JUDGING STATUTES: INTERPRETIVE REGIMES

Nancy Staudt, Lee Epstein, Peter Wiedenbeck, René Lindstädt & Ryan J. Vander Wielen[*]

I. INTRODUCTION

Theories of statutory interpretation abound. Scholars, judges, and commentators have long puzzled over the best method to locate the meaning of a statute and to this end have proposed a range of approaches that rely on various forms of evidence, including statutory text, legislative intent, agency interpretations, cultural norms, and judicial precedent.[1] These theories do not merely offer

[*] Nancy Staudt is Professor of Law at Washington University in St. Louis; Lee Epstein is the Edward Mallinckrodt Distinguished University Professor of Political Science and Professor of Law at Washington University in St. Louis; Peter J. Wiedenbeck is the Joseph H. Zumbalen Professor of Law and Associate Dean of the Faculty at Washington University in St. Louis; René Lindstädt and Ryan J. Vander Wielen are Ph.D. candidates in Political Science at Washington University in St. Louis. We are grateful to the National Science Foundation for supporting our research, to Andrew D. Martin for offering useful comments, and to James J. Brudney and Corey Ditslear for providing us with their data on civil rights cases. We used R (http://www.R-project.org) and Stata to conduct the analyses and generate the graphs presented in this article. The project's web site (http://epstein.wustl.edu/research/rationales.html) houses the database. Please e-mail all correspondence to Nancy Staudt, ncstaudt@wulaw.wustl.edu.

1. The literature here is voluminous; for an excellent introduction, see WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2001) [hereinafter ESKRIDGE ET AL., LEGISLATION]. Of course, despite the number of studies, no consensus exists as to how federal courts should use this evidence. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 130–81 (1994) [hereinafter ESKRIDGE, DYNAMIC INTERPRETATION] (defending an approach that permits judicial reliance on text, legislative history, and contemporary norms); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997) (arguing for a textualist interpretive process); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory*

competing modes of analysis; they also highlight competition among federal actors for control over the law-making process.[2] An advocate of a textualist or intentionalist reading of a statute argues for bestowing special weight on the legislature, whether its product or its process. One who supports interpreting statutes with deference to administrative rulings privileges the executive over the judicial and legislative branches in the interpretive process. Alternatively, those who defend reliance on substantive canons, precedent, or broad policy considerations in effect prioritize judge-made rules and perceptions. Championing one theory over others, therefore, favors a particular allocation of power within the federal government and for this reason we refer to each particular mode of analysis—whether textualism, intentionalism, deference, precedent, and so on—as a component of larger interpretive regime: legislative, executive, or judicial.[3]

Interpretation, 68 TUL. L. REV. 803 (1994) (arguing for an interpretive process that relies on text and legislative history); Daniel B. Rodriquez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003) (arguing for use of legislative history but only if statements are made by pivotal voters in the legislative process); Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998) (proposing that federal courts rely on text and legislative history to achieve the best results).

2. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 616–17 (1995) (providing a useful description of the various emerging theories of statutory interpretation).

3. *See* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992) (using a similar conceptual scheme). Of course, we understand—and indeed later elaborate—the distinctions between and among the major components of each regime; e.g., an emphasis on the plain meaning of a statute is quite distinct in many respects from a stress on its legislative history. On the other hand, both imply some degree of regard for the legislative product or process in ways that, say, deference to administrative rulings may not. *See, e.g.*, Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 LEGIS. STUD. Q. 353, 359–360 (1985) (claiming that the invocation of plain meaning, legislative histories, and legislative intent all represent deference to the legislature, though the degree of deference differs among them); *see also* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998) (demonstrating the "[j]ustices' consistent use of what I call judicially-selected policy norms").

In this essay, we do not intend to defend an extant regime; many others have done that.[4] Nor do we seek to develop a novel understanding of statutory interpretation; others have done that as well.[5] Rather, our goal is something more modest: to provide a descriptive mapping of statutory interpretation in the business context—specifically, in disputes over the meaning of the Internal Revenue Code. To that end, we analyze every tax case decided by the Supreme Court since Congress adopted the modern tax laws in 1909, with an eye toward identifying the various rationales deployed by the justices, as well assessing some commonly-held beliefs about trends in statutory interpretation over time.[6]

Our analysis unfolds in four steps. We begin, in Part II, by explaining our decisions to focus on interpretive regimes, to analyze a population of cases resolved over a nine-decade period, and to stress an economic aspect of judging. Parts III and IV describe the database we amassed and report the results of our investigation into rationales used by majority opinion writers since the early 1900s. Taken as a whole, the data depict a Court that has privileged its own precedent and judge-made rules over the preferences of the legislative or executive branches. In light of Schacter's[7] and Zeppos'[8] research, this does not come as much of a surprise; they too concluded that "judicially selected policy norms" predominate. What is interesting, though, is that this overall finding masks a move of some consequence: the justices may have prioritized their own viewpoints and rules in the earliest years, but, by the 1960s, they began to rely more heavily on both text and legislative history in their interpretation of tax laws. This tendency to privilege the legislature became firmly entrenched in the 1980s and continues today. With regard to agency interpretations of statutes, the Court has given progressively greater and greater deference to this form of evidence over time but has never bestowed on the executive branch the level of control allocated to itself and the legislative branch. In

4. *See, e.g.*, SCALIA, *supra* note 1; Redish & Chung, *supra* note 1; Rodriquez & Weingast, *supra* note 1; Ross & Tranen, *supra* note 1.

5. *See, e.g.*, ESKRIDGE, DYNAMIC INTERPRETATION, *supra* note 1; Schacter, *supra* note 3.

6. Congress adopted the corporate tax in 1909 and the income tax in 1913. For more information on the number of cases in the study, see Part III.

7. Schacter, *supra* note 3.

8. Zeppos, *supra* note 3.

Part V, we briefly explore these trends, as well as compare our results to data drawn from civil rights litigation.[9] We conclude, in Part VI, with suggestions for future research.

II. WHY INTERPRETIVE REGIMES? WHY A LONGITUDINAL, LARGE-N STUDY? WHY THE ECONOMIC CONTEXT OF JUDGING?

The balance of this article profiles the contents of a database housing information on the modes of statutory interpretation deployed by the Court in 991 tax cases. Eventually we hope to use these data in a larger study that seeks to explain: (1) why the justices adopt certain interpretive regimes, and (2) how their choices affect (a) the resolution of particular disputes and (b) their relations with other political organizations (but especially Congress). The preliminary results that we report here may help resolve on-going debates within law and the social sciences, if only because we study "the actual—as opposed to assumed—interpretive practices of the Supreme Court."[10] In what follows, we describe those current debates and explain how they informed our research choices—specifically the decision to focus on the Court's use of interpretive regimes in economic disputes extending over a ninety-year period.

A. Interpretive Regimes

The task of construing statutes confronts judges with a wide-array of interpretive choices—choices that come in the form of regimes, theories,[11] methods,[12] interpretive resources,[13] modes of

9. We are grateful to James G. Brudney & Corey Ditslear for providing these data, which come from their *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (manuscript and data on file with authors).

10. Schacter, *supra* note 3, at 56 (claiming that the "approach of legal scholars to the 'ought' is insufficiently informed by a systematic study of the 'is'").

11. *See, e.g.*, Zeppos, *supra* note 3, at 1081, 1084 (explaining how "dynamic theories" of statutory interpretation have come to "dominate" the literature).

12. Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 327–30 (2001) (analyzing five "methods" of interpretation: strict construction [plain meaning], deference to regulations, structure [purpose], legislative history, practical reasoning).

13. *See, e.g.*, Brudney & Ditslear, *supra* note 9 (manuscript at 27) (describing the canons as a form of reasoning and coding what they deem ten

analysis,[14] reasoning,[15] or forms of evidence, as scholars have variously described or delineated them. Although the possibilities are many in number and our mapping of them, as we explain in Part IV, is sufficiently fine to capture the details of interest to some scholars, our focus is on the Court's utilization of the broader categories of the three major interpretive regimes: legislative, executive, and judicial.

This focus reflects our belief that the deployment of one or a combination of regimes in any given case may unveil intriguing features of judging and, more generally, of inter-branch dynamics and policymaking. Chiefly, as other scholars have long asserted, when judges reveal their reliance on one or another approach, they may affect other players in the interpretive game.[16] So, on some accounts, (for example, if judges commit to a textualist approach) they may be signaling deference to Congress. But they also may be telling legislators that they ought not to expend scarce resources on constructing legislative documents filled with commentary on their

"interpretive resources": text, dictionaries, language canons, legislative history, legislative purpose, legislative inaction, Supreme Court precedent, common law precedent, substantive canons, and agency deference); Schacter, *supra* note 3 (including nine "interpretive resources" in her analysis: statutory language, legislative history, other statutes, judicial opinions, canons of construction, administrative materials, secondary sources, dictionaries, and miscellaneous others).

14. *See, e.g.*, Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 444 (1992) (coding four "modes of analysis": plain meaning, legislative history, legislative intent, interest-balancing).

15. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 347 (1991) (labeling as "reasoning" plain meaning, legislative history, canons, statutory precedents, purpose and policy, common law & constitutional law); *see also* Brudney & Ditslear, *supra* note 9 (analyzing the Court's use of legislative history and other textual materials in formulating opinions).

16. *See, e.g.*, Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 110–12 (1997) (noting possible consequences of methodological decisions in statutory interpretation); William N. Eskridge, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 39–42 (1994). *But see* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 112–13 (2000) (noting that, as an empirical matter, the consequences of adopting one interpretive methodology over another are unclear); Schacter, *supra* note 3, at 13 ("The interpretive resources that appear in Supreme Court opinions . . . offer guidance to lower courts, lawyers, and litigants.").

underlying purposes or goals, and litigants should not search for this evidence, as the court will ignore it in the decision-making process.[17] Alternatively, a judge committed to intentionalism may foster precisely the opposite incentives—lawyers should fill their briefs with excerpts from the documents, and legislators should work to build a legislative history in order to achieve their preferred outcomes.[18]

Other accounts, however, suggest a different kind of relationship between rationales and congressional reactions: one that places greater emphasis on the constraints confronting judges as first-stage interpreters, and not final policy makers, in the larger separation-of-powers system.[19] Along these lines comes a series of commentary reasoning that, because Congress is more likely to overturn decisions relying on the plain meaning of a law, the Court should eschew textualism as a primary mode of analysis.[20] Others make precisely

17. *See* SCALIA, *supra* note 1, at 36–37 (noting that refusal to rely on legislative history will save resources for both legislators and litigants); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 841 (1988) (arguing that a textualist approach will lead to statutes with extraordinary detail).

18. For a somewhat different account of the importance of legislative history, see Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51 (1994), which offers a formal model showing that "legislative history indicates to a Justice that he or she should examine the statute more closely" because decisions deviating "too far from the intent of the statute may be overturned by corrective legislation." *Id.* at 54.

19. *See* Eskridge, *supra* note 15; Schwartz et al., *supra* note 18; *see also infra* notes 22–24 (noting scholars' arguments that judges invite legislative override by invoking particular canons and rationales).

20. *See e.g.*, Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (2000) (discussing textualism and finding courts that adopt this method are more likely to suffer congressional override); Eskridge, *supra* note 15, at 374; Solimine & Walker, *supra* note 14 (presenting data to show that Congress is more likely to overturn textually-grounded decisions); 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, 308 (1990). Joining these commentators is Justice John Paul Stevens, who famously wrote in his dissent:

> In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation. Thus, for

the opposite claim, arguing that the legislature is more likely to overturn non-textually-grounded decisions.[21] A third group asserts that judges may invoke particular rationales fully aware of—even inviting—a legislative override.[22]

What all these predictions have in common may be more intriguing than their differences. The rationales are akin to instruments that justices wield strategically to obtain certain results.[23]

> example, in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), we rejected a "mechanical construction," of the fee-shifting provision in § 706(k) of Title VII of the Civil Rights Act of 1964 that the prevailing defendant had urged upon us . . . . That holding rested entirely on our evaluation of the relevant congressional policy and found no support within the four corners of the statutory text. Nevertheless, the holding was unanimous and, to the best of my knowledge, evoked no adverse criticism or response in Congress.
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> On those occasions, however, when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different. It is no coincidence that the Court's literal reading of Title VII, which led to the conclusion that disparate treatment of pregnant and nonpregnant persons was not discrimination on the basis of sex was repudiated by the 95th Congress . . . .
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> . . . .
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> In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take the time to revisit the matter" and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.

W.V. Univ. Hosps. v. Casey, 499 U.S. 83, 112–13, 115 (1991) (Stevens, J., dissenting) (internal citations omitted).

21. *See, e.g.*, Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Responses*, 11 AM. POL. Q. 441, 444 (1983) (suggesting that Congress is more likely to overturn anti-trust decisions than those involving labor because "[w]hile labor law is written in fairly specific terms, antitrust policy is . . . defined by Congress with broad strokes"); Solimine & Walker, *supra* note 14, at 442 (hypothesizing that "Congress is more likely to modify decisions that are based on something other than a 'plain meaning' analysis, because cases which engage in more vague reliance on policy goals . . . are more apt to trigger [a] reaction by attentive publics").

22. *See* Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 504 (1996); *see also infra* note 26 (describing Spiller and Tiller's findings).

23. For more on the idea of strategic instrumentation in a variety of

Nonetheless, further exploration of the extant literature is not critical here. What is important for our purposes is simply this: while the existence of institutional signaling (as well as the implicit bargains that branches within the federal government may reach in the law-making process) has not escaped scholars,[24] many specific claims about the relationship between rationales and inter-branch decision making have been the subject of little rigorous scrutiny.[25] By producing a reliable and valid mapping of regime deployment—a mapping that promotes further systematic investigations—we hope our data will lay an empirical foundation for these interesting debates. At the very least, identifying the various regimes is necessary to develop robust models capable of assessing particular hypotheses about the interactions between the Court and Congress.

B. Longitudinal and Large N

Many scholars have stressed intra-court decision making and, in particular, the relationship (or lack thereof) between the use of particular modes of interpretation and the types of judges who use them, as well as the results those judges reach. Some commentators, for example, assert that "liberal" judges make use of some theories (e.g., legislative intent) while eschewing others (e.g., plain meaning),

contexts, see, for example, Lee Epstein et al., *Dynamic Agenda Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002); Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence From Administrative Law*, 31 J. LEGAL STUD. 61 (2002); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349 (1999).

24. For a brief discussion of institutional signaling and implicit bargains, see Eskridge & Frickey, *supra* note 16, at 39–42. *See also* JEFFREY S. BANKS, SIGNALING GAMES IN POLITICAL SCIENCE 3–6 (1991) (arguing that, even with incomplete information between parties, signals can be sent between one another, which affects the decision making process).

25. And some of the scrutiny that does exist reaches different conclusions. *Cf.*, Brudney & Ditslear, *supra* note 9; 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 (1999) (concluding that Scalia's presence on the Court has led to a decline in the Court's use of legislative history in statutory analysis); 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 (1993) (maintaining the Court "continues to look at legislative history in cases where the meaning of a federal statute is at issue").

and that these choices have consequences for a dispute's ultimate resolution (and, perhaps, as we suggest above, for its ultimate reception in Congress). Others seem to agree that different sorts of judges rely on one type of rationale to the neglect of others but doubt the importance of that reliance for case outcomes.[26] Then there are those who dispute the idea that liberal judges are more likely than their conservative counterparts to deploy particular rationales but that the rationales are consequential in any event.[27] Still another set of scholars takes issue with the notion of a relationship between rationales and outcomes in virtually any form.[28]

This controversy may be distinct from debates over the effect of interpretive regimes on Congress, but in at least one way, it is similar. In both cases, the vast majority of arguments marshaled by participants have not been subjected to enough serious empirical scrutiny. And that, in part, explains why we made the decision to systematically inspect a full complement of cases—all tax disputes resolved by the Supreme Court—and take inventory of all the rationales invoked in them.

