

WHY SUPREME COURT JUSTICES CITE LEGISLATIVE HISTORY:
AN EMPIRICAL INVESTIGATION

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ABSTRACT

Much of the social science literature on judicial behavior has focused on the impact of ideology on how judges vote. For the most part, however, legal scholars have been reluctant to embrace empirical scholarship that fails to address the impact of legal constraints and the means by which judges reason their way to particular outcomes. This Article attempts to integrate and address the concerns of both audiences by way of an empirical examination of the Supreme Court's use of a particular interpretive technique – namely, the use of legislative history to determine the purpose and meaning of a statute. We analyzed every opinion in every Supreme Court statutory interpretation case from 1953 through 2006 that involved a frequently interpreted federal statute. We also collected original data on the characteristics of each statute, including its age, length, complexity, obscurity, and the number of times that it had been amended. We then used logit regression analysis to evaluate the impact of these characteristics, as well as the ideological tilt of the justices and their opinions, on the likelihood that a justice would cite legislative history in a given opinion.

We find overall that the use of legislative history is driven by a combination of legal and ideological factors. On the whole, the legal variables have a significantly larger impact on the likelihood of legislative history usage than the ideological variables, but the impact of the ideological variables cannot be dismissed. Statutes that are longer or more complex increase the likelihood of legislative history usage, whereas frequent amendment of a statute decreases that likelihood. The age of the statute also matters, but its effect is neither linear nor monotonic: very new and very old statutes are more likely to elicit legislative history usage than statutes of intermediate age. Majority opinions are significantly more likely to cite legislative history than dissenting opinions, which are in turn more than twice as likely to cite legislative history as concurring opinions. The

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evidence also suggests that the use of legislative history by one justice prompts other justices to respond in kind with legislative history arguments of their own.

With respect to the impact of ideological factors, liberal justices are generally more likely than conservative justices to cite legislative history. We found no support, however, for the proposition that justices use legislative history instrumentally in order to reach their ideologically preferred outcomes: legislative history usage does not affect the likelihood that a justice will arrive at his or her preferred outcome. Moreover, contrary to what some scholars have suggested, we also found no evidence that Justice Scalia has persuaded other justices to refrain from citing legislative history in their own opinions. Rather, the decline in the overall use of legislative history since the mid-1980s reflects a rightward shift in the ideological composition of the Court, as liberal justices who were inclined to cite legislative history have been replaced by conservative justices who are not inclined to do so.

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