

THE PARADOXICAL IMPACT OF SCALIA'S CAMPAIGN AGAINST LEGISLATIVE HISTORY

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Beginning in 1985, Judge and then Justice Antonin Scalia advocated forcefully against the use of legislative history in statutory interpretation. Justice Scalia's position, in line with his textualism, was that legislative history was irrelevant and judges should avoid invoking it. Reactions to his attacks among Justices and prominent circuit judges had an ideological quality, with greater support from ideological conservatives. In this Article, we consider the role that political party and timing of judicial nomination played in circuit judges' use of legislative history. Specifically, we hypothesize that Republican circuit judges were more likely to respond to the attacks on legislative history than their Democratic counterparts, and that judges who joined the bench during or after these attacks were more likely to be influenced than their counterparts who were appointed before the attacks. Utilizing a dataset containing all published federal appellate court majority opinions between 1965 and 2011 (more than 240,000 opinions), we find that, for both hypotheses, the judges whom we would expect to be more influenced by the attacks on legislative history were in fact less likely than their counterparts to cite statements from floor debates or committee hearings, traditionally regarded as among the least reliable forms of legislative history. But they were more likely than their counterparts to cite committee reports, traditionally regarded as the most

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reliable form of legislative history. The attacks on legislative history thus seem to have had the effect of pushing judges who might be expected to be influenced to (re)examine their treatment of legislative history but not (as Scalia had advocated) to avoid citing it. Instead, they adopted what had been the consensus approach for most of the twentieth century. Scalia influenced, but he did not persuade.

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INTRODUCTION

I think [Justice Scalia] is going to go down as one of the most important, most historic figures in the Court, and . . . I think the primary reason for that is that Justice Scalia has taught everybody how to do statutory interpretation differently, and I really do mean pretty much taught everybody. You know there's that classic phrase that we're all realists now. Well I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.

Justice Elena Kagan¹

¹ *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, HARV. L. TODAY at 7:58 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/8AXR-5Z62>]; see also *Justice Elena Kagan on Supreme Court and Constitutional Law: McCormick Lecture at the University of Arizona Rogers College of Law*, C-SPAN at 20:11 (Aug. 31, 2016), <https://www.c-span.org/video/?414445-1/justice-elena-kagan-supreme-court-constitutional-law> [<https://perma.cc/F5BM-YQKZ>] (“I think [Scalia’s] truly long-lasting legacy is in the area of statutory interpretation, where he changed the way *everybody* does statutory interpretation. It’s not just that he had his own distinctive method of interpretation. He really just moved the whole field.”); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) (“[E]veryone must acknowledge the valuable and very significant achievement of Justice Scalia in recalling the attention of the legal community to the importance

The role of legislative history is a central issue in statutory interpretation. Its use is the central methodological divide between textualists and purposivists or intentionalists.² Until the 1970s, there was a fairly broad consensus in the U.S. Supreme Court (and among scholars) that it is appropriate for courts to utilize legislative history in interpreting statutes, and that there is a hierarchy of legislative history in terms of reliability, reflecting the degree to which that legislative history is likely to shed light on Congress's purpose in enacting the stat-

of text in statutory interpretation. In a significant sense, we are all textualists now. The days when lawyers could 'routinely . . . make no distinction between words in the text of a statute and words in its legislative history' are surely over. Justice Scalia has very substantially affected the way scholars and judges think about statutory interpretation.") (quoting ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 31 (Amy Gutmann ed., 1997)); Marjorie O. Rendell, 2003—A Year of Discovery: *Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) (beginning her article, written in her capacity as a circuit judge, by flatly stating that "[w]e are all textualists now."); Diarmuid O'Scannlain, "We Are All Textualists Now": *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304 (2017) (circuit judge stating that we are all textualists now because of Scalia).

Interestingly, Kagan attended law school from 1983 to 1986, so Scalia's attacks on legislative history began while she was in her last year of law school. See *infra* notes 19–25 and accompanying text (describing the rise of those attacks).

² See, e.g., Edward L. Rubin, *Statutory Interpretations and the Therapy of the Obvious*, 68 VAND. L. REV. 159, 159–60 (2015) (noting "Justice Antonin Scalia's campaign to displace intentionalist or purposivist approaches to interpretation with what has come to be called 'textualism,' and his related effort to rule out reliance on legislative history."); Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 324 (2014) (noting this distinction).

As the names suggest, textualism looks only to statutory text, purposivism focuses on statutory purpose, and intentionalism focuses on legislative intent. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990) ("The three main theories today emphasize (1) the actual or presumed intent of the legislature enacting the statute ('intentionalism'); (2) the actual or presumed purpose of the statute ('purposivism' or 'modified intentionalism'); and (3) the literal commands of the statutory text ('textualism')."). The key for our purposes is that purposivists and intentionalists readily look to legislative history. See Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1938 n.113 (2005) ("Both an intentionalist and a purposivist will consult legislative history in making a determination."). Textualists, and in particular Justice Scalia's brand of textualism, avoids invocation of legislative history. See Rubin, *supra* note 2; *infra* notes 20–30 and accompanying text; *infra* note 57.

Purposivism and intentionalism are sometimes lumped together, with intentionalism sometimes treated as a form of purposivism and purposivism sometimes treated as a form of intentionalism. Nothing turns on this categorization for our purposes, since both entail looking to legislative history. As a convenient shorthand, we will refer to purposivism to encompass purposivism and intentionalism.

ute.³ That consensus about legislative history hierarchy eroded in the 1970s, as courts increasingly cited statements from floor debates and committee hearings, which had been considered among the least reliable forms of legislative history.⁴

Starting in the mid-1980s, several prominent Republican federal appellate judges expressed doubts about courts' relying on any legislative history. Most prominent among these was D.C. Circuit Judge and then Justice Antonin Scalia.⁵ His prominence probably reflected his higher visibility (he was elevated to the Supreme Court in 1986), the relentlessness of his attacks, and his clever use of language (and thus quotability). The assault on the use of legislative history thus became associated first and foremost with Scalia, although he was by no means the only person expressing opposition to its use.⁶

The attacks on legislative history were the key methodological element of Scalia's and others' attacks on purposivism in statutory interpretation. That is, their push against legislative history was part of their push against purposivism and in favor of textualism: courts should focus on the text that Congress actually enacted and should not try to determine Congress's underlying purpose. Tools like legislative history were not part of the text and thus should not be consulted.⁷

Textualism versus purposivism, and in particular the debate over the legitimacy of the use of legislative history, has been the biggest debate in statutory construction since the mid-1980s. Indeed, it is fair to say that it has been *the* statutory construction debate in the years since Scalia started his

³ See *infra* notes 11–14 and accompanying text.

⁴ The category of statements from floor debates encompasses all such statements, including revised and extended remarks (which are not actually spoken on the floor but instead are inserted into the record). Revised and extended remarks are not commonly cited, but we included them for completeness.

More generally, one can think of the category of “statements from floor debates and committee hearings” as all congressional debate. And we refer to citations to “floor debates or committee hearings” to highlight that an opinion need cite only a floor debate or a committee hearing to be included in this category.

⁵ See 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, 269 (2013) (“In the 1980s, legislative history was uncontroversial and very common. . . . Beginning in the late 1980s, however, a movement of judges and lawyers—led by Antonin Scalia—began to argue that this familiar interpretive resource was pernicious and should be banished from the judicial system.”).

⁶ As we discuss below, see *infra* note 31 and accompanying text, in this article we will often refer to Scalia as a convenient shorthand for Scalia and others.

⁷ See *infra* notes 36–39 and accompanying text.

attacks.⁸ Scalia not only raised the issue, but his attacks, and the responses to them, dominated all other statutory construction issues. It is not even clear what would be in second place.

The battles over legislative history and over textualism versus purposivism overlapped with ideology. The leaders of the movement against legislative history and purposivism (and in favor of textualism) were ideological conservatives.⁹ The leading judicial defenders of legislative history and purposivism (and against textualism) were ideological liberals.¹⁰

In this Article, we consider circuit judges' reactions to the advocacy of textualism and the concomitant attacks on legislative history by testing two hypotheses: whether Republican circuit judges were more responsive to the attacks on legislative history than were their Democratic counterparts, and whether judges who started serving during the Reagan Administration or thereafter were more responsive to the attacks than were their earlier-appointed counterparts (who would have been deciding statutory interpretation cases well before Scalia started attacking the use of legislative history). To determine responsiveness we compare citations to legislative history, because the more a judge cites legislative history, the less that judge is following Scalia's lead. We find that, for both hypotheses, the judges whom we would expect to be more hostile to legislative history were in fact less likely than their counterparts to cite floor statements or committee hearings, which had been regarded as among the least reliable forms of legislative history. But they were actually more likely than their counterparts to cite committee reports, which had been regarded as the most reliable form of legislative history. Thus the judges whom we expect to be more likely to be influenced by attacks on legislative history were in fact more influenced by them. But the nature of that influence was, from Scalia's standpoint, paradoxical: the attacks on legislative history seem to have had the effect of pushing Republican and post-Reagan judges to (re)examine their approach to legislative history but not to avoid its use and thus not to accept Scalia's approach. Instead, they ended up adopting what had been the consensus

⁸ Many thousands of pages of judicial opinions, law review articles, and books have been devoted to this debate. For a sample, see sources *supra* notes 1–2, *infra* notes 26–29, 33–34, and 52–72.

⁹ See *infra* notes 21–23, 41–42 and accompanying text.

¹⁰ See *infra* notes 33–35, 49–52 and accompanying text; see also Comm'r of Internal Revenue v. Clark, 489 U.S. 726, 739–43 (1989) (majority opinion by Justice Stevens with an extensive discussion of legislative history in light of statutory ambiguity; Scalia joined all but the discussion of legislative history).

approach until the 1970s, and that defenders of legislative history in the mid-1980s and thereafter had advocated as an alternative to Scalia's categorical opposition.

Part I of this Article discusses the approaches to legislative history that preceded the attacks on its use and the development of those attacks. Part II considers the ideological valence of the attacks on legislative history and concomitant support for textualism. This Part lays out our hypotheses regarding differences based on the political party of the appointing President and a judge's appointment before Ronald Reagan became President. Part III lays out the data and measures we use to test our hypotheses. Part IV presents and discusses our results.

We find that Scalia's influence was more nuanced and less complete than he wanted, and also less than our hypotheses predicted: after Scalia's attacks, Republican circuit judges became less likely to cite statements from floor debates or committee hearings than their Democratic counterparts, and judges appointed by Reagan or later Presidents (regardless of party) became less likely to cite such statements than their earlier-appointed counterparts. But the Republican and later-appointed judges became more likely than their counterparts to cite committee reports. Part V discusses the implications of our results.

I

THE JUDICIAL USE OF LEGISLATIVE HISTORY, AND ATTACKS ON IT

For most of the twentieth century, there was a fairly broad consensus in the U.S. Supreme Court (and among scholars) that it is appropriate for courts to utilize legislative history in interpreting statutes, and that there is a hierarchy of legislative history in terms of reliability, reflecting the degree to which that legislative history is likely to shed light on congressional intent. The Supreme Court in 1921 flatly stated that

By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative

intent in a case where otherwise the meaning of a statute is obscure.¹¹

The Court had similar pronouncements from the late nineteenth century to the mid-1980s, relying on committee reports and presenting them as the most reliable form of legislative history, and abjuring reliance on floor statements on the grounds that they are among the least reliable.¹² Legal com-

¹¹ Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921) (citations omitted).

¹² See *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represent[] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.’ We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.”) (citations omitted); *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (“A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report.”); *United States v. O’Brien*, 391 U.S. 367, 385 (1968) (declining to put any weight on floor statements, and stating that “if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees”); *Lapina v. Williams*, 232 U.S. 78, 90 (1914) (“Counsel for petitioner cites the debates in Congress as indicating that the act was not understood to refer to any others than immigrants. But the unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out, and we are not disposed to go beyond the reports of the committees.”) (citations omitted); *Binns v. United States*, 194 U.S. 486, 495 (1904) (stating that courts should not consult congressional debates but could consider legislative reports to “determin[e] the scope of statutes passed on the strength of such reports”); see also *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (plurality opinion) (“We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 310–11 (1979) (relying on a committee report and stating that “[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history”); *Gay v. Ruff*, 292 U.S. 25, 38 (1934) (“The report of the Judiciary Committee of the House which recommended the adoption of the 1916 amendment establishes that such was the sole purpose of Congress.”); *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 318 (1897) (noting “a general acquiescence in the doctrine that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body”).

These legislative history sources are longstanding. The Congressional Globe began publishing verbatim transcripts of floor debates in 1850. See Parrillo, *supra* note 5, at 272. The Globe was succeeded by the Congressional Record in 1873, and by the 46th Congress (1879–81) it ran to 10,000 pages. *Id.* As for committee reports, the House made them mandatory in 1880, and the Senate issued them on most bills by 1900. *Id.* Finally, congressional committees began publishing their hearings in the nineteenth century, and by 1910, 500–650 hearing transcripts were published per year. See *id.* As Parrillo also notes, through the middle of the twentieth century those materials were often difficult to gather for those who did not have access to an excellent library, which gave a huge

mentators in this period recognized this hierarchy as well.¹³ As commentators noted, Senators and Representatives often looked to conference and committee reports to understand the bill they were voting on.¹⁴

Starting around 1970, citations to legislative history increased dramatically in the Supreme Court and in circuit courts (and particularly in the D.C. Circuit, which hears a disproportionate share of challenges to actions by administrative

advantage to government agencies in marshaling legislative history materials during the New Deal and World War II. *See id.* at 321–38.

¹³ *See* REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 155 (1975) (“Materials in hearings and floor debates are so heterogeneous and fragmentary and so influenced by the tactics of promoting enactment that they have almost no credibility for the purposes of later interpretation.”); *id.* at 158 (“Much more reliable are the explanations, in committee or conference reports, of the purposes behind proposed legislation. These are some of the very rare kinds of legislative history that can make a respectable showing on the scale of reliability.”); William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621, 636 (1990) (presenting a hierarchy of legislative history sources from most to least authoritative, with committee reports as the most authoritative and floor and hearing colloquy considerably less authoritative); George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 39 *DUKE L.J.* 39, 40–41 (1990) (discussing “the hierarchy courts have established among the principal sources of legislative history (committee reports have been considered the most reliable, floor debates and hearings less so.”); William N. Eskridge, Jr. & Philip P. Frickey, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 709, 717 (1st ed. 1988) (“Most scholars and judges agree that committee reports should be considered as authoritative legislative history and should be given great weight Unlike statements from committee reports, statements made during committee hearings and floor debates have traditionally been given very little weight by courts and commentators.”); JAMES WILLARD HURST, *DEALING WITH STATUTES* 42, 43 (1982) (contrasting the Congressional Record with committee reports, and noting of the latter: “Most influential are the reports of the legislative committees that considered the bill that became the statute. It is an appropriate emphasis, because the committee is normally the workplace in which members have hammered out the particular content of the measure.”); Elizabeth A. McNellie, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 *COLUM. L. REV.* 157, 162–63 (1989) (“Committee hearings are probably the lowest form of extrinsic aid in the hierarchy of the traditional model. Generally, hearings are relegated to this role because of the extreme likelihood that no one other than the committee itself will hear the testimony and because it is assumed that any relevant statements will be reflected in the committee report.”). More recent sources agree. *See, e.g.*, ROBERT A. KATZMANN, *JUDGING STATUTES* 38 (2014) (contrasting committee reports and conference committee reports, which are “authoritative materials,” with other forms of legislative history like floor statements).

¹⁴ *See, e.g.*, Forrest Maltzman & Charles R. Shipan, *Change, Continuity, and the Evolution of the Law*, 52 *AM. J. POL. SCI.* 252, 260 (2008) (noting that the legislative meaning of laws to interest groups and legislators is often based on the agreements reached in conference reports); Alexander Bolton & Sharece Thrower, *Legislative Capacity and Executive Unilateralism*, 60 *AM. J. POL. SCI.* 649, 652–54 (2016) (noting the limited time and resources for members of Congress and their staff and their reliance on committee reports).

agencies).¹⁵ And the composition of legislative history citations changed: courts became much more likely to cite statements from floor debates or committee hearings. As we noted above, such statements had been regarded as among the least reliable forms of legislative history. Particularly relevant for our purposes, our data in this Article demonstrate (see Figure 1) that federal appellate court citations to these statements increased very dramatically in the 1970s through the early 1980s. Thus, in this period, the consensus hierarchy that had existed for most of the twentieth century lost some of its force. And, more generally, reliance on legislative history exploded.

A 1982 article containing the first statistical analysis of the Supreme Court's use of legislative history canvassed the literature on legislative history and concluded that there was "almost absolute acceptance" of legislative history, stating flatly that "[w]e can safely assume now, that the doubts and vacillations of the past in the adequate use of [legislative history] have vanished."¹⁶ This position accurately reflected both scholarly commentary and judicial practice. Indeed, some courts emphasized the importance of legislative history in interpreting a statute. Notable in this regard is a major Supreme Court case

¹⁵ See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1716 fig.5 (2010) (showing an increase in Supreme Court citations to legislative history starting in 1970 and a decline starting in the mid-1980s); Glenn Bridgman, *One of These Things Is Not Like the Others: Legislative History in the U.S. Courts of Appeal*, YALE STUDENT PRIZE PAPERS 1, 9, 25–27, 34 (2012) (presenting evidence of a dramatic increase of Supreme Court and federal appellate citations to legislative history starting around 1970 and a decrease starting in the mid-1980s and noting that "a greater percentage of the cases on the D.C. Circuit's docket involve statutory interpretation, and the D.C. Circuit has correspondingly more opportunities to cite legislative history."); Parrillo, *supra* note 5, at 389–90 (discussing the increase in Supreme Court and federal appellate court citations to legislative history from the early 1970s through the early 1980s and the drop thereafter, and noting that the willingness to review statutes and agency actions may have become more pronounced in the D.C. Circuit in the early 1970s as compared to other judicial circuit, as "a rising disenchantment with bureaucracy led the judiciary and especially the D.C. Circuit to become far more independent, willful, and aggressive in reviewing the actions of agencies than in the preceding generation").

¹⁶ Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS 294, 296–97 (1982); see also HURST, *supra* note 13, at 42 ("The twentieth-century approach is to be prepared and willing to give weight to particular legislative history."); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197–98 (1983) ("Not once last Term was the Supreme Court sufficiently confident of the clarity of statutory language not to double check its meaning with the legislative history. The language of 'plain meaning' lingers on in Court opinions, but its spirit is gone. In its application of the plain meaning rule, the Court now shifts onto legislative history the burden of proving that the words do not mean what they appear to say.").

from 1971, *Citizens to Preserve Overton Park, Inc. v. Volpe*, in which the majority, in interpreting a statute, stated: "The legislative history of [the statutes] is ambiguous. . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent."¹⁷ Among the many judges who invoked legislative history in the early 1980s was then-Judge Scalia.¹⁸

As it turned out, the 1982 article was published shortly before Scalia and other judges started arguing that the courts were using legislative history too profligately.¹⁹ As we noted

¹⁷ 401 U.S. 402, 412 n.29 (1971). In one of his attacks on the use of legislative history, Scalia highlighted similar language from a more recent brief:

I respectfully decline to join [the majority's legislative history] discussion, however, because it is natural for the bar to believe that the juridical importance of such material matches its prominence in our opinions—thus producing a legal culture in which, when counsel arguing before us assert that "Congress has said" something, they now frequently mean, by "Congress," a committee report; and in which it was not beyond the pale for a recent brief to say the following: "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language."