But that is not our only reason, nor should it be, since several scholars already have systematically tallied rationales. Brudney and

26. *See, e.g.*, Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982); Koby, *supra* note 25. Along somewhat different lines is Spiller and Tiller's work, which suggests that it may be difficult for judges simultaneously to apply their most preferred "rule" (e.g., plain meaning) and to reach their most preferred policy outcome (e.g., a holding in favor of the taxpayer) because "there is no guarantee that application of a preferred judicial rule will achieve the justices' preferred policy outcome." Spiller & Tiller, *supra* note 22, at 504. Accordingly, justices may occasionally apply a rule they favor to reach an outcome they dislike and that they believe Congress will dislike as well (and thus override) in an effort to achieve both rule and policy goals. *See id.* at 504–05.

27. *See, e.g.*, Brudney & Ditslear, *supra* note 9 (manuscript at 64–65); Henschen, *supra* note 3, at 363; Wald, *supra* note 25, at 69 ("Of those who have looked to legislative history, ideological bent is not determinative.")

28. Some within this group simply portray interpretive regimes as smokescreens for judicial preferences. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence*, 31 SANTA CLARA L. REV. 567 (1991) (focusing exclusively on constitutional, not statutory, disputes).

Ditslear, for example, considered ten "canons of construction"[29] invoked by the Burger and Rehnquist Courts in work-place related litigation;[30] Zeppos counted regime-based authorities cited by the Court in 413 randomly selected cases decided between 1890 and 1990;[31] Eskridge examined the Court's primary reasoning in a sample of disputes (size 275) resolved between 1978 and 1984;[32] Solimine & Walker coded four modes of analysis used in the 2,017 cases in which the Burger Court interpreted a federal law;[33] and Schneider scrutinized the underlying judicial reasoning deployed by lower federal courts in 482 tax cases.[34] Judge Patricia Wald described the use of legislative history and textualism during the Court's 1981[35] and 1988 terms,[36] and Stephanie Wald did the same for the 1991 term.[37] More recently, Schacter systematically analyzed the Court's deployment of various rationales during the 1996 term.[38]

On the one hand, the lessons from these and other empirical studies have been invaluable for our project,[39] and readers will see them sprinkled throughout. On the other hand, existing studies do have their limits. Primarily, most are so circumscribed in time—Zeppos is a notable exception here[40]—that they cannot shed much light on questions of great interest, such as the effect of "key actors'

29. Brudney & Distlear, *supra* note 9 (manuscript at 9).
30. *Id.* (manuscript at 18).
31. Zeppos, *supra* note 3, at 1088.
32. Eskridge, *supra* note 15, at 350–53.
33. Solimine & Walker, *supra* note 14, at 444.
34. Schneider, *supra* note 12, at 332–33.
35. Patricia M. Wald, *Some Observations of the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).
36. Wald, *supra* note 20.
37. Wald, *supra* note 25, at 49; *see also* Koby, *supra* note 25, at 384–85 (counting citations to legislative history materials in cases decided by the Supreme Court between 1980 and 1998).
38. Schacter, *supra* note 3, at 18–19.
39. Other studies include Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Henschen, *supra* note 3; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).
40. Zeppos, *supra* note 3 (examining cases decided between 1890 and 1990); *see also* Carro & Brann, *supra* note 39 (exploring the Court's use of legislative history between 1938 and 1979).

preference changes" on the use of particular rationales.[41] For that matter, they may be unable to support inferences about the period they analyze (e.g., making claims about the Rehnquist Court based on the 1996 term).

The latter is of particular concern in light of a question over which scholars have spilt no shortage of ink: whether regime change has occurred over time. Writing in the 1950s, for example, Fisher & Harbison speculated that the justices were increasingly relying on committee reports, floor debates, and other materials designed to divine the legislature's intent.[42] Carro and Brann provided empirical support for this speculation, as did Judge Wald. Her analysis of the 1981[43] and 1988[44] terms, in which she found that the Court invoked legislative history materials in the majority of its cases, led her to conclude that "[n]o occasion for statutory [interpretation] now exists when the Court will not look at the legislative history."[45] Just four years later, though, Merrill asserted that the tide had turned yet again—this time away from intentionalism and towards Justice Scalia's (new) textualism.[46] Specifically, Merrill found that the percentage of cases making "'substantive use' of legislative history" had decreased monotonically from 100 in 1981 to 75 in 1988 to 18 in 1992—a decline he attributed directly to Scalia.[47] "At first [Scalia's] effort seemed quixotic and appeared to have little impact on the other Justices," Merrill wrote.[48] "Over time, however, Justice Scalia's influence . . . has grown, to the point where it now appears . . . [to have] achieved a substantial measure of success."[49] Stephanie

41. *But cf.* Zeppos, *supra* note 3, at 1122–24 (arguing judges use recognized legal authority to justify a value choice).

42. Glendon M. Fisher, Jr. & William J. Harbison, *Trends in the Use of Extrinsic Aids in Statutory Interpretation*, 3 VAND. L. REV. 586 (1950).

43. Wald, *supra* note 35.

44. Wald, *supra* note 20.

45. Wald, *supra* note 35, at 195 (emphasis omitted).

46. Merrill, *supra* note 39. For Scalia's approach, see SCALIA, *supra* note 1. For commentary on his "new" textualism, see Eskridge, *supra* note 39; William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

47. Merrill, *supra* note 39, at 355–56.

48. *Id.* at 355.

49. *Id.*; *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992) (claiming that the

Wald's analysis of the same term (1992), on the other hand, found that over 85 percent of the Court's statutory decisions continued to cite legislative history,[50] though Schacter's more recent study (of the 1996 term) falls somewhere between Wald and Merrill.[51] Schacter found a 49 percent "rate of legislative history usage" which is less than Wald's 75 percent figure but "nearly triple the rate that Merrill observed in analyzing the 1992 Term."[52] Based on these findings, Schacter declared that "[i]t would be premature to declare the trend against legislative history to have reversed itself"[53] and that "the trend toward textualism is reversing."[54] Koby, however, would strongly disagree with both conclusions. His study of citations to legislative history between 1980 and 1998 reveals that before Scalia ascended to the Court, 3.47 citations to legislative history appeared (on average) in each decision; after Scalia's arrival, that figure dropped to 1.87.[55]

Undoubtedly, some of this disagreement, as well as other on-going debates in the literature, stems from the particular time periods under analysis and, more broadly, from the researcher's design choices (e.g., the decision to focus on a small number of cases,[56] a

"Supreme Court's actual use of legislative history is in decline"); Brudney & Ditslear, *supra* note 9 (both finding a decline in the Rehnquist Court's use of legislative history materials); Eskridge, *supra* note 39 (same).

50. Wald, *supra* note 25, at 49.

51. Schacter, *supra* note 3.

52. *Id.* at 15–16.

53. *Id.* at 16.

54. *Id.* at 37.

55. Koby, *supra* note 25, at 386.

56. We have thus far limited our discussion to studies examining at least one term, but other studies examine a handful or fewer. *See, e.g.*, William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055 (1999) (discussing a study of statutory interpretation in the context of one key case); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999) (citing analysis of two major Supreme Court cases in defense of the statutory interpretation method); R. Wilson Freyermuth, *Are Security Deposits "Security Interests"? The Proper Scope of Article 9 and Statutory Interpretation in Consumer Class Actions*, 68 MO. L. REV. 71 (2003) (investigating two decisions and arguing the cases rest on a flawed understanding of Article 9 of the UCC); Lawrence M. Solan, *Should Criminal Statutes Be Interpreted Dynamically?*, *in* ISSUES IN LEGAL SCHOLARSHIP, (Berkeley Electronic Press

particular term or era,[57] a random sample of a large number of cases,[58] or a population[59]) but other factors contribute as well. Perhaps the most consequential are: (1) how the researchers went about inventorying rationales; (2) whether they considered only instances of statutory interpretation or included constitutional analysis as well; and (3) the type and number of laws (or legal areas) scrutinized.

As to the first, three different approaches appear in the literature. One, "exemplified" by Zeppos,[60] Carro & Brann,[61] and Koby,[62] is to comb Court decisions for citations to particular types of authority (e.g., committee reports, past Court decisions, and so on) and then generate summary statistics. For example, Zeppos found that in the 413 randomly-drawn Court cases included in his study of the period between 1890 and 1990, the justices relied on judicial sources in 93.2, legislative in 87.7, and executive in 23.5 percent of the cases.[63]

To the extent that Zeppos clearly identifies the materials he placed into each of these categories, his study is a model. But for all the reasons Zeppos recognizes,[64] the approach of counting authorities without assessing whether they were nothing more than passing references is not ideal. Most subsequent scholars have thus eschewed it for one of the two others: reading the Court decision and coding a primary, dominant rationale,[65] or coding all rationales on which the opinion writer claimed to have relied.[66] The former certainly has some value but, then again, as Eskridge, a scholar who has used the approach, has noted, it suffers a serious drawback: "the Court almost never relies on just one reason."[67] The latter also has problems, but we think, and the most recent studies inventorying

2002), *at* http://www.bepress.com/ils/iss3/art8/ (exploring statutory interpretation in three criminal law decisions).

57. *E.g.*, Schacter, *supra* note 3; Wald, *supra* note 25.
58. *E.g.*, Eskridge, *supra* note 15; Zeppos, *supra* note 3.
59. *E.g.*, Carro & Brann, *supra* note 39; Koby, *supra* note 25.
60. Zeppos, *supra* note 3.
61. Carro & Brann, *supra* note 39.
62. Koby, *supra* note 25.
63. Zeppos, *supra* note 3, at 1093.
64. *Id.*, app. B.
65. *See, e.g.*, Eskridge, *supra* note 15, at 347 n.38.
66. *See, e.g.*, Brudney & Ditslear, *supra* note 9; Schacter, *supra* note 3.
67. *See* Eskridge, *supra* note 15, at 347 n.38.

rationales would seem to concur,[68] that its benefits well outweigh the costs. Accordingly, and as we explain in more detail in Part IV, in evaluating the Court's use of rationales, we coded them all based on which rationale the majority (or plurality) relied on to reach its result; we do not merely count authorities, nor do we include passing references.[69]

A second distinction among existing studies is whether they focused on the use of interpretive rationales or regimes in the statutory or constitutional context, or both. To us, combining the two is a mistake under any circumstances. The justices themselves may reject particular regimes in one context but not in another;[70] and, of course, owing to Congress' inability to overturn constitutional decisions by a simple majority, the nature of the relationship between the legislature and the judiciary may be quite distinct across the two areas.[71] In any event, because only statutory interpretation interests us, we do not include cases that the Court resolved exclusively on constitutional grounds.[72]

C. The Economic Context of Judging

This brings us to the third distinction among existing studies: the number and type of laws (or legal areas) considered. Beginning with the former, some researchers, perhaps the majority, fold many into one study. Zeppos, for example, relies on a random sample of all

68. *See, e.g.*, Brudney & Distlear, *supra* note 9; Schacter, *supra* note 3.

69. Our coding is thus similar to the one used by Brudney and Ditslear in Brudney & Ditslear *supra* note 9 (manuscript at 28) (focusing on interpretive resources "relied upon as affirmatively probative to help the majority reach its result; or . . . relied upon as 'a' or 'the' determining factor in the majority's reasoning process . . . . [I]n both instances the resource contributes in a meaningful way to the majority justification for its holding.")

70. It is well known, for example, that Scalia opposes the use of legislative history materials to construe laws, and while he does not seek the *intent of the Framers* in constitutional interpretation, he does search for the "original understanding" of the text's meaning. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989).

71. *See* Eskridge, *supra* note 15. *But see* Lee Epstein et al., *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583 (2001).

72. In 127 of the 991 cases in our study (or 12.82 percent), the Court interpreted a constitutional provision and a section of the Internal Revenue Code. In this essay, we discuss only rationales employed in the interpretation of the Code, not the constitutional provisions.

statutory interpretation cases;[73] Wald examines all cases during the 1991 term;[74] and Brudney and Ditslear scrutinize all workplace-related decisions (constitutional and statutory).[75] We see the logic here, but, at the same time, take note of studies comparing different laws finding that even the same justices deploy different rationales to interpret them.[76] Given variation in statutes (e.g., in their text and history), this finding hardly comes as a surprise, but it is one that counsels caution in combining legal areas. We heed that warning and, as we explain momentarily, focus on one statute, the Internal Revenue Code.[77]

Turning to the studies that tend to focus on one legal area or statute, we find, in contrast, little variation: the focus is almost always on some dimension of civil rights—to the neglect of complex economic and financial questions.[78] To us, the neglect of these issues is quite consequential; it means that, however sophisticated and insightful extant studies may be, our knowledge of statutory interpretation is incomplete at best and downright biased at worst.

Perhaps the best evidence of our claim emanates from the Supreme Court itself—specifically, from its plenary docket. As Figure 1 makes clear, while the Justices occasionally granted certiorari to more petitions involving civil rights (e.g., 1969 term),

73. Zeppos, *supra* note 3.

74. Wald, *supra* note 25.

75. Brudney & Ditslear, *supra* note 9 (manuscript at 18). Worth noting, though, is that these scholars disaggregate the data to draw comparisons between and among issues—a worthwhile task.

76. *Id.*; Henschen, *supra* note 3; Henschen, *supra* note 21.

77. This is not, of course, an entirely satisfactory solution since the most recent Code contains thousands of sections that govern many different dimensions of taxation. We analyzed the section(s) and subjects individually but here only report the overall (and not section-by-section or subject-by-subject) results.

78. This is as true of studies of rationales as it is of case outcomes. *See, e.g.*, William N. Eskridge, Jr., *Reneging on History?: Playing the Court/ Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 642–46, 664–66 (1991); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 41, 42–43 (1997) (study of case outcome in civil rights context). Notable exceptions include Schneider, supra note 12; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relation Decisions 1949–1988*, 23 RAND J. ECON. 463 (1992).

over the five-decade period, they devoted more of their scarce docket slots to (and resolved far more) economic controversies.

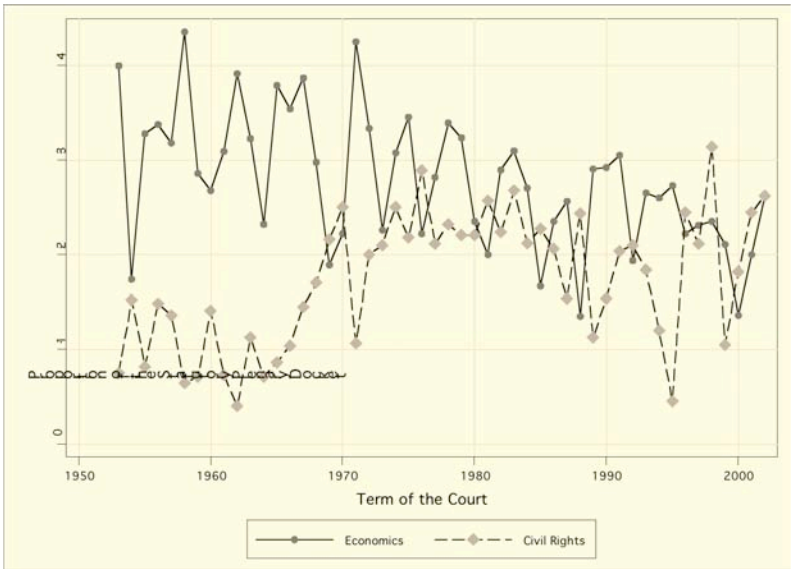

Figure 1: Civil rights and economics cases as a proportion of all statutory interpretation cases orally argued before the Supreme Court, 1953–2003 terms.[79]

Moving from the large categories of "economics" and "civil rights" towards particular pieces of legislation does not undermine to this conclusion about the prevalence of economic or financial disputes. As Epstein et al. report,[80] the justices of the Vinson (1946–1952 terms) and Warren (1953–1968 terms) Courts not only granted review to a disproportionate number of petitions centering on economically oriented laws, but they also focused on the Internal

79. N=2949. Computed from Harold J. Spaeth's U.S. Supreme Court Data Base (Dec. 9, 2004 release), *at* http://as.uky.edu/polisci/ulmerproject/sctdata.htm, with the following code (in Stata):

generate civrights=1 if (analu==0) & (dec type==1 — dec type==6 — dec type==7) & (authdec1==4 — authdec2==4) & (value==2) replace civrights=0 if civrights==.

generate economic=1 if (analu==0) & (dec type==1 — dec type==6 — dec type==7) & (authdec1==4 — authdec2==4) & (value==8) replace economic=0 if economic==.

80. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 653 (2003).

