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The Significant of Statutory Interpretive Methodologies

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ESSAY

THE SIGNIFICANCE OF STATUTORY INTERPRETIVE METHODOLOGIES

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INTRODUCTION

The proper method of interpreting statutes is an enormously important legal issue that has seen enormous theoretical discussion, including some by Supreme Court Justices themselves. This theoretical discussion, unfortunately, has been informed by little empirical study. The theories necessarily rely upon certain descriptive presumptions that should be tested. This Essay presents a preliminary study of some of those presumptions to better inform the theories.

Much of the debate has centered on the role of legislative history in statutory interpretation, typically contrasted with pure textual reliance.[1] The contemporary debate has been considerably informed by other considerations, such as the proper role of pragmatic statutory interpretation. There has been some exploration of the use of these differing methods over time but no comprehensive analysis of their use by the Justices of the most recent natural Court, nor of the precedential effect of different approaches.

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1 *See, e.g.*, Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 339 (2005) (describing the "clash" between devotees of textualism and those who rely on legislative intent).

After very briefly reviewing the theory underlying the interpretive methodologies, I embark on a study of their use in recent years by the current natural Court. Each statutory interpretation decision was coded for various cues to different interpretive methodologies. Then these cues were combined into an overall index for the different approaches. Descriptive statistics reveal that textualism and legislative intent are most common, but all the approaches find material use in Court opinions, though their frequencies differ among the Justices.

Having identified the opinions that make greater or lesser use of particular interpretive approaches, I then examine the use of these opinions as precedents. Textualist opinions find much greater use as precedents but are even more likely to receive negative treatment from subsequent courts. Use of the canons and legislative intent apparently reflect a relatively minimalist approach to decisionmaking, while textualism is a more "maximalist" projection of Supreme Court power.

I. INTERPRETIVE METHODOLOGIES SUMMARIZED

A great deal has been written on methods of statutory interpretation, and this Part provides an abbreviated review of the theoretical arguments raised in the academic literature. Ultimately, statutory interpretation involves giving meaning to a statutory text, in the context of a particular legal dispute. This Part considers the theories of textualism, legislative intent, pragmatism, and the canons of construction. These theories are not perfectly discrete.[2] Nevertheless, their approaches are sufficiently distinguishable to consider them contrasting theories.[3]

The most obvious interpretive method, typically considered the beginning of the analysis, relies on the words of the text itself. Some argue that reliance on the text should also serve as the end of the analysis, and I shall use the shorthand "textualist" to refer to this approach. Textualists argue that the meaning of a statute can be discerned entirely from the words used in the law under consideration.[4] This theory is associated with the "plain meaning" rule for interpreta-

2 *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 34–35 (2006) (contending that textualism has evolved toward significant consideration of legislative purpose).

3 *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006) (arguing that textualism remains distinctive by giving priority to the semantic content of laws rather than to their surrounding purpose).

4 *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005).

tion.[5] To help appreciate a statute's plain meaning, textualists may consult dictionary definitions of the words that it uses.[6] This theory must confront linguistic indeterminacy, the inability of words to perfectly capture concepts or resolve matters unforeseen at the time the words were drafted.

Textualists have developed tools to resolve textual uncertainty, without relying on extrinsic evidence such as legislative history. For example, textualism acknowledges that context influences the meaning of words. This is addressed through the "whole act" rule that dictates that textual meaning be assessed in the context of the statute as a whole.[7] Justice Scalia has thus exhibited a "broad commitment to understanding the statute in 'context'" as part of his statutory interpretation.[8] The whole act rule offers a variety of types of interpretive guidance: There is a presumption that words have a consistent meaning throughout a statute. A commonly used principle is the rule against surplusage. This presumes that Congress does not insert unnecessary and redundant language in statutes.[9] If one interpretation of certain language renders other language superfluous, the court rejects the interpretation of that language.[10]

Textualism is broadly accepted as an interpretive methodology, the controversy is over its exclusivism. Anti-textualists do not deny the relevance of text for interpretation but argue that the statute's words must be supplemented by an understanding of extrinsic evidence, which strict textualists have rejected.[11] Critics argue that there are

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5 For discussions of this plain meaning rule, see Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715 (1992); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997).

6 Some textualists are reputedly "almost fanatical" in their reliance on dictionaries for statutory interpretation. Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility and the Proper Incentives*, 44 DUKE L.J. 1133, 1143 (1995).

7 Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 409 (1994).

8 *Id.* at 403, 410–11 (citing United States v. Faust, 484 U.S. 439 (1988), Blanchard v. Bergeron, 489 U.S. 87 (1989), and Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990) as cases where Justice Scalia "clearly look[ed] to a broader context that include[d] not only other law, but specific policy considerations underlying the statute").

9 WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 266 (2000).

10 The Supreme Court has called it a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." Kungys v. United States, 485 U.S. 759, 778 (1988).

11 *See, e.g.*, Molot, *supra* note 2, at 48 ("When it comes to interpreting statutes, aggressive textualists purport to see legislation as words written on a piece of paper,

many cases in which the plain meaning of the text does not offer a clear resolution and that these difficult cases are the ones most likely to be taken by the U.S. Supreme Court.[12] Moreover, the alternative methods do not supplant textualism but merely supplement it.

The defenders of textualism often recognize the limitations of the interpretive doctrine but nonetheless argue that it is the best available tool for determining the meaning of statutes and that any reliance on some alternatives will yield inferior results.[13] Moreover, they have supplemented their defense by arguing the legal illegitimacy of some alternative approaches to interpreting statutes.[14] Perhaps most typical is the claim that textualism is necessary to restrain willful judicial decisionmaking based on personal preferences, though there are also constitutional and other arguments made against the other interpretive methodologies.[15]

A second interpretive method seeks the legislative intent or purpose in enacting the statute, as informed by the legislative history underlying its passage. To facilitate this process, it turns to the legislative history behind the enactment of a statute.[16] There is an established hierarchy among the sources of legislative history, such as committee reports, remarks in floor debates, and indirect evidence, such as the deletion of proposed language.[17] Such extrinsic evidence is used as a guide to find the legislative goal and, ideally, how the legislature would have resolved the instant judicial dispute had it considered the details of that dispute.[18] Justice Breyer has strongly defended consideration of legislative history in order to discern the legislative intent.[19]

This search for legislative purpose through legislative history has produced great controversy, among academics and among judges. Some have argued that the use of individual statements to aggregate the intentions of the full legislature is not a plausible task.[20] Others

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rather than as a collective effort by elected representatives to govern on behalf of their constituents.").

12 *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862 (1992).

13 *See, e.g.*, Manning, *supra* note 3, at 111.

14 *See, e.g.*, Molot, *supra* note 2, at 27.

15 *See infra* notes 24–28, 35, 42–45 and accompanying text.

16 *See* Breyer, *supra* note 12, at 848.

17 *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990).

18 *Id.*

19 *See, e.g.*, Breyer, *supra* note 12, at 847.

20 *See, e.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–45 (1992).

question the existence of a discernible legislative purpose underlying compromise legislation.[21] Justice Scalia questions the reliability of judicial history, calling the endeavor a "wild-goose chase."[22] Justices Scalia and Kennedy have explicitly rejected the validity of legislative history in opinions of the Court.[23] Even Justice Stevens has cautioned that legislative history may be an unreliable guide to interpretation.[24] These public opinions from the Justices have surely furthered doubts about the continued validity of legislative history at the Court.

Perhaps the most significant criticism of reliance on legislative intent lies in its purported malleability. Critics contend that "willful, manipulative judges" attribute "a purpose to a statute that just happens to coincide with the judges' own policy preferences."[25] The available materials of legislative intent are so expansive that such a willful judge can unearth something to support whatever position he or she favors. Judge Easterbrook argues that even "the best judge will find that the imagined dialogues of deceased legislators have much in common with today's judges' conceptions of the good."[26] This claim is oft asserted, though, without any rigorous supporting evidence. Others claim that reliance on legislative intent is not uniquely susceptible to ideological manipulation.[27] The classic formulation is that of Judge Harold Leventhal who claimed that citing legislative history was

21 *See, e.g.*, Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809–11 (1983) (noting that statutes are the product of compromise and may intentionally leave matters unresolved or fail to anticipate matters presented to the Court).