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529–30 (1989) (Scalia, J., concurring) (quoting Brief for Petitioner at 24, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (No. 87–2084)).

¹⁸ See, e.g., *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524 (D.C. Cir. 1984) ("The legislative history makes clear that for the exception of § 1605(a)(5) to apply 'the tortious act or omission must occur within the jurisdiction of the United States.'") (quoting a House report); *Toney v. Block*, 705 F.2d 1364, 1370 (D.C. Cir. 1983) (Tamm, J., concurring) ("The legislative history of Title VII clearly shows that Congress' intent in providing for awards of back pay to successful plaintiffs was to provide a 'make whole' remedy.") (quoting the Congressional Record), *abrogated by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Int'l Union, United Automobile, Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 864 (D.C. Cir. 1984) ("While we would not normally interpret the reference to include the section prior to its amendment, the language is at least susceptible of that interpretation. And the legislative history indicates this is precisely what was meant."); *Ctr. for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 4 (D.C. Cir. 1984) (stating that "[f]ar from contradicting [the text's] ordinary meaning, both the surrounding text of the statute and its legislative history tend to confirm it," and then discussing legislative history); *Simmons v. ICC*, 716 F.2d 40, 44 (D.C. Cir. 1983) ("In our view, the legislative history of the Act of January 2, 1975, suggests, like its text, that in all respects not explicitly stated the ICC is to be treated like other agencies subject to the Hobbs Act."); *Aluminum Co. of Am. v. ICC*, 761 F.2d 746, 749 (D.C. Cir. 1985) ("The legislative history of the APA makes it entirely clear (if reason alone does not suffice) that such a strange result was not intended."); *Am. Trucking Ass'ns, Inc. v. ICC*, 697 F.2d 1146, 1148–52 (D.C. Cir. 1983) (quoting and discussing legislative history at length); *Romero v. Nat'l Rifle Ass'n of Am., Inc.*, 749 F.2d 77, 82–83 (D.C. Cir. 1984) (quoting and discussing legislative history).

¹⁹ Even more striking was the timing of Judge Richard Posner's book *THE FEDERAL COURTS* (1985). In it, Posner noted that there had been a debate over whether judges should ever cite legislative history but characterized it as "now

above, Scalia's (and others') critiques of legislative history were part and parcel of their advocacy of textualism. As we also noted, the debate between textualism and purposivism, and thus the debate over the use of legislative history, had an ideological valence: the leading advocates of applying textualism and ignoring legislative history were ideologically conservative.

The first prominent judicial opinion articulating misgivings about the use of legislative history was then-Judge Scalia's concurring opinion in *Hirshey v. Federal Energy Regulatory Commission*.²⁰ Scalia's doubts about legislative history in *Hirshey* achieved particular prominence because the following summer he was nominated to the Supreme Court. At his confirmation hearing, no fewer than four Senators commented (mostly negatively) on his approach to legislative history in *Hirshey*, and Scalia himself stated that if he "could create the world anew," he would get rid of legislative history.²¹ Other (mainly Republican) circuit judges also noticed *Hirshey* and

academic." *Id.* at 269. Within months of the book's publication the debate was no longer academic.

²⁰ 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring). Interestingly, Scalia's critique in *Hirshey* was relatively mild in comparison to his blanket denunciations of legislative history on the Supreme Court, and the subject of his ire was the majority's reliance on a House committee report (which conventionally had been considered to be the most reliable form of legislative history). See *id.* Scalia stated: "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill." *Id.* (footnote omitted). He expanded on this latter point in a speech that he gave at many law schools between the fall of 1985 and the spring of 1986, just before his Supreme Court nomination:

As an intermediate federal judge, I can hardly ignore legislative history when I know it will be used by the Supreme Court. . . . I suppose I would rank most highly legislative history consisting of amendments defeated on the floor. . . . I suppose next to that would be extended floor debate—at least in circumstances, which occasionally occur, where the final text is actually being crafted on the floor. At the bottom of the list I would place—what hitherto seems to have been placed at the top: the committee report.

Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 442 n.64 (1988) (excerpting this speech).

Thus, then-Judge Scalia would have most squarely rejected invocation of committee reports. And one of the judges who joined Scalia in his attacks on legislative history, then-D.C. Circuit Judge Kenneth Starr, adopted a similar view, stating that "only the record of speeches on the floor of either chamber should be considered even minimally probative of Congress's intent . . . [because only] those remarks have been heard—however superficially—by members of Congress (albeit a minority in most instances)." Kenneth Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–76. By contrast, on the Supreme Court, Scalia generally rejected invocation of any legislative history. See *infra* notes 24–25 and accompanying text; *infra* note 57.

²¹ *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th

echoed its concerns. The first was Judge Alex Kozinski of the Ninth Circuit, who in a 1986 concurrence emphasized that “Judge (now Justice) Scalia has persuasively warned against relying on detailed discussions in legislative reports,” and fol-

Cong. 105–06 (1986); *Id.* at 65–68, 74–75, 105–07 (comments of Senators Grassley, Heflin, Simon, and Mathias, and Scalia statement).

Following up on a suggestion from Abbe Gluck, we asked Duke Research Librarian Wickliffe Shreve to review the transcripts of the nomination hearings of other Justices for questions about legislative history in statutory interpretation. In pre-Scalia Senate Supreme Court confirmation hearings, he found only one question about the use of legislative history in statutory interpretation (though the transcription of some hearings made it hard to do searches on them, so it is possible that he missed a question in other hearings): then-Judge O'Connor was asked “What is your approach in construing specific statutes? Would you feel constrained by the language of the statute and the legislative history or would you feel empowered to imply or create a consensus that might not have existed in the legislative branch?” *The Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 134 (1981).

After Scalia joined the Court, by contrast, nominees were frequently asked for their views about the use of legislative history in statutory interpretation, and the questioning Senator often invoked Scalia by name. *See, e.g., Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, Part 1*, 102d Cong. 213 (1991) (“Judge Scalia testified here, and has practiced it as a Justice, that in looking at history, he is not going to look to the committee reports, he is not going to look to congressional debate, he is going to look at the statute and just determine congressional intent from the language of the statute. Is that where you are going to get congressional intent?”); *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 130–31 (1990) (“[T]o what extent do you believe the legislative history should be taken into consideration, if you were sitting on the Supreme Court interpreting a statute passed by the Congress?”); *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 170 (1994) (“You and I, I think, share a similar view on the use of legislative history in the interpretation of statutes, unlike, for instance, the way I view Justice Scalia not wanting to look at legislative history. You, have written Law Review articles about it, and from a reading of your cases, I can also see that you are willing to rely on legislative history.”); *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 223–25 (1993) (“There are jurists who argue that the Court should disregard the tradition of looking to the legislative history of a law to determine how Congress intended that it be executed, and under this view they should look to the language in the four corners of the statute to resolve any ambiguities and not to committee reports, floor speeches, or any other items that might accompany a bill through the legislative process. Now, the proponents argue, as one has said, that ‘judicial abdication to a fictitious legislative intent’ would occur were you to look for congressional intent, and that legislative history itself is ‘the last hope of lost interpretive causes.’ Do you agree with that statement?”) (quoting Scalia; the Senator later stated, “For the benefit of my colleagues, the language that I quoted earlier, about judicial abdication to a fictitious legislative intent, that was Justice Scalia who articulated that position.” Justice Ginsburg drily (or perhaps drolly) responded “I am well aware of his position.”). Interestingly, all these nominees responded that legislative history is an appropriate source.

lowed with a block quote from Scalia's opinion in *Hirshey* and a discussion of it.²² Soon other circuit judges followed Scalia's lead, citing *Hirshey*.²³

Scalia was just getting started. In a series of concurring and dissenting opinions in his first few years on the Supreme Court, Scalia repeatedly criticized the use of legislative history.²⁴ He declined to join majority opinions because they in-

²² *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (en banc) (Kozinski, J., concurring in the judgment).

²³ See *Abourezk v. Reagan*, 785 F.2d 1043, 1054–55 n.11 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) (citing Scalia's concurrence in *Hirshey* in stating that "[c]ommittee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports"), *aff'd by equally divided Court*, 484 U.S. 1 (1987); *ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting) (stating that "[w]e in the judiciary have become shamelessly profligate and unthinking in our use of legislative history" and citing Scalia's concurrence in *Hirshey*); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) (criticizing reliance on legislative history and invoking Scalia's concurrence in *Hirshey*). In contrast to other early supporters of Scalia's *Hirshey* concurrence, Judge (and later Justice) Ruth Bader Ginsburg was a Democratic judge. But her opinion in *Abourezk* turned out not to presage support for his attacks on legislative history. See *infra* note 41.

²⁴ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.") (citation omitted); *United States v. Taylor*, 487 U.S. 326, 344–46 (1988) (Scalia, J., concurring) ("It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey. I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.").

Brudney and Ditslear choose 1986 as their cut-off point because of Scalia's ascension to the Court in that year, noting that "[u]pon becoming a Justice in the 1986 Term, Justice Scalia began to express relentless opposition to colleagues' use of legislative history." James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 *BERKELEY J. EMP. & LAB. L.* 117, 161 (2008). As they further note (in a section entitled "Justice Scalia's Line in the Sand"):

During his first three terms on the Court, Justice Scalia authored a series of separate opinions—including at least eight concurring in the Court's judgment—in which he expressly attacked or questioned the majority's reliance on legislative history. In these separate writings, Scalia insisted that the Court should not use legislative history to confirm or reinforce the plain meaning of text, that legislative history is very likely to be generated for strategic or insincere reasons, and that in any event it is highly unreliable. He also asserted on several occasions that courts must discover a statute's purpose or intent only from analyzing the text and not from the vagaries of a legislative record drafted or understood by, at best, small subgroups of members.

voked legislative history.²⁵ Other Justices, most notably Justice Clarence Thomas, sometimes joined him in declining to join opinions that cited legislative history, but no other Justice categorically rejected legislative history the way Scalia did.²⁶

Scalia's lack of full adherents in the Supreme Court meant that his attacks on legislative history never achieved a majority in the Court for broadly rejecting legislative history.²⁷ But his

Id. (footnotes omitted).

²⁵ See *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (“It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.”). In 1997, he even pointedly refused to join a footnote (although he joined everything else in the majority opinion) that merely explained why “[w]e give no weight to the legislative history[.]” See *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 955 n.† (1997) (noting that Scalia joined the entire majority opinion except footnote 4, which contained the explanation for the Court’s refusal to give weight to the legislative history).

In a few cases (mainly in his first years at the Court), Scalia did cite legislative history. See *United States v. Fausto*, 484 U.S. 439, 444 (1988) (Scalia, J.) (citing a Senate report); *Pierce v. Underwood*, 487 U.S. 552, 564 (1988) (Scalia, J.) (citing a conference report). So, though his citations to legislative history were rare, they did exist. Nonetheless, and unsurprisingly, given his many broadsides against invocation of legislative history, Scalia’s position quickly came to be associated with the rejection of its invocation. See Farber & Frickey, *supra* note 20, at 423 (criticizing “Justice Scalia’s argument that legislative intent should be considered irrelevant even when it can be determined.”); The Supreme Court, 1988 Term—Leading Cases, 103 HARV. L. REV. 320, 323 n. 28 (1989) (“As an analytical matter, Justice Scalia rejects reliance on legislative history as a means of interpreting statutes.”); *supra* note 2; *infra* notes 206–30. The broader point for our purposes is that the more a court cites legislative history, the less it is following Scalia. See *infra* note 57 and accompanying text.

²⁶ See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 146–47 n.169 (2011) (“Justice Scalia has expressed that view in a number of well-known separate opinions declining to join opinions of the Court that relied on legislative history. Justice Thomas has not taken the same categorical stance against legislative history that Justice Scalia has. From time to time, however, Justice Thomas will decline to join an opinion of the Court simply because of its citation on legislative history.” (internal citations omitted)); Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 408–09, 409 n.158 (2007) (“For nearly twenty years now, Justice Scalia has engaged in a sustained campaign against reliance on legislative history, and some other judges have signed on. . . . Justice Thomas, for example, although not as doctrinaire about the matter as Justice Scalia, has occasionally joined him in rejecting the validity of reliance on legislative history.” (footnotes omitted)).

²⁷ See Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017) (footnotes omitted):

Although Justice Scalia’s textualist campaign had tremendous influence, it never achieved its final victory. Notwithstanding all the time and energy he devoted to promoting textualism, Justice Scalia never persuaded the Supreme Court to abandon reliance on legislative history. The Court never ceased to consult statutory purpose.

attacks quickly attracted wide attention. By the end of the 1980s, Scalia's campaign against the use of legislative history was well known among judges and scholars.²⁸ He precipitated

Most of all, the Court never adopted Justice Scalia's fundamental textualist axiom: "The text is the law."

See also Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term: Scalia Rails but Legislative History Remains on Track*, 23 SW. U. L. REV. 47, 47 (1993) (making the point in the title of the article).

²⁸ See, e.g., Farber & Frickey, *supra* note 20, at 437 ("One time-honored source of legislative intent is the legislative history of the statute. Recently, however, Justice Scalia has roundly attacked the current judicial practice of routinely considering legislative history." (footnotes omitted)); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 429–30 (1989) ("In recent years, the Supreme Court has been divided about the significance of legislative intent and legislative history. The Court has suggested that the question for interpretation is in fact one of 'congressional intent,' and has generally treated legislative history as a key to the identification of 'intent.' Justice Scalia, however, has expressed considerable doubt about legislative intent in general and legislative history in particular. . . . Above all, Justice Scalia argues the legislative history was never enacted and is therefore not law." (footnotes omitted)); Marshall J. Breger, *Introductory Remarks: Conference on Statutory Interpretation*, 1987 DUKE L.J. 362, 368–69 (noting Scalia's opposition to the use of legislative history); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 38 (1988) ("If one adopts Justice Scalia's version of textualism, the question becomes a matter of the sources from which one derives the 'plain meaning' of the text. Scalia's anti-intentionalism studiously avoids examining legislative history for such meaning." (footnotes omitted)); Bruce Fein, *Scalia's Way*, 76 ABA J. 38, 38, 41 (1990) (noting that within a few short years of joining the Supreme Court's bench, Justice Scalia was able to generate a great amount of attention to his campaign against invocation of legislative history); Arthur Stock, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 160 ("One source Justice Scalia views as improper is the legislative history compiled by Congress. Though his antipathy toward legislative history was known before he joined the Supreme Court, over time he has reasserted this view with renewed vigor." (footnotes omitted)); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1296–97 (1990) ("With increasing frequency and tenor Justice Scalia has challenged the Court's traditional approach to interpreting statutes. . . . As part of this textualist theory, Justice Scalia has targeted the Court's longstanding reliance on legislative history to interpret statutes."); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990) [hereinafter Wald, *Sizzling Sleeper*] ("[T]here now exists a fully articulated and quite aggressive assault in the Supreme Court on the use of legislative history in construing statutes. The movement's spiritual leader is Justice Scalia." (footnote omitted)). Judge Wald summarized Scalia's attacks as follows:

Justice Scalia's textualist critique is not quite the same thing as the old plain meaning rule to which American judges have always given at least lip service. The plain meaning rule basically articulated a *hierarchy* of sources from which to divine legislative intent. Text came first, and if it is clearly dispositive, then the inquiry is at an end. But legislative history still has an important role to play as long as statutory text is not entirely "plain." According to the textualists, however, the problem with legislative history is not that it is

a major debate among jurists and scholars on the legitimacy of courts invoking legislative history in statutory interpretation.²⁹ In just a few years starting in the mid-1980s, Scalia not only challenged what had seemed to be a settled practice (citing legislative history) but also, through a combination of prominence and relentlessness, pushed the debate to center stage among judges and scholars.³⁰

As the discussion above indicates, Scalia was by no means alone in his campaign against judicial invocation of legislative

less authoritative than statutory language; rather, the textualists assert that Congress has a voice as a constitutional player only through its finally enacted statutes, no through any supplementary explanation thereof, and so legislative history is reduced to the status of "unauthoritative materials."

Patricia M. Wald, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, Remarks at U.S. Law Week's Annual Constitutional Law Conference 7-8 (Sept. 8-9, 1989).

Notably, there are no secondary sources in the Westlaw database containing "Scalia" in the same sentence as "legislative history" through 1985, but nineteen such sources through 1987, forty-five through 1988, and seventy-three through 1989. The Westlaw database added publications to its database during this time, but not nearly at that explosive rate.

²⁹ See, e.g., Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POLY 401, 401-02 (1994) (discussing the arguments over the permissibility of invocation of legislative history in statutory interpretation); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 858-65, 874-77 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (same); Manning, *supra* note 26, at 165-74 (same); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 101 (1995) (same); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1216-24 (2010) (comparing textualist and purposivist interpretive approaches from the standpoint of legitimacy).

³⁰ In addition to the sources cited above, see Eskridge, *supra* note 13, at 624-25 ("Justice Scalia's new textualism is a radical, as opposed to marginal, critique. It is a bold rethinking of the Court's role. Partly because of its analytical boldness, and partly because Justice Scalia is an intellectually aggressive member of the Court, the critique has already changed the Court's practice in statutory interpretation cases.").

Costello began his 1990 article as follows:

The Supreme Court is beginning to reexamine old approaches to statutory interpretation. With the increased mass and complexity of federal statutes over the last six decades, courts have turned increasingly to legislative history when faced with issues of statutory interpretation. The eagerness of many courts to examine congressional materials prompted the joke that under the "American rule," examination of statutory text is permissible only when legislative history is ambiguous. Now underway in the Supreme Court is a challenge, led by Justice Scalia, to routine reliance on legislative history as an aid to statutory interpretation. This challenge extends beyond merely curbing excesses occasioned by overreliance on legislative history. With increasing frequency, the Court emphasizes statutory language and structure and deemphasizes the role of legislative history.

Costello, *supra* note 13, at 39.

history. But his opposition to legislative history was categorical, he was on the Supreme Court, he repeatedly attacked the use of legislative history, and his language was sharp (and quotable). Scalia was most closely associated with the campaign against the use of legislative history in deciding cases, and indeed there is a consensus that Scalia brought the issue to the fore and led the movement.³¹ In this Article, we will refer to Justice Scalia as a convenient shorthand for Scalia and others in recognition of his status as the leader of the campaign against the use of legislative history. Relatedly, although it is of course impossible to know, it seems reasonable to assume that there would have been a movement against legislative history if Scalia had never existed.³² That said, without a Supreme Court Justice forcefully making the case against the invocation of legislative history, the movement very likely would not have been as prominent and would not have occasioned the many judicial opinions and law review articles by judges and professors addressing the issue.

There was a robust response to the attacks, led by prominent ideological liberal judges and law professors who supported the use of legislative history. But Scalia seems to have changed the terrain from where it had been in the 1970s through the mid-1980s: those who advocated the use of legislative history stated that of course they began with the statutory text, and that legislative history should be used carefully but is especially appropriate when the text is ambiguous.

As to what materials to cite, some who opposed the attacks on legislative history defended invocation, when appropriate, of all forms of legislative history. Notably, then-Judge Stephen Breyer gave a prominent lecture in 1991 defending the use of all forms of legislative history as possibly relevant to statutory

³¹ See *supra* notes 1–2 and accompanying text.

