ARTICLES

TWO ROADS DIVERGED: STATUTORY INTERPRETATION BY THE CIRCUIT COURTS AND SUPREME COURT IN THE SAME CASES

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Scholars and judges have long disagreed on whether courts of appeals construing statutes ought to adapt their use of interpretive resources to Supreme Court approaches. If circuit courts and the Supreme Court approach statutory issues in similar ways, this can perhaps provide a measure of predictability for litigants and the public while conserving judicial resources; it may also enhance perceptions of fairness in the judicial system. Such normative arguments invite—even demand—a fuller understanding of the underlying descriptive reality: whether anything approaching uniformity or consistency actually exists.

This Article aims to provide that understanding. It does so through an in-depth examination of similarities and differences in how the Supreme Court and circuit courts apply key interpretive resources in a universe of identical cases involving statutory interpretation: those in which the Supreme Court reviews what an appeals court has decided. From circuit judges' standpoint, such cases are more complex than the bulk of their docket; moreover, the judges are nearly always aware when they are creating or contributing to circuit conflicts that are centrally important to the Supreme Court's granting of certiorari.

Our findings provide a modicum of support for the virtue of predictability. The Supreme Court's increasing reliance during the Rehnquist and Roberts years on ordinary meaning, language canons, and dictionaries, and its declining interest in legislative history, are trends that the appeals courts followed with a lag of several years, suggesting that circuit courts are influenced to some degree by Supreme Court changes in emphasis and priority.

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But a number of findings lend descriptive support to normative arguments opposing uniformity. Some results support divergent approaches based on differences in institutional perspective: circuit courts prefer simpler interpretive frameworks as more compatible with their heavier workloads. Other findings supporting a pluralist approach in these identical cases suggest that appeals courts are reacting silently but negatively to the doctrinaire pronouncements of certain Supreme Court justices. And a third set of findings underscores both the necessity and the value of deliberative disputation between the two judicial levels.

In the end, it is the divergence in interpretive approaches between the two levels of courts that stands out. Based on our empirical and doctrinal analyses, a substantial degree of divergence seems inevitable even in this special universe of identical cases. Whatever its desirability may be as a normative matter, uniformity between the Supreme Court and the courts of appeals in reliance on interpretive resources is a chimera.

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INTRODUCTION

Scholars and judges have opined for years on whether courts of appeals construing statutes ought to adapt their use of interpretive resources to U.S.

Supreme Court approaches.[1] To the extent these arguments rest primarily on the Supreme Court's role in exercising hierarchical control over lower courts—a kind of methodological stare decisis—they have little traction. As we and other scholars have observed, the Court has been both divided and less than consistent about the relative weight given to text, canons, dictionaries, and legislative history.[2]

Still, arguments for a more consistent approach to interpretive resource usage between these two judicial levels may be based on the value of uniformity for its own sake. If circuit courts and the Supreme Court approach statutory issues in similar ways, this can perhaps provide a measure of predictability for litigants and the public while conserving judicial resources; it may also enhance perceptions of fairness in the judicial system. Such normative arguments invite—even demand—a fuller understanding of the underlying descriptive reality: whether anything approaching uniformity or consistency actually exists. This Article aims to provide that understanding through an in-depth examination of similarities and differences in how the Supreme Court and circuit courts apply key interpretive resources.

Comparing interpretive practices between these two judicial levels as a whole, however, is akin to comparing apples and oranges. Supreme Court justices today decide fewer than seventy-five cases per year, each raising

1. *Compare* Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002), *and* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010), *with* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014), *and* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 492–93 (2015), *and* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. FORUM 47 (2010); *see also* Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782–83 (2018) (Sotomayor, J., concurring) (criticizing her colleagues' methodological refusal to rely on legislative history as a confirmatory resource when the text is clear); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 229 (2008) (Kennedy, J., dissenting) (warning about the stare decisis nature of the majority's assertedly novel application of two language canons).

2. On text, see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006). *See also* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015). On canons, see James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) [hereinafter *Canons of Construction*] and Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (1992). On dictionaries, see James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV 483 (2013) [hereinafter *Oasis or Mirage*] and Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998). On legislative history, see James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008) [hereinafter *Liberal Justices*] and Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003). *See generally* James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV, 681, 691 (2017) [hereinafter *Protean Statutory Interpretation*]; Adrian J. Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001).

deeply contested legal questions.[3] They typically respond to resource-driven arguments from highly experienced lawyers, augmented by a wealth of amicus briefs including briefs from the solicitor general when the United States is not a party. By contrast, circuit courts decide thousands of cases each year, creating pressure to reach decisions with little attention to methodological approaches.[4] Further, many if not most cases involve fact-specific disputes that present no novel legal questions; there also are far fewer amicus briefs and the quality of lawyer participation is considerably more uneven than in the Supreme Court.[5]

But what if the comparison between the Supreme Court and circuit court approaches is apples to apples? This would involve examining how the two judicial levels rely on interpretive resources for a universe of identical cases—those on which the Supreme Court reviews what an appeals court has decided. From circuit judges' standpoints, such cases are more complex and important than the bulk of their dockets. Further, the judges are likely to understand that their decisions have a more than remote chance of being taken up by the justices. One major reason is that conflicts between circuits are centrally important to the Supreme Court's granting of certiorari in statutory cases, and judges nearly always are aware when they are creating or contributing to circuit conflicts.[6]

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3. In the 2011–2017 Terms, the Court decided an average of seventy-three cases with full opinions per term. This figure was calculated from the numbers of full opinions shown in table I(C) of the "Statistics" articles in the November issues of volumes 126 to 132 of the *Harvard Law Review*. In the Burger Court era, the Court decided about 150 cases per term. On the decline after the Burger Court, see David M. O'Brien, *A Diminished Plenary Docket*, 89 JUDICATURE 134 (2005) and David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010).

4. In 2017, the courts of appeals terminated 54,347 cases through decisions on the merits, with the largest number in the Ninth Circuit (11,867) and the smallest number in the District of Columbia Circuit (1050). *Table B-5*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_b5_0930.2017.pdf [https://perma.cc/87R2-79XX] (last visited Nov. 12, 2019); *see also Protean Statutory Interpretation*, *supra* note 2, at 695 (reporting that for three federal circuits, each appeals court judge participated in 253–430 merits decisions from 2005 to 2015, four-to-seven times as many as each of the justices).

5. *See Protean Statutory Interpretation*, *supra* note 2, at 696; Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 12–17 (2018).

6. One study of the 2003–2005 Terms, which included both statutory and nonstatutory cases, found lower court conflict in 69 percent of the cases that the Court decided after granting certiorari. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981–82 (2007). In all likelihood, the percentage for statutory cases was even higher. Based on data in the Supreme Court Database (archived at Washington University School of Law), in the 2012–2016 Terms, the Court cited circuit conflict in its opinion as a reason for hearing the case in 40 percent of the statutory cases with oral argument in which it reviewed a court of appeals decision. That proportion understates the importance of circuit conflict as a basis for accepting cases. This is primarily because the Court often cites no reason for hearing a case, including cases in which the petitioner made a credible claim of a conflict. Of the statutory cases in which the Court did cite a reason in the 2012–2016 Terms, it referred to circuit conflict in 62 percent. *See generally* SUP. CT. DATABASE, http://scdb.wustl.edu/index.php [https://perma.cc/7NDQ-SCGL] (last visited Nov. 12, 2019).

Our Article is devoted to exploring these identical cases. We examine the interpretive approaches taken over a fifty-year period in hundreds of instances where the Supreme Court granted certiorari and then reviewed appeals court decisions. Our dataset consists of 321 Supreme Court decisions and their appeals court counterparts, applying federal statutory law in one area—labor and employment—and covering the period from 1969 to 2018.[7] Based on our analysis of one hundred or more cases decided by the Burger, Rehnquist, and Roberts Courts, along with the appeals court decisions reviewed in each instance, we develop a nuanced and in-depth picture of similarities and differences in the way these two judicial levels have addressed their interpretive task for the same cases over extended time periods.

One should expect greater uniformity in interpretive reliance between the two levels for circuit court cases heard by the Supreme Court as distinct from all circuit court decisions.[8] But just how much uniformity is there: do these paired cases reflect identity more than divergence? Relatedly, how exactly should we assess the degree or nature of this uniformity? Based on overall instances of interpretive reliance at both judicial levels for an extended number of years? By comparing reliance trends over time between the two judicial levels? By focusing on the individual cases in which both the Supreme Court and appeals court rely on the same resource?

In seeking answers to these questions, we compare the nature and extent of reliance in our universe of identical cases for six separate interpretive resources. Three resources—ordinary meaning, dictionaries, and language canons—are generated by courts and are associated with a more textualist orientation. The other three—legislative history, legislative purpose, and agency deference—are generated by the politically accountable branches and are linked to a more purposivist focus. These six resources have acquired special saliency, as the Supreme Court since the late 1980s has become more self-consciously methodological in its approach to interpreting statutes.

We summarize our findings here, based on an empirical analysis that is organized in three distinct segments. Starting with the dataset as a whole, we looked for *general patterns in the application of resources*. Over the entire fifty-year period, circuit courts relied on ordinary meaning and agency deference more often than the Supreme Court. Conversely, the Supreme Court relied on dictionaries and purpose more often than the courts of appeals. And the two judicial levels relied to virtually the same extent on language canons and legislative history.[9] Appeals courts' tendency to rely more often on ordinary meaning than the Supreme Court was especially strong in cases under labor-management relations statutes. Further, in

7. More precisely, the cases that we analyzed were decided in the 1969–2017 Terms of the Court.

8. *See* James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and the Courts of Appeals*, 125 YALE L.J. FORUM 104, 104–05, 119 (2015); Bruhl, *supra* note 5, at 46–47.

9. *See* Table 1 *infra* Part II.A and accompanying text.

contrast with other statutes, the circuit courts relied somewhat more often on language canons and legislative history than the Supreme Court in Employee Retirement Income Security Act of 1974[10] (ERISA) cases.[11] As expected, reliance on textualist resources is associated with more pro-employer results and reliance on purposivist resources with more pro-employee results. However, those associations are relatively weak with two exceptions: courts of appeals are substantially more likely to invoke legislative history and agency deference in pro-employee decisions.[12]

Second, we examined *temporal patterns of reliance*. We explored three distinct Court eras[13] to determine whether broad trends in judicial reliance for our six identified resources follow similar paths in the Supreme Court and courts of appeals. We found sharp decreases for legislative purpose at both court levels that were essentially simultaneous, which indicated that both levels were likely affected by similar "outside" factors. In contrast, substantial increases or decreases for ordinary meaning, language canons, and legislative history occurred earlier in the Supreme Court, which indicates that circuit courts may have been influenced by the Court's greater enthusiasm for ordinary meaning and language canons and its diminished appetite for legislative history.[14]

Third, we analyzed *case-specific patterns of reliance* for our six targeted resources. We focused on "co-reliance," in which both the circuit court and Supreme Court rely on a given resource in the same case. We found that this co-reliance is highest for legislative history, followed by language canons, ordinary meaning, and agency deference; legislative purpose and dictionaries rank lowest.[15] Moreover, the two levels of courts increasingly diverged in their choices of resources in the same cases between the Burger and Roberts Courts, with most of that increase occurring in the Rehnquist era.[16] This increasing divergence is consistent with the possibility that the doctrinaire approaches to choices of resources by certain Supreme Court justices have produced higher levels of divergence between courts in the resources they apply to the same case.

Probing further into co-reliance with respect to three of our resources (legislative history, language canons, and dictionaries), we found that it was quite common for the two judicial levels to invoke the same resource in different forms, in terms of the particular type of legislative history, the specific language canon, or the particular dictionary definition deemed

10. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the U.S.C.).

11. *See* Table 2 *infra* Part II.A and accompanying text.

12. *See* Table 3 *infra* Part II.A and accompanying text.

13. These eras are the Burger Court from 1969 to 1986; the Rehnquist Court from 1986 to 2005; and the Roberts Court from 2005 to 2018. *See* Table 4 *infra* Part II.B and accompanying text.

14. *See* Table 5 *infra* Part II.B and accompanying text.

15. *See* Table 6 *infra* Part II.C and accompanying text. Co-reliance overall is higher for affirmances than for reversals; the statistical relationship is meaningful though not dramatic. *See* Table 7 *infra* Part II.C and accompanying text.

16. *See* Table 8 *infra* Part II.C and accompanying text.

relevant to help decide the issues in a given case. This finding underscores the divergence between the two courts in the ways they applied the same resources to individual cases. Finally, we analyzed from a doctrinal standpoint a limited number of individual paired cases involving reliance on dictionaries, language canons, and legislative history. We identify cases where the specific version of the resource relied upon was consistent between the two judicial levels and cases where the specific version was inconsistent between the Supreme Court and the circuit court. Inconsistent cases tend to reflect strategic application of a resource by the Supreme Court.

Based on our findings involving case-specific patterns of reliance, it appears that divergences in reliance on particular resources—both between resource categories and within the same category[17]—have increased or become more salient in the Roberts years. The justices seem at times willing to depart from or abandon circuit court methodological positions as part of their substantive judicial review. And circuit court judges may be silently resisting the inflexible application of interpretive resources by certain justices.

More broadly, our findings in support of a modest role for uniformity in fostering predictable usages between judicial levels are considerably outweighed by evidence that uniformity is subordinated to other interests: institutional needs at the appeals court level; circuit court reluctance to bow to orthodox textualist methodologies; and the inevitability and value of methodological contestation between the two judicial levels.

The rest of this Article proceeds as follows. Part I addresses debates over the value of a uniform approach when interpreting statutes in both the Supreme Court and circuit courts. Part II, the centerpiece of the Article, presents our empirical results. Part III examines a limited number of co-reliance cases in doctrinal terms, in an effort to illuminate further certain aspects of our empirical results. Part IV relates our empirical and doctrinal findings back to the normative debate over uniformity.

I. THE DEBATE OVER UNIFORMITY IN STATUTORY INTERPRETATION

Statutory interpretation at different judicial levels is characterized by conflicting and hotly contested theoretical approaches. Supreme Court justices and circuit court judges, as well as scholars of the federal and state judiciary, disagree on the weight—or in some instances even admissibility—that should be attached to a range of interpretive resources, including the ordinary meaning of enacted text, dictionary definitions, language and substantive canons, legislative history and purpose, agency deference, and

17. Divergences *between* resource categories refer to situations where, for instance, one court relies on language canons or legislative history and the other does not. Divergences *within* resource categories occur when both courts rely on language canons or legislative history but they invoke wholly separate specific versions, as when the appeals court relies on a conference committee report while the Supreme Court relies on House floor statements, or the appeals court relies on in pari materia while the Supreme Court relies on the rule against surplusage.

legislative inaction.[18] Amidst the high decibel level of judicial and academic noise, arguments have emerged favoring adoption of a more uniform approach to construing enacted laws that would apply to all courts. The source for such uniform rules is not our concern here: they could emerge from Congress or state legislatures, from the highest court in a given jurisdiction, or from designated advisory bodies such as those that developed the Federal Rules of Civil Procedure or Evidence.[19] Rather, we are interested in the arguments for and against uniformity as a value in statutory interpretation, especially between the Supreme Court and the courts of appeals.

A. Arguments Favoring a Uniform Approach Between Court Levels

Those favoring a uniform approach that would apply to both higher and lower federal courts focus on several benefits. Probably the most prominent is predictability in rule-of-law terms. A single controlling regime of statutory interpretation would mean that citizens who litigate under federal laws can rely on the same set of interpretive rules (or perhaps tiered hierarchies of rules) when arguing their cases before a district court, a circuit court, or the Supreme Court.[20] The Supreme Court could reinforce the applicability of such an interpretive regime for lower federal courts by utilizing its powers of judicial review.[21] It has been suggested that federal circuit courts might welcome this kind of direction or guidance, given their enormous caseloads and the fact that "most of the appeals they get can be decided uncontroversially by the application of settled principles."[22] But even if circuit court judges would not embrace a uniform interpretive regime,[23] the litigants and attorneys who argue cases before them might do so, in order to understand and make best use of the hierarchy of interpretive sources that courts at all levels will find persuasive.[24] In addition, Congress would be in a position to understand more clearly how its legal texts and lawmaking

18. *See* WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION 643–890, 1073–1178 (5th ed. 2014) (hereinafter ESKRIDGE ET AL.); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 1–329, 737–874 (2d ed. 2013).

19. *See* Rosenkranz, *supra* note 1 (arguing for a legislative authorization); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (arguing for a judicial authorization). We also do not address the constitutional issues surrounding whether Congress or state legislatures can dictate interpretive rules to the judicial branch.

20. *See* Foster, *supra* note 19, at 1892; Gluck, *supra* note 1, at 1770, 1851.

21. *See* Gluck, *supra* note 1, at 1852; Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 580–81 (2002).

22. Gluck, *supra* note 1, at 1852 n.357 (quoting RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (1999)).

23. Judge Richard Posner himself did not always favor such consistency in construing statutes, advocating instead for a pragmatic approach. *See* RICHARD A. POSNER, HOW JUDGES THINK 191–203, 242–45 (2008).

24. *See* Leib & Serota, *supra* note 1, at 48.

processes will be regularly construed, allowing it to draft future laws with such knowledge in mind.[25]

The benefits flowing from predictability also mean that the absence of a uniform methodological approach involves costs associated with uncertainty. Federal courts of appeals must address the weight and priority of various interpretive resources using their own best judgment, which inevitably takes them in different directions. Further, undue discretion in interpretive approaches leads to methodological conflicts between the circuits and the Supreme Court that implicate matters of substantive law: a claim under the Fair Labor Standards Act of 1938[26] (FLSA) or ERISA may be resolved differently based on the weight given to text, language canons, or legislative history.[27] This in turn may incentivize strategic behavior by individual judges or justices, denying litigants adequate clarity regarding the types of statutory arguments to make that will be accepted or effective in front of courts or agencies.

In addition, uniform interpretive rules between judicial levels would presumably result in cost savings for both courts and lawyers.[28] Thus, assuming adoption of a rule excluding legislative history from the interpretive process, or identifying *Webster's Third New International Unabridged Dictionary* as the sole source of word definitions, the justices and their appellate court colleagues would no longer expend time and resources researching legislative record evidence or sifting through definitions from multiple dictionaries.

Finally, there is the potential for what Abbe Gluck refers to as aspirational benefits. Gluck contends that this level of coordination among judges from different courts, in which they regularly set forth the same governing interpretive rules, may "serve as a reminder to the judges of the rules themselves. Perhaps ideology is less salient and the rules themselves do more work . . . because of this constant reminder. In this fashion the act of expressing the consistent rules may have a performative function."[29]

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25. *See* Rosenkranz, *supra* note 1, at 2142.

26. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.).

27. *See, e.g.*, Coke v. Long Island Care at Home, Ltd., 462 F.3d 48 (2d Cir. 2006) (relying inter alia on plain language and legislative history to hold in favor of an FLSA plaintiff), *rev'd*, 551 U.S. 158 (2007) (relying inter alia on language canons and agency deference while eschewing reliance on plain meaning and legislative history); Geissel v. Moore Med. Corp., 114 F.3d 1458 (8th Cir. 1997) (relying inter alia on text, language canons, purpose, and legislative history to hold against an employee seeking continuation health insurance coverage under an amendment to ERISA), *vacated*, 524 U.S. 74 (1998) (relying exclusively on text while eschewing reliance on language canons, legislative history, or purpose).

