VIRGINIA LAW REVIEW

VOLUME 108 APRIL 2022 NUMBER 2

ARTICLES

STATUTORY HISTORY

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The New Textualism championed by the late Justice Scalia is perhaps best known for its insistence that courts should not consult legislative history when interpreting statutes. Indeed, Justice Scalia himself was famous for dissenting from paragraphs, sentences, or even footnotes in opinions that so much as casually mentioned a statute's legislative history, even as corroboration for an interpretation reached through textual analysis. A less well-known corollary of modern textualism's aversion to legislative history, however, is that textualists are perfectly willing to examine prior versions of a statute—i.e., earlier drafts of the bill that ultimately became law or the original version of a statute that has since been amended—to speculate about the statute's meaning. In fact, textualist Justices regularly use this kind of "statutory history" to draw inferences about a statute's substantive

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meaning, even as they criticize the use of other, more traditional forms of legislative history.

It is at once surprising and instructive that textualists have embraced this kind of "statutory history" while rejecting traditional legislative history. On the rare occasions when they have acknowledged this dichotomy, textualists have sought to distinguish statutory history from traditional legislative history on the ground that the former involves comparisons of enacted statutory language, rather than mere commentary by legislators. Scholars have, largely uncritically, tended to accept these distinctions. But no one to date has studied the judicial use of statutory history in any significant detail, nor has anyone evaluated whether the theoretical justifications textualists offer for their use of statutory history, as distinct from traditional legislative history, hold up in practice.

This Article provides the first empirical and doctrinal examination of how the U.S. Supreme Court employs statutory history to determine a statute's substantive meaning. Based on a study of 574 statutory cases decided during the Roberts Court's first thirteen-and-a-half terms, this Article catalogues five different forms of statutory history inferences employed by the modern Court. It finds that (1) the Justices on the Roberts Court exercise significant discretion when drawing inferences from statutory history; and (2) while some of the statutory history inferences the Court draws are consistent with the theoretical justifications textualists have offered, many involve unenacted legislative materials or venture beyond traditional text-based analysis—and are difficult to distinguish from traditional legislative history or other contextual purposive evidence that textualists reject. In the end, this Article suggests that textualists should either abandon their reliance on statutory history altogether or, preferably, broaden their interpretive toolkit to include other forms of background legislative context evidence, at least as a check on the inferences they draw from statutory history.

INTRODUCTION

The New Textualism[1] championed by the late Justice Scalia is perhaps best known for its insistence that courts should not consult legislative history when interpreting statutes.[2] A less well-known corollary of this interpretive approach is that Justice Scalia and his fellow textualists were and are perfectly willing to examine *prior versions* of a statute—i.e., earlier drafts of a bill that ultimately became law or the original version of a statute that has since been amended—to speculate about a statute's meaning. Indeed, textualist Justices regularly use such "statutory history"—the cold record of how a statute evolved from one version to the next—to draw inferences about a statute's substantive meaning even as they criticize the use of other, more

[1] "New Textualism" is a term coined by Professor William Eskridge to describe the statutory interpretation methodology advanced by Justice Scalia beginning in the late 1980s. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 623 & n.11 (1990).

[2] See, e.g., 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 29–37 (1997) ("I object to the use of legislative history on principle."); William N. Eskridge, Jr., Textualism, the Unknown Ideal?, 96 Mich. L. Rev. 1509, 1512 (1998) ("Doctrinally, the new textualism's most distinctive feature is its insistence that judges should almost never consult, and never rely on, the legislative history of a statute.").

traditional forms of legislative history, such as committee reports or floor statements.

Consider two examples:

First, in *Arizona v. United States*, the Court considered whether federal law preempts an Arizona statute that regulates the behavior of immigrants who are unlawfully present in Arizona.[3] One of the state law provisions at issue made it a crime for illegal immigrants to seek employment.[4] The Court, in an opinion authored by Justice Kennedy, ruled that the provision was preempted by federal law.[5] In so ruling, the Court noted that Congress chose to impose civil, rather than criminal, penalties for immigrants who engage in unlawful employment—and backed this up with statutory history about the process by which the Immigration Reform and Control Act of 1986 ("IRCA") was enacted.[6] Specifically, Justice Kennedy's opinion noted that draft proposals to make unauthorized employment a criminal offense were introduced and "debated and discussed during the long process of drafting IRCA" and that "Congress rejected them."[7] Based on this drafting history, the Court concluded that IRCA's framework "reflects a considered judgment" by Congress that immigrants should not face criminal sanctions for engaging in unauthorized work.[8]

Second, in *Nichols v. United States*, the Court considered whether the Sex Offender Registration and Notification Act ("SORNA") requires sex offenders who move out of state to update their registrations with the jurisdiction they have left.[9] SORNA provides that "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved" to "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry."[10] Nichols moved from Kansas, where he was a registered sex offender, to the Philippines—a foreign country not covered by SORNA—and neglected to register his departure with the state of Kansas; he was convicted of violating SORNA because he had failed to update his

[3] 567 U.S. 387 (2012).
[4] Ariz. Rev. Stat. Ann. § 13-2928(C) (2011).
[5] *Arizona*, 567 U.S. at 405.
[6] See id.
[7] Id.
[8] Id.
[9] 136 S. Ct. 1113 (2016).
[10] 42 U.S.C. § 16913(c).

registration with Kansas.[11] The Tenth Circuit upheld Nichols' conviction, concluding that when a sex offender "leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved" under SORNA.[12] In a unanimous opinion authored by Justice Alito, the Supreme Court disagreed, ruling instead that SORNA does not require sex offenders to update their registration in a state that they have departed.[13] In so ruling, the Court relied on the statute's plain meaning, grammar rules, practical reasoning, and SORNA's statutory history.[14] Specifically, the Court noted that the Wetterling Act, a predecessor statute that SORNA replaced, explicitly required sex offenders to "report the change of address to the responsible agency in the State the person is leaving"—but that Congress declined to retain that language when it enacted SORNA.[15] "If the drafters of SORNA had thought about the problem of sex offenders who leave the country and had sought to require them to (de)register in the departure jurisdiction, they could easily have said so; indeed, that is exactly what the amended Wetterling Act had required," the Court explained.[16] Congress's decision to employ different language in SORNA, the Court reasoned, was significant: if Congress wanted to require sex offenders to update their registrations in the states they departed, "Congress could have chosen to retain the language in the amended Wetterling Act."[17] Because Congress chose not to do so, the Court concluded that SORNA did not require Nichols to update his registration in Kansas once he no longer resided there.[18]

In both of the above cases, the Court's references to statutory history were designed to provide contextual support for its chosen statutory constructions. In highlighting that Congress considered and rejected a proposal to impose criminal penalties on immigrants who engage in unauthorized work and that Congress changed the Wetterling Act text requiring registration updates in the state of departure when it enacted SORNA, the Court sought to demonstrate that its reading of the relevant statutes' texts was consistent with Congress's likely intent. But it did so without citing the typical commentary by individual legislators or

[11] *Nichols*, 136 S. Ct. at 1117.
[12] Id.
[13] See id.
[14] See id. at 1117–18.
[15] See id. at 1116 (emphasis omitted).
[16] Id. at 1118.
[17] Id.
[18] See id.

congressional committees that we ordinarily associate with the label "legislative history"—rather, it focused on changes Congress made to the statutes' texts and on background legislative circumstances, and it used those developments to make its own inferences about Congress's intent.

The inferences from statutory history employed by Justices Kennedy and Alito in *Arizona* and *Nichols* are not anomalous. Indeed, they are a fairly familiar feature of the Roberts Court's statutory jurisprudence. But while the use of statutory history has been part of the Court's interpretive arsenal for some time, scholars have paid surprisingly little attention to it as an interpretive resource. To date, only one article has examined the Court's use of statutory history in any detail—and that article did so only briefly, in passing.[19] No article has studied the Court's use of statutory history systematically, and no article has sought to illuminate the different types of inferences the Court draws from such history or to evaluate normatively the justifications offered for employing this form of history, in contrast to traditional legislative history.

This Article seeks to fill that void. It provides the first in-depth analysis of the multiple ways in which the modern Supreme Court uses statutory history to draw inferences about a statute's intended meaning. While the Article is primarily doctrinal in nature, it draws from an empirical database of 574 statutory cases decided during the Roberts Court's first thirteen-plus terms to supplement its analysis. Ultimately, this Article aims both to provide a catalogue of the different kinds of interpretive inferences the Court makes when examining a statute's historical evolution—what the Article refers to as "statutory history"—as well as to evaluate whether textualist Justices' willingness to employ statutory history can be squared with their unwillingness to examine traditional legislative history or other forms of background legislative context.

Five points stand out from the data and doctrinal analysis: (1) the Roberts Court's overall use of statutory history is moderate—15.7% of the cases in the dataset employed such history; (2) all of the Justices, irrespective of their interpretive methodology, invoke statutory history in the opinions they author; (3) the Court's most committed textualist

[19] See James Brudney & Lawrence Baum, Protean Statutory Interpretation in the Courts of Appeals, 58 Wm. & Mary L. Rev. 681, 688–89 (2017).

Justices invoke statutory history more often than they invoke traditional legislative history; (4) there are at least five different forms of inferences that the Justices tend to draw from statutory history; and (5) nearly *two-thirds* of the statutory history inferences the Court employs conflict in some way with the parameters textualists have articulated to distinguish statutory history from traditional legislative history.

This Article proceeds in three Parts. Part I defines what is meant by the term "statutory history," examines the ways in which this interpretive resource differs from traditional legislative history, and reviews the limited existing literature on statutory history. Part II reports data about the Roberts Court's use of statutory history in the 574 statutory cases decided during its first thirteen-and-a-half terms. Part II also provides a catalogue of the different forms of inferences the Court draws from statutory history, as well as offers doctrinal observations about the Court's use of this interpretive aid. Part III evaluates the theoretical implications of the Roberts Court's approach to statutory history, noting that the decontextualized use of statutory history shifts to judges, rather than legislators, the authority to fill in the gaps between different versions of a statute—and that judges engage in substantial speculation when performing such gap filling. It argues that while some forms of statutory history approximate the logical inferences common to traditional textual analysis, others share important features in common with traditional purposive interpretive tools—and are thus inconsistent with the justifications textualists have offered for embracing statutory history while rejecting traditional legislative history. In the end, Part III suggests that textualist judges should either end their reliance on statutory history altogether or, better yet, broaden their interpretive toolkit to include other forms of background legislative contextual evidence, at least as a check on the inferences they draw from statutory history.

I. SOME DEFINITIONS AND BACKGROUND

Before describing the Court's on-the-ground use of statutory history—and scholars' surprising lack of attention to this interpretive tool—it is worth pausing to (1) define precisely what this Article means by the term "statutory history" and (2) review the limited existing statutory interpretation literature on this topic. Section I.A defines the relevant terms as well as describes the two different forms of statutory history that the Roberts Court has employed when interpreting statutes:

drafting history and amendment history. Section I.B discusses the limited existing scholarly treatment of this interpretive resource.

A. Drafting History vs. Amendment History

At the most basic level, this Article uses the term "statutory history" to refer to the historical evolution of a statute from one version to the next, as evidenced by the text of different iterations of a proposed bill or amendments to an existing law. Such "statutory history" differs from other forms of legislative history in that it focuses on textual comparisons between different versions of a statute rather than on the views expressed by individual legislators or committees while deliberating, debating, and voting on the bill that eventually became law.[20] Textualist Justices have sought to explain their willingness to rely on statutory history—and to distinguish it from more traditional forms of legislative history—in a few different ways. Justice Scalia, for example, explained that "the historical evolution of a statute" is "based on decisions by the entire Congress" and insisted that it therefore differs from and "should not be discounted for the reasons that may undermine confidence in the significance of excerpts from congressional debates and committee reports."[21] His treatise on statutory interpretation declared that:

> [Q]uite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all members of the legislature when they voted.[22]

Justice Gorsuch similarly has commented that:

> [T]he statutory history I have in mind here isn't the sort of unenacted legislative history that often is neither truly legislative (having failed to survive bicameralism and presentment) nor truly historical (consisting of advocacy aimed at winning in future litigation what couldn't be won in past statutes). Instead, I mean here the record of

[20] See, e.g., id.; Anita S. Krishnakumar, Dueling Canons, 65 Duke L.J. 909, 985–86 (2016) [hereinafter Krishnakumar, Dueling Canons].

[21] Hubbard v. United States, 514 U.S. 695, 702–03 (1995).

[22] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012).

> *enacted* changes Congress made to the relevant statutory text over time, the sort of *textual evidence* everyone agrees can sometimes shed light on meaning.[23]

As Part III will demonstrate, both of these explanations overstate their cases to some extent, as some forms of statutory history employed by textualist Justices—including Justices Scalia and Gorsuch—are neither "enacted changes" made "by the entire Congress," nor have they "survive[d] bicameralism and presentment."[24] Nevertheless, the basic distinction holds: statutory history is based on the changes made (or contemplated) to the statute itself, whereas the traditional legislative history that textualists reject is based on *commentary* made by members of Congress during the process of enacting a statute.[25]

It is also important to note—and this is a point that textualist Justices fail to acknowledge when discussing the use of statutory history as an interpretive aid—that there are two distinct forms of statutory history that the Court regularly references: drafting history and amendment history. "Drafting history" refers to the successive versions of a proposed bill that precede its enactment into law—i.e., the drafts and proposals that were revised and edited during the legislative process.[26] "Amendment history," by contrast, refers to changes—or amendments—made to an already-enacted statute by subsequent Congresses.[27] Notably, the statutory history employed in Justice Kennedy's majority opinion in *Arizona v. United States*, discussed above, was drafting history, while the history of SORNA invoked by Justice Alito in *Nichols v. United States* was amendment history.

New textualists openly embrace the "amendment history" form of statutory history, as the above quoted commentary by Justices Scalia and Gorsuch illustrates. But they have not similarly embraced, or tended to talk about, "drafting history" when explaining their willingness to rely on a statute's historical evolution to determine its substantive

[23] BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2018) (Gorsuch, J., dissenting) (emphasis added).

[24] See discussion infra Section III.A.

[25] See Brudney & Baum, supra note 19, at 688–89.

[26] I am not the first to use the term "drafting history" to refer to this form of statutory history. See id. at 688.

[27] This category also includes five cases involving a new statute Congress enacted to displace an older statute dealing with the same subject matter. See, e.g., NLRB v. Sw. Gen., Inc., 137 S. Ct. 929 (2017) (interpreting the Federal Vacancies Reform Act, which replaced the Vacancies Act of 1868). For a complete list of such cases, see *infra* Appendix I.

meaning. Notably, the definitions and defense of statutory history articulated by Justices Scalia and Gorsuch do not apply to the drafting history form of statutory history: whereas the amendments that form the basis for "amendment history" necessarily must survive bicameralism and presentment and be voted upon by the entire Congress, the early bill drafts and proposals that constitute "drafting history" are not subject to bicameralism or presentment. In fact, such early bill drafts and proposals may not even be voted upon by the full chamber of *one* House—let alone both Houses of Congress.[28] For these reasons, some founding new textualist documents treat at least some forms of drafting history as illegitimate.[29]

This Article takes the view that, irrespective of textualist theorists' disclaimers, drafting history is nevertheless very much a form of statutory history—for at least three reasons. First, drafting history, like amendment history, depends, at bottom, on *textual* comparisons between earlier proposed versions of a statute and the final enacted version. Indeed, when inferring meaning from drafting history, judges tend to engage in the same kind of negative implication reasoning—particularly inferences that attribute significance to textual variations between different versions of the statute—that they employ when they infer meaning from amendment history.[30] Second, in a handful of cases, the members of the Roberts Court, including its textualist and textualist-leaning Justices, invoked amendment history *in tandem with* drafting history; that is, they emphasized that in the course of adopting a particular statutory amendment, Congress rejected proposed language (or policy options) that mirrored the interpretation advanced by one of the litigants.[31] Third, on closer examination, the differences between

[28] This could occur, for example, if a congressional committee considered the proposal. See, e.g., Larry Eig, Cong. Rsch. Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends 44 (2011), https://www.everycrsreport.com/files/20111219_97-589_ecc097f4f874b4d55b934f53cbb035432bfba150.pdf [https://perma.cc/RK7U-PZ69].

[29] See U.S. Dep't of Just. Off. of Legal Pol'y, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation 107–08 (1989) (criticizing practice of inferring meaning from fact that Congress rejected particular language during the enactment process).

[30] For a classic example, see discussion of *Arizona v. United States*, supra notes 3–8 and accompanying text.

[31] See Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1935 (2016); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 802 (2014); Jones v. Harris Assocs. L.P., 559 U.S.

amendment history and drafting history are subtler than they at first appear. This is because when employing amendment history, the Justices often attribute significance to what an amendment does *not* do, and such legislative omissions hardly can be described as acts taken by both Houses of Congress and approved by the President.[32]

In the end, irrespective of any criticisms textualist theorists have leveled against "drafting history" or efforts they have made to characterize statutory history as limited to "enacted" text, the reality is that, in practice, all of the Roberts Court's textualist and textualist-leaning Justices[33]—including Justices Scalia and Gorsuch—have at times employed unenacted drafting history to infer statutory meaning in the opinions they have authored.[34]

335, 352 (2010); 4th Est. Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 891 (2019); Begay v. United States, 553 U.S. 137, 143–44 (2008).

[32] See text accompanying infra notes 179–84, 204–05.