³² Note that the first significant writing in this period that questioned legislative history was by another circuit judge appointed by President Reagan, Judge Frank Easterbrook, and preceded *Hirschey*. In a brief 1983 essay, he suggested that courts too freely relied on legislative history. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–45 (1983). It did not achieve the prominence of Scalia's broadsides against legislative history, and by the standards of the late 1980s its critique was relatively mild—indeed, Easterbrook suggested that good statutory construction includes looking at legislative history. See *id.* at 550 (“Statutory construction is an art. Good statutory construction requires the rarest of skills. The judge must find clues in the structure of the statute, hints in the legislative history, and combine these with mastery of history, command of psychology, and sensitivity to nuance to divine how deceased legislators would have answered unasked questions.”). But it arguably helped to foster the debate over legislative history.

interpretation.³³ More commonly, supporters of legislative history emphasized the hierarchy noted above, stating that ignoring all legislative history was a mistake because committee reports were reliable even though statements from floor debates and committee hearings generally were not. Scalia's D.C. Circuit colleague Judge Abner Mikva, for example, argued in favor of reliance on committee reports but not floor statements.³⁴ Indeed, some took the opportunity to say that Scalia had usefully drawn attention to the impropriety of citing unreliable legislative history like floor debates and committee hearings, even as they also argued that Scalia went too far in also pushing for judges to ignore committee reports.³⁵

Thus the terms of the debate in the mid-1980s and thereafter were that a group of mainly ideologically conservative judges led by Scalia argued that courts should generally ignore all forms of legislative history and look only to statutory text, and a group of mainly ideologically liberal judges and law professors responded that courts should start with the text but should invoke legislative history to help flesh out the statutory language, in particular in cases of textual ambiguity. This latter group tended to emphasize a hierarchy with committee reports as reliable and statements made during floor debates and committee hearings as relatively unreliable. So the battle lines were drawn: one group would avoid citing any form of legislative history, and the other group would cite committee reports but perhaps not to statements from floor debates or committee hearings.

³³ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) ("Although I recognize the possible 'rearguard' nature of my task, I should like to defend the classical practice [of invoking legislative history] and convince you that those who attack it ought to claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not to condemn its use altogether. They should confine their attack to the outskirts and leave the citadel at peace.").

³⁴ See Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385 ("[Courts] must deal with the problem of resolving fine ambiguities in a statute, ambiguities where courts really do not know what a Congress had in mind. My approach is to go to the place in the legislative history where the majority did focus on the ambiguity. To this end, I always find that the committee report is the most useful device; it is what I use to try to resolve some of those ambiguities. Most of the time—not always, and not for every committee—the committee report represents the synthesis of the last meaningful discussion and debate on the issue."); Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 184 (1986) [hereinafter Mikva, *Reading and Writing Statutes*] ("The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute.").

³⁵ See, e.g., Eskridge, *supra* note 13, at 641–42; Farber & Frickey, *supra* note 20, at 442–43; *infra* notes 49–52 and accompanying text.

II

THEORY AND HYPOTHESES

A. The Ideological Quality of the Support for Attacks on the Use of Legislative History and the Responses to It

Justice Scalia and others who attacked the use of legislative history and advocated for textualism articulated their concerns in closely related terms of process and reliability. Scalia repeatedly noted that the only thing on which Congress voted was the text of the legislation.³⁶ Members might look to committee reports for guidance as to the meaning of provisions, but what they actually approved was the text itself, and nothing else. Relatedly, because committee reports (and of course statements from floor debates and committee hearings) were not part of what Congress formally approved, one could not be confident that they accurately reflected the majority coalition.³⁷ And, even more strongly, members of the majority coalition

³⁶ This is a theme that Scalia articulated even before he was elevated to the Supreme Court. See *Ill. Commerce Comm'n v. ICC*, 749 F.2d 875, 893 (D.C. Cir. 1984) (Scalia, J., dissenting) (“Legislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored. Those members of Congress who unsuccessfully oppose a legislative initiative favored by the Executive have every reason to fear that any ambiguity they leave in the statute will be interpreted against their interests by the implementing agency. But they also have every reason to trust that the clear limitations they succeed in imposing will be faithfully observed. Those are the rules of the game.”); Eskridge, *supra* note 13, at 653–54 (“Judge Scalia in 1985–86 argued that judicial inquiry into legislative intentions is inconsistent with our constitutional separation of powers. ‘Surely it is more consonant with that doctrine that—once a statute is enacted—its meaning is to be determined on the basis of its text by the Executive officers charged with its enforcement and the Judicial officers charged with its application.’” (footnote omitted) (quoting the speech that Scalia delivered at many law schools between fall 1985 and spring 1986, *supra* note 20)); see also Starr, *supra* note 20, at 375 (“Under democratic theory, the statute rather than extrastatutory materials governs the nation. Legislative history, however, has the potential to mute (or indeed override) the voice of the statute itself. In terms of democratic theory, the use of legislative history can distort the proper voice of each branch of our constitutional government.”).

³⁷ See, e.g., *United States v. Taylor* 487 U.S. 326, 345 (1988) (Scalia, J., concurring) (“[I]t must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.”); *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (“I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and

tion would be unlikely to be moved by, or even know about, a colloquy on the floor or in a committee hearing between two members.³⁸ Legislative history, Scalia suggested, was likely written by staffers or lobbyists who were attempting not to inform members of Congress but instead to influence judges' interpretation of the statute.³⁹

Senate Reports)."); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (Scalia, J., concurring) (1989) (criticizing the majority's invocation of committee reports and stating that "[t]he meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind."); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 620 (1991) (Scalia, J., concurring) ("Assuming that all the members of the three Committees in question (as opposed to just the relevant Subcommittees) actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in *unanimous* agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House. It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote."); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994) (Scalia, J.) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation.").

³⁸ See, e.g., *Overseas Educ. Ass'n, Inc. v. Fed. Labor Relations Auth.*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring) ("Far less reliable, as sources of statutory meaning, are remarks made during floor debate—even 'authoritative' explanations offered by a bill's sponsors. While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision. Few of his fellow legislators will have been on hand to hear the gloss the sponsor may have placed on a particular provision. Thus members of Congress, in voting on a measure, must be presumed to have relied on the meaning of the words read in context on a printed page."); Scalia, *supra* note 1, at 32 ("In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for the floor debate, or to read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone. The floor is rarely crowded for a debate, the members being generally occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken.").

³⁹ See, e.g., *Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring):

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases [cited by the majority] were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.

In his concurrence in *United States v. Taylor*, 487 U.S. 326 (1988), Scalia quoted and criticized the following statement from a member of Congress: "I have an

Scalia and other textualists stated that their approach was not designed to favor one set of outcomes over another, and

amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it." *Id.* at 345 (Scalia, J., concurring) (internal citation omitted). And in the book that inspired Judge Posner's harsh review in *The New Republic*, quoted *infra* note 42, Scalia and Bryan Garner said:

[W]hereas courts used to refer to legislative history because it existed, today it exists—in all its ever-increasing, profuse detail—because the courts refer to it. Legislators engage in floor colloquies (again, typically before an empty house) precisely to induce courts to accept their views about how the statute works. (They have been known to preface a colloquy with, "Let's make some legislative history.") Anyone familiar with the congressional scene knows that one of the regular jobs of Washington law firms is to *draft* legislative history—to be read on the floor or inserted into committee reports.

SCALIA & GARNER, *supra* note 29, at 377 (footnotes omitted).

Of course, many others disagreed with Scalia's characterization of the drafting and use of legislative history, particularly committee reports. *See, e.g.*, Mikva, *Reading and Writing Statutes*, *supra* note 34, at 385; Wald, *Sizzling Sleeper*, *supra* note 28, at 306–07; KATZMANN, *supra* note 13, at 37–39 (stating that legislators themselves use legislative history, particularly committee reports, and that there are reasons for it to remain reliable); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 977 (2013) (finding that 59% of congressional staffers they surveyed singled out committee and conference reports as "as very reliable sources for legislators to consider" as well as the most reliable forms of legislative history); *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 21 (1990) ("[M]y understanding of most of the legislation I voted on [while a U.S. Senator] was based entirely on my reading of its language and, where necessary, on explanations contained in the [committee] report.") (statement of Judge James L. Buckley).

Some textualists, most prominently Judge Easterbrook, also argued that looking for legislative purpose or intent was a fool's errand. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."). Scalia, by contrast, disparaged the notion of subjective legislative intent but invoked objective legislative purpose or intent as a valuable element of statutory construction. *See, e.g.*, *Bergeron*, 489 U.S. 87, 99–100 (1989) (Scalia, J., concurring) ("Except for the few passages to which I object, today's opinion admirably follows our more recent approach of seeking to develop an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose, rather than to achieve obedient adherence to cases cited in the committee reports."); *United States v. Fausto*, 484 U.S. 439, 447 (1988) (Scalia, J.) ("In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of [the statute]."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."); Karkkainen, *supra* note 29, at 410–19 (discussing the role of legislative intent and purpose in Scalia's jurisprudence).

more generally was not ideological in design or likely result. They said their focus was on methodology, not results.⁴⁰ That stated focus makes sense: methodology is absolutely essential to judging, so getting the methodology right in judicial opinions is of enormous importance.

That said, as the discussion in the previous Part suggests, the advocacy for and embrace of textualism and against legislative history had an ideological element from the outset: Scalia was known as a particularly conservative judge (and then Justice), and most of the other prominent advocates were ideological conservatives as well (Judges Alex Kozinski, Frank Easterbrook, Kenneth Starr, etc.).⁴¹ Simply stated, the movement against legislative history had a strong ideological skew.

Why? This goes beyond this Article and is speculative, but broadly speaking there are two obvious explanatory factors. First, it may be that, notwithstanding Scalia's disavowals of a focus on outcomes, ideological conservatives in fact expected that textualism would be a means to achieve ideologically conservative statutory interpretations. They may have expected that looking to purpose and legislative history would tend to broaden the scope of governmental authority and thus be more attractive to those who prefer broad regulatory authority, and that looking only to text would tend to do the opposite. Those taking this position would acknowledge that there will be some cases in which legislative history will have the effect of narrowing some seemingly broad statutory language, but expect that more often legislative history will show that Congress intended a broad sweep for its handiwork—and a broader sweep than

⁴⁰ See, e.g., SCALIA & GARNER, *supra* note 29, at 16.

⁴¹ See *supra* notes 21–23 and accompanying text; *supra* notes 32, 39; see also Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 373 (2005) (“[T]oday’s textualists tend to be politically conservative.”). The most prominent early exception was Democratic Judge and later Justice Ruth Bader Ginsburg. In 1987 she wrote an opinion following Scalia’s opinion in *Hirschey*, see *Abourezk v. Reagan*, 785 F.2d 1043, 1054–55 n.11 (D.C. Cir. 1986), but in her later years on the D.C. Circuit and during her time on the Supreme Court she regularly cited legislative history (and Scalia followed his practice of concurring in everything except for her invocation of legislative history). See, e.g., *Fedway Assocs., Inc. v. U.S. Treasury, Bureau of Alcohol, Tobacco and Firearms*, 976 F.2d 1416, 1421 (D.C. Cir. 1992) (Ruth Bader Ginsburg, J.) (stating that “[t]he relevant legislative history strongly supports our reading of the plain meaning of the text” and then discussing the legislative history); *W. Coast Sheet Metal, Inc. v. NLRB*, 938 F.2d 1356, 1361 (D.C. Cir. 1991) (Ruth Bader Ginsburg, J.) (quoting at length from legislative history); *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 273 (1996) (Ruth Bader Ginsburg, J.) (relying on the drafting history of a statute as reflected in the House Report and the conference committee report); *id.* at 279 (Scalia, J., concurring) (stating “I agree with the Court’s opinion, except that portion of it which enters into a discussion of ‘[t]he drafting history of § 4010.’”).

the bare words of the legislation might suggest. Insofar as those were the expectations, it might lead to an ideological divide over legislative history and textualism versus purposivism.⁴²

Second, ideological conservatives might prefer the apparently more rigorous methodology of textualism irrespective of any changes in ideological outcome that it might produce. Much of the criticism of the use of legislative history focused on the fact that judges could usually find *something* in the legislative history that supported almost any given statutory interpretation and thus was far too empowering of judges. The most

⁴² See, e.g., Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18 (“[T]he textual originalist demands that the legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. In this way, textualism hobbles legislation—and thereby tilts toward ‘small government’ and away from ‘big government,’ which in modern America is a conservative preference.”); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 68 (1991) (“Barring judges from looking at the history of a statute and confining them strictly to its text means that the statute will only apply in those instances that Congress explicitly passes upon. The scope of governmental regulation is thereby constricted.”); Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 181 n.178 (2009) (“[T]he new textualism arguably makes it more difficult for Congress to achieve its underlying objectives because courts have a tendency to interpret the law in a relatively stingy fashion pursuant to this methodology.”); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991) (arguing that formalism “embodies a relatively antigovernmental philosophy”); Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2066 (2005) (“By advocating a theory of statutory interpretation that is preoccupied with literal meaning, and purportedly relies on bright-line rules or canons of statutory interpretation, textualism strives to effectuate a broader ideological agenda that seeks to reduce the state and its regulatory functions to the necessary minimum.”). In this regard, it may be relevant that between 1933 and 1994, Democrats controlled the House of Representatives for all but four years, and the Senate for all but ten years, whereas during that span Republicans occupied the White House for 28 years. Simply stated, until 1995 the lived experience of judges (and everyone else) was of largely Democratic control of the House and Senate but a more even balance with respect to the White House. Insofar as invoking legislative history was understood to give additional weight and scope to members of the legislative majority (that is, in addition to what they had put in the legislative text), that would have meant giving additional weight to what had usually been Democratic majorities. See also *infra* note 106 and accompanying text.

The view that textualism is ideologically conservative is by no means universal. Maggie Lemos, for example, argues against it, noting that “whether a ‘stingy’ reading of statutes will appeal to political conservatives would seem to depend on the laws in question,” and contending that “a textualist reading is not necessarily more restrictive than a reading that is grounded on considerations of statutory purpose or evidence of legislative intent.” Lemos, *supra* note 29, at 865–66, 869; see also Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 815–19 (2008) (arguing that an association between political conservatism and textualism may be a result of judges’ self-selection bias).

famous line critical of the use of legislative history—one that Scalia himself invoked in one of his many separate opinions criticizing its use—was from Judge Harold Leventhal, a D.C. Circuit judge prominent in the 1970s, who said that “the use of legislative history [was] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”⁴³ The concern was that the use of legislative history provided judges with the ability to reach their favored statutory outcome. Ideological conservatives, including not just judges and scholars but also politicians, frequently criticized judges for “legislating from the bench.” This became a popular refrain among ideological conservatives in the 1980s.⁴⁴ The idea was that judges were arrogating to themselves authority that was properly in the political branches. The jurist who was most closely associated with this critique was Justice Scalia. His position, and that of many other supporters of textualism and against the use of legislative history, was that their methodological approach limited judicial discretion and was concomitantly preferable.⁴⁵ This might have an ideological skew

⁴³ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Scalia introduced the Leventhal reference with the following language:

The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. . . . But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.

Id.

⁴⁴ See, e.g., George H.W. Bush, *Candidates State Positions on Federal Judicial Selection*, 72 JUDICATURE 77 (1988) (“I am firmly committed to appointing judges who are dedicated to interpreting the law as it exists, rather than legislating from the bench.”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1 (1990):

In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislator should.

⁴⁵ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (“[W]hen one does not have a solid textual anchor . . . from which to derive the general rule, its pronouncement appears uncomfortably like legislation.”); SCALIA, *supra* note 1, at 35 (contending that courts’ use of legislative history “has facilitated rather than deterred decisions that are based upon the courts’ policy preferences, rather than neutral principles of law”); *id.* at 132 (“[T]he judge who uses ‘legislative intent or other interpretative methods’ does not en-

insofar as ideological conservatives are likely to prefer that decisions are made by democratically accountable decisionmakers (a theme that also underlies arguments, again more likely to be embraced by ideological conservatives, for greater presidential control over the executive branch, and particularly independent agencies).⁴⁶ Ignoring legislative history and relying solely on text might also appeal to those (again, prominently including Scalia himself) who preferred bright-line rules and categorical approaches to flexible or eclectic approaches that would allow for variations depending on the situation.⁴⁷ Bright-line rules might appeal to jurists who are ideologically conservative, but that does not mean that there is a causal relationship.⁴⁸

Interestingly, and as suggested at the end of the previous Part, prominent ideologically liberal judges and commentators had sympathy for some aspects of this critique. For instance, Scalia's D.C. Circuit colleague Judge Patricia Wald also quoted with apparent disapproval the statement from Judge Leventhal

tirely abandon text, but rather adds to whatever manipulability text contains the (much greater) manipulability of his extratextual methodology. I concede, of course, that textualism is no ironclad protection against the judge who wishes to impose his will, but it is *some* protection. The criterion of 'legislative intent,' by contrast, positively invites the judge to impose his will . . . it reduces him to guessing that the legislature intended what was most reasonable, which ordinarily coincides with what the judge himself thinks best."); *see also* Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.) (stating that textualism "cuts down the amount of judicial discretion, for judges free to bend law to 'intent' that are invented more than they are discovered become the real authors of the rule").

⁴⁶ Not coincidentally, Scalia was also the leading judicial voice for this "unitary executive" theory, which posits that the President must be able to oversee all of the executive branch. *See, e.g.,* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (arguing at length for a unitary executive theory that would invalidate as unconstitutional a statute allowing for an independent counsel whom the President could not directly control and could not fire at will). This theory, like textualism, gained particular prominence among ideological conservatives during the Reagan Administration, though it was not limited to them.

⁴⁷ *See* Scalia, *supra* note 45, at 1176, 1184–85 (contrasting general rules of law with discretion to do justice and preferring the former, and using textualism as one example of the former).

⁴⁸ Maggie Lemos suggests a way in which these might be connected: Suppose that individuals who are drawn to political conservatism also tend to be drawn to relatively bright-line rules. Suppose, further, that while the two tendencies are correlated with each other, one does not cause the other; instead, the same psychological forces that lead individuals to rules also lead many of them to adopt politically conservative views. If these suppositions were correct, they might provide a decidedly non-political explanation for the political patterns we observe in the adoption and rejection of textualism among judges and academics.

Lemos, *supra* note 29, at 889–90 n.207 (citation omitted).

quoted above.⁴⁹ She and other respondents to Scalia often argued against a practice of citing any legislative history that might be available.⁵⁰ They did not defend notions like that in *Overton Park* that a court should look to text only if the legislative history was not clear. On the contrary, they insisted that courts should begin with the statutory text and look to legislative history only to resolve textual ambiguities.⁵¹ But these ideologically liberal judges and commentators argued that rigor could be consistent with citing legislative history: courts should cite reliable legislative history like committee reports, whereas they should be very careful about citing the generally less reliable categories of floor debates and hearings.⁵²

⁴⁹ See Wald, *supra* note 16, at 214 (“I am left with the sense, expressed by Justice Stevens in a dissent late last Term, that consistent and uniform rules for statutory construction and use of legislative materials are not being followed today. It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to ‘looking over a crowd and picking out your friends.’” (footnotes omitted)).

⁵⁰ See *supra* notes 34–35 and accompanying text.

⁵¹ See Breyer, *supra* note 33, at 863 (“No one claims that legislative history is a statute, or even that, in any strong sense, it is ‘law.’ Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the ‘law.’ A judge cannot interpret the words of an ambiguous statute without looking beyond its words for the words have simply ceased to provide univocal guidance to decide the case at hand.”).