28. *See* Foster, *supra* note 19, at 1893–95; ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 132–34 (2006). Such cost savings may be attributable to the content of specific uniform methods (as with reliance on one particular dictionary or an accepted exclusion of legislative history sources, both mentioned in text), but they also may result from a general commitment to pursue uniformity per se.

29. Gluck, *supra* note 1, at 1855.

B. Arguments Opposing a Uniform Approach Between Court Levels

Opponents of uniformity offer a number of arguments against a rule-based approach. First, as a descriptive matter, there is nothing close to consensus regarding the correct way to engage in statutory interpretation. Although all judges would presumably agree that the text is of primary importance,[30] "[n]o court, and not even any single judge, is completely consistent in interpretive approach from case to case."[31] This latter statement applies to Supreme Court justices, including even Justice Scalia: his notable opposition to the use of legislative history did not stop him from joining some majority opinions that relied on it,[32] from writing dissents asserting its probative value,[33] or from authoring majorities that invoked certain forms of it.[34] And on the current Court, the textualist position taken by Justices Thomas and Gorsuch is at odds with the purposivist approach generally followed by Justices Ginsburg, Breyer, and Sotomayor. Given that there is little methodological uniformity on the Supreme Court, one should not expect such uniformity between the Supreme Court and appeals court judges, who have limited ability to ascertain what the Supreme Court wants them to do when they choose interpretive resources and limited incentives to follow the Supreme Court's shifting lead.

The lack of methodological consensus on the current Supreme Court also reflects how judicial positions on statutory interpretation have evolved over time. Initially and through most of the nineteenth century, U.S. courts proclaimed their fidelity to legislative "intent," yet they most often followed an eclectic approach rather than one based on larger theories.[35] From the 1930s until the mid-1980s, federal courts generally adhered to a legal process methodology that included considerable attention to legislative history.[36] Since the late 1980s, federal courts have tended to embrace a more textualist methodology that emphasizes the role of ordinary meaning and the language canons and downgrades legislative history and purpose,[37] although there has recently been some pushback against an overly textualist approach.[38] This pattern of continuing adjustment, and the ongoing tension evidenced in

30. In a widely quoted statement at a 2015 talk at Harvard Law School, Justice Elena Kagan said that "we're all textualists now." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016).

31. Bruhl, *supra* note 5, at 10–11.

32. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (joining Justice O'Connor's majority).

33. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 727–29 (1995) (Scalia, J., dissenting).

34. *See, e.g.*, Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 875–76, 877–78 (2014) (Scalia, J.) (relying on statutory history and context accompanying changes in textual language).

35. *See* ESKRIDGE ET AL., *supra* note 18, at 478–80 (citing numerous sources).

36. *See id.* at 506–07, 514–15. *See generally* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266 (2013).

37. *See* ESKRIDGE ET AL., *supra* note 18, at 568–83. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

38. *See* ROBERT A. KATZMANN, JUDGING STATUTES (2014); Re, *supra* note 2; Molot, *supra* note 2. *See generally* Vermeule, *supra* note 2.

current disagreements among both justices and appeals court judges,[39] counsels against freezing in place any single approach that would control methodological relations between the Supreme Court and the circuits.

Apart from these practical realities, certain normative considerations militate against a uniform approach. As other scholars have observed, interpretive methodology involving statutes is more akin to "a web of considerations with different and varying weights rather than a set of hierarchical rules."[40] Canons now number in the hundreds;[41] whether the whole act rule should trump in pari materia or the rule disfavoring repeals by implication should prevail over the rule that later-enacted laws control over earlier ones will inevitably call for situational analysis rather than a rule-like application, something even ardent textualists readily acknowledge.[42] Similarly, a uniformly chosen dictionary will have multiple definitions for most, if not all, statutory terms contested in litigation.[43] In this context, notions of compliance or noncompliance become fuzzy at best.[44]

Assuming arguendo that compliance could be measured and implemented in a more rigorous fashion, the consequences of a uniform interpretive approach between courts might be less than welcome. Because such rules about interpretation would operate prospectively, they would shape and limit rights, responsibilities, and liabilities under substantive law.[45] Thus, for instance, a uniform determination by the Supreme Court to confer upon the whole act rule and its corollaries priority status among all canons, or to rely exclusively on the *Oxford English Dictionary* for word definitions, or to exclude all consideration of legislative history, would apply to every appeals court interpretation of Title VII of the Civil Rights Act of 1964[46] ("Title VII"), ERISA, or federal criminal law. This result seems ironic, if not paradoxical, given that substantive law is more directly and heavily relied upon than interpretive approaches—by parties to litigation but also by

39. *Compare* KATZMANN, *supra* note 38, *with* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

40. Criddle & Staszewski, *supra* note 1, at 1593 (quoting Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1811 (2010)).

41. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 56–339 (2012) (cataloging canons as inter alia semantic, syntactic, contextual, expected meaning, government-structuring, private-right, and stabilizing); ESKRIDGE ET AL., *supra* note 18, at 1195–1215 (listing more than 150 canons invoked by Supreme Court from 1986 to 2014).

42. *See* SCALIA & GARNER, *supra* note 41, at 59 ("Principle of Interrelating Canons: No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.").

43. *See, e.g.*, Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011). Justices Thomas and Breyer differed on the appropriate definition for *making* material misrepresentations in connection with the purchase or sale of securities. The *Oxford English Dictionary*, on which Justice Thomas relied, listed more than seventy different definitional senses of the verb "to make." *Webster's Third New International Dictionary*, on which Justice Breyer relied, listed more than forty such senses. For further discussion, see *Oasis or Mirage*, *supra* note 2, at 555–57.

44. *See* Bruhl, *supra* note 5, at 11.

45. *See* Criddle & Staszewski, *supra* note 1, at 1592.

46. 42 U.S.C. §§ 2000e–2000e-17 (2012).

agencies seeking to administer the substantive law and by the public at large.[47]

It is apparent that methodology is distinctly subordinate to substantive law in relations between levels of courts when one considers the basis for certiorari petitions. As Aaron-Andrew Bruhl points out, the Supreme Court is unlikely to grant certiorari on a statutory question that all the circuits had agreed upon simply to repudiate a particular lower court's methodology. Nor would the Court refuse to grant certiorari on a circuit split involving the ordinary meaning of a statutory term just because all the circuits had used the approved dictionary or applied the preferred language canons.[48]

Finally, separate from concerns regarding adoption of a uniform interpretive approach, there is support for the affirmative value of divergence in interpretive methodologies involving different court levels. One argument emphasizes significant differences in resources. Lower federal courts have less time than the Supreme Court to devote to interpretation (due to their much heavier caseloads) and also less access to expertise (in the form of amicus briefs and the research capacities of multiple law clerks). Accordingly, it is suggested that these courts must, and should, rely more on a basic reading of text supplemented by expertise borrowed from judicial precedent and agency deference, and less on research into legislative or regulatory histories, than is appropriate for the Supreme Court.[49] The argument based on resource constraints seems especially applicable with respect to district courts, which deal most often with factual and evidentiary disputes that do not raise difficult legal issues and which rely heavily on precedent within their own circuits when resolving contested legal questions.[50]

Circuit court cases, where judges, supported by several law clerks, focus on tougher legal issues presented through an agreed-upon factual record, seem more analogous to the Supreme Court setting, although they do differ based on the number of relatively routine cases and the overall number of cases handled per judge.[51] At the same time, both circuit courts and the Supreme Court may benefit from a more pluralistic approach to statutory interpretation. The argument is that a broad array of interpretive tools available to litigants and judges promotes important values besides uniformity. "Deliberative and transparent contestation" increases the prospect of achieving sound results, as circuit court judges and Supreme Court justices discuss and disagree in case-specific settings over the relevance and weight of text, history, purpose, precedent, or various

47. *See* Criddle & Staszewski, *supra* note 1, at 1593–94.

48. *See* Bruhl, *supra* note 5, at 11.

49. *See* Aaron-Andrew Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 470–84 (2012).

50. Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U J.L. & POL'Y 83, 89–94 (2009); Bruhl, *supra* note 1, at 554–55; Bruhl, *supra* note 5, at 15.

51. *See supra* note 4 and accompanying text.

canonical presumptions.[52] This level of candid debate on methodological approaches also avoids encouraging judges to hide their real reasoning within the approach celebrated under a uniformity regime.[53]

C. Prominent Judges as Promoters of Uniformity

Before turning to the analysis of our dataset, we briefly address whether certain leading judicial proponents of methodological uniformity have succeeded in influencing their colleagues on other courts. Although this is something of an empirical digression from the normative arguments reviewed in Parts I.A and I.B, its consideration further illustrates the challenges confronting supporters of a uniform approach.

The most prominent methodological evangelist in recent decades has been Justice Scalia, whose judicial opinions (as well as books and articles) pressed for a rigorously textualist approach. Circuit courts, like the Supreme Court, have become more reliant on text-based tools such as language canons and dictionaries, and less reliant on legislative history. At the same time, these changes in the courts of appeals have been less substantial and also less consistent than in the Supreme Court—varying between circuits and also regarding particular interpretive resources.[54] Moreover, even this lesser degree of correlation does not amount to causal influence; other factors besides the writings of Justice Scalia may have played a more important role in circuit court developments.[55]

At the appeals court level, perhaps the most prominent advocate for an interpretive methodology has been Judge Richard Posner on the Seventh Circuit. As the author of numerous writings dealing in important respects

52. Leib & Serota, *supra* note 1, at 49–52; Criddle & Staszewski, *supra* note 1, at 1594; Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 268–76 (2013).

53. *See* Leib & Serota, *supra* note 1, at 61–62.

54. *See Canons of Construction*, *supra* note 2, at 29–36 (reporting a substantial increase in Supreme Court reliance on language canons and a substantial decrease in reliance on legislative history from the Burger to Rehnquist eras); *Oasis or Mirage*, *supra* note 2, at 520–24 (reporting development of a comfortable dictionary-use culture at the Supreme Court, extending to liberal justices as well as conservatives in Rehnquist and Roberts eras); *Protean Statutory Interpretation*, *supra* note 2, at 700–31 (reporting variable results between circuits in Roberts Court era regarding reliance on dictionaries and legislative history, and also lower reliance on both resources in circuit courts than in Supreme Court); Brudney & Baum, *supra* note 8, at 105 (reporting that dictionary reliance in Supreme Court from 1986 to 2011 was substantially higher than circuit court reliance in the same cases—those where Court granted certiorari on circuit court decisions); Bruhl, *supra* note 5, at 55–62 (reporting that appeals courts' increased citation to language canons and dictionaries and decreased citation to legislative history from the late 1980s onward parallels that of the Supreme Court but at a much lower frequency level and concluding that "[w]hatever its shifting fortunes in the Supreme Court, textualism did not conquer the lower courts").

55. *See* Bruhl, *supra* note 5, at 61 (discussing the possibility that these lower court responses reflect a strategy of Reagan administration appointments, Justice Department litigation approaches, or trends in the broader legal culture).

with statutes and their interpretation,[56] Judge Posner is more eclectic than Justice Scalia in his theoretical approach. At various times, he has advocated for an imaginative reconstruction analysis based on hypothesized legislative intent,[57] then something of an economics-centered approach,[58] and finally a more case-specific pragmatism.[59] At a practical level, Judge Posner was uncomfortable with the main textualist tools. He disparaged the use of language canons, deeming them to be essentially mechanical, readily manipulated, and unrealistic about the legislative process.[60] Judge Posner also criticized the judicial practice of relying on dictionaries;[61] in a prior study we found that he cited to a dictionary in less than one-tenth of one percent of his statutory majority opinions.[62] It seems evident that Judge Posner was not positively affected by the textualist thinking of Supreme Court colleagues like Justice Scalia. Yet notwithstanding his own considerable stature in legal, academic, and judicial circles, there is no reason to believe that Judge Posner's scholarly writings or judicial opinions exerted influence on members of the Supreme Court regarding statutory interpretation.[63]

But assuming arguendo that prominent judicial players exert little systemic influence on colleagues from a higher or lower court, hierarchical relations may still play some role in the methodological approaches of judges in specific cases. Consider the recent Second Circuit decision in *Zarda v. Altitude Express, Inc.*,[64] addressed to whether Title VII's prohibition of sex discrimination in employment applies to discrimination based on sexual orientation. The court's en banc majority opinion was written by Chief Judge Robert Katzmann, a leading purposivist in his decisions and scholarly writings.[65] In ruling that "sex discrimination," as understood under Title VII, covers discrimination based on sexual orientation, Judge Katzmann

56. *See, e.g.*, POSNER, *supra* note 23; RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996) [hereinafter CHALLENGE AND REFORM]; RICHARD POSNER, REFLECTIONS ON JUDGING (2013) [hereinafter REFLECTIONS ON JUDGING].

57. *See* CHALLENGE AND REFORM, *supra* note 56, at 286–93.

58. *See* Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993).

59. *See* POSNER, *supra* note 23, at 230–60.

60. *See* CHALLENGE AND REFORM, *supra* note 56, at 269–82, 285–86.

61. *See* REFLECTIONS ON JUDGING, *supra* note 56, at 179–81.

62. *See Protean Statutory Interpretation*, *supra* note 2, at 727.

63. We also recognize that what judges describe as their theories of statutory interpretation may bear little relationship to how they construe statutes in their opinions. Justice Scalia was notably consistent in this respect. For an example of a judge who was far less consistent, see Thomas W. Merrill, *Learned Hand on Statutory Interpretation: Theory and Practice*, 87 FORDHAM L. REV. 1 (2018). Merrill describes how Judge Learned Hand adopted and stuck close to imaginative reconstruction as an interpretive theory for decades in his writings but not in his circuit court decisions and suggests that "any unitary theory of interpretation . . . is doomed to failure when it runs up against the messy world of real controversies." *Id.* at 16–17.

64. 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623) (mem.).

65. *See* KATZMANN, *supra* note 38, at 29–54 (describing Katzmann's purposivist approach); *id.* at 55–90 (describing three of his Second Circuit opinions as illustrative of this approach).

presented a carefully crafted opinion relying heavily and primarily on close textual analysis.[66] A rigorously text-based opinion may be the most cogent way to reach the conclusion that the majority believed is a correct reading of Title VII. This approach also may be the most likely to survive Supreme Court review by the Court's textualist-oriented conservative majority.[67] Whether an appeals court is influenced in its methodological analysis by anticipating how the justices will analyze the substantive issues in the same case is one important issue that our empirical inquiry seeks to address.

II. EMPIRICAL FINDINGS

As previously discussed, we analyzed reliance by the Supreme Court and the courts of appeals[68] on six interpretive resources[69] in statutory cases that the Supreme Court decided on the merits in labor and employment law during the 1969–2017 Terms.[70] Labor and employment cases "are those that directly address some aspect of the employment relationship under federal law."[71] Federal labor and employment law is aptly representative in this interpretive setting. It includes a range of statutes enacted mainly between

66. *See Zarda*, 883 F.3d at 112–28. The principal dissent, by Judge Gerard Lynch, relied heavily on legislative history and purpose. *See id.* at 137–48.

67. Following the Second Circuit decision, the Court granted certiorari in April 2019 and heard oral argument in October 2019.

68. In the tables below, the Supreme Court is abbreviated as "SC" and the courts of appeals are abbreviated as "CA."

69. Although these six resources are well accepted and understood among legal scholars, judges, and practitioners, we briefly explain them here. "Ordinary meaning" refers to reliance on a common sense understanding of textual words or phrases, without reference to additional aids. "Dictionaries" include reliance on general, legal, or occasionally technical dictionary definitions. "Language canons" encompass reliance on both structural canons (such as the whole act rule or in pari materia) and sentence-level canons (like noscitur a sociis or the last antecedent rule). "Legislative history" includes reliance on traditional sources including conference reports, committee reports, floor statements, and hearings and also on drafting history—the prior enacted or proposed versions of a statutory provision that a court then compares with current text being construed. "Purpose" refers to reliance on evidence (from legislative history or text) that identifies what Congress meant to accomplish: the mischief at which a law is aimed, the policy justifications imputed to the statute, or the gap or ambiguity in the legal landscape it seeks to fill or clarify. "Agency deference" refers to reliance on an agency's interpretive judgment when construing or applying the contested statutory text—it could be based on *Chevron*, *Skidmore*, or some more subject-matter specific form of deference. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

70. We coded the cases for reliance on other resources beyond these six. At both judicial levels, we coded for reliance on substantive canons, Supreme Court precedent, common law precedent, and legislative inaction. At the appeals court level, we also coded for reliance on precedent from the same circuit and, separately, precedent from other circuits. We focus on our six previously identified resources because of their saliency for ongoing debates about textualist versus purposivist methodologies. In addition, some of the additional resources were relied on by one or both judicial levels either at a very low frequency (substantive canons, common law precedent, and legislative inaction) or an extremely high frequency (Supreme Court precedent), making comparative analyses less fruitful.

71. *Oasis or Mirage*, *supra* note 2, at 496 n.25. The criteria for selection of labor and employment cases are described in greater detail in *Canons of Construction*, *supra* note 2, at 15–18.

the 1930s and 1990s, with the five principal statutory schemes updated several times.[72] Because these laws are enforced through agency rulemaking and adjudication as well as private rights of action, there is ample scope for agency deference as a factor.[73]

The statutes that the Court interpreted in these cases included those dealing with labor-management relations (such as the National Labor Relations Act[74] (NLRA)), those dealing with workplace discrimination (primarily Title VII), and others such as ERISA and the FLSA. Cases decided solely on the basis of constitutional issues were excluded, but those with both constitutional and statutory issues were included.[75] Because we sought to compare resource use by the Supreme Court and federal courts of appeals, cases in this field were included only if they were decided by both courts.[76]

We included all the cases that met these criteria in the Roberts Court era (the 2005–2017 Terms). For the Burger and Rehnquist Courts (the 1969–1985 Terms and 1986–2004 Terms, respectively), we used a sample of one-third of the eligible cases, selecting every third case from a list of cases in chronological order.[77] That sampling was done to capture approximately equal numbers of cases from the three Courts, primarily because the annual number of cases decided by the Burger and Rehnquist Courts was considerably higher than the number decided each year by the Roberts Court.[78] Altogether, we analyzed 321 cases: 116 from the Burger Court, 100 from the Rehnquist Court, and 105 from the Roberts Court.

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72. See *infra* notes 85–88 and accompanying text for a description of the five principal statutory schemes and the range of other statutes encompassed in our dataset.

73. We have relied entirely or substantially on decisions construing federal labor and employment laws in prior empirical analyses of interpretive resources at both the Supreme Court and appeals court levels. *See Protean Statutory Interpretation*, *supra* note 2; *Oasis or Mirage*, *supra* note 2; Brudney & Baum, *supra* note 8; *Canons of Construction*, *supra* note 2; *Liberal Justices*, *supra* note 2; 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).

74. 29 U.S.C. §§ 151–169 (2012).

75. We treated cases involving interpretation of the Federal Rules of Civil Procedure as statutory.

76. Thus we omitted cases in which certiorari was granted from a state court decision or a three-judge district court decision. In a small proportion of the Supreme Court decisions, 4.4 percent of the total, multiple cases decided by courts of appeals were consolidated in the Court. In these consolidated cases, with one exception, we counted a resource as used in the court of appeals if the majority opinion in any of the cases relied on the resource. The exceptional case was *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), where certiorari was granted on three appeals court decisions. Because one of those decisions relied solely on precedent while the two others relied on five-to-six additional resources, we coded the precedent-only decision (which was affirmed) separately from the multiple-resources cases (which were reversed) in order to preserve analyses under Table 7*, infra* Part II.C. No other consolidated appeals court certiorari grants presented this stark contrast linking resources used to Supreme Court outcome.