22 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

23 *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and concurring in the judgment); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 470–473 (1989) (Kennedy, J., concurring).

24 John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1381 (1992).

25 Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 251 (1992).

26 Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984); *see also* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1323 (1990) (emphasizing the textualist position "that resort to legislative history subverts democratic values by allowing judges to pick and choose from the diverse opinions found in much legislative history, and thereby reach result-oriented decisions").

27 *See, e.g.*, William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1531 (1998) (contending that "any judge who is determined to be willful is unaffected by methodology" and, absent use of legislative history, can "shop dictionaries, canons of statutory construction, or statutory precedents" to support a preferred outcome).

like "looking over a crowd and picking out your friends."[28] There is considerable evidence of ideological voting on the Court,[29] but the claim about its association with use of legislative history should be more rigorously tested. One might expect legislative intent to be associated with a higher level of Court dissensus, if it is so easily molded and willfully used.

A third method that has received considerable contemporary consideration is known as pragmatism. The dimensions of pragmatism are somewhat amorphous, but the thrust of the methodology is consideration of the practical meaning of a decision. Justice Holmes famously rejected the tenets of pragmatism, declaring, "if my fellow citizens want to go to Hell I will help them."[30] Other judges question the wisdom of this position. Judge Posner has amplified his theory over succeeding years and defines its core as "merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans."[31]

Pragmatism may be relatively difficult to identify, as it is fact-based and lacks obvious cues like citation to legislative history. Certain traditional doctrines are steeped in pragmatic considerations. For example, the long standing "absurdity" doctrine presumes that Congress would not have intended to adopt a statute that produced absurd results in the particular case, so any such implication simply "reflects imprecise drafting that Congress could and would have corrected had the issue come up during the enactment process."[32] Thomas Merrill argues that for "most of our history, American judges have been pragmatists when it comes to interpreting statues."[33] Although Justice Scalia is known as a strong textualist, he has written that "consideration of policy consequences" is a "traditional tool[ ] of statutory construction."[34]

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28 As reported in Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 645 (2002).

29 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (providing evidence of ideological voting patterns). Some of this research is summarized and reviewed in Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 277–79 (1997).

30 Letter from Oliver Wendell Holmes to Harold Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe Howe ed., 1953).

31 RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 3 (2003).

32 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003).

33 Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 351 (1994).

34 Scalia, *supra* note 22, at 515.

Pragmatism has been criticized for reasons paralleling the malleability critique of legislative history—that it allows Justices to adopt whatever result they ideologically prefer. By its nature, pragmatism suggests a governmental policy judgment rather than law following. Such policy judgments are inevitably influenced by the judge's value system. Judge Posner suggests conversely that the transparent discretion provided by interpretive pragmatism may actually constrain judicial activism, arguing that "[j]udges are less rather than more likely to be power-mad if they know they are exercising discretion than if they think they're just a transmission belt for decisions made elsewhere."[35]

Even if judges do not ideologically abuse the reliance on pragmatic interpretation, the theory arguably inserts excess uncertainty into the law. Cass Sunstein, generally regarded as a pragmatist, has suggested that it might be more pragmatic to use a formalistic standard, given the limitations of the judiciary in developing coherent policy on a case-by-case basis.[36] Long ago, pragmatism was criticized as being "in a sense anarchistic and devoid of standards or principles," when "law requires an appreciable degree of uniformity, stability and certainty."[37] Such an effect might be observable in Justices' disagreement over the proper application of pragmatism and consequent dissensus on the Court.

A final method of interpretation to be noted is the reliance on canons of construction. The canons are not strictly a different interpretive theory but rather tools used to supplement the overarching theories of statutory interpretation. Many of the canons are interpretive presumptions with considerable pedigree, which often operate like rules of grammar for determining the proper understanding of text.[38] The canons are often regarded as complements to textualism, because they provide rules for textual interpretation that rely on no extrinsic evidence.[39] Textualists such as Justice Scalia have praised the canons for their clarity and usefulness in interpretation.[40] By contrast,

35 POSNER, *supra* note 31, at 96.

36 Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 921 (2003).

37 Walter B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 63, 71 (1925).

38 *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 651 (1992); John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1863 (2004).

39 *See, e.g.*, John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2D 283, 288, 291 (2002) (describing how the textualists have embraced the canons as alternatives to reliance on legislative history).

40 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25–27 (1997).

some have suggested that there is a conflict between use of the canons and reliance on legislative history.[41]

Although the canons appear neutral, Karl Llewellyn's classic article suggested that they were easily manipulable by judges with canonical thrusts countered by contrary canonical parries.[42] Llewellyn's historic claim has been considerably criticized, though, as "greatly overstated"[43] or "grossly overdone."[44] While the claim may have been overstated, some empirical research has tended to confirm Llewellyn's claim. The study of workplace decisions at the Supreme Court found that the canons were disproportionately invoked by liberal Justices to reach liberal opinions and conservative Justices to reach conservative opinions.[45]

Some canons are substantive in nature, rather than being mere aids to linguistic interpretation of statutory text. These create presumptions that statutes are meant to be interpreted in a certain way.[46] A traditional canon, known as the rule of lenity, creates a presumption for criminal defendants and demands that statutes clearly prescribe the proscribed behavior.[47] More recently adopted substantive canons include various presumptions favoring the federalism interests of the states.[48]

A Justice need not devote himself or herself to any single interpretive methodology, or reject any methodology, or even prioritize the methodology in case of conflict. Rather, a pluralist Justice may choose the method that seems best suited to the case at hand. A Justice could, in his or her judgment, rely on statutory text in one case, legislative history in the next, and perhaps rely on some broad prag-

41 *See, e.g.*, Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562 (1992).

42 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

43 Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989).

44 David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992).

45 *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 58–59 (2005).

46 *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 801.

47 *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 852 (3d ed. 2001) (addressing the canon's declaration that if the criminal statute "does not clearly outlaw private conduct, the private actor cannot be punished").

48 Thus, the Court has established canons against federal abrogation of a state's sovereign immunity or preemption of traditional state functions. *See, e.g.*, Brudney & Ditslear, *supra* note 45, at 13–14.

matic aim in the following decision. Pluralism is a system that grants great deference to judges, believing them able to best choose the rules to govern any individual dispute. Awarding such great deference to judges is not unique to this area of statutory interpretation but is found throughout American law, interspersed with more rigid rules of decision. For some, this pluralism might simply be considered a form of "ordinary judging" of the sort that courts generally undertake in making legal decisions.[49]

The Court as a body has been pluralist and its relative use of particular interpretive methodologies has waxed and waned over time. Textualism was the most traditional approach, but reference to legislative intent became paramount for some time.[50] After a period, the use of legislative history has seen greater criticism and correspondingly less use by the courts. The following Part discusses the Supreme Court's relative use of interpretive methodologies in recent years.

II. THE SUPREME COURT'S USE OF INTERPRETIVE METHODOLOGIES

This Part reviews the interpretive methodologies employed by the Court in recent years. The relative usage of interpretive methodologies has been a controversial issue in the literature. Many authors have identified changes in the Court's commitment to various theories at various times, and some empirical research has given flesh to these claims. The seminal study by Nicholas Zeppos examined the sources used in statutory interpretation by the Court since the 1890s.[51] He found that text was the most common resource used by the Court but that reliance on legislative history was common (congressional reports were used in 32% of the cases, debates in 16.9% of the cases, and material from hearings in 12.6% of the cases).[52] He also found that consideration of the practical consequences of interpretation were consistent occurrences.[53]

Recent years have purportedly seen a change in interpretive methods. Around a decade ago, commentators began remarking on a "decline of legislative history as an interpretive device in the Supreme Court."[54] The canons, by contrast, were seen as ascending in impor-

49 WILLIAM D. POPKIN, STATUTES IN COURT 208–12 (1999).

50 *See, e.g.*, Sunstein, *supra* note 43, at 426 (discussing popularity of legislative purpose interpretation in the 1950s and 1960s).

