One of These Things Is Not Like the Others: Legislative History in the U.S. Courts of Appeal

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Introduction

"In the past few decades, however, we have developed a legal culture in which lawyers routinely—and I do mean routinely—make no distinction between words in the text of a statute and words in its legislative history."

Justice Scalia, A Matter of Interpretation[1]

How accurate is Justice Scalia's characterization of American legal culture? Has runaway purposivism erased the distinction between statutory text and legislative history? Most scholars of statutory interpretation say no—although at one point legislative history seemed poised to dominate statutory interpretation, Justice Scalia and othertextualists have succeeded in defending the primacy of text.

In arriving at this answer, the intellectual conversation has focused onstatutory interpretation at the Supreme Court. But Justice Scalia's assertion sweeps far beyond the Court; it is a claim about "legal culture". So the question remains: how has legislative history fared outside of the Supreme Court?

In this paper, I aim to begin answering a small piece of this question by investigating the evolution of the use of legislative history in the circuit courts. I counted all of the citations to legislative history made by the circuit courts between 1950 and 2006. This data reveals the degree to which the circuit courts' usage patterns either confirm or reject Justice Scalia's claim about the prevalence of legislative history in statutory interpretation.

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[1]Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 18-23 (Amy Gutman ed., 1997).

The paper proceeds as follows: in Part I, I review the existing empirical literature on courts' citations to legislative history. This literature has focused almost entirely on the citation practice of the Supreme Court, although I do discuss two studies examining the use of legislative history by the circuit courts. Part II describes my study's methodology—an automatic computerized citation count—and analyzes the advantages and disadvantages of this approach relative to more traditional manual methodologies.

Part III presents my findings, namely that,while the D.C. Circuit has followed the Supreme Court in its use of legislative history, the other circuits have not.In the 1970s and 1980s, the D.C. Circuit cited legislative history far more frequently than the other circuits. During this period, the D.C. Circuit was responsible for roughly a third of all legislative history citations made by the circuit courts, despite handling only around five percent of the total cases. Following a peak of 941 citations in 1981, the D.C. Circuit's use of legislative history then steeply declined in the late 1980s. Both the height of this peak and the rapidity of the decline distinguish the D.C. Circuit from the other circuits. In particular, the Supreme Court exhibited a similar pattern of growth and decline in its use of legislative history during this period. Furthermore, statistical analysis of the data demonstrates that this difference cannot be entirely accounted for by several "simple" explanations, such as(1) the D.C. Circuit handling more statutory interpretation cases than the other circuits, (2) the D.C. Circuit authoring longer opinions than the other circuits, or (3) the D.C. Circuit authoring a higher proportion of outlier opinions—opinions that make an especially large number of legislative history citations—then the other circuits.

Part IV proposes three potential "substantive" explanations of why the D.C. Circuit may have handled more legislative history than the other circuits. First, the D.C. Circuit's

specialization in administrative law may predispose it to cite legislative history more than the other circuits, which handle less administrative law cases. Second, the attorneys practicing in front of the D.C. Circuit may have been more likely to argue from legislative history than lawyers litigating in other circuits. Third, the D.C. Circuit's distinctive relationship with the Supreme Court may have led it to mirror the Supreme Court's approach to legislative history more closely than the other circuits. Unfortunately, my study's methodology is not suited to exploring the strength of these more substantive explanations.

Finally, Part V discusses the descriptive and normative implications of the finding that the circuit courts have taken different paths in their use of legislative history. Descriptively, this finding complicates the conventional narrative of the evolution of the use of legislative history in the federal courts. This conventional narrative has focused on the Supreme Court, where legislative history peaked in the early 1980s before falling drastically. Outside of the D.C. Circuit, however, this pattern does not necessarily accurately describe the use of legislative history by the circuit courts.

Normatively, the finding that not every circuit embraced legislative history as thoroughly as the Supreme Court and D.C. Circuit alters the strength of several of the classic arguments for and against the use of legislative history. For example, the D.C. Circuit's familiarity with legislative history may make it less vulnerable than the other circuits to the institutional competence objection, which focuses on the inability of courts to interpret legislative history reliably. Similarly, the D.C. Circuit's heavy use of legislative history may make it *more* vulnerable than the other circuits to the manipulation objection, which turns on the congressional actors' incentives to twist the legislative history in anticipation of litigation. Part V concludes by

outlining the need for a more polycentricunderstanding of statutory interpretation in the American legal system.

I Literature Review

A. Empirical Work on the Supreme Court

Jorge Carro and Andrew Brann published the first major citation-count study examining courts' citations to legislative history in 1982.[2]Carro& Brann tracked every citation of legislative history made by the Supreme Court between 1938 and 1978. Their found a profound increase in citations to legislative history throughout this period: while the Supreme Court cited legislative documents nineteen times in 1938, by 1979 that number had swelled to 405.[3]Because they found that "fluctuations in the amount of citations" were not driven by variations in the Supreme Court's caseload, they announced that there had been "continual increase in the usage of legislative historical documents" by the Supreme Court.[4]

In addition to these quantitative findings on the Supreme Court's increasing citation of legislative history, Carro& Brann made several qualitative conclusions about the nature of these citations. First, the great majority of the citations were either to committee reports or to the Congressional Record.[5] Citations to these materials vastly outnumbered citations to other categories of legislative history, such as unenacted bills, hearings, or conference reports.[6] Second, opinions citing legislative history were much more likely to deal with certain subject matters than others —tax opinions, for instance, were unusually likely to include citations to

[2] 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)
[3]*Id.* at 303.
[4]Id. at 299.
[5]*Id.* at 299.
[6]*Id.* at 304 tbl. 2.

legislative history.[7] Third, different Justices cited legislative history at very different rates. Justice Brennan averaged 30.8 citations per year over his tenure, while Justice Burton only referenced legislative history 14.2 times a year.[8]

Carro& Brann's findings generated a great deal of interest; scholars were particularly fascinated by the possibility that the justices' ideology could be driving the variation in citation rate.[9] A number of subsequent studies sought to build on Carro& Brann's pathbreaking work.[10] In particular, Michael Koby published a direct extension of Carro& Brann's study in 1998,[11] applying Carro& Brann's citation counting methodology to all Supreme Court cases between 1980 and 1998.[12] Contrary to Carro& Brann's expectation that legislative history citation rates would continue to increase, this new data indicated that the Supreme Court's citation count peaked at 796 citations in 1985. By 1998, the Supreme Court cited legislative history only 79 times. [13]

Figure 1 combines Carro& Brann's original data with Koby's extension, providing the Supreme Court's citation counts for every year between 1938 and 1998.

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[7] *Id.*at 300-301.
[8] *Id.* at 302.
[9] *See, e.g.*, James J. Brudney& Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 158 &n.153 [hereinafter Brudney&Ditslear, *Scalia Effect*] (citing Carro& Brann for the proposition that "liberal justices cite legislative history substantially more than conservative justices").
[10] *See, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992); Patricia M. Wald, T*he 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 (1990); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).
[11] 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).
[12] *Id.* at 373.Koby's methodology differed from Carro& Brann's in that Koby only counted citations to "(1) committee reports; (2) congressional debate; (3) committee hearings; and (4) the text of bills." *Id.* Professor Koby argued that this limitation was justified because according to Carro& Brann's findings these four categories comprise the vast majority of legislative history citations.
[13] *Id.*at 384 tbl.I.

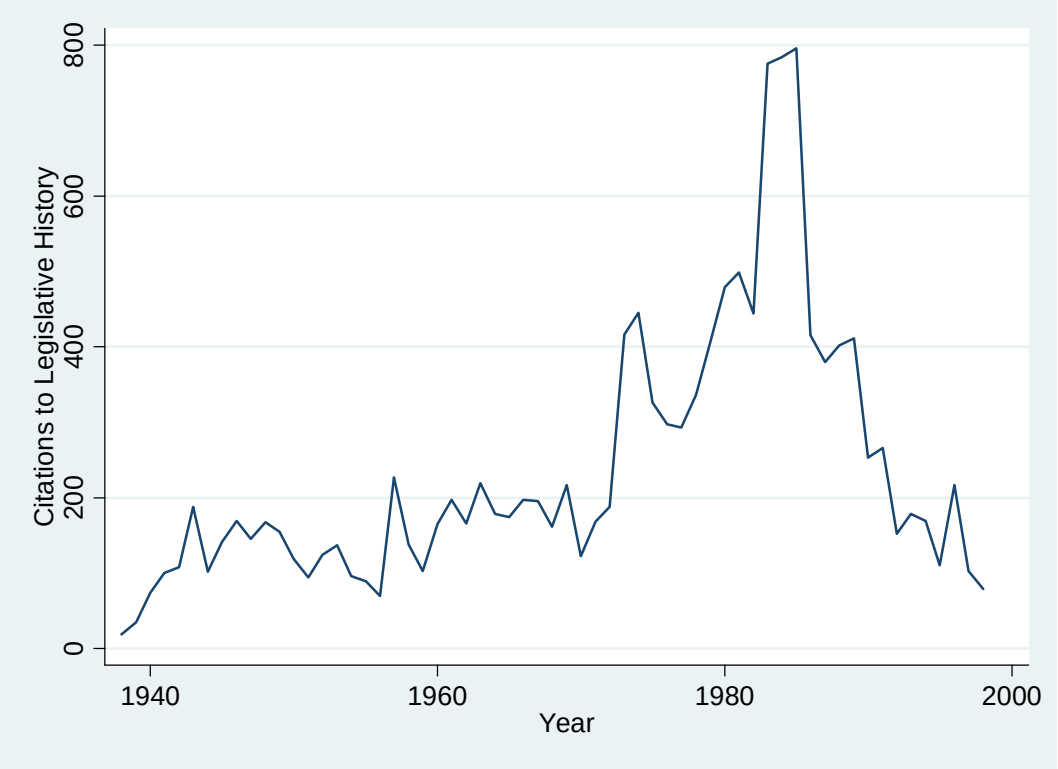

Figure 1: Citations to Legislative History Per Year in the Supreme Court

Because this plot displays only raw citations counts, it may partially reflect variations in the Supreme Court's caseload, rather than shifts in the Court's citation practice.[14] Nonetheless, the plot effectively sketches the evolution of the Supreme Court's use of legislative history. The plot begins with a low rate of legislative history usage. This continues until about 1970, when the number of citations begins to climb steeply. This ascent continues until the early-to-mid 1980s, when the trend reverses and the citation rate declines as quickly as it had climbed. The decline continues until citation rates return to where they had been in the 1950s. On the strength of this "clear and unmistakable pattern of decline," Professor Koby concluded that Justice Scalia had successfully persuaded the other Justices that legislative history was not a reliable source for

[14]Koby's study illustrates this point: at the beginning of his study, in 1980, the Supreme Court was hearing 156 cases a year, whereas at the end, in 1998, it was only hearing 94 cases a year. Koby, *supra* note 11,at 385 Tbl. 1. The number of statutory interpretation cases also plunges from 89 cases in 1980 to 49 in 1998. *Id.* 385 Tbl. 1.

statutory interpretation: "Justice Scalia and the critique [of legislative history] he represents contributed significantly to a sharp reduction in the Court's use of legislative history."[15]

Subsequent scholars have drawn on increasingly sophisticated statistical techniques to analyze whether this conclusion is warranted: is Justice Scalia responsible for the decline in citations of legislative history? In particular, Professors James Brudney and Corey Ditslear recently published a series of empirical studies that examined the "interpretative resources" used in Supreme Court opinions.[16] Rather than simply counting citations, Brudney&Ditslear coded the text of each opinion by hand, recording each time the opinion made an argument based on one of ten "interpretative resources": "(1) the plain or ordinary meaning of textual language; (2) dictionaries; (3) language canons; (4) legislative purpose; (5) legislative inaction; (6) Supreme Court precedent; (7) common law precedent; (8) substantive canons; and (9) agency deference[and (10) legislative history]."[17] Because this technique was far more labor-intensive than a straightforward citation count,Brudney&Ditslear limited their studies to specific topic areas. The first three articles looked at all labor law decisions during the Burger and Rehnquist Courts (1969-2005),[18] while the fourth study added tax cases to the dataset.[19]

In these studies, Brudney&Ditslear rejected the coarsest version of ProfessorKoby's theory that "Justice Scalia and the critique he represents" explain the decline in citation of legislative history. In particular, Brudney&Ditslear found that (1) the decline of the Court's use

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[15] *Id.* at 369.

[16] James J. Brudney& Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 221 (2006) [hereinafter Brudney&Ditslear, *Decline and Fall*];

[17] *Id.*

[18] James J. Brudney& Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) [hereinafter Brudney&Ditslear, *Canons of Construction*]; Brudney&Ditslear, *Decline and Fall*, *supra* note 16; James J. Brudney& Corey Ditslear, *Scalia Effect*, *supra* note 9.

[19] James J. Brudney& Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009) [hereinafter Brudney&Ditslear, *Warp and Woof*]. In addition, this study extended the study of work law cases up through the 2008 term.

of legislative history may be driven by "[s]ubject matter considerations," particularly the advancing age of several major labor statutes[20] and (2) "the Court's reliance on legislative history turns out to be intriguingly non-ideological in direction."[21] Furthermore, insofar as Justice Scalia has had an effect on the use of legislative history, it was probably not because his critique persuaded the other Justices that legislative history is a poor tool of statutory interpretation. Instead, Brudney&Ditslear's results suggest that Justice Scalia's "line in the sand" may have prompted the liberal Justices to eschew legislative history rather than risk a scathing dissent or concurrence by Justice Scalia. To be sure, this "strategic" explanation for the decline in legislative history still results in a Supreme Court with an aversion to legislative history.[22] Nonetheless, Brudney&Ditslear provide powerful evidence against, at the very least, the simplest version of the "Scalia persuasiveness" hypothesis proffered by Koby and others.

In 2010, David Law and David Zaring published the most recent, as well as the most statistically sophisticated, study of the Supreme Court's use of legislative history.[23] Law &Zaring improved on previous studies by looking not just at how the Court interpreted statutes, but also at the statutes being interpreted. First, they identified the forty statutes that have been most frequently interpreted by the Supreme Court, ranging from the Internal Revenue Code to

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[20]Brudney&Ditslear, *Decline and Fall*, *supra* note 16 at 229. Likewise, Brudney&Ditslear argue that the frequent usage of legislative history is in part attributable by the preeminence of Justice Blackmun in tax law. "[A]t least for a field perceived as tepid in terms of ideology and also judicial interest, the Justices may be willing to follow the interpretive example of a knowledgeable colleague when grappling with statutory challenges." Brudney&Ditslear, *Warp and Woof , supra* note 19at 1311 (2009)

[21]Brudney&Ditslear, *Decline and Fall*, *supra* note 21 at 229.

[22] In turn, a Supreme Court adverse to legislative history may lead the larger legal community to be adverse to legislative history. Brudney&Ditslear, *Scalia Effect* at 171 ("If the community of practicing lawyers and lower federal court judges perceives that the Justices value legislative history substantially less than they did in the past, this could encourage lawyers and judges to alter their own approaches to legal advocacy and judicial reasoning. Particularly when the diminished usage is by liberal Justices who have previously expressed their commitment to the legitimacy and value of this traditional resource, the Court may be sending a chilling signal to the legal community.").

[23] David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1654 (2010).

the Clean Air Act.[24] Next, they coded opinions interpreting these statutes for citations to the legislative history of the particular statute at issue. They also coded the statutes themselves for (1) age, (2) length, (3) complexity as measured by the statute's Flesh-Kincaid readability score,[25] (4) whether the statute had been previously interpreted, and (5) whether the statute had been frequently amended.[26] Lastly, Law &Zaring collected data on the ideological stance of the Justices themselves.

