009) (unpublished manuscript), *available at* <http://epstein.law.northwestern.edu/research/JudicialBehaviorQuinn.pdf> (observing that the supposed conflict between the legal and attitudinal camps “is overblown, poses a false dichotomy, and has few truly devout adherents”).

200. See Tamanaha, *supra* note 85, at 690-98 (arguing that, contrary to the assumptions of many political scientists, “the legal fraternity” has never subscribed to “the myth of mechanical jurisprudence” or been “oblivious to the potential influence of personal views on judging”).

201. If one examines the authorities that law professors cite for the proposition that political scientists subscribe to the attitudinal model, it becomes apparent that the attitudinal model is identified closely, if not almost exclusively, with two political scientists in particular, Jeffrey Segal and Harold Spaeth, who are even responsible for popularizing the term “attitudinal model.” See, e.g., Cross, *supra* note 198, at 252 & n.3 (asserting that “[p]olitical scientists, such as Jeffrey Segal and Harold Spaeth, employ an ‘attitudinal model,’” and noting that the term “attitudinal model” first “assumed prominence” thanks to an earlier edition of SEGAL & SPAETH, *supra* note 198); Czarnezki & Ford, *supra* note 117, at 847 (citing SEGAL & SPAETH, *supra* note 198, for the proposition that “[p]olitical scientists speak of two basic models of judicial behavior: the legal model and the attitudinal model”); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1646-50 (1998) (crediting Harold Spaeth, his coauthor David Rohde, and an earlier scholar, Glendon Schubert, with the development of the attitudinal model). Yet even Segal and Spaeth themselves do not claim that Supreme Court decision making is purely the result of the attitudes of the Justices, but instead conclude that legal factors have an effect, albeit one that is generally overwhelmed by attitudinal factors. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999) (finding that precedent has a small but discernable influence on the decisions of the Justices); Jeffrey A. Segal & Robert M. Howard, *An Original Look at Originalism*, 36 LAW & SOC’Y REV. 113 (2002) (finding that textual “plain meaning” influences the voting of conservative Justices).

reality, there exists no rigid dichotomy between the way in which legal scholars explain judicial decision making and the way in which political scientists do so. What we face, instead, are explanations of judicial behavior that fall on a continuum and differ more in emphasis and degree than in kind.

It is one thing to confirm, as many scholars have long argued, that law and ideology are both important determinants of judicial decision making. It is a much greater challenge, however, to assess the relative importance of the two. Insofar as ideology and law are incommensurable and abstract phenomena that cannot be placed on a common measurement scale, it is highly doubtful that there will ever be a plausible or satisfying way of specifying whether a particular court or decision was more influenced by law than by ideology, or vice versa. It is futile to seek simple answers to such blunt questions. Yet, as Lawrence Baum has suggested, there are fruitful questions to be asked once we abandon “the model of single-minded Justices”: “How do justices balance competing goals against each other? What conditions affect the relative weight of various goals?”²⁰² Such questions, all of which go to the broader question of how to locate judges on the law-versus-ideology continuum, belong at the core of the research agenda for scholars of judicial behavior.

We hope that this Article helps to lead the way. The hypotheses identified in this Article invite empirical testing in other contexts and can provide a common foundation for further research on the determinants of judicial opinion content, including those of a nonideological nature. Little is known empirically about the extent to which judges resort to different devices for the purpose of tackling inherently difficult questions (the guidance-seeking hypothesis), crafting precedent that will provide adequate guidance to lower courts and stand the test of time (the precedent-crafting hypothesis), justifying particular outcomes (the outcome-justifying hypothesis), or fighting fire with fire (the tit-for-tat hypothesis).²⁰³ It simply cannot be assumed that all of the substantive, methodological, and rhetorical resources available to judges—amicus briefs, dictionaries,

202. Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 761 (1994).