[33] For purposes of this Article, I count as "textualist" Justices Scalia, Thomas, and Gorsuch and as "textualist-leaning" Chief Justice Roberts and Justices Alito and Kennedy. Justices Scalia, Thomas, and Gorsuch have self-identified as textualists and clearly follow(ed) a textualist interpretive methodology—seeking to identify the plain meaning of statutory text, informed by dictionary definitions, language canons, and the whole act rule and eschewing reliance on legislative history, intent, and purpose. Chief Justice Roberts and Justices Alito and Kennedy, although less purist in their use of textualist interpretive tools, also emphasize these tools when construing statutes. See infra Table 2d. This labeling is consistent with how other scholars and commentators have characterized the Justices. See Peter Smith, Textualism and Jurisdiction, 108 Colum. L. Rev. 1883, 1887 (2008) ("[I]t appears that several Justices—clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy—on the Supreme Court now consider themselves textualists."); John Duffy, *In re Nuitjen*: Patentable Subject Matter, Textualism and the Supreme Court, Patently-O: Patent Law Blog (Feb. 5, 2007), https://patentlyo.com/patent/2007/02/in_re_nuijten_p.html [https://perma.cc/ZZ6A-9G7P] (explaining how Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito "adhere to some form of fairly rigorous textualism in statutory interpretation"); Charlie Stewart, Note, The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem, 116 Mich. L. Rev. 1485 (2018) (arguing that Justice Gorsuch is a textualist).

[34] See, e.g., Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1902–03 (2019) (Gorsuch, J.); Azar v. Allina Health Servs., 139 S. Ct. 1804, 1815 (2019) (Gorsuch, J.); Harbison v. Bell, 556 U.S. 180, 203 (2009) (Scalia, J., dissenting); Arizona v. United States, 567 U.S. 387, 405–06 (2012) (Kennedy, J.); Gonzales v. Carhart, 550 U.S. 124, 151–52 (2007) (Kennedy, J.); NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 942 (2017) (Roberts, C.J.); Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1059 n.2 (2019) (Alito, J.); *Halo*, 136 S. Ct. at 1935 (Roberts, C.J.) (drafting and amendment history); *Tex. Dep't of Hous.*, 576 U.S. at 536 (Kennedy, J.) (drafting and amendment history); *Jones*, 559 U.S. at 352 (Alito, J.) (drafting and amendment history); Bloate v. United States, 559 U.S. 196, 211 n.13 (2010) (Thomas, J.); FTC v. Actavis, Inc., 570 U.S. 136, 168 (2013) (Roberts, C.J., dissenting).

Finally, it is worth noting that while there are important differences between statutory history and the record of legislative debate that lawyers and scholars traditionally think of as legislative history, statutory history is nonetheless very much a form of legislative history. As Professor Max Radin once explained, the "legislative history" of a statute "mean[s] the successive forms in which the statute is found from the first draft presented until its final passage."[35] And the leading casebook on legislation and statutory interpretation describes legislative history as encompassing "the entire circumstances of a statute's creation and evolution."[36] Such circumstances necessarily include all records of all steps in the legislative process that lead to a statute's eventual enactment or amendment—including all proposed versions of the statute and all subsequent amendments.

The next Section reviews the limited literature that exists thus far on the use of statutory history as a tool of statutory interpretation.

B. Existing Literature

To date, the statutory interpretation literature has been fairly silent about the use of statutory history to determine a statute's meaning. A few scholars have made passing mention of statutory history—typically to note textualist jurists' willingness to consider such history as an interpretive resource despite textualism's strong stance against consulting other forms of legislative history.[37] Scholars have also

[35] Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 873 n.21 (1930); see also Victoria F. Nourse, Elementary Statutory Interpretation: Rethinking Legislative Intent and History, 55 B.C. L. Rev. 1613, 1615–16 (2014) (noting that "legislative history" encompasses three different forms of background context—evolution, semantic content as understood by Congress, and public documents—and recommending that the term legislative "history" be replaced with the term legislative "context").

[36] William N. Eskridge, Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 727 (6th ed. 2020); see also Eig, supra note 28, at 44 (discussing how legislative history includes comparisons between a statute and its predecessors and analysis of "differences among their language and structure").

[37] See, e.g., Caleb Nelson, What is Textualism?, 91 Va. L. Rev. 347, 361 (2005) ("[M]any textualists use records of a bill's drafting history (such as amendments made during the legislative process) to shed light on how members of the enacting legislature understood the resulting statute, and they let that information control their own interpretations of the statutory language."); John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 737 n.272 (1997) ("[I]t is worth noting that textualist judges also do not categorically exclude a statute's drafting evolution from their consideration of statutory context."); William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 204–05 (2016) (observing that all judges are willing to consider

occasionally used the history of individual statutes to make case-specific arguments about the proper way to interpret a particular statute.[38]

Only one article thus far has examined the judicial use of statutory history in any depth. That article, authored by James Brudney and Lawrence Baum, focused on differences in the approaches to statutory interpretation taken by the courts of appeals and the U.S. Supreme Court and contains a few paragraphs discussing statutory history, or what the authors call "vertical legislative history."[39]

Brudney and Baum's primary finding regarding "vertical legislative history" was that the U.S. Supreme Court invokes this form of history more frequently than do the courts of appeals—and that nearly one-third of the Court's legislative-history-invoking opinions reference this form of vertical, or statutory, history.[40] In particular, Brudney and Baum theorize that while the courts of appeals make only "modest" use of vertical legislative history, such history is "more attractive" to the Court's textualist Justices than other types of legislative history.[41] The authors note, for example, that even "legislative history skeptics," such as Justices Scalia and Thomas, invoked vertical legislative history in some of the opinions they authored. Furthermore, none of the opinions that referenced vertical legislative history led with apologetic prefatory phrases such as "for those who find legislative history useful," even though it has become commonplace for such prefatory language to precede the Court's references to other forms of legislative history.[42] Based on these empirical and doctrinal observations, Brudney and Baum

"statutory history" consisting of "formal changes in the Code made by the legislature when it enacts new laws and amends them over time"); see also Krishnakumar, Dueling Canons, supra note 20, at 986 (noting that even the most "ardent" textualist Justices are "willing to consult evidence of how a particular statutory phrase or provision evolved over time").

[38] See, e.g., William N. Eskridge, Jr., Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections, 127 Yale L.J. 322, 347–77 (2017); Matthew Powers & Steven Carlson, The Evolution and Impact of the Doctrine of Willful Patent Infringement, 51 Syracuse L. Rev. 53, 67–68 (2001); Mary Bedikian, The Pernicious Reach of 26 U.S.C. Section 6672, 13 Va. Tax Rev. 225, 232–35 (1993).

[39] See Brudney & Baum, supra note 19, at 716, 721.

[40] Brudney and Baum compared U.S. Supreme Court cases involving criminal law, business and commercial law, and labor and employment law with a sampling of cases decided by the Second, Seventh, and Tenth Circuits involving the same three subject areas. See id. at 702. They found that 32.5% of the Supreme Court opinions that invoked legislative history referenced statutory history, whereas only 9.3% of the court of appeals opinions that invoked legislative history invoked statutory history. See id. at 716 & tbl.6.

[41] Id. at 688–89.

[42] See id. at 721–22 & nn.233–36.

posit that "[a]lthough vertical legislative history may be understood as one means of ascertaining legislative intent, it also might be viewed as an acceptable proxy for textualist interpretation."[43] Finally, Brudney and Baum observed that while there were "no strong patterns" in the Justices' references to statutory history, textualist-leaning Justices Kennedy and Alito were among those who invoked this form of legislative history most frequently.[44]

In short, Brudney and Baum's work provides empirical support for the anecdotal observation, made by a handful of legislation scholars before them, that textualist jurists are more favorably inclined to use statutory history as an interpretive resource than they are to use traditional legislative history. Their work also broadens our collective knowledge about judges' on-the-ground use of statutory history by showing that the U.S. Supreme Court invokes such history more frequently than do the lower courts.

But many gaps remain in our understanding of this interpretive tool. The literature thus far contains no deep analysis of how precisely judges use a statute's history to determine its present-day meaning. No one has sought to identify patterns in judicial reasoning or to catalogue the different forms of inferences jurists draw when comparing earlier versions of a statute to later enacted (or amended) versions. Nor does the existing literature contain any normative or theoretical assessment of whether it *makes sense* for textualist judges to reject traditional legislative history—and related background context evidence such as the mischief that motivated the legislature to enact a statute or evidence of legislative inaction—while embracing statutory history as a valid interpretive resource.

Part II provides a catalogue of five different forms of judicial inferences that the U.S. Supreme Court regularly draws from a statute's history. Part III explores the theoretical implications of the Court's use of such statutory history—arguing that the practice of inferring meaning based on text-to-text comparisons and logical inferences entails a fair amount of judicial discretion as well as decontextualizes the interpretive endeavor in perhaps underappreciated ways. Part III also suggests that at least some of the inferences the Court draws from statutory history mirror the inferences that interpreters draw from the mischief that

[43] Id. at 721.
[44] See id. at 722.

motivated the statute and various forms of legislative inaction and that if textualist jurists are willing to infer meaning from statutory history, they should also be willing to check the inferences they draw against other forms of contextual evidence generated by the legislative process that produced the statute.

II. INFERRING MEANING FROM STATUTORY HISTORY

This Part reports data based on quantitative and qualitative analysis of ninety-six statutory interpretation opinions decided during the Roberts Court's 2005 through 2018 Terms[45] that invoked a statute's history. The study draws on data from a larger study of 574 statutory interpretation cases decided by the Roberts Court between January 31, 2006, and July 1, 2019. Section II.A describes the methodology by which the cases reviewed for the study were gathered and coded. Section II.B presents quantitative data regarding the frequency with which the Roberts Court as a whole, and its individual members, employed statutory history in the Court's statutory interpretation cases. Section II.C provides a catalogue of the different forms of judicial inferences the members of the Court tend to draw from statutory history, discussing several specific cases and noting patterns in the Court's analysis.

A. Methodology

This Article draws on empirical data from a larger study of 574 statutory interpretation cases decided by the Roberts Court. The cases in the dataset were compiled in the following manner: every case decided by the U.S. Supreme Court between January 31, 2006 and July 1, 2019 was examined to determine whether it dealt with a statutory issue. Any case in which the Court's opinion contained a substantial discussion about statutory meaning was included in the study. Cases that involved the Federal Rules of Civil Procedure (or other federal rules) were not included,[46] but a handful of constitutional cases in which the Court construed the meaning of a federal statute were included. This selection

[45] The 2005 Term cases include only cases decided after January 31, 2006—the date that Justice Alito joined the Court.

[46] I made this judgment call because the FRCP are created in a manner that differs significantly from federal statutes—i.e., they are drafted by judges rather than Congress and do not require the President's approval. Accordingly, several interpretive tools used to construe statutes are not available, or provide a very different kind of context, when used to construe the FRCP—e.g., legislative history, intent, the whole act rule, the whole code rule.

methodology yielded 574 statutory cases, with 574 majority or plurality opinions, 231 concurring opinions, 312 dissenting opinions, 35 part-concurring/part-dissenting opinions, and 4 part-majority/part-concurring opinions, for a total of 1,158 opinions. Of these, 285 cases were decided unanimously, and 290 were decided by a divided vote.[47]

Each opinion in each case was coded for references to the following interpretive tools: (1) plain meaning/textual clarity; (2) dictionary definitions; (3) grammar rules; (4) the whole act rule; (5) other statutes; (6) common law; (7) substantive canons; (8) Supreme Court precedent; (9) statutory purpose; (10) practical consequences; (11) legislative intent; (12) legislative history (including statutory history); (13) language canons; and (14) agency deference.[48] The interpretive resources coded for in this study are consistent with those examined in other empirical studies of the Court's statutory interpretation practices.[49] Opinions that referenced a statute's legislative history were also sub-coded for references to statutory history. As noted earlier, 96 of the 1,158 opinions studied referenced statutory history as an interpretive aid; those 96 opinions form the basis for the bulk of the analysis in this Article.

In recording the Court's use of individual interpretive tools, only references that reflected substantive judicial reliance on the tool were counted. Where an opinion mentioned an interpretive canon or tool but rejected it as inapplicable, that was not coded as a reference to the canon

[47] This figure counts as unanimous all cases in which there was no dissenting opinion, even if concurring opinions offering different rationales were issued.

[48] In order to reduce the risk of inconsistency, I and at least one research assistant separately read each opinion and separately recorded the use of each interpretive resource. In the event of disagreement, I reviewed the case and made the final coding determination. For a detailed explanation of my coding methodology, see Anita S. Krishnakumar, Cracking the Whole Code Rule, 96 N.Y.U. L. Rev. 76, 167–72 (2021) [hereinafter Krishnakumar, Whole Code Rule] (Codebook). At the outset of the study, I did not keep track of intercoder reliability, but I began doing so when coding cases from the 2017–2018 terms. The intercoder agreement rate (between myself and my research assistants) for those terms was 89.0%. This is within typical acceptable intercoder reliability rates. See K.A. Neuendorf, The Content Analysis Guidebook 143 (2002).

[49] See, e.g., Jane Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 11–12 (1998); James Brudney & Corey Ditslear, Canons of Construction and the Elusive Quest for Neutral Reasoning, 58 Vand. L. Rev. 1, 30 (2005); Frank B. Cross, The Theory and Practice of Statutory Interpretation 143 (2009) (providing tables for interpretive sources and coding individually for specific interpretive tools).

or tool.[50] Secondary or corroborative references to an interpretive tool, on the other hand, were counted; thus, where the Court reached an interpretation based primarily on one interpretive source but went on to note that x, y, and z interpretive tools further supported that interpretation, the references to x, y, and z were coded along with the primarily relied-upon source.[51]

In addition, each Justice's vote in each case was recorded, as were the authors of each opinion. This methodology was the same as that followed in my previous empirical studies.[52]

Last, every opinion that invoked statutory history was coded for placing "minimal reliance," "some reliance," or "heavy reliance" on such history. While this coding necessarily involved some judgment calls, I believe it adds valuable texture to our understanding of *how* the Court uses statutory history when it chooses to invoke it. In any event, my data and coding decisions are available for others to review and agree or disagree with. The coding parameters for reliance were as

[50] An example may help illustrate. In *Stokeling v. United States*, 139 S. Ct. 544 (2019), the Court considered whether a robbery offense that lists as an element the use of "force sufficient to overcome a victim's resistance" counts as a "violent felony" under the Armed Career Criminal Act ("ACCA"). The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). Thus, the statutory question was whether the use of "force sufficient to overcome a victim's resistance" qualifies as "physical force" under the ACCA. The Court concluded that it does, relying primarily on the common law combined with the ACCA's statutory history. Specifically, the Court noted that the previous version of the ACCA incorporated the common law of robbery's definition of "force" as "force sufficient to overcome a victim's resistance"—and reasoned that because the amended statute retained the term "force," it too should be read to incorporate the common law definition. *Stokeling*, 139 S. Ct. at 551–52. The opinion was coded for reliance on common law and statutory history (among other interpretive tools). Justice Sotomayor dissented, relying primarily on precedent and statutory purpose. Her opinion disagreed with the majority's statutory history inference that, in retaining the term "force," the amended ACCA necessarily incorporated the common law definition of robbery. See id. at 561–62. Justice Sotomayor's dissent was coded for reliance on precedent and statutory purpose, but not statutory history.

[51] For example, in *Stokeling*, discussed above, the majority opinion supported its common law and statutory history arguments with dictionary definitions, references to state robbery statutes, practical reasoning, and precedent. See *Stokeling*, 139 S. Ct. at 552–54. Although the opinion referenced these other interpretive tools to "buttress[]" the reading it arrived at based on common law and statutory history, the opinion was coded for reliance on dictionary definitions, other statutes, practical consequences, and precedent in addition to common law and statutory history. Id. at 552.

[52] See Krishnakumar, Whole Code Rule, supra note 48, at 94; Anita S. Krishnakumar, Reconsidering Substantive Canons, 84 U. Chi. L. Rev. 825, 841–43 (2017); Krishnakumar, Dueling Canons, supra note 20, at 921–23.

follows: An opinion was coded for "minimal reliance" on statutory history if it made passing reference to statutory history (as in a footnote or quick aside). An opinion was coded for "some reliance" if it made more than minimal reference to a statute's history—e.g., leading with other interpretive tools and then noting that the statute's history "reinforces" or "supports" the chosen construction. Finally, an opinion was coded for "heavy reliance" if it relied primarily or heavily on statutory history to justify the interpretation it adopted.[53]

B. Statutory History Statistics

Before reporting the data, it is important to note some limitations of this study. First, the study covers only thirteen-and-a-half Supreme Court terms and ninety-six statutory-history-invoking opinions, all decided by some combination of the same twelve Justices. While this dataset is large enough to teach us some valuable things about the Court's use of statutory history as an interpretive tool, the data reported may reflect trends specific to the Roberts Court. Second, great significance should not be placed on the precise percentages reported; the number of cases reviewed is large enough to provide some useful insights, but the focus should be on the patterns that emerge rather than

[53] Some examples may help illustrate: In *Schindler Elevator Corp. v. United States ex rel. Kirk*, the Court concluded that written FOIA responses from a government agency were "reports" subject to the False Claims Act's public disclosure bar. The majority opinion relied primarily on the statute's ordinary meaning, buttressed by dictionary definitions, the whole act rule, the *noscitur a sociis* canon, statutory purpose, and precedent. 563 U.S. 401, 407–10 (2011). Toward the end, it also noted that "[t]he drafting history of the public disclosure bar does not contradict our holding" and "[i]f anything . . . supports [it]." See id. at 412–13. The opinion was coded for "minimal reliance" on statutory history.

By contrast, the majority opinion in *Stokeling v. United States*, discussed *supra* note 50, relied primarily on the fact that a previous version of the ACCA incorporated the common law definition of "force" and concluded that the amended version must have the same meaning because it retained the term "force." 139 S. Ct. at 551–52. The opinion was coded for "heavy reliance" on statutory history.

Last, in *Burgess v. United States*, 553 U.S. 124 (2008), the Court held that a state drug offense punishable by more than one year qualifies as a "felony drug offense" under the Controlled Substances Act, even if state law classifies the offense as a misdemeanor. The majority relied primarily on the statute's language, structure, dictionary definitions, and comparisons to other similar statutes. See id. at 129–31. It then noted that "[t]he drafting history of the CSA reinforces our reading"—because a 1994 amendment expanded the definition of "felony drug offense" beyond just felonies, to include offenses "punishable by imprisonment for more than one year under any law." Id. at 133–34 (emphasis omitted). The opinion was coded for "some reliance" on statutory history.

on specific percentages. Third, in noting the weight, or intensity, of an opinion's reliance on statutory history, I make no claims to have discovered the Justices' underlying, or "true," motivations for deciding a statutory case; the data do not reveal whether an opinion referenced a statute's history because the opinion's author was persuaded by that history or merely because the author thought the statutory history provided a convincing justification for the chosen interpretation. The study's empirical and doctrinal claims are confined to describing how the Justices publicly engage a statute's history as a justification for their statutory constructions and to theorizing about discernable patterns in their public engagement of statutory history.