Revenue Code in particular. It was the "most litigated law" during both these eras, followed by the Sherman Anti-Trust Act (during the Vinson Court) and the National Labor Relations Act (as amended) (during the Warren Court).[81] These trends show no sign of abating. Between the 1986 and 2003 terms, as we depict in Figure 2, the Supreme Court decided more statutory controversies involving the tax code than any other federal statute. Importantly too, most all other laws making frequent appearances in the Court also were outside the realm of civil rights, including the Federal Rules of Civil Procedure, the Bankruptcy Code, and the Employee Retirement Income Security Act.

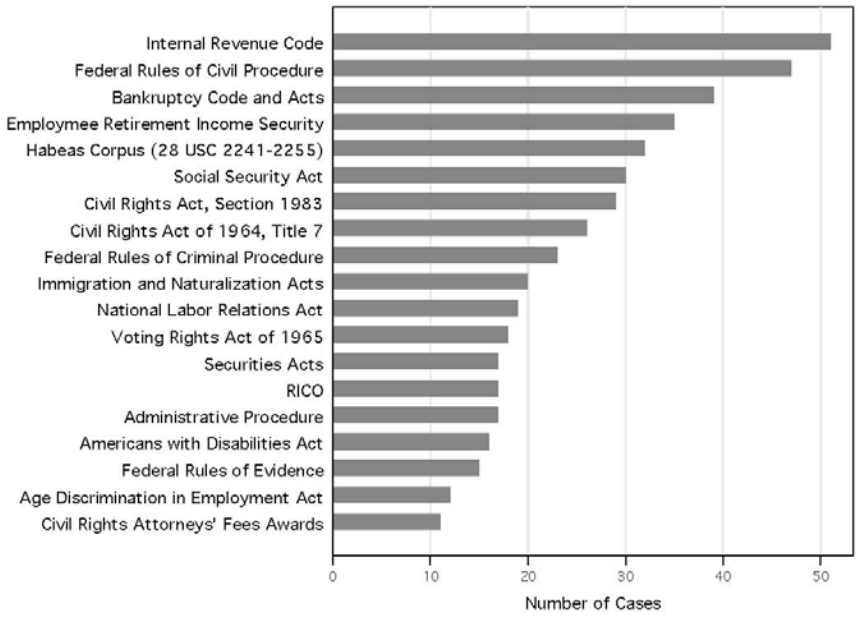

Figure 2: Most litigated laws during the Rehnquist court era, 1986–2002 terms. The Social Security Act includes Aid to Families with Dependent Children, Medicaid, Medicare, and Supplemental Security Income. Securities Acts include the Securities Act of 1933, the Securities and Exchange Act, and the Williams Act.[82]

81. *Id.*

82. Computed from Harold J. Spaeth's U.S. Supreme Court Data Base, *supra* note 79, (October 14, 2004 release), *at* http://as.uky.edu/polisci/

III. OUR STUDY: THE INTERNAL REVENUE CODE

If the Supreme Court's docket suggests anything about the importance of a legal question, then these data underscore a point we made at the onset: it seems clear that scholars can only develop a complete picture of judicial behavior in the context of statutory disputes—of both the rationales employed and the outcomes reached—by incorporating economic controversies into their analyses.

Certainly investigating the full range of economic or financial disputes—suits involving labor, bankruptcy, anti-trust, and so on—would be optimal. Owing to the usual constraints, however, we focus on just one type: tax cases. This concentration reflects the substantive expertise of two of the authors (Staudt and Wiedenbeck) as well as the simple fact that the Internal Revenue Code has received more play in the Supreme Court (at least since 1946) than any other law. Likewise, as we noted earlier, we see value in focusing on one particular law rather than on multiple statutes or areas. In short, even if we have a limited ability to reach high-quality inferences about other economic laws from our study of the Internal Revenue Code, tax seems the best starting point for a study of statutory interpretation in this understudied context.[83]

Conducting the investigation required us to identify all Supreme Court cases that interpreted the tax code and analyze each case to determine the mode(s) of analyses the Court employed to interpret the particular section of the code at issue in the dispute. In Part IV, we explain modes of analyses in some detail. Here we focus on case identification.

We began our search for disputes over the Internal Revenue

ulmerproject/sctdata.htm, using the law variable if (in Stata): (analu==0 — analu==3 — analu==5) & (dec type==1 — dec type==6 — dec type==7) & (term ¿1985 & term != 2003).

83. We have more to say about generalizing the results of our study to other types of laws in Part VI, *infra*. Worth noting here, though, is that we recognize taxation may be distinct from other areas because of the "rapid interplay between Congress and the Court in this area." Note, *Congressional Reversal of Supreme Court Decisions: 1945–1957*, 71 HARV. L. REV. 1324, 1324 n.3 (1958); *see also* Eskridge, *supra* note 15, at 344 (providing data to show that tax decisions are disproportionately overridden by Congress); Solimine & Walker, *supra* note 14, at 445 (same). At the least, this is why the Harvard note writer excluded tax from an inventory of cases reversed by Congress.

Code by locating every case in the Supreme Court that mentioned the word "tax."[84] We then reviewed the cases yielded by the search, retaining only those that involved the interpretation of a federal tax statute. This procedure led to the exclusion of state taxation cases, as well as those involving tax fraud, jurisdictional questions, evidentiary issues, and constitutional controversies that did not involve a statutory interpretation problem. At the end of the culling process, we were left with 922 distinct cases, distributed over nearly ninety Supreme Court terms (1912–2000).[85]

As Figure 3 shows, however, those 922 cases are not evenly dispersed. Whether we consider the sheer number of taxation lawsuits (the bottom panel) or their fraction of the plenary docket (the top panel), the Court heard the bulk of the cases in the first half of the 20th century, and the numbers dropped precipitously after that time.[86] Indeed, from a high water mark of 0.41 in 1935—meaning that tax cases occupied 41 percent(!) of the plenary docket—the proportion fell as low as 0.07 fifty years later, in 1985. Moreover, after the 1940s, the number of tax cases had tapered off considerably, from forty-six cases in 1940 down to eight just two decades later in 1960 and five in 2000.

84. We identified these cases via the following Lexis search: (federal w/s tax!) or (excise w/s tax!) or (estate w/s tax!) or (user w/5 fee) or (user w/s tax!) or (tax! w/s fraud) or (irc) or (i.r.c.) or (stamp w/s tax!) or (income w/s tax!) or (internal w/s revenue) or (tax! w/s lien) or (tax! w/s code) or (tax! w/s evad!) or (tax! w/s evasion) or (corporate w/s tax!) or (payroll w/s tax!) or (employment w/s tax!) or (social w/s security) or (26 usc) or (26 u.s.c.) or (tax! w/s refund) or (tax! w/s deficiency) or (unemployment w/s tax!) or (gift w/s tax!) or (fica w/s tax!) or (f.i.c.a. w/s tax!).

85. The 922 figure includes only orally argued cases that resulted in a per curiam opinion or a judgment or opinion of the Court. It also reflects cases identified by citation rather than docket number. In other words, if the Court collapsed three petitions under one docket number, we counted that case only once, not three times.

86. The mean across the 89 terms is 11.261, with a standard deviation of 10.333.

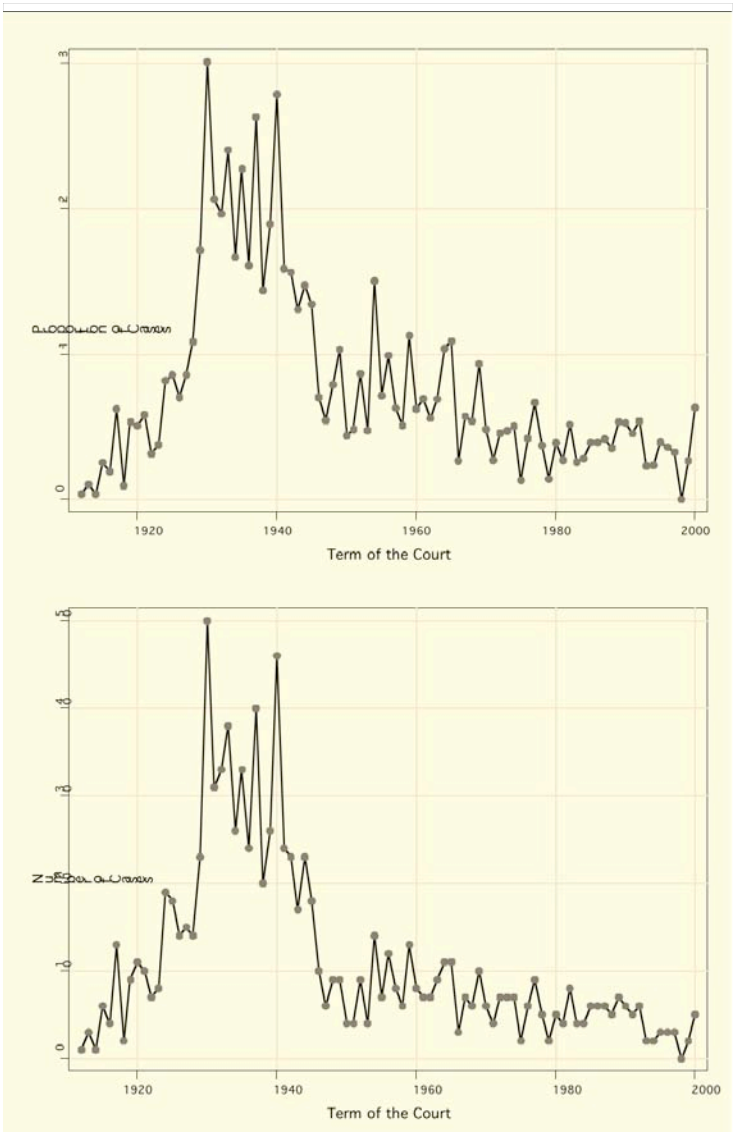

Figure 3: Tax Cases on the Supreme Court's plenary docket, 1912–2000 terms. N=991. The top panel shows the number of cases; the bottom panel shows their proportion.[87]

87. The N for this figure is indeed 991, not 922. For an explanation, see Part IV, *infra*.

Nonetheless, we should not take these declines, as precipitous as they may appear, to mean that tax cases are no longer present on the Court's docket. Quite the opposite. In terms of coverage, in all but one term since 1912 (the 1998 term) the Court has interpreted the Code at least once. Moreover, as the top panel of Figure 3 shows, computing tax disputes as a proportion of the total plenary docket—a step we should take in light of the decline in the number of cases the Court decides each term—yields an 8 percent figure that has held rather steady over the years. The exception here is the period between 1930–1940 when the Court's docket was literally over-flowing with tax cases.

IV. INTERPRETIVE REGIMES IN THE ECONOMIC CONTEXT

With 922 tax cases in hand, we set out to identify the section of the tax code at issue and the approach(es) to statutory interpretation the Court adopted in reaching its conclusion. Because we are interested in how the Court treats each code provision, the unit of analysis for our investigation is the code section, and not the case—thereby bringing our total number of units to 991 (in other words, in 69[88] of the 922 cases the Court interpreted two or more sections of the tax code).[89] We then examined each section separately and coded the particular rationale(s) (e.g., plain meaning, agency deference, precedent) the Court adopted for purposes of endowing the statutory provision with meaning. As we noted earlier, we did not limit ourselves to one rationale; we coded as many as the Court employed. Finally, we grouped the rationales into one of three regimes: legislative, executive, or judicial.

In sections to follow, we organize our discussion around the three regimes, explaining them (and the more particular rationales that they subsume) in some detail and providing descriptive data on the approaches the Court stated it adopted on each tax question it considered. Our purpose in so doing, as we noted at the onset, is to determine how the Supreme Court claimed it allocated power among

88. Of those sixty-nine cases, the Court scrutinized two sections of the code in sixty-one of them, and three sections in the remaining eight.

89. Even though our unit of analysis is, in fact, the section and not the case, for purposes of explication, we use the term "case" throughout to describe our units.

the different branches of the federal government in the interpretive process.

In undertaking this task, we recognize, as did Schacter in her study of rationales, that "[t]he use of particular argumentative resources [that appear] in opinions does not tell us how the writer of the opinion actually reached her decision, only how she decided to present and justify it;"[90] that is why we emphasize the terms "stated" and "claimed." It may very well be the case, as literature we reviewed earlier suggests,[91] that the justices appear to defer to the legislative or executive branch, when, in fact, they are merely using the canons, rules, and evidence as a means to justify their preferred (and predetermined) outcome in the case. In other words, the Court may suggest it is allocating power to others, thereby downplaying its own role in the process, while in fact it is retaining power and control for itself.

The extent to which the Court deploys rationales in this way is an empirical question—but one that we cannot hope to address without a detailed mapping of those rationales. It is for this reason, and the others we considered in Part II, that our enterprise takes on special importance. To reiterate, we fully concur with Schacter when she writes that the sorts of data we describe below—the legislative, judicial, and executive regimes deployed by the Court—may not reveal "how Justices are *actually deciding* cases" but nonetheless have "consequences" because they "help to set the boundaries for statutory interpretation by legitimating particular resources and approaches [and] . . . offer guidance to lower courts, lawyers, and litigants."[92]

A. The Legislative Regime

The legislative model of statutory interpretation perceives the federal judiciary as an important player in the interpretive process but nonetheless posits that the Court should have little or even no substantive policy-making role.[93] Theorists who support this model

90. Schacter, *supra* note 3, at 13.

91. *See supra* note 28.

92. Schacter, *supra* note 3, at 13.

93. In describing the various regimes, not to mention their components, we are necessarily brief: space limitations prevent us from reviewing the large and ever-growing literature. Again, for an informed review, see ESKRIDGE ET AL.,

argue that Congress is the branch of government primarily responsible for making law and the justices must serve as agents of Congress in the interpretive process (the executive branch appears to be irrelevant). The justices, as faithful agents, must decipher congressional commands found in statutory law and apply them to the particular case at hand, avoiding the inclination to privilege their own viewpoints, those of the president, or the people-at-large above those of the legislators reflected in the statute and other relevant documents.[94] Although various commentators debate the means and the scope of the evidence by which justices should go about uncovering legislative mandates, each group believes the Court must: (1) respect the democratic process and avoid acting as a "super-legislature" and (2) implement the enacting legislature's commands.

There are, of course, many variants of the legislative model. In what follows, we focus on three of the more prominent: textualism, intentionalism, and purposivism.

1. The Legislative Product: Textualism

Textualism requires that judges look to the words of the statute in the interpretive process. This mandate stems from the idea that only the statutory language represents the law; what congressional members wanted to say, or expected or assumed would happen if they had thought of a particular case, is not relevant because only the words of the statute were subjected to bicameral consideration and were presented to the president for approval or veto as required under Article I, section 7 of the Constitution.[95] Theorists who

LEGISLATION, *supra* note 1.

94. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 32–33 (1985) (requiring federal courts defer to the legislature in the interpretive process under separation of powers); Redish & Chung, *supra* note 1, at 805 (stating the originalist interpretive model's view that a "judge's role as interpreter is limited to deciphering these commands and applying them to particular cases"); Cass Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 532 (1998) (reviewing ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) (stating the goal of any system of interpretation is to constrain judicial discretion).

95. U.S. CONST. art. I, § 7 (requiring bicameral legislative approval and presentment to the president before a bill can become law); *see* SCALIA, *supra* note 1; FREDERICK SCHAUER, PLAYING BY THE RULES (1991) (advocating formalistic statutory interpretation); John F. Coverdale, *Text as Limit: A Plea*

support the textualist approach argue that the method enables the enacting Congress to predict the effects of its language and, at the same time, stays the hand of activist justices who might interpret statutes according to their own political preferences.[96] Although most textualists agree their approach may lead courts to interpret statutory language contrary to the enacting Congress' expectations, they argue this is not necessarily countermajoritarian in the long run because Congress will learn that courts adhere to formalistic statutory interpretation and, thus, will recognize its ability to control the judiciary through clear drafting.[97] Textualism, then, will discourage the Court from bending statutes and distorting the law's plain meaning to fit an alleged purpose and, at the same time, will encourage legislators to be more transparent in the law-making process—both democracy enhancing outcomes.[98] To capture the cases that relied upon the textualist approach, thereby "privileging" the legislative branch and, in particular, its final product (i.e., the statute itself), we inspected each case for its reliance on the canons or modes of interpretation that emphasize the words of the tax code. Specifically, we coded for the Court's reliance on the following

for a Decent Respect for the Tax Code, 71 TUL. L. REV. 1501, 1557 (1997) (arguing that a court that ignores statutory text is "probably imposing its own view of good tax policy in preference to the provisions actually enacted by Congress"); John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2236 (1995); Adrian Vermeule, *Dynamic Statutory Interpretation and the Institutional Turn*, 5 BERKELEY ELEC. PRESS (2002); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 113–49 (2000). The textualists' argument that judges must look to the words of the statute is not unique—all statutory interpretation theorists agree that judges must look to the words of the statute in order to resolve legal controversies. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1557 (1998) ("All major theories of statutory interpretation consider the statutory text primary. The plain meaning of a text, as applied to a set of facts, is the focal point for attention whether one is a textualist, intentionalist, or pragmatic interpreter of statutes"). The textualists are unique in that they require the judge stop with the words and look no further in the interpretive process.