77. Because the cases on the list were not prescreened to eliminate those with only constitutional issues and those with no court of appeals decision, some of the cases chosen by this method were ineligible for inclusion. Such a case was replaced with the next case or, where necessary, the closest case in the list that was eligible.

78. The mean numbers of decisions with full opinions per term were 146 for the Burger Court, 101 for the Rehnquist Court, and 76 for the Roberts Court through the 2017 Term.

The majority opinions in each Supreme Court decision and corresponding court of appeals decision were read in order to ascertain reliance on the six interpretive resources that we analyzed.[79] At the outset, it is important to define what we mean by reliance. When an opinion refers to a resource, its use of that resource can range from a passing mention to substantive deflection as being of no probative value to treatment as determinative in the case. Our criterion was whether an opinion relied on the resource as one basis for its decision: whether the resource contributed in a meaningful way to the majority's justification for its holding. Thus, reliance is considerably more than mere citation or use, though it may well be less than dispositive invocation.[80] The reliance criterion has been used in a series of studies that were predecessors to this one.[81]

A. General Patterns in Reliance on Resources

We began by getting a general picture of the relative frequencies of reliance for the six resources in the Supreme Court and courts of appeals. We looked first at the full set of 321 cases and then broke the cases down by statute, by the Supreme Court's treatment of the appeals court decision, and by the direction of the Court's decision in relation to the employer and employee.

Table 1 shows the overall frequency with which the courts relied on these resources. For three of the six resources, dictionaries, language canons, and legislative history, the frequencies for the two levels were quite similar. In one sense, those similarities are unsurprising, because the two levels of courts were deciding the same cases. Yet the similarities are noteworthy in light of what might be considered the collective agenda of the Supreme Court, an

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These figures were calculated from table I(A) in the "Statistics" articles in the November issues of volumes 84 to 132 of the *Harvard Law Review* (1970–2018). The share of the Roberts Court's agenda devoted to labor and employment cases was also somewhat lower than the shares for the Burger and Rehnquist Courts; the labor and employment cases in our initial dataset constituted 14.1 percent of the Burger Court agenda, 15.6 percent of the Rehnquist Court agenda, and 12.7 percent of the Roberts Court agenda. Finally, the Roberts Court through the 2017 Term was somewhat shorter (thirteen terms) than the Burger (seventeen terms) and Rehnquist (nineteen terms) Courts.

79. When there was no majority opinion in the Supreme Court, the plurality opinion was used instead. In *Howard Delivery Service, Inc. v. Zurich American Insurance Co.* (*In re Howard Delivery Service, Inc.*), 403 F.3d 228 (4th Cir. 2005), *rev'd*, 547 U.S. 651 (2006), there was no majority opinion but instead two concurring opinions for the majority. Those two opinions together were treated as the equivalent of a majority opinion.

80. There is certainly value in empirical analyses of judicial reasoning based on frequency of citation rather than reliance. *See generally* Bruhl, *supra* note 5. One thing citation analysis cannot reveal, though, is a link to judicial outcomes: whether a citation reflects use of a resource that the opinion author supports or one that the author rejects as inconclusive, unpersuasive, or even incorrect. Because we examine the relationship between judicial reasoning and judicial outcomes as part of our empirical assessment, see Table 3 *infra* Part II.B and accompanying text and Table 7 *infra* Part II.C and accompanying text, we have focused on resources used to advance those outcomes.

81. See *Canons of Construction*, *supra* note 2, at 24–26 for the most complete explanation of interpretive reliance. *See also Protean Statutory Interpretation*, *supra* note 2, at 705; *Liberal Justices*, *supra* note 2, at 129.

agenda that has been driven primarily by conservative justices: emphasis on language canons and dictionaries as a means to discern the meaning of statutes and considerable distrust of legislative history as a guide to that meaning.

Table 1: Frequency of Reliance on Selected Resources in All Cases

Resource	SC Cases (%)	CA Cases (%)
Ordinary Meaning	61.1	78.2
Dictionaries	9.0	7.2
Language Canons	23.1	24.0
Legislative History	35.8	35.2
Legislative Purpose	74.1	48.0
Agency Deference	17.1	23.4

Differences in reliance on agency deference can be interpreted in different ways, depending on whether we focus on the simple difference in frequency of use (6 percentage points) or on the ratio between the frequencies (37 percent higher in the courts of appeals). But by both criteria, the courts of appeals relied on agency deference more often than the Supreme Court did. The difference may reflect the fact that agency deference is regarded, albeit perhaps unconsciously, as an efficient case-management resource for circuit courts that must cope with very heavy dockets. By contrast, the Supreme Court's docket is rather light,[82] and the justices benefit from having more time and lawyer input to look beyond the agency's interpretive position.

Differences in reliance between the two levels of courts were substantial for ordinary meaning and even greater for legislative purpose.[83] Those differences are certainly surprising in light of the textualist agenda of some justices: we would not have expected court of appeals judges to rely more heavily on ordinary meaning than the higher court or for the Supreme Court to rely more heavily on evidence of legislative purpose. The circuit courts' lower frequency of reliance on purpose (like their higher reliance on ordinary meaning and agency deference) may reflect attention to case-management priorities. Circuit judges may regard simpler interpretive frameworks as more compatible with their workloads, whereas the Supreme Court has more time to devote to interpretive analysis, and briefs from parties and amici often assist with the comparatively labor-intensive task of unearthing or discerning purpose.[84]

82. See *supra* notes 3–4 for data.

83. For ordinary meaning, the difference between the two levels was 17 percentage points and the frequency of use by the courts of appeals was 28 percent higher than the Supreme Court. For legislative purpose, the corresponding differences were 26 percentage points and 54 percent.

84. *See* Merrill, *supra* note 63, at 7–8 (discussing the significant epistemic demands on a judge when reconstructing the context of a historical enactment).

Patterns of reliance on resources may vary among statutes because of attributes such as the clarity with which the laws are written, the extensiveness of their legislative history, and the number of times they have been updated by Congress. The relative frequency with which certain resources are relied on at the two court levels may also vary with the attributes of statutes. To probe these possibilities, we identified five statutes or sets of related statutes that were frequent subjects of labor and employment cases: (1) NLRA, the Labor Management Relations (Taft-Hartley) Act[85] that modified the NLRA, and the Railway Labor Act[86] (RLA), an analogue of the NLRA for the airline and railroad industries; (2) Title VII and its amendments; (3) the Age Discrimination in Employment Act of 1967[87] (ADEA) and its amendments; (4) ERISA and its amendments; and (5) the FLSA and its amendments. Altogether, 64 percent of the 321 cases involved interpretation of one of these statutes.[88]

Comparison of the five sets of statutes indicated that there were few dramatic differences among them. However, some of the differences are of interest. For three of the sets of statutes, there were enough cases for us to be confident that the courts' proportionate reliance on particular resources was meaningful. Table 2 shows the frequency with which the two levels relied on our six resources for cases involving those three sets of statutes.

85. 29 U.S.C. §§ 141–197 (2012).

86. 45 U.S.C. §§ 151–188 (2012).

87. 29 U.S.C. §§ 621–634.

88. The NLRA and RLA were interpreted in seventy-two cases, Title VII in sixty-six cases, ERISA in thirty-six cases, ADEA in eighteen cases, and FLSA in sixteen cases. Four cases involved the interpretation of two of these five sets of statutes. These cases were included in both of the two categories. The other 36 percent of the cases involved interpretation of numerous statutes where the interests of employees or employers were at stake. These include the Occupational Safety and Health Act of 1970; the Federal Mine Safety and Health Act of 1977; the Federal Employers' Liability Act; the Civil Service Reform Act of 1978; the Federal Arbitration Act; the Patient Protection and Affordable Care Act; the False Claims Act; and statutes enacted as part of the Bankruptcy Code, the Criminal Code, the Tax Code, and the Immigration Code.

Table 2: Frequency of Reliance on Resources, Selected Statutes

	NLRA/RLA		**Title VII**		**ERISA**	
	SC Cases (%)	CA Cases (%)	SC Cases (%)	CA Cases (%)	SC Cases (%)	CA Cases (%)
Ordinary Meaning	41.7	65.3	62.1	71.2	72.2	86.1
Dictionaries	1.4	2.8	7.6	7.6	8.3	8.3
Language Canons	12.5	15.3	24.2	22.7	13.9	25.0
Legislative History	30.6	29.2	33.3	25.8	33.3	41.7
Legislative Purpose	81.9	44.4	74.2	43.9	72.2	52.8
Agency Deference	25.0	34.7	9.1	15.2	11.1	16.7

If the statutes themselves evoked different emphases on particular resources, we would expect that effect to be manifested at both court levels. Only two of the six resources showed such a pattern, and both involved the NLRA.[89] Of greater interest to us is variation in the relative weight of particular resources at the two court levels. With one qualification, there is not a substantial variation across statutes in this respect.[90] Thus the relative frequency with which the Supreme Court and courts of appeals rely on different interpretive resources is not shaped substantially by the statutes they interpret.

The qualification involves reliance on two resources under ERISA. The appeals courts rely on language canons about twice as often as the Supreme Court does for ERISA cases, in contrast to virtual equivalence for the two other statutes. Additionally, the appeals courts rely on legislative history more than the Supreme Court in these same ERISA cases, by about a 25

89. There was heavier reliance on agency deference in cases involving the NLRA and its related statutes. This is probably due primarily to the fact that there is no private right of action under the NLRA. Because every case involves the agency as a litigant, courts are effectively required to address deference questions on a more regular basis than under Title VII and ERISA, where private rights of action exist and most cases on appeal involve private parties on both sides. There also was lighter reliance on dictionaries for the NLRA and related statutes. We suspect this is due to the fact that a large majority of NLRA-related cases arose in the Burger era, before the Supreme Court began to utilize dictionary-based interpretive analysis. *See Oasis or Mirage*, *supra* note 2, at 495 (noting that the Burger Court cited to dictionaries an average of five cases per term from 1969 to 1986).

90. For instance, the higher level of reliance on ordinary meaning in the courts of appeals is reproduced for all three sets of statutes, though the difference is greater for the NLRA than it is for the other two statutes. There is a similar pattern for legislative purpose: although the gap between the Supreme Court and the courts of appeals is lower for ERISA than for the other two sets of statutes, it is at least 19 percentage points across all three statutes.

percent margin, whereas the circuit courts invoke legislative history the same or less than the Supreme Court for the two other statutes.

On language canons, a possible explanation involves the length and labyrinthine complexity of ERISA,[91] which allows for and perhaps invites reliance on structural canons such as the whole act rule, meaningful variation, in pari materia, and expressio unius. In the appeals courts, where ordinary meaning reliance is generally higher than for the Supreme Court, the particular complexity of ERISA terms and provisions may have encouraged a stronger interest in language canons to help unpack that meaning. Additionally, ERISA, enacted in 1974, did not reach the Supreme Court until the 1980s: the bulk of interpretive decisions occurred in the Rehnquist and Roberts eras, which are halcyon years for language canons. By contrast, both NLRA and Title VII decisions are concentrated in the Burger and early Rehnquist eras,[92] when language canons had not yet become as prevalent a part of the circuit courts' interpretive menus.

We are less clear about the reasons for the modestly greater reliance on legislative history by the appeals courts. Perhaps the challenging aspects of ERISA textual provisions have led the circuit courts to search for clarification or confirmation in accompanying committee reports and floor discussions. Then too, ERISA has been repeatedly amended since 1974 on issues related to health care, pension protections, welfare plans, and taxation,[93] giving rise in comparative terms to many more instances of legislative history for appeals courts to consider. This consideration largely occurred in a period when the Supreme Court became less interested in consulting legislative history.[94]

We have already noted the extent to which debates between competing approaches to statutory interpretation in the courts and in the legal community fall along ideological lines: conservatives tend to favor textualism, a tendency that has become stronger over time, while liberals tend to favor purposive approaches that take into account legislative intent and goals. That disagreement is highlighted by the long-running debate between Justice Stephen Breyer and the late Justice Antonin Scalia.[95] Their debate reflects a belief, albeit one that is usually implicit rather than explicit, that the competing approaches favor different outcomes. For this reason, we might

91. *See* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) (referring to ERISA as a "comprehensive and reticulated statute"); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) (same).

92. *See* James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Law Decisions of the Supreme Court's 1999–2000 Term*, 16 LAB. LAW. 151 (2000).

93. ERISA was enacted in 1974. *See* Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the U.S.C.). It has been amended in 1980, 1984, 1986, 1989, 1994, 1996, 1998, 2008, and on other occasions.

94. *See Canons of Construction*, *supra* note 2, at 32–33, 35–36.

95. *Compare* STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2008), *and* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992), *with* SCALIA, *supra* note 37, *and* SCALIA & GARNER, *supra* note 41.

expect a correlation between reliance on particular resources and the ideological direction of decisions, either because resources associated with the competing approaches lead to different outcomes, because pro-employer and pro-employee opinions draw on different resources as justifications for the outcomes they reach, or simply because conservative justices tend to write pro-employer opinions and liberals tend to write pro-employee opinions.[96]

The direct relationships between justices' ideological positions and their reliance on interpretive resources identified as textualist or purposivist in our sample of labor and employment cases are mixed. Those relationships are best illuminated by comparison of liberal and conservative justices in the Roberts Court, which sits during a time when the debates over interpretive methods are well established. Liberal justices are more likely than their conservative colleagues to rely on the three resources associated with purposivism, and the differences for legislative history would be much sharper if Justice Kennedy was excluded from analysis.[97] But there were minimal differences between conservatives and liberals in reliance on the resources associated with textualism, and liberals were actually a little more likely to employ ordinary meaning and dictionary definitions.

In labor and employment law, cases typically involve conflicts between the interests of employers and those of employees. Of course, conservatives are more favorable to employers' interests and liberals to employees' interests. Thus, we coded decisions according to whether they favored the interests of employers or of employees.[98]

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96. In our Roberts Court cases, leaving aside per curiam decisions, 72 percent of the pro-employer majority opinions were written by justices who are generally identified as conservative; in contrast, 65 percent of the pro-employee majority opinions were written by justices identified as liberals. These percentages, and those presented in *infra* note 98, exclude per curiam decisions.

97. Liberal justices relied on legislative history 32 percent of the time, compared with 20 percent for conservatives (and 11 percent for conservatives if Justice Kennedy is excluded). Liberals relied on legislative purpose 77 percent of the time, compared with 52 percent for conservatives. The difference for agency deference was smaller, 20 percent versus 14 percent. For ordinary meaning, the reliance rate was 71 percent for conservatives, 77 percent for liberals; for dictionaries, the reliance rate was 20 percent for conservatives, 23 percent for liberals; for language canons, the reliance rate was 38 percent for conservatives, 36 percent for liberals.

98. In the great majority of cases, this coding was straightforward and unambiguous. However, some cases contained ambiguities. When unions were in contention with employees, cases were coded as pro-employer or pro-employee based on whether the union's position was consistent with the interests of most employees. The same rule was used when employees were on both sides of a case. There were some cases in which these rules did not resolve an ambiguity, and in eighteen Supreme Court cases (5.6 percent of the total), no direction was coded and the case was omitted from this analysis. We did not code the direction of court of appeals decisions directly; rather, direction was determined by the direction of the Supreme Court decision and the Court's disposition of the court of appeals decision (i.e., whether the Court affirmed or instead reversed or vacated the decision under review). There likely are a few cases in which this rule mischaracterized the court of appeals decision. There were three cases with multiple court of appeals decisions in which those decisions differed in direction, so these cases were omitted from the analysis at the court of appeals level. Thus a total of twenty-one cases were not included in this analysis.

The results are shown in Table 3. Ten of the twelve relationships between decision direction and reliance on particular resources are in the direction that we would expect based on our identification of the first three resources with textualism and the last three with purposivism. But these relationships are weak, with the exception of a notable pro-employee tilt associated with reliance on legislative history and agency deference in the courts of appeals.

The pro-employee results for legislative history may reflect the fact that because major statutes in the labor and employment arena were all enacted to protect or promote the interests of workers, the legislative record evidence accompanying these laws will tend to be consonant with that pro-worker legislative intent. That trend has been muted in the Supreme Court, due at least in part to Justice Scalia's intractable hostility to legislative history and liberal justices' consequent reluctance to invoke that resource when Scalia was on their side.[99] Similarly, the agencies charged with applying and enforcing these major statutes (National Labor Relations Board, Equal Employment Opportunity Commission, Department of Labor) also tend to be pro-employee when implementing their congressional mission; circuit courts' deference to their judgment—more frequent in general than Supreme Court deference—may well reflect that direction.

There is also a partial exception for dictionaries. Although we do not want to exaggerate the relationship for dictionary use, it is noteworthy that nearly two-thirds of the opinions that relied on dictionaries at the court of appeals level and more than two-thirds at the Supreme Court level were in support of conservative outcomes.[100]

99. *See Protean Statutory Interpretation*, *supra* note 2, at 718, 721–22 (discussing work-arounds to relying on legislative history, created especially by liberal justices, in order to retain Scalia's support); *Liberal Justices*, *supra* note 2, at 160–69 (discussing a "Scalia effect," leading liberal justices to rely less on legislative history when authoring majorities that Scalia joins, even though the prevailing party briefs rely heavily on such history).

100. Like some other differences we have cited, *see supra* Table 1, the differences in dictionary use between pro-employer and pro-employee decisions appear to be considerably greater when ratios of use in the two types of decisions are calculated than when differences in percentage points are calculated.

Table 3: Frequency of Reliance on Resources by Case Outcome

	SC Cases (%)		**CA Cases (%)**	
	Pro-employer	Pro-employee	Pro-employer	Pro-employee
Ordinary Meaning	64.3	59.5	78.8	77.3
Dictionaries	12.1	7.4	9.5	5.5
Language Canons	25.7	20.9	21.2	24.5
Legislative History	37.9	35.0	27.7	39.3
Legislative Purpose	70.7	77.9	43.1	49.1
Agency Deference	17.1	17.2	13.9	29.5

We investigated one other possible relationship between ideology and reliance on particular resources. Justices and judges might well be more inclined to invoke agency deference when the current presidential administration matches their ideological leanings. One study found that Supreme Court justices and court of appeals judges were more likely to validate administrative agency policies when the presidential administration was on the same side of the ideological divide as that of the justice or judge.[101] Although reliance on particular interpretive resources is different from votes on the outcome of cases, there is some reason to posit that judges are more likely to invoke deference to administrative agencies when they are sympathetic to the administration on ideological grounds.

A test of this hypothesis based on the proportions of cases in which justices and judges invoke agency deference is necessarily imperfect because agency deference is not relevant to all statutory decisions. Still, those proportions provide a meaningful test.[102] We classified justices as liberals and conservatives on the basis of their overall voting tendencies in cases involving labor and employment issues; we classified judges on the basis of the party of their appointing president.[103] As it turned out, the posited relationship did not exist at either level.

101. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

102. There is no reason to think that the relevance of agency deference differs between cases in which the court's opinion is written by liberals and those in which the opinion is written by conservatives. During the post-*Chevron* period for our dataset (1984–2018), when agency deference was perhaps a more salient interpretive resource, presidential administrations were Democratic and Republican in roughly equal proportions (sixteen years Democratic and eighteen years Republican). For the period preceding *Chevron* (1969–84), presidential administrations were Republican for nine years and Democratic for four.