1. Frequency and Weight

Table 1 reports the frequency with which the members of the Roberts Court as a whole referenced various interpretive canons and tools. There were 1,158 opinions in the dataset; the columns break down the rates at which each interpretive tool was referenced across all opinions, as well as in majority, dissenting, concurring, and part-concurring/part-dissenting opinions.[54] As the Table shows, the Justices invoked statutory history in 96 (8.3%) of all opinions in the dataset, including 11.5% of the 574 majority opinions.[55] In addition, 15.7% of the 574 *cases* in the dataset contained at least one opinion that referenced statutory history.

[54] See infra Table 1.

[55] See id. These figures exclude three opinions counted by Brudney and Baum that considered, but rejected, an argument based on drafting history. See United States v. Hayes, 555 U.S. 415, 428 (2009); James v. United States, 550 U.S. 192, 200–01 (2007); United States v. Castleman, 572 U.S. 157, 172 (2014).

Table 1
Overall Roberts Court Rates of Reliance on Interpretive Canons and Tools
2005–2018 Terms

	All Opinions (n=1158)	Majority Opinions (n=574)	Dissenting Opinions (n=314)	Concurring Opinions (n=231)	Partial Opinions (n=39)
Canons / Interpretive Tools					
Text / Plain Meaning	40.3%	49.8%	36.0%	25.1%	25.6%
Dictionary Rule	22.2%	30.1%	18.8%	7.8%	17.9%
Other Statutes	21.2%	28.7%	21.0%	4.8%	10.3%
Common Law Precedent	11.9%	15.7%	8.3%	6.9%	15.4%
Substantive Canons	14.9%	16.7%	17.8%	6.9%	10.3%
Agency Deference	5.4%	5.7%	5.7%	2.6%	12.8%
Statutory History	8.3%	11.5%	8.6%	0.9%	2.6%
Legislative History (incl. Statutory History)	24.1%	27.9%	29.6%	8.7%	17.9%
Combined Language Canons / Grammar	8.7%	12.4%	7.0%	2.6%	5.1%
Whole Act Rule	27.9%	37.6%	26.1%	8.2%	15.4%
Supreme Court Precedent	57.9%	69.5%	52.9%	37.2%	54.3%
Practical Consequences	36.5%	37.5%	47.8%	20.3%	31.4%
Purpose	24.1%	28.0%	28.3%	9.5%	17.9%
Intent	11.3%	10.8%	18.2%	4.8%	2.6%

Tables 2a–2b report the relative rates at which the members of the Roberts Court referenced statutory history as compared to traditional legislative history in the opinions studied. As Table 2a shows, there were 279 opinions in the dataset that referenced some form of legislative history; 34.4% of these invoked statutory history[56]—a figure consistent with Brudney and Baum's findings in the cases they studied.[57] Table 2a also shows that, as a group, the textualist and textualist-leaning Justices authored close to half—42.7%—of the opinions in the dataset that invoked statutory history, whereas they authored a little under a quarter—23.0%—of the opinions in the dataset that invoked traditional legislative history.[58]

[56] See infra Table 2a.

[57] See Brudney & Baum, supra note 19, at 716 & tbl.6 (reporting that statutory history was invoked in 32.5% of cases that referenced legislative history).

[58] See infra Table 2a.

Table 2a
Roberts Court Rates of Reliance on Statutory History Versus Traditional Legislative History in Opinions that Invoke Legislative History
(n =279)

	All Legislative History-Invoking Opinions (n=279)	Opinions Authored by Textualist/ Textualist-Leaning Justices[59]	Opinions Authored by Non-Textualist Justices
Statutory History (n=96)[60]	34.4% (n=96/279)	42.7% (n=41)	57.3% (n=55)
Traditional Legislative History Only (Not Incl'ing Statutory History) (n=183)	65.6% (n=183/279)	23.0% (n=42)	77.0% (n=141)

Table 2b reports each individual Justice's relative rates of reference to statutory versus traditional legislative history in the opinions s/he authored that invoked legislative history. The Table reveals that the three most committed textualists to serve on the Roberts Court—Justices Scalia, Thomas, and Gorsuch—referenced statutory history more often than they referenced traditional legislative history in the opinions they authored, as did textualist-leaning Chief Justice Roberts.[61] By contrast, all of the Court's non-textualist Justices—Justices Breyer, Stevens, Ginsburg, Souter, Sotomayor, and Kagan—referenced traditional legislative history at notably higher rates than they referenced statutory

[59] For purposes of Table 2a, I classified Justices Thomas, Scalia, and Gorsuch as textualist and Chief Justice Roberts and Justices Alito, Kennedy, and Kavanaugh as textualist-leaning.

[60] Includes one per curiam opinion whose author is unknown.

[61] Of the opinions Justice Scalia authored that referenced some form of legislative history, 57.1% invoked statutory history; likewise, 61.5% of the legislative history-referencing opinions authored by Justice Thomas, 62.5% of the legislative history-referencing opinions authored by Chief Justice Roberts, and a whopping 85.7% of the legislative history-referencing opinions authored by Justice Gorsuch also invoked statutory history. See infra Table 2b.

history.[62] Justices Alito's and Kennedy's relative rates of reference to these two forms of legislative history were similar to those of the non-textualist Justices; both Justice Alito and Justice Kennedy invoked traditional legislative history in nearly two-thirds of the opinions and statutory history in roughly one-third of the opinions they authored that referenced one of these forms of history.[63]

[62] See id. The non-textualist Justices' rates of reference to statutory history ranged from 20.0% to 43.5%; by contrast, their rates of reference to traditional legislative history ranged from 56.5% to 80.0%.

[63] See id.

Table 2b
Individual Justices' Rates of Reliance on Traditional Legislative History Versus Statutory History in Opinions that Invoke Some Form of Legislative Record Materials[64] (n=95)[65]

		Statutory History		Traditional Legislative History Only	
Scalia	(n=7)	57.1%	(n=4)	42.9%	(n=3)
Thomas	(n=13)	61.5%	(n=8)	38.5%	(n=5)
Alito	(n=27)	37.0%	(n=10)	63.0%	(n=17)
Roberts	(n=8)	62.5%	(n=5)	37.5%	(n=3)
Kennedy	(n=21)	38.1%	(n=8)	61.9%	(n=13)
Souter	(n=10)	20.0%	(n=2)	80.0%	(n=8)
Ginsburg	(n=40)	32.5%	(n=13)	67.5%	(n=27)
Breyer	(n=60)	26.7%	(n=16)	73.3%	(n=44)
Stevens	(n=23)	43.5%	(n=10)	56.5%	(n=13)
Sotomayor	(n=40)	20.0%	(n=8)	80.0%	(n=32)
Kagan	(n=20)	25.0%	(n=5)	75.0%	(n=15)
Gorsuch	(n=7)	85.7%	(n=6)	14.3%	(n=1)

[64] Percentages reported in each row represent the number of opinions authored by each Justice that invoked the listed interpretive canon, divided by the total number of statutory interpretation opinions each Justice authored (that total number is reported below each Justice's name, as *n=X*).

[65] The total number of opinions reflected in Table 2b is 95, rather than 96, because the Table omits one per curiam opinion that invoked statutory history.

Table 2c reports the percentage of statutory history opinions that also referenced traditional legislative history—often to back up or corroborate the interpretive inference the opinion drew from statutory history. The Table reports both the overall rate of statutory + traditional legislative history references (47.4%) as well as the rate for opinions authored by each individual Justice.[66] The data show that, with the exception of Justices Kennedy (87.5%) and Sotomayor (25.0%), the non-textualist Justices employed traditional legislative history alongside statutory history at far higher rates than did their textualist counterparts.[67]

[66] See infra Table 2c.
[67] See id.

Table 2c
Individual Justices' Rates of Reference to Traditional Legislative History as Back-Up in Opinions that Invoke Statutory History
2005–2018 Terms

Authoring Justice	Statutory History Opinions that also Referenced Traditional Legislative History
Scalia (n=4)	0.0% (n=0)
Thomas (n=8)	0.0% (n=0)
Alito (n=10)	30% (n=3)
Gorsuch (n=6)	33.3% (n=2)
Roberts (n=5)	20% (n=1)
Kennedy (n=8)	87.5% (n=7)
Souter (n=2)	50.0% (n=1)
Ginsburg (n=13)	53.8% (n=7)
Breyer (n=16)	81.3% (n=13)
Stevens (n=10)	70.0% (n=7)
Sotomayor (n=8)	25.0% (n=2)
Kagan (n=5)	40.0% (n=2)
Total (n=95)	47.4% (n=45)

Last, Table 2d reports the rates at which each individual Justice who has served on the Roberts Court referenced each interpretive tool in the

opinions she authored.[68] The Table shows that Justice Gorsuch was by far the most frequent user of statutory history—citing such history in 26.1% of the opinions he authored.[69] Justices Stevens (16.4%), Ginsburg (11.1%), Breyer (11.2%), and Kennedy (10.4%) were the next most frequent users of statutory history in the opinions they authored.[70] The Table also reveals that textualist-leaning Justices Alito and Kennedy were generally more open to the use of traditional legislative history and other non-textualist interpretive tools—including statutory purpose and intent—than were the Court's most ardent textualists, Justices Scalia, Thomas, and Gorsuch.[71]

[68] Justice Kavanaugh was not included in Table 2d because he authored only seven opinions during the period studied.

[69] See infra Table 2d.

[70] See id.

[71] See id.

Table 2d
Individual Justices' Rates of Reliance on Different Forms of Interpretive Tools, by Opinion Author[72]
(n=1119)[73]

Canons / Interpretive Tools	Scalia (n=127)	Thomas (n=170)	Alito (n=126)	Roberts (n=79)	Kennedy (n=77)	Souter (n=35)
Text / Plain Meaning*	0.528	0.482	0.429	0.418	0.416	0.486
S. Ct. Precedent	0.48	0.565	0.548	0.658	0.662	0.543
Dictionary* Definitions	0.205	0.241	0.286	0.165	0.234	0.171
Whole Act Rule	0.260	0.294	0.302	0.342	0.273	0.314
Language Canons / Grammar*	0.087	0.124	0.095	0.089	0.117	0.057
Statutory History	0.031	0.047	0.079	0.063	0.104	0.057
Tradtional Legis. Hist.*	0.024	0.029	0.159	0.063	0.260	0.257
Whole Code	0.157	0.159	0.302	0.291	0.221	0.229
Common Law	0.118	0.010	0.167	0.152	0.065	0.143
Substantive Canons	0.134	0.129	0.127	0.215	0.182	0.143
Practical Consequences*	0.283	0.182	0.429	0.354	0.519	0.314
Purpose*	0.102	0.100	0.206	0.114	0.442	0.171
Intent*	0.039	0.018	0.135	0.063	0.065	0.229

[72] Percentages reported in each row represent the number of opinions authored by each Justice that invoked the listed interpretive canon, divided by the total number of statutory interpretation opinions each Justice authored (that total number is reported below each Justice's name, as *n=X*).

[73] The total number of opinions reflected in Table 2d is 1,119, rather than 1,158, because Table 2d omits 32 per curiam opinions and 7 opinions authored by Justice Kavanaugh during the period studied.

	Ginsburg (n=117)	Breyer (n=143)	Stevens (n=61)	Sotomayor (n=103)	Kagan (n=58)	Gorsuch (n=23)
Text / Plain Meaning*	0.265	0.245	0.426	0.427	0.483	0.478
S. Ct. Precedent	0.538	0.573	0.541	0.612	0.552	0.696
Dictionary* Definitions	0.12	0.175	0.164	0.32	0.397	0.435
Whole Act Rule	0.222	0.217	0.213	0.427	0.276	0.435
Language Canons / Grammar*	0.06	0.056	0.049	0.126	0.052	0.130
Statutory History	0.111	0.112	0.164	0.078	0.086	0.261
Tradtional Legis. Hist.*	0.299	0.399	0.328	0.33	0.293	0.087
Whole Code	0.231	0.182	0.148	0.252	0.172	0.478
Common Law	0.068	0.133	0.164	0.146	0.138	0.130
Substantive Canons	0.171	0.105	0.246	0.136	0.190	0.130
Practical Consequences*	0.402	0.483	0.295	0.466	0.362	0.478
Purpose*	0.35	0.392	0.295	0.272	0.397	0.130
Intent*	0.145	0.168	0.410	0.184	0.034	0.000

* Indicates that one-way ANOVA test, using Bonferroni multiple comparison test, reveals a significant difference between rates of reliance by different Justices in the opinions they authored at $p < .05$. (For Text / Plain Meaning p=.0000; Dictionary Definitions p=.0001; Whole Act/Language Canons p=.0001; Practical Consequences p=.0000; Purpose p=.0000; for Intent p=.0000; and for Legislative History p=.0000). In other words, for these particular interpretive tools, the patterns or differences in rates of reference across Justices were less than 5.0% likely to have occurred merely by chance.

Taken together, the data reported in Tables 2a–2d suggest that (1) the Court's most committed textualist Justices find statutory history more attractive than traditional legislative history; (2) the Court's non-textualist Justices employ traditional legislative history at greater relative rates than they do statutory history—although they also reference statutory history on a regular basis; and (3) two of the Court's

textualist-leaning Justices, Justices Kennedy and Alito, make regular use of statutory history but reference traditional legislative history more frequently than statutory history.[74] These findings are consistent with those reported in Brudney and Baum's earlier study—with the noteworthy exception that Justice Gorsuch, a committed textualist who was not on the Court during the period Brudney and Baum studied, leads the textualist Justices in rates of references to statutory history.

The data also reveal some interesting information about the weight the Justices placed on statutory history in the opinions in which they invoked it. Table 3 reports how often the members of the Roberts Court placed "minimal," "some," or "heavy" reliance on statutory history when they employed this interpretive tool.[75]

[74] See supra Tables 2b, 2d.
[75] See infra Table 3.

Table 3
Relative Weight Placed on Statutory History
2005–2018 Terms

	Minimal Reliance (n=12)	Some Reliance (n=64)	Heavy Reliance (n=20)
All Opinions that Employ Statutory History (n=96)	12.5% (n=12)	66.7% (n=64)	20.8% (n=20)
Majority Opinions (n=66)	16.7% (n=11)	63.6% (n=42)	19.7% (n=13)
Concurring Opinions (n=2)	0.0% (n=0)	50.0% (n=1)	50.0% (n=1)
Dissenting Opinions (n=27)	3.7% (n=1)	77.8% (n=21)	18.5% (n=5)
Partial Opinions (n=1)	0.0% (n=0)	0.0% (n=0)	100.0% (n=1)

The data show that the members of the Roberts Court rarely invoked a statute's history in a passing, or "minimal," manner (12.5% of the opinions).[76] The Justices placed "heavy" emphasis on statutory history in one-fifth (20.8%) of the opinions in which they invoked such history;[77] and the vast majority of statutory history opinions placed "some" intermediate weight on this interpretive resource, meaning that the opinion relied on the statute's history as one of several factors that supported a particular statutory construction.[78] The typical formulation

[76] See id.
[77] See id.
[78] See id. 66.7% of opinions that employed statutory history placed "some" weight on such history.

was as follows: The opinion began with an analysis of the statute's ordinary meaning and went on to note that the statute's history "underscored" or "further supported" the chosen reading.[79] In other words, the members of the Roberts Court typically used statutory history to corroborate a statutory construction arrived at through other interpretive tools—i.e., they used statutory history in precisely the manner in which Justice Scalia and other new textualists have refused to employ traditional legislative history.[80]

Overall, the data described above paint a picture of statutory history as an interpretive tool that is widely accepted by all of the Justices on the Roberts Court—although it is invoked in a relatively small subset of the Court's statutory cases. The members of the Roberts Court tended to reference other interpretive tools, such as plain meaning, precedent, practical consequences, the whole act rule, and dictionary definitions, far more often than they invoked statutory history—but they used statutory history to infer meaning at rates comparable to the rates at which they invoked language and grammar canons *combined*.[81] Moreover, the frequency with which the Justices invoked statutory history in the opinions they authored did not seem to depend on a Justice's preferred interpretive methodology. This suggests that statutory history may be playing an underappreciated role in the Court's statutory interpretation cases, and one worth examining.

2. Forms of Statutory History

As noted earlier, the Court's statutory history references tended to take two distinct forms: (1) references to successive versions of the statute considered by Congress during the drafting process ("drafting history"); or (2) references to the ways that a statutory amendment enacted by a subsequent Congress changed the regulatory scheme established by a previously enacted statute ("amendment history").

[79] See, e.g., United States v. Ressam, 553 U.S. 272, 274–75 (2008) ("further supports"); WesternGeco LLC v. Ion Geophysical Corp., 138 S. Ct. 2129, 2139–42 (2018) (Gorsuch, J., dissenting) ("underscores"); Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734, 741–43 (2017) ("bolsters").

[80] See, e.g., Samantar v. Yousef, 560 U.S. 305, 326–27 (2010) (Scalia, J., concurring) (criticizing majority's "needless[]" use of legislative history to corroborate textual analysis); Digit. Realty Tr. v. Somers, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring, joined by Alito & Gorsuch, JJ.) (refusing to join the portion of the Court's opinion that references a Senate committee report for corroboration).

[81] See supra Table 2d.