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

52 *Id.* at 1093.

53 *Id.* at 1097.

54 Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness*, 1994 PUB. INT. L. REV. 57, 57; *see also* Jane S. Schacter, *The*

tance.[55] This was confirmed by a study in the 1980s. Thomas Merrill found that virtually all the statutory interpretation cases decided in the 1981 term used legislative history substantially, while this was true of only 18% of the cases in the 1992 term, legislative history was not even mentioned in 62% of cases.[56] William Eskridge reports statistics showing a decline in reliance on legislative history between 1986 and 1991.[57] However, Judge Patricia Wald examined the 1988–1989 term of the Court and found that a majority of the cases made some use of legislative history.[58] A broader study of Supreme Court citations from 1980 to 1998 found "a significant decrease in the Supreme Court's reliance on legislative history documents, attributable at least in part to Justice Scalia's criticism of its use."[59] The most recent analysis involved workplace cases at the Court and found that use of legislative history had fallen by about 50% from the Burger Court to the Rehnquist Court,[60] though usage of the canons of construction had

Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1, 3 (1998) (noting that the Court's declining use of legislative materials has been taken to signal a move toward "new textualism"). Schacter did notice that the use of legislative history, though down from its peak, had increased in the prior few years.

55 *See* Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 670 (2005) (declaring that the "last half-century or so has witnessed a growth in the use of canons of statutory construction to implement substantive values and to attempt to bring about improvements in the legislative process").

56 Merrill, *supra* note 33, at 355.

57 WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 227 fig.7.2 (1994).

58 *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 287–88 (1990).

59 Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 370 (1999). Koby found that total citations to legislative history had dropped precipitously over the time period, but he did not break them down by cases. Even at the nadir of citations in the final year, there were more references to legislative history than there were to statutory cases. Indeed, his data suggest that the decline was not necessarily due to abandonment of the use of legislative history but could be due to more selective use of legislative history. Thus, a case may now use only one authoritative source of legislative history while a past case might have used a variety of different sources.

60 *See* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History?: Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 220 (2006). This may have been due to the fact that the statutes being interpreted had become somewhat dated, so that the decline in usage might "reflect the influence of intervening authority" rather than judicial opposition to usage of legislative history. *Id.* at 225.

increased correspondingly.[61] Moreover, none of this research considered the nature of negative references to interpretive methodologies—an opinion saying that use of legislative history was incorrect. They may have even coded such episodes as positive references.

While there seems to be a widely held belief that legislative history is disdained by the Court, the evidence hasn't clearly made this case. This research examines the use and significance of statutory interpretive methods, including legislative history. My study involves Supreme Court decisions involving statutory interpretation between the years 1994 and 2002, inclusive. The time period roughly captures the natural Court following Stephen Breyer's appointment. Cases were initially screened, through use of West's key number system, for cases with a headnote on "statutes." These cases were then screened for decisions using one of the interpretive methods studied. Over 120 cases were sampled, providing over one thousand separate Justice-votes for analysis. The vote of each Justice is the basic unit of analysis for this study. In addition to coding for factors such as whether the Justice joined the majority opinion or a different opinion, that opinion was coded for a series of statutory interpretation variables, listed in Appendix A.

One significant advance in the coding method is the recognition of negative references to an interpretive methodology. When an opinion criticized the application of a particular interpretive method in the case, it was coded with a negative number. Previous studies have run the risk of coding such criticism as a positive treatment of the methodology, because of its mention. These negative references were not infrequent, appearing in over 25% of the Justice opinions of the database. Hence, their recognition is important.

To create broader measures for particular interpretive theories, I created new variables that combined the Justices' use of several variables. For this purpose, I break the interpretive methodologies into four categories: textualism, legislative intent, canons, and pragmatism. Textualism (TEXT) is a new variable created from the combination of textualism, use of the plain meaning rule, use of dictionaries, use of common understanding of textual words, and use of the whole act rule. Legislative intent (LEGINT) is created from the combination of a direct use of legislative history, reference to legislative history, an explicit finding of ambiguity in statutory text, reliance on congressional inaction in response to a prior decision, or reliance on congressional reenactment in interpretation. Canon (CANON) is a

61 *See* Brudney & Ditslear, *supra* note 45, at 5.

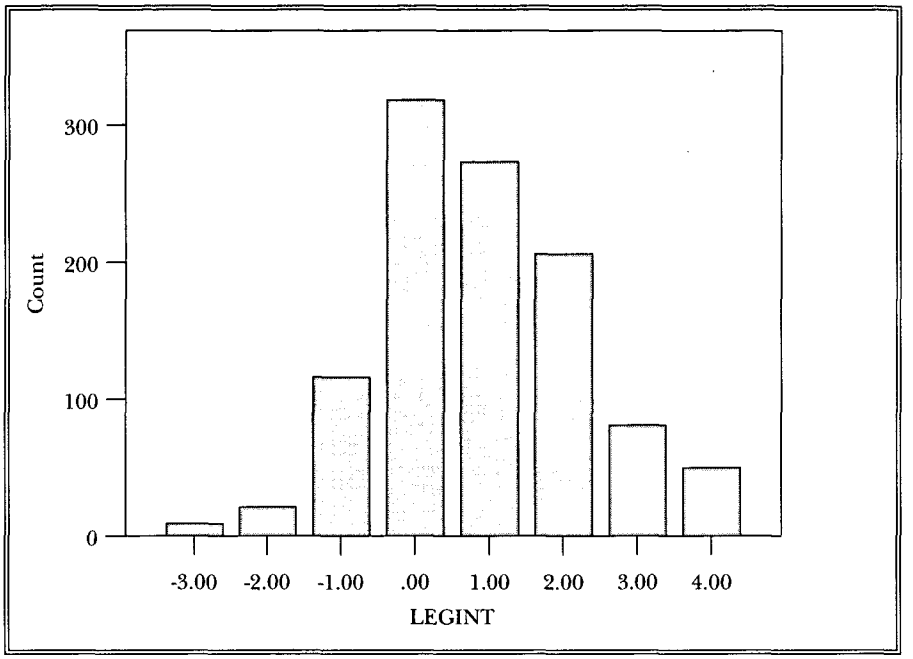
combination of reliance on any of the canons coded.[62] For each theory, each Justice is given a score that indicates his or her use of that theory. I also created a variable for pragmatic interpretation (PRAGMA) as a combination of reliance on the absurdity doctrine and reliance on deference to the executive branch.[63]

From these uses, I calculated scores for each case in the database. For example, each time that a Justice joined an opinion that referenced both the plain meaning rule and the whole act rule, that would produce a positive score of 2 for TEXT. By contrast, if a Justice joined an opinion that made no positive references to the textualism variables but criticized one of them, the TEXT score would be -1. By using individual Justice scores, the measures are weighted for greater consensus on the Court. Thus, a unanimous opinion with a 2 score for TEXT would receive nine measures of this score, while a 6-3 opinion would receive six measures, with the remaining three coded for the content of the concurring or dissenting opinions. The following figures display the absolute frequency of opinions for each score for references to legislative intent.

62 The study does not analyze all the scores of canons that might be used but only some of the most common linguistic and substantial ones. For a list of the variables coded in this study see *infra* Appendix A.

63 Coding for pragmatism in interpretation is more difficult, because the theory is not so directly associated with the particular interpretive methodologies invoked by courts. Some have argued that nearly all the principles of statutory interpretation are consistent with a pragmatic approach to decisionmaking. *See* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1194. Such a broad claim, though, is unhelpful in differentiating the effect of pragmatism. The absurdity doctrine, concerned as it is with consequences of interpretation, is an obvious candidate for coding pragmatism. Deference is also included because it is easily understood as a delegation of interpretive authority to those who are better suited to promoting the effective functioning of a statute. *See, e.g.*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2087–88 (1990) (contending that *Chevron* deference should be interpreted as a recognition that agency interpretations are best suited to making extratextual "judgments about how a statute is best or most sensibly implemented").