Using a set of sophisticated regressions on this data, Law &Zaring differentiated between the legal and political factors that have driven the Court's use of legislative history. Legally, the Court is more likely to invoke legislative history when it is confronted with especially complex statutes or in a majority opinion that will stand as binding precedent. Politically, the replacement of liberal Justices by more conservative Justices, rather than ideological shifts by individual Justices, is responsible for the Court's less-frequent citation of legislative history since the 1980s. Furthermore, Law &Zaring, like Brudney&Ditslear before them, "reject[ed] the oft-expressed hypothesis that Justice Scalia's vocal criticism of legislative history helps to explain the overall decline in legislative history usage since the Burger Court."[27]

In sum, scholars agree that the Supreme Court's use of legislative historyincreased in the 1970s and early 1980s and the began to decline.[28] Explaining these trends, however, is a far murkier endeavor. Given Justice Scalia's outspoken criticism of legislative history and the timing of his nomination to the Court, it is easy to understand why Koby and others were so

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[24]*Id.* at 1685.
[25]The Flesch-Kincad score "compute[s] the readability of a given text using objective parsing rules that capture how difficult a text is to read from a grammatical and linguistic perspective, with no need for human intervention in the form of subjective coding decisions. This score, a widely used linguistic measure of the readability of a text, is calculated from two ratios: the ratio of words to sentences, and the ratio of syllables to words."*Id.* at 1692.
[26]*Id.* at 1689-95.
[27]*Id.* at 1659.
[28]*Cf. infra* Part V.A.1.

quick to attribute the decline in legislative history in the late 1980s and early 1990s to the persuasiveness of Justice Scalia's critique. The more detailed studies conducted by Brudney&Distlear and Law &Zaring reveal, however, that no simple, monocausal account can explain the Court's evolving willingness to use legislative history.

B. Empirical Work on the lower courts

Lower federal courts have not received anywhere near the same amount of scholarly attention as the Supreme Court. Only two works directly address the use of legislative history by lower courts.

First, Frank Cross briefly investigated how the circuit courts have used legislative history in a section of his recent book on statutory interpretation.[29] Cross searched Westlaw for circuit court opinions that used the term "legislative history" and counted how the number of search results varied over time. As Cross himself acknowledged,[30] there are significant problems with this methodology: (1) courts may invoke legislative history without writing the words "legislative history," (2) an opinion may include the words "legislative history" even if the opinion does not rely on legislative history, and (3) courts could use the words "legislative history" only to dismiss the relevance of a piece of legislative history. Nonetheless, Cross contended that these errors are "random noises . . . [that] would not obscure trends over time."[31]

Cross found that, up until the late 1980s and early 1990s, there was a rapid and steady increase in the number of appellate opinions containing the words legislative history. This

[29] FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 183-87 (2009).
[30] *Id.* at 184.
[31] *Id.* It is unclear if Professor Cross is correct in claiming that these errors would only be "random noise." As the legislative history debate became more prominent in the 1980s with the nomination of Justice Scalia, judges may have become more self-conscious about their use of legislative history, and thus more likely to explicitly use the words "legislative history." If this were true, Professor Cross could see an upward trend in the use of the words "legislative history" which did not reflect an underlying increase in the usage of legislative history.

increase was followed by an equally steady decrease in the 1990s and 2000s. Cross argued that this turnaround was not directly attributable to the increasing conservatism of the appellate courts under Presidents Reagan and Bush I. Instead, he suggested that the lower courts may have reacted to a "perceive[d] . . . 'major policy shift' [in] statutory interpretation methods at the Supreme Court."[32]

Second, Michael Abramowicz and Emerson Tiller recently published an innovative study investigating whether judges disproportionately cite legislative history created by ideologically congenial legislators.[33] This study canvassed all circuit and district court opinions published between 1950 and 2003 for citations to the Congressional Record. For each of these citations, Abramowicz& Tiller ascertained (1) the identity of the legislator cited and (2) the identity of the judge who authored the citation.[34] By regressing the ideological affiliation of the judge (as measured by the party of the president who appointed the judge) against the ideological affiliation of the legislator being cited, Abramowicz& Tiller hoped to discover whether liberal judges were, for instance, more likely to cite liberal legislators.[35]

Abramowicz& Tiller concluded that they were not. Although "Democratic" judges were more likely than "Republican" judges to cite the Congressional Record, they were equally likely to cite Republican and Democratic legislators.[36] On the other hand, Abramowicz& Tiller did find that "judges . . . consider the political-ideological preferences of the judges who will review

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[32] *Id.*
[33] Michael Abramowicz, Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEGAL STUD. 419 (2009).
[34] *Id.* at 427-28.
[35] *Id.* at 425-26.
[36] *Id.* at 439.

or be part of the decision-making process in determining which legislators to cite."[37] It is unclear, however, whether these results are applicable to other types of legislative history. For example, committee reportsthat illuminate the viewpoint of the enacting coalition may prove especially persuasive to an ideologically sympathetic judge.

Ultimately, however, neither of these works subject circuit courts to the same depth of scrutiny as the Supreme Court has faced in Brudney&Ditslear, Law &Zaring, and numerous other studies. There is not even a Carro& Brann for the circuit courts: neither Cross nor Abramowicz& Tiller collect the straightforward data about the circuit courts that has been available for the Supreme Court since 1980. This study hopes to begin to remedy that deficit.[38]

II. Methodology

This study aims to extend Carro& Brann's study to the courts of appeals by analyzing a dataset made up of all of the opinions published in the Federal Reporter Second and Federal Reporter Third between 1950 and 2006, the time period for which the best data was available.[39] Unlike most other citation count studies, this study neither counted citations by hand nor counted citations with searches in commercial databases like Lexis and Westlaw.[40] Instead, I worked directly with a digital version of the Federal Reporter.[41]Because of certain limitations of

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[37] *Id.* ("For district court judges, that means looking to the makeup of the circuit court; for circuit court judges, that means looking to the makeup of the other members on the panel and of the remainder of the circuit.").

[38] For a reasonably comprehensive bibliography of citation count studies, including studies on state courts and foreign jurisdictions, see Appendix B of William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267, 298 (2002). Many of these studies focus on citations to precedent or scholarly articles, rather than to legislative history. *See also* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999) (metastudy collecting 84 individual studies of the connection between judicial ideological and judicial rulings).

[39] Specifically, volumes 178 through 999 of the Federal Reporter Second and volumes 1 through 491 of the Federal Reporter Third.

[40] *See, e.g.*, Carro& Brann, *supra* note 2 (Handcount); Wald, *supra* note 10 (Handcount); Law &Zaring, *supra* note 23 (electronic); Koby, *supra* note 11 (electronic).

[41] This digital version of the Federal Reporter is available at http://bulk.resource.org/courts.gov/c/.

commercial databases, analyzing the text of opinions directly offered much greater latitude in specifying exactly how to count the citations to legislative history. This study focused on the opinions published by the D.C. Circuit and the other eleven regional circuits; it did not consider opinions authored by the Federal Circuit, the Court of Claims, and the Temporary Emergency Court of Appeals.[42] This resulted in a dataset of 541,977 opinions. In total, these opinions included more than six billion characters of text—the equivalent of more than two thousand King James Bibles.

I used a customized computer program to analyze the opinions in this dataset. This program first generated metadata for each opinion, including: (1) the volume and page number of the opinion, (2) the circuit which authored the opinion, (3) the year the opinion was published and (4) the length of the opinion.[43] Next, the program counted the number of citations to legislative history in each opinion. The computer program searched for text matching a number of "search patterns" designed to capture specific types of citation to legislative history.[44] For example, the search pattern for House Committee Reports would successfully match a diversity of citation formats: "H.Rep," "H.R. Rep.," "House Rep.," "H.R. Report," and others.

In particular, the program searched for citations to six types of legislative history:

1. House and Senate Committee Reports;
2. House and Senate Conference Reports;
3. House and Senate Documents;
4. The Congressional Record;
5. House and Senate Bills; and

[42] These courts handle such highly specialized subject matters that data from these circuits might not be comparable to the data from the "normal" circuits.
[43] Ideally, the program would have also extracted the identity of the judge who authored the opinion. Unfortunately, the Courts of Appeal are wildly inconsistent in how they label the author of each opinion. Accordingly, the computer program was incapable of reliably identifying the author of opinions.
[44] Technically speaking, the program used "regular expressions" to search for citations to legislative history. "Regular expressions" are a more powerful version of the Boolean queries that can be used to search Westlaw and Lexis-Nexis.

6. The United States Code Congressional and Administrative News.[45]

I did not count citations to congressional hearings because courts have not adopted any consistent citation practice for hearings; accordingly the program would either drastically over- or under-count citations to hearings.

A. Advantages

Automated analysis of opinions offers a number of advantages, particularly when compared to hand-coding. First and foremost, a computer can efficiently analyze far more opinions than would be feasible using manual analysis. The search algorithm used here could catalogue and analyze 540,000 opinions in a little over an hour. Canvassing a similar number of opinions by hand is simply implausible: assuming that an individual reading opinions is able to code, on average, one opinion every two minutes, that person would take over two years to analyze the entire dataset used in this study. Accordingly, hand-coding studies almost always focus on datasets of no more than a few hundred opinions.[46] The largest hand-coding study conducted so far—the Songer database used in Professor Frank Cross's study of the circuit courts—analyzed roughly 18,000 opinions published by the circuit courts between 1925 and 2002.[47] Automation permits the study of a dataset that is an order-of-magnitude larger than even this largest of hand-coding studies.

Second, automation avoids selection bias because it canvasses the entire universe of published opinions, rather than a possibly unrepresentative subset. Indeed, this may be an additional reason why empirical studies have focused on the Supreme Court rather than circuit,

[45] The program was designed to avoid double-counting parallel citations to U.S.C.C.A.N.
[46] *See, e.g.*, Brudney&Ditslear, *Warp and Woof*, supra note 19, at (755 opinions); Brudney&Ditslear, *Scalia Effect*, *supra* note 9 (534 opinions); Zeppos, *supra* note 10 (413 opinions).
[47] FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 3 (2007).

district, or state courts. Researchers coding opinions by hand can only look at a small fraction of the opinions published each year by the lower courts. Since there is no guarantee that this small fraction will be a representative sample, scholars may choose to focus on studying the Supreme Court's comparatively modest output.[48] Here, however, automation makes it just as easy to count every citation in the Federal Reporter as it would be to count every citation in the U.S. Reports.

Third, the speed advantages of automation permit the study of a much longer time period than would otherwise be possible. Whereas most hand-coding studies look at a handful of Supreme Court Terms,[49] here the dataset covered fifty-seven years. Those hand-coding studies which cover a longer time range, such as the Songer database, do so at the cost of selecting only a few opinions from each year. This greatly increases the chance that their results are statistical flukes, or driven by selection bias.[50]By contrast, my study's "wide-angle lens" facilitates the identification of long-term historical trends in the citation of legislative history—trends that might be obscured by the random year-to-year fluctuations that could dominate shorter time frames.[51]

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[48]*Cf.*Brudney&Ditslear, *Decline and Fall*, *supra* note 16 at 229 (noting that even their study of the Supreme Court could also analyze "only one-sixth of the Court's caseload" and that "a study of the Court's output in other substantive areas might yield additional findings").

[49]*See, e.g.*, Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 231 (2010) (3.5 terms); William H. Manz, *supra* note 38(1 term); Zeppos, *supra* note 9 (20 terms); Wald, *supra* note 10 (1 term); *cf.*Brudney&Ditslear, *Canons of Construction*, *supra* note 18 at 28 ("Our period of thirty-four years allows for observation of some evolution in the Court's usage of canons, but our discussion of current and relatively recent practices provides for more of an in-depth or time-lapse snapshot than a prolonged historical perspective.").

[50]*See, e.g.*,Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1923 (2009) (extensively criticizing selection bias issues in the Songer database).

[51] For instance, in 1983 Judge Patricia Wald concluded, on the strength of a comprehensive review of statutory interpretation cases from the 1981-82 Supreme Court term, that the Plain Meaning Rule has been "effectively been laid to rest." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983). Judge Wald recanted on this claim only seven years later, when a follow-up study led her to admit that her "funeral ceremony in 1983 for the Plain Meaning Rule was premature." Patricia

Fourth, computers will never make a mistake or allow unconscious biases to contaminate the results.[52]. If the opinion contains a citation that matches the search pattern, that citation will always be counted. By contrast, hand-coding relies on individuals—often student research assistants—to decide whether an opinion satisfies inherently subjective criteria.[53] To be sure, hand-coding studies almost always take measures to limit coding errors: authors provide the coders with significant guidance about how to code opinions and multiple coders will often work on the same opinions to allow the comparison of results.[54] Despite these preventative measures, however, coding errors could still contaminate the results of these studies.[55] For instance, Landes and Posner conducted a "spot check" of forty opinions coded in the Songer database and identified "a high error rate in cases decided before 1960."[56] Automation avoids this particular source of error.

A final advantage of automated analysis is that the analysis can be repeated quickly and easily with new search patterns. This was useful for two reasons. First, it allows for rapid refinement of the search patterns, which helps ensure that the identification of legislative history

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M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990).

[52] Of course, this means the computer is only as accurate as the search pattern it is given. *See infra* Part II.B.1.

[53] See, e.g., Brudney&Ditslear, *Canons of Construction*, *supra* note18, at 24 n.92 (describing coding procedure used by research assistants). Of course, a human hand-coding opinions can code much more intelligently than a computer. For instance, the Songer database codes for the "primary issue" of an opinion. DONALD R. SONGER, THE UNITED STATES COURT OF APPEALS DATABASE: DOCUMENTATION FOR PHASE 1, at 5, available at http://www.cas.sc.edu/poli/juri/cta96_codebook.pdf. No computer analysis that I know of could hope to reliably identify the primary issue addressed in an opinion.

[54] *See, e.g.*, id.at 10 (describing double coding procedure); Brudney&Ditslear, *Canons of Construction*, *supra* note18, at 24 n.92 (same).

[55] See Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 534 (2009) ("As I reviewed and compared the students' coding, however, it became clear that there were several sources of mistakes that I had not anticipated. In many instances, for example, accurately coding the cases required background knowledge about different areas of law, knowledge that my law student coders did not always have.").

[56] William M. Landes& Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 777 (2009). Landes& Posner also conclude that "a number of the systematic classification decisions that the coders made are erroneous"—for example, the Songer database codes all pro-plaintiff votes in intellectual property cases as "liberal" votes. *Id.* These types of systematic errors, however, are just as likely to afflict automated citation counting as hand-coding.

citations is as accurate as possible.[57] Second, new hypotheses can be investigated quickly. For example, it was straightforward to examine the hypothesis that citations to *Chevron* might be statistically related to citations to legislative history.[58]I re-ran the analysis programwith a new search pattern designed to pick up citations to *Chevron*, and the new data was ready within an hour. By contrast, if scholars coding opinions by hand had not initially looked for *Chevron* citations, they could not investigate the new hypothesis without re-coding all of the opinions in the dataset—a daunting prospect even for datasets much smaller than the one used here. [59]

B. Disadvantages

Despite these advantages, my methodology also has a number of disadvantages. These included both automation disadvantages, relating to the mechanics of counting citation with a computer programs, and conceptual disadvantages, relating to the limitations of citation counting as an empirical tool.