203. See *supra* Part III (describing the four hypotheses).

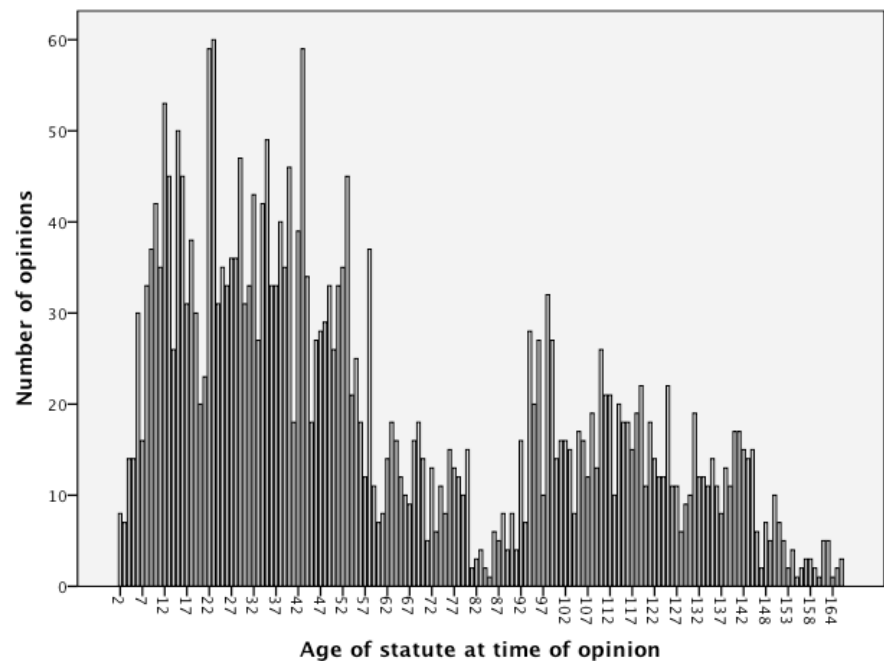
foreign case law, the *Federalist Papers*,²⁰⁴ and so forth—are used for the same reasons. Empirical testing of such hypotheses will be crucial to the development of a systematic and rigorous understanding of judicial reasoning and opinion writing.

204. See Corley et al., *supra* note 84, at 333, 335-36, 339 (finding on the basis of empirical analysis that the rate at which Supreme Court Justices cite the *Federalist Papers* is heightened by, inter alia, the ideological conservatism of the Justices themselves, the need to confront “special legitimacy challenges” that arise when the Court is striking down a law or altering precedent, and the fact that other Justices have cited the *Federalist Papers* as well).

*Appendix I:
Regression Coefficients, Standard Errors, and Confidence
Intervals*

	<i>Coefficient</i>	<i>Robust standard error</i>	<i>z- statistic</i>	<i>P > z </i>	<i>95% confidence interval</i>	
<i>Bulk</i>	.128	.032	3.97	0.000	.064	.192
<i>Complexity</i>	.602	.149	4.03	0.000	.309	.894
<i>Obscurity</i>	-8.32 e-6	.00001	-0.53	0.596	-.00003	.00002
<i>Novelty (first-time interpretation)</i>	-.021	.338	-0.06	0.949	-.685	.642
<i>Amendedness</i>	-.090	.037	-2.43	0.015	-.164	-.0177
<i>Age of statute</i>	-.028	.006	-4.55	0.000	-.040	-.016
<i>(Age of statute)²</i>	.0002	.00004	3.80	0.000	.00008	.0002
<i>Year of decision</i>	.115	.014	7.78	0.000	.086	.144
<i>(Year of decision)²</i>	-.002	.0003	-7.10	0.000	-.003	-.001
<i>Age of statute * year of decision</i>	.0001	.0001	0.83	0.405	-.0002	.0005
<i>(Age of statute * year of decision)²</i>	-2.88e-08	1.92e-08	-1.50	0.133	-6.65e-08	8.81e-09
<i>Dissent</i>	-1.152	.097	-11.84	0.000	-1.343	-.962
<i>Concurrence</i>	-2.401	.188	-12.78	0.000	-2.770	-2.033
<i>Special concurrence</i>	-1.750	.158	-11.11	0.000	-2.06	-1.442
<i>Unanimity</i>	-.147	.121	-1.21	0.225	-.385	.091
<i>Author ideology</i>	-.068	.031	-2.23	0.026	-.128	-.008
<i>Outcome ideology</i>	-.0164	.086	-0.19	0.848	-.184	.151
<i>Author ideology * outcome ideology</i>	-.0258	.040	-0.64	0.521	-.105	.053
<i>Author ideology * legislative ideology</i>	.253	.128	1.97	0.049	.001	.504
<i>Scalia authorship</i>	-1.070	.264	-4.05	0.000	-1.589	-.552
<i>Scalia on Court</i>	-.245	.222	-1.11	0.269	-.680	.189
<i>Post-Chevron</i>	.144	.208	0.69	0.490	-.268	.551
<i>Constant</i>	-2.429	.579	-4.20	0.000	-3.564	-1.295