96. *See* Finley v. United States, 490 U.S. 545, 556 (1989); *see also* Eskridge, *supra* note 95, at 1549 (citing *Finley*).

97. Indeed, this may explain why some studies report a higher risk of reversal for Court decisions that invoke this approach as opposed to, say, intentionalism.

98. *See* Eskridge, *supra* note 95, at 1550.

thirteen textual canons[99] or rationales:[100]

1. Avoid rendering language superfluous.

2. Ejusdem generis: where general words follow specific words, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words. Where the opposite sequence is found (i.e., specific words following general ones) the doctrine is equally applicable and restricts application of the general term to things that are similar to those enumerated.[101]

3. Expressio unius: the enumeration of certain things in a statute suggests that the legislators did not intend to include things not listed.

4. Legislative drafting mistakes should be ignored.

5. Nosciture a sociies: the meaning of one term is "known by its associates" (i.e., understood in the context of other words in the list).

6. Placement of a section has no relevance.

7. Placement of a section has relevance.

8. Plain, ordinary meaning of the law: adherence to the common usage or common understanding of the words.

9. Punctuation, grammar, syntax: the act of looking to punctuation, grammar, or syntax to decide meaning of the law.[102]

99. *See* Eskridge, *supra* note 39, at 663–64 (analyzing the textualists' interest in seeking "a revival of canons that rest upon precepts of grammar and logic . . .").

100. To facilitate assessments of our coding decisions, we lay them out here and elsewhere with some degree of specificity. We also have made our database freely and publicly available on the internet at http://epstein.wustl.edu/research/rationales.html so that others can recode our data in whatever ways they deem appropriate.

101. A notable example of the application of this canon in the tax area is the limiting interpretation given to "other casualty" in the authorization of the casualty loss deduction of I.R.C. § 165(c)(3), "fire, storm, shipwreck, or other casualty . . ."

102. Under this approach, a court may consider the placement of a period or comma, use of conjunctive or disjunctive, use of "may" versus "shall," use of singular versus plural, or the confusion about terms such as "unless." *See, e.g.*, Appleman v. United States, 338 F.2d 729, 730 (7th Cir. 1964); Rosenberg v.

10. Statutory headings have no relevance.

11. Statutory headings have relevance.

12. Technical meaning: interpret words in accordance with some background legal concept (like the category of employee) or in line with a judicially developed term of art.[103]

13. Whole act rule: look to the context of the word or provision by looking to the other parts of the statute[104] to ensure that the will of the legislature is executed.

For each canon, we coded whether the Court (1) relied on it, (2) refused to rely on it, (3) found the canon inconclusive, or (4) did not discuss the canon but implicitly relied upon it. Because our interest here lies in whether the Court relied on a canon when it reached a decision, we focus exclusively on (1)—cases in which the majority (or plurality) opinion clearly invoked the canon to interpret the code.

Figure 4 displays the results of this focus, detailing the proportion of cases in which the Court relied on each mode of analysis. The plain and technical meaning rationales appear most frequently in 15.34 percent and 18.47 percent of the 991 cases, respectively. In contrast, in just .3 percent (n=3) of the 991 disputes, the Court relied in part or in full on "drafting mistakes" as a reason to reach a conclusion about an interpretive question.

C.I.R., 198 F.2d 46, 50 (8th Cir. 1952); United States v. Rogers, 122 F.2d 485 (9th Cir. 1941).

103. For example, "convenience of the employer" has been construed to mean business necessity rather than convenient in the ordinary sense of helpful.

104. For example, titles, preambles, privos, assumption of consistent usage.

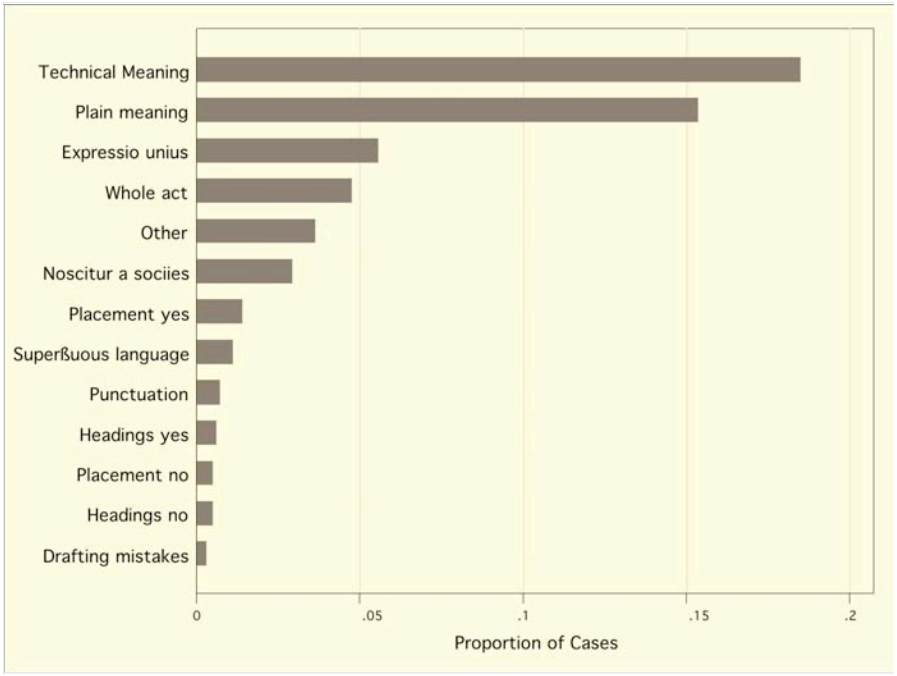

Figure 4: Proportion of tax cases relying on text-based rationales, 1912–2000 terms. N=991.[105]

Overall, the Court invoked at least one of the textual canons in 39.46 percent (n=391) of the 991 cases—hardly a stunning figure in light of the historical prominence of this approach,[106] not to mention previous research.[107] Even so, recall that at least some scholars have alleged a growing disenchantment with this form of analysis on the Court's part (despite Scalia's advocacy of it), while others have argued quite the opposite: that a noticeable increase in textualism,

105. N=991. "Other" includes: legislative history cannot be used to override plain meaning (n=1); words are susceptible to dual meanings (n=1); language must yield when it produces unfair or unintended results (n=1).

106. *See* Wald, *supra* note 35, at 196–197.

107. *See, e.g.*, Eskridge, *supra* note 39, at 657 (putting the figure for all textual sources at 33 percent for the 1988 term); Eskridge, *supra* note 15, at 350 (listing a percentage of 48.5 for the 1978–84 terms at Table 8); Merrill, *supra* note 39, at 355 (reporting the use of dictionaries in 33 percent of the Court's 1992 term cases); *see also* Schacter, *supra* note 3, at 19 & n.60 (suggesting that 100 percent of the Court's 1996 term decisions relied in part or in full on statutory language).

and a decline in the use of legislative history, has occurred over the last decade or so.

We will shortly jump into this controversy, comparing the Court's reliance on textual and historical evidence. For now, we ask whether the use of textual canons has varied over time, as some commentators suspect. Figure 5 provides the answer, and it is quite interesting in light of existing debates.[108] Prior to the 1970s, with some term-by-term variation, the Court analyzed the Code's text in no more than 50 percent of the cases.[109] Beginning in the mid-to-late 1970s—that is, well before Scalia arrived at the Court[110]—that picture changed dramatically: the majority of decisions, and in some terms the vast majority, relied in part or in full on a textual approach. Put another way, during the longest natural court when Earl Warren was Chief Justice (1958–61 terms),[111] the majority examined the text in 47.06 percent of the 34 cases it decided. That figure is above the overall mean of the entire series (39.46), but it is well below the percentages for the longest periods of membership stability during the Burger (1975–80 terms) and the Rehnquist Court's (1994–00 terms), of 62.07 (N=29) and 72.22 (N=18), respectively.

108. It is important to note that because we coded all rationales on which the opinion writer claimed to have relied, it is possible the justices relied on one or more approaches in addition to the various text-based canons we depict in Figure 5.

109. We use windows of six terms, rather than single terms, to ensure at least ten cases on which to base the illustrated proportions.

110. But see Figure 7 for a somewhat different (comparative) take on the data.

111. A natural court is a period of stability in Court membership. *See, e.g.*, Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 724 n.9 ("[A] natural court persists until its composition is changed. That is, when a new justice is appointed to replace an incumbent, a new natural court begins."); David M. O'Brien, *Charting the Rehnquist Court's Course: How the Center Folds, Holds, and Shifts*, 40 N.Y.L. SCH. L. REV. 981, 981 n.5 ("Political scientists generally analyze the Supreme Court in terms of 'natural courts,' periods in which the Court's personnel remain stable.").

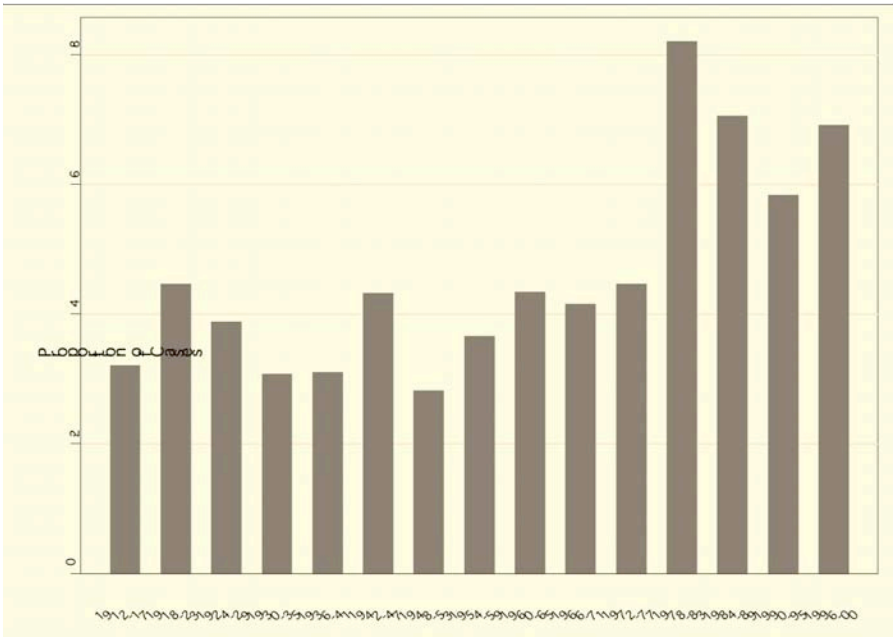

Figure 5: Proportion of tax cases relying on text-based rationales over time, 1912–2000 terms.[112]

Although we cannot necessarily generalize to other areas of the law, at least in tax cases, it appears that textual analysis now plays a critical role in statutory interpretation. This conclusion would hardly surprise contemporary observers, but its genesis might: the steady growth in use of textual canons may trace back to the onset of the Burger Court or perhaps even to the late Warren Court—but seemingly not to Scalia's appointment; the current trend appears to have been well underway before 1986.

2. The Legislative Process: Intentionalism & Purposivism

Like textualists, intentionalists and purposivists subscribe to the notion that the Supreme Court is the agent of Congress. These theorists, however, argue that justices can best play this "agent" role if they look beyond the language of the statute and consider congressional intent and purpose when reaching conclusions.[113]

112. N=991.

113. The distinction between "intent" and "purpose" boils down to this: when judges refer to "legislative intent," they generally have in mind an

Intentionalists and purposivists, therefore, agree with textualists that the underlying goal of statutory interpretation is to implement the preferences of the enacting legislators; they argue, however, that without context, words have no plain meaning. This insight leads intentionalists and purposivists to argue that textualism is not only incoherent for its single-minded focus on the words of the statute, but ignoring legislative intent and purpose works to undermine the democratic process.[114] The textualist approach is allegedly anti-democratic because it ignores results the legislature intended and, thus, privileges the justices' own idiosyncratic views regarding the meaning of words—a meaning that may well differ from the underlying legislative intent and purpose. Addressing the issue directly, Justice Breyer has argued that if the Court adheres to the rigid textualist method in the judicial decision making process, it will

interpretation of a statute that the legislators themselves had when drafting the statute and would apply in the circumstances at issue. Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 281–84 (1997). "Legislative purpose," by contrast, involves an interpretation that conforms to the broader policy purposes of the statute—in circumstances that the legislators may never have anticipated. *See id.* at 283. Both an intentionalist and a purposivist will consult legislative history in making a determination. As one author put it:

> Originalists find the legislative will through either "intentionalism" or "purposivism." Intentionalists (including Professors Edward O. Correia and Earl M. Maltz (in a modified form)) seek to apply statutes in light of the legislature's original intent. In this subjective inquiry, the court first seeks to determine the legislators' actual intent. Absent evidence that the legislature actually considered and resolved the problem presented, the court may scan the statute's context and history to "imaginatively reconstruct" what the legislature would have decided if it had actually considered the issue. Judge Richard A. Posner is the leading modern advocate of imaginative reconstruction.
>
> Purposivists use a more objective approach in which the court first reviews the statute, its context, and history to discern the statute's original purpose, then applies the statute in light of that underlying purpose. Leading practitioners of purposivism include Justice John Paul Stevens and the late Professors Henry M. Hart, Jr. and Albert M. Sacks.

Id at 281–84 (citations omitted).

114. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various originalist approaches to statutory interpretation); J. W. HURST, DEALING WITH STATUTES (1982); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

produce absurd results,[115] ignore drafting mistakes,[116] fail to account for specialized meanings,[117] produce both over- and under-inclusive interpretations of the law,[118] and dismiss reasonable interpretations to controversial statutes.[119] In short, as a true agent of Congress, the Court must look, not only to the text of the statute, but also to the legislative history found in the floor debates, committee reports, and other documents to understand and implement the law.

Textualists do not dismiss these criticisms but, instead, argue that a few such unfortunate outcomes will force Congress to adopt clear language in the drafting process, which will enhance democracy in the long run. The problem with this response, according to the intentionalists and purposivists, is that it fails to reflect how Congress actually works. Congress is a bureaucratic organization with more than 20,000 employees working full-time and generating legislation through complicated processes that involve interaction with other institutions including the executive branch, business organizations, labor unions, and public interest groups. These realities lead intentionalists and purposivists to deem the textualists' expectation—that Congress could, even if it wanted, update legislation that passes through the courts—unrealistic and naïve.[120] Only when courts investigate and need legislative materials behind the law's words can fair and workable outcomes result.[121] In short, however, distinct intentionalism and purposivism[122] both place

115. *See* Breyer, *supra* note 49, at 848–50.
116. *See id.* at 850–51.
117. *See id.* at 851–53.
118. *See id.* at 853–56.
119. *See id.* at 856–60.
120. *See id.* at 869–74.
121. For example, if Congress adopts a statute prohibiting vehicles in the park and intended the statute to reduce noise and pollutions, the two approaches might lead to distinctly different outcomes in a dispute involving the arrest of a bicyclist for riding around the park. An intentionalist Court would look to the legislative history to determine if the members of the legislature saw a bicycle as a "vehicle," and if so, would uphold the penalty imposed. A purposivist Court, by contrast, would examine the purpose of the statute and would conclude that the bicyclist did not cause the harm that Congress sought to eliminate and would acquit. *See* Sunstein, *supra* note 94, at 540 (providing an illuminating discussion of purposivism and intentionalism).
122. *See supra* note 113 (describing the distinction between intentionalism and purposivism).

emphasis on the process leading to a statute's creation. Accordingly, in identifying decisions that relied on either approach, we looked for the use of the following evidence, which was produced during the law-making process:

1. Congressional knowledge of administrative and judicial action: consideration of what Congress knew or could have known when it adopted the provision.[123]

2. Coordination and consistency with other laws: assumption that Congress intended different parts of the tax laws to be coordinated with one another.