1. Automation Disadvantages

An automated citation count, particularly one over such a large and diverse set of opinions, could fail to identify citations that do not conform to standard citation formats.[60] A stray period or incorrect abbreviation may have caused the search algorithm to skip over what any human would clearly identify as a citation of legislative history. Opinions published in the

[57] *Cf.infra* Part II.B.1.
[58] See *infra* Part IV.A. In this instance, there did not appear to be any discernable relationship between citations to *Chevron* and citations to legislative history.
[59] *Cf.* Carolyn Shapiro, *supra* note 55, at 534-35 (discussing the need to recode her entire dataset to both (1) correct "several sources of mistakes that [she] had not anticipated" and (2) "add [new] issue codes").
[60] *Cf.* Law &Zaring, *supra* note 23, at 1686 & n.119 (discussing how their study "relied upon the Court's citation practices to be relatively consistent with the practices outlined in the Bluebook").

1950s and 1960s are especially likely to be miscounted because citation formats had not yet been standardized, especially for unconventional sources like legislative history.[61]

To minimize these types of errors, I adopted a two-pronged approach. First, I conducted numerous spot checks by selecting a random opinion, hand-counting citations to legislative history, and comparing my count to the result of the automated count. When discrepancies arose, I identified which citations were not counted and refined the search algorithm so that it would pick up those citations in the future. Second, I read several volumes of the Federal Reporter from the 1950s and 1960s cover to cover looking for unorthodox citation formats, which I then added to the search algorithm. As a result, I believe the search algorithm successfully identified the bulk of citations to legislative history, while avoiding almost all false positives. Furthermore, I have no reason to believe that any residual error that remains could significantly bias the results in any particular direction.

2. Conceptual Disadvantages

Beyond the technical issues of an automated count, there are also conceptual difficulties with using a raw citation count to investigate courts' use of legislative history. Often, even the judges authoring opinions are unclear on what each citation is supposed to stand for. As Professor John Merrymen, the author of the first major citation count study, argued:

> The citation of authority in judicial opinions . . . is often an uncritical unreflective process carried out without conviction or understanding about the purpose of citation, the nature of authority or the function of precedent. Presumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader. [62]

[61] *Seeid.* (explaining that "citation practices have become more formal and consistent over time, and accordingly more likely to be captured by our search string").
[62] John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954).

Merely counting a citation cannot reveal what the judge intended to mean by citing legislative history. Nor can it tell us what meaning that citation has for the reader.[63] Instead, all a citation count study provides is the total number of citations to legislative history. Drawing substantive conclusions about judicial behavior, then, requires what Professor Merrymen called a "theory of citation"[64]—something that tells us what the numerical data of the citation count says about how judges are treating legislative history. For instance, the most obvious "theory of citation" is that, all else being equal, more frequent citation to legislative history implies that the judiciary is more willing to use legislative history.

Even this inference may be problematic because it depends on the unrealistic assumption that each citation of legislative history is equivalent to every other citation of legislative history. This assumption obscures a number of important factors that might differentiate one citation of legislative history from other citations. First, it assumes that citations of legislative history are all of equal importance. An opinion may cite legislative history a single time. However, if that citation is the dispositive citation that resolves the case, that single citation may "matter" more than ten citations to legislative history that pertain to peripheral issues.[65]In the aggregate citation count, however, ten citations counts for ten times as much as one citation, regardless of the relative importance of the citations.

Second, a citation count ignores the valence of the citation—whether the citation is positive or negative. If an ardent textualist makes a citation to legislative history solely to

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[63]*Cf.*Brudney&Ditslear, *Canons of Construction*, *supra* note 18, at 28 ("[O]ur study seeks to examine which interpretive resources were used to justify the Court's decisions, not what actually accounts for each author's judicial behavior. As we suggested earlier, it would be difficult, if not impossible, to assess empirically the array of personal values, practical considerations, and principled reasons that motivates each individual Justice.").

[64] John H. Merryman, *Toward a Theory of Citations: An Empirical Study of Citation Practice in the California Supreme Court in 1950*, 1960, and 1970, 50 S. CAL. L. REV. 381 (1977).

[65]*Seeid*. ("[A judge] may rely on [an interpretative resource] as modestly probative to advance her reasoning in one opinion while invoking them as central to her justification in a separate decision.).

criticize its unreliability,[66] that citation is counted equally with a citation made by a dyed-in-the-wool purposivist. Professor Frank Cross at one point suggested that up to twenty-five percent of the Supreme Court opinions he analyzed may have made negative citations to legislative history.[67] Professor Cross, however, also provided some preliminary evidence that the same may not be true of the circuit courts.[68] Regardless, a citation count does not differentiate between these positive and negative uses of legislative history—they are all included in the overall total.[69]

Unlike the technical disadvantages discussed *supra*, technical improvements to the methodology of this study cannot resolve these issues. They are problems inherent in the structure of citation counting. This, of course, does not mean that citation counts are worthless. Rather, it means that readers and researchers should approach the raw data cautiously, with an eye to what it can and cannot tell us. As Judge Harry Edwards put it, citation counters must "acknowledge the limits of their research and maintain an appropriate level of modesty in their claims."[70]

III. Findings

This Part presents the results of the computerized analysis I performed on the *Federal Reporter*. I begin by showing that, as a whole, the circuit courts have roughly tracked the Supreme Court's use of legislative history. Next, I break the citation count data down by circuit, revealing that during the 1970s and 1980s, the D.C. Circuit tracked the Supreme Court much

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[66] *See, e.g.*, Wisconsin Pub.Intervenor v. Mortier, 501 U.S. 597, 616-623 (1991) (Scalia, J., concurring in the judgment).
[67] FRANK B. CROSS, THEORY AND PRACTICE, *supra* note 29, at 143 (2009).
[68] *Id.* at 184 ("Only about 1% of the references to 'legislative history' in circuit court opinions was negative.").
[69] This may be particularly problematic if, as Law &Zaring have suggested, judges are more likely to cite legislative history if other judges have already cited legislative history in the opinion. Law &Zaring, *supra* note 23 at 1739. If a dissenting judge criticizes the use of legislative history by the majority opinion, this may drive up the total citation count, without necessarily indicating that the judiciary as a whole is more inclined to use legislative history.
[70] Edwards & Livermore,*supra* note 50, at 1966.

more closely than the other circuits. I analyze the disparity between the D.C. Circuit and the rest of the circuits and show that the D.C. Circuit's handling of more "legislative history" cases cannot entirely explain the difference. I conclude by examining two other potential explanations for the D.C. Circuit's frequent use of legislative history: (1) the D.C. Circuit's longer opinions, and (2) a disproportionate contribution by a few opinions that each contain a very high number of citations to legislative history.

A. Legislative History in the Circuit Courts

How has the circuit courts' use of legislative history varied over time? Given the Supreme Court's influence on the circuit courts,[71] one might expect the circuit court's to mimic the Supreme Court's use of legislative history. If so, the circuit court data should demonstrate a relatively low rate of citation to legislative history in the 1950s and 1960s, tremendous growth in the 1970s and 1980s, and a collapse in the late 1980s.[72]

At first blush, the data collected from the *Federal Reporter* seems to bear out this hypothesis.Figure 2 presents the total citations to legislative history per year in circuit court opinions from 1950 to 2006.

[71] *See, e.g.*, CROSS, THEORY AND PRACTICE, *supra* note 29, at 182 ("Lower federal courts may take indirect cues from Supreme Court practice and adapt their own interpretative methods accordingly.")
[72] *See*Figure 1*supra.*

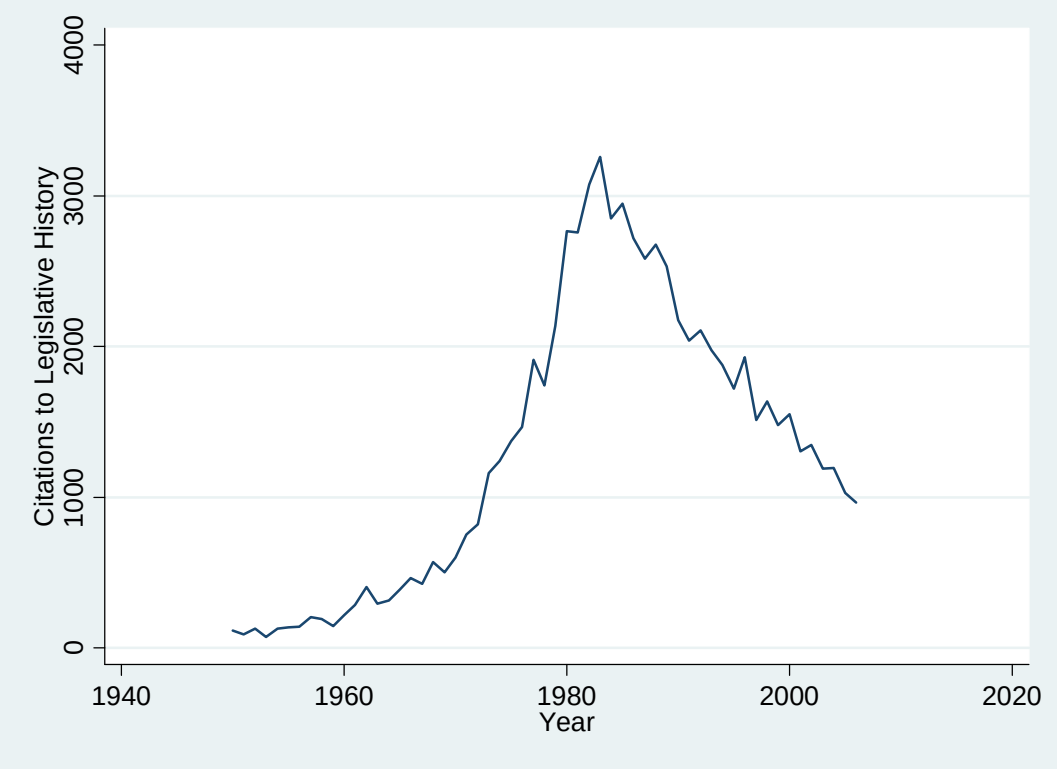

Figure 2:Citations to Legislative History Per Year in the Courts of Appeals

The trends in this plot resemble the trends in the Carro& Brann/Koby Supreme Court citation data shown above in Figure 1. Qualitatively, the two plots share a nearly identical pattern of growth and decline: the same quiescence in the 1950s and 1960s, the same dramatic run-up from 1970 to the mid-1980s, and the same collapse from the late 1980s to the present day. The Supreme Court data and the circuit court data are not entirely identical; for instance, the 1980s collapse in Supreme Court citation rates was both more rapid and more complete than the corresponding decline in the circuit courts. Still, the qualitative similarity is striking and supports the hypothesis that the courts of appeals' use of legislative history has mirrored that of the Supreme Court.

B. Circuit-by-Circuit Analysis

Although the U.S. appellate courts as a whole resemble the Supreme Court, breaking down the citation counts for individual circuits reveals that the rise and fall of legislative history in the circuit courts was not a uniform nationwide phenomenon. Instead, it was largely confined to the D.C. Circuit. Figure 3 breaks down the citation count data—the same data aggregated in Figure 2—for each individual circuit.

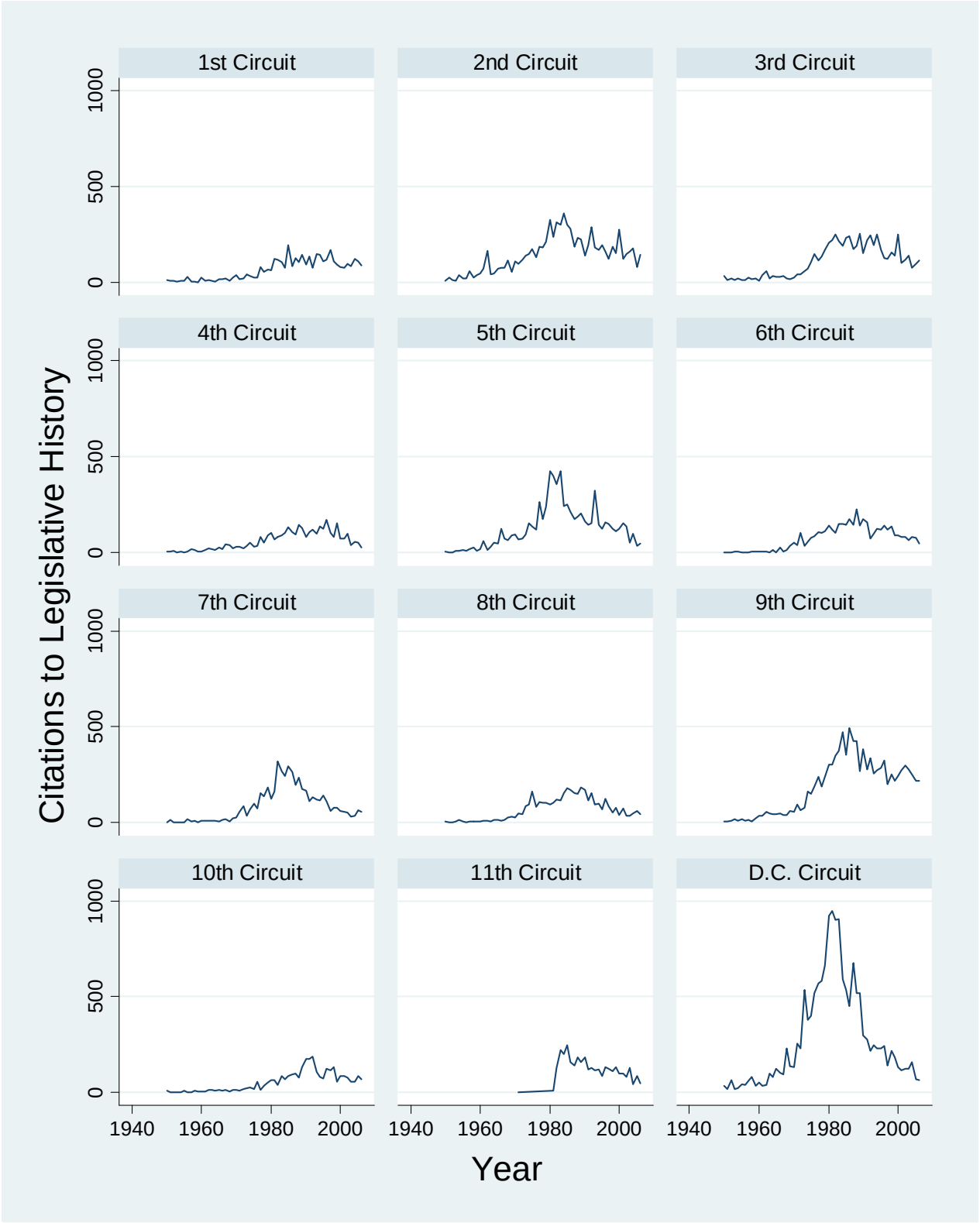

Figure 3:Citations to Legislative History Per Year, Broken Down By Circuit

The D.C. Circuit is the outlier in this data. It outstrips all of the other circuits in both the peak number of citations and in the magnitude of its rise and fall during the 1970s and 1980s. For example, the D.C. Circuit peaks in 1981 at 947 citations, a significantly higher number of citations than any other circuit made in any other year. The relative "prominence" of this peak is high as well: at its height in the 1970s and 1980s, the D.C. Circuit made, on average, 491 citations per year more than it had during the 1950's and 1960's, and 380 citations per year more than it would during the 1990s and 2000s.