103. We coded justices' ideological tendencies on the basis of their votes in cases falling within issue area 7 (unions) and issues 20060 (employment discrimination), 20140 (sex

In the Supreme Court, conservative justices were more likely than liberals to invoke agency deference under a Republican president, and liberal justices were a little more likely to invoke it under a Democratic president, but the differences were small.[104] In the courts of appeals, the relationships were actually in the opposite direction from what we posited, although again of small magnitude.[105]

This certainly does not mean that judges and justices were responding to cases in which they relied on agency deference on a nonideological basis: when liberal judges and justices wrote their court's opinion in these cases, the court was distinctly more likely to rule in favor of employees than it was in cases with a conservative author.[106] Still, the nonappearance of the posited relationship between ideology and reliance on agency deference suggests that judges and justices do not perceive that resource in ideological terms.

B. Temporal Patterns and Supreme Court Influence

Interpretive resources may wax and wane over time. As textualism gained a stronger foothold in the Supreme Court, largely through the advocacy of Justice Scalia, the Court's reliance on legislative history declined.[107] The growing popularity of textualism also helps to explain the dramatic growth in reliance on dictionaries to interpret statutory language.[108] Beyond our interest in the relationship between resource use in the Supreme Court and the courts of appeals, it is valuable to provide a broader picture of changes in

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discrimination in employment), and 40030 (due process, hearing, government employees) in the Supreme Court Database. *See* SUP. CT. DATABASE, *supra* note 6. Although percentages of liberal and conservative decisions are not fully comparable over time, the percentages for the justices comported well with the perceptions of scholars and other observers. Three justices (John Marshall Harlan, Potter Stewart, and Sandra Day O'Connor) were omitted from the analysis because their scores suggested that they should be characterized as moderates rather than liberals or conservatives. Following Thomas J. Miles and Cass R. Sunstein, *supra* note 101, at 826–27, we coded court of appeals judges on the basis of the party of their appointing president. For decisions, we characterized the president's party on the basis of the time of the Court's decision, but we omitted decisions that came during the first year of a president's tenure because judges or justices might not necessarily identify those cases with the new administration.

104. The proportions were as follows: Republican president/conservative justice, 25.0 percent; Republican president/liberal justice, 21.4 percent; Democratic president/conservative justice, 12.7 percent; Democratic president/liberal justice, 15.9 percent.

105. The proportions were as follows: Republican president/Republican appointee, 19.4 percent; Republican president/Democratic appointee, 28.6 percent; Democratic president/Republican appointee, 30.8 percent; Democratic president/Democratic appointee, 25.0 percent.

106. In the Supreme Court, 63.6 percent of the decisions invoking agency deference with liberal authors favored employees, compared with 35.3 percent for conservative authors. In the courts of appeals, the comparable rates were 80.0 percent for authors appointed by Democratic presidents and 62.1 percent for those appointed by Republicans. The percentages for the Supreme Court were similar to those for all cases in the dataset; for the courts of appeals, the percentages of pro-employee decisions across all cases were distinctly lower for both Republican and Democratic appointees (43.2 percent and 67.9 percent, respectively) and the interparty difference was greater.

107. *See Canons of Construction*, *supra* note 2; *Liberal Justices*, *supra* note 2.

108. *Oasis or Mirage*, *supra* note 2, at 494–96.

reliance on all six interpretive resources as a means to gauge the impact of the rise of textualism on choices to use these resources by judges in the federal appellate courts.

To the extent that trends in the reliance on interpretive resources occur, they are likely to occur in both the Supreme Court and the courts of appeals. One reason is that judges at the two levels are subject to similar influences. Thus, for instance, the growing prominence of textualism as reflected in legal scholarship and pedagogy might have affected the thinking and practices of both Supreme Court justices and court of appeals judges.[109] The other reason is that court of appeals judges may be influenced by reliance on resources in the Supreme Court. For one thing, court of appeals judges may follow the lead of the Supreme Court because they are convinced by the justices' rationales. Alternatively, or in addition, they may feel obliged to follow that lead, either because they believe it is their duty to do so or because they think the justices are more likely to approve of decisions that reflect the justices' own methodological preferences. The goal of minimizing reversals is especially relevant to the cases that the Court ultimately decides because a substantial majority of these cases are ones in which court of appeals judges could anticipate the possibility of Supreme Court review.

We can begin our examination of trends in the two judicial levels by dividing our study period by chief justice. The results are shown in Table 4. Comparison of the Burger and Roberts Courts indicates a general similarity in trends between the two levels. Reliance on ordinary meaning, dictionaries, and language canons increased; reliance on legislative history and legislative purpose declined; there was little change in reliance on agency deference. The lack of increase in agency deference at both judicial levels is notable given that near the end of the Burger era, the Supreme Court announced its so-called *Chevron* revolution,[110] putatively expanding the scope for agency deference over its previous *Skidmore*-based approach.[111]

109. *See* WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 575–603, 634–656 (2d ed. 1995); Easterbrook, *supra* note 39, at 64. *See generally* SCALIA, *supra* note 37.

110. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Thomas Merrill & Kristin Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

111. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Table 4: Frequency of Resource Reliance by Chief Justice Eras

	Burger		**Rehnquist**		**Roberts**	
	SC Cases (%)	CA Cases (%)	SC Cases (%)	CA Cases (%)	SC Cases (%)	CA Cases (%)
Ordinary Meaning	52.6	70.7	59.0	83.0	72.4	81.9
Dictionaries	0.0	0.9	8.0	6.0	20.0	15.2
Language Canons	12.9	24.1	22.0	13.0	35.2	34.3
Legislative History	46.6	39.7	36.0	35.0	23.8	30.5
Legislative Purpose	83.6	61.2	77.0	40.0	61.0	41.0
Agency Deference	18.1	24.1	17.0	24.0	16.2	21.9

The increases and declines are consistent with what we would expect from the growing popularity of textualism over time. As we noted earlier, past studies have found some evidence of these trends for dictionaries and legislative history;[112] the findings shown in Table 4 provide a much fuller picture, documenting the considerable impact of changes in thinking about modes of statutory interpretation within the legal community and the courts.

The trends have not taken identical form in the two levels of courts. With the exception of legislative purpose, increases and decreases in reliance on particular resources were more pronounced in the Supreme Court. For ordinary meaning and legislative purpose, change came earlier in the courts of appeals, and from the start the appeals courts were ahead of the Supreme Court in relying on ordinary meaning and eschewing legislative purpose. Reliance on language canons grew steadily in the Supreme Court, but in the courts of appeals, that reliance declined in the Rehnquist Court era and then sharply increased in the Roberts Court era.[113]

112. *See supra* notes 37–38 and accompanying text; Bruhl, *supra* note 5, at 59–60.

113. The Roberts-era appeals court cases involving language canons feature by far the highest number of instances where those courts rely on more than one language canon: this occurs 60 percent of the time, as compared with 15 percent for Rehnquist-era appeals court cases and 18 percent for Burger-era appeals court decisions. Roberts-era appeals courts also rely on a considerably wider range of language canons than their earlier counterparts. Although the whole act rule (and its corollaries) has been the most prevalent canon during all three eras in the appeals courts, it has become less dominant since 2005. Twelve other language canons have been relied on in the Roberts years, compared with five others in both the Rehnquist and Burger eras. These differences suggest that appeals courts have adopted a more robust approach to language canons over time, perhaps influenced by the expanded Supreme Court reliance that began during the Rehnquist years.

These broad patterns suggest that covariation in temporal trends between the two court levels was substantial but imperfect. That possibility indicates the value of looking more closely at those trends by breaking down the time periods more finely—specifically, by year. A finer-grained analysis gives us a better picture of covariation, and by doing so it allows us to distinguish between the two possible reasons for covariation that we have described. If justices and judges are responding to similar influences, we would expect that trends would track each other most closely if we compare patterns of resource use in the same years. If judges are influenced by the Supreme Court, we would expect some lag in the linkage between the trends at the two levels; for instance, increases or decreases in the courts of appeals might tend to occur three-to-five years after similar increases or decreases in the Supreme Court. Of course, we would not expect anything like a perfect correlation between trends, with or without a time lag. But we can look to see whether there is a substantial correlation between trends at the two levels and, if so, whether the correlation is higher with or without a lag.

One reason to expect an imperfect correlation is the limited number of cases in our study, an average of six or seven cases per year. That small number leaves considerable room for random variation, especially because the Supreme Court decisions in a given year are not in the same cases that the courts of appeals decided in that year.[114] To limit the impact of that random variation, we computed a measure of reliance rate for each year that took into account reliance rates in the years immediately contiguous to the year in question.[115]

Because there was no general trend over time in reliance on agency deference, we did not analyze correlations for that resource. Table 5 shows the correlations for the other five resources.

114. The time between the court of appeals decision in a case and the Supreme Court decision is typically one or two years. Among the cases in our study, 94 percent of the Supreme Court decisions came either one or two calendar years after the court of appeals decision.

115. Specifically, we computed a measure of reliance rate for each year that also incorporated the year before and the year after, though giving double weight to the year in question. Thus, for 2015, the use rate was calculated as follows: (year 2014 use rate × 0.25) + (year 2015 use rate × 0.50) + (year 2016 use rate × 0.25). The analysis of correlations was limited to the years for which this reliance rate could be calculated (1971–2016). (1970 was eliminated because there was only one Supreme Court decision in the dataset in 1969; 2017 was eliminated because there were no court of appeals decisions in the dataset in 2018.).

Table 5: Correlations Between Annual Rates of Reliance on Resources by Supreme Court and Courts of Appeals, 1971–2016[116]

	Lag (in Years) Between Rates in SC and CA[117]						
	0	1	2	3	4	5	6
Ordinary Meaning	.070	.077	.114	.239	**.289**	.254	.245
Dictionaries	.528	**.645**	.527	.291	.221	.352	.523
Language Canons	-.062	.017	.025	.104	.291	**.312**	.137
Legislative History	.003	.138	.236	.377	.592	**.725**	.635
Legislative Purpose	.302	.366	**.403**	.317	.177	.145	.262

These correlations should be interpreted with some caution. For one thing, they may reflect idiosyncratic factors rather than systematic relationships.[118] Accordingly, one or two correlations for a resource that are quite different from the other correlations should be heavily discounted. Further, the highest correlations for ordinary meaning and language canons are not very strong.[119]

Even with suitable cautions in mind, the patterns in the correlations still provide support for several conclusions. First, all but one of the thirty-five correlations are positive, and all five resources have meaningful positive

116. The highest correlation for each resource is in bold.

117. The lag is the number of years between the Supreme Court's rate of reliance on a resource and the courts of appeals' rate of reliance on the resource, with the court of appeals years coming later. To take one example, for correlations with a one-year lag, the Supreme Court's use for 1972–2015 is compared with the courts of appeals' use for 1973–2016.

118. *But cf*. Bruhl, *supra* note 1, at 503 (finding that correlations between citation rates at the two levels were higher if they were lagged by a couple of years). The effect of idiosyncrasy is illustrated by the correlations for agency deference, which we do not present in Table 5 because there was no general trend in reliance on that resource. The correlations are negative for the lags from no years through four years; the highest of these correlations is -.417 for a two-year lag. Such a negative correlation is not susceptible to a meaningful explanation; in all likelihood, it is an artifact of the lack of clear trends in either the Supreme Court or the courts of appeals.

119. The correlation squared represents the proportion of the variation in one variable that can be explained statistically by variation in the other variable. MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 31, 33 (2001). Thus, the correlation of .312 for language canons with a five-year lag indicates that only 10 percent of the variation in the use rate for the courts of appeals is explained statistically by the Supreme Court rate. The highest correlation for legislative purpose corresponds to explanation of only 16 percent of the variation. The higher correlations for dictionaries and legislative history show more powerful explanation—42 percent for dictionaries and 53 percent for legislative history. As with other descriptive statistical relationships, explanation in a statistical sense does not necessarily mean explanation in a causal sense.

correlations for multiple years. Clearly, trends in the courts of appeals are not fully independent of trends in the Supreme Court.

Second, the pattern of correlations for the various lags supports different conclusions for different resources. For ordinary meaning, language canons, and legislative history, the increases or decreases in reliance on particular resources came first in the Supreme Court and only later in the courts of appeals. The steady increases in the correlations up to a four-year lag for ordinary meaning and a five-year lag for language canons and legislative history are striking. This suggests that circuit courts may have been influenced by the Supreme Court's greater enthusiasm for ordinary meaning and language canons and its diminished appetite for legislative history.

For legislative purpose, the trends in the two levels of courts appear to be close to simultaneous, suggesting that the two judicial levels were likely affected by similar "outside" factors rather than the circuits being responsive to Supreme Court changes.[120] For dictionaries, there is some evidence of simultaneity, but the high correlation with a six-year lag complicates the picture.

Finally, the correlations for dictionaries and legislative history reach levels so high that they are very unlikely to be idiosyncratic. For legislative history, the time lag strongly suggests that court of appeals judges responded to the Supreme Court's movement away from reliance on that resource. That conclusion is consistent with the declines at both court levels in the frequency of reliance on legislative history from the Burger Court to the Rehnquist Court and from the Rehnquist Court to the Roberts Court, as shown in Table 4. The patterns in that table also make clear something that the correlations cannot show: the decline in reliance on legislative history was far more substantial in the Supreme Court than it was in the courts of appeals—23 percentage points versus 9 percentage points. As a result, while the Supreme Court relied more frequently on legislative history than the courts of appeals in the Burger era, the opposite has been true in the Roberts era. If the Supreme Court influenced reliance on legislative history in the courts of appeals, as the correlations indicate, that influence was limited in magnitude.

For dictionaries, as we have noted, the correlations do not point to as clear a picture. The highest correlation was with a one-year lag, which suggests that the Supreme Court and courts of appeals acted more or less simultaneously.[121] However, the high correlation with a six-year lag

120. Possible "outside" factors include (a) an increased number of congressional overrides from the 1970s to the late 1990s, along with growing criticism of activist courts, resulting in a desire to reduce reliance on a search for legislative purpose that reinforces perceptions of judges as untrammeled policymakers and (b) developments in scholarship and pedagogy, emphasizing the role of close textual analysis. *See* ESKRIDGE & FRICKEY, *supra* note 109, at 575–603, 634–656. *See generally* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014); Easterbrook, *supra* note 39; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

121. We calculated correlations with "reverse lags," so that rates of dictionary use in the courts of appeals were compared with rates of use in the Supreme Court in later years. With a one-year reverse lag, the correlation was .362; with a two-year reverse lag, the correlation

suggests the possibility that court of appeals judges responded to the trend in the Supreme Court. The seven- and eight-year lags reinforce this possibility: the correlation reached another peak at seven years (.582) before declining a little at eight years (.517). Thus both Supreme Court influence and simultaneous change should be left open as possibilities, though acceptance of the latter possibility would require us to identify the source of a simultaneous response.[122] In any event, Table 4 shows that in contrast with legislative history, the change in reliance on dictionary definitions in the courts of appeals was nearly as great in magnitude as the change in the Supreme Court.

C. Co-reliance on Resources

Up to this point, we have focused on patterns of reliance on particular resources in aggregated sets of cases. But we can gain important additional insight into resource use by examining the extent to which the Supreme Court and the courts of appeals rely on the same resources when they decide the same specific case. We begin by considering what we call "co-reliance" in terms of our six categories: to what extent do the two levels of courts rely on resources such as language canons or legislative history in the same cases? Reliance on language canons or on legislative history reflects a distinct modality of judicial reasoning. We are interested in how often the Supreme Court and appeals courts both invoke such a modality for the same case; we also want to know whether this co-reliance occurs more often in cases of affirmance than reversal, and whether its frequency has increased or decreased between the Burger and the Roberts eras.

Then we will consider co-reliance in terms of specific versions of resources. For instance, when both judicial levels invoke legislative history or language canons, to what extent do the Supreme Court and the circuit court rely on the same source of legislative history or the same language canon? This sense of co-reliance addresses a more refined aspect of judicial reasoning, implicating tensions or disagreements within a particular modality such as language canons. In addition, addressing co-reliance for specific versions of a resource effectively invites a more doctrinal analysis of how that resource is applied in individual cases, an analysis we undertake in illustrative terms in Part III.

At the level of our categories of resources, even if the Supreme Court and the courts of appeals both relied on a particular resource randomly across the

was .291. When these correlations are compared with those shown in Table 5, they reinforce the appearance of simultaneous change.

122. Simultaneous change in dictionary use might reflect the factors that are relevant to legislative purpose, discussed in *supra* note 120. Such a change also may reflect a felt need by generalist federal judges to avoid error or embarrassment when faced with information overload from increasingly long and complex statutes. *See Oasis or Mirage*, *supra* note 2, at 498–501. A possible further source would be an increasing tendency to include citations to dictionaries in the briefs presented to the federal appellate courts. Such a tendency could have resulted from a perception that with the growing popularity of textualism, judges and justices were becoming more receptive to textualist evidence such as dictionary definitions.

cases they decided, there would still be co-reliance in some cases. But there are three reasons to posit that co-reliance will occur at a higher rate than if it was simply random. First, judges and justices may respond systematically to the attributes of cases by relying on the resources that are most relevant to resolution of the statutory issues in those cases. Second, in crafting Supreme Court opinions, justices and their clerks may be influenced by the content of the court of appeals opinions that they are reviewing. Indeed, it is common for the Court's opinions to incorporate language directly from lower court opinions.[123] Third, when court of appeals judges anticipate that the Supreme Court is likely to review their decision, they may employ the resources that they perceive the justices think the most appropriate.

There is no perfect measure of co-reliance because the different measures that might be used reflect different perspectives on co-reliance and because every measure is biased by the frequency with which a resource is relied on.[124] We will employ two fairly simple measures that have relatively small biases and that provide different perspectives on co-reliance.[125] The first is the difference in the frequency with which the Supreme Court relied on a resource when the court of appeals also relied on the resource, compared with cases in which the court of appeals did not rely on the resource.[126] The second is the difference between the frequency of co-reliance that actually occurs and the frequency that would be expected if the relationship between reliance on a resource by the two levels of courts was only random.[127]

The results are shown in Table 6. Because of the ways that our two measures get at co-reliance, the differences in Supreme Court reliance on a resource depending on court of appeals reliance on the same resource are more striking than the differences between random and actual co-reliance for each resource. Taking the two measures together, we think that the data support two conclusions about these resources as a whole. The first is that there is a meaningful relationship between reliance on these interpretive resources by the Supreme Court and by the courts of appeals. One or more of the possible reasons for convergence between the two levels of courts in the same cases operate in practice.

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123. Pamela C. Corley, Paul M. Collins Jr. & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31, 37–38 (2011); Adam Feldman, *Opinion Construction in the Roberts Court*, 39 LAW & POL'Y 192, 197–98, 202–03 (2017).

124. For resources with a sufficient frequency of reliance—such as ordinary meaning or legislative purpose—a considerable amount of co-reliance would occur on a random basis. Our interest is in identifying and understanding patterns of co-reliance that are more than random. Some measures are biased by the simple frequency of reliance, others by the deviation of the frequency from a 50 percent use rate.

125. Despite the conceptual differences between these measures, their values across the six resources correlate highly, at .822.

126. That difference is measured in percentage points, comparing the proportion of cases in which the Supreme Court uses a resource between cases in which the court of appeals relied on the resource and those in which it did not.

127. The proportion of cases with co-reliance based on a random relationship between use by the two levels is calculated as the proportion of cases with use by the Supreme Court multiplied by the proportion of cases with use by the court of appeals. We calculated the difference between random and actual use in percentage points.