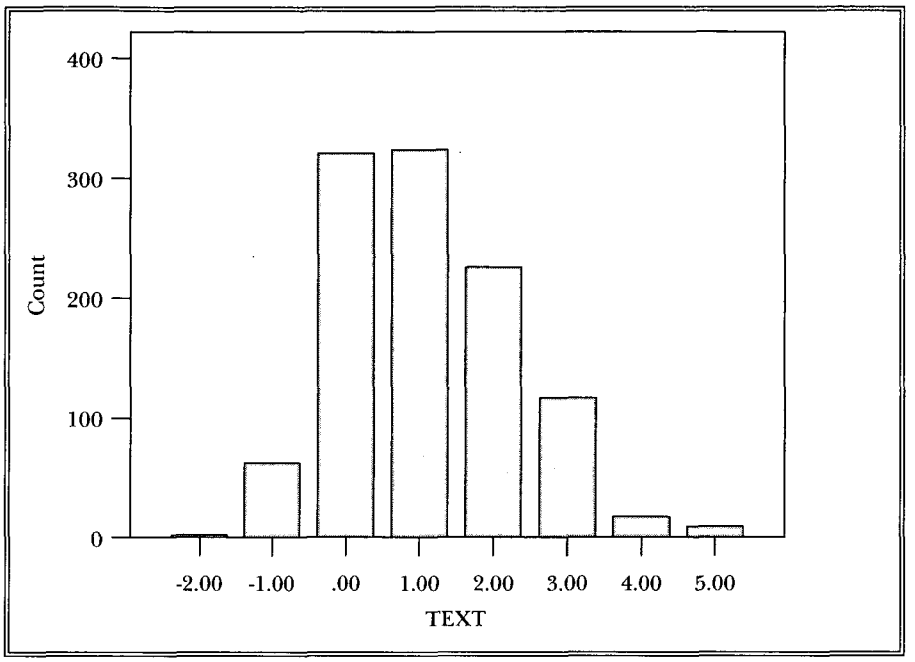
FIGURE 1. LEGISLATIVE INTENT SCORE FREQUENCIES



Contrary to the existing research, it appears that legislative intent remains a significant source for statutory interpretation in the Supreme Court. A majority of cases make some positive use of some tool of legislative intent. This data indicates that the purported "death" of legislative history is exaggerated. The frequency of use of legislative history, though, may be less than at some prior historical periods, as identified in prior research, so use may have declined slightly.[64] Figure 2 replicates this process of frequency counts, using the textualism scale.

64 *See supra* notes 54–61 and accompanying text.

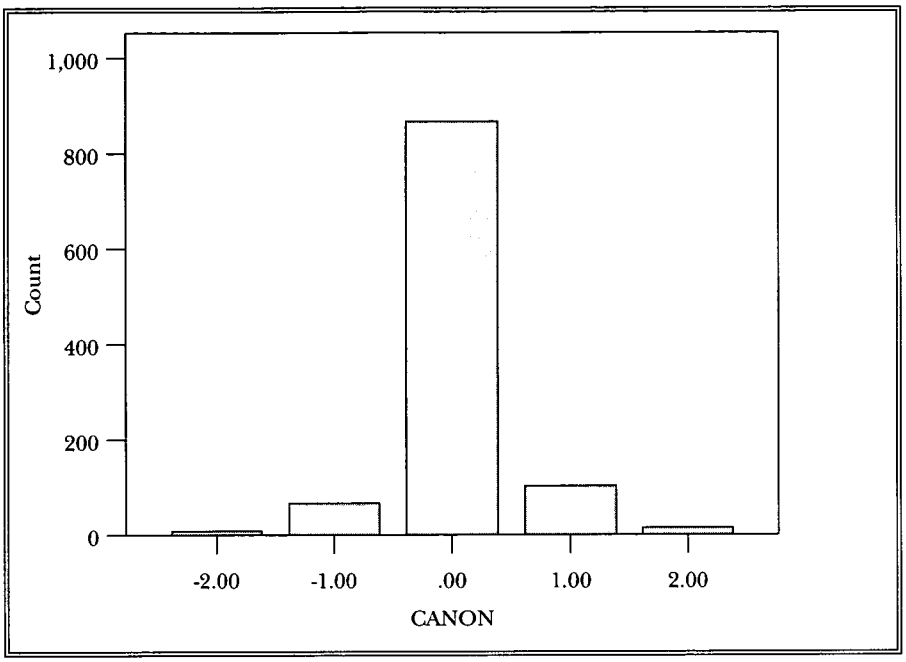
FIGURE 2. TEXTUALISM SCORE FREQUENCIES



Textualism is used somewhat more frequently than legislative intent, but not so much more often as might be presumed. A substantial minority of Supreme Court opinions makes no reference to principles of textualism or even makes a negative reference to one of the tenets of textualism.[65] Specific references to textualism are scarcely more common than references to the measures for legislative intent. Claims of a contemporary commitment to textualist interpretation are unsupported by this research. Figure 3 displays the frequency of references to a canon of statutory construction.

65 Brudney & Ditslear's study of workplace law decisions likewise found that explicit references to textual meaning interpretation were absent from many cases. *See* Brudney & Ditslear, *supra* note 45, at 30.

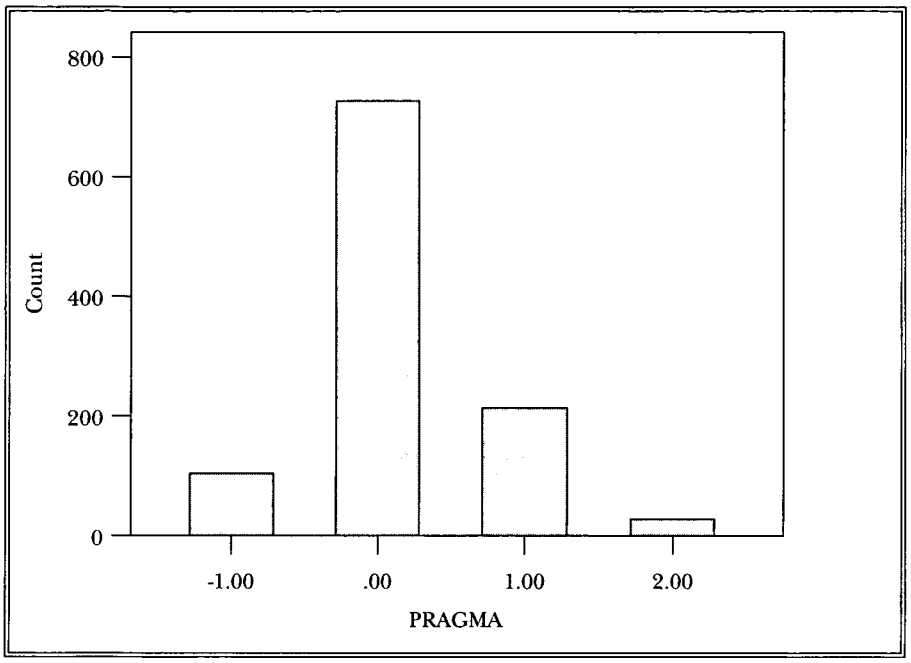
FIGURE 3. CANON SCORE FREQUENCIES



Reference to the canons is much less common than use of textualism or legislative history, but they are used positively in over ten percent of the opinions of the period.[66] Interestingly, a proportionally high number of references to the canons are negative ones. The net positive use of canons is quite low, which dispels suggestions that they have seen a renascence in the current Court. Figure 4 displays the frequency of references to principles of pragmatism.