⁵² Judge Mikva brought these points together and is worth quoting at length:

If the [statute’s] words are capable of a clear meaning that can be applied to the case at hand, we ought to look no further. As Judge Leventhal said, one can always find some friends in the legislative history. Judges ought not tilt the result by looking unnecessarily. Unfortunately, the plain meaning doctrine does not answer many of the interpretation disputes that judges are called upon to resolve. For many reasons, including original sin, legislators do not always speak plainly, and certainly not comprehensively. There will be numerous occasions in which the judges must look to the legislative history to decide the cases before them.

. . . . Seldom is the floor debate the vehicle by which the legislative branch resolves its wording disputes. Those arguments are much more likely to be resolved in committee and reflected in the committee report. Nevertheless, some judges think that the committee report is “unreliable” because it is written by staff rather than by Members of Congress. Other judges do not think about the committee report at all. I think it ought to be the first place that judges look to find out what Congress meant. The enemy is not legislative records—only *bad* legislative records.

. . . . Legislators will frequently use the easy access to the Congressional Record as a device to confuse the plain meaning of a statute. Judges will frequently get gulled by this device.

Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981–82 (1989); see also Wald, *Sizzling Sleeper*, *supra* note 28, at 306–07 (“To disregard committee reports as indicators of congressional understanding because we are suspicious that nefarious staffers have planted certain information for some undisclosed reason, is to second-guess Congress’ chosen form of organization and delegation of authority, and to doubt its ability to oversee

B. The Implications for Judicial Behavior

Insofar as ideologically conservative judges' embrace of textualism, and concomitant dismissal of legislative history, reflected a desire to achieve ideologically conservative case outcomes, and insofar as methodology imposes some constraint, one might expect to see an increase in conservative outcomes for judges who abjured reliance on legislative history. If methodology imposes no constraint, then presumably judges would reach the same outcomes whether or not they used legislative history.

Other scholars have looked at case outcomes to see what role the use of legislative history has played. In a study of 320 opinions on labor-employer relations by eight liberal Supreme Court Justices from the 1969 to 2006 terms, Brudney and Ditslear concluded that when liberal Justices cite legislative history materials in their reasoning, they often do so to justify a higher proportion of their pro-employer outcomes than their pro-employee decisions.⁵³ Benesh and Czarnezki studied all nonunanimous decisions issued by the U.S. Court of Appeals for the Seventh Circuit from the 1997 term through the 2003 term in the legal areas of criminal procedure, civil rights, First Amendment, due process, and privacy.⁵⁴ After controlling for the ideology of the judges and identifying whether a case was resolved in a liberal or conservative ideological direction, the authors did not observe a statistically significant relationship between a judge's career usage of legislative history and the likelihood a judge will vote conservatively.⁵⁵

its own constitutional functions effectively. It comes perilously close, in my view, to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle."); Wald, *supra* note 16, at 201 ("Committee reports indeed remain the most widely accepted indicators of Congress' intent."); Farber & Frickey, *supra* note 20, at 448 ("American public law has quite properly recognized that statutory meaning is necessarily greatly influenced by statutory context. Legislative history is part of that context, and some aspects of it—such as committee reports—will frequently represent the most intelligent exposition available of what the statute is all about." (footnote omitted)); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 41–56 (1994) (considering and rejecting constitutional and practical arguments for disregarding or devaluing legislative history, especially committee reports).

⁵³ See Brudney & Ditslear, *supra* note 24, at 125–28 (presenting evidence against the view that legislative history is invoked opportunistically by federal judges).

⁵⁴ Sara C. Benesh & Jason J. Czarnezki, *The Ideology of Legal Interpretation*, 29 WASH. U. J.L. & POLY 113, 124–25 (2009) (suggesting that legislative history is invoked opportunistically by federal judges).

⁵⁵ *Id.* at 130–31.

Focusing on outcomes is useful, but it relies on contestable (and contested) ideological coding of how conservative or liberal a given decision is.⁵⁶ In this Article, we ask a more parsimonious question that focuses on citations to legislative history. Those advocating for textualism and attacking the use of legislative history argued that judges were making a methodological mistake insofar as they cited legislative history, and they urged that judges refrain from doing so. That is, the central methodological implication of this focus on text is that courts should not look to legislative history in construing statutes. Legislative history was irrelevant to the proper interpretation of statutes, and courts should avoid citing it. Thus Scalia frequently joined a majority opinion in all respects except the portion of it that cited legislative history. This makes for a straightforward analysis of judicial citation behavior: the more judges cite legis-

⁵⁶ For arguments against the reliability of coding, see Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1925 (2009):

[I]t is very difficult to characterize many case outcomes. For example, the general rights embraced by freedom of religion and freedom of expression sometimes conflict with the exercise of other rights; it may not be clear how presumed liberal or conservative judges should be expected to vote in such cases. Cases may be disposed of on procedural grounds that are essentially nonideological, leading to coding errors when the outcome must be coded as liberal or conservative. A court's interpretation of a statute may defy ideological description (*e.g.*, rate allocations in a matter before the Federal Energy Regulatory Commission, where the parties before the court are competing companies). . . . [M]any appeals involve multiple, complex issues, thus making it impossible to describe the appellate court's disposition as liberal or conservative.

See also Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 480–81 (2009) (“[R]ather than illuminate the workings of the Supreme Court, some empirical findings may reflect the way the [Supreme Court Judicial] Database reports [or codes] information.”); Anna Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG. 414, 415–21 (2013) (finding, as the title suggests, confirmation bias in the Supreme Court Judicial Database); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 11–14 (arguing that ideological coding of case outcomes is fraught with difficulties, and that “the different factors used to code a case as ‘conservative’ or ‘liberal’ may cut in different directions within the confines of a single case”).

For arguments in favor of the reliability of coding, see, *e.g.*, Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEORGETOWN L.J. 1, 8 n.30 (2009) (defending the ideological coding of cases in the Supreme Court Judicial Database); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO STATE L.J. 1635, 1673 n.129 (1998) (arguing in favor of ideological coding).

lative history in their majority opinions, the less they are following Scalia.⁵⁷

Others have looked at citation patterns generally. One strand of this research focuses on how much influence Justice Scalia's crusade against legislative history and concomitant embrace of textualist statutory interpretation had over the Supreme Court.⁵⁸ Koby studied opinions by the Court from the time Scalia was nominated in 1986 to 1998, finding an overall decline in citations to committee reports, congressional debates, and committee hearings in Supreme Court opinions during this period.⁵⁹ Mikva and Lane concluded that little has changed in the way courts interpret statutes, and argue that because the Supreme Court, lower federal courts, and state courts of last resort continue to use legislative history materials to interpret statutes, textualism did not have deep and persistent effects.⁶⁰

⁵⁷ Judges frequently cite legislative history (and other relevant legal materials like enacted statutes and prior opinions) and then conclude that the cited material is not dispositive in that case. In such a situation, the judge is treating the category of legislative history as relevant but finding that this particular legislative history does not help to resolve the case. That is in tension with Justice Scalia's repeated admonitions to avoid citing legislative history in the first place. Scalia pithily summarized his long-held views on citing legislative history in a 1996 case: "The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it." *Bank One Chicago, N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 283 (1996) (Scalia, J., concurring). It is also possible that a judge might cite legislative history but also indicate that all legislative history is irrelevant. Again, in doing so, the judge would not be adopting Scalia's position (and his frequent practice in joining all of a majority opinion except for its discussion of legislative history) that judges should generally ignore legislative history in the first place. And in our review of cases for this Article, we found a range of reliance on legislative history (some opinions relied on it, some treated it as useful but not dispositive, some treated it as relevant but not adding much, etc.), but no opinions that cited legislative history only to state all that all legislative history is irrelevant. That said, we cannot rule out the possibility that on some occasions judges so stated, although we have no reason to believe that such a possibility changes our results.

⁵⁸ See Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212–21 (2000).

⁵⁹ See Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. LEGIS. 369, 384–87 (1999); see also Siegel, *supra* note 26, at 401–13 (finding that briefs filed in the Supreme Court continued to cite legislative history, perhaps reflecting the fact that Scalia never achieved a majority on the Supreme Court for his complete rejection of legislative history and thus counsel wanted to cite legislative history in the hope of persuading those who looked to it).

⁶⁰ See Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 121–23 (2000) (discussing that Scalia's crusade against legislative history materials in statutory interpretation had more profound effect on scholars than judges).

A second relevant strand of research focuses on the impact of Scalia's campaign against the use of legislative history on federal appellate courts. Bruhl uncovered evidence that courts of appeals adopt patterns of statutory interpretation from the Supreme Court.⁶¹ Similarly, Cross argued that lower federal courts may take statutory interpretation cues from the Supreme Court and adapt their own interpretive methods accordingly.⁶² A number of research projects have found evidence that lower courts absorb and implement the Supreme Court's patterns of statutory interpretation.⁶³ Notably, Bridgman explored all citations to legislative history materials in published federal appellate opinions from 1950 to 2006.⁶⁴ By analyzing overall citation rates and the rate at which certain types of legislative materials are cited, he found that during the 1970s and 1980s the D.C. Circuit's use of legislative materials tracked the Supreme Court more closely than the other circuits.⁶⁵ Bridgman found that the disparity between the D.C. Circuit and the other circuits cannot be fully accounted for by the D.C. Circuit handling more statutory interpretation cases or writing longer opinions.⁶⁶ Cross counted the number of opinions published by federal appellate courts each year that contain a reference to "legislative history," "Conference Committee," Westlaw Keynumbers associated with textualism, and Westlaw Keynumbers associated with pragmatism.⁶⁷ Among many notable findings, Cross observed a steady decline in the rate federal courts of appeals refer to "legislative history" in the late 1980s.⁶⁸ Brudney and Baum, focusing on Supreme Court

⁶¹ See 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, 483, 540-41 (2015).

⁶² See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 187-89 (2008) (counting the number of opinions published by each courts of appeals each year that contain a reference to "legislative history," "Conference Committee," along with the Westlaw Keynumbers associated with textualism, and the Westlaw Keynumbers associated with pragmatism).

⁶³ See Bridgman, *supra* note 15, at 1 (studying patterns of citations to legislative history in courts of appeals from 1950 to 2006); see also Bruhl, *supra* note 61, at 491-93 (discussing the large scale trends of statutory interpretation methods in lower federal courts and identifying these trends as evidence that a movement towards a more formal system of stare decisis for statutory interpretation is possible); Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 573-89 (1996) (noting patterns of statutory interpretation between the Supreme Court and the Tenth Circuit).

⁶⁴ See Bridgman, *supra* note 15, at 12-14.

⁶⁵ *Id.* at 25-26.

⁶⁶ *Id.* at 31-32, 35-36.

⁶⁷ CROSS, *supra* note 62, at 184.

⁶⁸ See *id.* at 187.

and appellate court decisions from 2005 to 2015, found that the Supreme Court has been far more likely to cite legislative history than the Courts of Appeals.⁶⁹ In separate papers using different datasets, both Bruhl and Brudney/Baum considered appellate cases reviewed by the Supreme Court (so the same case produces an appellate and a Supreme Court opinion) and found that even when the Supreme Court and the appellate court cite legislative history, they often invoke different legislative history materials.⁷⁰ Among their conclusions was that federal appellate courts do not treat Supreme Court opinions as creating methodological *stare decisis* with respect to legislative history (or other interpretive resources).

Other scholars have explored some impacts of ideology on judges' use of legislative history. Abramowicz and Tiller found that federal district court judges were modestly influenced by the ideological composition of the appellate court above them and of their colleagues.⁷¹ Law and Zaring evaluated ideology and statutory interpretation with regard to the Supreme Court, finding that Justices are more likely to consult legislative history materials when they are ideologically aligned with the political party that enacted the statute they are interpreting.⁷²

In this Article we examine citations to legislative history in light of judicial political party. As the discussion above suggests, we hypothesize that the attacks on the judicial use of legislative history would have more traction with ideologically conservative judges than ideologically liberal judges.⁷³ The most straightforward measure of ideology is political party, and in particular the political party of the most recent President to

⁶⁹ James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 707–22 (2017).

⁷⁰ James J. Brudney & Lawrence Baum, *Two Roads Diverged: Statutory Interpretation by the Supreme Court and the Circuit Courts in the Same Cases*, 88 FORDHAM L. REV. 823, 837–63 (2019); 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, 50 (2018).

⁷¹ See Michael Abramowicz & Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEGAL STUD. 419, 419 (2009) (noting that an authoring judge will have a greater tendency to cite legislative history by legislators who share political party affiliation with the colleagues and superiors of the authoring judge than legislators sharing the same political party affiliation as the authoring judge himself).

⁷² See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1726 (2009).

⁷³ One way of conceptualizing this point is that those more likely to be affected by Scalia's attacks will, at the margin, be less likely to cite legislative history. And the bigger the impact, the bigger the margin. The more they are influenced, the more dubious they will be about citing legislative history.

nominate a given judge.⁷⁴ We thus expect that, in the federal appellate courts, there was a difference between how Democratic and Republican judges responded to the attacks on legislative history in their citation practices. Specifically, we hypothesize that Republican circuit judges would have a stronger reaction to the attacks on legislative history.

Justice Scalia's message was straightforward: legislative history is irrelevant to statutory interpretation and thus judges should generally ignore it. This yields an expectation: the more fully judges adopt Scalia's position, the more likely they will be to ignore legislative history relative to those who do not adopt his position. Correspondingly, the more judges cite legislative history, the less they are following Scalia's lead, because they are citing what he considers to be irrelevant materials. Citation counts have obvious limitations: we have only the bare fact of citation, without additional information about exactly how much weight a judge put on the cited source. But in this case bare citations are significant, because they are inconsistent with Scalia's general position. A citation to legislative history in a given opinion suggests that the author has rejected Scalia's methodological position on legislative history.⁷⁵

We focus on the author of the majority opinion because the opinion author is likely to have the predominant influence on the prose of her opinion and the citations within it.⁷⁶ Studies have shown that circuit judges bargain over case outcomes, but there is no clear empirical evidence that this bargaining extends to the citations within those opinions.⁷⁷

⁷⁴ See, e.g., Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1327 (2009) (noting the party of the most recent President to nominate a judge is the standard practice for identifying the ideology of a judge; the last President had the most information and circuit judgeships are more politically salient and sensitive than district court judgeships); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 5–7 (2006) (using the President's party as the measure of judicial ideology); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008) (same); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718–19 (1997) (same).

⁷⁵ See *supra* note 57 and accompanying text.

⁷⁶ See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 95–107 (1997) (noting that the author of the majority opinion has the greatest impact on the content within an opinion).

⁷⁷ See, e.g., Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294, 311–13 (1998) (examining the extent of accommodation in Supreme Court majority opinions by studying the draft opinions circulated by the majority opinion author); see also Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representa-*

This leads to our first hypothesis: after the launching of the attacks on judicial use of legislative history, circuit judges appointed by Republican Presidents would be significantly less likely to cite all forms of legislative history than their Democratic counterparts.

Our second hypothesis involves the diffusion of ideas. Max Planck famously said that “[a] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.”⁷⁸ The broad point is that ideas that change the intellectual terrain are likely to have a bigger impact on those who come of age after the diffusion of the idea than on their predecessors. One arguable example in law is law and economics. Commentators have noted that law and economics had particular impact on lawyers, regulators, and professors who came of age after its rise had begun.⁷⁹ Simply stated, some movements shift the terms of the debate going forward, with a greater influence on those whose intellectual development occurs during or after the debate.

Judges appointed before the 1980s joined the bench, and thus began interpreting statutes and deciding what, if any,

tion Under Panel Decision Making, 20 J.L. ECON. & ORG. 299, 321 (2004) (finding that gender and ideological composition of federal appellate panels influences whether panelists vote to reverse or affirm); Sheldon Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 481 (arguing that bloc voting occurred on most federal appellate courts).

⁷⁸ MAX PLANCK, *SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS* 33–34 (Frank Gaynor trans., 1949); see also THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 174–210 (3d ed. 1996). Paul Samuelson shortened Planck’s statement to the pithier “science makes progress funeral by funeral,” adding: “the old are never converted by the new doctrines, they simply are replaced by a new generation.” See *Science Makes Progress Funeral by Funeral*, QUOTE INVESTIGATOR (Sept. 25, 2017), <https://quoteinvestigator.com/2017/09/25/progress/> [<https://perma.cc/AVD3-CP5S>].

⁷⁹ See, e.g., Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 18 HASTINGS INT’L & COMP. L. REV. 157, 171 (1994) (“In the United States, law and economics is already deeply influencing the methods of reasoning of a new generation of lawyers, and its impact on the applied law is already a reality.”); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1, 36 (1991) (“As the bureaucracy has grown more aware of the reasoning behind market-based approaches, it has responded to them more favorably. Younger staff members in particular have been influenced by the growth over the past decade of the ‘law and economics’ movement within major law schools and the proliferation of professional schools of public policy.”); Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN’S L. REV. 231, 232 n.1 (2009) (“[L]aw and economics provided a tangible theory of human behavior that would influence a generation of legal thought.”).

sorts of legislative history to rely on, before the attacks began. For those who became judges in the Reagan Administration and thereafter, by contrast, the attacks on legislative history occurred early in their judicial careers or before they ever started. There is some evidence that these later-appointed judges were more influenced by Scalia's attacks on legislative history than were their earlier-appointed counterparts. Gluck and Posner interviewed forty-two federal appellate judges and found generational differences. Notably, in contrast to older judges, they "heard Justice Scalia's and textualism's influences emphasized by younger judges of all political backgrounds."⁸⁰ This dovetails with dozens of conversations one of the authors has had with judges and law professors who came of age before and after Scalia launched his attacks.

We expect that later judges would be more impacted by the arguments against legislative history than those who had been engaging in statutory interpretation well before Scalia started his attacks. And we would expect this effect would extend to Democratic judges appointed after the Reagan Administration, as Scalia's attacks may have led lawyers of all political stripes to examine their approach to legislative history. So we hypothesize that judges appointed by Reagan and later Presidents were more influenced by the attacks on legislative history than were their earlier-appointed counterparts. This leads to our second hypothesis: after the launching of the attacks on judicial use of legislative history, circuit judges appointed by Reagan or later Presidents would be significantly less likely to cite all forms of legislative history than circuit judges appointed by earlier Presidents.

Our two hypotheses are independent of each other, so we expect that each will operate independently, with the result that post-Reagan Republican judges would be most affected by the attacks on legislative history. That is, we hypothesize that the post-Reagan effect interacts with judges' political party such that the post-Reagan effect would be greater among Republican cohorts than among Democratic cohorts.

⁸⁰ See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1312 (2018). Gluck and Lisa Bressman similarly suggest that there may be a generational effect on legislative drafters' awareness of judicial canons of interpretation. See Gluck & Bressman, *supra* note 39, at 1022 (discussing the "possibility that drafter awareness of the canons is *generational* and is changing across time").