By contrast,no other circuit ever cites legislative history more than 500 times in any year between 1950 and 2006. Similarly, their peaks are much less prominent than the D.C. Circuit. On average, other circuits cited legislative history 124 times a year more during the 1970s and 1980s than they did in the 1950s and 1960s—roughly a quarter of the 491 citation-per-year jump exhibited by the D.C. Circuit. The non-D.C. circuits follow one of two models. Some circuits, such as the Second, Seventh, and Ninth Circuits, are the molehill to the D.C. Circuit's mountain, with a comparatively small peak sometime in the 1980s, followed by a relatively mild decline. Other circuits, such as the First, Third, Sixth, and Tenth Circuits, have a gentle increase in the 1970s and 1980s, leading up to a plateau of relatively consistent usage after the late 1980s.[73]

The overall rise and fall portrayed in Figure 2 conflates the behavior of different circuit courts acting in different ways. The hypothesis that the circuit courts would mirror the Supreme Court holds for the D.C. Circuit. It does not, however, accurately describe the behavior of the

[73] Although at first glance the Fifth Circuit appears to be a "molehill" circuit, it is actually a "plateau" circuit because the decline in citations in the early 1980s is an artifact of the circuit split rather than an actual shift in citation practice. Adding together the counts for the Fifth and Eleventh Circuits demonstrates that together they form a "plateau" circuit.

other circuits. The D.C. Circuit and the Supreme Court appear to have a special relationship,[74] one which the other circuits do not share.

Accounting for circuit courts' differing caseloads can help clarify how special the relationship is. The 1970s and 1980s saw a tremendous increase in the caseloads of most of the circuit courts. The Ninth Circuit, for instance, more than tripled the number of cases it handled each year.[75] Likewise, a similar caseload increase caused the Fifth Circuit to split in 1981. Increasing caseloads, rather than any change in citation behavior, could be the primary cause of the growth in courts' citation of legislative history during this period: more opinions mean more citations. The D.C. Circuit, by contrast, experienced relatively consistent caseloads over the 1970s and 1980s, lessening the possibility that the D.C. Circuit's increasing use of legislative history was simply a byproduct of a growing docket.[76]

To account for the impact of disparate caseloads, I produced a per-case average by dividing each circuit's citation total by the number of cases handled by that circuit.[77]Figure 4 compares the D.C. Circuit's average against the rest of the circuit courts'.

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[74]*The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 507 (1988).
[75]*Compare*ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1970 at 210-13 tbl.B1 *with* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1970 at 354-356 tbl.B1.
[76]*See, e.g.*, *Contribution of the D.C. Circuit*, *supra* note 74, at 512-13 (Chief Judge Wald discussing light and consistent caseloads).
[77] These caseloads were taken from the data published annual by the Administrative Office of the U.S. Courts. One disadvantage of the Administrative Office data is that it is tabulated over fiscal years, whereas the case publication dates are grouped in calendar years. Because this inconsistency affects all circuits equally, however, there is no reason to believe that it distort the average citations per case of the D.C. Circuit *relative to* the other circuits.

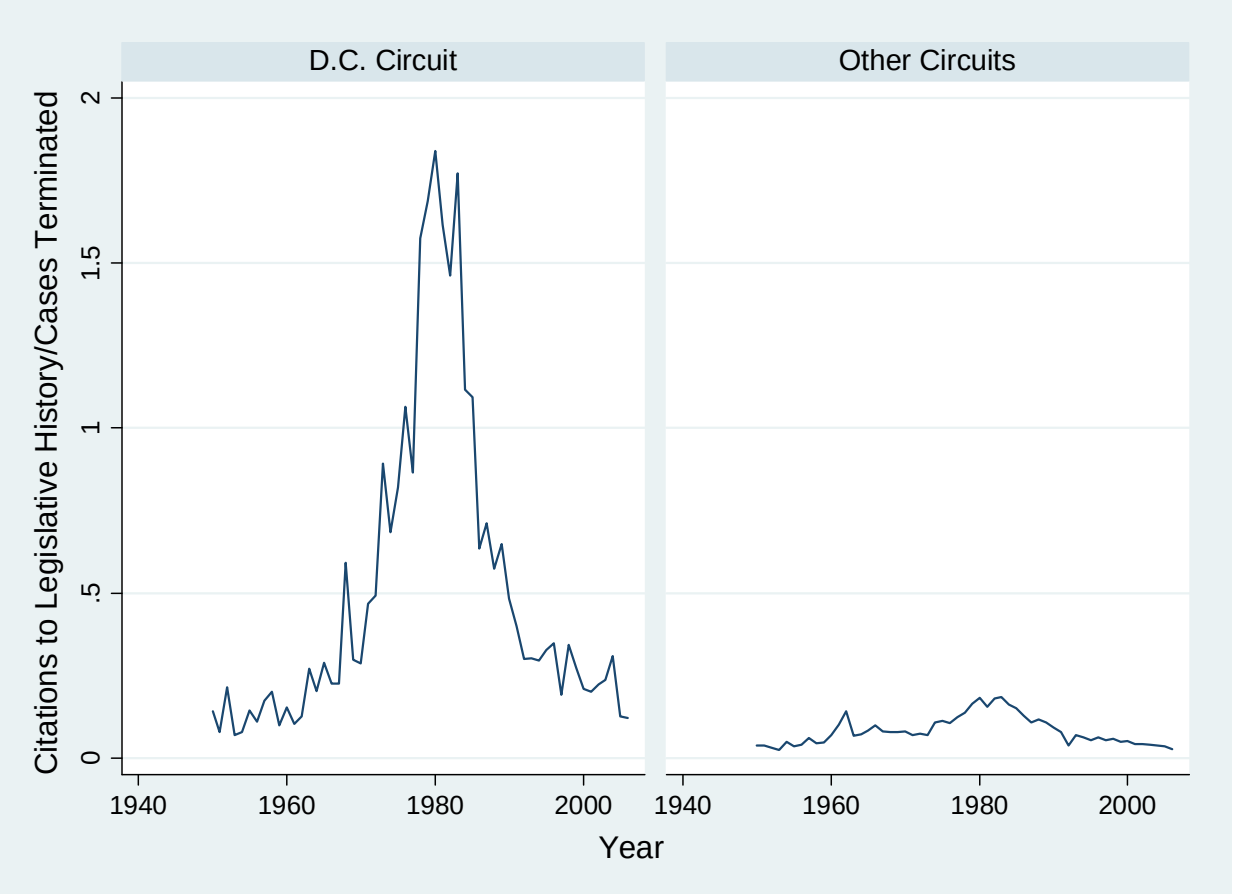

Figure 4: Citations Per Year to Legislative History, Controlled for Circuit Caseloads

The D.C. Circuit peaks at 1.84 citations per case in 1980. The other circuits averaged .18 citations per case in that same year. Put another way, the D.C. Circuit was responsible for a full third of all legislative history citations made by federal appellate courts in 1980, despite handling less than one-twentieth of the total caseload. The single highest legislative history citation rate among the non-D.C. circuits occurred in the Second Circuit, which made .45 citations per case in 1962.[78] The D.C. Circuit, however, surpassed this level every year between 1971 and 1991, illustrating the D.C. Circuit's distinctive tendency to use legislative history during this period.

[78] 1962 was a banner year for the Second Circuit's use of legislative history—a total of 165 citations, three times their overall average of 54 citations per year for the 1950s and 1960s. I examined the Second Circuit's cases from

C. The Role of Docket Composition

Was the D.C. Circuit more likely to cite legislative history than the other circuits, or was it simply handling more cases in which it could cite legislative history? Here, The D.C. Circuit's overall average of 1.84 citations per cases does not tell the whole story. The D.C. Circuit did not cite legislative history precisely 1.84 times in every case during 1980. Even at the height of the D.C. Circuit's use of legislative history, the majority of cases did not mention legislative history. Many cases did not involve statutory questions; in others, there was no legislative history addressing the statutory point at issue, or the court decided not to cite legislative history even if it was on point. In those cases that cited legislative history, some opinions cited a single statement from the congressional record to illustrate a tangential point,[79] while other opinions canvassed the entire legislative record, making dozens of citations.[80] All of these different scenarios together produce the average displayed in Figure 4.

Breaking this composite average apart gives a fuller understanding of the circuit courts' use of legislative history. Specifically, I used the overall citation count data to calculate two different statistics.[81] The first isthe "Citation Rate"— the percentage of the circuit's cases that cite legislative history at least once.[82] The second is the "Citation Strength"—the average

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this year to investigate whether the spike was caused by a single outlier case or collection of cases, but was unable to identify any unifying theme in the cases that cited legislative history.

[79]*See, e.g.*, MCI Telecommunications Corp. v. F.C.C., 627 F.2d 322, 335 (D.C. Cir. 1980) (making a single citation to S. REP. NO. 918, 94th Cong., 2d Sess. 4 (1976) to confirm that a section being interpreted "was designed to give greater leeway to the FCC").

[80]*See, e.g.*, Brown v. Califano, 627 F.2d 1221, 1223 (D.C. Cir. 1980) (citing legislative history 58 times during a comprehensive review of history of the Eagleton-Biden amendment to the Civil Rights Act).

[81]*Cf.*Abramowicz&. Tiller, *supra* note 33, at 436 ("The analyses above focus on citation patterns given a decision to cite legislative history rather than on the decision whether to cite legislative history at all.").

[82] Ideally, this question would be broken down even further, differentiating between (1) the percentage of cases which involve statutory interpretation and (2) the percentage of statutory interpretation cases which cite legislative history. This would help us to distinguish between trends in legislative history citation rates which are being driven by shifting docket composition and those trends which are being driven by shifting judicial behavior. Unfortunately, discerning which cases involve statutory interpretation is beyond the powers of a computer algorithm. I experimented with search patterns designed to pick up text such as "interpret 5 U.S.C. § 552" and "Congress intended to," but these searches proved unreliable. These searches turned up both too many false positives—cases

number of legislative history citations made in each of those cases with at least one citation.[83] Both the Citation Rate and the Citation Strength affect the overall rate of citation; when multiplied together, they produce the overall per-case citation frequency displayed in Figure 4.

I calculated the Citation Rate by counting the number of cases that cite legislative history at least once and dividing that figure by the same caseload totals used to create Figure 4. Figure 5 presents the results of this analysis:

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which did not involve statutory interpretation but matched the patterns anyway—and too many false negatives—cases which involved statutory interpretation, but did not trigger the search algorithm. As discussed above, a major advantage of hand-coding studies is that they can confine their analysis to a set of opinions which only includes statutory interpretation cases.

[83] To illustrate the distinction, suppose that scientists are studying a disease that causes individuals to have high blood pressure. The Citation Rate is analogous to the percentage of the general population that has the disease. The Citation Strength is analogous to the average blood pressure of those individuals who are sick.

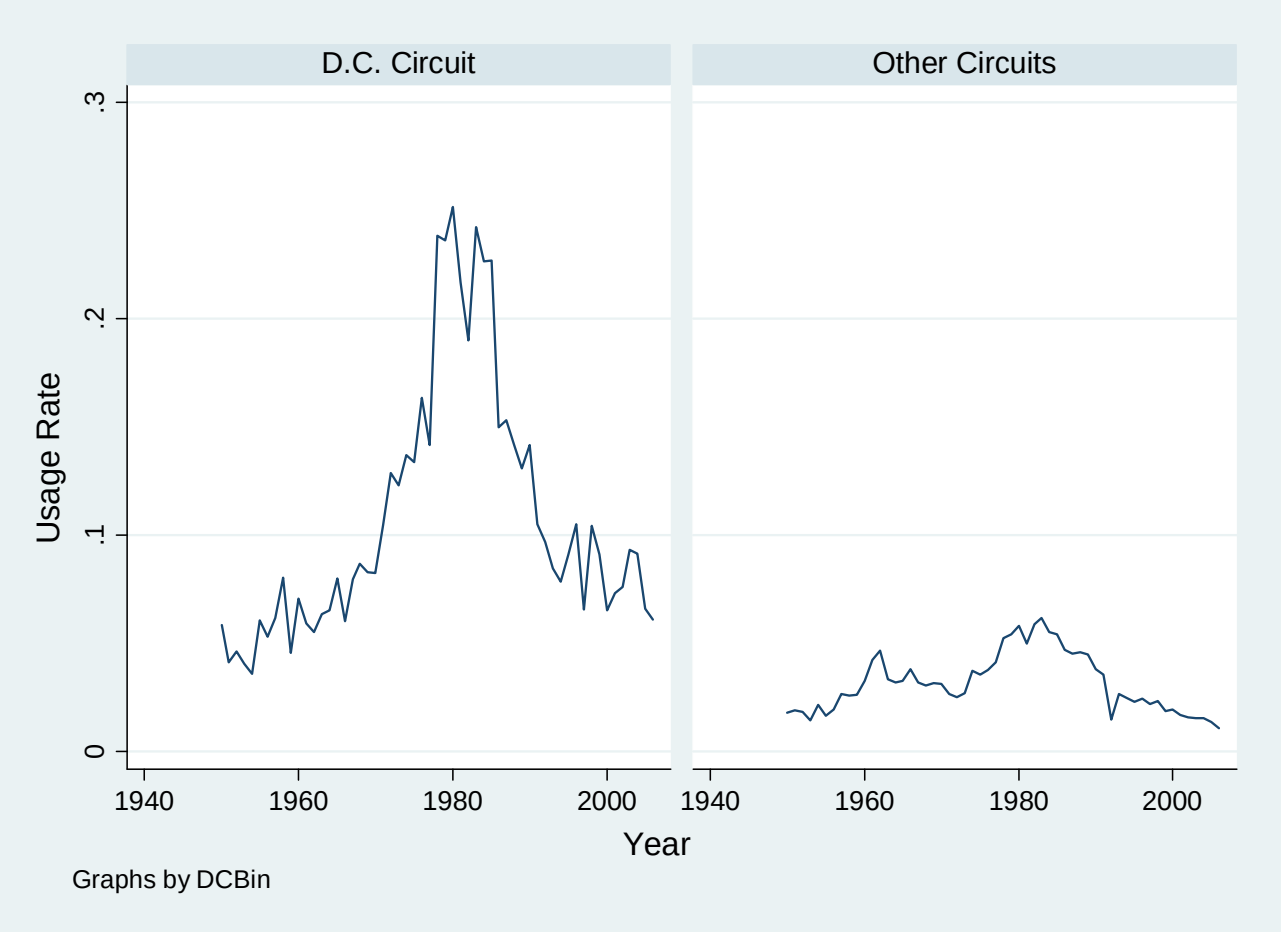

Figure 5: Citation Rate Over Time

Again, the D.C. Circuit outstrips the other circuits. In 1980, for example, the D.C. Circuit had a Citation Rate of twenty-five percent—it cited legislative history at least once in twenty five percent of its cases. By contrast, the other circuits had a Citation Rate of only five percent. In other words, the D.C. Circuit was about five times as likely as the other circuits to cite legislative history at least once in any given case.

The D.C. Circuit also had a higher Citation Strength than the other circuits. In 1980, the D.C. Circuit had a Citation Strength of 7.36. This means that, in those cases in which the D.C. Circuit cited legislative history, it made an average of 7.36 citations. By comparison, the other circuits had an average Citation Strength of 3.6 in 1980. Not only did the D.C. Circuit cite

legislative history in a higher proportion of its cases than the other circuits, it also made twice as many citations once it decided to use legislative history at all. This result generalizes throughout the 1970s and 1980s.