66 These numbers are much lower than found by Brudney & Ditslear's study of workplace law cases. *Id.* at 34.

FIGURE 4. PRAGMATISM SCORE FREQUENCIES



Pragmatism is invoked less frequently than textualism or legislative intent, but much more than the canons. Because it is somewhat more difficult to code for use of pragmatism, Figure 4 may understate the Supreme Court's references to its role, both positive and negative. Even from the figure, though, it is clear that pragmatism is an important factor in a material minority of statutory interpretation cases heard by the Court.

The above figures presented cumulative data, and individual Justices may vary in their use of interpretive theories. As discussed above, Justice Scalia is known for a devotion to textualism, while Justice Breyer is publicly dedicated to the theory of legislative intent. Reputedly "Scalia is sufficiently committed to his views about legal method that he often declines to join other [Justices'] opinions that employ improper methods."[67] Indeed, Scalia has on occasion concurred and simply declined to join a portion of an opinion relying on legislative history.[68] However, he has also been called a "fallen textualist," who fails to practice the theory "sincerely and consistently."[69] Both these

67 Merrill, *supra* note 33, at 351.

68 *See, e.g.*, Zedner v. United States, 126 S. Ct. 1976, 1990–91 (2006); Chickasaw Nation v. United States, 534 U.S. 84, 86, 91–93 (2001).

69 Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1634 (1991); *see also* Karkkainen, *supra* note 7, at 403 (con-

claims are based only on anecdotal examples, though, as relatively little empirical analysis has examined the extent to which the Justices consistently adhere to particular approaches.

To assess the degree to which this is a significant effect, I provide average scores for each of the Justices for their reliance on particular interpretive theories. Table 1 presents the mean score, by Justice, for their reliance on particular interpretive theories.[70]

TABLE 1. JUSTICES' USE OF INTERPRETIVE THEORIES

JUSTICE	LEGINT	TEXT	CANON	PRAGMA
Breyer	1.21	1.05	.02	.28
Ginsburg	1.18	1.21	.04	.25
Kennedy	1.03	1.30	.04	.13
O'Connor	.76	1.34	.03	.18
Rehnquist	.89	1.37	.03	.10
Scalia	.45	1.44	.03	.06
Souter	1.20	1.18	.02	.22
Stevens	1.41	1.09	.03	.28
Thomas	.57	1.44	.02	.05

These results are at least roughly consistent with expectations and the Justices' own pronouncements of their interpretive theories. Justices Breyer and Stevens are most likely to use legislative intent, while Justices Scalia and Thomas are the least likely to do so.[71] Some might be surprised that Scalia has a positive association with legislative intent, but this is attributable to the fact that legislative intent involves more than simple reliance on legislative history and the fact that Scalia joined a few opinions that used legislative history, though he

tending that "Justice Scalia's method cannot be properly characterized as 'textualism,' if that means . . . the exclusion of extratextual aids to interpretation").

70 The score is simply the Justice's mean use of that theory. For example, if a Justice relied on legislative history in 60% of decisions but ignored legislative history in 40%, the Justice's score would be 0.6 {1 * .6 + 0 * .4}. If a Justice relied on legislative history 50% of the time, ignored legislative history 25% of the time, and affirmatively rejected reliance on legislative history 25% of the time, the Justice's score would be 0.25 {1 * .5 + 0 * .25 + -1 * .25}. Numbers can be greater than one, because a Justice might refer to multiple aspects of legislative intent in an opinion.

71 These results are roughly consistent with the Brudney & Ditslear findings, though they had Stevens and Ginsburg as the Justices who most frequently used legislative history. *See* Brudney & Ditslear, *supra* note 60, at 223.

authored no opinions with such reliance in the database.[72] All the Justices rely relatively heavily on textualism and none make much use of the canons. Pragmatism shows some significant disparity in usage, with Breyer and Stevens invoking the theory about five times as much as Scalia or Thomas. Nevertheless, there is pluralism on the Court, as every Justice had a positive association with every interpretive methodology.

There is an obvious association of Justice ideology and interpretive methodologies. The most conservative Justices are the most opposed to use of legislative history, while relatively liberal Justices favor that approach. This suggests at least a possibility that the commitment to interpretive methodologies is insincere. For example, use of legislative history may be opposed by Scalia and Thomas simply because it would yield liberal results contrary to the preferences of conservative Justices. A study of judges on the Seventh Circuit has found that the use of the interpretive methodology of originalism is very highly associated with ideological conservatism.[73] While the directionality of this association is indeterminate, it is possible that conservatives prefer originalism (and liberals dislike it) because the method inherently conduces to conservative outcomes.

III. The Interaction of Interpretive Methodologies

Although the interpretive theories are often considered to be at odds with one another, this is not necessarily the case. Indeed, the Justices often attempt to make the strongest case for their opinions by citing numerous bases for their result. Consequently, an opinion might well suggest that both textualism and legislative history supported that result. Conversely, a Justice might affirmatively disapprove of legislative history and reject its use or simply disregard it and perhaps use other sources to supplant reliance on sources of legislative intent.[74] The latter approach is associated with Justice Scalia, who has gone so far as to write concurrences saying nothing beyond his disagreement with the majority's reliance on legislative history.[75] The

72 This is confirmed by Koby, *supra* note 59, at 392 n.100 (reporting that Scalia joined more than three opinions per year citing to legislative history between 1980 and 1998).

73 *See* Jason Czarnezki & Sara Benesh, *The Ideology of Legal Interpretation* (April, 2007) (unpublished manuscript, on file with author).

74 This association is briefly discussed in Brudney & Ditslear, *supra* note 60, at 225 (suggesting that in the workplace cases, the Justices relied less on legislative history but did not replace it with other interpretive supports for their conclusion).

75 Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 646 (2005) (Scalia, J., concurring in part); Conroy v. Aniskoff, 507 U.S. 511, 518 (1993) (Scalia, J., concurring

relative frequency of the contrasting practices, though, has not been measured.[76]

The summary statistics reported above do not capture the degree to which Justices relied on particular methodologies and thus do not fully capture the potential conflict. I analyze the degree to which greater reliance on one given theory produces lesser reliance on other interpretive methodologies. This is performed through a regression using my cumulative scores for interpretive methodologies. Thus, I analyze whether a greater reliance on one approach, such as TEXT, produces a lesser reliance on another approach, such as LEGINT. This is the first analysis, with the LEGINT score as the dependent variable and scores for the other three interpretive methodologies as independent variables. The coefficient and t-scores for each independent variable are reported in Table 2.

TABLE 2. EFFECT OF ALTERNATIVE METHODOLOGIES ON LEGISLATIVE HISTORY

	LEGINT	t
TEXT	−.016	.55
CANON	−.031	1.04
PRAGMA	.245***	8.20

The results show that textualism and legislative intent references are not conflicting, though neither are they especially complementary. The negatively signed relationship does not approach statistical significance. Nor is there any statistically significant association between relying on the canons and legislative history, as sometimes suggested. By contrast, legislative history and pragmatism appear to go hand in hand. There is a very strong positive association between grounding a decision both in legislative history and in pragmatism. The next analysis follows the same approach, except with pragmatism as the dependent variable.

in the judgment); Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring in part and in the judgment).

76 A limited exception to this generalization is found in research by Professor Eskridge. ESKRIDGE, *supra* note 57, at 227 fig.7.2.

TABLE 3. EFFECT OF ALTERNATIVE METHODOLOGIES ON PRAGMATISM

	PRAGMA	t
TEXT	.020	.675
CANON	.038	1.26
LEGINT	.245***	8.20

In addition to the earlier finding that pragmatism accompanies legislative history, the theory also appears to be perfectly consistent with textualism and the canons of construction, though not significantly correlated. To complete the test, Table 4 reports the same analysis, with use of canons as the dependent variable.

TABLE 4. EFFECT OF ALTERNATIVE METHODOLOGIES ON CANONS

	CANON	t
TEXT	.049	1.59
PRAGMA	.040	1.26
LEGINT	−.033	1.04

In this Table, we see little conflict between canons and all the other interpretive methods. Although canons are often viewed as companions of textualism, there is but a mild association of their mutual use in Supreme Court opinions. There were no statistically significant relationships between other methods and use of the canons. The canons appear to serve as a gap filler, perhaps as they were initially intended.