Table 4 reports the rates at which the members of the Roberts Court referenced drafting history and amendment history in the majority, dissenting, concurring, and partial opinions in which they invoked statutory history. As the Table reveals, the Justices invoked drafting history in one-fourth (25.0%) of the opinions in which they referenced statutory history.[82] The vast majority of opinions that invoked statutory history (67.7%) referenced amendment history; while seven opinions (7.3%) referenced both drafting history *and* amendment history.[83]

Table 4
Roberts Court Rates of Reliance on Different Forms of Statutory History
2005–2018 Terms

	Overall (n=96)	Majority Opinions (n=66)	Dissenting Opinions (n=27)	Concurring Opinions (n=2)	Partial Opinions (n=1)
Drafting History	25.0% (n=24)	19.7% (n=13)	33.3% (n=9)	0.0% (n=0)	100.0% (n=1)
Amendment History[84]	67.7% (n=65)	69.7% (n=46)	63.0% (n=17)	100.0% (n=2)	0.0% (n=0)
Drafting History & Subsequent Amendments	7.3% (n=7)	10.6% (n=7)	0.0% (n=0)	0.0% (n=0)	0.0% (n=0)

Table 5 reports the rates at which the textualist and textualist-leaning Justices as a group, and the non-textualist Justices as a group, employed drafting versus amendment history.

[82] See infra Table 5.
[83] See infra Table 4.
[84] Includes four opinions that relied on statutory history surrounding the enactment of a new statute that displaced an older statute, rather than an amendment.

Table 5
Reliance on Different Forms of Statutory History by Methodological Cohort
2005–2018 Terms
(n=95)[85]

	Textualist & Textualist-Leaning Justices (n=41)	Non-Textualist Justices (n=54)
Drafting History[86] (n=24)	19.5% (n=8)	29.6% (n=16)
Amendment History[87] (n=64) (no per curiam)	73.2% (n=30)	63.0% (n=34)
Drafting History & Amendment History (n=7)	7.3% (n=3)	7.4% (n=4)

As the Table reveals, drafting history featured in a little under one-third (26.9%) of the statutory history opinions authored by the Roberts Court's textualist and textualist-leaning Justices and a little over one-third (37.0%) of the statutory history opinions authored by the Court's non-textualist Justices.[88]

As Section II.C elaborates, the Court used these two forms of statutory history in similar ways—i.e., to draw logical inferences about statutory meaning. But drafting history shares some features of traditional legislative history that amendment history does not. Like traditional legislative history, drafting history consists of legislative record evidence from a statute's pre-enactment stages. Amendment history, by contrast, consists of predecessor statutes that were enacted into law by an earlier Congress (and President)—i.e., it is comprised entirely of post-enactment materials. Thus, the Court's—and

[85] Table 5 omits one per curiam opinion whose author (and his/her methodological leanings) is unknown.

[86] Includes one opinion that employed more than one form of statutory history inference.

[87] Includes eight opinions that employed more than one form of statutory history inference.

[88] See supra Table 5 (indicating that eleven of forty-one textualist-authored statutory history opinions employed drafting history, while twenty of fifty-four non-textualist-authored statutory history opinions referenced drafting history; these figures include opinions that employed both drafting and amendment history).

particularly textualist Justices'—preference for amendment history appears, at least at first glance, to be consistent with a broader skepticism about traditional legislative history and a growing preference for text-based tools. At the same time, however, some forms of amendment history have much in common with the mischief rule and legislative inaction—two interpretive tools typically associated with purposivism and rejected by textualists. Part III explains this commonality in detail and explores its theoretical implications. But before turning to such comparisons, Section II.C catalogues the different forms of inferences the Roberts Court tends to draw from both drafting and amendment history.

C. Forms of Judicial Inferences

This Section provides some texture to the numerical data reported in Section II.B. Specifically, it examines several cases that illustrate in detail how the Roberts Court employs statutory history to interpret statutes. There are five different forms of inferences that the Justices tend to draw from a statute's drafting or amendment history: (1) "meaningful revision" inferences reasoning that Congress's decision to omit or add specific language to a statute reflects a deliberate decision to broaden or narrow the statute's scope; (2) "effective reenactment" inferences concluding that subsequent amendments do not alter a statute's meaning on the relevant point; (3) "override or underwrite" inferences that advocate interpreting a statute in light of Congress's efforts to revise the statute to repudiate—or conversely, to codify—a judicial decision; (4) "rejected proposal" inferences determining that where Congress considered and rejected language supporting a particular policy during the legislative process, the statute should not later be read to encompass that policy; and (5) a small subset of "other" inferences that drew conclusions about a statute's meaning based on *expressio unius*, the whole act or whole code rules, or other similar logical comparisons between earlier and later versions of a statute. Table 6 reports the frequency with which the Court employed each of these forms of statutory history inferences.

Table 6
Roberts Court Rates of Reliance on Different Forms of Judicial Inferences in Opinions that Invoke Statutory History 2005–2018 Terms

	Total (n=96)[89]	Drafting History (n=25)	Amendment History[90] (n=65)	Drafting & Amendment History (n=7)[91]	Plus Traditional Legislative History
Form of Judicial Inference					
Meaningful Revision	29.2% (n=29)	44.0% (n=11)	26.2% (n=17)	14.3% (n=1)	55.2% (n=16)
Effective Reenactment[92]	29.2% (n=29)	8.0% (n=2)	40.0% (n=26)	14.3% (n=1)	37.9% (n=11)
Overrides & Underwrites[93]	20.8% (n=20)	4.0% (n=1)	29.2% (n=19)	0.0% (n=0)	40.0% (n=8)
Rejected Proposals[94]	15.6% (n=15)	36.0% (n=9)	0.0% (n=0)	85.7% (n=6)	66.7% (n=10)
Other[95]	9.8% (n=9)	8.0% (n=2)	10.8% (n=7)	0.0% (n=0)	33.3% (n=3)

Table 7 similarly reports the frequency with which individual Justices on the Roberts Court employed each of these forms of statutory history inferences.

[89] Includes five opinions that employed two of the below forms of interpretive inferences.
[90] Includes four opinions that drew more than one form of interpretive inference.
[91] Includes one opinion that drew both an effective reenactment and a rejected proposal inference.
[92] Includes seven opinions that made an effective reenactment as well as another form of inference.
[93] Includes five opinions that made an overrides and underwrites as well as another form of inference.
[94] Includes one opinion that made a rejected proposal as well as an effective reenactment inference.
[95] Includes one opinion that made both an effective reenactment and another form of inference.

Table 7
Individual Justices' Rates of Reliance on Different Forms of Inferences in Opinions that Invoke Statutory History by Opinion Author[96] (n=95)[97]

		Meaningful Revision	Effective Reenactment[98]	Overrides & Underwrites	Rejected Proposal[99]	Other
Scalia	(n=4)	25.0%	0.0%	50.0%	0.0%	25.0%
Thomas	(n=8)	0.0%	75.0%	12.5%	12.5%	0.0%
Alito	(n=10)	30.0%	30.0%	0.0%	20.0%	20.0%
Roberts	(n=5)	20.0%	0.0%	20.0%	40.0%	20.0%
Kennedy[100]	(n=8)	25.0%	37.5%	37.5%	25.0%	0.0%
Souter	(n=2)	100.0%	0.0%	0.0%	0.0%	0.0%
Ginsburg[101]	(n=13)	23.1%	38.5%	30.0%	7.7%	7.7%
Breyer	(n=16)	37.5%	12.5%	18.75%	25.0%	6.25%
Stevens[102]	(n=10)	30.0%	30.0%	20.0%	20.0%	10.0%
Sotomayor	(n=8)	37.50%	37.50%	12.50%	0.00%	12.50%
Kagan	(n=5)	40.00%	20.00%	20.00%	20.00%	0.00%
Gorsuch[103]	(n=6)	50.00%	33.30%	33.30%	0.00%	0.00%

The next several Subsections explore in detail the five forms of statutory history inferences identified above and the Court's use or non-use of traditional legislative history to buttress them. Some of these

[96] Percentages reported in each row represent the number of opinions authored by each Justice that invoked the listed interpretive canon, divided by the total number of statutory interpretation opinions each Justice authored (that total number is reported below each Justice's name, as *n=X*).

[97] Table 7 omits one per curiam opinion whose author is unknown.

[98] Reflects six opinions that drew both effective reenactment and other forms of inferences.

[99] Reflects one opinion that drew both rejected proposal and effective reenactment inferences.

[100] Includes two opinions that drew both effective reenactment and other forms of inferences and that are counted under both forms.

[101] Reflects one opinion that drew both an effective reenactment inference and an overrides and underwrites inference and that was counted under both forms.

[102] Reflects one opinion that drew both an effective reenactment inference and an overrides and underwrites inference and that was counted under both forms.

[103] Reflects one opinion that drew both an effective reenactment inference and an overrides and underwrites inference and that was counted under both forms.

inferences are technical or logic-based, while others are more context-based. All involve at least some guesswork and speculation—and raise important theoretical questions about judicial discretion and the relative legitimacy of interpretive resources. It is worth exploring each of these forms of inference in detail because while some are consistent with the justifications textualists have offered for treating statutory history differently from traditional legislative history, others, such as the overrides and underwrites and rejected proposal forms, more closely resemble some of the purposive interpretive tools that textualists have criticized.

1. Meaningful Revision

The meaningful revision form of statutory history inference is similar, in many ways, to the meaningful variation subpart of the whole act rule. In the whole act context, the meaningful variation rule dictates that "a change of wording" between one statutory provision and another provision in the same statute "denotes a change in meaning."[104] Thus, the Court regularly instructs that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[105] The meaningful variation presumption has been extended to comparisons between different statutes that contain parallel, or similar, provisions, such that differences in the precise language used in the two statutes are presumed to reflect a congressional design that the two statutes mean different things.[106]

In the statutory history context, the meaningful revision category describes two related forms of inference that the Roberts Court tends to draw from a statute's history: (1) inferences that Congress's decision to omit language contained in one version of a statute when enacting a later

[104] P. St. J. Langan, Maxwell on the Interpretation of Statutes 282 (12th ed. 1969).

[105] See, e.g., Dean v. United States, 556 U.S. 568, 573 (2009); Russello v. United States, 464 U.S. 16, 23 (1983); Barnhart v. Sigmund Coal Co., 534 U.S. 438, 452 (2002).

[106] 2B Sutherland, Statutes and Statutory Construction § 51:2 (7th ed. 2012) ("[C]ourts presume a different intent when a legislature omits words used in a prior statute on a similar subject. More broadly, where a legislature inserts a provision in only one of two statutes that deal with a closely related subject, courts construe the omission as deliberate rather than inadvertent."); Krishnakumar, Whole Code Rule, supra note 48; see also Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619–20 (2018); United States v. Hayes, 555 U.S. 415, 421–22 (2009).

version of the statute reflects a deliberate decision to limit or otherwise change the statute's reach; and (2) inversely, inferences concluding that when Congress adds specific language to a new version of a statute or replaces existing language with new terms, that addition or replacement reflects a deliberate decision to bring the added items within the statute's reach.

Consider, for example, *BNSF Railway Co. v. Loos*, which raised the question whether a railroad's payment to an employee for work time lost due to an on-the-job injury counts as taxable "compensation" under the Railroad Retirement Tax Act ("RRTA").[107] A majority of the Court concluded that such payments are "taxable" compensation, relying on agency deference, a whole code comparison to the contemporaneously enacted Federal Insurance Contributions Act ("FICA"), and precedents interpreting FICA.[108] The majority also disagreed with the lower court's take on the RRTA's statutory history—arguing that amendments deleting the statute's express reference to pay for time lost as "compensation" were merely technical, relating to a change in how "compensation" is computed, and did not change the substance of what counts as "compensation."[109]

Justice Gorsuch dissented, relying on several interpretive tools including the statute's plain text, dictionary definitions, practical consequences, other statutes, and the statutory history rejected by the majority.[110] Like the majority, the dissent noted that the RRTA originally defined "compensation" to include remuneration "for time lost" and that Congress later amended the statute to remove this language.[111] However, Justice Gorsuch drew a different inference from this statutory revision, reasoning that "Congress's decision to remove the *only* language that could have fairly captured" the payments at issue *indicated* that such payments no longer count as taxable "compensation" under the RRTA.[112] To construe the statute otherwise, he argued, would mean that, "when Congress first added and then removed language about time lost and personal injuries, it quite literally wasted its time because none of its additions and subtractions altered the statute's

[107] 139 S. Ct. 893, 897 (2019).
[108] See id. at 897–900.
[109] See id. at 900–01.
[110] See id. at 904–07 (Gorsuch, J., dissenting).
[111] See id. at 907.
[112] Id.

meaning."[113] The dissent criticized the plaintiff for "read[ing] back into the law words (time lost, personal injury) that Congress deliberately removed" and called such interpretive practices "less 'a construction of a statute [than] an enlargement of it by the court.'"[114]

Notably, Justice Gorsuch's opinion painted its statutory reading as following inevitably from Congress's revisions to the RRTA's text—treating the process of legislative amendment almost like a math problem, with "additions" and "subtractions."[115] Indeed, Justice Gorsuch used statutory history almost as a linguistic tool, casting his conclusions as based on a purely text-to-text comparison and a cold, logical inference that *A – B = A and only A*. In so doing, Justice Gorsuch assumed for himself (and the judiciary) the task of defining the policy intentions—mere technical change versus fundamental change in coverage—behind Congress's decision to delete the term "compensation" from the statute. Moreover, he reached this logical conclusion without the help of any corroborating legislative record or other contemporaneous evidence of Congress's intent.[116] (Justice Ginsburg's majority opinion, by contrast, referenced House and Senate committee reports as well as contemporaneous and longstanding IRS regulations.)[117] This is noteworthy because it is similar to the decontextualized manner[118] in which textualist Justices often apply other interpretive tools—such as language and grammar canons, dictionary definitions, and the whole act rule—except that in this case, the interpretive tool at issue is intimately connected to the legislative process.

[113] Id.

[114] Id. (quoting W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991)).

[115] See id.

[116] Justice Gorsuch did draw a meaningful variation comparison between the amended RRTA to the Railroad Retirement Act, which retained the "pay for time lost" language deleted from the RRTA—but that other statute comparison is just another form of negative logical inference, rather than concrete contextual evidence of Congress's purpose or intent. See id. at 907.

[117] See id. at 901 (majority opinion) (House report); id. at 903 (Senate report); id. at 898 (IRS regulations).

[118] See, e.g., Victoria F. Nourse, Textualism 3.0: Statutory Interpretation After Justice Scalia, 70 Ala. L. Rev. 667, 670 (2019) (describing textualists' decontextualization of statutory terms as "the essential methodological flaw of textualism").

Numerous other opinions in the dataset similarly made some form of meaningful revision inference based on a statute's history.[119] Indeed, meaningful revision inferences were one of the two most common forms of statutory history inference recorded in the dataset, accounting for almost one-third (29.2%) of all opinions that invoked statutory history.[120] Further, all of the Justices—save for Justice Thomas—employed meaningful revision inferences in at least one of the opinions they authored.[121] There was a sharp divide, however, among the Justices regarding the use of traditional legislative history to bolster their meaningful revision inferences: whereas one-third (33.3%) of the meaningful revision opinions authored by the textualist or textualist-leaning Justices also referenced traditional legislative history, nearly two-thirds (65.0%) of the meaningful revision opinions authored by the non-textualist Justices invoked traditional legislative history.[122]

2. Effective Reenactment

As Table 6 shows, "effective reenactment" inferences were the second most common form of inference the members of the Roberts Court drew from a statute's history.[123] Like "meaningful revision" inferences, which parallel the meaningful variation canon, "effective reenactment" inferences parallel the "reenactment" canon. The traditional reenactment canon directs that when Congress amends a statute but makes no material change in the provision at issue—and leaves intact precedents interpreting that provision—the statute is

[119] See, e.g., FAA v. Cooper, 566 U.S. 284, 312–13 (2012) (Sotomayor, J., dissenting) (concluding that Congress's decision to drop "general damages" from the Senate bill during conference "can only reasonably imply" that such damages are not covered); Advoc. Health Care Network v. Stapleton, 137 S. Ct. 1652, 1658 (2017) (arguing that an amendment adding a new clause expanded the meaning of "church plan"); Ayestas v. Davis, 138 S. Ct. 1080, 1094 (2018) (stating that an amendment changing the verb "shall" to "may" conveys broad discretion); see also infra Appendix I (listing thirty meaningful revision opinions).

[120] See supra Table 6 (reporting that twenty-nine of ninety-six statutory history opinions in the dataset made a meaningful revision inference).

[121] See supra Table 7.

[122] There were twenty non-textualist-authored meaningful revision opinions in the dataset; thirteen referenced traditional legislative history. See Table 7; infra Appendix I (denoting with an asterisk statutory history opinions that referenced traditional legislative history). By comparison, there were nine textualist-authored meaningful revision opinions in the dataset; only three referenced traditional legislative history. See Table 7; infra Appendix I.

[123] See supra Table 6 (reporting that 29.2% of the statutory history opinions in the dataset employed an effective reenactment inference).

presumed to retain the meaning it had prior to the amendment.[124] The "effective reenactment" form of inference from statutory history operates similarly. Such inferences tend to begin with an observation that a previous version of the statute was construed to mean X, followed by one of two forms of judicial reasoning: (1) that certain key language did not change from one version of the statute to the next; or (2) that a particular change in the statute's language did not change the statute's meaning on the point in question. In either case, the observation is followed by a logical deduction that the current version of the statute must therefore have the same meaning as the earlier version.