The D.C. Circuit's lead in both Citation Rate and Citation Strength disposes of several simple explanations of the D.C. Circuit's frequent use of legislative history. In particular, one explanation for the D.C. Circuit's predominance in the use of legislative history during the 1970s and 1980s could be that the D.C. Circuit handled more statutory cases. In other words, a greater percentage of the cases on the D.C. Circuit's docket involve statutory interpretation, and the D.C. Circuit has correspondingly more opportunities to cite legislative history. On its face, this explanation seems sensible, given the D.C. Circuit's exclusive jurisdiction over a number of complicated statutes.[84]

However, while a docket-driven explanation could account for the D.C. Circuit's higher Citation Rate—a greater percentage of cases would involve legislative history—it could not, on its own, explain the D.C. Circuit's higher Citation Strength. To account for the higher Citation Strength, there must be some explanation for why, in addition to handling more legislative history cases, the D.C. Circuit invoked legislative history more frequently within each of these cases. Perhaps the legislative history cases handled by the D.C. Circuit were more complex, or maybe the D.C. Circuit was more comfortable with legislative history because it handled more legislative history cases. These explanations, and others, will be discussed *infra* in Parts IV& V. For now, even if the frequency of statutory interpretation cases is responsible for some of the

[84]*See, e.g.*, 42 U.S.C. § 7607(b)(1) (Clean Air Act); 43 U.S.C. § 1349(c)(1) (Outer Continental Shelf Lands Act); 47 U.S.C. § 402(b) (Communications Act); see also JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 285 (2001).

variation in legislative history citations, that does not in and of itself account for the entire disparity between the D.C. Circuit and the rest of the circuits.

Further analysis of the Citation Rate and Citation Strength reinforce the conclusion that the D.C. Circuit's high use of legislative history cannot be explained by the D.C. Circuit handling an unusual number of statutory cases. In particular, these two variables were highly correlated over time[85]: years in which the D.C. Circuit cited legislative history in more of its opinions were also years in which it made more citations in each of those opinions. This correlation implies that the D.C. Circuit's overall approach to legislative history was in flux. The same underlying cause may have led the D.C. Circuit to both cite legislative history in a greater number of cases and cite legislative history a greater number of times in each of those cases.[86] In other words, the D.C. Circuit did not cite more legislative history solely because it was handling more legislative history cases; instead, the D.C. Circuit was likely changing its entire citation practice.

By contrast, Citation Rate and Citation Strength are not significantly correlated in the other circuits. The "plateau" circuits—the First, Third, Sixth, and Tenth Circuit—did not display any consistent relationship between Citation Rates and Citation Strength. The First Circuit's Citation Rate, for instance, was fifty percent higher during the 1980s than during previous decades; its Citation Strength, however, remained relatively constant. Unlike the D.C. Circuit, the First Circuit's "plateau" might be entirely accounted for by an increase in statutory

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[85] The correlation over the period studied was 0.8. To return to the "high blood pressure disease" analogy discussed *supra* in note 83, if doctors found that the disease was both afflicting more people and causing even higher blood pressure among those it does afflict, that could suggest that both increases had been caused by some change in the characteristics of the disease, rather than by a statistical blip.

[86] To be clear: correlation is not causation. This data does not show that the change in Citation Rate caused the change in Citation Strength, or vice-versa. Indeed, this paper suggests that both changes were instead caused by an overall shift in the D.C. Circuit's approach to legislative history.

interpretation cases. A search of LexisNexis's "Interpretation" headnote returns 180 statutory interpretation cases in the First Circuit during the 1980s versus 64 statutory interpretation cases during the 1970s.[87] This larger number of statutory cases means that the First Circuit may have made more citations to legislative history even though its approach to statutory interpretation stayed the same.

Similarly, although analysis of the data from the "molehill" circuits—the Second, Seventh, and Ninth Circuits— produces slightly higher correlations than the plateau circuits, the "molehill circuits" still do not exhibit nearly as strong a relationship between Citation Rate and Citation Strength as the D.C. Circuit. Variations in the number of citations to legislative history might only reflect shifts in the number of statutory cases on the docket, rather than broad trends in methods of statutory interpretation. The shifts in citation practice occurring in the D.C. Circuit and Supreme Court may have stopped at the Beltway's edge.

D. Why the D.C. Circuit is Different: Alternative explanations

I also examined two other potential explanations for the disparity between the D.C. Circuit and the other circuits. I analyzed (1) the possibility that differences in opinion length are causing the variations in citation count and (2) the role of "outlier" opinions with an unusually high number of citations. As discussed below, neither of these factors can fully explain the D.C. Circuit's high rate of citation to legislative history.

1. Opinion Length

The D.C. Circuit is famous for publishing long opinions. Writing in 1988, Former Chief Judge Wald admitted that "a typical D.C. Circuit opinion can make Proust look like bedtime reading. . . . We've always held the record for the nation's longest opinions, and our lead is

[87] It is unclear how consistently these headnotes are used, or whether more recent cases might have been more accurately labeled than older cases. Nonetheless, the relative comparison is helpful.

stretching."[88]The data shows that during the 1970s and 1980s, the D.C. Circuit published slightly more pages of output in the Federal Reporter than the other circuits, despite handling only a fraction of the cases. Although the D.C. Circuit authors fewer opinions than the other circuits, the D.C. Circuit could still be publishing more total pages, and thus making more citations, simply because it is writing longer opinions.

What happens when this effect is removed? If every circuit hadpublished the same number of total pages, would the D.C. Circuit retain its substantial lead in citations to legislative history? Analyzing the per-page citation rate—the number of times a circuit cites legislative history, divided by the number of pages it published in the *Federal Reporter*[89]—produces the data presented in Figure 6.

[88]*Contribution of the D.C. Circuit*, *supra* note 76, at 512-13 (1988). Chief Judge Wald proposes two reasons for why the D.C. Circuit is authoring such lengthy opinions : (1) the complexity of the D.C. Circuit's docket, particular in agency cases and (2) the D.C. Circuit's comparatively light caseload, which allows the judges "to dwell on each decision." *Id.*

[89] Technically, the variable plotted inFigure 6is "citations per character," which is, for all intents and purposes, equivalent to citations per page.

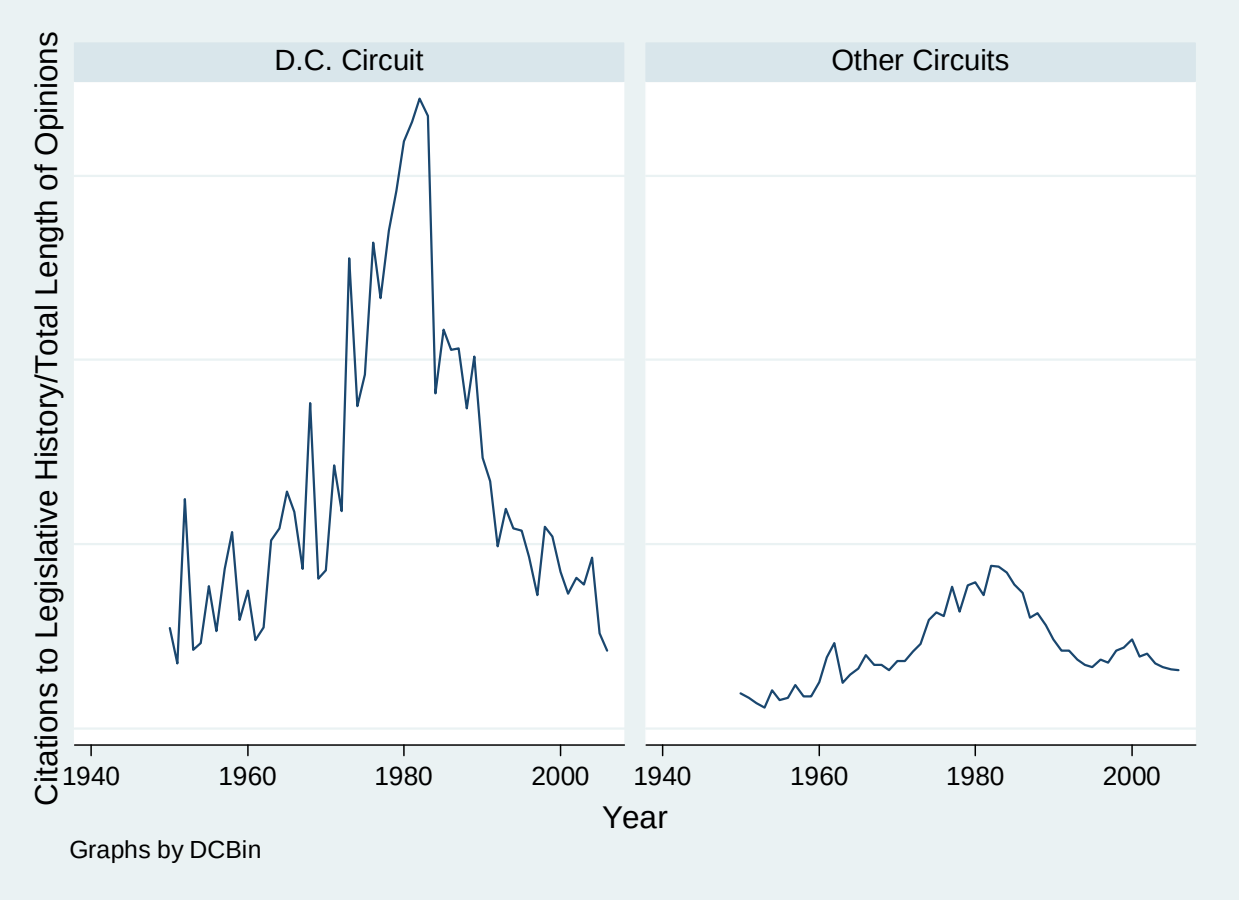

Figure 6: Citations to Legislative History, Controlled for Length

The D.C. Circuit retains its lead over the other circuits. Here, however, the disparity between the D.C. Circuit and the other circuits is less dramatic than the disparity in citations per case seen above in Figure 4. For example, in 1980, the D.C. Circuit made four times as many citations per page as the other circuits, a significantly smaller lead than the D.C. Circuit's ten-fold margin in citations per case. Some, but not all, of the D.C. Circuit's high rate of citation to legislative history can be attributed to the propensity of the D.C. Circuit to author longer opinions.

It is difficult to say how large this factor is. In addition to longer opinions leading to more legislative history citations, legislative history citations may lead to longer opinions. If cases

which involve legislative history tend to be longer and more complex than other cases, the D.C. Circuit's lengthy opinions could be caused, at least in part, by the D.C. Circuit's tendency to cite legislative history, rather than the reverse. Controlling the citation count for the length of opinions therefore requires also controlling for the possibility that longer opinions are the result, rather than the cause, of legislative history citations. Teasing these two effects apart would require determining the degree to which legislative history lengthens opinions, which in turn, would require more detailed analysis than can be done with an automated citation count. The most likely scenario is that *some* portion of the D.C. Circuit's lead in legislative history citations during the 1970s and 1980s is *probably* attributable to the D.C. Circuit's lengthier opinions.

2. Outlier Opinions

Another explanation for the D.C. Circuit's prominent use of legislative history would be that a few outlier opinions, each with dozens or hundreds of citations, were responsible for the bulk of the increase. This cannot be the entire explanation: an examination of the circuits' Citation Rates demonstrates that outlier opinions cannot account for all of the disparity, as a few extra "blockbuster" cases each year would not significantly increase the total number of cases that cite legislative history at least once.

In contrast, a few cases with especially high citation counts could pull up the average Citation Strength, even if the vast majority of cases that cite legislative history continue to make only a few citations. The D.C. Circuit did publish a number of blockbuster cases during the 1970s and 1980s.[90] For instance, in 1979, the D.C. Circuit cited legislative history 71 times in *Alabama Power v. Costle*,[91] in which it construed the Clean Air Amendments Act of 1977. A

[90] The single biggest blockbuster case was authored by Judge Friendly of the Second Circuit. In Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), Judge Friendly cited legislative history 120 times in the course of deciding whether the Commodity Exchange Act created a private right of action.

[91] 636 F.2d 323 (D.C. Cir. 1979).

year later, Judge Skelly-Wright referenced legislative history 68 times as he sought to untangle the FCC's antitrust responsibilities under the Clayton Act in *United States v. FCC*.[92] Are these big cases driving the D.C. Circuit's high Citation Strength?

Surveying the court's entire docket will demonstrate whether big cases played an unusually large role in the D.C. Circuit's high citation count. This is the "citation distribution": the relative balance of (1) big, high-citation cases, (2) intermediate cases with an average number of legislative history citations, and (3) small cases that cite legislative history only once or twice. If the increase in Citation Strength represents a greater across-the-board willingness to use legislative history, then the shape of this distribution should stay the same, even as the average number of citations increases. By contrast, if the citation count is being pulled upward by the addition of a few blockbuster cases, then the shape of the distribution will change—a higher percentage of cases will be placed in the "tails" of the distribution.

The relative distribution of cases is quantified by calculating the *kurtosis* of the citation distribution for each year and each circuit. Kurtosis is a statistical measure that gauges the contribution of "outlier" cases with especially large (or small) citation counts relative to "average" cases with citations counts nearer to the mean. An increase in kurtosis would imply that high-citation cases were responsible for a greater proportion of the total citation count.

For the D.C. Circuit, however, the kurtosis remained relatively constant over the time period studied. Even as the D.C. Circuit's average citation frequency increased and decreased, the distribution of high-, medium-, and low-citation opinions stayed the same. The high-citation-

[92] 652 F.2d 72 (D.C. Cir. 1980).

count examples discussed above were part of a broader trend, rather than a few outsize outliers pulling up the total.

The other circuits, by contrast, exhibit a slightly upward trend in kurtosis, potentially signaling that high-citation count cases began to play a larger role in these circuits. More importantly, however, the kurtosis of these other circuits varied year to year. In some years, the kurtosis is low, indicating that most of the circuit's legislative history cases are making an intermediate number of citations; in other years the kurtosis spikes, indicating that a few big cases pulled the same circuit's average upward. For example, in 1976, the Ninth Circuit cited legislative history 188 times in 60 different cases. Of these 60 cases, 59 cited legislative history fewer than eight times. The remaining case, *United States v. Tulare Lake Canal Co.*, cited legislative history 56 times.[93] A brief review of the other 59 cases reveals that the majority of them use legislative history for background, or to make tangential points. In other words, the Ninth Circuit used legislative history sporadically. Legislative history was not a routine tool of statutory interpretation, but rather "heavy artillery" brought in to resolve particularly difficult or controversial cases such as *Tulare Lake*. For the D.C. Circuit, however, legislative history was a routine tool of statutory interpretation, at least during the 1970s and 1980s. Yet again, the D.C. Circuit and the rest of the country followed different models.

E. Summary of Findings

To summarize, my analysis of the data yielded the following conclusions:

1. The D.C. Circuit's use of legislative history grew tremendously starting in 1965 and continuing to roughly 1985. It then collapsed, leading to relatively infrequent citation from around 1990 through the end of the study. This rise and fall mirrors the pattern of growth and decline in the Supreme Court's use of legislative history.

[93] 535 F.2d 1093 (9th Cir. 1976).