One must be cautious in the interpretation of these results. Supreme Court opinions justify decisions, and Justices may be inclined to cite all plausible supporting bases for their results. Consequently, one might expect to see positive associations between interpretive methodologies, as a Justice would argue that both the text and the legislative history support his or her resolution of the case. This would be the traditional "kitchen sink" theory of argument. If true, this finding would still be a theoretically significant one, as it implies that the Justices are more committed to the outcome of the decision than the interpretive methodology by which it is reached.

Despite this caveat, we can draw some conclusions about the interaction of the interpretive methodologies. In general, the Justices appear to be pluralist in their statutory interpretations, frequently sup-

porting their decisions with multiple interpretive theories.[77] The conflict between reliance on textualism and on legislative history, commonly propounded in research, does not appear in the results. One can also conclude that pragmatism is not inconsistent with other interpretive theories. All its associations are positive, and the association is a strong and statistically significant one with respect to reliance on legislative history. This finding would seem to dispel the concern that pragmatism unleashes the Justices to do whatever they wish, unhinged from statutory text, legislative history, or traditional canons of construction.

While the relative interpretive methodologies are often debated as if they were conflicting, this does not appear to be the case in practice. Reliance on textualism typically accompanies use of sources of legislative intent. Nor does pragmatism or use of canons of construction displace textualism or legislative intent. Pluralism dominates the Court's approach to statutory interpretation. The Justices tend to pick and choose among the available interpretive methodologies, and use of legislative history remains fairly common at the Court.

IV. Interpretive Methodologies and Consensus

The above Parts covered the frequency with which the interpretive methodologies were used overall and in tandem, but these counts covered a variety of very different opinions. In some cases, the Court was divided, while in others it was unanimous in its result (though perhaps with concurring opinions). The most frequent outcome in the dataset was a unanimous opinion, in 39.7% of the cases. The second most frequent outcome, though, was a minimum winning 5-4 coalition, which occurred in 26.4% of the cases. This Part considers whether certain interpretive methodologies can produce more consensus among the Justices. For example, one might expect less consensus from the use of legislative intent, which is controversial. By contrast, reliance on the "ordinary meaning" of text itself supposedly enables diverse ideologies to reach consensus.[78]

Professor Vermeule laments the lack of evidence on the question of "whether judicial disagreement increases or decreases as sources are added beyond the statutory provisions at hand," and this Part pro-

77 *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wis. L. Rev. 205, 272 (contending that many Justices take an "agnostic position" in the debate among theories of statutory interpretation).

78 *See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 Sup. Ct. Rev. 231, 232.

vides some of that evidence.[79] The association of interpretive methodologies and consensus is easily tested in a regression in which the dependent variable is the vote in the case. Vote is captured as the percentage of Justices in the majority (e.g., a 6-3 decision would be scored as .67). The four cumulative interpretive methodology scores were used as independent variables. Table 5 displays the results of this analysis.

TABLE 5. INTERPRETIVE THEORIES AND COURT CONSENSUS

	Vote	t
TEXT	.010	.321
PRAGMA	.095***	3.014
LEGINT	−.019	.556
CANON	.032	1.047

Only pragmatism showed a statistically significant effect on consensus, and its association was quite strong. This interpretive theory, when applicable, seems to command support across the spectrum of Justices. The associations for textualism and legislative intent do not approach statistical or substantive significance in their effect.

The significance of the consensus association is unclear, however. Pragmatism may correlate with larger majorities simply because it is not a helpful methodology for resolving the sorts of close cases that produce 5-4 decisions. Thus, it may not be the methodology that produces consensus but its usefulness in particular types of cases. In addition, the regression methodology assumed a linear relationship between the variables and the vote in the case, which may not be accurate. For example, an examination of the legislative intent score shows some interesting nonlinear results. Table 6 breaks down the relative use of legislative history, using the mean score, by the size of the Supreme Court majority.

79 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 189 (2006).

TABLE 6. LEGISLATIVE HISTORY AND VOTE MARGIN

Vote	LEGINT
5-4	0.94
6-3	0.55
7-2	0.36
8-1	0.80
9-0	0.67

The legislative intent scores were highest in those cases decided through the minimum winning coalition, and this score included references in dissenting opinions as well. The scores were also relatively high in unanimous or near unanimous decisions and lower in those decided by 6-3 or 7-2 margins. This creates a possible inference that legislative history is especially useful, or necessary for a case's resolution, in close decisions.[80] None of the other interpretive methodologies displayed this sort of quadratic association with the Court's vote in the case, and the textualism scores were very close to linear.[81]

To amplify this analysis, I considered whether use of the plain meaning rule appeared to influence the opinions of the Justices and produce consensus. The plain meaning rule, which lies at the heart of textualism, would seem to provide a decision standard that should be plain and ideologically neutral, if in fact interpretive methodologies determine decisions. Perhaps the Justices could agree when statutory meaning was plain. For each Justice, I examined the ideological direction of the opinion in those cases in which they invoked the plain meaning rule in support of their outcome. I compare these rates with decisions in a separate area of the law involving constitutional civil liberties.[82] Table 7 reports the percentage of conservative votes by Jus-

80 The increased use of legislative intent methodologies in greater Court majorities might reflect the fact that the result in these clear cases found greater support in all interpretive methods, with the opinion providing the "kitchen sink" justification for an outcome.

81 The research on workplace decisions found that use of canons was associated with close decisions. *See* Brudney & Ditslear, *supra* note 45, at 52–53. No such clear pattern appeared in these data.

82 This approach to testing for methodological sincerity was recently used in Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67 (2005). Farnsworth did not directly test for interpretive theories but found little differences between the ideology of Justice votes in constitutional and statutory criminal cases, calling into question the degree to which any methodology controls ideological predilections. *Id.* at 70.

tices in constitutional civil liberties cases,[83] the percentage of conservative votes in cases in this database in which they relied on the plain meaning rule and the number of cases in which they invoked the rule.

TABLE 7. PLAIN MEANING RULE AND IDEOLOGICAL OUTCOMES

JUSTICE	Civil Liberties	Plain Meaning	Number
Breyer	39.8%	39.6%	23
Ginsburg	35.4%	39.8%	23
Kennedy	63.4%	63.3%	21
O'Connor	64.3%	76.5%	26
Rehnquist	78.2%	68.9%	27
Scalia	71.6%	71.4%	29
Souter	39.2%	45.8%	27
Stevens	35.5%	27.4%	23
Thomas	74.9%	76.5%	24

All the Justices used the plain meaning rule in a comparable number of opinions that they joined. Although the votes were cast *in the same cases*, it seems quite clear that plain meaning was not at all plain, as the Justices differed considerably over the application of the standard in these same cases. The conservatism of plain meaning decisions roughly parallels that in constitutional civil liberties decisions. The probability of conservative votes from a Justice using the plain meaning rule conforms pretty closely to their overall ideological preferences, save for Justice O'Connor's degree of conservatism as measured by their overall voting patterns in all cases.[84] Overall, the plain meaning standard seems ideologically manipulable and incapable of constraining preferences to provide greater consensus.

83 The data for liberal votes in civil liberties cases comes from LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 486–88 (3d ed. 2003).

84 In a statistical comparison of the rate of conservative votes in plain meaning cases in the database as opposed to other cases, only Justice O'Connor showed a statistically significant difference in plain meaning cases. A separate regression found that greater reliance on textualism did not produce decisions that differed from the Justices' general ideological preferences. *See* Frank B. Cross, *The Theory and Practice of Statutory Interpretation in the Supreme Court* (ExpressO Preprint Series, Working Paper No. 238, 2004), *available at* http://law.bepress.com/expresso/eps/238. This finds some confirmation in a study of constitutional decisions that found that greater reliance on originalism as an interpretive methodology did not influence ideological outcomes. *See* Jeffrey A. Segal & Robert M. Howard, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 133–34 (2002).