Table 6: Co-reliance on Resources by Supreme Court and Courts of Appeals Compared with Two Benchmarks

	SC Reliance on Resource			**Co-reliance on Resource**		
	CA Relies	No CA Reliance	**Difference**	Random	Actual	**Difference**
Ordinary Meaning	65.7	44.3	**21.4**	47.7	51.4	**3.7**
Dictionaries	26.1	7.7	**18.4**	0.6	1.9	**1.3**
Language Canons	44.2	16.4	**27.8**	5.5	10.6	**5.1**
Legislative History	54.9	25.5	**29.4**	12.6	19.3	**6.7**
Legislative Purpose	78.6	70.1	**8.5**	35.6	37.7	**2.1**
Agency Deference	32.0	12.6	**19.4**	4.0	7.5	**3.5**

The second is that there is still considerable divergence between the two levels in individual cases. To take two examples, even though dictionaries and agency deference would seem considerably more relevant to some cases than to others, the Supreme Court still relied on those resources less than one-third of the time when a court of appeals chose to use them. Even for the language canons, where we might expect a high level of agreement on their relevance, the Supreme Court relied on that resource less than half the time when the court of appeals had done so. Legislative purpose is the only resource that the Court relied on more than two-thirds of the time when the court of appeals had also relied on it, and that figure is not meaningful because the Court's rate of reliance was nearly as high when the court of appeals had not relied on legislative purpose.

By both of our two measures, co-reliance was highest for legislative history, followed by language canons, ordinary meaning, and agency deference. Legislative purpose and dictionaries each ranked last by one measure and next to last by the other.

It may be that language canons and legislative history are especially case-specific in their relevance, so that judges and justices would have some inclination to rely on them in the same cases even if neither level of court influenced the other. There are many well-articulated language canons, and their taxonomy has become increasingly visible;[128] this facilitates selecting them for application on a case-by-case basis. Legislative history is case-specific for a different reason. Particular legislative record sources are linked to different stages of the lawmaking process; judges and justices seeking

128. For detailed categorizations, see SCALIA & GARNER, *supra* note 41, at 56–339 and ESKRIDGE ET AL., *supra* note 18, at 1195–1215.

guidance on legislative intent may view the same or different stages of the process as relevant or controlling in a given case.[129]

In contrast, dictionaries and legislative purpose seem more discretionary—resources that could be employed or eschewed in any case. Judges seeking clarification on the ordinary meaning of a statutory term may choose to consult a dictionary, but they may instead seek guidance from their own instincts or common sense, or else turn to definitions appearing in the statute. And references to a generalized legislative policy motivation may be sufficiently subjective or indefinite to be invoked on a more random basis by judges.

Co-reliance may also differ between cases in which the Supreme Court affirms the court of appeals decision that it reviews and cases in which the Court vacates or reverses.[130] The most obvious basis for such a difference is that the choice of resources may affect the outcome that a court reaches. If a court of appeals relies on legislative history to reach its decision and the Supreme Court rejects the relevance of legislative history, that divergence may lead the Court to reach a different judgment and thus to a reversal of the court of appeals. Alternatively, when the Court has voted to reverse the court of appeals, the justice who writes the Court's opinion may justify that reversal by employing a set of resources different from those on which the lower court relied.[131]

One test of this hypothesis is based on the simple number of agreements between the two courts about reliance on the six resources; if either both courts or neither rely on a particular resource, that is counted as an agreement. Thus this measure can range from 0 to 6. Altogether, the mean number of agreements was 4.32 for cases in which the Supreme Court affirmed the court of appeals and 4.13 when it reversed or vacated that decision. Thus, disposition and agreement were related in the expected direction, and the difference is probably sufficient in magnitude to be meaningful, but it is not dramatic.

We can look more closely at this relationship by examining specific resources. Table 7 shows the relationship between reliance on each resource by the Supreme Court and reliance or nonreliance by the court of appeals in the same case for affirmances versus reversals by the Court. The figures

129. *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1226–27 (2010); *see also* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 66 (2016) (emphasizing the importance of relying on the legislative history source that is most proximate to Congress's decision about the insertion or meaning of the contested textual provision).

130. We use the term "reverse" to refer to decisions in which the Court reverses or vacates the court of appeals decision.

131. Like the Court's decisions as a whole, our cases are dominated by reversals. Three cases were omitted from analysis of affirmances and reversals because the Court consolidated cases and its decision reversed one court of appeals and affirmed another. Of the 318 remaining cases, 208 (65.4 percent) were reversals.

shown are the increases in percentage points when the court of appeals relied on a resource—the same measure as the "difference" column in Table 6.[132]

Table 7: Increase in Reliance on Resources in Supreme Court When Court of Appeals Relies on Resource[133]

	Affirming (%)	**Vacating or Reversing (%)**
Ordinary Meaning	19.1	23.1
Dictionaries	49.4	4.7
Language Canons	34.1	23.6
Legislative History	32.1	26.6
Legislative Purpose	8.6	6.7
Agency Deference	42.5	2.9
Mean[134]	31.0	14.6

Our hypothesis predicts that the difference will be greater for cases in which the Supreme Court affirms the court of appeals. The mean statistical effect of courts of appeals' use on Supreme Court reliance on the six resources is more than twice as great for affirmances. The relationship is in the expected direction for five of the six resources, all but ordinary meaning. It is quite small for legislative purpose, moderate in magnitude for language canons and legislative history, and quite large for dictionaries and agency deference. The results for dictionaries can be discounted heavily because there were only six cases in which both courts relied on that source; the results are driven heavily by the fact that four of those six cases involved affirmances. Because there were twenty-three cases in which both courts relied on agency deference, the results for that resource are more meaningful but still should be read with some caution.[135]

Our findings on this hypothesis are mixed. There is enough evidence to indicate that agreement about reliance on certain interpretive resources is

132. The analysis might be "flipped," so that the question is how much resource use in the court of appeals increases when the Supreme Court uses the resource. The patterns for some specific resources change: the differences between cases with affirmance and reversal virtually disappear for ordinary meaning and language canons, and a difference appears for legislative purpose (7.9 percent for reversal cases and 14.4 percent for affirmance cases). But the mean differences are quite similar to those in Table 7: 14.3 percent for reversal and 28.9 percent for affirmance.

133. The meaning of the entries in the table can be illustrated with the cell for affirming and ordinary meaning. In cases in which the Supreme Court affirmed the court of appeals, the percentage of cases in which the Supreme Court relied on ordinary meaning was 19.1 percentage points higher when the court of appeals relied on ordinary meaning.

134. These means give equal weight to the percentages for the six resources. If those percentages are weighted by the numbers of court of appeals opinions that use each resource, the percentages become 24.1 percent for affirmances and 17.5 percent for reversals. The increased percentage for reversals and the decrease for affirmances primarily reflect the small numbers of court of appeals opinions with dictionary use.

135. Fifteen of the twenty-three cases with co-reliance on agency deference involved affirmances.

correlated with agreement on the outcome of cases, but overall the relationship between the two types of agreement is moderate at most.

Another aspect of co-reliance to consider is change over time. As we showed earlier in this section, the frequency with which the federal appellate courts relied on five of our six resources (all but agency deference) increased or decreased to meaningful degrees between the Burger Court and the Roberts Court, and these changes were especially dramatic in the Supreme Court. With these changes, it is possible that patterns of co-reliance changed as well.

One possibility is that co-reliance became more common because the Supreme Court communicated its preferences about interpretive resources more clearly to the lower courts over time. In the Burger Court era, justices did not express strong preferences on or off the Court, so court of appeals judges had little guidance from the Court about what resources were appropriate to use. From the onset of the Rehnquist Court, individual justices increasingly articulated their preferences. In turn, the growing support for textualism was reflected in the Court's increased reliance on resources associated with textualism and declining reliance on resources disfavored by that school of thought. With that guidance, court of appeals judges might have had greater interest and capacity for following the Court's lead than they did in the Burger Court era.

Yet the changes in reliance on resources by the Supreme Court might have led to changes in co-reliance that went in the opposite direction. Our earlier study of dictionary and legislative history use indicated that in the Roberts Court era, the courts of appeals take a more pragmatic approach to reliance on interpretive resources than does the Supreme Court.[136] If the Supreme Court moved toward a more dogmatic approach over time while the lower courts maintained their pragmatism, then there may have developed a greater divergence in reliance on resources over time.

We tested these competing hypotheses in the same ways that we tested the hypothesis about co-reliance. We began by looking at the level of agreement about reliance on the six resources. By this measure, agreement declined considerably, from a mean of 4.45 in the Burger Court to 4.14 in the Rehnquist Court and 4.00 in the Roberts Court. But this decline is partly a product of dictionary reliance—or, more accurately, nonreliance—in the Burger Court. Because only one opinion at either level relied on dictionaries during that period,[137] a very high rate of agreement on dictionary reliance was guaranteed, so we did not calculate an increase in reliance on dictionaries in the Burger Court when the court of appeals relied on dictionaries.

If we compare the mean for the other five resources, omitting dictionaries, the decline is less substantial though still meaningful: from 3.46 to 3.24 to 3.28. We should not dismiss the decline across all six resources because the agreement of the two levels of courts about nonreliance on dictionaries in the

136. *See generally Protean Statutory Interpretation*, *supra* note 2.
137. That was a court of appeals decision.

Burger Court is significant in itself, even though the results for the other five resources indicate a less dramatic decline. Moreover, it is of interest that by both of these two measures, most if not all of the decline occurred from the Burger Court to the Rehnquist Court. This was the period when some justices began to take a more doctrinaire approach to reliance on particular kinds of resources.

Table 8 shows the relationship between time and co-reliance for individual resources.[138] The means for the resources[139] show that there was an overall decline in co-reliance on these resources. Like the mean numbers of agreements, the means for these relationships indicate that most of the decline occurred between the Burger and Rehnquist Courts.

Table 8: Increase in Reliance on Resource in Supreme Court When Court of Appeals Relies on Resource, by Chief Justice Era

	Burger (%)	**Rehnquist (%)**	**Roberts (%)**
Ordinary Meaning	41.1	14.4	-8.0
Dictionaries[140]	—	27.0	5.9
Language Canons	20.6	18.9	35.1
Legislative History	27.3	32.5	24.2
Legislative Purpose	2.3	9.2	7.1
Agency Deference	32.6	10.5	12.7
Mean[141]	24.8	18.7	12.8
Mean (Without Dictionaries)	24.8	17.1	14.2

As the table shows, the temporal patterns were quite different across the resources. Co-reliance actually increased substantially for language canons during the Roberts years and to a small extent for legislative purpose in the

138. As we did for the analysis of Supreme Court disposition, *supra* note 131, we "flipped" the analysis so that the question is how much resource use in the courts of appeals increases when the Supreme Court uses the resource. None of the basic patterns for individual resources changed, and the patterns for the means were quite similar. For all six resources, the mean difference in court of appeals reliance on a resource between cases with Supreme Court reliance or nonreliance on that resource was 27.6 percent in the Burger Court, 16.6 percent in the Rehnquist Court, and 14.1 percent in the Roberts Court. If dictionary use is omitted, the means are 27.6 percent, 15.8 percent, and 16.0 percent, respectively.

139. Because the data for dictionary use in the Burger Court are not meaningful, we computed a mean for all six resources (with dictionaries included in the Rehnquist and Roberts Courts) and a mean for the five resources other than dictionaries.

140. Differences were not computed for dictionaries in the Burger Court because of the near-absence of dictionary use in that period.

141. If weighted means are used, *see supra* note 134, the percentages for the Burger and Rehnquist Courts are close to those for the unweighted means. But the percentages for the Roberts Court decline moderately (from 12.8 percent to 8.6 percent for all six resources and from 14.2 percent to 8.8 percent when dictionaries are excluded). Those declines reflect the negative difference for plain meaning, the most frequently used resource in the courts of appeals.

Rehnquist era. It increased and then returned to its earlier level for legislative history, so that co-reliance in the Roberts Court was slightly lower than in the Burger Court. The substantial increase for language canons may reflect at least in part a more robust embrace of these canons by appeals courts following the expanded Supreme Court reliance that began during the Rehnquist years.[142]

On the other hand, there was a large decline in co-reliance for agency deference in the Rehnquist years and a considerable decline in dictionary co-reliance for the Roberts period. Further, we found a massive decline for ordinary meaning in both the Rehnquist and Roberts eras, to the point that the Roberts Court was *less* likely to rely on ordinary meaning in cases in which the court of appeals relied on it.

The means at the bottom of the table show that for the six resources as a whole, co-reliance declined considerably between the Burger and Rehnquist eras. The patterns for individual resources are complicated. For language canons, one of the three resources associated with a textualist approach, growing reliance on this resource at both court levels in the Roberts Court was accompanied by growing agreement on when to rely on it. For the other two textualist-identified resources, just the opposite occurred: increased reliance on ordinary meaning and dictionaries occurred at the same time as agreement on their reliance in individual cases declined.

Among the three resources associated with a purposivist approach, agreement about when to rely on legislative history and legislative purpose remained stable even as the overall reliance on those resources declined.[143] That stability of agreement about legislative history is especially striking in light of the growing disagreement over the legitimacy of using this resource at all. In contrast, agreement on when to rely on agency deference dropped considerably even though there was stability in the frequency with which this resource was relied on.

This mixed set of temporal patterns does not lend itself to simple conclusions. However, the overall decline in co-reliance on resources suggests that the increasingly doctrinaire approach of some Supreme Court justices to choices of interpretive resources has worked against agreement about which resources to rely on in particular cases.

Our discussion of co-reliance thus far has been based on categories of resources. But when two courts both draw from the same broad category, such as legislative history, they might be relying on different specific

142. As noted earlier, Roberts-era appeals courts rely on multiple language canons over half the time when they invoke the canons (compared to less than one-fifth of the time for Burger- and Rehnquist-era appeals court decisions); they also invoke a considerably wider range of language canons than their counterparts in those earlier eras. *See supra* note 113.

143. Co-reliance for agency deference and legislative history occurred most often in the Burger era, whereas for language canons and dictionaries it occurred most often in the Roberts era. It is not surprising that for our resources with the two highest levels of co-reliance, legislative history is front-loaded and language canons are back-loaded. The overall frequency of reliance for legislative history peaked in the Burger years, whereas overall frequency for language canons has been greatest during the Roberts period.

resources within that category—say, House hearings versus a conference report. For that reason, it is worthwhile to examine the extent to which there is what we will call a match between the Supreme Court and court of appeals in the specific resources that they rely on. Three of our six resources are amenable to analysis of matches of specific resources: legislative history, language canons, and dictionaries. There were only six cases in which both courts relied on dictionaries, so quantitative analysis of specific matches does not tell us much.[144]

For language canons, we treated the two courts as fully matching if they relied on the same canon or canons. If they shared at least one canon, but one court relied on a canon that the other did not, that was a partial match.[145] If the two courts had no canons in common, that was treated as a nonmatch. Of the thirty-four instances of co-reliance, 29 percent were full matches, 32 percent partial matches, and 38 percent nonmatches.

For legislative history, matches were based on sources such as House committee reports, Senate hearings, and House floor debates.[146] Because an opinion relies on several sources of legislative history more often than it relies on multiple language canons, our coding rules for matching were more complicated than they were for canons. We counted a match as full if the two courts relied on two or more of the same legislative history sources and those same sources amount to at least half the sources relied on by either one of the two courts[147] or if each court relied on the same single source. A match was treated as partial if at least one-quarter (but less than one-half) of the sources relied on by one court were relied on by both, or if one of the two sources relied on by either court was relied on by both. Nonmatches were

144. We counted co-reliance on dictionaries as a full match if the two courts defined the same word or words and if their definitions (even if from different dictionaries) were the same or similar. Partial matches were instances in which the two courts defined the same word but one court also defined additional words; or if the courts defined the same word or words but the definitions were quite different. By those criteria, of the six cases, two had full matches, two partial matches, and two nonmatches.

145. In two instances in which different canons are quite similar, we combined them into a single category: (a) noscitur a sociis and ejusdem generis and (b) variants of the whole act rule (interpret the same terms in the same way; the presumption of consistent usage; the presumption of meaningful variation; the presumption against redundancy; and the presumption against surplusage).

146. Thus a match would occur if both courts relied on the House committee report or on floor debate from the same chamber. It would be possible to use a criterion for matches that is even more demanding, counting as a match only situations where the two courts relied on the same portion of a committee report or the same floor speaker. We concluded that because the sources invoked by the two judicial levels for a particular law were predictably limited (e.g., one authorizing committee report per chamber, and floor statements from managers or leading proponents), our criterion was appropriate. By the same token, we could have counted as a language canons match only situations where reliance on the same canon (e.g., the rule against surplusage or noscitur a sociis) addressed the same portion of the text. That seems to us unduly constraining, inasmuch as different judges invoke these canons to clarify or elucidate often-distinct portions of a text they regard as ambiguous or inconclusive. Still, in interpreting the data on matches, our criteria should be kept in mind.

147. In other words, at least 50 percent of the sources relied on by the Supreme Court were also relied on by the court of appeals, or at least 50 percent of the sources relied on by the courts of appeals were relied on by the Supreme Court.

cases in which less than one-quarter of the sources relied on by the Supreme Court were relied on by the court of appeals and less than one-quarter of the sources relied on by the court of appeals were relied on by the Supreme Court. Of the sixty-two instances of co-reliance, 47 percent were full matches, 31 percent partial matches, and 23 percent nonmatches.

Because specific language canons and sources of legislative history are not fully comparable with each other, and because our measures of matching differed between the two, comparisons between the results for the two resources must be approached with caution. That said, it is worth noting that the level of full matches is considerably higher for legislative history than for language canons, and the level of nonmatches is substantially higher for language canons. To the extent such comparisons are meaningful, the higher level of nonmatches may reflect the great number of language canons from which courts may choose (far greater than the sources of legislative history) as well as the absence of any hierarchy among them.

Finally, the higher proportion of nonmatches for language canons is accompanied by a considerably higher reversal rate at the Supreme Court (77 percent versus 43 percent for legislative history nonmatch cases).[148] The raw numbers of nonmatch cases are small enough to be treated with some caution,[149] but the results suggest that language canons are susceptible to being used more strategically by the Supreme Court than legislative history. Given that language canons populate a large universe with no hierarchy of authority, justices who wish to reverse the appeals court have ample discretion in their choice of a different or dueling canon. Legislative history sources are fewer in number and involve more of a recognized hierarchy; this may somewhat constrain the options for strategic reliance on a different specific legislative history resource when deciding to reverse a circuit court decision.

Stepping back, and again with some caution given that our measures of matching are new ones, we can say something about the overall levels of matching. The clearest conclusion is also the most important: co-reliance on the same interpretive resource frequently masks considerable disagreement about which canon or which source of legislative history is relevant to the issues in a case.[150] Although the pattern of matches for dictionaries is less meaningful because of the limited number of cases with

148. Overall, there was no meaningful relationship between the extent of the match and reversal for legislative history. The reversal rates were 43 percent for nonmatches, 63 percent for partial matches, and 52 percent for full matches. However, there was a substantial relationship for language canons: a 77 percent reversal rate for nonmatches, 60 percent for partial matches, and 44 percent for full matches.