2. The other circuits also increased their rate of citation to legislative history during the 1960s, 1970s and 1980s, but not nearly as much as the D.C. Circuit, especially relative to their increasing caseloads. Some of these circuits appear to also follow the Supreme Court's pattern of growth and decline in how they cite legislative history, but not as strongly as the D.C. Circuit. Other circuits do not appear to show much decline at all.
3. The disparity between the D.C. Circuit and the other circuits cannot be fully accounted for by the D.C. Circuit handling more statutory interpretation cases.
4. The disparity between the D.C. Circuit and the other circuits cannot be fully accounted for by the D.C. Circuit's longer opinions.
5. The D.C. Circuit's frequent use of legislative history was not attributable to a few especially prolific cases. By contrast, "big" cases may play a relatively larger role in the use of legislative history by other circuits.

IV. Unresolved questions of causation

Compared to the other circuits, the D.C. Circuit was distinctive in the overall number of citations it made to legislative history. It was distinctive in how rapidly it increased its rate of citations in the 1970s, and distinctive in how rapidly the rate of citations fell in the late 1980s and 1990s. And it was distinctive in how closely this pattern of rise and decline tracked the pattern of rise and decline in citations to legislative history by the Supreme Court.

Unfortunately, although citation counting can tell us that the D.C. Circuit *was* distinctive, it cannot tell us much about *why* the D.C. Circuit was distinctive. Citation counting is simply too rough and imprecise a metric to provide much insight into the underlying processes that drive judges to cite legislative history in their opinions. Of course, based on the citation count data, I was able to rule out a few simple explanations: the D.C. Circuit's distinctiveness was not the result of an abnormally large docket, or of a higher proportion of statutory interpretation cases. Beyond this, however, the citation count data is of limited explanatory value.

In this Part, I propose a few potential explanations for the disparity between the D.C. Circuit and the other circuits: (1) the D.C. Circuit's preeminence in administrative law, (2) the D.C.

Circuit's location in Washington, and (3) the D.C. Circuit's special relationship with the Supreme Court. This is not an exhaustive list, nor does this Part purport to assess the strength of these explanations—it is likely that all three play some role in the D.C. Circuit's distinctive approach to legislative history. Instead, these explanations simply present potential avenues for future investigation.

A. Administrative Law

One explanation for the difference between the D.C. Circuit and the other circuits is the D.C. Circuit's distinctive docket—in particular, its focus on administrative law. Beginning in the 1970s, the D.C. Circuit has been incredibly influential in administrative law, leading Justice Scalia to remark that "with the possible exception of the Supreme Court, and I'm not even sure that that exception is a valid one, the D.C. Circuit has had more to do with the shaping of administrative law in this country than any other court."[94]According to Chief Justice Roberts, about one-third of the D.C. Circuit's docket is composed of direct appeals from agency decisions (compared to less than twenty percent nationwide), with another quarter being civil cases involving the federal government (five percent nationwide).[95]

Administrative law cases, especially the administrative law cases handled by the D.C. Circuit, often deal with unusually complex statutes.[96]As Law &Zaring found with the Supreme

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[94]*Bicentennial Celebration of the District of Columbia Circuit*, 204 F.R.D. 499, 593 (2001); *see also*BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT*(1999); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554 (2010);

[95] John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376-77 (2006).

[96]*See, e.g.*, Craig N. Oren, *The Clean Air Act Amendments of 1990: A Bridge to the Future?*, 21 ENVTL. L. 1817, 1828 (1991) (quoting JOHN QUARLES & WILLIAM H. LEWIS, THE NEW CLEAN AIR ACT, at v (1990)) (describing the Clean Air Act, over which the D.C. Circuit has exclusive jurisdiction, as a "monster of complexity"); Peter H. Schuck& E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 999 (1990) (D.C. Circuit's administrative law cases generally recognized as being among the most complex); see also *supra* Part III.D.1 (discussing D.C. Circuit's unusually lengthy opinions).

Court,[97] the burden of interpreting these complex statutes may have prompted the D.C. Circuit to reach for legislative history as an interpretative aid.[98] Similarly, many of the administrative statutes being interpreted during the 1970s and 1980s were relatively new—products of the explosion of legislation during the Great Society.[99] The D.C. Circuit may have looked to legislative history as a guide[100]for these new and unfamiliar statutes.[101]

In addition, legislative history may have been an especially potent weapon in the battle being waged during the 1970s and 1980s between federal agencies and the D.C. Circuit. During that period, the D.C. Circuit envisioned itself as a "trustee of the ghost of congresses past . . .brandishing the intent of a Congress that left power decades ago" against agencies who had deviated from that intent.[102] The D.C. Circuit frequently invoked legislative history to determine whether agencies had remained faithful to Congress's original vision.[103]

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[97] Law &Zaring, *supra* note 23, at 1654.

[98] *But cf.* United States v. W.R. Grace & Co., 429 F.3d 1224, 1240 (9th Cir. 2005) (noting that the "legislative history is particularly unhelpful" because of the complexity of the statute being interpreted).

[99] *SeeContribution of the D.C. Circuit*, *supra* note 74, at 510 ("Between 1968 and 1978, Congress passed more regulatory statutes than it had in the nation's previous 179 years.").

[100] *Cf.* Law &Zaring, *supra* note 23, at 1724 (2010) ("When a statute is first enacted, the Court has little experience with it yet faces the widest range of unanswered questions about its meaning."); Brudney&Ditslear, *Decline and Fall*, *supra* note 16 ("For statutes enacted in the 1960s and 1970s, legislative history may have been deemed especially valuable in the initial round of Court decisions, as the justices grappled for the first time with discerning congressional intent.").

[101] *See* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 372 (1987)("[R]ecent enactments such as the Clean Air and Clean Water Acts, the Resource Conservation and Recovery Act, the Natural Gas Policy Act, the Transportation Deregulation Acts, and the Cable Television Act tend to dominate the federal docket. Courts are often ill equipped to master the complexities of these sometimes labyrinthine statutes . . . .").

[102] *Contribution of the D.C. Circuit*, *supra* note 74, at 522.

[103] *See, e.g.*, Rodway v. U.S. Dept. of Agric., 514 F.2d 809, 818-20 (D.C. Cir. 1975); City of Los Angeles v. Adams, 556 F.2d 40, 44 (D.C. Cir. 1977); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 560 (1985). This phenomenon dropped off somewhat after *Chevron* granted agencies deference in their interpretation of statutes, although courts continued to use legislative history in evaluating Chevron step 1. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1135 (2008) ("It is all but settled that relevant legislative history is admissible in the Chevron inquiry."). To evaluate the impact of *Chevron*, I scanned the Federal Reporter for citations to Chevron and ran regressions to determine whether there was a (positive or negative) correlation between citations to Chevron and citations to legislative history. Unfortunately, this analysis yielded no real results, perhaps indicated that Chevron did not have an appreciable effect on the use of legislative history.

All of these factors may have combined to shape the D.C. Circuit's docket in a way that led directly to the D.C. Circuit's frequent invocation of legislative history. In particular, the role of administrative law in the D.C. Circuit's docket would explain not only the D.C. Circuit's higher Citation Rate (the D.C. Circuit handled more administrative appeals than the other circuits), but also the D.C. Circuit's higher Citation Strength (the D.C. Circuit handled more complex administrative appeals than the other circuits).

B. Geography

The D.C. Circuit's location in Washington, D.C. might have made it more likely than the other circuits to cite legislative historyin two ways. First, legislative history might have been more available in D.C. than the other circuits. Congress is located in Washington, and proximity to the source of legislation and legislative history likely increases the availability of legislative history. Beyond this, however, lawyers practicing in Washington, D.C. were also more likely to have easier physical access to legislative history, especially in the days before computerized research.[104]

For example, considerthe Union List of Legislative History, a directory of legislative history resources collected by the Law Librarians' Society of the District of Columbia. The first Union List, assembled in 1946, identified twenty three legislative history libraries, all located in Washington, D.C. Of these twenty three libraries, twenty one were housed at administrative agencies, one at the Supreme Court, and one at the private law firm of Covington and Burling.[105]

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[104]*See* Stephen G. Margeton, *Of Legislative Histories and Librarians*, 85 LAW LIBR. J. 81, 97 (1993) (contrasting pre- and post-computer era methods of researching legislative history)

[105]Special Committee on Legislative Histories of the Law Librarians' Society of the District of Columbia, *Union List of Legislative Histories*, 39 *Law Libr. J.* 243 (1946).

By 2000, when the seventh edition of the Union List was published, there were one hundred and twenty-two separate legislative history libraries in Washington, D.C.[106]

Legislative history was far less accessible outside the beltway. As Stephen Margeton described in his account of the evolution of legislative history libraries:

> The preparation of legislative histories was still largely limited to firms and agencies in Washington, D.C., however. Significant history collections in faraway cities such as New York or San Francisco were rare. This was undoubtedly influenced by both the difficulty of obtaining the documents outside of the nation's capital and the early reluctance of lawyers to focus on the important role that legislative histories were destined to play in the courts.[107]

This disparity in access prompted Justice Jackson to excoriate the Court for disadvantaging non-D.C. litigants in the 1953 case *United States. v. Public Utilities Commission of California*.[108] Justice Jackson observed that the counsel for the respondent, a California state agency, had been unable to locate any copies of the relevant legislative history in the entire state of California.[109]Before the advent of computerized legal research, legislative history was likely too expensive to be cited routinely by lawyers practicing outside the D.C. area.[110]

Second, the attorneys of the D.C. bar may have been more likely to cite legislative history in their briefs than lawyers in other jurisdictions because they were more familiar with legislation,

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[106]*The Union List of Legislative Histories* (7th ed. 2000).
[107]Margeton, *supra* note 104, at 82 (1993).
[108]United States v. Pub. Utilities Comm'n of Cal., 345 U.S. 295, 319 (1953)(Jackson, J., concurring); *see also* Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT'L L. 151, 194 (2003).
[109] The attorneys were only able to read the legislative history four days before the argument, *after* they had arrived in Washington, D.C. *See* Pub. Utilities Comm'n,345 U.S. at 319-20.
[110]*Cf.*Pepper v. Hart, 1993 A.C. 593 (H.L. 1992) (fearing that admitting legislative history may " involve the possibility at least of an immense increase in the cost of litigation in which statutory construction is involved."); *see also* Robert C. Berring, Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information, 69 Wash. L. Rev. 9, 29 (1994)("Materials that were once held in the sub-basements of only the best law libraries are now as easily retrieved on LEXIS and Westlaw as a Supreme Court decision.").

the legislative process, and legislative history.[111] For one, many lawyers in D.C. either worked for the government—whether in Congress, one of the agencies, or some other position—or had at one point practiced in government before leaving for the private sector.[112] Working for the government may teach attorneys how to use legislative history—recall that in 1946, twenty-one out of twenty-three legislative history libraries were housed in federal agencies.[113] These attorneys likely took their familiarity with them when they left to practice in D.C. area law firms.

Furthermore, lawyers in the D.C. bar were also intimately involved in processing this legislative history into a form usable by other lawyers.[114] A large percentage of comprehensive legislative histories of major statutes were compiled by prominent D.C. law firms. Arnold & Porter, for example, assembled a four volume legislative history of the Foreign Intelligence Surveillance Act of 1978 (FISA), which collected House and Senate committee reports, hearings, floor statements, and various versions of the bill as it evolved towards passage.[115] Collecting and publishing these assembled legislative histories likely further enhanced the D.C. bar's distinct familiarity with legislative history.

The D.C. bar's greater access to and familiarity with legislative history may have been an ingredient in the D.C. Circuit's high rate of citation to legislative history. By contrast, lawyers outside the beltway were probably less likely to cite unfamiliar and hard-to-find legislative

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[111] *SeeContribution of the D.C. Circuit*,*supra* note 74, at 513.

[112] *See* Brown v. Dist. of Columbia Bd. of Zoning Adjustment, 486 A.2d 37, 63 (D.C. 1984); Susan L. Burke, *Professional Responsibility*, 35 CATH. U. L. REV. 1225, 1225 (1986).

[113] *See also*. Eskridge& Baer, *supra* note 100, at 1197 ("Because they are often involved in statutory drafting and congressional deliberations, agencies usually know the legislative history very well, and their briefs provide the statutory archaeologist with excellent material . . . .").

[114] *See* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 371 (1987).

[115] LEGISLATIVE HISTORY OF THE FOREIGN SURVEILLANCE AMENDMENTS ACT OF 1978 (1978); *see also, e.g.*, LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT (1946) (Covington & Burling); LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 (1977) (Covington & Burling); LEGISLATIVE HISTORY OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (Arnold & Porter); LEGISLATIVE HISTORY OF THE FOOD AND AGRICULTURE ACT OF 1977 (1977) (Howrey Law Firm).

history in their briefs, which in turn meant that judges outside the beltway were less likely to cite legislative history in their opinions.[116]The D.C. bar's advantage in this area may have begun to dissipate in the late 1980s as computerized research made it increasingly easy for lawyers outside D.C. to research legislative history.[117]

C. The D.C. Circuit's relationship with the Supreme Court

The D.C. Circuit's treatment of legislative history was not just very different from the other circuits, but also very similar to the Supreme Court's treatment of legislative history. One explanation for the D.C. Circuit's profligate use of legislative history in the 1970s and 1980s could therefore be that it was following the example of the Supreme Court more closely than the other circuits.

There is some support for this theory. Roy McCleese, formerly an Assistant Solicitor General and currently himself a nominee to the D.C. Circuit, speculated that during the 1980s the D.C. Circuit and the Supreme Court shared a "unique relationship" driven by "ideological disagreement"—the D.C. Circuit reversed a disproportionate number of D.C. Circuit cases during this period. [118]McCleese also found, however, that this disagreement did not extend to method of statutory interpretation: "an examination of the [opinions[. . . reveals that the two courts do not engage in a general disagreement over the proper exegetical tools or the appropriate use of those tools."[119] The D.C. Circuit, then, may have been in a more direct conversation with the Supreme Court during this period than the other circuits, and may have

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[116]*Cf.*Manz, *supra* note 38, at 267 (2002) (discussing the "'the symbiosis between appellate brief[s] and [judicial] opinion[s].")

[117] Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 602 (1996) ("[A]ccess to legislative materials is easier now with much more materials on Lexis and Westlaw."); Wald, *supra* note 10, at 200 ("Technology has made an anachronism of Justice Jackson's lament . . . .");

[118] Roy W. McLeese III, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for A National Court of Appeals*, 59 N.Y.U. L. REV. 1048,1048 (1984).

[119]*Id.* at 1051-52.

been more attuned to methodological shifts in the Court's approach to statutory interpretation. Similarly, Chief Judge Wald argued that the D.C. Circuit performed a unique "framing and staging function for the Supreme Court."[120]

Furthermore, a disproportionate number of Supreme Court Justices came up through the D.C. Circuit. Of the twenty-two Supreme Court appointments made between 1950 and 2006, five were previously judges on the D.C. Circuit: Warren Burger, Antonin Scalia, Clarence Thomas, Ruth Bader Ginsburg, and John Roberts.[121] The number would have been even higher if Robert Bork's nominations had not been rejected by the Senate or Douglas Ginsburg had not withdrawn his nomination.[122]

And this overlap was not limited to the justices themselves. During the 1970s and 1980s, fifty-four percent of all Supreme Court clerks had previously clerked for a judge on the D.C. Circuit.[123] Supreme Court clerks play an important role in the preparation of opinions; they "serve as the justices' miners, probing all the possible sources of law to help the justice develop a position."[124] In particular, the clerks may have played an especially large role in the Court's use of legislative history because legislative history is so time-consuming to research and analyze.[125] Having clerks who are comfortable with researching and analyzing legislative history could

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[120] *Contribution of the D.C. Circuit*, *supra* note 74, at 512.