Some tentative conclusions can be drawn about the association of interpretive methodologies and Court consensus. The hypothesis that textualism promotes consensus is unsupported. All of the Justices rely on text, as seen in Table 1, but more usage of textualist principles does not promote larger majorities. A key of textualism, the plain meaning rule, seems quite indeterminate in Court application. Pragmatism is the theory most associated with greater consensus. This creates an inference that pragmatism is not invoked for ideological ends, as sometimes suggested, but serves as a sincere basis for decisionmaking for the purpose of advancing nonideological conceptions of the public good. Pragmatism tools were useful in a relatively small number of cases, however. The greater use of legislative history in close cases evidences the pluralist approach of the Justices. They appear more likely to use this approach in difficult decisions where other methods may be inconclusive.

V. PRECEDENTIAL EFFECT OF STATUTORY METHODOLOGIES

The effect of the interpretive methodologies should not be limited to decisions of the U.S. Supreme Court. The Court's actual decision affects only the parties to the case and is of modest importance. The opinions provide the basis of the decision, which may be reliance on textualism, or legislative history, or some other interpretive methodology. It is these opinions that have the most practical significance, because as precedents they govern the subsequent decisions of lower courts,[85] who render vastly more decisions and functionally establish the law of the land.[86] "Specialists in judicial politics overwhelmingly agree that the essence of the Court's policy-making power resides in its majority opinions," which "articulate legal principles and, in effect, public policies that affect the behavior of both governmental and nongovernmental decision makers."[87] Yet this effect has been overlooked in all the existing research on the issue.

Measuring precedential effect requires dependent variables that capture this effect. To measure the precedential significance of decisions, I use the Westlaw service, which lists how often cases are cited by

85 *See, e.g.*, THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE SUPREME COURT 2–3 (2006) (noting that while the disposition has implications, the "legal reasoning . . . can have more far-reaching consequences by altering the existing state of legal policy and thus helping to structure the outcomes of future disputes").

86 *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1458–59 (2003) (describing how circuit court decisions are those of the greatest importance for the law in the United States).

87 HANSFORD & SPRIGGS, *supra* note 85, at 3.

other courts and distinguishes negative citations to an opinion. This enables a raw count of the number of times that an opinion is cited positively or negatively. Westlaw also has a depth of treatment service, giving more "depth of treatment stars" to citing opinions that make greater use of the precedent. Thus, a "four star" treatment of an opinion means that the citing case has a substantial discussion of the precedent, such as a full textual page of analysis.[88] Table 8 reports these descriptive statistics.

TABLE 8. DESCRIPTIVE STATISTICS ON PRECEDENT VARIABLES

	Minimum	Maximum	Mean	Standard Deviation
All Positive	0	1013	67.9	130.4
Four-Star Positive	0	444	23.7	56.9
All Negative	0	85	9.1	14.2

There is tremendous variation in the frequency with which cases are cited. The number of four-star positive precedential uses is quite high, compared with cases generally, but this may simply be due to the fact that the Supreme Court cases are recent ones with less precedential development by lower courts, requiring closer analysis in the early decisions applying them. Positive treatment exceeds negative treatment, but the negative treatment is material, as the average case sees over nine negative applications by subsequent decisions, notwithstanding the recency of the precedential opinion. Because the distribution of citations is not normal and has a heavy right tail of highly cited cases, I converted them to a log scale to better normalize the distribution and use the log scales as the dependent variables in the following tests of the effect of interpretive methodologies on precedential effect.

This analysis requires the use of control variables that may influence the frequency with which Supreme Court opinions are used as precedent. The *year* of the decision is a necessary control variable, because the Court decisions in the data are relatively recent ones, and earlier opinions have more opportunity to be cited as precedents. I use vote as a variable measuring the size of the deciding Court majority, because there is a belief that decisions with larger majorities are more influential as precedents.[89] In addition, an ideology variable

88 *See* Al Harrison, *KeyCite Review*, LAW LIBRARY RESOURCE XCHANGE, http://www.westlaw.com/WestlawFeatures/Internet/llrx.wl (last visited Apr. 15, 2007).

89 *See* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 632 (1990); Sara Benesh & Malia Red-

captures whether the Court's decision is a liberal or conservative one, as this fact may also influence lower court use of precedent. This was coded as a dummy variable, with liberal decisions coded as a "1" and conservative decisions coded as "0." Table 9 reports the results of a regression using these control variables with the four interpretive methodology variables of the underlying Supreme Court opinion cited, reporting the coefficient and the t-term for statistical significance.

TABLE 9. INTERPRETIVE THEORIES AND TOTAL POSITIVE CITATIONS

	Citations	t
Year	−.183***	5.869
Vote	−.186***	5.975
Ideology	−.015	.487
TEXT	.106***	3.426
LEGINT	.016	.512
PRAGMA	.033	.312
CANON	−.053*	1.719

The association with *vote* was significant and negative, perhaps meaning that the more significant cases are the difficult close ones for the Court. The association with *year* was significant and negative, which meant that earlier cases received more citations, as expected. *Ideology* was insignificant. Of our interpretive methodologies, textualism had an effect and it was a distinctly positive one. Opinions that relied more heavily on textualism were more often used in subsequent decisions. Reliance on the canons had less citation impact, with statistical significance at the 0.10 level.

The total positive citations included all lower court cases, including relatively insignificant applications such as string citations. I examine "substantial" positive citations as those with "four star" coding in Westlaw. Such substantial use may be the best measure of the precedential value of a Supreme Court opinion. Table 10 reports the results of the same regression, using those substantial citations as the dependent variable.

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dick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 537, 546–47 (2002); Richard L. Pacelle & Lawrence Baum, *Supreme Court Authority in the Judiciary: A Study of Remands*, 29 AM. POL. Q. 169, 175–76 (1992).

TABLE 10. INTERPRETIVE THEORIES AND SUBSTANTIAL POSITIVE CITATIONS

	Citations	t
Year	−.008	.249
Vote	−.175***	5.231
Ideology	−.052	1.532
TEXT	.071**	2.122
LEGINT	.039	1.133
PRAGMA	.078**	2.263
CANON	−.126***	3.770

Textualism and pragmatism are both statistically significantly associated with more substantial positive citations. Use of the canons again shows a significant negative association with such citations. Textualism appears to be a powerful device for influencing subsequent opinions, while reliance on canons is a relatively weak device. This might be interpreted as evidence that textualist opinions are more "useful" to later courts.

The next analysis considers negative citations to Supreme Court opinions. The Westlaw system distinguishes negative citations to a Court opinion, which includes reversals and the more common cases where the opinion was "not followed," or where a court distinguished or declined to extend the application of the decision. Table 11 replicates the analysis for the categories of positive citations, with all negative citations as the dependent variable.

TABLE 11. INTERPRETIVE THEORIES AND TOTAL NEGATIVE CITATIONS

	Citations	t
Year	−.073**	2.255
Vote	−.233***	7.265
Ideology	.07**	2.144
TEXT	.146***	4.569
LEGINT	.027	.823
PRAGMA	.075**	2.258
CANON	−.006	.182

The control variables are all highly significant. The association with *vote* was highly significant, suggesting that the closely decided cases are the most controversial ones but also the weakest precedential decisions. Ideology was also significant, indicating that liberal

Supreme Court opinions receive more negative citation treatment than do conservative ones.

Among the interpretive methodologies, textualism is associated with more negative treatment, at a level that is significant statistically and substantively. A one unit change in the textualism score produces a 14.6% increase in negative citations, indicating that a high textualism score (the scale runs to five) could produce over 50% more negative citations. This finding would seem to refute the theory that textualist opinions are necessarily more "useful." Such opinions produce an increase in negative citations that exceeds the increase in positive ones. Use of pragmatism is likewise associated with more negative citations, though with a strength that is only about half as much as that for use of textualism. Greater use of legislative intent or canons had no meaningful effect on negative citations.