149. There are thirteen language canon nonmatch cases and fourteen legislative history nonmatch cases in our dataset.

150. Disagreement may also take forms that our measures of matching do not capture. As we noted earlier, for legislative history, one court might draw from a different passage in the same source, such as a Senate committee report. *See supra* note 145. And for both resources, the two courts may reach opposite conclusions from a particular canon or passage in the legislative history.

co-reliance, the pattern for dictionaries reinforces that conclusion.[151] Thus, our findings on matching reinforce our findings on co-reliance by underlining the differences in the specific resources that the courts of appeals and the Supreme Court rely on when addressing the statutory interpretation issues that arise in the same case.

D. Overview of Findings

Our set of findings about patterns of use for six interpretive resources is complex: different findings point in different directions. If we focus on comparison between the Supreme Court and courts of appeals, perhaps the best general conclusion is that there is a meaningful but limited similarity in their choices of resources as bases or support for their judgments.

At the broadest level, the frequency with which the two court levels relied on four of the six resources—all but legislative purpose and, to a lesser degree, ordinary meaning—is at the same general level for our study period as a whole. That pattern holds for each of the three families of labor and employment statutes that the Court interprets most frequently, with a modest exception for two resources under ERISA.

This similarity is noteworthy, but its significance should not be overstated. When two levels of courts decide the same set of cases, it is inevitable that they will tend to rely on particular resources with similar frequencies. Moreover, the substantially higher rates with which courts of appeals rely on ordinary meaning and the Supreme Court relies on legislative purpose underline the fact that the two levels of courts do not march in lockstep even in deciding the same set of cases.

More significant are the similarities between the two court levels in temporal trends between the early and late parts of our study period. Both levels increasingly relied on the three resources associated with textualism, although language canons in the courts of appeals followed a more complicated path over time. And both relied on legislative history and legislative purpose less frequently between the Burger and Roberts Courts. Year-level correlations between trends provided additional evidence that the Supreme Court and the courts of appeals moved in the same direction in their choices of resources, and the correlations were especially strong for dictionaries and legislative history.

This similarity in trends indicates a systematic element to the increases and declines that occurred in all six resources, except for agency deference. That systematic element could stem from similar responses to developments in the legal world by the courts of appeals and Supreme Court, such as the growing interest in textualism. Alternatively, or in addition, it could stem from the Supreme Court's influence on lower courts, influence that might reflect different motivations.

Yet the coinciding of trends should not be exaggerated. Importantly, changes in the frequency with which five of the resources were relied on were

151. *See supra* note 144.

generally more substantial in the Supreme Court than in the courts of appeals; legislative purpose is the one exception among those five resources, and the decline in reliance on legislative purpose came earlier in the courts of appeals. Whatever the sources of temporal trends were, they had a distinctly more limited effect in the courts of appeals than in the Supreme Court.

Even more noteworthy are our findings with respect to co-reliance on resources in the same individual cases. The frequency with which both courts employ a particular resource in a given case is greater than we would expect if the choice of resources was random. It seems likely that both courts are responding to attributes of individual cases that make particular resources appropriate. At the same time, it is quite common for one court to rely on a particular resource in deciding a case while the other court eschews that resource in deciding the same case. That is especially true, as we would expect, for resources that are employed only infrequently: the Supreme Court relied on dictionaries only one-fourth of the time when the circuit court had done so. But it is also true for resources invoked more regularly: the Court relied on language canons less than half the time when the circuit court had done so, and the ratio for legislative history was only slightly above half. Moreover, when the two courts do rely on the same resource in their opinions, our inquiry indicates that the courts frequently employ different versions of the same resource.

These differences in the choices of interpretive resources by the Supreme Court and the courts of appeals are striking in light of the fact that we are comparing their responses to the same set of cases. As we have noted, because the choices of resources by judges and justices are inevitably guided and constrained by the attributes of the cases they decide, at least a moderate degree of similarity between court levels in those choices is almost guaranteed. Further, judges on the two court levels are subject to some of the same influences from the larger legal world as well as their influence on each other. Nonetheless, the Supreme Court and the courts of appeals display considerable independence in their reliance on resources, both overall and especially in particular cases.

III. DOCTRINAL ANALYSES: CONSISTENCY AND INCONSISTENCY WITHIN CO-RELIANCE

The most granular aspects of our empirical analysis involve case-specific reliance on interpretive resources. Our overall findings reported in Table 1 suggest equivalent levels of reliance for two important resources—language canons and legislative history. But those equivalences give way to more complicated results when examining matches and nonmatches for cases with co-reliance. As discussed above, for roughly two-fifths of the cases in which both courts relied on language canons, the two courts had no canons in common. The proportion of total nonmatches was lower for legislative history; still, in over three-fifths of co-reliance cases, the two courts shared less than half the same legislative history sources.

Given these surprisingly high levels of divergence in reliance within the same resource categories between the Supreme Court and the courts of appeals, we probe more deeply here into co-reliance cases themselves. To be sure, there is also considerable divergence in reliance involving judicial selection of resource categories. As previously discussed, the Supreme Court relied on language canons less than half the time when the appeals court had done so, and the proportion was only slightly above half with respect to legislative history.[152] Still, examining divergence within resource categories allows us to explore the possible motivations behind divergence in stronger terms.

In our effort to analyze co-reliance cases, we begin with definitions of certain key terms. We distinguish between what we call *consistent* and *inconsistent* uses of the same resource. Consistent usage occurs when the appeals court and the Supreme Court essentially rely on the same version of the same resource—a similar or identical definition of the same word in one or more dictionaries; the same language canon (including a recognized variation); or the same source(s) of legislative history.[153] Consistent usage generally arises in cases of full match between the two courts, though it also may occur in cases of partial match.[154]

Inconsistent usage occurs when the two judicial levels rely on different specific versions of the same resource. Thus, a circuit court may regard the dictionary definition of one textual term as pivotal while the Supreme Court regards a substantially different definition of the same term, or the definition of a different term, as probative; or the circuit court may rely on House and Senate committee reports while the Supreme Court invokes floor debates and the conference report. Inconsistent usage usually arises in cases of nonmatch or partial match between the two courts.

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152. *See supra* Table 6 and accompanying text. The Court relied on dictionaries only one-fourth of the time when the circuit court had done so. *See supra* Table 6 and accompanying text. There are an ample number of specific cases that could serve as illustrative of these findings. In addition to the cases discussed at *supra* note 27, see, for example, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (relying inter alia on dictionaries and legislative history to hold in favor of a class of female employees), *rev'd*, 564 U.S. 338 (2011) (relying inter alia on ordinary meaning and language canons while rejecting reliance on legislative history and saying nothing about dictionaries); Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Serv., Inc.), 403 F.3d 228 (4th Cir. 2005) (relying inter alia on ordinary meaning, language canons, and dictionaries to hold against an employer's workers' compensation insurance carrier in a bankruptcy case), *rev'd*, 547 U.S. 651 (2006) (relying inter alia on legislative history and purpose while eschewing reliance on ordinary meaning and language canons and saying nothing about dictionaries).

153. By "same source" of legislative history, we referred to the same general source (such as a Senate report or a House hearing) in our earlier empirical analysis of matches, partial matches, and nonmatches. *See supra* notes 146–47 and accompanying text. In our closer examination of individual cases, we consider this consistency of general sources but also review the particular contents of those sources. *See, e.g.*, *infra* notes 220–23 and accompanying text (discussing *Espinoza v. Farah Manufacturing Co.*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973)).

154. See *supra* notes 144–47 and accompanying text for description of full matches, partial matches, and nonmatches when relying on the same resource category.

We also distinguish within inconsistent usages between what we call direct and indirect inconsistency. A direct inconsistent usage appears more conscious and strategic: the Supreme Court has chosen to rely on a different version of the resource (a different definition, canon, or piece of legislative history) that it construes to be in direct tension or conflict with the version invoked by the appeals court, sometimes over the objection of a dissenting justice. For instance, an appeals court might apply the canon of meaningful variation to derive different meanings from two otherwise parallel provisions, while the Supreme Court might view the two provisions as similar in meaning or identical in scope based on the in pari materia canon.

An indirect inconsistent usage—rare compared to direct inconsistency—appears almost inadvertent: the Supreme Court's pursuit of the different version (again a different word, canon, or piece of legislative history) addresses a separate aspect of the issues at stake, perhaps a distinct legal question or subquestion in the case. Again, to use a hypothetical example, an appeals court might rely on a conference report discussion linked to enactment of a particular provision while the Supreme Court relies on a Senate report accompanying a separate provision in the same statute that addresses a distinct legal question. This triadic approach—consistency, direct inconsistency, indirect inconsistency—may be fuzzy or contestable at the margins, but we believe it reflects certain important differences in approach, the scope and meaning of which are illustrated when applied to specific cases.

With that background, we focus on co-reliance in the three categories for which we analyzed matches and nonmatches: dictionaries, language canons, and legislative history. We identify cases where the specific version of the resource relied upon is consistent between the two judicial levels and cases where it is inconsistent. For the latter cases, we regard most inconsistent approaches as direct and strategic though at least one is indirect.

A. Dictionary Co-reliance

Cases in which both the circuit court and Supreme Court rely on dictionary definitions are comparatively rare: only six appear in our dataset.[155] Four of the six are from the Roberts era, for which we included every labor and employment case decided by both judicial levels.[156] The two other dictionary co-reliance cases arose in the Rehnquist era, for which we sampled

155. When we refer to numbers and proportions of cases in various categories in this section, it should be kept in mind that we are referring to cases in the dataset; as we have discussed, the cases for the Burger and Rehnquist Courts represent a one-third sample of all eligible cases during those periods. Because the dataset includes similar numbers of cases from the three periods, numbers of cases with co-reliance are fairly comparable across periods.

156. Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018), *rev'g* 845 F.3d 925 (9th Cir. 2017); NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017), *aff'g* 796 F.3d 67 (D.C. Cir. 2015); Chamber of Commerce v. Whiting, 563 U.S. 582 (2011), *aff'g sub nom.* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011), *vacating* 570 F.3d 834 (7th Cir. 2009).

every third decision.[157] It is hardly surprising that no dictionary co-reliance cases arose in the Burger era, given that dictionary reliance was then virtually nonexistent at both judicial levels.[158]

For the Roberts and Rehnquist eras, the low number of co-reliance cases reflects the presence of a high number of nonmatches. The four Roberts Court co-reliance cases contrast with a total of twenty-two dictionary reliance cases in the Supreme Court and sixteen reliance cases in the circuit courts. Similarly, the two Rehnquist co-reliance cases represent a small fraction of the instances of dictionary reliance at either judicial level.[159] We briefly describe two of the four Roberts-era decisions here, as well as one of two from the Rehnquist Court. We focus only on the dictionary definition issues, although both courts invoked various other resources in each of the three cases.

In *Navarro v. Encino Motorcars, LLC*,[160] the Ninth Circuit had to construe an exception to overtime compensation requirements under the FLSA; specifically, whether service advisors in an automobile dealership were covered by the exemption for "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."[161] The Ninth Circuit panel, noting that these advisors were clearly not salesmen engaged in the selling of automobiles, determined that the key textual terms from an ordinary meaning standpoint were "primarily," "engaged," and "servicing."[162] Relying on definitions from four dictionaries in general use,[163] the court held that service advisors were not "chiefly" or "principally" "occup[ied]" or "involved" in the "supply[,] maintenance[, or] . . . repair of automobiles"; rather, they were employed to wait on customers and arrange for mechanics to do the servicing work, and therefore were subject to the FLSA overtime requirements.[164]

The Supreme Court reversed.[165] Ignoring the terms "primarily" and "engaged in," the majority relied on definitions of "salesman" and "servicing" in two of the four general use dictionaries invoked by the court

157. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *aff'g* 130 F.3d 893 (10th Cir. 1997); McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988), *aff'g sub nom.* Brock v. Richland Shoe Co., 799 F.2d 80 (3d Cir. 1986).

158. There were no dictionary reliance cases among the 116 Supreme Court decisions for the Burger era and only one such case among the circuit court decisions for the same era.

159. The two cases contrast with eight Supreme Court decisions in our Rehnquist Court dataset that relied on dictionaries and six circuit court decisions relying on dictionary definitions.

160. 845 F.3d 925 (9th Cir. 2017), *rev'd*, 138 S. Ct. 1134 (2018).

161. 29 U.S.C. § 213(b)(10)(A) (2012).

162. *See Navarro*, 845 F.3d at 931.

163. *See id.* (relying on the *Random House Dictionary of the English Language* ("*Random House*"), *Webster's Third New International Dictionary* ("*Webster's Third*"), *Oxford English Dictionary* ("*OED*"), and the *American Heritage Dictionary*).

164. *See id.* The court considered the company's dictionary-related argument that, in broad terms, the service advisors were "involved" in "supplying maintenance and repair," but found that this stretched the ordinary meaning too far; the court observed that "[w]e usually do not say that we primarily engage in an activity that we do not perform personally (and that we may lack the skills to perform)." *Id.*

165. Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018).

of appeals.[166] The majority concluded that because a "salesman" is someone who sells goods or services, a service advisor is plainly a salesman. Further, "servicing" can mean either maintaining or repairing a motor vehicle, or providing a service, and these advisors are "integral to the servicing process"—they meet and listen to customers, suggest repair and maintenance services, and explain the work done when customers return to collect their vehicles.[167] A Supreme Court dissent emphasized one of the Ninth Circuit's dictionary arguments: that the ordinary meaning of "servicing" is the action of repairing or maintaining a vehicle, not just being "integral to the servicing process."[168]

We view this as an example of inconsistent co-reliance that is direct. The Supreme Court majority chose to define a word in the FLSA text ("salesman") that the Ninth Circuit panel had viewed as inapplicable. The Court also ignored two words in that text ("primarily" and "engaged") that the Ninth Circuit had regarded as central. Further, although the two courts employed the same dictionary definitions for one key term ("servicing"), they emphasized different aspects of those definitions. Strategic thinking as part of Supreme Court review need not have a particular ideological orientation. While the Court in *Encino Motorcars* pursued such an approach to dictionary definitions as part of reversing a pro-employee decision below, another Roberts Court case of direct inconsistent co-reliance involved broadening the dictionaries consulted as part of vacating a pro-employer decision by the court of appeals.[169]

In our final Roberts Court example, *Chamber of Commerce v. Whiting*,[170] the Court reviewed a Ninth Circuit decision that construed the savings clause of the preemption provision in the Immigration Reform and Control Act (IRCA).[171] An Arizona law, aimed at employers who hire undocumented immigrants, included as its main sanction the revocation of state licenses to do business in Arizona.[172] The federal statute expressly preempts state laws imposing civil or criminal sanctions "other than through licensing and similar laws."[173] The circuit court relied on the *Black's Law* definition of "licensing" and "licenses" as "a permission, usually revocable, to commit some act that would otherwise be unlawful," and held that the Arizona law—providing for

166. *See id.* at 1140 (relying on *OED* and *Random House*). *Compare supra* note 163.

167. *See id.*

168. *See id.* at 1144–45 (Ginsburg, J., dissenting).

169. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7–8, 14 (2011) (The majority concluded that additional dictionary definitions of "filed" make the definition more ambiguous than the appeals court allowed for and that a "complaint" need not be "filed" in writing to trigger the antiretaliation protections of the FLSA.).

170. 563 U.S. 582 (2011). The Ninth Circuit decision is titled *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom. Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011). The cases involved other issues besides the express preemption question for which dictionary definitions were invoked. We do not address those issues here.

171. *See* 8 U.S.C. § 1324(a)(h)(2) (2012).

172. *See Chicanos*, 558 F.3d at 862 (describing the provisions of the Legal Arizona Workers Act, which was enacted in 2007).

173. 8 U.S.C. § 1324(a)(h)(2).

the suspension of employers' licenses to do business in the state—fell squarely within the IRCA savings clause.[174] The Supreme Court affirmed on the express preemption issue. The Court relied on a *Webster's Third* definition of "licensing" that was identical in relevant respects to the *Black's Law* definition invoked by the Ninth Circuit.[175] Like the court below, the majority found this definition dispositive.

We view this as an example of consistent co-reliance. Although the two courts invoked different dictionaries to define the same key word, the definitional language they consulted was virtually identical. And the two courts applied these definitions in the same contextual manner to reach the same conclusion. The Supreme Court went on to reject additional arguments raised by the dissent that its dictionary definition was overbroad or left key issues unaddressed, but an extra dimension of contestation in a Supreme Court decision is not unusual. What is salient for our purposes is that the majority focused on defining the same word as the appeals court, and in doing so it applied an identical definitional concept.

Finally, in *Sutton v. United Air Lines, Inc.*,[176] the issue was whether, under the Americans with Disabilities Act of 1990[177] (ADA), corrective and mitigating measures (such as eyeglasses in this instance) should be considered when determining if an individual is disabled, thereby restricting the Act's potential scope of coverage. The ADA defines someone with a "disability" as an individual with "a physical or mental impairment that substantially limits one or more . . . major life activities" or an individual "regarded as having such an impairment."[178] The Tenth Circuit analyzed the word "impairment" by referencing three dictionaries (one general and two legal) and applying the consensus dictionary meaning (to make worse, weaken, diminish) to the plaintiffs' uncorrected vision deficiencies; the court concluded that the plaintiffs' vision is a physical impairment under the ADA.[179] The court went on to hold, however, that this impairment did not substantially limit the plaintiffs' major life activity of seeing, because an assessment of "substantially limits" must take into consideration mitigating or corrective measures such as eyeglasses. The court reached this conclusion largely through reliance on the analyses of other lower courts, without invoking any dictionary definitions.[180]

In affirming the lower court decision, the Supreme Court relied on definitions of "substantially" in two general dictionaries to hold that

174. *See Chicanos*, 558 F.3d at 865.

175. *See Whiting*, 563 U.S. at 595 (reciting the *Webster's Third* definition of a license as "a right or permission granted in accordance with law . . . to engage in some business or occupation . . . which but for such license would be unlawful").

176. 527 U.S. 471 (1999). The Tenth Circuit decision is *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

177. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

178. 42 U.S.C. § 12102(2) (2012).

179. *See Sutton*, 130 F.3d at 898–900 (relying on *Webster's Ninth New Collegiate Dictionary*, *Black's Law Dictionary*, and *Ballentine's Law Dictionary*).

180. *Id.* at 900–03.

"substantially limits" in this context means the plaintiffs should have alleged they were unable to work in a broad class of jobs.[181] The Court then applied those definitions to a second legal question in the case: whether the defendant airline regarded the plaintiffs' impairment as substantially limiting their ability to work. Even assuming that working is a major life activity, the plaintiffs' allegation was simply that the airline employer had found the plaintiffs' poor vision precluded them from holding positions as global airline pilots. The Court held that being denied access to a single pilot-related job did not amount to a *substantially* limiting impairment.[182]

We view this as an example of inconsistent co-reliance that is indirect, and seemingly almost inadvertent. The two courts each relied on dictionaries, but in doing so they defined two different words. They used five separate and nonoverlapping dictionaries to address two distinct elements of what constitutes a disability under the ADA. Further, the words they defined ("impairment" and "substantially") were then applied to two separate legal questions in the case. The Supreme Court did not rely on dictionaries to address the first prong of the ADA's core concept—whether an individual has a substantially limiting impairment that amounts to a disability. And the Tenth Circuit did not invoke dictionaries to address the "regarded as having an impairment" prong of the statute's approach to disability.