III DATA AND MEASURES

We test our hypotheses by analyzing a dataset made up of all published federal appellate court majority opinions between 1965 and 2011, totaling 240,933 opinions. The opinions we use are from the Jonathan Mayer Advancing Empirical Legal Scholarship data repository of published opinions (Mayer Opinions).⁸¹ We developed a Python script that parsed each opinion and drew out information on the circuit, the author of the majority opinion, citations within the majority opinion, and publication date. We matched the authoring judge with biographical information from the Federal Judicial Center containing the name and party of the President who most recently nominated the judge and the date of the judge's first commission to the federal judiciary. As we noted above, we use the political party of the President who most recently nominated the circuit judge as the measure of political party.⁸²

Next, we identified instances of citations to legislative history materials. Some types of legislative history materials took on a variety of citation formats. For example, in order to find all citations to committee reports, including conference reports, our searches included all iterations of "Conf. Rep.," "H.R. Rep.," and "S. Rep." We included all citation formats of which we were aware, including formats from the Legal Bluebook as well as nonstandard citation formats.⁸³ So, for example, we searched

⁸¹ See Jonathan Mayer, *Advancing Empirical Legal Scholarship: Federal Appellate Opinions and Rules*, WEB POLY (May 3, 2013), <http://webpolicy.org/2013/05/03/advancing-empirical-legal-scholarship-federal-appellate-opinions-and-rules/> [https://perma.cc/N68V-A5NG]. We created two samples of majority opinions from the Mayer Opinions and compared them with opinion data from the Caselaw Access Project. *Project: Caselaw Access Project*, LIBR. INNOVATION LAB (2019), <https://case.law> [https://perma.cc/22B9-ME94]. The first sample contained opinions with known citations to legislative history materials and the second sample contained opinions that did not include citations to legislative history materials. We found that the opinions and their citations (or lack thereof) matched with opinion data from the Caselaw Access Project. Moreover, the number of published opinions for each appellate court in our time period of interest matched up with opinion data provided by the Caselaw Access Project.

⁸² See *supra* note 74.

⁸³ See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, <https://www.legalbluebook.com/> [https://perma.cc/XF3N-85K4] (last visited Feb. 10, 2020). We searched for every standard and nonstandard citation form that we observed in any opinion. But given the many conceivable nonstandard citation formats, we cannot be completely confident we have captured the entire universe of citations to legislative history materials in our data. That said, we are confident that we have captured all citations when standard and obvious nonstandard citation formats have been used. Further, we investigated the frequency of nonstandard formats and found that there is no clear circuit-level or judge-level source driving

both for “Cong. Rec.” (the Bluebook citation form for the Congressional Record) as well as nonstandard citation formats such as “Cong. Record” and “Congressional Rec.”⁸⁴ We also included as a comparator two compendiums of duly enacted or promulgated federal laws—the United States Code and the Code of Federal Regulations. These two sources are of course quite different from legislative history materials, as they are the enacted legislation or promulgated regulations. Thus there were four basic sources in total: statements made in House and Senate floor debates or in House and Senate committee hearings; House and Senate committee reports (including conference reports); the Code of Federal Regulations; and the United States Code.⁸⁵

We utilized the advance search tool within Lexis Advance in order to validate our data on citations to legislative history materials in courts of appeals majority opinions.⁸⁶ These

this type of citation behavior. Instead, the source of these nonstandard citation formats appears to be clerk-level effects, as a judge’s opinions may contain these nonstandard citations in one term but not contain them in the following term.

⁸⁴ There are many advantages for implementing an automated analysis of majority opinions. First, a machine can efficiently analyze far more content than would be feasible through a hand-coding or manual analysis. (The most extensive hand-coding study conducted so far for opinions by federal appellate courts is the United States Court of Appeals Database, JUD. RES. INITIATIVE, <https://artsandsciences.sc.edu/poli/juri/appct.htm> [<https://perma.cc/XY8X-ECF6>] (last visited Feb 10, 2020), which manually analyzed 18,000 opinions published by the federal courts of appeals between 1925 and 2002.) Second, our automation avoids selection bias because it canvasses the entire universe of published opinions within our selected time range, rather than a possibly unrepresentative sample of opinions. Finally, machines are not prone to unconscious biases that exist within human researchers. Even with procedures, codebooks, and intercoder reliability checks, data coded by humans will always be prone to human error. The general disadvantage of our automated technique is that the process is limited to the parameters we specify. In other words, if we fail to specify a specific citation format, those citations will not be identified.

⁸⁵ Other types of legislative materials, such as concurrent and joint resolutions, were also identified and validated. Given the infrequent use of these materials in opinions by courts of appeals, we ultimately decided to omit these types of materials from our study.

Statements in floor debates are cited ten times more often than statements in committee hearings. We combined them into a single category because when courts and commentators have discussed hearing statements, they have treated them as similar to floor debates in their unreliability. See, e.g., *S & E Contractors, Inc. v United States*, 406 U.S. 1, 13 n.9 (1972) (“[W]e have been extremely wary of testimony before committee hearings and of debates on the floor of Congress.”); *supra* note 13. As a robustness check, we calculated all the results presented in this Article for floor statements and committee statements separately, and all the substantive results were the same.

Citations to the Congressional Globe are included in the Floor Debate or Committee Hearing category of legislative history materials. See *supra* note 12.

⁸⁶ We also performed a second internal validation test to check across time and circuits for extreme jumps and drops in the citation patterns. This process

searches rely on a string-matching pattern to identify whether an opinion contains a citation to a legislative history material or not. If our searches in Lexis Advance revealed a number of opinions citing a given legislative history material that is smaller or larger than the number we gleaned from Mayer Opinions, it would suggest that our search terms failed to accurately capture citations to legislative history materials. Within Lexis Advance, we limited our searches to reported opinions by federal courts of appeals and limited the range of publication dates from January 1, 1965 to December 31, 2011. The results by Lexis Advance yielded the same number of reported opinions as found when searching within Mayer Opinions, thus validating our data and the reliability of our method for identifying citations to legislative materials within opinions.

We perform our analyses at the opinion level: this allows us to determine whether, in a given majority opinion, there are any citations to the relevant materials. We believe this is the appropriate measure for two reasons. First, Justice Scalia's clear admonition was against citing legislative history, so the key line is between citation and noncitation.⁸⁷ Second, focusing on citation versus noncitation prevents the analysis being skewed by a few opinions that contain a very large number of citations to the relevant materials.

Table 1 depicts the distribution of majority opinions that cite different types of materials along with the string-matching searches used to identify the citations. Table 1 also identifies what percent of the opinions that cite a specific type of legislative history were authored by a Republican judge.⁸⁸

observed if there was a 20% increase (or decrease) in the number of opinions citing legislative materials as compared to the previous year. We did this for each type of legislative material that had more than 300 opinions citing the given type (omitting Senate concurrent resolutions, House concurrent resolutions, Senate joint resolutions, House joint resolutions, Senate documents, and House documents). The results of this internal validation indicate that there was no sudden and inexplicable drop (or rise) in the number of opinions citing a type of legislative material.

⁸⁷ See *supra* note 57.

⁸⁸ The searches implemented in Lexis Advance are not impacted by the punctuation found within the "Search Term(s)" column for Table 1. For example, "S. Rep." is akin to "S Rep" in the search. However, with regard to the regular expressions used within the text of opinions, punctuation does matter. For this reason, the regular expression analysis includes both "S. Rep." and "S Rep."

TABLE 1: SEARCHES OF MATERIALS IN REPORTED MAJORITY
OPINIONS (1965–2011)

Type of Legislative History Material	Search Term(s)	Number of Opinions*	% Authored by Republican Judge
Floor Debate or Committee Hearing	"cong. rec" OR "congressional rec" OR "cong. record" OR "cong. globe" OR "statement of rep" OR "statement by Rep" OR "statement of sen" OR "statement by sen" OR "statement of chair" OR "statement by chair" OR "statement of hon" OR "statement by hon" OR "statement of representative" OR "statement by representative" OR "statement of senator" OR "statement by senator" OR "statement of honorable" OR "statement by honorable" OR "remarks of rep" OR "remarks by Rep" OR "remarks of sen" OR "remarks by sen" OR "remarks of chair" OR "remarks by chair" OR "remarks of hon" OR "remarks by hon" OR "remarks of representative" OR "remarks by representative" OR "remarks of senator" OR "remarks by senator" OR "remarks of honorable" OR "remarks by honorable" OR "comments of rep" OR "comments by Rep" OR "comments of sen" OR "comments by sen" OR "comments of chair" OR "comments by chair" OR "comments of hon" OR "comments by hon" OR "comments of representative" OR "comments by representative" OR "comments of senator" OR "comments by senator" OR "comments of honorable" OR "comments by honorable" OR "hearing before the committee" OR "hearing before the comm" OR "hearing before the subcommittee" OR "hearing before the subcomm" OR "hearing on h.r" OR "hearing on s." OR "hearing before the h" OR "comm. hearing" OR "hearing before the s" OR "comm. hearing"	7,803	37.29%
Committee Report	"conf. rep" OR "conf. report" OR "h.r. rep" OR "s. rep" OR "s.report" OR "h. rep" OR "h.rep" OR "conference rep" OR "senate rep" OR "house rep" OR "h.r. report" OR "s. report" OR "h. r. report" OR "h. r. report" OR "committee report" OR "committee rep" OR "comm. rep" OR "comm. report" OR "subcommittee rep" OR "subcommittee report" OR "subcomm. rep." OR "subcomm. report"	30,215	56.36%
Code of Federal Regulations	"C.F.R."	41,749	50.84%
U.S. Code	"U.S.C."	231,212	49.75%

*Number of majority opinions validated by Lexis Advance and with the aid of research assistants.

Table 1 presents aggregate data concerning the frequency of citations to legislative materials in majority opinions.⁸⁹ In the next section we disaggregate the statistics from Table 1 to observe more specific citation patterns by Democratic and Republican judges across time. We also employ a series of empirical approaches to test our hypotheses.

IV RESULTS

First, we disaggregate the data and depict the frequency at which each type of legislative history material is cited by Republican and Democratic appellate judges for each year in our analysis.⁹⁰ In each figure the x-axis represents the year the opinions were published, the y-axis represents a count of the

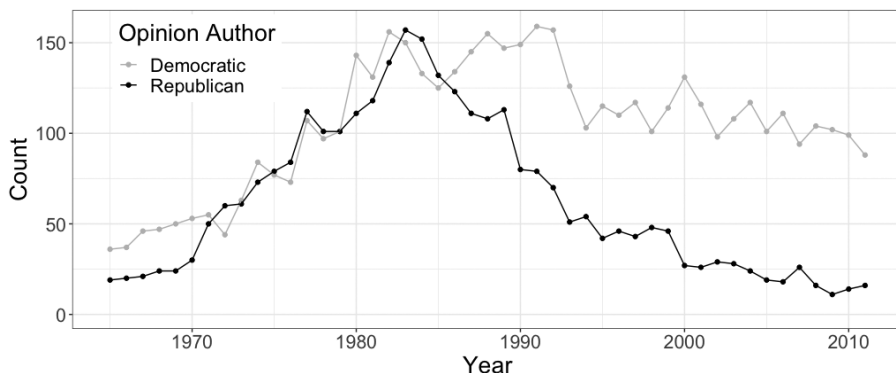
⁸⁹ We performed several samples of our results for citations to committee reports (including conference reports) and committee hearings and found that they accurately reflected citations to the relevant materials. The Congressional Record, however, created a special challenge because of its mixed contents: the Congressional Record contains House and Senate floor proceedings, transcripts of floor debate and remarks, notice of all bills introduced, the text of bills (as passed by a chamber, but usually not when introduced), full text of all conference committee reports, notices of committee and presidential actions and communications, and statements or documents submitted by members of Congress for publication. Richard J. McKinney, *An Overview of the Congressional Record and Its Predecessor Publications: A Research Guide*, LAW LIBR.'S SOC'Y WASH., D.C., (last updated May 2019), <https://www.llsdc.org/congressional-record-overview> [<https://perma.cc/T6SH-7HNQ>]. In addition, some materials from floor debates are actually committee or conference reports or portions thereof (often section-by-section analyses produced by the relevant committee) that are inserted in the record. With the help of two excellent research librarians, we reviewed all 457 majority opinions that referred to a conference report within 100 words of a citation to the Congressional Record, in order to determine whether a given opinion cited both a conference report and a floor debate or instead cited a conference report that was published in the Congressional Record. And, with the help of two excellent research assistants, we reviewed each majority opinion that was identified in our textual analysis as containing a citation to the Congressional Record, in the standard Bluebook format or not (using the search terms identified in Table 1). This examination yielded a total of 7,803 majority opinions citing the Congressional Record. Our research assistants reviewed each of these majority opinions to determine if it cited a statement from a floor debate (that is, a statement or remark by a Senator or Representative, not including the portions of such statements or remarks that were committee or conference reports or portions thereof). The research assistants agreed on more than 99% of the cases that they both coded, and we agreed with the coding of each research assistant in more than 99% of the cases.

⁹⁰ The number of cases resolved by the courts of appeals each year generally increases over the course of our study. See *Statistics & Reports*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports> [<https://perma.cc/8M85-LPW7>] (last visited Feb. 10, 2020). We did not see a systematic increase in the cases that are most likely to involve statutory interpretation (such as administrative law cases). In any event, any increase in caseload (or particular kinds of cases) could not explain our results on differing citation propensities.

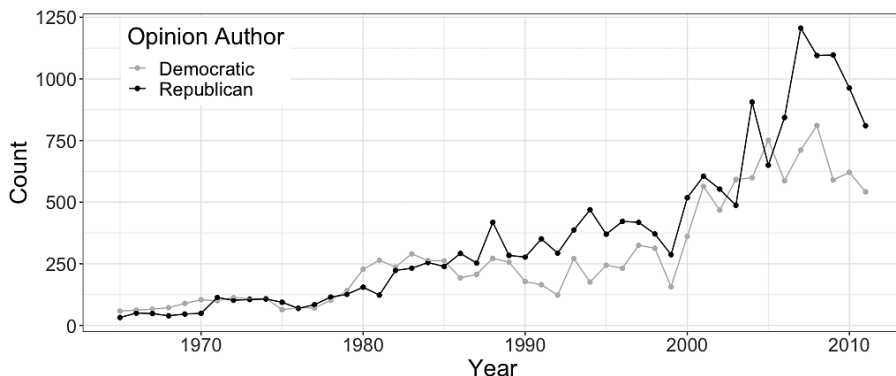
number of opinions that cite a given legislative history material, and the legend identifies Republican (black line) and Democratic (grey line) appellate judges.⁹¹

FIGURE 1: NUMBER OF MAJORITY OPINIONS CITING MATERIALS BY PARTISANSHIP (1995–2011)

Opinions Citing Floor Debates or Committee Hearings (1965–2011)



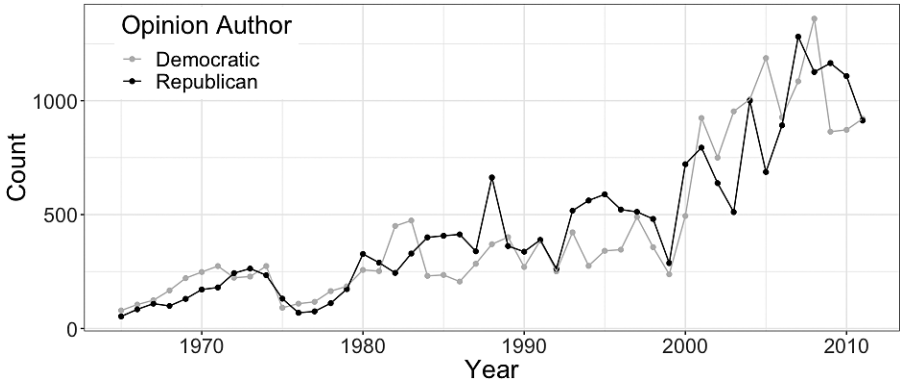
Opinions Citing Committee Reports (1965–2011)



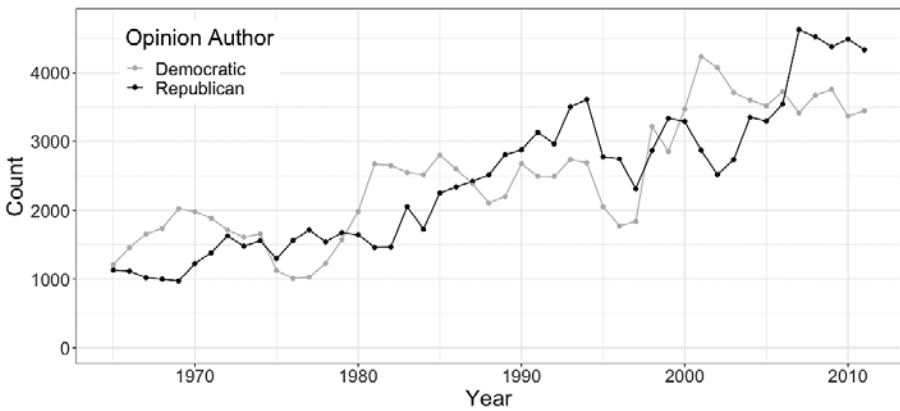
⁹¹ So the y-axis in Figure 1 reflects the total number of majority opinions published in a given year citing a given material rather than the proportion of opinions authored by Republican and Democratic judges for each year that cite a given material. Figures 2, 3, and 4 focus on the average probability scores of Republican and Democratic judges citing legislative history materials.

Note that the absolute number of citations to different materials varies dramatically (e.g., there are many more citations to the United States Code than to floor debates or committee hearings). We are not presenting these figures to highlight the differences in the number of citations to, say, the United States Code as compared to citations to floor statements or committee hearings. Instead, we are presenting them to highlight the relative changes within each type of material, and thus we use scales designed to highlight such changes.

Opinions Citing the Code of Federal Regulations (1965–2011)



Opinions Citing the US Code (1965–2011)



Citations to statements from floor debates or committee hearings are particularly striking, as they rose dramatically for Republican and Democratic judges through the mid-1980s and then equally dramatically decreased for Republican judges. As for committee reports, in the mid-1980s Republican appellate judges began to cite them more often than Democratic appellate judges and the trend continues for the rest of the period in our study, with a significant increase by Republican judges in the early 2000s. By contrast, there are no clear and prolonged patterns for citations to the U.S. Code and the C.F.R.

One interesting aspect of these figures is that Republican judges' increase in citations to committee reports was much greater than the increase in their citations to the U.S. Code: comparing 1965 to 1985 opinions with 1986 to 2011 opinions, the average number of Republicans' majority opinions citing committee reports went from 121 per year to 681 per year (a 462.8% increase), whereas the average number of Republicans'

opinions citing the U.S. Code went from 1,399 per year to 3,292 per year (a 135.3% increase). This increase standing alone is not particularly significant, but it is suggestive of a notable increase in Republicans' citations to committee reports, notwithstanding Justice Scalia's hostility to all forms of legislative history (and, indeed, his early singling out of committee reports for particular condemnation).⁹²

In order to assess the significance of the patterns observed in Figure 1, we employ a range of statistical tests. These empirical tests can evaluate the predicted relationship between Scalia's attacks on legislative history materials and the decision to cite legislative history materials by appellate judges.

A. Partisan Differences in Citation Behavior

As we noted above, our first hypothesis is that after Justice Scalia's attacks on legislative history materials there was a non-random difference between Democratic and Republican appellate judges' citation of legislative history. This raises the question of what years we should use for our comparison. We chose as our main specification comparing majority opinions published between 1965 and 1985 with majority opinions published between 1986 and 2011, on the theory that 1986 represents the most obvious break—it was the year that Scalia was confirmed to the Supreme Court, after some public discussion (including at his confirmation hearings) of his hostility to judicial invocation of legislative history. Thus 1986 was the most obvious year when circuit judges (and circuit judge nominees) would have become aware of the campaign against legislative history and in favor of textualism.