[121] The next most productive circuit was the Second, which yielded three appointees: Justices Harlan, Marshall, and Sotomayor.

[122] See also Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1341-42 (2005).

[123] *See List of Law Clerks of the Supreme Court of the United States*,available at http://en.wikipedia.org/wiki/Supreme_Court_clerks.

[124] Peter B. Rutledge, *Clerks*, 74 U. Chi. L. Rev. 369, 372 (2007) (reviewing ARTEMUSWARD & DAVID L. WEIDEN. SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006) and TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE, THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006)).

[125] Cf. Frank B. Cross et. al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 534 (2010) ("The availability of this additional assistance provided by clerks reduces the costs to the Justices of finding and using citations.").

therefore increase the likelihood that the Justices would cite legislative history in their opinions. And the clerks of the 1970s and 1980s were comfortable, because so many of them had cut their teeth researching legislative history for the judges of the D.C. Circuit.

These dynamics—D.C. Circuit judges to Supreme Court justices and D.C. Circuit clerks to Supreme Court clerks—demonstrate that the D.C. Circuit was more closely connected to the Supreme Court than the other circuits. This connection may help explain why the D.C. Circuit's willingness to use legislative history tracks the Supreme Court's use of legislative history so closely.

V. Implications

The hetereogeneity of the circuit courts citation of legislative history has two implications. First, it unsettles the conventional story about how the use of legislative history has evolved in American courts. The conventional narrative—a narrative thathas served as the background to the entire conversation about legislative history—focuses on the behavior of the Supreme Court. My data shows that the narrative cannot be generalized to the entire federal judiciary. Second, the heterogeneity of the circuit courts affects the strength of normative arguments about whether courts should use legislative history at all.

A. Descriptive Implications

1. The Conventional Narrative of Legislative History

Academic debate over statutory interpretation has focused almost entirely on statutory interpretation in the Supreme Court. In particular, the question of whether it is appropriate to use legislative history has, in practice, been treated as a question of whether it is appropriate for the Court to use legislative history. In turn, this focus on the Supreme Court has shaped the conventional wisdom about the changing fortunes of legislative history as a tool for statutory

interpretation. Drawing on both doctrinal analysis and the empirical data discussed *supra* in Part I, scholars such as John Manning,[126] Charles Tiefer,[127] and others[128] have produced a stylized narrative of the rise and fall of legislative history in the latter half of the 20th century.

In this narrative, the Court began to increase its usage of legislative history in the 1960s and 1970s as liberal purposivistssought to aggressively interpret the tsunami of federal legislation that had been recently signed into law.[129] For example, liberals would often cite legislative history as evidence of a "broad remedial purpose . . . which certainly implies the availability" of private rights of action.[130] Conservatives on the Court initially responded in kind, invoking legislative history to argue that liberals were being unfaithful to congressional intent.[131] Legislative history grew to dominate statutory interpretation, a domination symbolized by Justice Marshall's oft-quoted line that because "the legislative history . . . is ambiguous . . . we must look primarily to the statutes themselves to find the legislative intent."[132]

The conventional story continues: in the 1980s, legislative history was dethroned. Textualism arrived on the scene in force, heralded by the just-appointed Justice Scalia and a new generation of conservative scholars and judges. Textualism mounted a multi-pronged assault on

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[126] *See* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1291 (2010)

[127] *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 214-17 (2000)

[128] *See, e.g.*, Law &Zaring, *supra* note 23, at 1666; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351 (1994).

[129] Tiefer, *supra* note 127, at 214 ("Opinions of the Warren Court in the 1960s and early 1970s, particularly those by Justices Douglas, Marshall, and Brennan, justified liberal readings of statutes . . . with a purposivist use of legislative history.").

[130] J. I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964). For other examples of the Court of that period using legislative history to find a private right of action, see, for example, Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); and Hall v. Cole, 412 U.S. 1 (1973) (using legislative history to justify the award of attorney's fees).

[131] *See, e.g.*, United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 231-252 (1979) (Rehnquist, J., dissenting); *see also*WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, AND ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY102 (4thed, 2007) (discussing Justice Rehnquist's use of legislative history in *Weber*).

[132] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971); see alsoAntonin Scalia, *Common Law Courts*, *supra* note 1, at 31.

judicial use legislative history, attacking its constitutionality,[133] reliability,[134] and usefulness.[135] And this assault succeeded—the Court became far less willing to cite legislative history,[136] the "plain meaning rule" came into vogue, and prominent scholars felt comfortable declaring that "we are all textualists now."[137]Textualism stopped well short of total victory: the Court continues to consult legislative history,[138] despite Justice Scalia's repeated and passionate dissents.[139] Still, compared to its heyday in the 1970s and 1980s, legislative history has been knocked off its pedestal; consulting legislative history is no longer the dominant, or even preferred method of statutory interpretation.[140] And that, more or less, is where the story leaves off today, with academic commentators carefully watching the Roberts Court for any signal that we are entering a new phase in the battle over the use of legislative history.[141]

Two aspects of this story demand further attention. First, this historical account of the rise and fall of legislative history is shared by partisans on both sides of the legislative history debate.

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[133]*See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 671 (1990) ("(" According to Justice Scalia, relying on committee reports to determine a statute's meaning is tantamount to lawmaking by Congressional subgroups that the Court found unconstitutional in Chadha."); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB.POL'Y 61, 68 (1994); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 27 (2006).

[134]Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005, 1012 (1992) ("[T]he widespread expectation that judges will consult legislative histories leads to distortion of the histories and makes them unreliable indicators of congressional intent.").

[135]*See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1838 (1998) ("("Even accepting these premises, however, problems of judicial competence create grave risks that judicial resort to legislative history to gauge legislative intent will prove counterproductive."); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 644 (1995) (articulating the textualist argument that reliance on legislative history incentivizes sloppy drafting by Congress).

[136] See *supra*Figure 1.

[137]Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998).

[138]*Cf.*Archer-Daniels-Midland Co. v. United States, 37 F.3d 321, 323-24 (7th Cir. 1994) (opinion by Posner, J.) ("Legislative history is in bad odor in some influential judicial quarters, but it continues to be relied on heavily by most Supreme Court Justices and lower-court judges; and in the case of statutory language as technical and arcane as [this], the slogan that Congress votes on the bill and not on the report strikes us as pretty empty.").

[139]*See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 637-39 (1987) (Scalia, J., dissenting).

[140]*See, e.g.*, Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 463 (2002) ("Arguments based on legislative history are held in contempt, at least where the history is cited as the primary source of legislative meaning.").

[141]*See, e.g.*,Krishnakumar, *supra* note 49, at 238 (2010); Elliott M. Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB.POL'Y 983 (2007).

Although they may disagree about whether the turn away from legislative history was a good idea, both purposivists and textualists agree, as a descriptive matter, about the basic contours of the historical evolution of the courts' use of legislative history.[142] This is not to say that each side does not put its own spin on the story. Textualists paint the turn away from legislative history as a triumphant repudiation of an unconstitutional and unreliable source of statutory meaning.[143] By contrast, purposivists argue that the rejection of legislative history has unmoored statutory interpretation from congressional will, and deprived judges of a valuable interpretative resource.[144] Still, both of these normative accounts are built upon the same historical foundation: legislative history was prominent in the 1970s and 1980s and then fell from grace in late 1980s and 1990s.

Second: as with all conventional wisdom, this historical story is contested around the edges. This stylized story reflects, in some sense, the lowest common denominator of the legislative history literature. Individual scholars often tell more nuanced accounts that modify aspects of the basic rise and fall story. For example, although almost everyone agrees that textualism succeeded in combatting the use of legislative history, there is widespread disagreement about the extent of this success.[145] In another example, Adrian Vermuele modifies the basic rise-and-

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[142]*Compare, e.g.*, John F. Manning, *Second-Generation Textualism*, *supra* note126, at1291 (outlining this basic descriptive story from a textualist perspective) *with* Charles Tiefer, *supra* note 127, 213-217 (telling a similar historical story from a purposivist perspective). Scholars advocating for interpretative approaches orthogonal the traditional textualist-purposovist divide also tend to accept the traditional narrative regarding the rise and fall of legislative history. See WILLIAM N.ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 218 (1994) (characterizing the Burger Court era as "Bursting with Legislative History").

[143]*See, e.g.*,Thompson v. Thompson, 484 U.S. 174, 192 (1988) (citing INS v. Chadha, 562 U.S. 919 (1983)); John F. Manning, *TextualismAs ANondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Note, *Why Learned Hand Would Never Consult Legislative History Today*, *supra* note 134, at 1017 (1992).

[144]*See, e.g.*, Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 578 (1992).

[145]*Compare* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 1 (2006) ("Textualists have been so successful discrediting strong purposivism and updating their new brand of 'modern textualism' that they have forged a new consensus on the interpretive enterprise that dwarfs any remaining disagreements. ") and Thomas W. Merrill, supra note128, at 351 (1994) *with* Jane S. Schacter, *The Confounding Common Law*

fall story by superimposing smaller fluctuations onto the larger trends: "The revised statistics . . . suggest an oscillating pattern of use, one that rises from 1938 until 1949, falls again until 1958, then fluctuates uncertainly until a dramatic upward spike occurs in the mid-1970s. That spike begins a slow downward trend in the mid-1980s, rises again in the mid-1990s, and falls again towards the end of the decade."[146] Additionally, scholars vigorously contest the role of Justice Scalia in turning the tide against legislative history. For some scholars, Justice Scalia was the central actor in the rise of textualism; for others, he played a lesser role.[147] Despite these—and other—disagreements, however, the basic outline of the rise-and-fall story remains largely the same.

2. How the Discrepancy Between the D.C. Circuit and the Rest of the Country Upsets the Conventional Narrative

The data presented in this paper shows that the conventional rise and fall narrative does not apply uniformly to the entire federal judiciary Just because the conventional narrative accurately describes the Supreme Court's treatment of legislative history does not mean that the conventional narrative accurately characterizes the fate of legislative history as a whole. There are more courts than just the Supreme Court, and in particular, there are more courts interpreting statutes than just the Supreme Court. As Abbe Gluck has argued, "the near-exclusive focus" of

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Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1, 5 (1998) ("[T]he 1996 Term reflects some resurgence in the use of legislative history.") and Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235 (1997).

[146]Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 186 (2001).

[147]*Compare* James J. Brudney& Corey Ditslear, *Scalia Effect*, *supra* note9*with* Law &Zaring, *supra* note 23, at 1729 ("Although Justice Scalia has been vocally opposed to the use of legislative history, we found no evidence that he has successfully persuaded others to follow his lead.").

the statutory interpretation literature "on the most difficult U.S. Supreme Court cases has created a distorted picture . . . and so impoverished [the] conversation."[148]

Here, looking just one rung down on the federal judicial hierarchy reveals the pitfalls of focusing so intensely on the Supreme Court. In the eyes of many, the circuit courts are as important, if not more important, than the Supreme Court. Frank Cross and Stephanie Lindquist, for example, label the circuit courts "probably the single most important level of the federal judiciary."[149] The Supreme Court grants certiorari in only a tiny percentage of cases; for the vast majority of litigation, the circuit courts are the final stop.[150]

The limited bite of Supreme Court review means that the circuit courts play an important role in the interpretation of federal statutes.[151] Furthermore, for the purposes of this paper in particular, the circuit courts as a whole cite far more total legislative history than the Supreme

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[148]Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1811 (2010); *see also*Tracey E. George, *Developing A Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1665 (1998) ("Students of the lower courts have expressed concern that the models developed in analyzing the Supreme Court may not be well-suited for other courts.").

[149]Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1385 (2009); *see also* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1273 (2005).

[150]*See, e.g.*,George, *supra* note 148, at 1636 ("[A]lthough the United States Supreme Court is technically the final word on federal law and cases, the circuit courts have become the courts of last resort for most litigants and the sources of doctrinal development for most legal issues."); *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001) (finding that the "Court has granted certiorari to less than four percent of petitions, accounting for less than one percent of all cases decided by courts of appeals"); *see also* Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the U.S. Courts of Appeals*, 23 J.L. ECON. & ORG. 421 (2007).

[151]*See, e.g.*,Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 318-19 (2005) ("Because the courts of appeals resolve more interpretive disputes than does the Supreme Court, ensuring a sound interpretive theory for the courts of appeals is in some respects more important than doing the same for the Supreme Court."); Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 62 (2001) ("When interpreting statutes, [circuit] courts directly influence the formation of federal policy in a significant way; congressional reaction to those rulings may go far in determining both branches' influence over policy making."); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987); Aaron-Andrew P. Bruhl, H*ierarchy and Heterogeneity: How to Read A Statute in A Lower Court*, 97 CORNELL L. REV. 433, 457 (2012); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862 (1992).

Court. Between 1950 and 2006, the Supreme Court cited legislative history 16,380 times, in a total of 2,576 cases. This is dwarfed by the circuit courts, which cited legislative history 73,591 times over 25,112 cases. In terms of legislative history as a tool of statutory interpretation, the circuit courts have reached for that tool far more frequently than the Supreme Court. Any account of the American approach to legislative history that focuses on the Supreme Court while neglecting the circuit courts is simply incomplete.[152]

And the data presented here shows that the rise-and-fall narrative does not accurately describe how circuit courts have used legislative history—at least not all of the circuit courts. As discussed above,[153] the rise-and-fall narrative does capture the evolution of legislative history in the D.C. Circuit. But the non-D.C. circuits behaved very differently. The "plateau circuits"—the First, Third, Sixth, and Tenth Circuits—never embraced legislative history nearly as much as the D.C. Circuit and Supreme Court during the 1970s and 1980s. Having never embraced legislative history in the first place, these circuits also did not share the D.C. Circuit and Supreme Court's decisive turn away from legislative history in the late 1980s and 1990s. Other circuits—the "molehill circuits"—did have something of a rise-and-fall in their use of legislative history during the 1970s and 1980s, but to a much lesser degree than the D.C. Circuit and Supreme Court.Furthermore, once the citation count data is controlled for the rising caseloads of that period, it is clear that the rise-and-fall narrative does not accurately capture the use of legislative history in the non-D.C. Circuits.

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[152]*Cf.* James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U.L. REV. 1, 70 (2007)
[153]*Seesupra* Part III.B.

The story of legislative history's dramatic rise and fall is thus only accurate up to the beltway's edge. For the other eleven circuits,[154] different stories must be told—stories of a more measured embrace of legislative history, followed by a less severe rejection. This disaggregation demonstrates that, when it comes to statutory interpretation, the federal judiciary does not move as one. While the Supreme Court may set the beat, the circuit courts have considerable latitude when deciding how to interpret statutes. Like the state courts,[155] the circuit courts may serve as independent laboratories where judges can experiment with novel approaches to statutory interpretation, in dialogue with both the other circuits and the Supreme Court.[156] The statutory interpretation conversation should broaden beyond the Supreme Court and acknowledge the heterogeneity of the federal judiciary's approach to statutory interpretation.

B. Normative implications

The incompleteness of the rise-and-fall narrative is more than just a matter of historical accuracy. The Supreme Court's embrace of legislative history during the 1970s and 1980s has been a fixed point in the normative debate over whether courts should use legislative history. For purposivists, that era symbolizes a Court dedicated to implementing the will of Congress; for textualists, it symbolizes a Court rampantly subverting the rule of law. The heterogeneity of the circuit courts' use of legislative history unsettles that fixed point in the conversation. For the circuit courts, at least, that period was neither a triumph for the purposivists, nor a disaster for textualists.