In reviewing four of the six dictionary co-reliance cases that appear in our dataset,[183] we identified three distinct forms of consistency or inconsistency. This diversity of case-specific applications illustrates how even presumptive uniformity of reliance on a particular interpretive resource can conceal various divisions and disagreements. Further, three of our four specific cases involved some form of inconsistent co-reliance. That is not terribly surprising given the scope for judicial discretion that results from the wide range of potentially relevant words to define in a given statutory text as well as the range of available dictionaries and definitions to choose from.[184]

B. Language Canons Co-reliance

There are thirty-four cases in which both the circuit court and the Supreme Court rely on language canons. In addition to the far larger number of co-reliance cases compared to dictionaries, the frequency of cases in which only one of the two courts relied on language canons is proportionately less, especially in the Roberts period when co-reliance cases constitute more than half of total instances of reliance by the Supreme Court and more than half at the appeals court level.[185] As with dictionaries, over half of the co-reliance

181. *Sutton*, 527 U.S. at 491 (relying on *Webster's Third* and *OED*).

182. *Id.* at 492–93.

183. In addition to the three cases addressed in text, we summarized a fourth case. *See supra* note 169 and accompanying text.

184. *See Oasis or Mirage*, *supra* note 2, at 527–39 (reporting on the Supreme Court's use of dictionaries as highly subjective and idiosyncratic).

185. For the Roberts years, there are twenty-one co-reliance cases compared to thirty-seven total language canon reliance cases in the Supreme Court (57 percent) and thirty-six in the appeals court (58 percent). For the Burger years, the percentages are also relatively high,

cases (twenty-one of thirty-four) occurred in the Roberts era—although unlike dictionaries, there also were ample instances of co-reliance in the Burger era. We describe four co-reliance cases here: one each from the Burger and Rehnquist periods and two from the Roberts years. Again, we are interested only in co-reliance on language canons; while both courts regularly invoked other resources as well, our focus here is on which language canons are invoked and in what ways.

In *Morton v. Delta Mining, Inc.*,[186] the issue was whether the Federal Coal Mine Safety and Health Act authorizes the secretary of the interior to assess civil penalties against mine operators without making factual findings. The relevant section of the Act provides as follows:

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation . . . has been *given an opportunity for a public hearing*, and the Secretary has determined, by decision incorporating his findings of fact *therein*, that a violation did occur . . . . Any hearing under this section shall be of record and shall be subject to section 554 of [the Administrative Procedure Act].[187]

The secretary assessed a civil penalty without making findings of fact, and the mining companies appealed. The Third Circuit held against the secretary, relying in part on two language canons. The court first relied on the rule against surplusage. Because the section provides that any hearing is subject to section 554 of the Administrative Procedure Act (APA), which itself requires factual findings, the requirement of findings in the first sentence would be redundant if it did not refer to a situation other than one in which a hearing was requested and held.[188] The Third Circuit also invoked the rule of the last antecedent. The secretary contended that "therein" in the section referred to the hearing, hence when there was no hearing, there could be no "findings of fact therein." The court rebuffed this contention, concluding that "[s]ince the word 'decision' follows 'hearing' in the statute, the most natural and probable referent of 'therein' is 'decision,' not 'hearing.'"[189]

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especially for the Supreme Court: eight instances of co-reliance among fifteen total Supreme Court instances of reliance (53 percent) and eight of twenty-eight in the circuit courts (29 percent). During the Rehnquist period, co-reliance percentages are lower: five co-reliance cases out of twenty-two Supreme Court instances of reliance (23 percent) and five of thirteen total circuit court reliance cases (38 percent). For the entire dataset, instances of language canon co-reliance are 46 percent of all cases with Supreme Court reliance and 44 percent of all cases with appeals court reliance. It should be noted that, all else being equal, co-reliance will be more frequent in these proportionate terms when a resource is relied on more frequently—as is true of language canons in comparison with dictionaries.

186. 495 F.2d 38 (3d Cir. 1974), *rev'd sub. nom.* Kleppe v. Delta Mining, Inc., 423 U.S. 403 (1976). The case, selected through our sampling process, was argued and decided on the same day as a case reviewing the same issue from the D.C. Circuit. *See* Nat'l Indep. Coal Operators Ass'n v. Kleppe, 423 U.S. 388 (1976). The Court's reasoning is set forth in the companion case heading and we refer to those pages here.

187. *Delta Mining*, 495 F.2d at 40 (quoting 30 U.S.C. § 819(a)(3) (1970) (emphasis added)).

188. *Id.* at 42.

189. *Id.* at 42 n.20.

The Supreme Court reversed, holding that unless the mine operator had requested a hearing, such a hearing was not required before the secretary made factual findings and assessed a penalty. Like the appeals court, the Supreme Court relied on the rule against surplusage. But it focused more narrowly on the word "opportunity" rather than the relationship between APA requirements and the provision's first sentence. Emphasizing that the section provides mine operators with no more than an "opportunity" for a hearing, the Court concluded that "[t]he word "opportunity" would be meaningless if the statute contemplated [formal] factual findings whether or not a . . . hearing [was] held."[190] The Court did not refer to the last-antecedent argument invoked by the circuit court.

We regard this as inconsistent usage that is direct and seemingly strategic. Although the two courts relied on the same canon, the rule against surplusage, they focused on surplusage in distinct parts of the contested textual provision. The Supreme Court also acted strategically in not addressing either of the language canon positions adopted by the appeals court.

In our Rehnquist-era case, *American Hospital Ass'n v. NLRB*,[191] the petitioner challenged the NLRB's exercise of its notice and comment rulemaking power under section 6 of the NLRA. Petitioner's argument was that the duly promulgated rule—establishing eight presumptive employee bargaining units for acute care hospitals—was unlawful because a different section of the Act, section 9(b), requires the Board to determine the appropriate bargaining unit "in each case," meaning on a case-by-case basis.[192] The Seventh Circuit rejected this argument, relying in part on the whole act rule. The appeals court noted that the two sections (6 and 9(b)) were enacted at the same time, that Congress was explicit in granting the Board untrammeled rulemaking power in section 6, and that "it is probable . . . that Congress would have made an explicit exception for unit determination" had it meant to place that determination beyond the scope of the Board's rulemaking powers.[193]

The Supreme Court affirmed.[194] In doing so, it relied on the same whole act analysis. As stated by the Court, "[a]s a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in section 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section."[195]

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190. *Delta Mining*, 423 U.S. at 398.

191. 899 F.2d 651 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991).

192. *Id.* at 655.

193. *Id.* at 656.

194. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609 (1991).

195. *Id.* at 613. It is perhaps worth noting, although neither court did so here, that the NLRA is replete with express provisos and qualifiers in other sections. *See, e.g.*, National Labor Relations Act, ch. 372, § 8(a)(5), 49 Stat. 449, 452 (defining bad faith bargaining, "subject to the provisions of section 9(a)"); *id.* § 8(b)(4) (defining unlawful secondary picketing subject to three separate provisos).

We view this as an example of consistent usage. The two courts relied on the same canon, applying it in the same manner to conclude that they could integrate the same two textual provisions.

Our first Roberts-era case is *Burlington Northern & Santa Fe Railway Co. v. White*,[196] construing the antiretaliation language of Title VII. The language of the basic prohibition in Title VII, section 703(a), bars discrimination (based on race, sex, etc.) with respect to compensation or terms or conditions of employment; by contrast, the antiretaliation provision, section 704(a), bars "discriminat[ion] against" an employee as retaliation (for filing a charge, testifying, etc.) without referring to compensation or terms and conditions of employment.[197] The Sixth Circuit construed the antiretaliation language as covering only employee-adverse action related to the terms or conditions of employment. In doing so, it relied on the whole act rule, reasoning that because the text in both sections uses the same key phrase, "discriminate against," having a different standard for the two provisions "would be burdensome and unjustified by the text" given the presumption that Congress intends the phrase to have the same basic meaning throughout the statute.[198] The appeals court went on to uphold the jury verdict that the plaintiff's retaliatory reassignment and suspension qualified as adverse actions related to her terms and conditions of employment.[199]

The Supreme Court affirmed but applied a different language canon analysis to the relevant text. The Court began by noting the Sixth Circuit's analysis, supported here by the solicitor general, urging that the "antiretaliation provision should be read *in pari materia* with the antidiscrimination provision."[200] But the Court emphasized that "the language of [section 703(a)] differs from that of the antiretaliation provision in important ways," specifically the absence in section 704(a) of words limiting "discrimination" by relating it to terms and conditions of employment.[201] The Court instead invoked its version of expressio unius or meaningful variation, stating: "We normally presume that, where words differ as they differ here, 'Congress acts intentionally . . . in the disparate inclusion or exclusion.'"[202] Having determined that the jury was not required to find that the employer's challenged actions were related to the terms or conditions of employment, the Court went on to affirm the jury verdict because its findings that the employer's actions were "materially adverse" were adequately supported in the record.[203]

196. 548 U.S. 53 (2006).

197. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-3(a) (2012); *see also Burlington N.*, 548 U.S. at 61–62 (discussing the statute); White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795 (same), *aff'd*, 548 U.S. 53 (2006).

198. *Burlington N.*, 364 F.3d at 799–800.

199. *Id.* at 800–04.

200. *Burlington N.*, 548 U.S. at 61.

201. *Id.* at 61–62.

202. *Id.* at 62–63 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

203. *Id.* at 70–73.

We view this as an instance of inconsistent usage that is direct. The two judicial levels focus on the same two textual provisions but draw opposite conclusions by relying on dueling canons. The whole act rule and in pari materia emphasize harmonization of two not quite identical phrasings, whereas expressio unius and meaningful variation focus on the differences and why Congress added them. Although the Supreme Court decision results in an affirmance, the Court's canons-based reasoning departs from the appeals court approach in a manner that appears to be strategic.[204]

Our final language canons case, also from the Roberts period, is *Gómez-Pérez v. Potter*.[205] The issue was whether the provision of the ADEA extending protection to federal employees creates a cause of action for retaliation.[206] The First Circuit held that it did not, relying on the Supreme Court's reasoning in the *Burlington Northern* decision along with the canon of meaningful variation.[207] Invoking *Burlington Northern*, the appeals court noted that there is a clear substantive difference between causes of action for discrimination and retaliation.[208] The court emphasized that the ADEA provision governing private employers includes an explicit cause of action for retaliation while no equivalent provision exists for federal employees; it concluded that Congress knew how to protect against retaliation but had acted intentionally to omit that protection here.[209] The appeals court went on to reject an in pari materia argument based on asserted parallels to Title VII. Although conceding that the ADEA protections for federal employees were patterned after those for federal employees added earlier to Title VII, the court pointed out significant differences between the two sets of federal employee protections that made it inappropriate to borrow here from the Title VII approach.[210]

The Supreme Court reversed, holding that federal employees have a cause of action for age-based retaliation despite the statute's silence in this regard.[211] The Court relied in part on prior decisions construing other antidiscrimination laws,[212] but it noted that the employer's principal argument was the one relied upon by the First Circuit.[213] The Court declined to invoke the meaningful variation canon because the two relevant provisions (ADEA provisions covering private and federal employees) were not enacted

204. A concurring opinion from Justice Alito followed the Sixth Circuit position that section 704(a) should reach only those discriminatory practices covered by 703(a). *Id.* at 73–80 (Alito, J., concurring).

205. 476 F.3d 54 (1st Cir. 2007), *rev'd*, 553 U.S. 474 (2008).

206. *Id.* at 55–56.

207. *Id.* at 57–60.

208. *Id.* at 57–58.

209. *Id.* at 59.

210. *Id.* at 59–60 (noting that in Title VII, Congress intended for the federal employee provision to incorporate provisions applicable to the private sector—including the private sector antiretaliation provision). By contrast, the ADEA federal employee provision emphasized that it was self-contained and unaffected by other sections such as those governing actions against private employers. *Id.*

211. Gómez-Pérez v. Potter, 553 U.S. 474, 491 (2008).

212. *Id.* at 479–82.

213. *Id.* at 486.

simultaneously and contained different language regarding prohibited practices.[214] Instead, the Court invoked the Title VII language prohibiting federal-sector discrimination, and in particular the broad prohibition in both statutes of "discrimination" rather than a list of specific prohibited practices as existed for employees in the private sector.[215] This broad ban—evident in both statutes' coverage of federal employees—led the Supreme Court to rely on the parallels to protections for Title VII federal employees, rather than the protections for ADEA private employees.[216] In his dissent, Chief Justice Roberts invoked the Court's reasoning in *Burlington Northern*.[217] He acknowledged the majority's argument that meaningful variation has less force when the two provisions are not enacted simultaneously but noted that when the federal ADEA provision was added seven years later in 1974, Congress was amending the private sector ADEA text at the same time, hence was very likely "attuned to its own work reflected in the differences between" the private sector and federal sector provisions.[218]

Once again, this is an example of direct inconsistent usage. Indeed, the appeals court invoked the meaningful variation approach that had been endorsed by the Supreme Court in its recent *Burlington Northern* decision, a case also addressing the relationship between antidiscrimination and antiretaliation provisions. But whereas the Supreme Court in the earlier case had invoked meaningful variation, it opted to reject that canon here, relying instead on a version of in pari materia. The Court relied on other resources as well, and its turnaround doubtless reflects at least in part that language canons are presumptions, not rules. For our purposes, however, we view the Supreme Court's rejection of the meaningful variation canon—relied upon by the appeals court here and by the Supreme Court itself in a recent similar case—as an example of strategic inconsistent usage.

As was true with respect to dictionary co-reliance, our canons cases illustrate the complex judicial choices that underlie seeming agreement on the probative value of a given interpretive resource. In *Delta Mining*, the exact same canon (rule against surplusage) was relied on to justify opposite results at the two judicial levels. And in *Burlington Northern* and *Gómez-Pérez*, duels between canons that are inherently in tension (in pari materia and meaningful variation) resulted in divergent outcomes, even when the appeals court in the second case attempted to follow what it viewed as the Supreme Court's prior canonical preference in similar circumstances.

Stepping back, language canons are understood to be presumptions that must at times be reconciled with one another. They arguably are not subject to as much judicial discretion as the choice of which word(s) to define and which dictionaries to use. Still, given the absence of an agreed-upon hierarchy among these canons, there is a wide range of choices courts can

214. *Id.* at 486–87.
215. *Id.* at 487–88.
216. *Id.* at 487–89.
217. *Id.* at 495 (Roberts, C.J., dissenting).
218. *Id.* at 496–97.

make, some of which are in tension with one another. Once again, this level of case-specific discretion tends to discourage uniformity in application of an interpretive resource that both court levels agree is worthy of reliance.

C. Legislative History Co-reliance

Legislative history reliance involves the highest number of co-reliance cases—sixty-two across the three periods. Cases with co-reliance constituted over half the total number of cases for the entire period in which the Supreme Court relied on legislative history and over half for the appeals courts as well—and above half for each court level for each of the three periods except for the Roberts era in the appeals courts.[219] In contrast to dictionaries and language canons, where the majority of cases with co-reliance arise in the Roberts era, cases with co-reliance in legislative history occur primarily in the Burger years followed by the Rehnquist period; only one-fifth take place during the Roberts years.

We summarize four cases here: two from the Burger era and one each from the Rehnquist and Roberts periods. As was true for dictionaries and language canons, we focus only on the use of legislative history in these cases, although both courts also relied on various other resources in each of the four cases.

In *Espinoza v. Farah Manufacturing Co.*,[220] the issue was whether Title VII's prohibition against discrimination based on "national origin" made it unlawful to discriminate on the basis of citizenship or alienage. The Fifth Circuit, after finding the ordinary meaning of "national origin" did not obviously encompass "citizenship," consulted the legislative history for reassurance. The court quoted from the floor statement made by the chairman of the House subcommittee reporting the bill, confirming that "national origin" meant "the country from which you or your forebears came from,"[221] and held for the employer. The Supreme Court affirmed, also invoking the legislative history, "though quite meager,"[222] as fully supporting the ordinary meaning of "national origin." The majority quoted from the same House floor statement that had been relied on by the appeals court, and reinforced its reliance with a reference to House committee report commentary equating the terms "'national origin' and 'ancestry.'"[223]

We view this as an example of consistent co-reliance. Although the two courts recognized that there was little directly relevant legislative history, they invoked the same key House floor statement to reinforce that the

219. For our entire dataset, instances of legislative history co-reliance are 54 percent of all instances of Supreme Court reliance and 55 percent of all instances of appeals court reliance. For the Burger era, the reliance proportions are 54 percent (Supreme Court) and 63 percent (appeals courts). For the Rehnquist era, the proportions are 56 percent (Supreme Court) and 57 percent (appeals courts). For the Roberts era, the proportions are 52 percent (Supreme Court) and 41 percent (appeals courts).

220. 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973).

221. *Id.* at 1333 (quoting the remarks of Representative Roosevelt).

222. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

223. *Id.* at 89.

ordinary meaning of "national origin" was exactly, and only, what Congress intended. That both courts invoked this floor statement to confirm the persuasive import of ordinary meaning further evidences the consistency of their approaches. The probative value of legislative history is often as a confirmatory resource; given that courts typically invoke an amalgam of interpretive justifications, the role of confirmatory reasoning is both available and regularly used.[224]

In our second Burger Court example, *Linden Lumber Division v. NLRB*,[225] the legislative history is more complex. The issue under the NLRA was whether an employer may refuse to bargain with a union that has obtained authorization cards from a majority of bargaining unit members. The appeals court relied in part on the textual provision (section 9(a)) that the employees' exclusive bargaining representative shall be the union "designated or selected" by a majority of the employees in an appropriate unit;[226] it added that the Supreme Court had previously construed these alternate textual terms to mean an election was not the only "predicate for a union claim to majority status," triggering an employer's duty to bargain.[227] The appeals court then emphasized the legislative history accompanying efforts to amend section 9(a) in 1947. It observed that the House version of the 1947 text would have made an employer's refusal to bargain unlawful only if the union had been certified through an election.[228] The conference report, however, rejected this version, instead "follow[ing] the provisions of existing law," which made it unlawful to refuse to bargain "subject to the provisions of section 9(a)."[229] The appeals court concluded from this sequence of drafting history that Congress clearly contemplated an employer's duty to recognize the union even absent an election.[230] The appeals court reinforced its reliance by observing that Congress in 1947 added a new section 9(c)(1), giving employers the right (and obligation) to file their own representation petition as a safeguard if they doubted the majority status of a union supported by authorization cards.[231]

The Supreme Court reversed.[232] In a 5-4 decision, the majority invoked separate legislative history accompanying section 9(c)(1).[233] It viewed this history (excerpts from the Senate committee report and the Senate sponsor's

224. *See* Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV 901 (2011).

225. 419 U.S. 301 (1974), *rev'g sub nom.* Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973).

226. Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099, 1106 (D.C. Cir. 1973) (quoting 29 U.S.C. § 159(a)), *rev'd sub nom.* Linden Lumber Div. v. NLRB 419 U.S. 301 (1974).

227. *Id.* (relying on NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969)).

228. *Id.* at 1106 & n.27 (citing H.R. 3020, 80th Cong. (1947)).

229. *Id.* at 1106 n.27 (quoting H.R. REP. NO. 510, at 41 (1947) (Conf. Rep.)).

230. *Id.* at 1107.

231. *Id.* at 1106.