3. Lack of legislative history: conducted search for legislative history but could not find any relevant sources to assist in the interpretive process.

4. Legislative history, with the following coded separately:

- Congressional record (debate)
- Congressional bills
- Committee reports
- Congressional/committee hearings
- Congressional studies and analyses

5. Legislative inaction: consideration of legislative "inaction" in reaching a decision.

6. Post-enactment legislative history.[124]

7. Related statutes, including those provisions directly related to the same subject matter at issue.[125]

8. Speaker's status: identification of the status of the speaker in any of the above contexts.

The results of this coding process indicate that, overall, the court invoked at least one of these pieces of evidence in 59 percent (n=585) of the 991 cases, but their individual use varies as Figure 6

123. For purposes of this project, we coded for instances in which the Court indicated that Congress "actually knew" or "could have known" of judicial or administrative action deemed relevant to the outcome.

124. This could include legislative history associated with the reenactment of the same or similar provision. Thus, if the Court interprets section 22 of the 1939 Code but looks to the legislative history of section 61 of the 1954 Code, it is looking at post-enactment legislative history.

125. For example, in interpreting a corporate reorganization issue, the Court might examine various other related corporate reorganization provisions.

illustrates. "Post-enactment history," for example, appears quite infrequently while "related statutes" analysis appears quite frequently (in 433 of the 991 cases). But, collectively, the traditional sources of legislative history are what most often occupied the justices. Combining the five components of this approach (congressional record, bills, reports, hearings, and studies and analyses) yields a figure of 0.489; that is, in nearly half the cases, the Court claimed to have relied, in part or in full, on some feature of the code's history. Along these lines, committee reports clearly dominate[126]—a finding that would displease Justice Scalia[127] but one that comports with the Court's own rhetoric[128] and with other studies.[129]

126. *See* Eskridge, *supra* note 39, at 636 (deeming committee reports as "most authoritative" under the "hierarchy of [legislative history] sources"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990).

127. As Eskridge reports, in speeches delivered between 1985 and 1986, then-Judge Scalia leveled a strong attack on the use of committee reports: "As an intermediate federal judge, I can hardly ignore legislative history when I know it will be used by the Supreme Court. But it seems to me we can at least be more selective in the sorts of legislative history we employ . . . . At the bottom of my list I would place—what hitherto seems to have been placed at the top: the committee report." Eskridge, *supra* note 39, at 651 n.117.

128. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921) ("By repeated decisions of this court it has come to be well established that the debates in Congress . . . are not a safe guide . . . [to] ascertaining the meaning and purpose of the law-making body. But reports of committees of [the] House or Senate stand upon more solid footing, and may be regarded as an exposition of the legislative intent . . . ." (citations omitted)).

129. *See* Wald, *supra* note 25, at 58 (concluding that committee reports were the most frequently cited source of legislative history during the 1992 term); Koby, *supra* note 25, at 390 (finding 50 percent of all legislative history citations during the period between 1980–1998 were to committee reports).

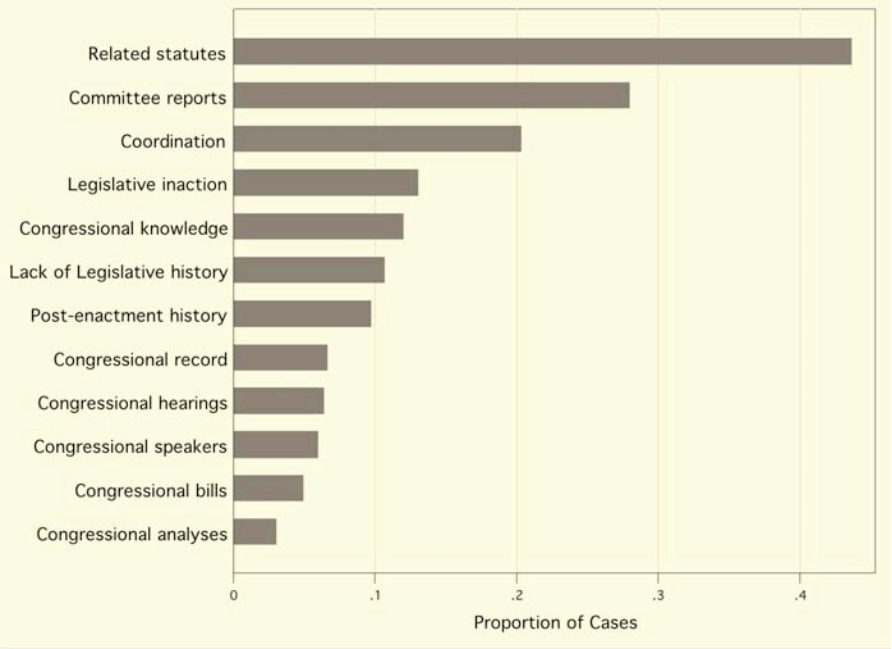

Figure 6: Proportion of tax cases relying on approaches grounded in legislative intent or purpose, by component, 1912–2000 terms. N=991.

More dissensus in the extant literature exists over whether the Court's reliance on legislative history has changed over time. Recall that Brudney & Ditslear[130] and Merrill[131] found a decline in the contemporary Court's reliance on legislative history and a concomitant increase in its use of textual materials—as did Stephen Breyer.[132] Indeed, Justice Breyer went so far as to declare that "[r]eferring to legislative history to resolve even difficult cases may soon be the exception rather than the rule."[133] Schacter, on the other hand, found that during the 1996 term the justices invoked the "concept of 'intent'" in 49 to 84 percent of their opinions.[134]

130. *See* Brudney & Ditslear, *supra* note 9 (manuscript at 34–37).
131. *See* Merrill, *supra* note 39.
132. *See* Breyer, *supra* note 49, at 846.
133. *Id.* at 846.
134. Schacter, *supra* note 3, at 14–15 (noting that the number increases to 84% if references to Congress' "will . . . [,] desire . . . [or] purpose" are considered); *see also* Wald, *supra* note 20 at 309–10 (concluding that textualism

Figure 7 takes three different cuts at this controversy. The top panel considers whether the Court relied, in part or in full, on an analysis of a section's legislative history; in other words, it is a longitudinal version of the data presented in Figure 6 but draws only on the congressional record, bills, reports, hearings, and studies and analyses. The center and bottom panels consider the relationship between textualism and legislative history, with the center panel illustrating the proportion of cases relying nonexclusively on the rationale,[135] and the bottom panel focusing on the proportion of cases relying exclusively on one or the other but not both.

gained currency with the Court during the 1988–89 Term); Wald, *supra* note 35 at 196–99 (discussing the pervasiveness of reliance on legislative history during the 1981 Term); Wald, *supra* note 25 at 69–70 (concluding that, as of the 1992 Term, there were seven justices who readily cited legislative history).

135. In other words, this panel compares the data in the top panel and that displayed in Figure 5.

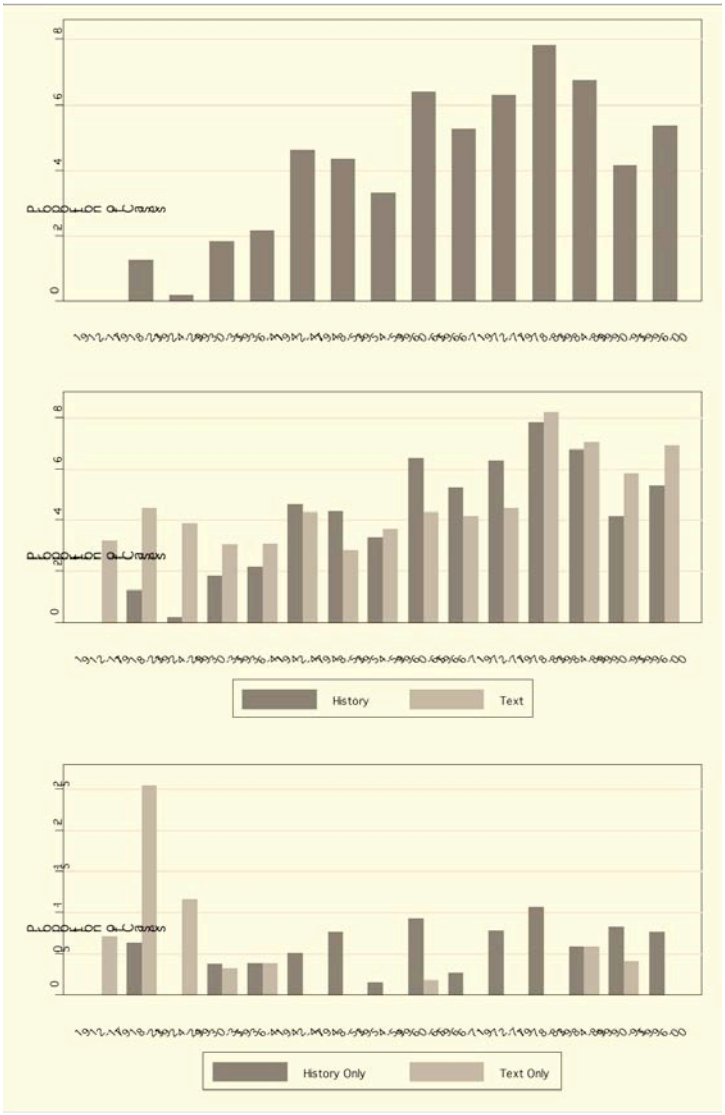

Figure 7: Proportion of tax cases relying on legislative history and textualism overtime, 1912–2000 terms. N=991

Taken collectively, several interesting patterns emerge from these figures. Note first the rather dramatic jump in the use of legislative history materials over time. During the first six terms in our dataset, the Court did not consider the code's legislative history even once. By the last six terms (1994–2000), it did so in 50 percent

of the disputes. And yet, however comparatively high the figure of 50 percent may be, it is a good deal lower than the zenith of usage (nearly 80 percent) reached by the end of the Burger Court. In other words, the data lend support to those scholars who report increased interest in legislative history materials during the 1960s into the 1980s,[136] but they also substantiate claims of declining interest during the Rehnquist Court years.[137] Where the data cast some doubt is over Breyer's prediction of the disappearance of legislative history from the Court's decisions.[138] While the current Court may be less inclined than its immediate predecessors to look to committee reports, the congressional record, and other traces of the legislature's intent, it continues to invoke these materials in about half its decisions.[139]

Yet another interesting pattern emerging from Figure 7 (the middle panel) centers on the use of legislative history relative to textual approaches. While the Court has increasingly relied on both, transformations of some import may have occurred in the 1940s and again in the late 1970s. Notice that up until (roughly) the Stone Court, textual evidence dominated the justices' approach to statutory interpretation but, just as Carro and Brann reported,[140] by the 1940s (until the late 1970s) legislative history became more prevalent. Then, in line with commentary by Eskridge and others, the tide

136. *See, e.g.*, Carro & Brann, *supra* note 39. An alternative explanation for the increased reliance on legislative history exists. The original statutes that Congress adopted in 1909 and 1913 were simple, short and had almost no legislative history. Over time, as Congress adopted additions and amendments, it also built up a more comprehensive collection of relevant committee reports, bills, hearings, etc. upon which the justices could rely. Thus, the changes in judicial methodology may reflect the growth of the statute and the concomitant growth in the legislative documents. This hypothesis raises an interesting empirical question that requires an investigation into the available legislative documents for the code provisions at issue in the court controversy. The inference that in each individual case the justices had more legislative documents upon which to rely because many more such documents exist in the aggregate is an inference vulnerable to the ecological fallacy (i.e., making inferences about individual cases based on aggregate data for a group).

137. *See* Brudney & Ditslear, *supra* note 9 (manuscript at 37); Eskridge, *supra* note 39, at 657; Koby, *supra* note 25; Merrill, *supra* note 39.

138. *See* Breyer, *supra* note 49, at 846.

139. *See* Fig.7.

140. Carro & Brann, *supra* note 39, at 298–99; *see also* Fisher & Harbison, *supra* note 42.

turned again:[141] historical sources remained important, but the justices became increasingly inclined to rely on canons and rationales associated with textualism.[142] Once again, though, and in juxtaposition to some existing commentary,[143] that latter move occurred well before Scalia arrived at the Court.[144] So, while his presence may have accelerated the observed trend, he does not appear to have initiated it—at least not in tax.

Finally, consider the data in the bottom panel of Figure 7. Primarily, they support claims that it is rare for the Court to rely exclusively on either textual or historical evidence.[145] But they do tend to shore up Judge Wald's assertion that the "textualist approach is not yet the law of the land."[146] At minimum, it seems that the majority has yet to embrace the "new" textualist mantra that "once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant."[147] Instead, the court seems to adhere to the algebra teacher's mantra: check your work.

3. Summary of the Legislative Regime

These specific patterns aside, recall that nearly 50 percent of the Court's decisions invoked materials associated with congressional intent and purpose. This figure is hardly trivial, but it pales in comparison to the justices' overall deployment of the legislative regime during the period and cases under analysis. Indeed, if we combine the data on legislative "product" (textual approaches) and on legislative "process" (purpose and intent), then we observe the Court allocating power to Congress in 69 percent (n=688) of the 991 taxation cases resolved since 1912 (see Figure 15, which appears later in the text).

This percentage fits comfortably with other studies,[148] and it certainly indicates at least some stated degree of deference on the

141. Brudney & Ditslear, *supra* note 9 (manuscript at 38–39); Eskridge, *supra* note 39, at 657; Koby, *supra* note 25, at 395.

142. *See* Eskridge, *supra* note 39, at 656–665.

143. *E.g.*, Koby, *supra* note 25, at 392, 395; Merrill, *supra* note 39, at 363.

144. *See* Fig.7.

145. *See* Brudney & Ditslear, *supra* note 9 (manuscript at 53); Eskridge, *supra* note 15, at 347 n.38.

146. Wald, *supra* note 20, at 286.

147. Eskridge, *supra* note 39, at 623.

148. *See* Schacter, *supra* note 3; Zeppos, *supra* note 3.

part of the Court's majority to legislative product and process—at least over the ninety-year period included in this study. But do the combined data mask trends in use over time, as was the case with both text and legislative history?

Zeppos, in his analysis of a random sample of all statutory interpretation cases, found little change.[149] Based on the data depicted in Figure 8, however, we cannot say the same for tax alone. Observe the growth in the size of the darker bars (which indicate the Court's reliance on legislative product or process rationales, though perhaps in combination with other theories of interpretation)—such that during the earliest terms the Court claimed to have deferred to the legislature in about 40 to 60 percent of the cases; by the later terms, that range increased to 70 to 90 percent. The lighter bars, indicating the use of a legislative regime and no others, reveal a somewhat different pattern. During the first three term "windows" the Court was more likely to rely solely on the legislative regime than in the subsequent ten. Only beginning in the late 1980s did it even approach the level of exclusive reliance on legislative rationales seen in the earliest terms.