We could have chosen other years as a breakpoint, and we could have dropped data in the first few years after he joined the Supreme Court, on the theory that it may have taken a few years for his attacks to achieve widespread understanding. So we ran each empirical test presented in this Part with alternative specifications for different sets of years. Specifically, our first set of alternative specifications utilized different cutpoints, comparing 1) opinions published from 1965 to 1987 against opinions published from 1988 to 2011; 2) opinions published from 1965 to 1989 against opinions published from 1990 to 2011; and 3) opinions published from 1965 to 1991 against opinions published from 1992 to 2011. Our second set of alter-

⁹² See *supra* note 20 and accompanying text; *infra* notes 111–112 and accompanying text.

native specifications omitted opinions that were published from 1986 to 1988, opinions published from 1986 to 1990, and opinions published from 1986 to 1992. That is, these estimations compared 1) opinions published from 1965 to 1985 against opinions published from 1989 to 2011; 2) opinions published from 1965 to 1985 against opinions published from 1991 to 2011; and 3) opinions published from 1965 to 1985 against opinions published from 1993 to 2011. Under each alternative specification, our primary results retain their statistical significance and substantive meanings.

Returning to our main specification, we first employ unpaired t-tests on two subsets from our data. The first subset contains opinions published from 1965 to 1985 (the pre-Scalia Effect time period), and the second contains opinions published from 1986 to 2011 (the post-Scalia Effect time period). We perform an unpaired t-test for each type of legislative history material in our study to estimate whether there are statistically significant differences in citation behavior towards legislative history materials between Democratic and Republican judges.⁹³ Table 2 presents the results of each t-test.

⁹³ In an alternative specification for the t-test results in Table 2, we calculated the difference in the number of opinions by Democratic judges that cite a given legislative history material and the number of opinions by Republican judges that cite the same material for each year. We performed a set of unpaired t-test on whether the annual differences were significantly different from one another in the two time periods—pre- and post-Scalia’s ascension to the Supreme Court. This specification allows us to test whether the differences in citation behavior between Democratic and Republican judges were significantly different from one another in the pre-Scalia period against the post-Scalia period (they were). The results of this process can be found in section A of the Appendix.

If we had had reason to expect that there was an abrupt change in the citation behavior in one particular year within the range of our study, we would have performed a structural breaks test over the opinion data. However, we have no reason to believe that there was a single relevant event. As we discussed in the text, Scalia’s ascension to the Supreme Court is the best cutpoint, but his attacks likely came to be known, and to be influential, over a period of time. Indeed, that is why we performed the alternate specifications with different years that we note in the text above.

TABLE 2: T-TEST RESULTS: COMPARING DEMOCRATIC AND REPUBLICAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS IN THE PRE-SCALIA EFFECT PERIOD (1965–1985)

	Floor Debates or Committee Hearings	Committee Reports
T-Score (P-Value)	0.496 (0.623)	0.954 (0.345)
# of Opinions	3,455	5,280
% Authored by Rep.	46.97%	45.5%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

COMPARING DEMOCRATIC AND REPUBLICAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS IN THE POST-SCALIA EFFECT PERIOD (1986–2011)

	Floor Debates or Committee Hearings	Committee Reports
T-Score (P-Value)	8.930*** (2.835e-11)	-2.349** (0.023)
# of Opinions	4,348	24,935
% Authored by Rep.	28.8%	58.6%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

The tables reveal statistically significant divergences between Democratic and Republican judges' citation practices between 1986 and 2011 but no statistically significant difference in the earlier time period. Specifically, there are no statistically significant differences between Democratic and Republican circuit judges' majority opinions from 1965 to 1985 in their citations to statements from floor debates or committee hearings or to committee reports, but there are significant differences between Democratic and Republican circuit judges' citation behavior in majority opinions from 1986 to 2011.

Further, within the post-Scalia period t-tests, we observe a positive and statistically significant t-score for the t-test concerning citations to floor debates or committee hearings and a negative and statistically significant t-score for the t-test for citations to committee. The direction of the t-scores suggests

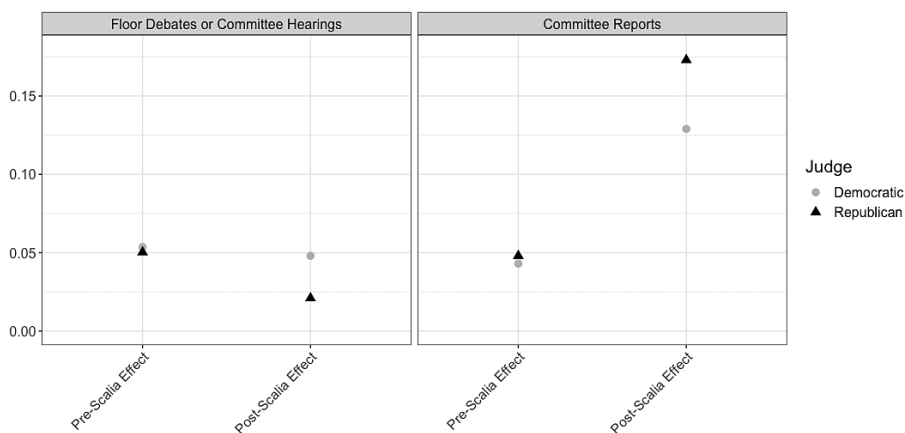
that, on average, in the post-Scalia time period Democratic judges cited floor debates or committee hearings more often, and committee reports less often, than their Republican counterparts.

As a complement to the results in Table 2, we calculate the average probability that a Democratic and a Republican judge within our data would cite each type of legislative history material in an opinion before and after the Scalia Effect. The purpose of this analysis is to take into account changes in the ratio of Democratic to Republican judges in the Courts of Appeals. We want to determine whether the citation behavior trends we observe in Figure 1 and Table 2 are driven by partisan differences rather than differences in the population sizes of Democratic and Republican appellate judges. We first divide all opinions into pre-Scalia Effect (1965–1985) and post-Scalia Effect (1986–2011) categories, and then subdivide them into a Republican author group and a Democratic author group. We calculate the probability of citing a given legislative history material by dividing the number of published opinions citing a given legislative history material by the number of published opinions within each partisan group for each time period.⁹⁴ The resulting score ranges from zero to one, with higher scores implying that a judge is more likely to cite a given legislative history material.⁹⁵ Given this calculation, the resulting estimate can also be interpreted as the average probability that a Democratic judge or a Republican judge in our study would cite a given legislative history material. Further, the estimated scores can also be referred to as propensity scores, as the estimated scores depict and represent the mean observed citation behavior for each type of judge. Figure 2 presents the average probability scores estimated in each calculation.

⁹⁴ This calculation assumes that, on average, a Democratic judge and a Republican judge will author a similar number of published opinions each year.

⁹⁵ This calculation does not provide us with a measure of uncertainty for the point estimates, and for this reason there are no confidence intervals included in the figure.

FIGURE 2: AVERAGE PROBABILITY OF A GIVEN JUDGE CITING LEGISLATIVE HISTORY MATERIALS IN A MAJORITY OPINION: PRE-SCALIA EFFECT AND POST-SCALIA EFFECT



The visualizations in Figure 2 suggest that the average probability that a Republican judge would cite statements from floor debates or committee hearings decreased following Scalia's attacks on legislative history. By contrast, the average probability that a Democratic judge would cite such statements in her opinions was almost identical in both time periods. Importantly, the result suggests that the observed differences in citation of floor debates or committee hearings between Democratic and Republican judges are not simply driven by the ratio of Republican to Democratic judges.

Further, Figure 2 suggests that in the pre-Scalia Effect time period the average Democratic judge and the average Republican judge had very similar propensities to cite committee reports in majority opinions. In the post-Scalia Effect time period, the average probability for both types of judges of citing committee reports dramatically increased, with a larger increase for Republican judges. Overall, Figure 2 supports the estimated statistical differences in citation behavior between Democratic and Republican appellate judges found in Table 2 and provides further evidence that the results in Table 2 are not simply driven by changes in the composition of the appellate bench.

B. Presidential Cohort Effects on Citation Patterns

Our second hypothesis predicts that judges nominated by a President who came before Reagan (pre-Reagan Cohort) would be more likely to cite legislative history materials than their counterparts appointed by Reagan and later Presidents

(post-Reagan Cohort).⁹⁶ We estimate another set of unpaired t-tests in order to test this hypothesis. We perform an unpaired t-test for each type of legislative history material in our study to estimate whether there are statistically significant differences in citation of legislative history materials between judges from the pre-Reagan cohort compared to judges from the post-Reagan cohort.⁹⁷ Table 3 presents the results of each t-test.⁹⁸

⁹⁶ We also tested this hypothesis with a set of pairwise t-tests comparing the number of opinions by each presidential cohort that cited legislative history materials. We observed, for example, that Nixon judges' citation of statements from floor debates or committee hearings is statistically distinct from the more recent Republican cohorts. While the results provide evidence of statistically significant non-random differences in the citation behavior across older and newer presidential cohorts, the tests cannot tell us which cohorts will cite certain legislative history materials more or less often. For this reason, we also calculated the average probability that a judge from each presidential cohort would cite floor debates or committee hearings along with the average probability that a judge from each cohort would cite committee reports. The results of each pairwise t-test and the calculated average probability scores by cohort are in section B of the Appendix.

⁹⁷ In an alternative specification for the t-test results in Table 3, we employed a 1986 cutpoint as the start of the post-Reagan cohort instead of a cutpoint of 1981. The empirical and substantive results of Table 3 held under this alternative specification.

⁹⁸ There are two rather important considerations that we addressed in a robustness check of our results. The first involves the D.C. Circuit, which hears a disproportionate percentage of cases involving statutory interpretation. The second is on the role of the *Chevron* doctrine, which changed the methodology a judge would apply to determine whether to accept an agency's legal interpretation of the statute it administers. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

As to the former, we replicated our primary results in Table 3 while omitting D.C. Circuit opinions. The estimated coefficients for the Scalia Effect variable retained the same direction and level of statistical significance for each replication model. This finding indicates that the citation behavior of D.C. Circuit judges is not driving our results in Table 3.

To perform a robustness check with respect to *Chevron*, we ran a series of unpaired t-tests comparing Democratic judges' and Republican judges' citations in their majority opinions in the following categories: 1) all opinions from 2003 to 2011; 2) opinions citing *Chevron*; 3) opinions citing but not applying *Chevron*; and 4) opinions citing and applying *Chevron*. Our general findings of observed differences between Democratic and Republican judges replicate for this specific time period (2003-2011). Likewise, our statistical findings of meaningful differences in citations of floor debates or committee hearings by Republican and Democratic judges hold across each specification with respect to the *Chevron* doctrine. With regard to committee reports, the statistically significant difference in citation behavior between Democratic and Republican judges goes away when we narrow our focus to opinions citing committee reports and citing the *Chevron* doctrine. Similarly, our statistically significant finding goes away when we narrow our focus to opinions citing committee reports and citing and applying the *Chevron* doctrine. However, for opinions citing committee reports and *Chevron* but not applying the *Chevron* doctrine, the statistically significant difference between Democratic and Republican appellate judges reappears. These results are in section C of the Appendix.

TABLE 3: T-TEST RESULTS: COMPARING PRE-AND POST-REAGAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS (1965-2011)

	Floor Debates or Committee Hearings	Committee Reports
T-Score (P-Value)	-7.753*** (1.567e-12)	4.238*** (9.074e-05)
# of Opinions	7,803	30,215
% Authored by Post-Reagan Cohort	17.0%	51.3%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

Table 3 reveals statistically significant divergences between pre-Reagan and post-Reagan judges' citation practices. Specifically, there are statistically significant differences between pre- and post-Reagan circuit judges' majority opinions in their citations to statements from floor debates or committee hearings and to committee reports.

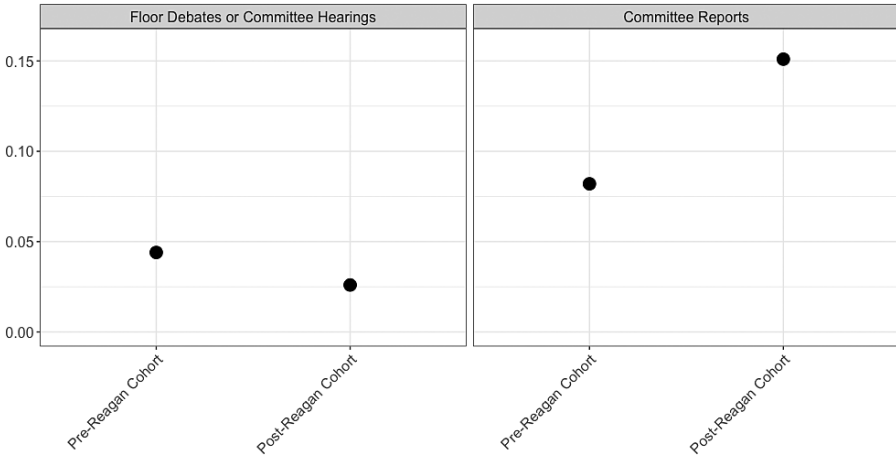
As with the t-tests in Table 2 for ideology, these results in Table 3 for presidential cohorts provide statistical evidence that Scalia's attacks on legislative history and advocacy of textualism are associated with differences among the cohorts' citation of these legislative history materials.

To extend our findings in Table 3, we calculate the average probability that a judge from each cohort would cite each type of legislative history material. For each cohort, we calculate the probability of citing a given legislative history material by dividing the number of opinions citing a given legislative history material by the number of published opinions.⁹⁹ The resulting estimate ranges from zero to one, with higher scores suggesting a higher probability of a citation to a given legislative history material. The resulting estimate indicates the probability that the average judge from within a cohort would cite a given legislative history material in a given opinion. As we noted above, these estimated scores are also referred to as propensity scores, as the estimated scores depict and represent the mean

⁹⁹ This calculation assumes that, on average, each pre-Reagan and post-Reagan judge will author a similar number of published opinions each year, regardless of whether she is a Democrat or Republican. This calculation does not yield a measure of uncertainty for the point estimates, and thus there are no confidence intervals included in the figure.

observed citation behavior for each cohort. Figure 3 presents the estimated scores.¹⁰⁰

FIGURE 3: AVERAGE PROBABILITY OF A GIVEN JUDGE CITING LEGISLATIVE HISTORY MATERIALS IN A MAJORITY OPINION: PRE-REAGAN COHORT AND POST-REAGAN COHORT



The visualizations in Figure 3 suggest that the average probability of citing statements from floor debates or committee hearings is smaller for a judge in the post-Reagan cohort as compared to a judge in the pre-Reagan cohort, and the reverse is true for committee reports. Thus Figure 3 indicates that the pre-Reagan cohort and the post-Reagan cohort exhibit different citation behaviors towards legislative history.

In order to determine if there is an underlying partisan dimension within each cohort driving the average probability scores in Figure 3 and the results in Table 3, we disaggregate the pre- and post-Reagan cohorts based on the political party of the President appointing the judge.¹⁰¹ Figure 4 presents these estimated scores.¹⁰²

¹⁰⁰ As we noted above, we chose to use Reagan as the dividing line on the theory that even pre-1986 Reagan judges had fewer opportunities to decide statutory interpretation cases and thus might be more persuadable. But in light of our use of 1986 as a cutpoint for the Scalia Effect in our first hypothesis, we checked the robustness of our scores by treating Reagan judges nominated in 1986 or earlier as a part of the pre-Reagan cohort. The substantive probability scores changed very little.

¹⁰¹ This calculation functionally operates the same as the previous estimation of average probability scores. See *supra* note 99.

¹⁰² As with the previous analogous estimation, *supra* note 100, we checked the robustness of our scores by treating Reagan judges nominated in 1986 or earlier as a part of the pre-Reagan cohort. The substantive average probability scores

FIGURE 4: AVERAGE PROBABILITY OF A GIVEN JUDGE CITING LEGISLATIVE HISTORY MATERIALS IN A MAJORITY OPINION BY PARTISANSHIP AND COHORT

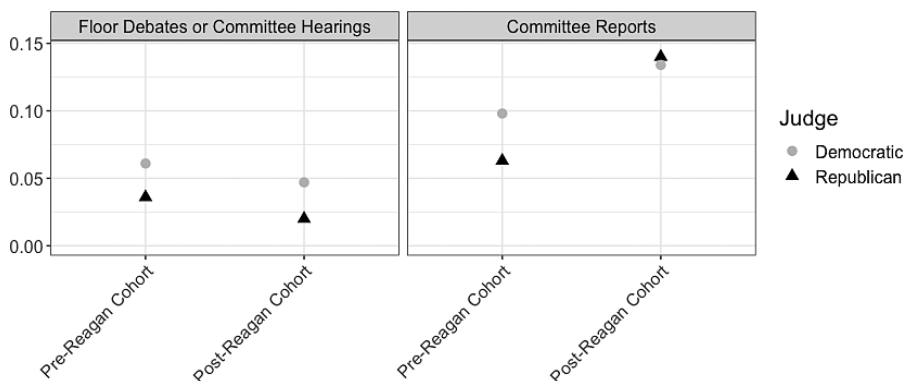


Figure 4 suggests that post-Reagan Republican judges have a lower average probability of citing statements from floor debates or committee hearings than pre-Reagan Republican judges. The same is true of pre- and post-Reagan Democratic judges. This finding supports our prediction in our second hypothesis, as both Democratic and Republican judges in the post-Reagan cohort are less likely to cite statements from floor debates or committee hearings than their counterparts in the pre-Reagan cohort. Notably, when we compare the estimated scores across the pre-Reagan and post-Reagan cohorts, the (slightly) larger difference in citations to statements from floor debates or committee hearings is among the Republican judges.¹⁰³ The results with respect to committee reports are more dramatic. Republican judges have a larger difference in their pre- and post-Reagan cohorts than do Democratic judges.

changed very little. This robustness check included a re-estimation of the scores found in Figure 4 under this alternative specification. The results retained the same substantive meaning.

We considered relying on a difference-in-differences estimation (DID), but we had concerns over violating the parallel trends assumption entailed in DID. Post-Reagan judges joined the bench in 1981 or thereafter, so a DID estimation comparing pre- and post-Reagan judges makes sense only for the post-1980 period, rather than the 1965 to 2011 period that our data covers. That said, we performed DID estimations for the 1981 to 2011 period. The results conform to the estimations presented in Figure 4.

¹⁰³ When compared, Republican judges in the pre-Reagan cohort have a 0.036 probability of citing floor debates or committee hearings, whereas Republican judges in the post-Reagan cohort have a 0.020 probability—a difference of 0.016. Democratic judges in the pre-Reagan cohort have a 0.061 probability of citing floor debates or committee hearings, whereas Democratic judges in the post-Reagan cohort have a 0.047 probability—a difference of 0.015.

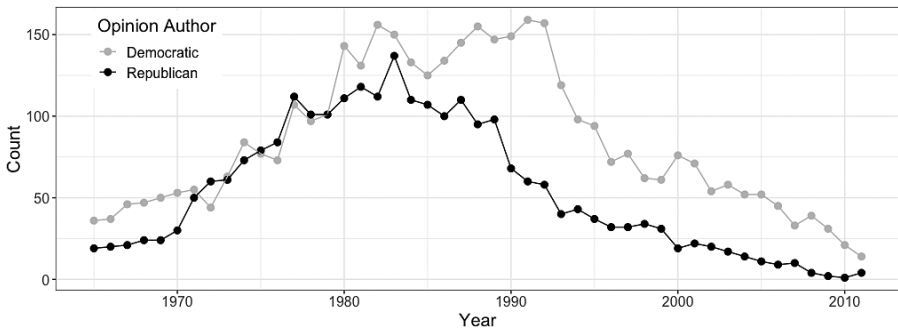
Interestingly, the propensity to cite committee reports is highest for the post-Reagan Republican cohort.