Furthermore, this heterogeneity has implications for the strength of several of the common arguments at the center of the normative debate over legislative history—if various circuits

[154] Really ten circuits, as the Fifth and Eleventh Circuits should be treated as one for purposes of this analysis.
[155] See Gluck, *supra* note 148, at 1861 (2010).
[156] For an innovative argument that this methodological heterogeneity is desirable, see Bruhl, *supra* note 151.

adopted different approaches to legislative history, these arguments may apply more or less strongly to each circuit. This section discusses two of the most common objections to legislative history—the institutional competence objection and the manipulation objection—and how they fare in light of the data presented in this paper.

1. The Institutional Competence Objection

The institutional competence objection argues that courts should not use legislative history because judges are not capable of reliably understanding legislative history. Even if legislative history were a reliable source in the abstract, judges are poorly placed to ascertain the interpretative implications of that source. In other words, judges are lawyers, not legislators, and are therefore prone to misinterpret the products of the legislative process.

A prominent articulation of this objection is Adrian Vermeule's reexamination[157] of the Court's use of legislative history in the canonical case *Holy Trinity Church v. United States*.[158] Professor Vermeule contests the traditional account of *Holy Trinity*, in which the Court used legislative history to evade what appeared to be the plain meaning of the text of the statute. Relying on this traditional account, the conversation about *Holy Trinity*centered on whether the Court should use legislative history to undermine contrary statutory text.[159]

Professor Vermeule, however, argues that this focus on the tension between text and legislative history is predicated on an incorrect assumption.[160] Revisiting the original sources of legislative history in *Holy Trinity*, Professor Vermeule argues that there was no tension between

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[157] Vermeule, *supra* note 135 (1998).
[158]143 U.S. 457 (1892).
[159]*See* Antonin Scalia, *Common Law Courts*, *supra* note 1, at 18-31; Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1307 (1997); ("Church of the Holy Trinity v. United States is not only a case, but is the marker for an entire legal tradition"); William N. Eskridge, Jr., "*Fetch Some Soupmeat"*, 16 CARDOZO L. REV. 2209, 2217 n.38 (1995).
[160] Vermeule, *supra* note 135, at 1837.

the legislative history and the statutory text; the apparent contradiction was the product of judicial misinterpretation. When read properly, the legislative history "did not support the Court's holding, but rather supported the rule apparent on the face of the statutory text itself."[161]

Professor Vermeule then generalizes this analysis of *Holy Trinity* into a broader institutional competence argument against legislative history. The misinterpretation of legislative history in *Holy Trinity* was not an isolated mistake, but instead an example of how the judiciary, as a whole, is simply not capable of using legislative history properly. Professor Vermeule offers a sophisticated account of how "[d]istinctive features of the adjudicative process . . . might interact with distinctive features of legislative history in a manner that causes courts systematically to err in their attempts to discern legislative intent from legislative history."[162] For instance, judges are often unfamiliar with the "roles, characteristics, and incentives" of the legislators involved in passing a statute, which undercuts their ability to reliably interpret the legislative history produced by those legislators.[163] Similarly, Professor Vermeule suggests that because judges are used to interpreting authoritative legal texts, they are prone to overestimate the reliability of documents produced in the heat of legislative battles.[164]

The strength of the institutional competence objection, then, depends on how proficient judges are at understanding legislative history. If judges are cloistered rubes who could not tell a standing committee from a conference committee, that lends a great deal of support to the institutional competence objection.[165] If, on the other hand, judges are sophisticated analysts of

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[161] *Id.*
[162] *Id.* at 1838.
[163] *Id.* at 1873.
[164] *Id.* at 1875.
[165] *Cf.* Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. (2012) (forthcoming) ("Judges, scholars, and law students dismantle congressional reports and debate as if early reports . . . were interchangeable with much-altered bills . . . and as if statements of those who lost the debate . . .

the legislative process, then that undermines the institutional competence argument. As Professor Vermeule admits, this is ultimately an empirical question about the capabilities of the judiciary.[166]

But as the findings discussed *supra*make clear, judges are not all cut from the same cloth. Some judges may be legislative rubes at the same time as other judges are practiced readers of legislative history. The strength of the institutional competence argument, then, may vary judge to judge. In particular, a judge who routinely traffics in legislative history may be a more savvy consumer of that history than a judge who uses legislative history only occasionally. This could happen in two ways, which I will call the "practice-makes-perfect" hypothesis and the "familiarity" hypothesis. The "practice makes perfect" hypothesis suggests that the more a judge sees and uses legislative history, the more conversant that judge will become with the details of legislative history, including, (1) the legislative actors who generate legislative history,[167] (2) the congressional rules that govern the legislative process,[168] and (3) the relative merits of different types of legislative history.[169] In the alternative, the "familiarity" hypothesis would have the line of causation run in the opposite direction: those judges who are already more familiar with legislative history are exactly the judges who would be most comfortable citing legislative history in the first place.

If it is true that courts that use legislative history more are also more skilled at using that history, then the data presented in this paper has significant implications for the strength of the

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amount to authoritative statements of meaning . . . . Such readings invite legislative history's critics to shout 'activism.'").

[166] Vermeule, *supra* note 135, at 1865 (noting that the institutional competence argument "represents a quasi-empirical assessment").

[167] William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992)

[168] *See, e.g.*, Nourse, *supra* note 165.

[169] See, e.g., ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 142, at 221-222.

institutional competence objection. If some circuits use legislative history much more frequently than other circuits, then the institutional competence objection would apply more strongly to circuits that cite legislative history sporadically than to circuits that use it routinely. As the data discussed *supra* shows, the big divide, then, is between the D.C. Circuit and the other circuits.

Consider, for instance, the use of legislative history during its heyday in 1981. Over the past ten years, the eleven judges of the D.C. Circuit had cited legislative history 5057 times in a total of 812 cases. By comparison, over that same ten years the eleven judges of, for instance Sixth Circuit had cited legislative history just 857 times in only 260 cases. Given that the judges of the D.C. Circuit worked with over five times as much legislative history as the judges of the Sixth Circuit, it is at least plausible that they were, on average, more skilled at analyzing legislative history when it came in front of them. They would be, for example, less likely to "overestimate or underestimate the weight due to a particular item of legislative history."[170]

Unfortunately, it is very difficult to know for certain whether habitual consumers of legislative history become more skilled in its use. Assessing either the "practice makes perfect" or "familiarity" hypothesis would require "would require, at a minimum, full examination of the statutes, legislative histories, and resulting judicial opinions in a fair sample of all . . . statutory cases,"[171] not to mention some independent metric for assessing the accuracy of each judge's use of legislative history.

However, there is some circumstantial evidence for these hypotheses. D.C. Circuit judges active during the peak of the D.C. Circuit's use of legislative history were also unusually active in the academic debate over legislative history. Justice Scalia is the most prominent example of

[170]Vermeule, *supra* note 135, at 1866.
[171]*Id.* at 1865.

this phenomenon. Justice Scalia is joined by Chief Judge Wald,[172] Judge Starr,[173] and Judge Mikva,[174] who all published articles on the use of legislative history in statutory interpretation. This pattern of intellectual involvement suggests that the judges of the D.C. Circuit were familiar with the intricacies of legislative history, and therefore probably less likely to make the interpretative errors identified by Professor Vermeule.[175] This familiarity, in turn, may have beeneither a cause or a consequence of the D.C. Circuit's extraordinarily high rate of citation to legislative history.

In sum, then, the large disparities in how frequently each circuit cites legislative history may require a more nuanced account of the institutional competence objection, at least as it is applied to the appellate courts. The institutional competence objection may be unusually strong in the case of circuits that have only ever used legislative history sporadically.[176] By contrast, the institutional competence objection does not have as much punch when applied to those circuits that used legislative history systematically—in particular, the D.C. Circuit during the 1970s and early 1980s. The variation in the citation data points to the need for a more granular conversation about the normative force of the institutional competence objection.

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[172] *See, e.g.*, Wald, *The Sizzling Sleeper*, *supra* note 10 , at 278 (1990); Wald, *Some Observations on the Use of Legislative History*,*supra* note 10.

[173] *See, e.g.*, Starr, *supra* note 114.

[174] Judge Mikva was a former legislator, suggesting that he was unusually familiar with the nuances of legislative history. This may help explain his prolific history of publishing on the topic. *See, e.g.*, Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981 (1989); Abner J. Mikva& Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121 (2000); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380 (1987); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987).

[175] Chief Judge Wald certainly seemed to think so: "In our opinions and at our oral arguments, there is constant preoccupation with and debate about how Congress and agencies actually work, and how much of legislative history is concocted or real." Contribution of the D.C. Circuit, *supra* note 74, at 514.

[176] Note the ironic implications for textualism: because textualism hasn't been able to fully eradicate the use of legislative history, those circuits in which textualism has been unusually successful at combatting legislative history may become less skilled at analyzing legislative history when they do use it. Textualism may, in some sense, be "heightening the contradictions" for legislative history.

2. The Manipulation Objection

The disparity between the D.C. Circuit and the rest of the country has implications for another classic argument against the use of legislative history: the "manipulation objection."[177] The manipulation objection revolves around the prospect of legislators and legislative staffers fabricating legislative history because they hope to influence future litigation over the statute. Perhaps the most famous articulation of this objection comes from Justice Scalia's dissent in *Blanchard v. Bergeron*:

> As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . ., but rather to influence judicial construction.[178]

Accordingly, Justice Scalia and others argue, courts should reject legislative history because the very fact that courts consult legislative history creates the incentive for manipulation, and thus corruption, of that history.[179] The manipulation objection therefore depends on the expectations of both legislative actors and interest groups with a stake in potential litigation. The more that these actors expect courts to consult the legislative history, the greater the perceived incentive for those actors to expend resources manipulating that legislative history.[180]

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[177] *See generally* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 53-55 (1989);James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 47-53 (1994) (discussing and rejecting the manipulation objection).

[178] 489 U.S. 87, 98-99 (1989) (Scalia, J., dissenting).

[179] See, e.g., Note, *Why Learned Hand Would Never Consult Legislative History Today*, *supra* note 134, at 1017 (1992)("Once they know that judges will refer to legislative history when interpreting statutes, legislators, staffers, and lobbyists have great incentives to introduce comments in the record solely to influence future interpretations - and especially to insert statements that could not win majority support in Congress.").

[180] *Cf.* Adrian Vermeule, *The Cycles of Statutory Interpretation*, *supra* note 146, at 163 ("Each member of the enacting coalition (for short, 'member') must choose one of the following two moves: (a) 'manipulate the legislative history' or (b) 'do not manipulate the legislative history.' There is some positive cost to manipulation.").

The strength of the manipulation objection scales with the frequency of citation to legislative history.[181] In a sporadic citation regime, the manipulation argument is weak. The chance that the court will consult the manipulated legislative history is probably too low to justify either the cost of preparing and inserting the corrupted legislative history or the risk of getting caught. The legislative history will remain uncorrupted, ensuring that when the courts do decide to consult legislative history, they are seeing an untainted source.

By contrast, the manipulation objection is quite strong when legislative history is consulted routinely. Legislators and lobbyists know that the manipulated legislative history will come in front of a judge, and there is therefore a greater chance that their efforts to manipulate that history will bear fruit. If judges are consulting legislative history more, there is a higher chance that they are reading unreliable material.

The data presented here shows that the circuit courts have been in both high- and low-citation regimes. The D.C. Circuit, of course, consulted legislative history habitually, creating a correspondingly high incentive for legislative actors to invest in manipulating the legislative history. The non-D.C. circuits, by contrast, cited legislative history sporadically; legislatively actors probably did not consider it cost-effective to plant legislative history if the statute would be litigated in one of these other circuits. Note that the strength of the manipulation objection varies conversely to the institutional competence objection. Whereas the institutional competence objection applies more strongly to the non-D.C. circuits than to the D.C. Circuit, the manipulation objection applies more strongly to the D.C. Circuit than the non-D.C. Circuits. The

[181] *Cf.* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 29 (1988) (quoting a speech by Justice Scalia) ("As Justice Scalia has noted, 'the more the courts have relied upon committee reports in recent years, the less reliable they have become.'").

heterogeneity of the circuit courts thus has crosscutting implications for the normative debate over legislative history.

Of course, this argument is predicated on legislative actors paying attention to the behavior of the circuit courts. Given the intense uncertainty over the extent of manipulation,[182] as well as the covert nature of the manipulation that does occur, it is nearly impossible to know for certain whether these actors are thinking about specific courts when planting legislative history. It may be that these potential manipulators are focused entirely on the Supreme Court's treatment of legislative history. Similarly, if the perceptions of these potential manipulators have been shaped by the conventional narrative about legislative history, they might not be aware that the various circuits have divergent attitudes regarding legislative history. On the other hand, given that most statutory interpretation cases never go beyond the courts of appeal,[183] these actors also have a significant incentive to care about the behavior of the lower courts.[184]

In any event, the manipulation objection itself turns on the premise that manipulators pay attention to judicial behavior—if they don't, then the courts don't have to worry that their use of legislative history will incentivize manipulation.[185] Taking the manipulation objection on its own terms, then, the data presented *supra* shows that the D.C. Circuit may have been a much more tempting target for potential manipulators than the other circuits.

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[182] Compare 137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991) (Statement of Sen. Danforth) ("It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional record. . . . That is one method of trying to doctor the legislative history and influence the future course of litigation.") *with*Brudney, *Congressional Commentary*, *supra* note 177, at 59 (1994) (referring to the evidence for manipulation as "anecdotal rather than systemic").

[183] See *supra* notes 148-152 and accompanying text.

[184] This may be particular true of the D.C. Circuit because certain statutes—administrative statutes, for instance—are unusually likely to be litigated there. See supra Part IV.A. If potential manipulators know that the statute in question is likely to be interpreted by the D.C. Circuit, that incentivizes the manipulator to consider the views of the D.C. Circuit.

[185] Of course, the courts would still need to consider the possibility that the legislative history had been manipulated and was therefore unreliable. They just wouldn't have to worry that their consultation of legislative history would lead to future manipulation.

C. The need for a more nuanced account

Judges and scholars should stop discussing legislative history as if it is only ever used in the Supreme Court. The conversation must recogonize that statutes are often interpreted by the lower courts, and that the interpretative methodologies used by these courts vary a great deal. Similarly to what Abbe Gluck has shown in the state courts,[186] the circuit courts outside the beltway adopted during the 1970s and 1980s a more text-centric approach to statutory interpretation than either the Supreme Court or the D.C. Circuit. Understanding and acknowledging that statutory interpretation is a heterogeneous, polycentric endeavor will enrich our descriptive account of how courts are using legislative history and advance the debate over whether it should be used.

That the circuit courts have adopted different approaches legislative history may signal that there are other disagreements over statutory interpretations between the circuit courts and the Supreme Court as well as among the circuits. As long as the federal judiciary continues to reject methodological stare decisis, each of the circuits is free to forge its own path in statutory interpretation. Perhaps they have already diverged from the Supreme Court in other ways,such as being more or less open to arguments from congressional intent, arguments from structure, or the canons of construction.[187]Alternatively, perhaps legislative history is the only interpretative resource that has provoked such intense divergences within the federal judiciary. Either way, expanding the statutory interpretation conversation beyond D.C. will yield a more accurate and nuanced understanding of how statutes are read in American legal culture.

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[186]*See* Gluck, *supra* note 148.
[187]*Cf.* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1592 (2008)