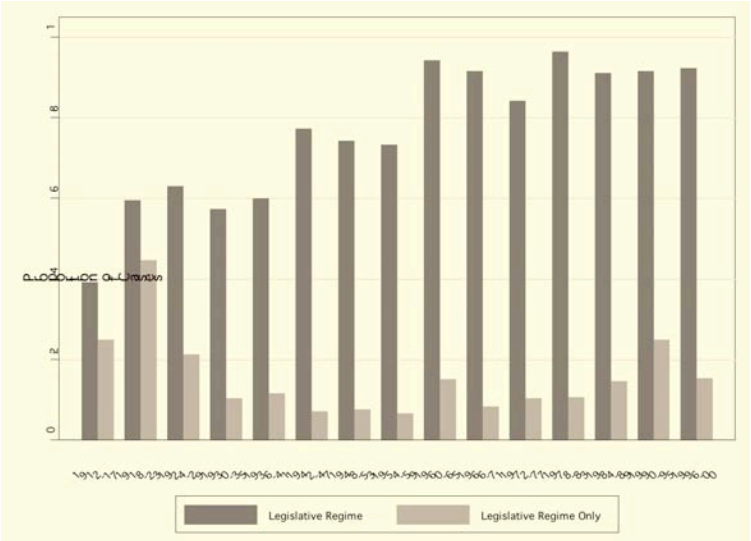

Figure 8: Proportion of tax cases relying on a legislative regime overtime, 1912–2000 terms. N=991

149. Zeppos, *supra* note 3.

B. The Executive Regime

In Part V, we return to these interesting patterns. For now, though, let us consider yet another regime, one centering on deference to the executive. Like legislative models of decision making, this one too reflects the view that the Court is the voice of a democratically elected body and not an autonomous actor free to implement its own preferences in legal controversies involving statutes. Where this approach diverges from the legislative regime, however, is that it requires the Court to defer to the agencies (in this context, both the Internal Revenue Service [IRS] and the Treasury) and not to the legislature; policymaking authority in the resolution of doubtful cases is, thus, removed from Congress and the judiciary and put into the hands of the executive.[150] By deferring to the IRS and Treasury rulings and regulations, the Court effectively allocates power from one branch to another and assures that accountable actors—agents subject to executive control—make the policy choices, and thus arguably avoids the countermajoritarian difficulty presented when the Court takes control of the law-making process. Many statutory theorists support this interpretive model for its democracy-enhancing features;[151] as Professor Jane Schacter notes:

> [although the] agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[152]

In addition to its ability to preserve majoritarian politics,

150. In the context of the Internal Revenue Service, the president selects the Commissioner and the Chief Counsel. IRS, *IRS History and Structure*, *at* http://www.irs.gov/irs/article/0,,id=98142,00.html (last visited Aug. 22, 2005). For a discussion of current appointees, see the Internal Revenue Service website *at* http://www.irs.gov. The president also selects the Secretary of Treasury. *Id.*

151. Bell, *supra* note 16, at 141–48 (describing arguments for relying on executive interpretation of statutes); Schacter, *supra* note 2, at 616 (quoting Chevron v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1994), for the same proposition).

152. Schacter, *supra* note 2, at 616.

supporters of the executive model argue that this approach to interpretation assures the best outcomes. Executive agencies consist of experts who are equipped to make informed and knowledgeable policy decisions, and, given their superior understanding of complex problems, it is sensible to defer to this expertise in statutory controversies. Countless tax professionals have argued that agency deference is particularly important in the context of taxation—a context in which the justices clearly lack such expertise and one in which the IRS and Treasury officials are uniquely capable of divining hidden congressional purpose given their roles in the development of actual legislation.[153] The rule of deference, in short, assures the Court will reach sound and predictable outcomes rather than flawed or problematic answers to difficult interpretive problems.

Two decades ago, in *Chevron v. Natural Res. Def. Council*,[154] the Supreme Court confirmed the role of agencies in the interpretive process by holding that federal courts should defer unless Congress "has directly spoken to the precise question at issue."[155] The important point for purposes of this essay is not the idea that the Court should defer to agency interpretations, but whether the Court claims it defers and for how long it has been so claiming. To address

153. *See* Joel Newman, *The Story of* Welch*: The Use (and Misuse) of the "Ordinary and Necessary" Test for Deducting Business Expenses*, *in* TAX STORIES 154, 181 (Paul L. Caron ed., 2003) (the Justices frequently issue opinions that are "needlessly confus[ing]"); Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 173 (2001) ("Tax lawyers have derided the Supreme Court, complaining that the Court 'hates tax cases' and generally bungles the cases it does hear."); Bernard Wolfman, *The Supreme Court in the* Lyon's *Den: A Failure of Judicial Process*, 66 CORNELL L. REV. 1075, 1099–1100 (1981) (arguing that Supreme Court tax opinions have become the "laughingstock" of the bar and implying greater deference is warranted to the experts in the field). Various other scholars, however, doubt the value of deference to agencies. *See, e.g.*, MICHAEL LIVINGSTON, TAXATION: LAW, PLANNING AND POLICY (2004) (critiquing the courts for deferring to one of the litigant's interpretation of the law over the opposing litigant's view); Sunstein, *supra* note 94, at 544–50 (critiquing deference as inconsistent with separation-of-power norms).

154. 467 U.S. 837 (1984). The court stated, "If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . [T]he question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

155. *Id.* at 842.

these questions, we inspected the 991 tax cases for judicial reliance on the following documents.

1. Acquiescence or non-acquiescence: IRS announcements indicating that in similar future cases it will follow (or that it expressly refuses to follow) a U.S. Tax Court decision that ruled against the Commissioner.

2. Private letter rulings: IRS rulings that provide prospective advice on the application of law to a specific set of facts that may not be relied upon as precedent by other taxpayers.

3. Regulations issued by an agency other than the Treasury or Internal Revenue Service.[156]

4. Revenue procedures: published procedures and methods for dealing with the IRS and addressing matters such as the required content of a request for an advance ruling.[157]

5. Revenue rulings: IRS rulings that provide prospective advice on the application of law to a specific set of facts that may be relied upon as precedent by other taxpayers.

6. Technical advice memoranda: memoranda that apply the law to a specific set of facts growing out of the examination (audit) of a return (as opposed to prospective advice). Like private letter rulings, technical advice memoranda also may not be relied upon as precedent by other taxpayers.

7. Treasury regulations.

8.Other documents: other documents including Chief Counsel Memoranda, Actions on Decisions, Field Service Advice, etc.

156. The most common example in the tax area consists of Labor Department regulations interpreting or prescribing rules under the Employee Retirement Income Security Act of 1974 (ERISA), which sometimes impact the application of the tax law's qualified pension and profit-sharing plan provisions.

157. As a matter of administrative law, these are presumably binding procedural rules, although not issued under notice-and-comment public rulemaking procedures because they are exempt from them.

For each of these sources, we determined whether the Court did or did not defer to the executive and excluded those in which the Court refused to give weight to ruling or regulation.

Across the entire period included in this study, the Court invoked one or more of these executive generated sources in 27.25 percent (n=270) of the 991 cases (see Figure 15). As Figure 9 indicates, however, the justices paid almost no attention to revenue procedures, private letter rulings, technical advice memoranda, and acquiescence or non-acquiescence announcements. What did capture the Court's interest were treasury regulations, on which it relied, in part or in full, in 21 percent (n=215) of 991 cases.

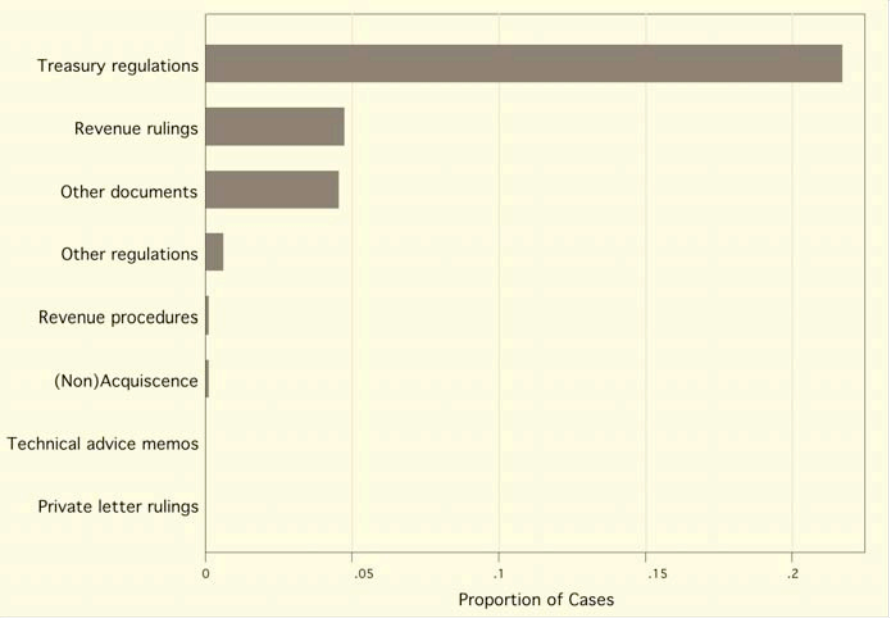

Figure 9: Proportion of tax cases relying on executive materials, by component, 1912–2000 terms. N=991.

While there is little commentary in the literature on the degree to which we might expect changes over time in the invocation of this regime, most of the emphasis, as we noted above, has been on the use of legislative history versus textualism; scholars have not been entirely silent. Eskridge, for example, suggests that Scalia and other "new" textualists endorse the "procedural canon" of administrative

deference and have become increasingly "aggressive in criticizing Justices who are willing to use legislative history or purpose to correct agency mistakes."[158] If this is so, we might expect to see an increase in the use of executive materials since Scalia's arrival on the Court.

Do the data bear this out? Figure 10 provides the answer, and it is mixed. Clearly, at least through the 1980s, we observe monotonic growth in the Court's reliance on one or more components of an executive regime (though, as the lighter bars indicate, rarely does it rely solely on this regime).[159] A decline appears to have occurred since the 1990s, and indeed, term-level data bear this out: only in 1996 did the Court defer to the executive in more than half the cases it resolved. That is why we say the results are mixed. On the one hand, we observe growth in the use of an executive regime over time; on the other, it appears to have little do with Scalia. In fact, if anything, the current Court has shown a greater reluctance than some of its immediate predecessors to invoke agency-based materials.

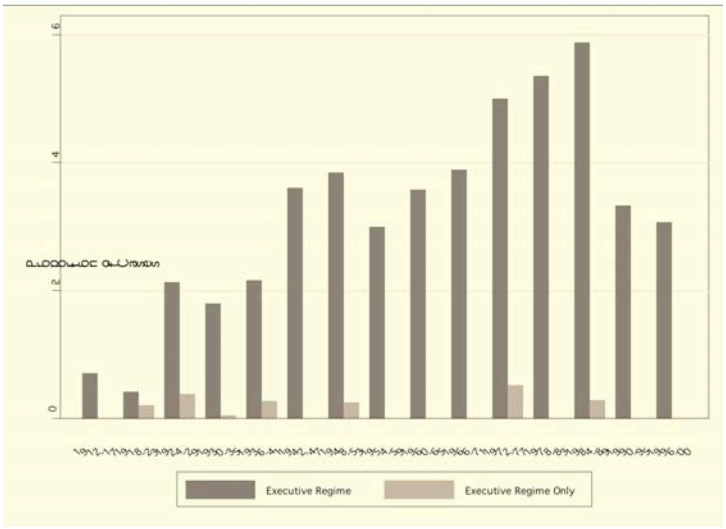

Figure 10: Proportion of tax cases relying on an executive

158. Eskridge, *supra* note 39, at 665.

159. The Court's increased reliance on the executive regime may also be explained by the increased number of executive documents available. See *supra* note 39 for a discussion of this empirical question in the context of the legislative regime.

regime, by component, 1912–2000 terms. N=991.

C. Judicial Regime

While scholars and judges certainly recognize (and occasionally applaud) the concept of "statutory stare decisis,"[160] as far as we know, none have ever advocated giving complete control and discretion over the interpretive process to federal judges; rather, all see some role for the democratically elected bodies. Many statutory theorists, such as Professors Dworkin and Eskridge and Judges Posner and Calabresi, may urge judges to exercise discretion as co-equal partners with the legislative and executive branches when interpreting statutes, but they do not argue that judges should entirely ignore statutory text, legislative history, and agency rulings when reaching conclusions about the meaning of statutory provisions.[161]

Social scientists, in contrast, have long noted trends in the decision-making process that strongly suggest justices make decisions based on their own preferences without regard to statutory law.[162] Our investigation also suggests that the justices are often willing to allocate power and discretion to themselves, not as co-equal partners, but rather, as the only relevant players in the interpretive game. In reading the tax cases, it was apparent that the Court regularly relied on judge-made rules for purposes of interpreting the tax code. Surely this comes as no surprise to scholars of statutory interpretation, many of whom have long acknowledged the role of precedent in decision making. But the extent of the Court's use of precedent may surprise even them: in more than a handful of the cases (see Figure 15, which appears later in the text), the Court never even cited to the statute at issue but relied entirely on its own past rulings—this is especially true in the years directly following adoption of the corporate income tax in 1909.

Since this approach to decision making is one in which judges

160. Eskridge, *supra* note 15, at 398. They also criticize it as well. For a summary of their complaints, see *id.* at 397–98.

161. *See infra* notes 179–184 and accompanying text.

162. *See, e.g.*, SEGAL & SPAETH, *supra* note 28, at 86–96; *cf.* Segal, *supra* note 28, at 28, 33 (explaining that the attitudinal theoretical model holds that while judges do consider the facts of a case, a judge bases his decisions on his sincere ideological beliefs and values).

allocate power to themselves, we deem it a judicial regime. And we attempt to capture it by analyzing the cases, not just for a reliance on precedent, but also for their use of a set of substantive canons of interpretation and broad policy rationales not found in the legislative history or in agency rules but apparently considered relevant by the Court.

Beginning with precedent, our protocols called for us to code cases in which the majority opinion writer asserted that a prior ruling served as a, or the, basis for interpretation (mere citations were insufficient). In *Cheek v. United States*,[163] for example, the Court considered the definition of "willfully" as used in Sections 7201 and 7203 of the tax code[164] and referred only to its own past precedent for making this determination—no text, legislative history, revenue ruling or other evidence came into play.[165] We categorized *Cheek* as a case that relied only upon judicial precedent in the interpretive process. In *Commissioner v. Schleier*,[166] in contrast, the Court considered the tax consequences of liquidated damages received in an ADEA claim under Section 104(a)(2), which excludes "the amount of any damages received . . . on account of personal injuries or sickness."[167] The government argued the ADEA damages were punitive in nature and thus not covered by the tax exclusions.[168] The Court agreed with this argument, noting that its opinion in *Trans World Airlines v. Thurston*[169] explicitly addressed and rejected the taxpayer's argument to the contrary.[170] Unlike *Cheek*, *Schleier* also

163. 498 U.S. 192 (1991).

164. 26 U.S.C. §§ 7201, 7203.

165. *See Cheek* 498 U.S. at 201–07. The majority in *Cheek* may have believed its interpretation of "willfully" was implicitly sanctioned by Congress given that the term has a long-standing definition in the common law that Congress most likely understood when it adopted Code Sections 7201 and 7203. Our coding protocols, however, did not permit us to impute such beliefs to the Court. That is to say that the Court may have believed their decision reflected deference to the legislature, but nowhere in the opinion was this deference mentioned nor did the majority opinion cite to any legislative documents supporting such a belief.

166. 515 U.S. 323 (1995).

167. *Id.* at 333.

168. *See id.* at 326–27.

169. 469 U.S. 111 (1985).

170. *Schleier*, 515 U.S. at 331–32; *see also* Comm'r v. Estate of Hubert, 520 U.S. 93, 102 (1997) (citing Ithica Trust v. United States, 279 U.S. 151 (1929) as authority for decision that present-value principles should be used for

involved reliance upon textual and substantive canons as well as legislative history, but our point is that the Court stated that precedent played a role in its analysis.

Overall, the Court used precedent in this manner in 35.02 percent (n=347) of the 991 tax cases; and in over a third of the 347 cases (n=118), precedent was the only rationale the Court gave for its decision. This was far more typical (as already suggested) during the earliest years in our data set than in later periods, as Figure 11 makes clear. Note that while the use of precedent, in combination with other modes of analysis, has not varied much over time (especially not since the 1912–17 term window), the use of precedent alone has declined substantially: until the 1960s, it was not unusual to see as many as one in ten decisions relying exclusively on precedent; by the 1970s, that became a near rare event.