For an example of the second form of effective reenactment inference, consider *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc*.[125] *Helsinn* involved the America Invents Act ("AIA"), which bars a person from obtaining a patent on an invention that was "in public use, *on sale*, or otherwise available to the public before the effective filing date of the claimed invention."[126] At issue was whether the pre-filing licensing and sale of an invention to a third party who was contractually obligated to keep the invention's details confidential placed the invention "on sale" within the meaning of the AIA. The Court, in a unanimous opinion by Justice Thomas, held that despite the confidentiality clause, the licensing and purchase agreements counted as "sales" under the AIA—and that Helsinn therefore was barred from seeking a patent for the invention.[127]

In so ruling, the Court relied heavily on the AIA's statutory history. Justice Thomas's opinion began by noting that "[e]very patent statute since 1836 has included an on-sale bar" and that when Congress enacted the AIA, it did so "against the backdrop of a substantial body of law" interpreting the on-sale bar.[128] That body of law, the Court reasoned, barred the issuing of patents for inventions if even a "single sale" had been made.[129] The Court then noted that the AIA retained the "exact language" used in predecessor patent statutes, adding only the catchall phrase "or otherwise available to the public."[130] "In light of this settled

[124] See Eskridge, supra note 37, at 177; Pierce v. Underwood, 487 U.S. 552 (1988).
[125] 139 S. Ct. 628 (2019).
[126] 35 U.S.C. § 102(a)(1) (emphasis added).
[127] See *Helsinn*, 139 S. Ct. at 632–33.
[128] Id. at 633.
[129] See id.
[130] Id. at 633–34.

pre-AIA precedent construing the meaning of 'on sale,'" the Court presumed that, "when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction of that phrase."[131] The addition of the phrase "or otherwise available to the public" was, in the Court's view, "simply not enough of a change for us to conclude that Congress intended to alter the meaning of the reenacted term 'on sale.'"[132]

Several other cases in the dataset similarly inferred that when Congress amended a statute but left key language intact or changed statutory text in insignificant ways, Congress should be presumed to have retained, and even reaffirmed, the statute's original meaning.[133]

As with the meaningful revision inferences discussed above, effective reenactment inferences necessarily involve at least some judicial speculation about the scope of the change Congress intended to effectuate when it revised the statute. Indeed, some of the cases say things like "we doubt that Congress meant" for the amended language to alter the statute's "longstanding thrust,"[134] or "[i]t would be passing strange"[135] to read the amendment to change the statute's meaning, or that Congress's retention of specific language "suggests"[136] that it did not mean to alter the statute's meaning. Such language reflects the leaps of logic that the Court (or authoring Justice) is making in these cases: it could very well be the case that Congress amended a statute precisely in order to change its longstanding thrust, rather than simply to clarify the

[131] Id.

[132] Id. at 634.

[133] See, e.g., Pepper v. United States, 562 U.S. 476, 488–89 (2011) (noting that the amendment recodified relevant language "without change"); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239–40 (2009) (observing that amendments did not change relevant statutory text and "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) ("When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text."); Abbott v. United States, 562 U.S. 8, 20 (2010) ("We doubt that Congress meant a prefatory clause . . . to effect a departure so great from [the statute's] longstanding thrust . . . ."); Bilski v. Kappos, 561 U.S. 593, 639 (2010) (Stevens, J., concurring) (reasoning that the statutory change "was made for clarity and did not alter the scope of a patentable 'process'"); see also infra Appendix I (listing twenty-six effective reenactment cases).

[134] *Abbott*, 562 U.S. at 20.

[135] BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 901 (2019).

[136] Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter, 575 U.S. 650 (2015).

meaning the statute had all along, but the Court in these cases is making a negative implication inference in the opposite direction. Also worth noting is that several of these cases referenced judicial decisions interpreting the original version of the statute and presumed that Congress was both aware of those interpretations and intended to retain them when it chose to retain the relevant statutory language.[137] This form of argument is quite similar to legislative inaction arguments that textualists have vociferously criticized in other contexts, as Subsection III.A.2 below elaborates.

Despite the logical leaps and speculation inherent in effective reenactment inferences, the Court's articulation of such inferences can sometimes read like a math problem: If *B* statutory phrase means *X*, then *B + 0 (or ˜0) change = X*. (If the statutory language stayed the same (+ 0), or almost the same (˜0), then there must have been no change in the statute's meaning, and the amendment or revision must have amounted to an "effective reenactment.") Importantly, such framing lacks any reference to contextual clues that could fill in the blanks about whether Congress intended for a particular statutory revision to effectuate a fundamental policy change, or merely to continue the status quo with a few minor adjustments. Indeed, only a fraction (37.9%) of the Court's effective reenactment inferences offered external contextual support for their conclusions—i.e., only some of the effective reenactment opinions checked their inferences against other available evidence of congressional intent, such as traditional legislative history.[138]

3. Overrides and Underwrites

The "overrides and underwrites" form of statutory history inference refers to arguments that the amended or final version of a statute should be given a meaning that honors Congress's efforts to revise the statute in response to a judicial decision. Specifically, the "override" inference refers to instances where the Court points out that Congress revised a statute in an effort to repudiate, or override, an earlier judicial decision and reasons that the revised statute should be construed to honor that reversal. Conversely, the "underwrite" form of inference refers to instances where the Court reasons that Congress approved of a particular judicial decision and revised the statute in order to codify some aspect of

[137] See, e.g., sources cited supra note 133.
[138] See supra Table 6 (last column).

the decision—e.g., by incorporating into the statute certain standards,[139] tests,[140] or causes of action[141] recognized in the decision. In referring to such codification arguments as "underwrites," this Article borrows a term coined by James Brudney and Ethan Leib to describe legislative action "that evidences an express legislative endorsement of a judicial reading."[142] The Article groups legislative overrides and underwrites together because both forms of inference derive, at bottom, from statutory history indicating that Congress revised a statute *in response to a judicial decision*. Taken together, "override and underwrite" inferences accounted for 20% of the statutory history opinions in the dataset,[143] although the vast majority of the opinions invoked an override, rather than underwrite, inference.[144]

Some examples should help illustrate:

Overrides. In *Skilling v. United States*, the Court considered whether a recently enacted criminal statute covered honest services frauds, including investment fraud.[145] For decades before *Skilling*, the courts of appeals had construed the federal mail fraud statute to cover acts that deprive the public of the intangible right to receive honest services, such as bribery and kickback schemes.[146] But in *McNally v. United States*, the Supreme Court rejected this construction, holding that the mail fraud statute does not cover honest services fraud.[147] Congress quickly overrode *McNally*, enacting a new statute designed specifically to encompass the honest services fraud that lower courts had deemed covered under the mail fraud statute prior to *McNally*.[148]

[139] See Jefferson v. Upton, 560 U.S. 284, 290 (2010) (noting that an amendment to the federal habeas statute "was an almost verbatim codification of the standards delineated in *Townsend v. Sain*").

[140] See Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1011–12 (2017) (noting that the Copyright Act codified *Mazer v. Stein*'s separability test).

[141] See Lewis v. City of Chicago, 560 U.S. 205, 212 (2010) (noting that the Civil Rights Act of 1991 codified "disparate impact" claims recognized in *Griggs v. Duke Power Co.*).

[142] Ethan Leib & James Brudney, Legislative Underwrites, 103 Va. L. Rev. 1487, 1491 (2017).

[143] See supra Table 7.

[144] Seventeen of twenty-one opinions coded as "overrides and underwrites" involved an override. See infra Appendix I.

[145] 561 U.S. 358 (2010).

[146] See id. at 399–401.

[147] 483 U.S. 350, 359–60 (1987).

[148] See 18 U.S.C. § 1346 (1988).

Skilling was an Enron executive charged with investment fraud under the new statute, which he challenged as unconstitutionally vague.[149] The Court acknowledged that Skilling's vagueness challenge "has force" but construed the statute narrowly to avoid the vagueness problem.[150] In so doing, the Court relied significantly on statutory history. First, the Court outlined the override history described above—explaining that Congress enacted the new statute "specifically to cover one of the 'intangible rights' that lower courts had protected . . . prior to *McNally*: 'the intangible right of honest services.'"[151] Second, the Court observed that the history of Court-Congress interactions demonstrated that Congress intended for the statute to "incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud."[152] It then found that the "vast majority" of honest-services cases decided before *McNally* involved offenders who participated in bribery or kickback schemes in violation of a fiduciary duty.[153] In order to "preserve what Congress certainly intended the statute to cover," the Court decided to "pare that body of precedent down to its core"—namely "fraudulent schemes to deprive another of honest services through bribes or kickbacks."[154] In other words, the Court used the statute's history—i.e., the fact that it was enacted specifically to encompass the bribery and kickback schemes that had been covered under the mail fraud statute prior to *McNally*—both to speculate about Congress's intent and to extrapolate a limit on the statute's reach.[155]

Underwrites. The codification form of statutory inference appeared in only a handful of opinions in the dataset. A typical example was *Lewis v. City of Chicago*,[156] which raised the question whether a city's implementation of a written test for firefighter applicants could form the basis for a disparate impact claim by African American applicants under Title VII.[157] (The city had adopted a policy of hiring preferentially from the pool of firefighter candidates who scored eighty-nine or above on a

[149] *Skilling*, 561 U.S. at 402–03.
[150] Id. at 405, 408–09.
[151] Id. at 402 (citing Cleveland v. United States, 531 U.S. 12, 19–20 (2000)).
[152] Id. at 404.
[153] Id. at 407.
[154] Id. at 404.
[155] Id. at 408–09.
[156] 560 U.S. 205 (2010).
[157] 42 U.S.C. § 2000e-2(k).

written test.)[158] The Court, in an opinion authored by Justice Scalia, held that the city's use of the eighty-nine-or-above cut-off could form the basis for a cognizable disparate impact claim. In so ruling, the Court noted that "as originally enacted, Title VII did not expressly prohibit employment practices that cause a disparate impact," but that in a case called *Griggs v. Duke Power Co.*, the Court interpreted Title VII to bar "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[159] The Court went on to observe that in 1991, Congress amended Title VII to codify the requirements of the "disparate impact" claim *Grigg*s had recognized—and concluded that the African American firefighters' claims against the city established a prima facie disparate impact claim under Title VII, as amended.[160]

Other cases in the dataset similarly relied on statutory history indicating that Congress sought to codify a judicial decision to determine the statute's meaning.[161]

As the above examples illustrate, override and underwrite inferences differ in important respects from the meaningful revision and effective reenactment inferences described in Subsections II.C.1 and II.C.2. Most significantly, override and underwrite inferences provide important background context that explains the legal change Congress was trying to effect when it enacted a particular statutory revision. Rather than speculate about congressional intent based purely on text-to-text comparisons between different versions of a statute, override and underwrite inferences explain what Congress was reacting to, and what it sought to achieve, when it revised a statute. There is still judicial discretion and speculation involved with this form of statutory history inference, but the Court's reasoning does not read like a pure logic or math problem; instead, the Court looks to Congress's motive and intent to override or codify a judicial decision as a guide to determining the scope of the revisions Congress enacted. That is, the Court looks to the legislature—rather than itself—to connect the dots between earlier and later versions of a statute.

In this sense, override and underwrite inferences—and override inferences in particular—share features in common with an interpretive tool known as the "mischief rule." The mischief rule is an age-old

[158] See *Lewis*, 560 U.S. at 208.
[159] Id. at 211.
[160] See id. at 212 (citing 42 U.S.C. § 2000e-2(k)).
[161] See, e.g., cases cited supra notes 139–41.

interpretive doctrine that instructs interpreters to read a statute in light of the "evil" or "defect" that the legislature sought to cure when it enacted the statute.[162] It typically is associated with a purposivist approach to statutory interpretation and entails some discussion of the societal problem or background circumstances that motivated the law in question.[163] The override and underwrite response inferences described in this Subsection are framed differently from the typical mischief rule reference: Whereas application of the mischief rule entails identifying the "evil" that Congress sought to remedy, override and underwrite inferences highlight a judicial ruling that Congress either disagreed with and sought to repudiate, or agreed with and sought to codify. Despite this difference in framing, however, the two interpretive tools share a similar focus on the background circumstances that motivated Congress to act. Indeed, in the override context, the "evil" Congress seeks to remedy is a judicial decision, and the explication of that decision + Congress's efforts to undo it takes the place of the societal problem + remedy that otherwise would form the basis for a mischief rule inference.

4. Rejected Proposals

Proposals that Congress considered and rejected during the legislative process are another form of statutory history the Roberts Court regularly uses to infer a statute's meaning. Rejected proposal inferences typically proceed as follows. The Court first observes that at some point during the legislative process, Congress considered a proposal or amendment that would explicitly have prescribed X reading of the statute. The Court then notes that Congress ultimately declined to adopt the proposal or amendment—and infers that Congress's failure to do so demonstrates that Congress did not intend for the statute to mean X.

Justice Kennedy's majority opinion in *Arizona v. United States*, discussed earlier, provides a classic example of this form of inference.[164] Recall that the case involved an Arizona law that made it a crime for illegal immigrants to seek employment and that the Court held that portions of the Arizona law were preempted by federal law.[165] In so

[162] See Heydon's Case (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b.

[163] See, e.g., Scalia & Garner, supra note 22, at 428, 433–34; Samuel Bray, The Mischief Rule, 109 Geo. L.J. 967, 985–91 (2021).

[164] See discussion supra notes 3–8.

[165] Arizona v. United States, 567 U.S. 387, 388–89 (2012).

doing, the Court noted that Congress, during the process of enacting the federal law, explicitly considered and rejected proposals to make unauthorized work by illegal immigrants a criminal offense.[166] This congressional rejection, the Court argued, "reflects a considered judgment that making criminals out of aliens engaged in unauthorized work" would be "inconsistent with federal policy and objectives."[167] In so reasoning, the Court cited floor statements as well as hearing testimony by the bill's sponsor—i.e., traditional legislative history—describing the rejected proposals.[168] However, Justice Kennedy's opinion did not quote directly from these traditional legislative history sources or their explanations for why Congress declined to criminalize unauthorized work by illegal immigrants. This is noteworthy because the briefing in the case cited several legislative record statements that explicitly confirmed the accuracy of the Court's inference—including comments such as "many who enter illegally do so for the best of motives" and that criminal penalties "would serve no useful purpose."[169] The Court's decision to omit such corroborating legislative history evidence from its opinion and to rely instead on the objective fact that Congress rejected a proposal to criminalize the behavior at issue and a judicial inference about what this rejection means is a telling sign of (1) just how reluctant some members of the Court are to use traditional legislative history even to corroborate; and (2) how comfortable the members of the Roberts Court are resting statutory meaning purely on logical inferences and judicial speculation about the legislative intent behind certain changes (or non-changes) to a statute's text.

The conclusion that rejected proposals reflect a congressional repudiation of a particular statutory construction is not, of course, the only logical or plausible inference one could draw from such statutory history. As students of legislative procedure well know, Congress may have had any number of non-substantive, procedural or institutional reasons for rejecting a particular legislative proposal.[170] This is a point

[166] Id. at 405.

[167] Id.

[168] See id. at 405–06 (citing floor statements by Rep. Dennis and hearing testimony by Rep. Rodino).

[169] See Brief for the United States at 37–38, *Arizona*, 567 U.S. 387 (No. 11-182), 2012 WL 939048, at *24, *32 n.23 (quoting H.R. Rep. No. 99-682, pt. 1, at 46 (1986) and 118 Cong. Rec. 30,155 (1972)).

[170] For example, a majority of the members of Congress may have believed that the rejected proposal provided the better rule, but Congress may have run out of time during the

that the Court's textualist Justices have hammered home in other cases.[171] And yet all of the Justices—including the Court's most committed textualists—have signed on to opinions that infer meaning from rejected proposals without qualification.[172] Indeed, as Table 7 shows, five of the seven textualist and textualist-leaning Justices who have served on the Roberts Court have *authored* opinions that attribute significance to rejected legislative proposals.[173] Moreover, as Table 6 shows, rejected proposal inferences account for 15.6% of the statutory history opinions in the dataset—a not insubstantial number.[174]

The textualist Justices' use of rejected proposal inferences in such cases is surprising at first blush—both because textualists have been critical of this interpretive tool in the past[175] and because inferences based on the fact that Congress rejected a particular proposal during the legislative process *sound* like open speculation about legislative intent. But if we look deeper, rejected proposal inferences' appeal to textualist

legislative session to enact the proposal; or congressional leadership may not have cared enough about the issue to push it through the cumbersome legislative process; or members of the committee in charge of reviewing the proposal may have disagreed with the majority and killed the proposal; or legislators in one chamber may have favored the proposed revision, while legislators in the other chamber were too busy to take up the bill; or individual members who approved of the proposal may have been unwilling to vote for it because it contained other provisions they disagreed with. For a general discussion of problems with attributing significance to legislative inaction, including the rejected proposal rule, see William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 69 (1988).

[171] See, e.g., Rapanos v. United States, 547 U.S. 715, 750 (2006) (Scalia, J.) ("We have no idea whether the Members' failure to act in 1977 was attributable to their belief that the Corps' regulations were correct, or rather to their belief that the courts would eliminate any excesses, or indeed simply to their unwillingness to confront the environmental lobby."); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169–70 (2001) (Rehnquist, C.J.) ("'[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.' A bill can be proposed for any number of reasons, and it can be rejected for just as many others." (citations omitted) (quoting Cent. Bank of Denver, N.A. v. 1st Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); United States v. Est. of Romani, 523 U.S. 517, 535 (1998) (Scalia, J., concurring) ("Congress cannot express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.").

[172] See, e.g., 4th Est. Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 891 (2019) (unanimous opinion joined by all textualist Justices) (rejecting interpretation because "Congress considered, but declined to adopt, a proposal to allow suit immediately upon submission of a registration application"); see also sources cited infra note 185.

[173] See Table 7. This includes Justice Kavanaugh, whose *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), dissent employed a rejected proposal inference.

[174] See supra Table 6.

[175] See, e.g., sources cited supra note 171.

Justices becomes more understandable. On closer examination, rejected proposal inferences share several features in common with meaningful revision and effective reenactment inferences: like meaningful revision and effective reenactment inferences, rejected proposal inferences rest on a negative logical inference—i.e., that if Congress rejected statutory language that would have clearly embraced X statutory meaning, then it must not have intended for the statute to mean X. This is essentially the same kind of logical inference as the meaningful revision inference that if Congress deleted X statutory word or phrase, it must have intended for the statute to no longer cover X. In both cases, cold, logical calculation dictates the outcome, like a math or logic puzzle.

5. Other Inferences

There were also a handful of opinions in the dataset that used statutory history to infer meaning, but did so in a manner not captured by the above four forms of judicial inference. Some of these opinions made what were essentially whole act or whole code arguments comparing revisions Congress made to parallel provisions of the same statute or even to different, but related, statutes.[176] Others employed logical inferences similar to those captured by the *expressio unius* canon.[177] Overall, when the members of the Roberts Court made one of these "other" types of statutory history inferences, they rested those inferences on text-to-text comparisons and their own logical deductions. As was the case with the inferences described in Subsections II.C.1–II.C.4, in so doing the Justices often ignored or failed to cite traditional legislative history that supported their conclusions—even when supportive legislative history was briefed by the parties or amici.[178]

[176] See Yates v. United States, 574 U.S. 528, 542 (2015) (making a whole act inference that one provision would duplicate another's coverage if interpreted expansively); United States v. Ressam, 553 U.S. 272, 275 (2008) (making a meaningful variation inference involving related statutes amended in different ways); Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143–44 (2018) (Ginsburg, J., dissenting).