The results thus far indicate that judges appointed before Reagan differ from judges appointed by Reagan or thereafter, and that this difference exists both for Republican and Democratic judges. The differences between Republican and Democratic judges are not as striking as the commonalities among them: pre-Reagan Republican and Democratic judges are more likely to cite statements from floor debates or committee hearings, and less likely to cite committee reports, than Republican and Democratic judges appointed by Reagan or thereafter.¹⁰⁴

Figure 1 displays the number of opinions citing legislative history materials before and after Scalia’s attacks. In Figure 5 we disaggregate those numbers by presidential cohort and partisanship. This allows a comparison of pre-Reagan Republicans with pre-Reagan Democrats, and post-Reagan Republicans with post-Reagan Democrats. These figures are not propensity scores, but instead display total numbers of opinions in each category. Importantly, the pre-Reagan cohort is shrinking in the later time periods in Figure 5 due to deaths and retirements. This helps explain why the total number of opinions authored by pre-Reagan judges citing legislative history materials (or anything else, for that matter) dwindles. It also suggests that comparisons in Figure 5 between judges from different presidential cohorts may be less meaningful than comparisons within presidential cohorts.

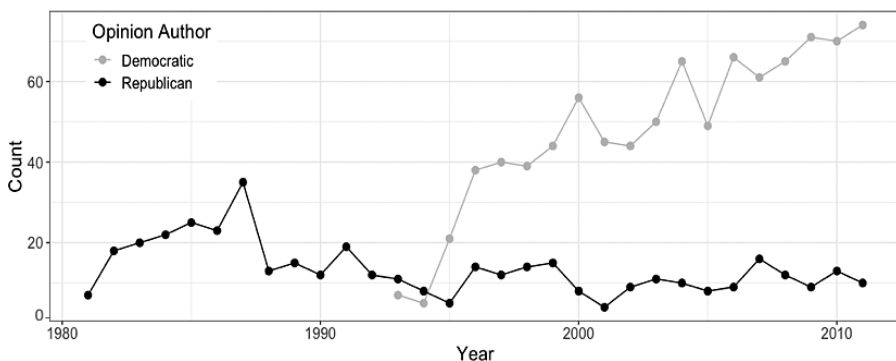
FIGURE 5: NUMBER OF MAJORITY OPINIONS CITING MATERIALS BY PARTISANSHIP AND COHORT (1965–2011)

Opinions Citing Floor Debates or Committee Hearings by Pre-Reagan Judges (1965–2011)

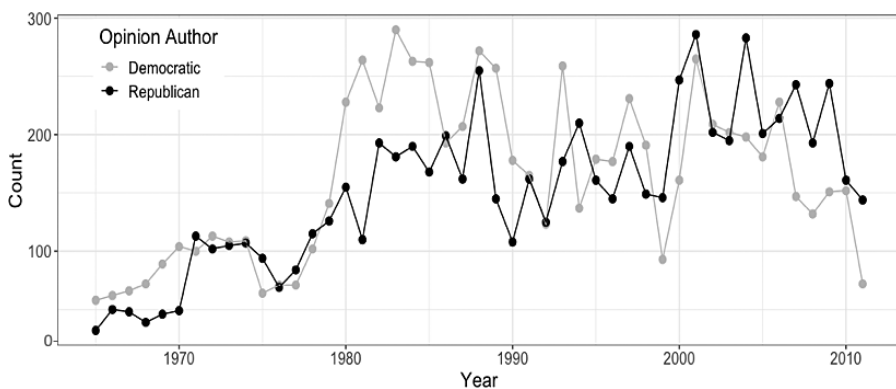


¹⁰⁴ We include data disaggregated for each appointing President in section B of the Appendix.

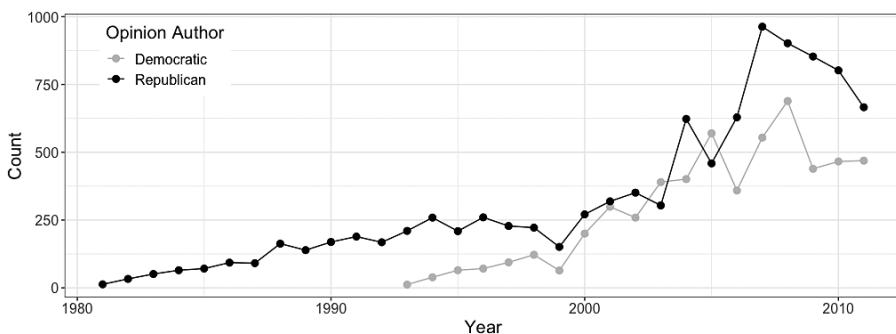
Opinions Citing Floor Debates or Committee Hearings by Post-Reagan Judges (1965–2011)



Opinions Citing Committee Reports by Pre-Reagan Judges (1965–2011)



Opinions Citing Committee Reports by Post-Reagan Judges (1965–2011)



The visualizations in Figure 5 demonstrate that pre-Reagan Democratic authors cite floor debates or committee hearings more often than pre-Reagan Republican judges do. And post-Reagan Democratic authors similarly cite floor debates or

committee hearings more than post-Reagan Republican judges do.

Turning to committee reports, there is a relatively stable number of opinions authored by pre-Reagan Democratic and Republican judges citing such reports across the entire time period of interest. By contrast, there was an explosion of opinions citing committee reports for post-Reagan Democratic and Republican judges in the mid-2000s. And the rise was particularly striking for post-Reagan Republican judges.¹⁰⁵

¹⁰⁵ When Figure 5 is replicated with the percentage, rather than the number, of all majority opinions that cite a particular type of legislative history, the same substantive patterns of citation behavior arise. In Figure 5 we present the number instead of the percentage of opinions to maintain consistency with Figure 1.

We performed four additional regressions over our data as additional specifications. The first two regressions addressed our empirical results in Table 2 and the second addressed the results in Table 3. The first regression is a logistic regression with the opinion as the unit of analysis and whether a specific type of legislative history is cited or not as the binary dependent variable. The independent variables are also binary and interact within the regression. The first independent variable is whether the authoring judge is Democratic or Republican, and the second is whether the opinion was written before or after the Scalia Effect. The second regression is a negative binomial. The unit of analysis is at the year and circuit level. The dependent variable of interest is a count of the number of opinions authored each year within each circuit that cite a specific legislative history material. Once again, two binary variables that identify the partisanship of the authoring judge and the time period (pre- or post-Scalia effect) are included in the regression and interacted. The third regression is a logistic regression with the same unit of analysis and dependent variable design as the previous logistic regression, with the exception that the interacted independent variable for the Scalia Effect is replaced by an independent variable for pre- versus post-Reagan judges. That is, the first independent variable remains the same (whether the authoring judge is Democratic or Republican), and the only change is substituting the judicial cohort for the year Scalia joined the Court, in line with the difference in focus between Table 2 and Table 3. The final regression is a negative binomial regression with the same unit of analysis and dependent variable design as the previous negative binomial regression, with the exception that the interacted independent variables concern the partisanship of the authoring judge and the pre-versus post-Reagan cohort of the authoring judge (again, corresponding to the difference in focus between Table 2 and Table 3). The results of each regression support the substantive and empirical findings presented in Figures 1, 2, 3, 4, and 5 and in Tables 2 and 3. More broadly, the results of the first and second regressions provide statistically significant empirical support for our findings in this Article with respect to judges' partisanship and citation behavior, and the results of the third and fourth regressions provide statistically significant empirical support for our findings in this Article with respect to judges' cohort and citation behavior.

If we had had reason to suspect irregular citation behaviors from year to year, we would have interacted the partisanship variable with the year the opinion was published. Such a specification could mitigate bias introduced if irregular behavior in one year confounded the interpretation of the partisanship variable. For our data, however, Figure 1 and subsequent analyses indicate that there were relatively steady and predictable changes from year to year within the range of our study.

With respect to the visualizations in Figures 4 and 5 and the empirical results in Table 3, it is important to highlight that when we control for the political party of the judges, the differences in citation behavior among pre- and post-Reagan cohorts are significant. And when we control for pre- and post-Reagan cohorts, the differences in citation behavior between Democratic and Republican judges are also significant. This leads us to conclude that the political party of a judge and the cohort have independent impacts on judges' citation behavior.

V

IMPLICATIONS

In the mid-1980s Antonin Scalia launched a campaign against judges invoking legislative history in statutory interpretation. He said that what mattered was the text that Congress voted on, and legislative history was irrelevant. His attacks soon gained widespread notice and followers, helped by his prominence as a Justice and the sharpness and relentlessness of his attacks. The resulting debate over the use of legislative history, and textualism versus purposivism more generally, was the central debate in statutory interpretation. In this Article, we have examined the effect of Scalia's attacks, in light of the facts that, first, there was an ideological valence to judges' public reactions to those attacks and, second, some judges had been deciding cases long before Scalia's attacks began. We hypothesized that Republican circuit judges would respond to the attacks more than Democratic circuit judges, and that circuit judges nominated by Reagan or later Presidents (post-Reagan) would respond more than pre-Reagan judges.

In an additional set of separate regressions, we also considered whether some judge-level characteristics of the authoring judge beyond political party and presidential cohort correlate with citations to legislative history materials. Relying on biographical data from the Federal Judiciary Center, we were able to identify for each judge the year she joined the appellate bench, her gender, and the law school she attended. As to the latter, following Epstein, Landes, and Posner, we compared Yale Law and Harvard Law graduates to the graduates of other law schools. LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 355–56 (2013). We found that, controlling for political party, the more recently a judge joined the bench the less likely she was to cite floor debates or committee hearings, and the more likely she was to cite committee reports. As for education, judges from Yale and Harvard were slightly less likely to cite floor debates or committee hearings than were other judges. The regression results also revealed no statistically significant difference between citation to committee reports by graduates from Yale and Harvard and such citations by graduates of other law schools. Further, we found no statistically significant correlation between gender and citation of any type of legislative history materials.

Specifically, we hypothesized that Republican and post-Reagan judges would be less likely to cite legislative history. What we found is more nuanced: Republican judges and post-Reagan judges were less likely to cite statements from floor debates or committee hearings, but they were more likely to cite committee reports (including conference reports).

So, how do we explain these results? One seeming possibility, which we did not hypothesize, involves control of Congress and a particular application of judicial ideology. As we noted above, between 1933 and 1980, Democrats controlled the Senate for all but four years, and between 1933 and 1994, the Democrats controlled the House for all but four years.¹⁰⁶ So through the 1970s, citing committee reports was likely to entail citing reports written under the auspices of Democratic leadership, whereas floor statements could come from any member of Congress. A judge who wanted to invoke Republican representatives' views thus might switch from floor statements to committee reports after Republicans started controlling committee reports.

This possible reason for a switch to committee reports would not explain the behavior of Democratic judges: there is no reason to believe that post-Reagan Democratic judges wanted to cite committee reports more, and floor statements less, than their pre-Reagan Democratic counterparts because that way they would be citing Republican representatives. As for Republican judges, note that this explanation entails affected circuit judges being more ideologically conservative, or perhaps more short-term ideologically conservative, than Scalia. After all, Scalia advocated against invocation of legislative history, and he started his campaign in 1985—the fifth year of Republican control of the Senate. So judges who switched from citing floor statements to citing committee reports in order to cite Republicans were either more ideological than Scalia or more focused on immediate implementation of ideology. Scalia is usually considered to be on one end of the ideological spectrum, but this explanation entails many circuit judges who were nontrivially more ideological than he was, which is certainly conceivable, but there is no evidence that Republican judges were more ideologically conservative than Scalia was.

The history of party control during our time period provides an opportunity to test this explanation. After decades of Demo-

¹⁰⁶ See *supra* note 42 and accompanying text.

cratic control, Republicans controlled the Senate from 1981 to 1987, but the House remained out of their reach until 1995. If Republican judges' move to citation of committee reports reflected their desire to cite Republicans in Congress, then we would expect a sharper increase in Republicans' citations to Senate committee reports in the years during and immediately after Republican control of the Senate than in their citations to House committee reports. Others have found that most citations to legislative materials occur within six years of legislative passage, so if Republican judges wanted to cite Republican Senators we should see a spike in citations to Senate and not House reports in the years 1981 to 1990.¹⁰⁷ But in fact when we compare citations from 1975 to 1980 with citations from 1981 to 1990, we find no statistically significant difference in the increase in the average probability score of a Republican judge citing a Senate committee report as compared to a House committee report.¹⁰⁸ A second test focuses more specifically on post-Reagan Republican judges: if such judges were inclined to cite Republicans in Congress, we would expect a sharper increase in their citations to House committee reports in the years after the Republicans gained control of the House in 1995 than in their citation to Senate reports. So we can compare post-Reagan Republicans' citations to each house's committee reports in the 1981 to 1994 period with their citations in the 1995 to 2008 period. We find no statistically significant difference in the increase in the average probability score of a post-Reagan Republican judge citing a House committee report as compared to a Senate committee report.¹⁰⁹ These findings, combined with the lack of evidence that Republican judges

¹⁰⁷ See John M. de Figueiredo & Edward H. Stiglitz, *Signing Statements and Presidentializing Legislative History*, 69 ADMIN. L. REV. 841, 855–56 (2017).

¹⁰⁸ To allow for a time lag after the Republican takeover of the Senate in 1981, and as a robustness check, we also compared citations from 1975 to 1980 with citations from 1984 to 1990. We found no statistically significant difference in the increase in the average probability score of a Republican judge citing a Senate committee report as compared to a House committee report.

¹⁰⁹ As another robustness check, we allowed for a time lag, this time after the Republican takeover of the House in 1995: we compared post-Reagan Republicans' citations to committee reports in the 1981 to 1994 period with their citations in the 1998 to 2008 period. Again, we found no statistically significant difference in the increase in the average probability score of a post-Reagan Republican judge citing a House committee report as compared to a Senate committee report. We performed similar robustness checks for all Republican judges (pre- and post-Reagan)—one comparing committee report citations from 1981 to 1994 with those from 1995 to 2008, and another comparing such citations from 1981 to 1994 with those from 1998 to 2008. As with the robustness checks for post-Reagan Republican judges, there were no statistically significant differences in either calculation.

were more ideologically conservative than Scalia, lead us to conclude that a desire to cite Republican Senators is not driving our results on Republican judges' citation patterns.¹¹⁰

We find a different explanation more persuasive, although we cannot prove it with our data. We think that our results—which, recall, are only partially consistent with our original hypotheses—make sense in light of what happened both before and after Scalia launched his campaign. For most of the twentieth century, there was a broad consensus on the hierarchy of legislative history materials noted above. Then, in the 1970s through the mid-1980s there was an explosion in citations to statements from floor debates and committee hearings, but no similar explosion in citations to committee reports. The hierarchy of legislative history apparently had lost some of its force.

Scalia and others' attacks on legislative history seem to have destabilized, at least for some judges, the practices that were getting established in the 1970s and early 1980s. And that destabilization seems to have had a greater impact on the judges that we hypothesize would be most likely to be influenced.

But there were two competing sides in the debate in the mid-1980s and thereafter: textualists like Scalia who said that legislative history should generally be ignored, and purposivists who said that judges should start with the statutory language but should be willing to look to reliable legislative

¹¹⁰ Another alternative hypothesis involves lawyers' supply of citations to circuit judges: perhaps at least one side in a case usually will have an incentive to cite legislative history, so that lawyers usually will present legislative history in their briefs; and insofar as judges' opinions reflect what is in lawyers' briefs, the judges' opinions will thus cite legislative history. Holding aside the degree to which opinions include all the arguments and citations in lawyers' briefs, this hypothesis would not explain our results. If we had found no differences in the Republicans' and post-Reagan judges' citations relative to their counterparts, then this hypothesis might be tenable. But this hypothesis cannot explain the differences we find. Similarly, if one posited that lawyers are more likely to cite a particular kind of legislative history in particular kinds of cases that might have increased or decreased over the period of our study (e.g., a category of case that might have risen in the post-Scalia period), that might conceivably explain a rise or fall in citations to a particular kind of legislative history among all judges. But because panel selection of judges for a given case is blind to their political party, it would not explain the differences we find. We suppose that one could attribute an extraordinary level of clairvoyance to lawyers in knowing that, for instance, Republican judges would be relatively more likely to cite committee reports than their Democratic counterparts despite Scalia's attacks (and even greater clairvoyance in knowing not only who would be on their panel but also who on that panel would write the majority opinion), but that strains credulity, especially as no one before this Article has hypothesized (much less found) the divergence in the citation of committee reports versus floor statements or committee hearings that we find in this Article.

history if there were statutory ambiguities. These purposivists usually invoked the hierarchy of legislative history materials that courts and commentators had regularly invoked through the 1960s, with committee reports at the top and statements from floor debates and committee hearings far below.

One might have expected—and we hypothesized—that Republican and post-Reagan judges would have tended to follow Scalia's lead and cite legislative history much less than their Democratic and pre-Reagan counterparts (who would have tended to cite all forms of legislative history). But in this Article we find that Republican and post-Reagan judges adopted practices more in line with ideological liberals like Judges Mikva and Wald who rejected Scalia's blanket opposition than with Scalia himself. The Republican and post-Reagan judges were less likely than their counterparts to engage in the practice, which had been common in the 1970s, of citing statements from floor debates or committee hearings; but they were more likely than their counterparts to cite committee reports. In this way, these judges helped to revive the approach to legislative history that prevailed until the 1970s and was later championed by Scalia's opponents. The anti-legislative-history movement led by Scalia seems to have shifted the debate, and the Republican and post-Reagan judges also shifted. Their shift, however, was to the modified purposivism that responded to Scalia's critiques and had prevailed until the 1970s, not to the broader rejection of legislative history that Scalia advocated.

The fact that Republican and post-Reagan judges were more likely than their counterparts to cite committee reports is particularly ironic in light of Scalia's earliest attacks on legislative history: as we noted above, in his first writings expressing doubt about legislative history, he stated that he was more skeptical of committee reports than of other forms of legislative history.¹¹¹ As he said (after discussing other forms of legislative history) in a speech he gave at many law schools between the fall of 1985 and the spring of 1986, "At the bottom of the list I would place—what hitherto seems to have been placed at the top: the committee report."¹¹² Despite Scalia's placement of committee reports at the bottom of the hierarchy of legislative history materials, Republican and post-Reagan judges became more likely than their counterparts to cite these reports, even as they were less likely to cite floor statements or committee hearings. They appear to have accepted the hierarchy of legis-

¹¹¹ See *supra* note 20.

¹¹² Farber & Frickey, *supra* note 20, at 442 n.64 (excerpting this speech).

lative materials that had previously prevailed—and that Scalia had rejected.¹¹³

This Article thus has three significant implications. First, influence on judges was heavily based on their political party and their pre-existing experience engaging in judicial statutory interpretation. Republican judges were more influenced by the

¹¹³ This does not necessarily mean that judges' citation practices were sincere, in the sense that they were citing materials that they believed should be cited. It is possible that their practices were insincere because they were strategically aimed at the Supreme Court, which might review any of their decisions: perhaps circuit judges cited materials based on what they thought the Supreme Court Justices wanted to see. If so, judges' citation practices reflect not persuasion but a desire to please the Supreme Court.