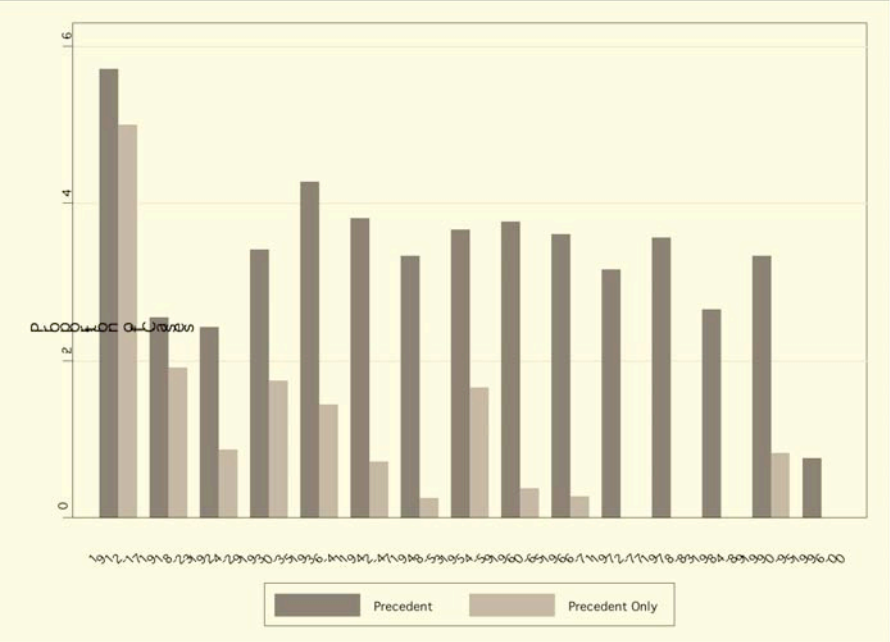

Figure 11: Proportion of tax cases relying on precedent, 1912–2000 terms. N=991.

In addition to precedent, we also considered whether the

valuing estate property).

majority relied on the following substantive canons of statutory interpretation—canons that emerge from judge-made rules and operate to give the Court considerable discretion in the interpretive process.

1. Constitutional problems: interpret the law to avoid constitutional problems.
2. Deference to the trial court: defer to trial court interpretations in the taxation context.
3. Federalism concerns: interpret the law in a manner that gives appropriate deference to the states.
4. General rule that tax statutes should be strictly construed: interpret tax statutes narrowly in favor of the taxpayer.
5. Presumption against implied exceptions: do not assume Congress implicitly provides exemptions to taxation.
6. Presumption against implied repeals: do not assume Congress intends to repeal a provision implicitly through other actions (or non-actions).
7. Presumption against irrationality or injustice: assume Congress did not intend irrational or unjust applications of the law.
8. Rule of lenity: strictly construe the law if it is intended to punish.
9. Other: all other substantive canons.

Figure 12 shows the proportion of cases in which the Court relied on these canons and, as we can observe, none appeared with any regularity. Topping the list was "irrationality," but the justices made use of this canon in only about 9 percent of the 991 cases; for all others, that figure was under 5 percent.[171]

171. Overall, the Court invoked at least one of these substantive rules in only 28.86% (n=286) of the 991 cases.

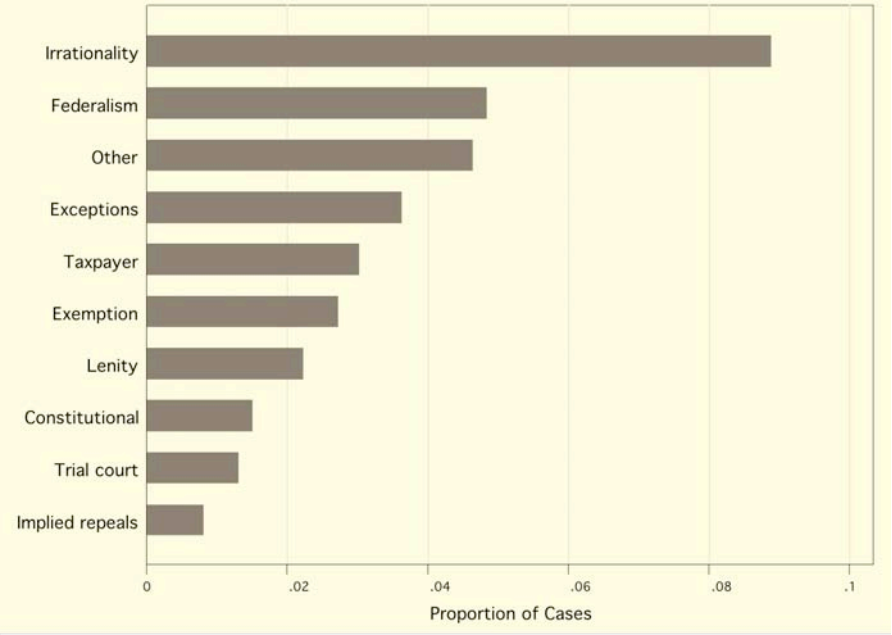

Figure 12: Proportion of tax cases relying on substantive rules, by component, 1912–2000 terms. N=991.

Finally, we inspected the opinions for reliance upon the following policy rationales:[172]

1. Administrative ease: asserts that a litigant's argument or the Court's own decision is likely to promote or undermine the administration of the tax laws.

2. Economic Growth/Economic Stability: these two categories present (in principle) instances of the use of the tax system to achieve macroeconomic objectives.[173]

3. Horizontal equity concerns: addresses the consequences of a litigant's argument or of the Court's own decision on horizontal equity. Horizontal equity implies equal

172. For each case, we coded whether the Court addressed the positive, neutral, or negative effects the case would have on a particular policy consideration. As long as the Court addressed the effect of its opinion (whether positive, negative, or neutral), we coded this variable as present.

173. We coded growth and stabilization concerns under these categories only; we reserved the penalty and subsidy category for other non-tax objectives.

treatment of taxpayers in similar circumstances, i.e., equal economic income in the case of the income tax, or equal wealth in the case of the estate and gift taxes.

4. Revenue raising concerns: addresses the consequences of a litigant's argument or of the Court's own decision on the federal government's ability to raise revenue.

5. Subsidies/Penalties: these categories reflect tax expenditure analysis—i.e., that Congress uses the tax law to promote other goals (non-tax objectives) by offering tax-based inducement (special exclusions, deductions, credits, reduced rates, or deferral privileges) to engage in behavior that Congress deems socially desirable.[174]

6. Tax avoidance concerns: addresses the consequences of a litigant's argument or of the Court's own decision on taxpayers' ability to avoid paying taxes.

7. Transitional equity concerns: addresses the consequences of a litigant's argument or of the Court's own decision on transitional equity.[175]

8. Vertical equity concerns: Addresses the consequences of a litigant's argument or of the Court's own decision on vertical equity. Vertical equity implies that taxpayers at different income levels are treated fairly.[176]

174. Ordinarily, these rationales would be present only if the case involves a provision of the statute that Congress enacted for the purpose of promoting such extrinsic (i.e., non-tax) goals, and so the issue would be the proper or intended trade-off between tax and non-tax objectives. Accordingly, these rationales are likely to be present only if the legislative history of the provision sub judice indicates that the tax system is being used to promote other goals; therefore, we must code the statutory interpretation and legislative history rationales.

175. The issue here is whether a change in tax rules imposes windfall gains or losses on taxpayers who acted in reliance on prior law. Delayed effective dates, phase-in rules and grandfather clauses are typical devices used to cushion the impact of tax transitions, and cases involving such transition rules are likely to invoke transitional equity as a rationale for the decision.

176. Progression means that as income rises, a larger proportion of the taxpayer's income is taken in taxes (not simply that taxes increase with income). Similarly, regression means that as income rises, a smaller proportion of the taxpayer's income is taken in taxes even though the dollar amount of tax may increase monotonically with income.

Experts in tax policy tend to view the Court's reliance on policy rationales as an example of judicial fidelity to implicit legislative purpose; that is to say, while Congress may not explicitly mention concerns associated with fairness, efficiency, administrative ease, or revenue raising effects—these concerns are always present in the tax context. Yet, as any tax scholar would acknowledge: the tax statute contains so many exceptions to these general policy considerations that it is virtually impossible to know *exactly* what the legislators had in mind absent an explicit reference to a particular policy. While Congress and the executive agencies at times address policy concerns, the Court often invokes them even when the elected branches have not done so, and we view this as an exercise of judicial prerogative rather than deference to another branch of government. Across all the terms in our data base, we found that the justices made use of at least one of these rationales in 46 percent (n=458) of the 991 cases.

At the same time, though, as Figure 13 shows, some rationales received far more play than others. So, for example, while tax avoidance concerns made their way into 14.33 percent (n=142) of the 991 cases, vertical equity considerations appeared in just five cases.

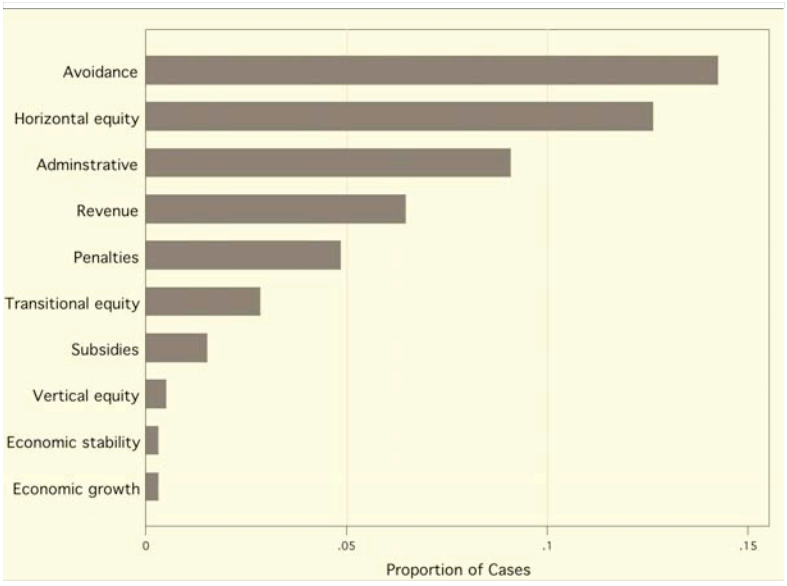

Figure 13: Proportion of tax cases relying on policy

considerations, by component, 1912–2000 terms. N=991.

Equally interesting are the results of combining the three types of evidence (past statutory precedent, substantive canons, and policy considerations) upon which the Court relies when privileging its own branch of government. Overall, the Court invoked a judicial regime (though perhaps in combination with others) in a hefty proportion of the 991 cases, .762 (n=755). That figure, which comports with Zeppos' and Schacter's research,[177] is reasonably consistent across the nine decades in our dataset, as Figure 14 shows. What has changed markedly is the Court's sole reliance on past precedent, substantive canons and policy consideration (indicated by the lighter bars in the figure). While it regularly privileged its own judgment to the exclusion of the other branches in early terms, by the mid-20th century, that was no longer the case. These days, it is the relatively rare decision that relies exclusively on "judicially-selected policy norms."[178]

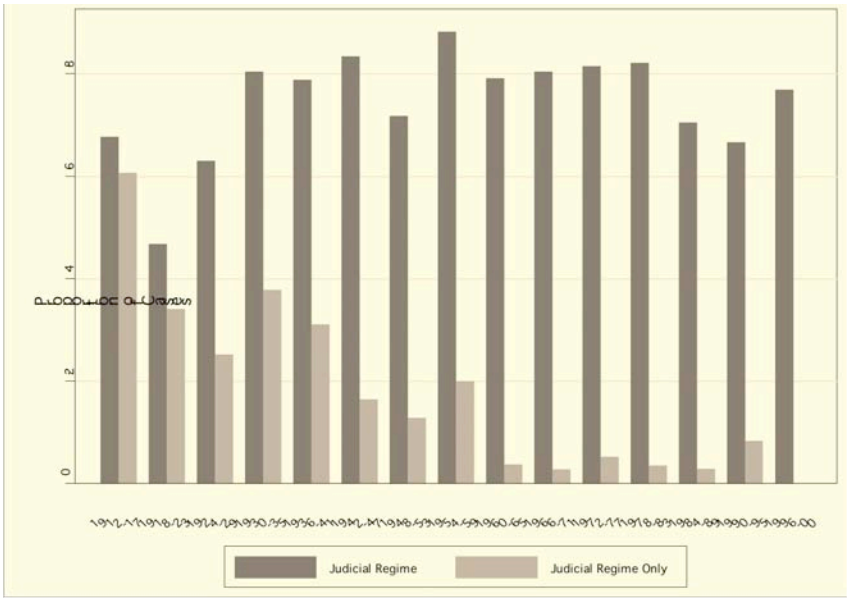

Figure 14: Proportion of tax cases relying on a judicial

177. Schacter, *supra* note 3, at 18 (showing that precedent is employed in decisions 95 percent of the time or more); Zeppos, *supra* note 3, at 1093 (finding that 93.2 percent of all majority decisions rely on judicial sources).

178. *See* Schacter, *supra* note 3, at 26–28.

regime, 1912–2000 terms. N=991.

D. The Partnership Regime

A final group of statutory theorists argue the Court should not eliminate its role in the decision-making process, but neither should it elevate its own preferences above all others. This group sees the federal judiciary as an equal partner with the elected branches of government rather than a subservient agent.[179] Judges, it is argued, are in a position to offer a "distanced reflection on questions that the legislature alone cannot—or usually does not—address. The unique position of judges to offer this distanced reflection provides the necessary complement to the electoral accountability of the legislature."[180] As Professor Schacter notes, the "complementarians" are not identical in their viewpoints, but they all allow for considerable judicial discretion in the interpretive process.[181] So, for example, Guido Calabresi argues that because federal judges are disinterested partners in the law-making process with no clear constituency and, while the legislature suffers from the "burden of inertia," judges should not hesitate to declare statutes "obsolete" if the law is out of sync with the modern legal framework.[182] Other commentators, such as Professor William Eskridge, assert that statutory interpretation should be a dynamic process that allows for judicial freedom and enables judges to reach the best substantive

179. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGES OF STATUTES (1982) (arguing the judicial role in statutory interpretation should be similar to that found in the common law context); RONALD DWORKIN, LAW'S EMPIRE 313 (1986) (proposing collaborative approach to statutory interpretation); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 541, 544 (1982) (proposing that statutory interpretation is analogous to writing a chain novel—each player in the process writes a chapter including legislators and judges); Eskridge, *supra* note 95, at 1556–60 (concluding that the best decisions have in common "hard-hitting and candid analysis of a variety of legal sources for figuring out what the text means"); *see also* Carlos E. Gonzàlez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 614–624 (1996) (summarizing and agreeing with arguments that call for a co-equal role for the judiciary and the elected branches of government); Schacter, *supra* note 2, at 608–11 (summarizing theories of statutory interpretation that call for collaborative model).

180. Schacter, *supra* note 2, at 627 (citing to DWORKIN. *Supra* note 179, at 313–54).

181. *Id.* at 630.

182. CALABRESI, *supra* note 179, at 64–65.

results based on all the relevant legal and cultural evidence available.[183] These scholars do not advocate complete judicial discretion: statutory text and other originalist sources are relevant in the interpretive process, but so too are changed circumstances, current public values, and contemporary norms.[184] The judiciary in effect is in the position to adapt out-of-date laws to changed circumstances rather than rely on the legislature to do so as the legislative regimes mandate.

To capture the role of the partnership model in tax cases, we looked to the Court's use of the legislative, executive, and judicial materials we described above, and found that, overall, the justices employed two or more regimes in 58.43 (n=579) percent of the cases. Clearly, though, they were more eager to couple some rationales than others, as Figure 15 indicates. They invoked judicial and legislative evidence in combination the most often—in 32.69 percent (n=324) of the 991 cases. After this partnership approach, we found a reliance on evidence from all three branches in 16.65 percent (n=165) of the cases; evidence from only the executive and legislative branches in 6.16 percent (n=61); and from the executive and judicial branches in just 2.93 percent (n=29).

183. ESKRIDGE, DYNAMIC INTERPRETATION, *supra* note 1.

184. Aleinikoff, *supra* note 114, at 21 (arguing for a partnership model of statutory interpretations that understands a statute as an on-going process in which both Congress and subsequent players have a role); Eskridge, *supra* note 95, at 1559–60 (1998) (arguing that judges must exercise humility in interpreting statutes, and while they should be part critic, they must also be part agent to Congress); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 317 (1989) (arguing federal courts should consider any factors they deem appropriate if a statute's language is unclear); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1140 (1990) (arguing federal courts should rely on both statutory text and contemporary public values in the interpretive process).