[177] See Jones v. Bock, 549 U.S. 199, 214 (2007) (employing an *expressio unius* argument where amendment added two grounds for sua sponte dismissal but not the ground at issue); Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 477 (2006) (arguing that an amended statute overrode some parts of *Patterson v. McLean* decision, but not *Patterson*'s holding requiring a contractual relationship).

[178] See, e.g., Brief for Hon. Michael Oxley as Amicus Curiae in Support of Petitioner at 21–22, Yates v. United States, 574 U.S. 528 (2015) (No. 13-7451), 2014 WL 3101371, at *14–16 (quoting floor statements by Sen. Hatch); Brief for the United States at 23–24,

III. SOME PROBLEMS

As the cases discussed in Part II demonstrate, there is substantial judicial discretion involved in the practice of inferring meaning from statutory history. Judges determine whether particular statutory changes reflect minor or technical updates or, conversely, signal fundamental policy change—often based on their own intuitions. Indeed, despite some Justices' efforts to cast the use of statutory history as a straightforward logic puzzle, assigning interpretive meaning to statutory revisions often involves a judicial judgment call. Unsurprisingly, that judgment call can tend to break consistently with individual Justices' ideological preferences. These observations raise important normative questions about the practice of inferring meaning from statutory history—and the relationship between such history and other contextual resources.

Section III.A evaluates whether statutory history can meaningfully be distinguished from traditional legislative history, and whether the distinctions textualists have offered to justify their reliance on statutory history correlate with their actual interpretive practices. It also considers how statutory history compares to two other interpretive tools regularly employed by purposivist jurists but rejected by modern-day textualists—legislative inaction and the mischief rule. Section III.B explores how the use of statutory history in isolation to extrapolate meaning from text-to-text comparisons of different statutory versions tends to decontextualize the interpretive endeavor—and, in the process, to shift power from Congress to the judiciary. Section III.C explores potential lessons from the Roberts Court's use of statutory history and concludes that while there are some noteworthy technical differences between statutory history and traditional legislative history, it makes little sense to use the former to engage in what is essentially guesswork about what Congress sought to accomplish while refusing even to *look to* traditional legislative history or other legislative context evidence as possible sources of guidance. It recommends that textualists either abandon statutory history as an interpretive aid altogether or, preferably, widen their interpretive toolkit to include other forms of contextual clues to statutory meaning—at least in those cases in which they are willing, or find it necessary, to rely on statutory history.

United States v. Ressam, 553 U.S. 272 (2008) (No. 07-455), 2008 WL 189554, at *10 (quoting Senate Report supporting majority's meaningful variation inference).

A. Distinguishing Statutory History

As Part I highlighted, textualists have sought to reconcile their reliance on statutory history with their rejection of traditional legislative history on a number of grounds. Subsection III.A.1 below explores whether such disparate treatment of statutory history versus traditional legislative history is defensible, either for the reasons provided by textualists themselves or for other reasons. Subsection III.A.2 explores noteworthy parallels between some forms of statutory history inferences and other traditional purposive interpretive tools, such as the mischief rule and inferences based on legislative inaction.

1. Not That *Different from Legislative History*

Recall from Part I that textualist Justices Scalia and Gorsuch claimed that statutory history is different from traditional legislative history because the former is "based on decisions by the entire Congress,"[179] while the latter is "unenacted" and "neither truly legislative nor truly historical" in that it "failed to survive bicameralism and presentment" and "consist[s] of advocacy aimed at winning in future litigation what couldn't be won in past statutes."[180] Justice Gorsuch further claimed that statutory history consists of "the record of *enacted* changes Congress made to the relevant statutory text over time," which is a form of "textual evidence."[181]

While these descriptions accurately depict *some* forms of statutory history—and some forms of judicial inferences from statutory history—they fit poorly with other forms of inferences described in Part II. For example, while it is true that amendment history involves comparisons between two "enacted" texts that survived bicameralism and presentment, "drafting history" does not. Indeed, drafting history focuses on *unenacted* legislative materials—i.e., bill drafts—that by definition were not voted into law by *either* House of Congress, let alone signed by the President. Notably, some of the drafting history-based statutory history opinions issued by the Court, including opinions authored and joined by textualist Justices, involved bill drafts that were only even *considered* by one House and that, therefore, were neither "made by the entire Congress" nor subject to bicameralism and

[179] See, e.g., Hubbard v. United States, 514 U.S. 695, 702–03 (1995).
[180] BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2018) (Gorsuch, J., dissenting).
[181] Id.

presentment.[182] To be sure, one-half of the comparison involved in drafting history inferences is the final, enacted version of the statute—which has survived both bicameralism and presentment. But the foundation for the Court's inferences in such cases is how the statute has evolved from an earlier draft version—and that draft version undeniably consists of an unenacted remnant of the legislative process, much like the floor statements, hearing testimony, and committee reports that textualists refuse to consider. The drafting history form of statutory history accounts for a quarter (25.0%) of the statutory history opinions in the dataset, as well as a quarter (26.9%) of all statutory history opinions *authored* by textualist or textualist-leaning Justices.[183] Moreover, there were nine drafting history opinions authored by non-textualist Justices that were *joined* by at least one, and often by several, textualist Justices—accounting for an additional 9.4% of all statutory opinions in the dataset.[184] Inferences based on drafting history thus constituted a nontrivial slice of the Court's (and textualist Justices') statutory history opinions.

Perhaps more importantly, even in those opinions that employed *amendment* history, some of the specific inferences drawn by the Court failed to satisfy the "enacted text" criteria articulated by Justices Scalia and Gorsuch. Most notably, the rejected proposal form of judicial inference involves comparing the final version of a statute to a

[182] See, e.g., Arizona v. United States, 567 U.S. 387, 405–06 (2012) (Kennedy, J.) (House only); Corley v. United States, 556 U.S. 303, 319 (2009) (Souter, J., joined by Kennedy, J.) (Senate); Hertz Corp. v. Friend, 559 U.S 77, 85–88 (2010) (Breyer, J., joined by all textualist Justices) (unanimous) (House); NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 942–43 (2017) (Roberts, C.J., joined by all textualist Justices) (Senate); Mohamad v. Palestinian Auth., 566 U.S. 449, 459–60 (2012) (Sotomayor, J., joined by all Justices except Justice Scalia in relevant part) (House).

[183] See supra Table 4 (reporting that drafting history was employed in 24 of 96 opinions that invoked statutory history); Table 5 (reporting that eleven of forty-one opinions authored by a textualist or textualist-leaning Justice employed drafting history, including opinions that invoked *both* drafting and amendment history).

[184] See *Corley*, 556 U.S. at 319–20 (Souter, J., joined by Kennedy, J.); *Hertz*, 559 U.S at 85–88 (Breyer, J., joined by all textualist Justices); Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1037–38 (2019) (same); *Mohamad*, 566 U.S. at 459–60 (Sotomayor, J., joined by all except Justice Scalia); Harbison v. Bell, 556 U.S. 180, 190 (2009) (Stevens, J., joined by Kennedy, J.); Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 293–95 (2010) (Stevens, J., joined by all textualist Justices except Justice Scalia in relevant part); 4th Est. Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 891 (2019) (Ginsburg, J., joined by all textualist Justices); Begay v. United States, 553 U.S. 137, 143–44 (2008) (Breyer, J., joined by Roberts, C.J., & Kennedy, J.); Hamdan v. Rumsfeld, 548 U.S. 557, 579 (2006) (Stevens, J., joined by Kennedy, J.).

legislative proposal that by definition was not enacted and did not survive bicameralism or presentment. As with drafting history, rejected proposals often are considered and rejected by only one chamber of Congress—never making it to the other chamber or to the President because of their failure to pass that initial legislative hurdle.[185] Rejected proposal inferences accounted for 8.5% of the *amendment* history opinions in the dataset and for 17.1% of the statutory history opinions authored by textualist or textualist-leaning Justices.[186]

Similarly, many of the effective reenactment inferences drawn by the Court were based, not on "the record of enacted changes Congress made to the relevant statutory text"[187] but, rather, on *the absence of enacted changes* to the statute's text—and a presumption about congressional intent based on the absence of such textual changes. These effective reenactment inferences amount, at bottom, to inferences about the meaning to be divined from Congress's *failure to enact* specific textual changes. But inferences based on congressional *failure to act*, or *inaction*, are quite different from inferences "based on decisions by the entire Congress"[188] and depend upon legislative behavior that is neither "enacted" nor has "survive[d] bicameralism and presentment."[189] Indeed, for these reasons, textualists usually decry inferences based on any form of legislative inaction, as discussed further *infra* Subsection III.A.2. Like drafting history and rejected proposal inferences, then, the text-did-not-change, or inaction, form of effective reenactment inference—which accounted for 12.5% of the opinions in the dataset and 17.9% of opinions authored by textualist Justices—is fundamentally inconsistent with the justifications textualists have provided for treating

[185] See, e.g., *Arizona*, 567 U.S. at 405–06 (2012) (House only); Begay v. United States, 553 U.S. 137, 143–44 (2008) (House); *Hertz*, 559 U.S. at 85–88 (House); *Obduskey*, 139 S. Ct. at 1037–38 (Senate); Wis. Cent., Ltd. v. United States, 138 S. Ct. 2067, 2077 (Breyer, J., dissenting) (Senate); Jones v. Harris Assocs. L.P., 559 U.S. 335, 340–41 (2010) (House); Michigan v. Bay Mills Indian Cmty. 572 U.S. 782, 801–02 (2014) (Senate).

[186] See supra Tables 5–7. There were seventy-one opinions in the dataset that invoked amendment history; six employed a rejected proposal inference (and invoked drafting history as well). See infra Appendix I. In total, there were seven textualist-authored opinions in the dataset that made a rejected proposal inference. See id.; Table 7.

[187] BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (emphasis omitted).

[188] See, e.g., Hubbard v. United States, 514 U.S. 695, 702–03 (1995).

[189] BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019).

statutory history differently from legislative history (and other forms of contextual evidence of congressional intent).[190]

Finally, override and underwrite inferences fail to satisfy a different distinction articulated by Justice Gorsuch—i.e., that statutory history is based on "textual evidence." The theory behind this distinction, although Justice Gorsuch did not flesh it out fully, is that inferences based on statutory history are different from inferences based on traditional legislative history because the former depend on close text-to-text comparisons of earlier and later statutory language—whereas the latter depend on legislative record evidence, or commentary, that is one step removed from the statute's text. In textualists' view, such commentary is markedly different from textual analysis and may even be characterized as a form of policy "advocacy."[191]

But override and underwrite inferences differ markedly from textual analysis too, depending not on text-to-text comparisons but on judicial speculation about how a particular statutory application fits with Congress's goals or design. Indeed, override and underwrite inferences require judicial acknowledgment of a *background fact about Congress's underlying aim* in revising a statute—i.e., that Congress was attempting to override or codify a judicial decision—and judicial speculation about the statute's scope based on that background fact. Crucially, the fact or information at the center of an override or underwrite inference is not typically established from the statute's text. Instead, such information tends to derive from sources such as committee reports, floor statements, or the Court's own precedents—or simply to be asserted as a form of judicial notice-taking.[192] The Court then uses the fact that Congress was

[190] There were twelve text-did-not-change effective reenactment opinions in the dataset. See Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 765 (2011); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173–74 (2009); TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 (2017); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015); Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter, 575 U.S. 650, 660 (2015); Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 107–08 (2010); United States v. O'Brien, 560 U.S. 218, 232–33 (2010); NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 953 (2017); Kucana v. Holder, 558 U.S. 233, 249–51 (2010); Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1762 (2018); Pepper v. United States, 562 U.S. 476, 488–89 (2011); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009). Seven were authored by textualist or textualist-leaning Justices; all involved amendment history. See infra Appendix I.

[191] See BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting).

[192] See, e.g., Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734, 742–43 (2017) (precedent and judicial notice); Ricci v. DeStefano, 557 U.S. 557, 623–24 (2009) (Ginsburg, J., dissenting) (judicial notice); Dean v. United States, 556 U.S. 568, 579 (2009) (Stevens, J.,

trying to undo or, conversely, to cement a judicial decision as a starting point from which to extrapolate the revised statute's scope. Override and underwrite inferences thus differ from the "textual evidence" described by Justice Gorsuch in that they focus on the bigger picture, including congressional motive and intent, rather than on narrow textual analysis. Override and underwrite inferences accounted for 29.2% of the amendment history opinions in the dataset; 47.4% of these were authored by the textualist or textualist-leaning Justices.[193] Overall, 19.5% of the opinions authored by textualist or textualist-leaning Justices employed amendment history *and* made an override or underwrite inference.[194]

Ultimately, if we add together the drafting history opinions authored by the textualist and textualist-leaning Justices as well as the textualist-authored opinions that employed amendment history + rejected proposal, override/underwrite, or inaction-based effective reenactment inferences, it turns out that nearly two-thirds (63.4%) of the statutory history opinions in the dataset authored by textualist-leaning Justices employed statutory history in a manner that was inconsistent with textualist Justices' own parameters explaining what makes some forms of legislative record materials more reliable than others.[195]

Despite the above-described discrepancies between the justifications textualist Justices have articulated for their reliance on statutory history and textualist Justices' on-the-ground use of such history, there are some important differences between statutory history and traditional

dissenting) (floor statements by Sen. DeWine); Bilski v. Kappos, 561 U.S. 593, 639–40 (2010) (House and Senate committee reports); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 54, 57–58 (2006) (judicial notice).

[193] There were sixty-five amendment history opinions in the dataset; nineteen of these employed an override or underwrite inference. See supra Table 6. Eight of nineteen opinions in the dataset that employed amendment history *and* an override or underwrite inference were authored by textualist or textualist-leaning Justices. See supra Tables 6–7; infra Appendix I.

[194] There were forty-one opinions in the dataset that were authored by textualist or textualist-leaning Justices. See supra Table 5. Eight employed amendment history and drew an override or underwrite inference. See infra Appendix I.

[195] Of the forty-one textualist-authored opinions in the dataset, eight employed drafting history, three employed amendment *and* drafting history and made a rejected proposal inference, seven employed amendment history and made an inaction-based effective reenactment inference, and nine employed amendment history and made an override or underwrite inference; two opinions made multiple inferences and were not double-counted. See infra Appendix I; sources cited supra notes 193–94. Overall, twenty-six of forty-one textualist-authored statutory history opinions made one of the above forms of inferences.

legislative history that are worth noting. Traditional legislative history typically takes one of three forms: (1) statements from committee reports issued by the House or Senate; (2) floor statements made by members of Congress during debate on a proposed bill; or (3) witness statements delivered at hearings held by congressional committees. Committee reports contain commentary, penned by the members of the congressional committee that drafted the bill, that explains the statute's provisions to the rest of Congress.[196] Floor statements vary widely in scope and objective—some are made by a bill's sponsors to clarify the statute's effect, others are made by a bill's opponents in an attempt to undermine support for the bill, and still others fall somewhere in between.[197] Hearing testimony, which is cited far less often in judicial opinions than committee reports or floor statements,[198] often reflects the views of government actors outside of Congress or even lobbyists or interest group representatives with a stake in the proposed legislation.[199]

All of these forms of legislative history can and often do contain statements about the circumstances that motivated Congress to enact or revise a statute—including the fact that Congress was responding to a judicial decision or that it rejected a legislative proposal that would have explicitly covered the situation at issue.[200] As the above discussion has

[196] See, e.g., James Brudney, Canon Shortfalls and the Virtues of Political Branch Interpretive Assets, 98 Calif. L. Rev. 1199, 1226 (2010); George Costello, Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 Duke L.J. 39, 43.

[197] See, e.g., Brudney, supra note 196, at 1226 (explaining that bill sponsors' floor statements are considered almost as authoritative as committee reports, while statements by non-legislative drafters—especially a bill's opponents—are given far less weight); Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 435 F.3d 1011, 1015 (9th Cir. 2006) (distinguishing between relative weight afforded to sponsors' versus other members' floor statements).

[198] See, e.g., Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1337 n.228 (2020) [hereinafter Krishnakumar, Backdoor Purposivism].

[199] See, e.g., Allison Giles, The Value of Nonlegislators' Contributions to Legislative History, 79 Geo. L.J. 359, 375–76 (1990) (flagging Court's reliance on testimony by investment industry lobbyists and SEC and noting that non-legislator testimony "proves only that at least one member heard the testimony, not that any individual member, much less the entire Congress, agreed with it"); Renee Jones, Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate, 41 Wake Forest L. Rev. 879, 907 (2006) ("In congressional hearings on major reform bills, Congress hears testimony from academics, lobbyists, and government officials who provide competing perspectives on the proposed legislation.").

[200] See, e.g., Osborn v. Haley, 549 U.S. 225, 257 (2007) (Breyer, J., concurring in part and dissenting in part) (citing a committee report explaining that Westfall Act's "functional effect . . . is to return Federal employees to the status they held prior to the *Westfall*

shown, when courts use such forms of traditional legislative history as a guide to a statute's meaning, they are doing something that is not all that different from what textualist Justices do when they use the overrides/underwrites or rejected proposals forms of statutory history to construe statutes.

But floor statements and hearing testimony also often take the form of explanatory commentary by individual legislators or interest groups—i.e., individual speakers' own interpretations of what particular statutory provisions mean.[201] This kind of commentary, particularly when offered by someone who is not a bill sponsor, or in some cases not even a legislator,[202] is different from the objective record of how a statute's provisions have evolved or the factual circumstances surrounding legislative action (or inaction) that underlie the overrides and underwrites and rejected proposal inferences described in Subsections II.C.3–II.C.4. Because traditional legislative history often goes beyond illuminating the circumstances surrounding congressional action and instead offers individual legislators' or hearing witnesses' views on statutory meaning, it remains at least technically, and perhaps meaningfully, distinguishable from statutory history. Thus, textualist Justices' willingness to embrace statutory history while refusing to consult traditional legislative history is at least somewhat theoretically coherent. After all, even overrides and underwrites and rejected proposal inferences depend on independently verifiable facts—i.e., the circumstances that led to a statute's enactment or the fact that Congress declined to adopt a particular legislative proposal[203]—not on unverified

decision"); 4th Est. Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 891 (2019) (citing House and Senate reports indicating that "Congress considered, but declined to adopt" a proposal that would have explicitly authorized the interpretation at issue).