232. Linden Lumber Div. v. NLRB, 419 U.S. 301, 310 (1974).

233. *See id.* at 307–08.

floor statement) as aimed not at placing a broad obligation on employers but rather as allowing employers to petition for an election only in limited circumstances—when confronted with competing recognition claims by two or more unions.[234] The dissenting justices relied, as had the court of appeals, on the Act's drafting history summarized in the conference report.[235]

This is an example of inconsistent use that we regard as direct. The fact that the appeals court and Supreme Court discuss wholly separate legislative history sources, involving distinct textual provisions, could lead to calling the inconsistent use indirect rather than direct and seemingly strategic. The circuit court addresses drafting history and failed amendments for section 9(a), drawing strong inferences from the conference report summary of that history. The Supreme Court relies instead on history accompanying the addition of a new separate provision in 1947. However, the Court majority makes no reference at all to the conference report emphasized by the appeals court and the dissenting justices, suggesting a more deliberate and conscious decision to avoid that history. Admittedly, the Supreme Court relies on other resources more than legislative history to support its holding, notably agency deference.[236] What matters for our purposes, however, is that the majority ignores legislative history that the appeals court (and its own colleagues) found highly probative, instead invoking separate history for a textual provision that was ancillary to the dispute as framed by the circuit court.

Our Rehnquist-era example, *Smith v. City of Jackson*,[237] involves whether the ADEA authorizes recovery in disparate impact cases similarly to Title VII. The Fifth Circuit held that disparate impact claims may not arise under the ADEA, pointing in part to an exception in the text that has no Title VII parallel[238] but also relying strongly on ADEA legislative history. The appeals court invoked the findings and aims of the 1965 congressionally mandated report by the secretary of labor that gave rise to the ADEA.[239] It emphasized the report's conclusions that older workers face the problem of *arbitrary* age discrimination based on misconceptions about their abilities (while recognizing that the process of aging affects everyone who lives long enough), as distinct from racial prejudice that reflects social and economic factors. Based on its review of the secretary's report, the court concluded by contrasting the ADEA's "refined purpose" with the broad remedial objectives of Title VII.[240]

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234. *Id.* (citing to S. REP. NO. 105 (1947) and 93 CONG. REC. 3838 (1947) (remarks of Sen. Taft)).

235. *See id.* at 312 (Stewart, J., dissenting) (quoting H.R. REP. NO. 510, at 41 (1947) (Conf. Rep.)).

236. *Id.* at 309–10 (majority opinion).

237. 351 F.3d 183 (5th Cir. 2003), *aff'd*, 544 U.S. 228 (2005).

238. *Id.* at 190–91 (construing the provision allowing employers to act based on "reasonable factors other than age" as signifying a barrier against disparate impact claims).

239. *Id.* at 193–94.

240. *Id.* The circuit court also relied on the House report accompanying the 1990 amendments to the ADEA, contending that Congress's insistence on employers producing age-related statistics for those laid off in certain circumstances was meant "to alert [those] employees to the possibility that they might have suffered disparate *treatment* based on age."

The Supreme Court affirmed the lower court judgment but on different reasoning: it held that the ADEA authorizes disparate impact recovery comparable to Title VII, although petitioners had failed to set forth a valid disparate impact claim in the instant case.[241] In holding that disparate impact claims are permitted under the ADEA, the Supreme Court relied in part on identical parallel provisions in the two texts.[242] But it also invoked "striking parallel[s]" between the Court's articulation of its disparate impact theory under Title VII and the emphasis on obstacles unrelated to job ability or performance set forth in the secretary of labor's report commissioned by Congress.[243]

We view this as a close case but classify it as consistent usage. The two judicial levels examine the same legislative history resource to address the same legal issues. Because they draw different conclusions from this resource, one could infer inconsistency. However, the secretary of labor's report commissioned by Congress is an unusual piece of legislative history—more akin to a parliamentary white paper[244] reflecting an anticipated law's underlying purposes than to traditional postintroduction drafting history, or committee and floor commentary that may shed light on questions of specific legislative intent. The report is also a central part of the legislative record that led to drafting and enactment of the ADEA, often referenced by reviewing courts. While drawing distinct inferences from different discussions in the report, the two courts regarded this legislative record document as crucial, and they each sought an underlying relevant purpose from its contents. The appeals court viewed the report's focus on misconceptions about older workers' abilities as revealing a narrower purpose than what gave rise to disparate impact liability under Title VII. The Supreme Court considered the same report's focus on discrimination

Id. at 193 n.12 (referring to H.R. REP. NO. 664, at 22 (1990)). The Fifth Circuit went on to reinstate the plaintiffs' disparate treatment claims because they had been prematurely dismissed by the district court. *Id.* at 196–98.

241. Smith v. City of Jackson, 544 U.S. 228, 233–43 (2005).

242. The majority invoked identical antidiscrimination language in the two statutes to support its view that both disparate treatment and disparate impact are covered in each instance, although the ADEA's additional "reasonable factors other than age" language narrowed the scope of disparate impact coverage. *Id.* at 233–34, 239.

243. *Id.* at 235 n.5, 238 (identifying the Court's reasoning in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) with the Wirtz report). Justice Stevens, the majority opinion's author, was joined by four justices in the holding that disparate impact applies under the ADEA but its scope is narrower than under Title VII. Justice Scalia, concurring, relied on agency deference to justify recognizing disparate impact rather than the text and history analysis set forth above. *Id.* at 243 (Scalia, J., concurring).

244. As explained on the U.K. Parliament's webpage: "White papers are policy documents produced by the Government that set out their proposals for future legislation. White Papers are often published as Command Papers and may include a draft version of a Bill that is being planned. This provides a basis for further consultation and discussion with interested or affected groups and allows final changes to be made before a Bill is formally presented to Parliament." *White Papers*, UK PARLIAMENT, www.parliament.uk/site-information/glossary/white-paper [https://perma.cc/9ARD-AHTR] (last visited Nov. 12, 2019).

unrelated to animus or job performance as supporting the application of disparate impact liability under the ADEA.

Our final legislative history example comes from the Roberts Court period. In *Advocate Health Care Network v. Stapleton*,[245] the issue was the scope of ERISA's exemption of "church plans" from the comprehensive regulation of employee benefit plans under that statute. The specific question presented was whether the exemption applies to defined benefit plans that are established by church-affiliated hospitals rather than the church itself.

The three circuit courts held that a church plan must be established by a church, or a convention or association of churches, in order to qualify for the exemption. In addition to relying on the textual definition of a church plan, the courts invoked legislative history.[246] They noted that the purpose behind the original 1974 definition—exempting plans created and maintained by churches—was to avoid problems of government entanglement with religion without unduly expanding the scope of exemptions that might jeopardize the health of pension plans.[247] The definition was expanded in ERISA's 1980 amendments, and the circuit courts construed the 1980 legislative history to reflect a clear intent to confer modest new coverage for plans established by a church but *maintained* by a church-affiliated pension board while also consciously eschewing coverage of plans that were *established* by these church-affiliated entities.[248]

The Supreme Court reversed, relying principally on its reading of the 1980 text,[249] regarding the 1980 legislative history as generally supportive of its textual analysis.[250] The Supreme Court's approach to the history began by discounting its value, noting the Court's traditional view that excerpts from committee hearings and scattered floor statements provide little illumination and "even those lowly sources speak at best indirectly to the precise question

245. 137 S. Ct. 1652 (2017), *rev'g sub nom.* Rollins v. Dignity Health, 830 F.3d 900 (9th Cir. 2016) *and* Stapleton v. Advocate Health Care Network, 817 F.3d 517 (7th Cir. 2016) *and* Kaplan v. St. Peter's Healthcare Sys., 810 F.3d 175 (3d Cir. 2015). All three appeals court cases reach the same result, and they invoke almost entirely the same legislative history. In granting certiorari on all three decisions and reversing them all, the Supreme Court refers to them collectively. Accordingly and for convenience, we do so as well, identifying legislative history references by one or more appeals court decisions as necessary at different points.

246. The three circuit courts discussed 29 U.S.C. § 1002(33)(A) (2012). *See* Rollins v. Dignity Health (*Rollins*), 830 F.3d 900, 905–06 (9th Cir. 2016), *rev'd sub nom.* Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017); Stapleton v. Advocate Health Care Network (*Stapleton*), 817 F.3d 517, 522–23 (7th Cir. 2016), *rev'd*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017); Kaplan v. St. Peter's Healthcare Sys. (*Kaplan*), 810 F.3d 175, 180–81 (3d Cir. 2015), *rev'd sub nom.* Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017). "Church plan" refers to plans established by religious institutions such as synagogues and mosques, not simply churches.

247. *Stapleton*, 817 F.3d at 527 (citing S. REP. NO. 383 (1973)).

248. *Rollins*, 830 F.3d at 907–08 (citing 1980 Senate floor statements and 1980 Senate Finance Committee executive session minutes); *Stapleton*, 817 F.3d at 528 (citing a 1978 House floor statement); *Kaplan*, 810 F.3d at 184–85 (citing 1980 Senate floor statements and 1980 Senate Finance Committee executive session minutes).

249. *Advocate Health Care Network*, 137 S. Ct. at 1658–59.

250. *Id.* at 1661–62.

here."[251] The Court's most specific reliance on legislative record evidence was to testimony at a 1979 Senate Finance Committee hearing, cited by the United States in its amicus brief as undermining employees' arguments about the purpose of the provision; this was a hearing not mentioned by any of the appeals court decisions.[252] The Court also invoked a Senate floor statement without mentioning that it had been addressed (and purportedly distinguished) in some detail by two of the appeals courts.[253]

We regard this as inconsistent usage that is direct and strategic. The three appeals courts relied on several pieces of legislative history to support their shared view of what the 1980 definitional change did and did not accomplish. Moreover, the courts were remarkably unified in the record evidence they cited and the implications they drew from it. The Supreme Court looked askance at that history, instead adverting briefly to a single hearing excerpt from a year earlier. The appeals courts viewed the history as relatively meaningful, consistent, and coherent; the Supreme Court decidedly did not, and invoked an isolated document as support for its contrary conclusion.

These legislative history co-reliance examples make clear that the prospects for direct inconsistency that is strategic are comparable to those for dictionaries and canons. The Supreme Court may cite to a different piece of legislative history while ignoring or downplaying the history relied on by the appeals court (as in *Linden Lumber* and *Advocate Health Care Network*). In addition, consistency in co-reliance may vary in its complexion: relatively straightforward in certain instances (as in *Espinoza*) but harder to assess in others (as in *City of Jackson*).

More broadly for our case-specific examples, strategic co-reliance did not align with the ideological outcomes typically associated with these three resources. Direct inconsistency in dictionary reliance supported both pro-employer and pro-employee results (*Navarro* and *Kasten*[254]); similarly, direct inconsistency for language canons favored employees in two related cases (*Burlington Northern* and *Gómez-Pérez*), and legislative history results favored employers when consistent (*Espinoza*) as well as when strategic (*Linden Lumber*). On the other hand, direct inconsistency did align pretty closely with Supreme Court reversals in our twelve illustrative cases.[255]

The classification of these cases in doctrinal terms involves close judgments in several instances. And of course, they are examples, not patterns. But they suggest that once one enters the case-specific details of

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251. *Id.* at 1661. It is worth pointing out that the Senate Finance Committee executive session (part of the committee markup on the bill), relied on by two of the three circuit courts, is not the same as a traditional committee hearing.

252. *Id.* at 1662.

253. *See* 125 CONG. REC. 10,052 (1979) (statement of Sen. Talmadge); *see also Advocate Health Care Network*, 137 S. Ct. at 1662 (briefly discussing the statement); *Rollins*, 830 F.3d at 907–08 (discussing the statement in more detail); *Kaplan*, 810 F.3d at 183–84 (same).

254. *See supra* note 169 and accompanying text (summarizing the *Kasten* Court's pro-employee holding under the antiretaliation protections of ERISA).

255. All six reversals involved direct inconsistency. Of six affirmances, only one (*Burlington Northern*) involved direct inconsistency; of the others, four were consistent co-reliance and one (*Sutton*) was indirect inconsistency.

co-reliance settings, divergence in application of the same interpretive resource is a strikingly frequent result, just as it was as part of our empirical findings.

IV. REVISITING THE DEBATE OVER UNIFORMITY

Our discussion in Part I addressed the normative debate on uniformity in statutory interpretation. Although our extensive empirical findings and illustrative doctrinal analyses are descriptive rather than normative, they have certain normative implications that seem worthy of attention.

Insofar as proponents of a uniform approach extol the virtues of predictability, our findings provide a modicum of support for their position. The Supreme Court's increasing reliance during the Rehnquist and Roberts years on ordinary meaning, language canons, and dictionaries, and its declining interest in legislative history, are trends that the appeals courts followed several years later.[256] These meaningful positive correlations suggest that circuit courts are being influenced to some degree by Supreme Court changes in emphasis and priority when invoking interpretive resources. This may be in part because appeals court judges have become more convinced as to the virtues of predictability. Alternatively, it may reflect a strategic calculation by these judges that their decisions contributing to a circuit split are more likely to be affirmed if they adhere to the Court's changing methodological priorities. Additionally, insofar as there has been some channeling of interpretive discretion, circuit judges and the attorneys who practice before them may perceive more guidance and less uncertainty when briefing, arguing, and deciding cases. Whether the Supreme Court's influence involves any synergies with attorneys who reinforce that influence through the adjustment of their own arguments is a question that deserves separate empirical inquiry.[257]

On the other hand, a number of our findings lend descriptive support to normative arguments opposing a uniform approach. One such argument involves differences in institutional perspective. We found that appeals courts overall rely more often on ordinary meaning and agency deference, and less often on legislative purpose, than does the Supreme Court. We suggest that these differences relate to case-management priorities faced by the lower courts, in that appeals court judges prefer simpler interpretive frameworks as more compatible with their heavier workloads.[258] In particularized terms, we found that the circuit courts rely somewhat more often on language canons in ERISA cases. We propose that the unusually complex wording of this statute may well trigger the lower courts' need to invoke these canons as an aid to deciphering ordinary meaning.[259] We also

256. *See supra* Tables 4 and 5 and accompanying text.

257. For preliminary related inquiries into the influence of attorneys and their briefs on Supreme Court reasoning, see, for example, *Liberal Justices*, *supra* note 2, at 164–65 and *Oasis or Mirage*, *supra* note 2, at 532–33.

258. *See supra* Table 1 and accompanying text.

259. *See supra* Table 2 and accompanying text.

identified a notable pro-employee tilt in the appeals courts associated with reliance on agency deference. We view this tilt as a likely corollary to circuit courts' greater overall reliance on agency deference to help manage their workloads,[260] given that the agencies charged with applying these worker-protection statutes tend to be pro-worker when implementing their congressional mission.[261]

Additional findings support a second argument against uniformity, based on circuit court reaction to certain justices' campaigns for a more textualist orthodoxy. Despite the Supreme Court's diminished appetite for legislative history starting in the Scalia years, appeals courts continue to rely on legislative record evidence accompanying these pro-worker statutes, leading to a distinctive pro-worker tilt that is missing in Supreme Court reliance on the resource.[262] In addition, we identify a substantial decline in co-reliance for ordinary meaning in the Rehnquist and Roberts eras, along with a large decline in co-reliance for dictionaries in the Roberts era and for agency deference in the Rehnquist era.[263] Our inference—that circuit courts may well be reacting silently but negatively to the doctrinaire pronouncements of certain Supreme Court justices—lends support to the value of a pluralist interpretive approach grounded in the well-rooted views and practices of appeals court judges related to the selection of interpretive resources.

A third normative observation is that our findings on matches and nonmatches, and our individual case analyses of consistencies and inconsistencies, underscore both the inevitability and the value of deliberative disputation.[264] The fact that reliance on language canons exhibits relatively more disagreement than legislative history reliance (in the form of a higher level of nonmatches and a higher reversal rate) may reflect the more open-ended and less hierarchical aspects of the canons universe. But more broadly, our findings that the Supreme Court and appeals courts in individual cases rely on different categories of resources, and different specific resources within the same category, contribute to the prospects for achieving well-reasoned and sound results. The justices may decide to emphasize different bases for interpretation than the appeals courts did, but in doing so they must confront what the lower courts concluded were the

260. *See supra* Table 1 and accompanying text.

261. *See supra* Table 3 and accompanying text.

262. *See supra* Table 3 and accompanying text.

263. *See supra* Table 8 and accompanying text. The steep decline in agency deference co-reliance deserves more attention than we can give it here. Insofar as our findings suggest that *Chevron*, as later refined (or muddled) by *United States v. Mead Corp.*, 533 U.S. 218 (2001), failed to generate a consistent approach to agency deference cases, they are broadly consistent with findings about the Supreme Court's own approach to agency deference during the Rehnquist era. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008). Additionally (or alternatively), the appeals courts' consistently higher reliance on agency deference across all three eras, as shown in Table 4, may mask some degree of politicization of that resource by a Rehnquist Court that was quite likely to find "stage one" review appropriate in *Chevron* settings.

264. *See supra* notes 142–49 and accompanying text; *see also supra* Part III.

most relevant resources, even if these do not match the justices' own preferences. And insofar as the justices ignore or inadequately respond to this divergence, they are likely to be criticized—in a Court dissent, in the scholarly community, and perhaps in Congress.

Finally, we recognize that apart from the endogenous rule-of-law foundations for our empirical and doctrinal analyses, interpretive convergence and divergence may be attributable in part to extrinsic factors that also influence the judiciary. We have referred at various points to the impact of statutory interpretation pedagogy and scholarship, the litigation strategies adopted by government attorneys, the presidential appointment power, and the frequency of congressional overrides and media criticism of activist courts.[265] We do not try to assess the influence of these factors here, and we are not confident as to how that might be accomplished. Still, we recognize that they may contribute in various ways, militating either in favor of or against a more uniform interpretive approach.

CONCLUSION

The judicial choice of whether to rely on a particular category of resource and the choice of a particular version of that resource are fundamentally similar. Judges draw on the resources they deem useful—either to help them in finding the "right answer" as a principled matter or to help them justify for strategic reasons an answer they have already reached. Our descriptive analysis of reliance patterns in the Supreme Court and the courts of appeals does not allow us to infer either a predominantly principled or a primarily strategic motivation in choices about which resources to rely on. What *is* clear from our findings is that even when both courts rely on the same resource category, Supreme Court decisions often involve a specific version of that resource—and a manner of applying or analyzing it—that diverges from the version and manner relied on by the circuit courts.

The debate about whether federal courts of appeals should conform their choices of interpretive resources to those of the Supreme Court is lively and likely to continue. This Article sheds important light on that debate through our understanding of the actual practices of the two levels of courts. By focusing on a set of identical cases on which both levels reach decisions, we have been able to compare their practices in a particularly direct way.

In our inquiry, we found considerable similarity between the Supreme Court and the courts of appeals in their overall reliance on certain particular resources. That similarity is not surprising in light of shared expectations about the appropriateness of these resources in general. Further, we found some evidence that the Supreme Court's collective preferences about the use of certain resources have influenced practices in the courts of appeals.

But it is the divergence between the two levels of courts that stands out. Across the set of labor and employment cases that we analyzed, there were some substantial differences in the frequency with which the Supreme Court

265. *See supra* notes 24, 101, 120, 122 and accompanying text.

and the courts of appeals relied on various resources. Even more striking was divergence in specific cases. When one court relied on a resource such as legislative history or language canons, quite often the other court did not. Further, even when both courts relied on such a resource, the specific versions they used frequently differed. And in the illustrative cases we reviewed in-depth, inconsistent usage of the same resource was especially prevalent when the Supreme Court reversed a circuit court decision.

Although we identified various possible reasons for case-specific divergences regarding our six interpretive resources, we cannot reach definitive judgments about the relative weight of those reasons. Still, it seems clear that a substantial degree of divergence is inevitable even in this special universe of identical cases. Whatever its desirability may be as a normative matter, uniformity between the Supreme Court and the courts of appeals in reliance on interpretive resources is a chimera.