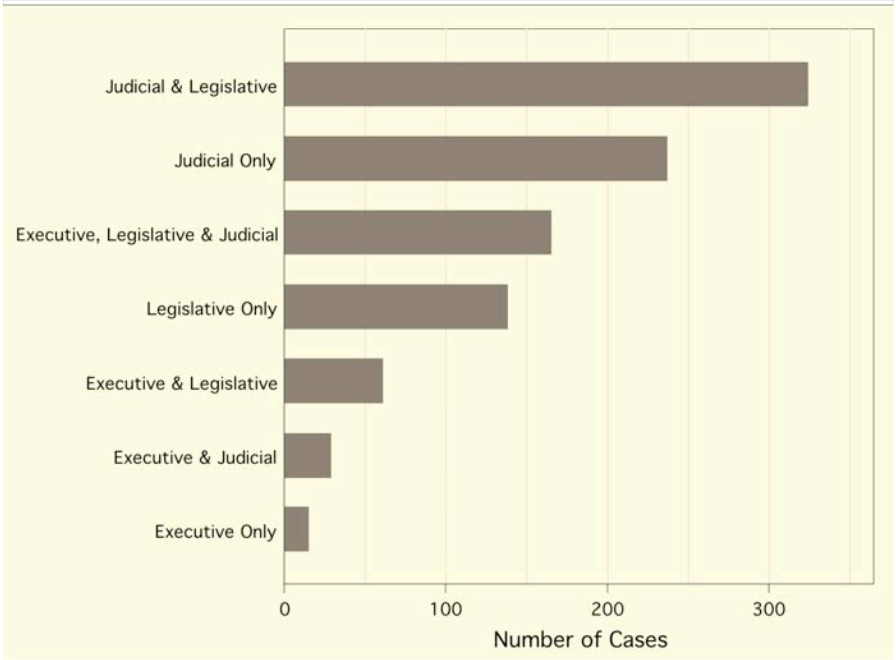

Figure 15: Proportion of tax cases relying on the partnership model and on individual interpretive regimes, 1912–2000 terms N=991.

The fact that the Court used the partnership model in 59 percent of the cases should lead readers to wonder about the other 41 percent—cases in which the court relied on evidence from just one branch. Figure 15 provides the answer, depicting the number of cases in which the Court relied solely on legislative, executive, or judicial regimes, in addition to how often it adopted a partnership model. As we can observe, the justices looked solely to legislative materials in 13.93 percent of the disputes (n=138), and to IRS or Treasury interpretations in just 15 cases (or 1.51 percent). Perhaps the most surprising finding is that the Court relied only on judicial forms of evidence in 23.92 percent (n=237) of the cases, eschewing even the text of the statute itself! "Fidelity to the legislature" may be "thought to satisfy the demands of democratic theory" and "judicial legitimacy" may "depend[] on the court's doing the legislature's

bidding rather than [its] own," as Schacter recently wrote.[185] But one would not know it by looking at the Court's own decisions—at least not in the 991 tax cases in this study.[186]

V. SOME COMPARISONS: OVER TIME AND ACROSS LEGAL AREAS

We embarked on this project to consider changes in the modes of statutory analysis over time and across legal areas. In what follows, we provide some data on both, with the end result being, as readers will see, far more questions than answers.

A. Trends in the Court's Analysis of the Tax Code

Most of our analyses thus far have focused on the Court's use of particular types of rules and evidence across the last nine decades. Along the way, we explored some trends over time—primarily in an effort to illuminate contemporary debates over, say, the purported decline in the use of legislative history and the ascendancy of textualism. Of greater concern to us, though, and as we hope we have made clear throughout, is the Court's reliance on particular regimes. That is because, to state the case succinctly, the deployment of any one regime or combination thereof may have important implications for all players in the interpretive game.

Figure 15, of course, provided some indication of the use of these regimes in the tax context. But, as it turns out, those aggregated data once again mask important trends over time—as Figure 16 reveals. Looking across and down the figure, it appears that, in general, the Court has increasingly invoked all the regimes since it first began interpreting the code in 1912: in all three instances, the proportion of use now is greater than it was during the first term window (.071 versus .308 for the Executive Regime; .393 versus .923 for the Legislative Regime; .679 versus .769 for the Judicial Regime)—so much so that we might simply conclude that the Court

185. Schacter, *supra* note 2, at 594.

186. On the other hand, as we show in Part V, some change has occurred over time, such that the contemporary Court is more likely to deploy a legislative, rather than judicial regime.

of today feels a far greater need to justify its decisions with reference to executive, legislative, or judicial evidence than ever before.[187] But that conclusion would ignore interesting variation within and among the various regimes. So, for example, while reliance on IRS and Treasury interpretations has increased over time, the Court has never given the executive branch the level of deference awarded to the legislature or the judiciary. Moreover, as we saw in Figure 10 and despite some commentary to the contrary, the Court may have prioritized its own judge-made rules through the 1950s, but, by the 1960s, it became more willing to claim deference to the legislature, thereby appearing to constrain its own discretion in the interpretive process.

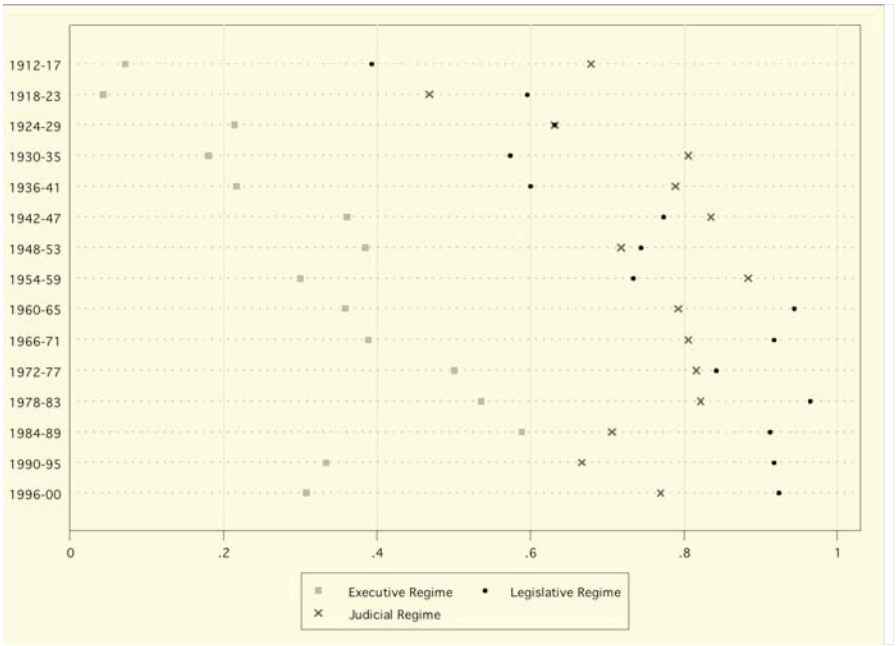

Figure 16: Proportion of cases using the three regimes over time. N=991.

187. Simple bivariate logistic regression models of each regime on time provide limited confirmation. In each model, "time" produced a statistically significant coefficient ($p < .05$).

What explains these interesting patterns? Certainly a legalistic explanation would suggest that the availability of relevant documents predicts judicial reliance on the different regimes. But a social science explanation might also investigate inter-branch politics. Along these lines, it would seem reasonable to hypothesize that the (Republican) Court's declining deference to the executive in 1990 reflected the ascendancy of Bill Clinton to the White House. By the same token, we might speculate that the Warren Court's extensive use of legislative materials in the 1960s reflected preference compatibility with Congress, and that today's Court's renewed interest in the judicial regime reflects the increasingly Republican composition of the federal bench. Then again, politics is just one possibility; we can imagine that many other factors—but especially internal court dynamics[188]—help explain the adoption of a particular regime(s) in a given case, and we are now hard at work sorting through the possibilities.

B. A Comparison: Regimes in Civil Rights versus Business Cases

Throughout this article, we have drawn comparisons with other studies that systematically explored the use of rationales. Almost needless to write, those comparisons were gross and tentative at best. That is because the extant studies are less alike than they are different: more often than not, the authors develop distinct approaches to categorize the justices' reasoning and include dissimilar rationales within those categories. They focus on a wide range of laws and legal areas, and they cover divergent time periods.

Fortunately, though, there is at least one paper from which we can make more precise comparisons: Brudney & Distlear's analysis of the canons of construction used by the Burger and Rehnquist Courts (1969–2003 terms) in workplace-related cases.[189] Because these scholars provide sufficient details on how they coded each canon or rationale and because their research procedures are quite

188. *See, e.g.*, Brudney & Ditslear, *supra* note 9 (exploring the relationship between the employment of particular canons of construction and the size of the majority coalition); Zeppos, *supra* note 3, at 1111 (suggesting that the Court's internal dynamics may explain the use or rejection of particular authoritative sources).

189. Brudney & Distlear, *supra* note 9 (manuscript at 33–41).

similar to our own,[190] we are able to match our data with theirs[191]—which they generously supplied us. In particular, they provided us with information on work-related suits involving race or gender. A comparison of these disputes with our tax cases may enable us to determine the extent to which we and others can generalize about the justices' reasoning from one legal area to the next.

As it turns out, inferences from law-to-law are more reasonable on some rationales than others. To see this, consider, first, the top panel of Figure 17, which compares our tax data to Brudney & Distlear's civil rights data on several specific components of the legislative regime (actually on all those that were readily comparable).[192] The data on two components—legislative product (i.e., attention to textual materials) and legislative process (i.e., use of sources designed to identify the legislature' purpose or intent)—are virtually indistinguishable. On legislative inaction, in contrast, a rather large difference emerges: the justices reference congressional silence in only 11.54 percent of the 130 civil rights cases. That figure was less than half that for tax cases (25.34 percent of 147). In

190. For example, they did not limit themselves to one "primary" rationale, nor did they code a rationale or source as present if the majority simply mentioned it: it had to be "probative" or "determining." *Id.*

191. Some limitations exist. One limitation is coverage: our data set begins in 1912 and ends in 2000; theirs begins in 1969 and ends in 2003. *See id.* For purposes of comparison, we used data from the 1970–2000 terms (the first civil rights cases in their database are from the 1970 term). Another limitation is a problem that would plague virtually any comparison of this sort: we and they categorized rationales in somewhat different terms. When in doubt, we did not attempt to evaluate our data against theirs. Specifically, in using their data set, we made the following decisions:

1. We only include reliance on a rationale if Brudney & Ditslear coded it as "2" (genuine or positive reliance) or "3" (source is "a" or "the" determining factor).

2. To create the legislative product (text) variable, we combined their variables textm, dictm, lancanm.

3. To create the legislative process (intent and purpose) variable, we combined their variables leghism, legpurm, leginam.

4. To create the legislative regime variable, we combined the variables listed above under legislative product and process.

5. To create the judicial regime variable, we combined their variables sctprem, comlawm, subcanm.

6. We treated their agdefm variable as akin to our executive regime variable.

192. *See supra* note 174.

light of the emphasis dynamic theorists place on the legislative inaction, this result is worthy of further study.[193]

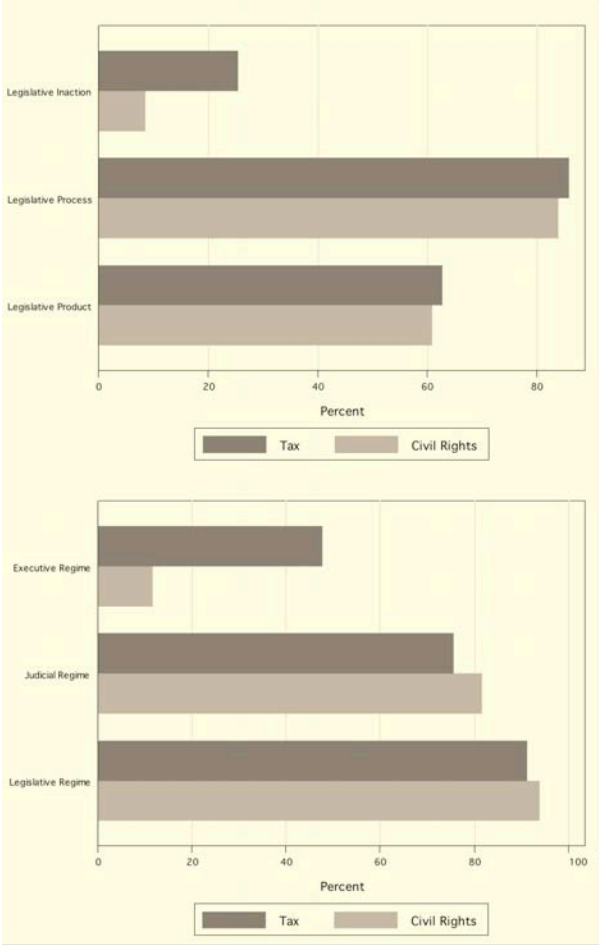

Figure 17: Proportion of civil rights and tax cases using the three regimes, 1970–2000 terms. N=130 for civil rights; N=147 for tax. The Legislative Process variable includes Legislative Inaction; the Legislative Regime variable

193. *See, e.g.*, Eskridge, *supra* note 15, at 403 (noting that the Court's "invocation of special stare decisis for statutory precedents, legislative inaction, and subsequent legislative history is a signal that it is readjusting its own preferences to avoid an override . . . .").

includes Legislative Product and Legislative Process.

The data displayed in the bottom panel of Figure 17 shows a similar pattern of reliance in particular regimes. Once again, the figures for two of the regimes—Legislative and Judicial—are nearly identical but not so of the Executive Regime: the justices employ materials associated with agency deference in 47.62 percent of the tax cases (n=111) but only in 8.46 percent (n=11) of the civil rights disputes. It is certainly possible that some of the variation exhibited in Figure 17 may be due to distinctions between Brudney & Ditslear's coding procedures and ours. But, it seems more plausible that the observed difference in the Court's regard for the executive branch may have less to do with coding and far more to do with the specific areas of the law under analysis. As we have already noted, scholars and professionals alike contend that deference to the IRS and Treasury is particularly important in tax cases due to the justices' lack of expertise.[194] We know of no such argument in the civil rights context.

VI. CONCLUDING REMARKS

The Court's divergent approach to reaching decisions in civil rights and tax points to a danger in drawing inferences from one law (or legal area) to the next. It also underscores a claim we made at the onset: if we are to develop a full picture of statutory interpretation, we must pay greater attention to the range of disputes—whether centering on labor, civil rights, economics, or even tax.

This is but one lesson of our analysis; we have described others throughout. Most important is the attention that our analysis draws to the lessons we have yet to learn. So, for example, we found an unusual willingness on the part of the current Court to deploy a legislative regime. Why? Greater political uncertainty? Preference alignment with the legislature? Past rebukes from Congress? More complex legislation? We could ask similar questions about inter-branch relations: if our findings about the increasing use of the legislative regime is peculiar to tax, does it explain why tax decisions are particularly susceptible to legislative scrutiny and even overrides,[195] as Eskridge might suggest?[196] If so, why do the justices

194. *See supra* note 151 and accompanying text.
195. *See supra* note 83.

continue to invoke textual and historical sources in this area of the law? Are they attempting to invite a legislative response, as Spiller and Tiller might argue?[197]

Possible answers are near endless, as are the many other questions our data raise. Seen in this way, our investigation merely serves to show that however far the study of statutory interpretation has moved over the last decade or so—and it has advanced considerably—it still has some distance to travel. Pushing the project along could, of course, take many forms. We have employed but one—an approach that relies heavily on what "is" rather than what "ought" to be[198]—but we surely do not want to discourage scholars from using another or others that would contribute to the larger enterprise.

196. Recall that Eskridge, *supra* note 15, among others, *see supra* note 20, has argued that Congress is more likely to overturn decisions invoking the plain meaning of a law. Another group of scholars suggests quite the opposite (the legislature is more likely to overturn decisions grounded in legislative history). *See supra* note 21. But either way, they seem to suggest that exclusive reliance on a legislative regime may invite congressional reaction.

197. *See supra* notes 22–23 and accompanying text.

198. *See* Schacter, *supra* note 3, at 56 (claiming that the "approach of legal scholars to the 'ought' is insufficiently informed by a systematic study of the 'is'").