[201] See, e.g., Reed Dickerson, Statutory Interpretation: Dipping into Legislative History, 11 Hofstra L. Rev. 1125, 1131 (1983) (criticizing judicial reliance on hearing testimony because it is often slanted in favor of bill proponents' position).

[202] Hearing testimony often consists of statements by non-legislators. See, e.g., Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) (testimony by Professor Robert Schwemm); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 811 (2014) (testimony by Navajo Nation President); United States v. Quality Stores, Inc., 572 U.S. 141, 153 (2014) (statements submitted by Treasury Department during Senate Finance Committee hearing).

[203] See, e.g., Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734, 742–43 (2017) (noting that Congress enacted § 271(f) in response to Court's decision in *Deepsouth Packing Co. v. Laitram*); Ricci v. DeStefano, 557 U.S. 557, 623–24 (2009) (Ginsburg, J., dissenting) (noting that Congress enacted Civil Rights Act amendments in response to Court's decisions in *Wards Cove* and other cases); Skilling v. United States, 561 U.S. 358, 402–03 (2010)

statements or characterizations made by individual legislators or hearing witnesses, or explanatory commentary penned by a handful of legislators.

In acknowledging that there are technical differences between statutory history and some forms of legislative history that may lend at least some support to textualist Justices' embrace of the former and rejection of the latter, this Article does not mean to suggest that textualist Justices' disparate treatment of statutory history and traditional legislative history is the *ideal* approach for courts to follow. Indeed, as Sections III.B and III.C below explain, there are potential benefits—such as providing important background context—that may result from consulting traditional legislative history. Thus, the better interpretive approach, in my view, would be for all of the Justices to consult traditional legislative history alongside statutory history as a check on the interpretive inferences they draw from statutory history rather than treat these two forms of legislative-process-generated forms of background information differently.

2. Legislative Inaction and Mischief Parallels

As Subsection III.A.1 illustrates, textualist Justices' willingness to use a statute's history to determine its substantive meaning—while rejecting legislative history and other purposive interpretive resources that provide context about the choices Congress made during the legislative process—is at once understandable *and* incongruous. It is understandable because some of the inferences textualists draw from statutory history are text-based and mirror the kind of logical analysis and assumptions that underlie textualists' most-favored interpretive tools—e.g., the whole act meaningful variation rule, the *expressio unius* canon, and so on. But it is also incongruous, because many of the inferences textualists regularly draw from statutory history either are *not* text-based or depend on judicial speculation about the meaning of Congress's *failure to act*. These latter forms of statutory history inferences are difficult to distinguish from the inferences that non-

(noting that Congress enacted honest services statute in response to Court's ruling in *McNally v. United States*); FTC v. Actavis, Inc., 570 U.S. 136, 168 (2013) (Roberts, C.J., dissenting) ("Congress has repeatedly declined to enact legislation addressing the issue the Court takes on today."); Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1935 (2016) (noting that Congress rejected proposed codification that would have explicitly ratified the test at issue).

textualist Justices tend to draw from traditional purposive interpretive tools that textualists long have denigrated.

This Subsection highlights some noteworthy parallels between two time-honored purposive interpretive tools—legislative inaction and the mischief rule—and the Roberts Court's statutory history inferences. The parallels between these interpretive tools highlight the flaws inherent in textualist efforts to distinguish statutory history from other purposive interpretive tools, as well as illustrate that statutory history does not necessarily constrain judges more than the purposive tools that textualists reject.

Legislative Inaction. There is a longstanding debate in statutory interpretation theory over what meaning, if any, should be attributed to the legislature's failure to act. As Professor Bill Eskridge has explained, the term "legislative inaction" refers to interpretive arguments that favor a particular statutory construction on the theory that Congress has assented to that interpretation by not overruling it, by reenacting the statute, or by rejecting a bill or amendment embodying an alternative interpretation.[204] In a 1988 article, Eskridge labeled inferences based on these three forms of inaction as: (1) the "acquiescence rule"—in which the Court views Congress's failure to overturn a judicial interpretation as evidence that Congress has acquiesced in that interpretation; (2) the "reenactment rule"—in which the acquiescence argument is bolstered by the fact that Congress reenacted the statute without material change sometime after the judicial interpretation was issued; and (3) the "rejected proposal rule"—in which the Court infers from the rejection of a bill or amendment by Congress, or by a chamber or committee of Congress, that an interpretation similar to the rejected proposal falls outside the statute's reach.[205] At the time of his article, Eskridge noted that the Court was careful about relying on legislative inaction to determine a statute's meaning, typically doing so only when it could point to congressional awareness of the interpretive issue and to some evidence that Congress deliberated about the judicial interpretation.[206]

Textualists, including especially Justice Scalia, have been critical of legislative action in general and of the acquiescence and rejected proposal rules in particular. For example, Justice Scalia cautioned that:

[204] See Eskridge, supra note 170, at 67.
[205] See id. at 70–71.
[206] See id. at 71.

> [O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [Congress's] intent from the *failure* to enact legislation. The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.[207]

For these reasons, he urged courts to "admit that vindication by congressional inaction is a canard."[208] Other textualists have been similarly critical of legislative-inaction-based inferences about a statute's meaning.[209]

Yet the text-did-not-change effective reenactment and rejected proposal forms of statutory history described in Section II.C, and readily employed by the Roberts Court's textualist Justices, share obvious parallels to legislative inaction arguments. Indeed, as noted earlier, I chose the "effective reenactment" label precisely because of similarities between this form of statutory history inference and the reenactment canon. Further, many of the effective reenactment opinions described in Subsection II.C.2 expressly referenced a judicial decision interpreting the original version of the statute at issue—and presumed that Congress was aware of and intended to affirm that judicial interpretation when it retained the statutory language in question.[210] Some of the opinions even expressly spoke in terms of Congress's *failure to act* or its *inaction* in updating the relevant provision.[211] Likewise, the "rejected proposal

[207] Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting).

[208] Id. at 672; see also Rapanos v. United States, 547 U.S. 715, 749 (2006) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.").

[209] See, e.g., Halliburton v. Erica P. John Fund, 573 U.S. 258, 300 (2014) (Thomas, J., concurring) ("'Congressional inaction lacks persuasive significance' because it is indeterminate; 'several equally tenable inferences may be drawn from such inaction.'" (quoting Cent. Bank of Denver, N.A. v. 1st Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); Tex. Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 571 (2015) (Alito, J., dissenting) ("Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute." (citations omitted)).

[210] See, e.g., sources cited supra notes 190–96.

[211] See, e.g., Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 765 (2011) ("Nor has Congress seen fit to alter § 271(c)'s intent requirement in the nearly half a century since

cases" Eskridge described are identical to the "rejected proposal" form of statutory history outlined in this Article and, by definition, *all* draw inferences from Congress's *failure* to act. But inferences based on Congress's failure to act are hardly equivalent to—and indeed, could be characterized as the opposite of—inferences "based on decisions by the entire Congress" that have been approved by the President.

Textualists have not grappled at all with these parallels between statutory history and legislative inaction inferences, which further call into question the line textualists have drawn between statutory history and other forms of contextual evidence about a statute's meaning.[212] Perhaps equally troubling is that, unlike the legislative inaction cases Eskridge's article described, the Roberts Court's use of inaction-based statutory history inferences has not been limited to cases in which the Court can demonstrate congressional awareness or deliberation about the interpretive question at issue. On the contrary, many of the effective reenactment and rejected proposal inferences drawn by the Roberts Court rest on judicial presumption alone, without any supporting legislative history or other contextual evidence indicating congressional attention to the interpretive question at issue.[213]

Mischief Rule. The mischief rule instructs courts, when interpreting a statute, "to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem."[214] That is, it directs courts to reflect on the "evil" that Congress sought to remedy in enacting the statute and the means Congress chose for remedying that evil.[215] If the conduct at issue is similar to the "evil" or mischief that motivated Congress to enact the statute, then the court is to

Aro II was decided."); TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 (2017) ("Congress has not amended § 1400(b) since *Fourco* . . . ."); see also sources cited supra note 190 (presuming that Congress was aware of and intended to affirm a prior judicial interpretation when it retained the statutory language in question).

[212] Justice Scalia's treatise on statutory interpretation endorses a "Reenactment Canon"—but the canon he describes is quite different from the reenactment inference described in this Article; Scalia's version states, "If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning." See Scalia & Garner, supra note 22, at 256–57. This maxim corresponds to the "meaningful revision" inference described in this Article and does not involve legislative inaction.

[213] See supra Table 6 (last column indicating that 62.1% of effective reenactment and 33.3% of rejected proposal opinions did not reference traditional legislative history).

[214] See Bray, supra note 163, at 968.

[215] See id. at 990 (citing Black's Law Dictionary (6th ed. 1990)).

construe the statute to cover the conduct; but if the conduct is not similar to the mischief that motivated the statute, or if construing the statute to cover the conduct would interfere with remedying the evil Congress enacted the statute to address, then the statute should be construed *not* to cover the conduct.

There are essentially two steps involved in applying the mischief rule. First, the court must identify, or establish, the societal problem—i.e., the mischief—that Congress sought to resolve by enacting the statute. Second, it must determine whether the conduct or situation before it falls within the scope of that societal problem. To identify the mischief, a court may look to the statute itself, to public evidence of the problem preceding the statute's enactment, or to legislative history—or it may simply take judicial notice of well-known circumstances surrounding the statute's passage.[216] From there, the court extrapolates a core meaning, or area of statutory coverage, and reasons that the conduct at issue either falls within or without that core coverage.[217]

This is not all that different from the approach the Court has taken in many of its statutory history cases. Indeed, as noted in Subsection II.C.3, the overrides and underwrites form of statutory history is rather analogous to the mischief rule: The Court in such cases first establishes the fact that Congress enacted a particular statutory revision in order to override or codify a judicial decision and extrapolates from there to determine the boundaries of the statute's coverage. Recall, for example, how the *Skilling v. United States* majority emphasized that Congress

[216] See, e.g., King v. Burwell, 576 U.S. 473, 479–81 (2015) (academic book, hearing testimony, and judicial notice of facts about the history of state health reform efforts that preceded the Affordable Care Act); Yates v. United States, 574 U.S. 528, 535–36 (2015) (judicial notice and a committee report); Bond v. United States, 572 U.S. 844, 848–49 (2014) (preamble to an international treaty and academic books); Lawson v. FMR, LLC, 571 U.S. 429, 448–49 (2014) (newspaper articles and committee report); Adoptive Couple v. Baby Girl, 570 U.S. 637, 649 (2013) (statute's text and committee report); Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1011–12 (2017) (judicial notice); United States v. Davis, 139 S. Ct. 2319, 2330–31 (2019) (judicial notice); Boumediene v. Bush, 553 U.S. 723, 738 (2008) (judicial notice); Jefferson v. Upton, 560 U.S. 284, 290 (2010) (precedent and judicial notice); see also sources cited supra note 192 (inferring mischief from legislative history, precedent, or judicial notice).

[217] See *King*, 576 U.S. at 492, 497–98 (determining that rejected reading would "likely create the very 'death spirals' that Congress designed the Act to avoid"); *Bond*, 572 U.S. at 859–60 (concluding that defendant's crime did not involve a "chemical weapon" within statute's core meaning); *Yates*, 574 U.S. at 546 ("It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping.").

enacted the honest services statute to override the Court's decision in *McNally v. United States* and used that background fact to infer that the honest services statute must cover the core bribery and kickback offenses at issue in *McNally*.[218]

The rejected proposal form of statutory history inference also seems somewhat analogous to the mischief rule: the Court in such cases begins by establishing a background fact about the process that produced the statute—in this case, that Congress considered and rejected a proposal that would have explicitly adopted X reading of the statute—and extrapolates from that background fact that X meaning must fall outside the scope of the statute as enacted.

More broadly, the mischief rule's use of a background, motivating problem to define the scope of a statute's coverage is only a few steps removed from other forms of statutory history inferences—e.g., meaningful revision, effective reenactment, whole act, and *expressio unius* inferences—that first establish how a statute's text changed (or did not change) over time, or how it compares to another provision's text, or how it expressly enumerates certain covered items, and then use that fact as a springboard from which to make assumptions about the statute's reach. The only difference is that in the context of the mischief rule, the facts the Court relies on are about the societal problem or evil that Congress sought to remedy when it enacted the statute, whereas in the context of statutory history, the facts the Court relies on are about votes Congress has taken, judicial decisions to which Congress has responded, or evidence about how a statute's text has changed (or not changed) over time.

New textualists might counter that statutory history provides a better, more disciplined, and objective way of taking into account the facts that gave rise to a particular statutory provision than does the mischief rule. That is, they might seek to distinguish the mischief rule as an open-ended inquiry that allows judges to define a statute's goals at whatever level of generality suits their preferred interpretive outcome, while countering that statutory history, by contrast, solves the level of generality problem by providing a clear, limiting roadmap to the statute's scope.[219] The Roberts Court's on-the-ground use of statutory history, however, illustrates the problem with such defenses. Indeed,

[218] Skilling v. United States, 561 U.S. 358, 404–05 (2010).

[219] Many thanks to Bill Eskridge for highlighting this counterargument.

cases such as *BNSF Railway Co. v. Loos*, *Skilling v. United States*, and others show that statutory history leaves judges with ample discretion to define a statute's scope at whatever level of generality they want.[220] In *BNSF*, for example, the statutory history of the relevant amendment did not point inexorably to one clear meaning—leading Justice Ginsburg to conclude that the changes Congress enacted were merely "technical" in nature and did not alter the statute's meaning,[221] while Justice Gorsuch (and Justice Thomas) concluded that those same amendments worked fundamental changes in the statute's meaning.[222] Similarly, in *Skilling v. United States*, although the statutory history behind the honest services amendments was clear—Congress unambiguously sought to override the Court's decision in *McNally* and to reinstate the pre-*McNally* state of the law—that history hardly translated into a clear-cut interpretation of the statute.[223] On the contrary, it left a majority of the Court sufficient discretion to rewrite the statute to encompass *only* kickback and bribery schemes,[224] but it also prompted several Justices to write separately to criticize the majority's rewrite—*while acknowledging* that the amendment at issue represented an attempt to override *McNally*.[225] In other words, the Justices did not dispute the substance of the relevant amendment history in either *BNSF* or *Skilling*—but they did sharply dispute the interpretive inferences to be drawn from that history.[226] This is precisely what textualist Justices argue is the matter with traditional legislative history—that it is too open-ended to constrain judges and leaves judges free to make a case for whatever statutory reading they prefer.

At the end of the day, even supposedly "math problem" or "logic puzzle" like forms of statutory history inferences involve a similar kind of extrapolation and speculation about congressional purpose and intent as do traditional purposive interpretive tools such as legislative inaction or the mischief rule—because in order to determine the scope of change

[220] See discussion supra notes 188–90 and accompanying text.
[221] 139 S. Ct. 893, 900–01 (2019).
[222] See id. at 907 (Gorsuch, J., dissenting).
[223] See text accompanying supra notes 145–55.
[224] 561 U.S. 358, 407–09 (2010).
[225] Id. at 416–22 (Scalia, J., concurring in part, joined by Thomas & Kennedy, JJ.).
[226] For other similar disputes over how to interpret statutory history, see opposing opinions in *United States v. Ressam*, 553 U.S. 272, 275–76, 281 (2008), *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1814–15, 1819–20 (2019), *Harbison v. Bell*, 556 U.S. 180, 190–92, 203 (2009), *NLRB v. Southwest General, Inc.*, 137 S. Ct. 929, 941–42, 953 (2017).

effected by a statutory revision, judges ultimately need to make a guess about what Congress was trying to achieve with that revision. And the wiggle room inherent in such guesses gives judges significant power to shape or define the statute's scope as they see fit.

B. Decontextualization and Judicial Power

This Section explores how the use of statutory history to infer meaning—absent any contextual evidence corroborating the judicial deductions underlying the Court's inferences—tends to decontextualize the interpretation of statutes and, in the process, to shift power from the legislature to the judiciary.

As the case examples in Section II.C illustrate, many of the inferences the Court regularly draws from statutory history depend on rigid logical deductions or negative presumptions. That is, they compare a statute's current language to its previous language, or to language Congress considered but declined to adopt, or to an amendment Congress added to another section of the statute or even to another related statute—and insist that any discrepancies must add to, subtract from, or in some other way alter the statute's substantive meaning. This is particularly true of the meaningful revision, rejected proposal, and effective reenactment forms of inferences—which tend to mirror the logic of many of the linguistic canons that textualists champion more broadly.[227]

Of course, negative presumptions or "math problem" approaches to statutory interpretation are not new—scholars have long noted that textualism tends to turn statutory interpretation into a logic puzzle of sorts.[228] But it is curious to find the Court employing this approach with

[227] For example, the meaningful revision and rejected proposal forms of inference parallel the whole act rule against superfluity precept that each statutory provision or phrase should be construed to have independent significance—a principle that supports construing statutes not only to avoid redundancies, but also to attribute interpretive significance to newly added (or removed) statutory terms and to assume that a rejected proposal would have accomplished something the rest of the statute does not. See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 933 (2013) (explaining that the rule against superfluity dictates that "statutory words are intended to have independent meanings and are not intended to overlap with other terms"); Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

[228] See, e.g., Thomas Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash. U. L.Q. 351, 354, 372 (1994) (arguing that textualists' approach to statutory interpretation resembles puzzle-solving); Richard Pierce, The Supreme Court's New

respect to an interpretive resource—the record of amendments and revisions to a statute—that is so closely tied to the legislative process. For in thus focusing on text-to-text comparisons and logical deductions when determining the meaning of statutory revisions, the Court effectively separates the amendments or revisions from their surrounding context—i.e., the circumstances, goals, or social problem that motivated Congress to revise the statute in the first place. In other words, when the Court turns statutory history into another piece in a logic puzzle, it decontextualizes the statute's historical evolution—separating the fact of specific statutory revisions from the policy choices and reasoning that motivated those revisions.