There is no way to know whether such insincerity explains our results, but it seems quite unlikely. Either all judges behaved strategically by citing materials insincerely (that is, to please the Supreme Court), in which case there is a puzzling divergence between what Republican and post-Reagan judges regarded as good strategy and what Democratic and pre-Reagan judges considered good strategy, or only one set of judges (Republican and post-Reagan or Democratic and pre-Reagan) was engaged in such insincere strategic behavior. The first possibility (with all judges citing materials in order to please the Supreme Court) might conceivably help to explain a consistent rise (or fall) in citations to legislative history (or even some types of legislative history) among all judges if the Supreme Court moved from one approach to legislative history to a different one. But it cannot explain the divergence we observe unless one further supposes that these sets of judges systematically reached different conclusions regarding what strategic citation behavior entailed. This possible explanation seems particularly problematic for the divergence between Democratic and Republican judges, whose citation behavior did not significantly differ pre-Scalia but did significantly differ post-Scalia. We would have to assume that they agreed on good citation strategy pre-Scalia but disagreed post-Scalia.

The second possibility assumes that Republican and post-Reagan (or, conversely, Democratic and pre-Reagan) judges behaved significantly more insincerely than their counterparts—and, in fact, Republican or Democratic (but not both) judges were not insincere pre-Scalia, but became insincere post-Scalia. We have no basis for positing a divergence in judges' taste for insincere citation behavior, much less for it arising only for either Democrats or Republicans post-Scalia. Beyond that, we also note that neither side of the divergence between Democrats and Republicans and between pre- and post-Reagan judges is obviously the strategic one, in terms of pleasing the Supreme Court. Being more likely to cite committee reports but less likely to cite floor statements might appeal to some Justices in this period, but it might displease others (not only Scalia and presumably Thomas but also Justices who were happy to cite floor statements). And insofar as ideology might play a role, it seems strange that Republican judges, relative to their Democratic counterparts, adopted a citation practice that would be more associated with moderate Democrats than with conservative Republicans. As we initially hypothesized in this Article, the more obvious result of ideology would be to push Republicans to cite all forms of legislative history less often than their Democratic counterparts.

All that said, we cannot rule out the possibility that our results reflect judges citing materials simply to please the Supreme Court. And if we could know the extent of that insincerity, it would shed additional light not only on the phenomena we find but also on larger questions involving judicial behavior. Ultimately, though, this possibility seems interesting but, in light of our data, highly improbable.

attacks on legislative history than were their Democratic counterparts. Independent of that ideological impact, judges who began serving during or after Scalia's attacks were more influenced than were their earlier-appointed counterparts. And, reflecting the independence of these two effects, the combination of them was particularly powerful: the effect for Republican post-Reagan judges was greater than for Republicans alone or post-Reagan judges alone.

Second, a single Justice was able to have a remarkable influence on judicial interpretation. Most Justices are part of larger coalitions that, over many years, push judicial behavior in one direction or another. But this was a campaign led by a single Justice, and it had a fairly quick and dramatic effect—and one that has persisted. Other judges (and later Justice Thomas) joined Scalia's crusade, though generally not with the same rejection of the invocation of legislative history.¹¹⁴ Scalia was the acknowledged leader, and, as our data show, the crusade against legislative history had effects that were immediate and long-lasting, in addition to being significant. There may have been other Justices who had a similar impact on some aspect of judicial behavior, but they have been few and far between. John Marshall is the most obvious candidate, but it is not clear how many others there are. As Justice Kagan noted in the quotation at the beginning of this article, Justice Scalia's influence on statutory interpretation was exceptional.¹¹⁵

But, third, the impact of Scalia's campaign was mixed. He put the issue on the table, spurring judges (and lawyers and law professors) to consider ignoring legislative history, and more generally to think about how and why they would treat legislative history. That is an enormous impact. But the response to his attacks seems to have been that the most affected judges jettisoned floor and hearing statements, a form of legislative history widely considered fairly unreliable, but embraced committee reports, a form of legislative history that had been considered reliable—by the lights of those who were willing to invoke legislative history. Scalia's campaign was able to stimulate a rethinking, but not an adoption of his approach. That he was able to spur this rethinking is remarkable. He did not, however, achieve his goal of eliminating virtually every invocation of legislative history.

The bottom line from our data and analyses is that ideology matters, as does becoming a judge in the era before textualists

¹¹⁴ See *supra* notes 22–27 and accompanying text.

¹¹⁵ See *supra* note 1 and accompanying text.

started arguing against legislative history: the data show meaningful differences based on political party and pre- versus post-Reagan cohort. But the nature of the impact was not what Scalia wanted. The judges most influenced by his attacks seem to have (re)considered the role for legislative history and decided to adopt the pre-1970s consensus. From his perspective, his impact was paradoxical, in the sense of being self-contradictory: the judges his attacks most influenced accepted one element of his critique and rejected another element, even though he conceptualized those elements as part and parcel of a coherent textualist whole. He wanted to convince judges to adopt textualism, but they did not. He influenced, but he did not persuade.

CONCLUSION

We began this article with a quotation from Justice Kagan that Justice Scalia “taught everybody how to do statutory interpretation differently” and that “we’re all textualists now.”¹¹⁶ How do we assess those claims, and the success of Scalia’s campaign against legislative history?

One way of looking at the data we present is that Scalia had meaningful success—he got half a loaf, and half a loaf is significant. He attacked a practice he deemed unprincipled, and although circuit judges did not wholly accept his prescription, Republican and post-Reagan circuit judges who might be expected to be more influenced by Scalia did become more careful than their counterparts in their invocation of legislative history. He thus managed to destabilize the prevailing norms and push many judges to think more carefully about their use of legislative history.

On a different view, many judges may have been influenced by Scalia’s critique of the prevailing approach to legislative history, but they rejected his categorical hostility to it. Under Scalia’s approach, judges should treat legislative history as basically irrelevant. Prominent liberal judges responded that legislative purpose is relevant, and that there is a principled way of invoking legislative history that looks more to committee reports and less to floor debates and statements at committee hearings. This debate led judges, and in particular Republican and post-Reagan judges, to consider these issues, and they sided with the prominent liberal judges: they concluded that

116 *Id.*

text alone was not sufficient, and that committee reports should be invoked. On this view, Scalia largely failed.

Part of the choice between these positions depends on unknowable considerations. For instance, what would have happened if there had been no attacks on the use of legislative history? Perhaps liberal judges and law professors would have been happy for the 1970s pattern to persist, and so absent those attacks they would not have advocated for the pre-1970s consensus. And maybe the legislative history practices of the 1970s would have continued. Under those circumstances, we would say that the Scalia-led attacks on legislative history were fairly successful, because they brought about the rethinking among liberal judges and law professors noted above, and spurred the movement away from the least reliable forms of legislative history. On the other hand, perhaps even in the absence of any attacks on legislative history liberal judges and law professors would have made the same arguments for the pre-1970s consensus, and perhaps those arguments would have been exactly as successful as they turned out to be in reality. In that scenario, Scalia's arguments against legislative history achieved nothing, as the same result would have occurred had Scalia never launched any attacks.

These scenarios, as counterfactuals, are of course unprovable. Beyond that, a conclusion about the degree to which Scalia succeeded or failed also depends on judgment calls with no obvious metric—notably, how much weight one puts on the influenced judges' decrease in citations to floor debates or committee hearings versus their increase in citations to committee reports.

Thus the best answer to the question whether Scalia achieved modest success or instead failed is yes.

Appendix:
The Paradoxical Impact of Scalia's Campaign
Against Legislative History

Stuart Minor Benjamin and Kristen M. Renberg

A.

ALTERNATIVE TEST OF DIFFERENCES IN CITATION BEHAVIOR
BETWEEN DEMOCRATIC AND REPUBLICAN JUDGES

As an alternative specification for the unpaired t-test results in Table 2, we first calculated the difference in the number of opinions published by Democratic judges citing a given legislative history material and the number of opinions published by Republican judges citing the same material for each year. We performed a set of unpaired t-tests on whether the annual differences were significantly different from one another in the two time periods: pre- and post-Justice Scalia's ascension to the Supreme Court's bench. This specification allowed us to test whether the differences in citation behavior between Democratic and Republican judges were significantly different from one another in the pre-Scalia period against the post-Scalia period. The results are presented in Table A1 below.

The results in Table A1 support the main findings in the Article. With respect to citations to floor debates or committee hearings, the results indicate that Republican judges cited them 7.9% less often than Democratic judges in the pre-Scalia period. The gap widened considerably after Scalia's appointment, with Republican judges citing them 73.6% less often than Democratic judges. With respect to committee reports, Republican judges cited them 16.3% less often than Democratic judges in the pre-Scalia period. After Scalia's appointment, not only did Republican judges cite committee reports more often than Democratic judges, but the gap was 122%.

TABLE A1: T-TEST RESULTS: COMPARING DIFFERENCES IN
 REPUBLICAN AND DEMOCRATIC JUDGES'
 CITATION BEHAVIOR IN MAJORITY OPINIONS IN THE PRE- AND POST-
 SCALIA PERIODS

		Floor Debates or Committee Hearings	Committee Reports
<i>Pre-Scalia Effect</i>	R minus D (1965-1985)	-7.93 (21)	-16.33 (21)
<i>Post-Scalia Effect</i>	R minus D (1986 -2011)	-73.66 (26)	121.96 (26)
	T-Score p-value	14.33*** (1.155e-15)	-5.572*** (5.32e-06)

Note: ***p<0.01; **p<0.05; *p<0.1. Number of (years) are shown in parentheses. "R" represents Republican judges and "D" represents Democratic judges.

B. PRESIDENTIAL COHORT RESULTS

Figures B1 and B2 present the average probability scores for citations to legislative history materials for each presidential cohort in our study. The results in Figure B1 indicate that more recent Republican cohorts have a lower probability of citing floor debates or committee hearings than do older Republican cohorts. Meanwhile, more recent Republican cohorts, on average, cite committee reports more often than older Republican cohorts. As for Democratic judges, there is an increase in citations to committee reports with each succeeding presidency, whereas for floor debates or committee hearings there is an increase until the Clinton judges (the only post-Reagan Democratic cohort). It is also interesting to note the dramatically lower rate of citations to floor debates or committee hearings among post-Reagan Republican judges.

We also performed a series of paired t-tests across Republican cohorts and across Democratic cohorts to observe correlations in citation behavior to legislative materials. Each t-test compares one cohort of judges against another cohort of judges. Tables B1 and B2 display the results for the paired t-tests for Republican presidential cohorts. Tables B3 and B4 display the results for the paired t-tests for Democratic presidential cohorts. We highlight the statistically significant findings in each table.

FIGURE B1: AVERAGE PROBABILITY OF CITING LEGISLATIVE HISTORY MATERIALS ACROSS REPUBLICAN COHORTS

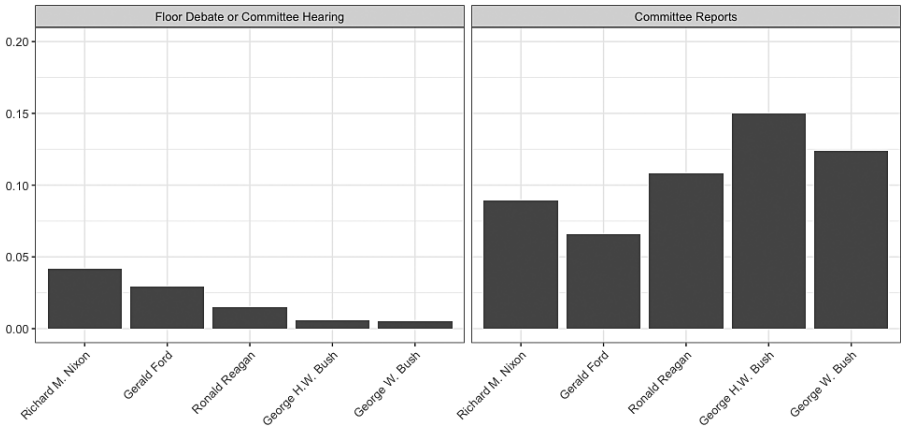


FIGURE B2: AVERAGE PROBABILITY OF CITING LEGISLATIVE HISTORY MATERIALS ACROSS DEMOCRATIC COHORTS

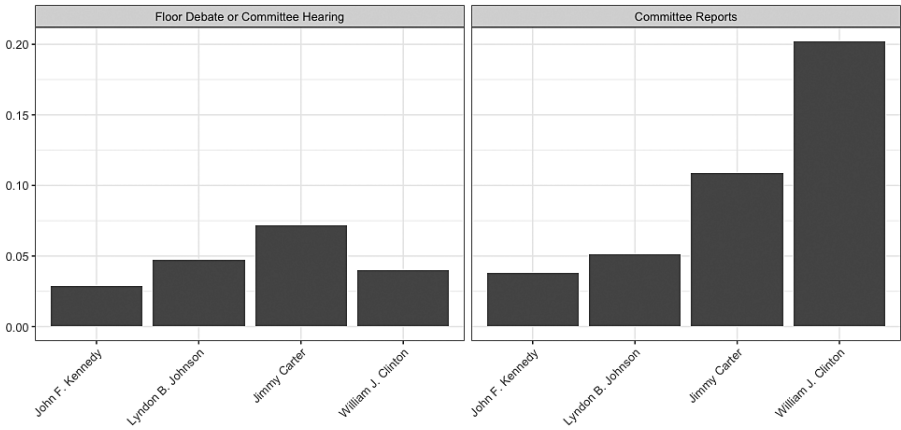


TABLE B1: PAIRWISE T-TEST ON CITATIONS TO FLOOR DEBATES OR COMMITTEE HEARINGS ACROSS REPUBLICAN COHORTS (1965–2011)

	W. Bush	H.W. Bush	Reagan	Ford
H.W. Bush	1.000	-	-	-
Reagan	2.4e-07	2.7e-07	-	-
Ford	1.000	1.000	6.8e-05	-
Nixon	3.8e-14	3.8e-14	0.09	5.0e-11

TABLE B2: PAIRWISE T-TEST ON CITATIONS TO THE COMMITTEE REPORTS ACROSS REPUBLICAN COHORTS (1965–2011)

	W. Bush	H.W. Bush	Reagan	Ford
H.W. Bush	1.000	-	-	-
Reagan	3.9e-09	2.2e-8	-	-
Ford	1.000	1.000	2.4e-12	-
Nixon	0.62	1.000	4.9e-05	0.02

TABLE B3: PAIRWISE T-TEST ON CITATIONS TO FLOOR DEBATES OR COMMITTEE HEARINGS ACROSS DEMOCRATIC COHORTS (1965–2011)

	Clinton	Carter	Johnson
Carter	1,8e-09	-	-
Johnson	1.000	7.9e-08	-
Kennedy	0.93	7.2e-12	0.56

TABLE B4: PAIRWISE T-TEST ON CITATIONS TO THE COMMITTEE REPORTS ACROSS DEMOCRATIC COHORTS (1965–2011)

	Clinton	Carter	Johnson
Carter	1.000	-	-
Johnson	0.0003	0.0102	-
Kennedy	4.7e-05	0.0022	1.000

C.

CHEVRON

In 1984, the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), creating a new two-step test to determine whether to accept an agency's legal interpretation of the statute it administers. Given the importance of this new deference regime and the fact that the case was decided a couple of years before the rise of the attacks on legislative history, we test whether *Chevron* has a latent relationship with the decision to cite certain types of legislative history materials.

Prior research by Barnett and Walker analyzed published appellate court opinions from 2003 to 2013 that cite *Chevron*.¹¹⁷ The authors found that, in opinions citing *Chevron*, the court applied *Chevron* deference 77% of the time. We merged

¹¹⁷ Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 1 (2017).

our data with data provided by Barnett and Walker. Table C1 presents the distribution of opinions citing a given type of legislative history material, citing *Chevron*, and applying *Chevron*. The results in Table C1 suggest the *Chevron* doctrine is usually applied when it is cited, but the percentage of cases applying *Chevron* varies.

As an additional validation check for the main findings in our Article, we compared the opinions from the time period when our data overlaps with the Barnett and Walker study and found the same number of opinions citing *Chevron*. We also replicated our finding of significant partisan differences in the citation behavior of judges for the specific time period of our data that overlaps with the Barnett and Walker study (2003–2011). These results are shown in Table C2.

Tables C3, C4, and C5 present the results of a series of unpaired t-tests. The tests found in Table C3 include only opinions that cite *Chevron*. The tests found in Table C4 include only opinions that cite but do not apply *Chevron*. Finally, the tests found in Table C5 include only opinions that cite and apply *Chevron*.

Across the five sets of results we found statistically significant differences in citation behavior between Democratic and Republican judges in opinions citing floor debates or committee hearings. With regard to committee reports, the statistically significant difference in citation behavior between Democratic and Republican judges goes away when we narrow our focus to opinions citing committee reports and citing *Chevron* (see Table C3). Table C5 presents a similar finding, with no statistically significant differences between Democratic and Republican judges when we narrow our focus to opinions citing committee reports and both citing and applying the *Chevron* doctrine. However, when we consider opinions citing committee reports and *Chevron* but not applying the *Chevron* doctrine, the statistically significant difference between Democratic and Republican appellate judges reappears (see Table C4).

TABLE C1: APPLICATIONS OF *Chevron* in Reported Opinions by Courts of Appeals Across Types of Legislative Materials (2003–2011)

Type of Legislative History Material	Number of Opinions*	Number of Opinions Citing <i>Chevron</i> ⁺	Number of Opinions Citing and Applying <i>Chevron</i> ** (% of Opinions Applying <i>Chevron</i> and Citing Legislative Material) (% of Opinions Citing and Applying <i>Chevron</i>)
Floor Debates or Committee Hearings	1,891	195	149 (7.87%) (76.41%)
Committee Hearing	212	26	21 (9.90%) (80.76%)
Code of Federal Regulations	17,858	2,841	2,447 (13.91%) (86.13%)
U.S. Code	67,504	5,414	4,028 (5.96%) (74.39%)

*Number of cases validated by Lexis Advance.

+ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Indicated by Barnett and Walker (2017) and Mayer Opinions.

TABLE C2: T-TEST RESULTS: COMPARING DEMOCRATIC AND REPUBLICAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS (2003–2011)

	Floor Debates or Committee Hearings	Committee Reports
T-Score	6.294***	-2.949**
(P-Value)	(0.000)	(0.012)
# of Opinions	1,891	10,478
% Authored by Rep.	12.70%	56.89%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

TABLE C3: T-TEST RESULTS: COMPARING DEMOCRATIC AND REPUBLICAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS CITING *CHEVRON* (2003–2011)

	Floor Debates or Committee Hearings	Committee Reports
T-Score (P-Value)	2.089** (0.020)	-1.143 (0.279)
# of Opinions	195	1,579
% Authored by Rep.	9.74%	61.45%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

TABLE C4: T-TEST RESULTS: COMPARING DEMOCRATIC AND REPUBLICAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS CITING BUT NOT APPLYING *CHEVRON* (2003–2011)

	Floor Debates or Committee Hearings	Committee Reports
T-Score (P-Value)	4.894*** (0.000)	-2.223** (0.044)
# of Opinions	46	205
% Authored by Rep.	8.69%	65.36%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

TABLE C5: T-TEST RESULTS: COMPARING DEMOCRATIC AND REPUBLICAN JUDGES' CITATION BEHAVIOR IN MAJORITY OPINIONS CITING AND APPLYING *CHEVRON* (2003–2011)

	Floor Debates or Committee Hearings	Committee Reports
T-Score (P-Value)	4.088*** (0.001)	-0.922 (0.377)
# of Opinions	149	1,374
% Authored by Rep.	8.05%	59.75%

Note: *** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