*Appendix II:
Distribution of Data, by Age of Statute*



*Appendix III:
Federal Statutes Most Frequently Interpreted by the
Supreme Court*

<i>Statute Name</i>	<i>Citation</i>
42 U.S.C. § 1983	<i>Id.</i>
42 U.S.C. § 1988	<i>Id.</i>
Administrative Procedure Act	5 U.S.C. § 551 et seq.
Aid to Families with Dependent Children (AFDC) provisions of the Social Security Act, plus amendments	42 U.S.C.A. § 601 et seq.
Age Discrimination in Employment	29 U.S.C.A. § 621 et seq.
Americans with Disabilities Act	42 U.S.C. § 12101 et seq.
Bankruptcy Code, Bankruptcy Act or Rules, or Bankruptcy Reform Act of 1978	11 U.S.C.
Clayton Act	15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53
Clean Air Act	42 U.S.C. §§ 7401-7671q
Federal Water Pollution Control (Clean Water), plus amendments	33 U.S.C. §§ 1251-1387
ERISA	29 U.S.C. § 1001 et seq.
Fair Labor Standards Act	29 U.S.C. ch. 8
False Claims Act	31 U.S.C. § 3729 et seq.
Federal Employers' Liability Act	45 U.S.C. § 51 et seq.
Federal Power Act	16 U.S.C. §§ 791a-828c
Federal Tort Claims Act	28 U.S.C. § 1346(b); 28 U.S.C. § 2671 et seq.
Federal Food, Drug, and Cosmetic, and related statutes	21 U.S.C. § 301 et seq.
Foreign Sovereign Immunities Act	28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611
Freedom of Information Act	5 U.S.C. § 552
Habeas Corpus	28 U.S.C. §§ 2241-2255
Immigration and Nationality Act	8 U.S.C.

Individuals with Disabilities in Education Act	20 U.S.C. § 1400 et seq.
Internal Revenue Code	26 U.S.C. (multiple chapters)
Interstate Commerce Act	24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C. .)
Jones Act	46 U.S.C. § 30301
Labor-Management Relations Act	29 U.S.C. § 141 et seq.
Labor-Management Reporting and Disclosure Act	29 U.S.C. § 401 et seq.
Longshore & Harbor Workers' Compensation	33 U.S.C. §§ 901-950
Omnibus Crime Control and Safe Streets, National Firearms, Organized Crime Control, Comprehensive Crime Control, or Gun Control Acts, except for RICO	26 U.S.C. ch. 53; 42 U.S.C. § 3711; 84 Stat. 922; 18 U.S.C. ch. 44
National Labor Relations Act	29 U.S.C.A. § 151 et seq.
Natural Gas or Natural Gas Policy Act	15 U.S.C. §§ 717 et seq., 3301 et seq.
Railway Labor	45 U.S.C. § 151 et seq.
RICO	18 U.S.C. §§ 1961-1968
Robinson-Patman Act	15 U.S.C. § 13
Securities Act of 1933; Securities & Exchange Act of 1934; Williams Act	15 U.S.C. §§ 77a et seq., 78a et seq.
Selective Service, Military Selective Service, or Universal Military Service and Training Acts	40 Stat. 76; 54 Stat. 885; 50 U.S.C. App. § 450 et seq.
Sherman Act	15 U.S.C. § 2 et seq.
Social Security, as amended, including Social Security Disability Benefits Reform Act, but excluding Medicare, Medicaid, Supplemental Security Income, and Aid to Families with Dependent Children	42 U.S.C. ch. 7
Title VII of Civil Rights Act of 1964	42 U.S.C. § 2000e et seq.
Voting Rights Act	42 U.S.C. § 1973 et seq.