These findings have a faint echo in research on congressional responses to statutory interpretations. A study of bankruptcy decisions and statutory amendments addressed this question.[90] It considered fifty-eight bankruptcy law rulings that were overruled, compared with a control group of decisions that were not altered by the Congress. The overruled decisions were disproportionately based on textualist reasoning in the courts.[91] While most of the decisions in the control group were pragmatic (37%), few of these decisions were found in the overruled group (7%).[92] By contrast, only 10% of the decisions in the control group were exclusively textualist, but such reasoning made up 33% of the overruled group sample.[93] Thus, it is textualist interpretations that were most often unacceptable to the legislature, while pragmatist rulings were acceptable. This is consistent with my finding that textualist decisions were more likely to be negatively treated by subsequent courts but contrary to the negative treatment of pragmatism-based decisions.

Cases decided using textualist principles appear to have much greater precedential use. They produce more positive citations but are even more strongly associated with negative citations in subsequent decisions. This is a far more significant finding than that associated with the mere use of interpretive methodologies on the Supreme Court. A textualist decision appears to be a more powerful one that exerts greater influence on other courts.

90 Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 900–12 (2000).

91 *Id.* at 908–10.

92 *Id.* at 909.

93 *Id.*

Some caution is necessary for interpreting these results. For example, they could be influenced by selection effects. The greater precedential consequence of textualist opinions might simply mean that those decisions are more frequently litigated and therefore more likely to show up as precedents.[94] This would produce results similar to those I found. This explanation would be a counterintuitive one, though a striking finding. Textualist decisions are generally more associated with "rules" as opposed to "standards" and thus would presumably be more certain in their application.[95] Justice Scalia himself has propounded this justification for reliance on textualism.[96] Yet the results of this study could suggest the opposite, that the indeterminacy of these decisions results in greater litigation over their implications.

In a recent book, Cass Sunstein has divided the Justices into theoretical categories, which include fundamentalists and minimalists.[97] He identifies fundamentalists in terms of constitutional interpretation as those inclined to originalism, who insist on setting clear rules, and who "have radical inclinations" to "make large scale changes in constitutional law."[98] He contrasts them with minimalists who "favor narrow rulings . . . that resolve the problem at hand without also resolving a series of other problems that might have relevant differences."[99] Under this framework, it appears that textualism is a "maximalist" approach to statutory interpretation. It produces broad decisions that are frequently cited as precedents, both positively and negatively. Those who Sunstein labels fundamentalists, Justices Scalia and Thomas, are also the most textualist interpreters, which is consistent with the thesis.

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94 *See* Andrew F. Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 205 (1999) (noting that "[m]odels of the litigation process suggest that litigation rates will be higher where uncertainty over court decisions is greater").

95 *See* Grundfest & Pritchard, *supra* note 28, at 643 (noting that it is reliance on legislative history that is criticized for increasing the "potential for confusion" in the law); Siegel, *supra* note 1, at 339 (noting that "textualists tend to prefer mechanical, rules-based methods of interpretation that, at least ostensibly, minimize the role of judicial choice in the interpretive process").

96 *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring) (contending that the use of legislative history "was more likely to confuse than to clarify" and criticizing the methodology for its "indeterminacy").

97 CASS R. SUNSTEIN, RADICALS IN ROBES 23–25 (2005).

98 *Id.* at 26.

99 *Id.* at 29.

CONCLUSION

From these results, we can draw several conclusions that are contrary to the conventional wisdom about theories of statutory interpretation. All theories find material use on the Supreme Court, with textualism and legislative intent being far and away the most frequently used. Although individual Justices clearly vary in their use of interpretive theories, the Court as a whole is quite pluralist in its methods of statutory interpretation. It is impossible to determine, though, whether this pluralism is sincere (using the best available methods for each case) or strategic (using the methods that conform to the Justice's ideologically preferred outcome).

The purported conflict between textualism and legislative history or pragmatism does not much exist. There is no negative association between their usage in Supreme Court opinions. Nor do the results support the hypothesized strong affinity between textualism and reliance on the canons, which appear to complement all the other interpretive theories. The sole strong association is between use of legislative intent and pragmatic interpretive methods. This finding generally confirms the pluralism of the Court's interpretive method.

Nor do the interpretive methodologies in general appear to show much effect on Court consensus. Only pragmatism had any effect on this standard. Indeed, the plain meaning rule results clearly establish that plain meaning is not at all plain, at least to Supreme Court Justices. They are readily able to find whatever plain meaning suits their ideological proclivities.

The different theories do show strikingly different precedential effects. Textualism decisions are controversial ones, with more future citations and especially negative citations. Pragmatism also shows this effect, while reliance on the canons tends to produce fewer future decisions, both positive and negative, showing minimalism in effect. Legislative intent is neutral on this score, with greater reliance on its materials such as legislative history showing no effect on future judicial use of the opinion, positive or negative.

This research cannot determine which methodology is the "best," though it can considerably inform that debate. If one trusts the sincerity of the Justices, the availability of multiple interpretive methods is best, because it allows them to choose the most suitable approach for the case at hand. If one prefers to constrain such pluralistic choice, neither of the common tools of textualism or legislative intent appear effective at promoting consensus in their application, though pragmatism does have this effect.

If one prefers minimalist decisionmaking, one would favor use of the canons (though they are helpful in only a small number of cases) and reliance on legislative history. Textualism and pragmatism appear to be decisionmaking tools of greater controversy in subsequent application.

APPENDIX A

VARIABLES AND CODING

The data in this study involved coding Supreme Court decisions between 1994 and 2002. The vote of each individual Justice was separately coded for variables including method of statutory interpretation, type of case, and ideological direction of the vote.

The statutory interpretation variables that were coded included:

Text Use: Was the text of the statute used in the opinion?

Textualism: Did the opinion make explicit reference to textualism?

Plain Meaning: Did the opinion expressly invoke the plain meaning rule?

Ambiguity: Did the opinion find the statutory language to be ambiguous?

Dictionary: Was a dictionary used to ascertain the meaning of statutory text?

Common Understanding: Did the opinion use common understanding of meaning?

Technical Understanding: Did the opinion use technical understanding of meaning?

Whole Act: Did the opinion invoke the whole act rule?

Absurdity: Did the opinion find an interpretation of text to be absurd?

Legislative History: Did the opinion use legislative history for statutory meaning?

Conference Committee: Was the legislative history from a conference committee?

Other Committee: Was the legislative history from an nonconference committee?

Sponsor: Was the legislative history a sponsor statement?

Other: Was the legislative history some other aspect of the record (e.g., hearing)?

President: Did the opinion use a presidential statement for statutory meaning?

Post Enactment: Did the opinion use post-enactment legislative history?

Congressional Inaction: Did the opinion use congressional inaction for interpretation?

Reenactment: Did the opinion rely on a statute's reenactment for interpretation?

Legislative Purpose: Did the opinion use legislative purpose for interpretation?

Chevron Deference: Did the opinion use *Chevron* deference?

Expressio: Did the opinion use the *inclusio unius* canon?

Ejusdam: Did the opinion use the *ejusdam generis* canon?

Noscitur: Did the opinion use the *noscitur a sociis* canon?

Common Law: Did the opinion use the canon requiring that statutes in derogation of the common law be strictly construed?

Federalism: Did the opinion use the canon against preemption of traditional state functions?

Constitutional avoidance: Did the opinion use the constitutional avoidance canon?

Lenity: Did the opinion use the rule of lenity canon?

For each of these variables, a Justice vote was coded as "1" if it affirmatively used the interpretive principle, "0" if it made no mention of the principle, and "-1" if it rejected the use of the principle in interpretation. Rejection could take the form of either the rejection of the validity of the interpretive standard as a general matter or the rejection of its value in the particular case.

The cases were also coded by year of decision, number of Justices in the majority, whether the case outcome was liberal or conservative, whether the Justice in question dissented or concurred and whether the Justice authored the opinion containing the statutory interpretation analysis.