In some of the opinions in the dataset, this decontextualization is mitigated by references to other interpretive resources, such as traditional legislative history, that provide perspective and corroboration for the inferences that the Justices draw from statutory history. But the vast majority of those opinions were authored by the Court's non-textualist, rather than its textualist or textualist-leaning Justices. Specifically, there were forty-two opinions in the dataset that referenced traditional legislative history alongside statutory history; thirty were authored by a non-textualist Justice, while only twelve were authored by textualist or textualist-leaning, Justices.[229] Moreover, half of the textualist-authored opinions that referenced traditional legislative history were authored by Justice Kennedy, who no longer serves on the Court.[230] This means that the use of traditional legislative history to confirm or provide context for judicial inferences drawn from statutory history was quite limited among the *current* members of the Court's textualist and textualist-leaning wing. The figures were similar for references to statutory purpose alongside statutory history.[231]

In the end, these data suggest that in a majority of statutory history opinions in the dataset—and in the *vast* majority of statutory history opinions authored by the textualist Justices—the members of the Roberts Court relied on their own intuitions or rigid logical deductions

Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749, 779 (1995) (same).

[229] See supra Table 2d.

[230] See id.

[231] During the period studied, the members of the Roberts Court referenced statutory purpose alongside statutory history in thirty-two opinions. Of these, nine were authored by textualist or textualist-leaning Justices (five by Justice Kennedy), and twenty-three were authored by non-textualist Justices. See id.

to determine the meaning of legislative revisions that Congress either adopted or declined to adopt. And they employed such logical deductions and intuitions despite the fact that what we know about the legislative process suggests that it is often neither logical nor intuitive.[232] Rejected proposal inferences, for example, presume that when Congress considers but declines to adopt particular statutory language, it does so because it disagrees with the substance of the proposed language.[233] As discussed in Part II, however, there are many other legislative process realities that could explain a congressional vote to decline a particular proposal—so the choice of which inference to draw remains wide open.[234] Similarly, meaningful revision inferences assume that changes in statutory language convey meaningfully different policy choices—but the line between significant and insignificant change is notoriously difficult to define and tends to amount, in the end, to a case-by-case judicial judgment call. Legislative history or other contextual evidence about the legislative process might help clarify whether or not Congress intended for a particular revision to effect a substantive change, but the textualist and textualist-leaning Justices have proved largely unwilling to check their statutory history inferences against such contextual evidence.

The choice to cut off contextual evidence about the reasoning behind legislative decisions to revise (or not revise) a statute can have a substantial impact on the conclusions one draws about the statute's meaning. In *Gross v. FBL Financial Services, Inc.*, for example, the Court refused to apply the "motivating factor" test codified in amendments to Title VII to the Age Discrimination in Employment Act ("ADEA"), despite the fact that the ADEA was modeled after and copied the language used in Title VII.[235] The Court based this conclusion on the ADEA's history, noting that when Congress amended Title VII to explicitly endorse the "motivating factor" concept, it did not similarly amend the ADEA—despite contemporaneously enacting other

[232] See, e.g., William O'Dowd, Law and Public Choice: A Critical Introduction by Daniel A. Farber and Philip P. Frickey, 29 Harv. J. on Legis. 321, 323 (1992) (describing the legislative process as "illogical," "chaotic," and "arbitrary").

[233] Eskridge, supra note 170, at 110 ("One must assume that a deliberate policy decision informed Congress's rejection of these alternatives in favor of the language presently contained in the statute.").

[234] See supra notes 170–71 and accompanying text.

[235] 557 U.S. 167, 173–74 (2009).

amendments to the ADEA.[236] That is, the Court made an effective reenactment plus whole code inference, concluding that Congress's decision to amend the ADEA without explicitly mentioning the "motivating factor" concept *must reflect* a congressional intent not to give the ADEA the same meaning as Title VII.

This was not the only plausible inference the Court could have drawn from the ADEA's statutory history: all of the courts of appeals that considered the "motivating factor" issue before *Gross* had unanimously applied Title VII's "motivating factor" test to ADEA claims.[237] The Court's contrary inference thus was very much a judgment call or an exercise of judicial discretion and speculation—not the inevitable conclusion to a logic problem. Moreover, the Court's inference was directly contradicted by a committee report indicating that a "number of other laws banning discrimination, including . . . the [ADEA], are modeled after, and have been interpreted in a manner consistent with, Title VII" and recommending that "these other laws modeled after Title VII be interpreted consistently . . . with Title VII as amended by this Act."[238] The Court ignored this traditional legislative history, instead drawing its own competing inferences based on cold comparisons between the original and amended texts of Title VII and the ADEA.

Ultimately, an interpretive decision to ignore traditional legislative history or other resources that might provide context for how and why a statute evolved from one version to the next, and to instead infer meaning based on presumptions about how statutory language has changed over time, is a deliberate decision to preference judicial deduction and analysis over information generated by the legislative process. And, in this sense, it is a decision to shift power and authority to the judiciary—allowing judges to make the inferences, guesses, and judgment calls that translate changes in statutory language into substantive meaning while discounting clues about statutory meaning provided by the legislature. Put simply, inferring meaning from a statute's history based solely on logical deduction is an approach that arrogates to judges, rather than legislators, the power to connect the dots between different points in the legislative process—and to do so in a manner that often ignores the realities of the legislative process itself.

[236] See id. at 174.
[237] See id. at 183–84 & n.5 (Stevens, J., dissenting).
[238] H.R. Rep. No. 102-40, pt. 2, at 4 (1991).

C. Some Lessons

A close look at the Roberts Court's on-the-ground use of statutory history suggests at least three important lessons for statutory interpretation theory and for textualism in particular. First, text-to-text comparisons between earlier and later versions of a statute do not point inevitably to a single, clear statutory meaning—and do not constrain judges any more than traditional purposive interpretive tools such as internal legislative history, the mischief rule, statutory purpose, or inferences based on legislative inaction. Second, the sophisticated comparisons and logical inferences the Court draws when it invokes statutory history are inconsistent with textualism's focus on the "ordinary reader" and its critique of legislative history as inaccessible to such readers. Third, inferring statutory meaning from statutory history, while ignoring other contextual evidence about the legislative process that shows a statute is illogical, disrespects Congress and enhances judicial power. This Section explores each of these lessons in turn.

Judicial Restraint. Textualists contend that their interpretive approach is superior to others in part because it minimizes judicial discretion and ideological decision-making. In contrast to other interpretive approaches, which are said to enhance judicial discretion, textualism claims to "narrow the range of acceptable judicial decision-making" and "curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences."[239] With respect to statutory history, textualists essentially contend that inferring a statute's purpose and intent from the text that Congress enacted is more objective and legitimate than interpreting statutes in light of the goals or explanations that members of Congress articulated in un-enacted legislative materials. Bill Eskridge has long challenged such claims, arguing that a purely text-based approach is neither more objective nor more constraining than interpretive approaches that consider un-enacted legislative materials.[240] My own empirical and doctrinal work has documented how several text-based interpretive tools confer substantial discretion on judges.[241] This Article deepens these earlier critiques—demonstrating

[239] Scalia & Garner, supra note 22, at xxviii.

[240] See, e.g., William N. Eskridge, Jr., The New Textualism and Normative Canons, 113 Colum. L. Rev. 531, 533, 537 (2013).

[241] See Krishnakumar, Backdoor Purposivism, supra note 198, at 1278; Krishnakumar, Whole Code Rule, supra note 48, at 81–83; Krishnakumar, Dueling Canons, supra note 20, at 912.

that the lines textualists have drawn between text-based statutory history inferences and inferences based on other forms of legislative context are fragile and that the former can enhance judicial power at the expense of legislative authority.

As Sections III.A and III.B elaborated, a side-by-side comparison of earlier and later versions of a statute's text is not necessarily objective and does not necessarily point to a single correct reading of a statute. More than one explanation, or judicial inference, is often suggested by such comparisons, and—as the cases discussed in Part II demonstrate—judges often exercise substantial discretion in choosing which inference to credit. Moreover, as Section III.A explained, some of the inferences the Court draws from statutory history are not even truly text-based, but instead depend on judicial assumptions about legislative inaction or extrapolation from the background circumstances that motivated Congress to enact a statute in the first place.

These observations suggest that, in the end, what textualists accomplish when they consult statutory history while eschewing traditional legislative history is not the elimination of judicial discretion, but rather the obscuring of such discretion. That is, textualists' approach to statutory history effectively drives judicial guesswork about statutory purpose and intent underground—and shifts the focus of the interpretive task from the legislature to the judiciary by turning it into a word game of sorts.

Textualist Justices' approach to statutory history also contradicts another core tenet of textualist theory—that the goal of statutory interpretation should be to identify the meaning that an ordinary reader would understand a statute to have, rather than the meaning that a reader with a sophisticated understanding of the legislative process would comprehend. As now-Justice Amy Coney Barrett has explained, "What matters to the textualist is how the ordinary English speaker—one unacquainted with the peculiarities of the legislative process—would understand the words of a statute."[242] Indeed, this was one of the bases for Justice Scalia's critiques of legislative history—as he famously compared efforts to determine a statute's meaning based on "what the

[242] See Amy Coney Barrett, Congressional Insiders and Outsiders, 84 U. Chi. L. Rev. 2193, 2194 (2017); see also John F. Manning, What Divides Textualists From Purposivists?, 106 Colum. L. Rev. 70, 77 (2006) (stating that judges should ascribe to statutes the meaning that "a reasonable person conversant with applicable social conventions would have understood them to be adopting").

lawgiver meant" to Emperor Nero's practice of posting edicts high up on pillars so that ordinary citizens could not read them.[243]

The irony, however, is that combing through the legislative record to identify and compare previous versions of a statute or legislative proposal to the enacted version of the statute can be just as, if not more, complicated and time-consuming as finding the committee report that accompanied a statute or the pages in the Congressional Record that correspond to floor debate about the statute. Further, the logical inferences the Court draws based on statutory history are often sophisticated and nuanced, and hardly seem like the kind of reasoning one would expect an ordinary reader to replicate. How is the ordinary reader supposed to know, for example, that Congress rejected a particular legislative proposal unless she digs through the legislative record to examine congressional votes and the text of proposed amendments? Likewise, how is the ordinary reader supposed to know that Congress amended a statute in order to override a particular judicial decision unless she pays close attention to judicial decisions?

Thus, a second lesson the Roberts Court's use of statutory history teaches is that the textualist Justices either do not actually care all that much about identifying the meaning that an ordinary reader would understand a statute to have, or they have not sufficiently thought through the ways in which statutory history—like traditional legislative history and other contextual aids connected to the legislative process—complicates and renders the interpretive endeavor less accessible to the ordinary reader.

Disrespecting Congress. A second problem, or lesson, from the Court's approach to statutory history is that relying on logical inferences drawn from the statute's text alone can elevate judicial conjecture over concrete legislative exposition—and thereby have the effect of disempowering Congress. Indeed, inferring statutory meaning based on textual updates made by Congress over time—essentially guessing at what Congress was trying to accomplish with successive iterations of a statute—while ignoring the explanations Congress itself provided for those updates is both illogical and profoundly disrespectful to a co-equal branch. Congress, after all, is supposed to be the master in statutory matters, and the Court is supposed to act as its agent in translating statutory meaning. But a system in which judges insist on filling in the

[243] Scalia, supra note 2, at 17.

gaps between points in the legislative process through assumptions and guess-work, while disregarding concrete evidence from the legislative record explaining those gaps, risks turning the master-agent relationship on its head.

Recommendations. Given the above lessons and theoretical tensions that the use of statutory history poses for textualism, there are three possible adjustments textualist judges could make to their interpretive practices:

First, textualists could abandon the use of drafting history altogether, and instead limit their consideration of statutory history exclusively to amendment history. This approach would have the advantage of remaining theoretically consistent with textualism's fundamental tenet that only the duly enacted text of a statute is a legitimate source of law. It also seems practically feasible given that the textualist and textualist-leaning Justices on the Roberts Court *authored* only eleven opinions in the entire dataset that invoked drafting history.[244]

But abandoning drafting history would not eliminate *all* of the theoretical tensions described in this Article. This is because some of the inferences that the Court—including the textualist Justices—have tended to draw from *amendment* history are inconsistent with some of textualism's core principles. As discussed earlier, several textualist-authored amendment history-referencing opinions made (1) override or underwrite inferences that ventured beyond textual analysis to infer meaning based on the circumstances that motivated Congress to amend a statute, or (2) effective re-enactment inferences that relied, at least in part, on Congress's *failure to act* rather than on textual updates that survived the Article I, Section 7, process.[245] Still others employed amendment history alongside drafting history to make rejected proposal inferences that necessarily depended on un-enacted legislative

[244] Textualist and textualist-leaning Justices did also join several opinions that invoked statutory history, see sources cited supra notes 182–85 and infra note 248, so in order to be truly faithful to textualism's tenets they might in future cases have to also distance themselves from those sections of their colleagues' opinions that employ statutory history.

[245] There were nineteen amendment history opinions in the dataset that made override or underwrite inferences; eight were authored by textualist or textualist-leaning Justices. See infra Appendix I. Twenty-six opinions relied on amendment history to make an effective reenactment inference; fourteen were authored by textualist or textualist-leaning Justices. See id.

materials.[246] Thus, abandoning drafting history would go some—but not all—of the way toward reconciling textualist jurists on the grounds of interpretive practices with textualism's theoretical claims.

Second, textualist judges could abandon the use of statutory history of all forms, including amendment history, entirely. Such an approach would eliminate all of the theoretical tensions identified in this Article and would be most consistent with textualism's fundamental tenets. However, I do not think this would be the best approach for textualist jurists to take for a number of reasons. First, as a practical matter, even if textualist judges were to make a jurisprudential commitment to cease using all forms of statutory history, it seems unlikely that they would adhere to that commitment in practice. We need look only to the Court's experience with rejected proposals to see why: although textualists long have criticized the use of rejected proposals to determine statutory meaning *in theory*, the data show that they regularly make inferences based on rejected proposals in the opinions they author.[247] Even Justice Scalia, who was one of the staunchest theoretical critics of rejected proposal use, regularly joined opinions authored by other Justices that inferred meaning from rejected proposals.[248]

There is a reason for this discrepancy between theoretical stance and actual interpretive practice: Textualism's exclusion of contextual evidence such as traditional legislative history, the mischief rule, and the like inevitably leaves textualist judges searching for some context outside the four corners of the statute—at least in some close cases. Textualists thus often reach for other interpretive tools, beyond the words of the statute, to fill in the contextual gaps left by their refusal to consult legislative history and other similar purposivist interpretive tools. Statutory history is one of these other tools. Indeed, it is no

[246] See Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1934–35 (2016) (Roberts, C.J.); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) (Kennedy, J.); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 802 (2014) (Kagan, J.); Jones v. Harris Assocs. L.P., 559 U.S. 335, 352 (2010) (Alito, J.).

[247] See discussion supra Section III.A; infra Appendix I.

[248] Justice Scalia famously joined the majority opinion in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), which relied heavily on rejected proposals. See also *Jones*, 559 U.S. at 352 (relying in part on fact that the provision ultimately enacted adopted "a different method" than one proposed in the House); Hertz Corp. v. Friend, 559 U.S. 77, 95 (2010) (relying in part on a rejected test); Bloate v. United States, 559 U.S. 196, 211 n.13 (2010) (considering the failure to adopt an amendment); FTC v. Actavis, Inc., 570 U.S. 136, 168 (2013) (Roberts, C.J., dissenting) (relying in part on Congress's failure to act on a particular issue).

accident that textualists have carved out an exception for some forms of legislative record materials; the need for interpretive context makes it difficult to entirely ignore the legislative process that produced a statute when trying to determine the statute's meaning. But as this Part has shown, when textualists reach for contextual aids like statutory history, they tend to blur the sharp lines they have tried to draw between acceptable text-based inferences and unacceptable purposive guesswork.

Nor do I think it would be a *good idea* for textualist jurists to try to ignore statutory history in response to my critique; in my view it is a *good thing* that textualist judges sometimes rely on such history when interpreting statutes. While I have reservations about the value of attributing meaning to rejected proposals—because there are many different reasons Congress could have had for declining to adopt a particular proposal—the other forms of statutory history inferences can provide important insight into a statute's meaning. In particular, a lot of interpretive value would be lost if the Court were to stop paying attention to the fact that Congress enacted a particular statutory revision in an effort to override or underwrite a judicial decision. Indeed, it seems downright silly, if not deceptive, for the Court to ignore the background fact that Congress was responding to a particular judicial interpretation when trying to determine the meaning of a provision enacted to codify or undo that interpretation. But once textualism makes room for inferences based on this kind of background fact, it becomes difficult to justify *not* considering other kinds of background circumstances and motivating factors that prompted Congress to enact or revise a particular statute.

A third option would be for textualist judges to acknowledge that statutory history is a form of contextual evidence that reaches beyond the four corners of the enacted text and that it can be difficult to distinguish such history from other kinds of legislative-process-related contextual evidence.[249] Textualists also could acknowledge that relying on statutory history to infer meaning while ignoring other forms of legislative-process-related evidence that exists *in the same case* runs the risk of providing an incomplete picture of a statute's meaning. In order to avoid such risks, and to ensure that the inferences they draw about a statute's meaning are accurate, textualists thus might broaden their

[249] Some textualist scholars have acknowledged as much, see Manning, supra note 242, at 79–81, but textualist judges do not, to date, appear to have done so.

interpretive toolkit to check their statutory history inferences against other available contextual evidence connected to the legislative process. That is, in those cases in which textualist judges find it illuminating or useful to consult a statute's history, they could check the inferences they draw from that history against the mischief the statute was designed to remedy, the purpose Congress articulated for the statute, and even traditional legislative history—as a way of testing that the inferences they draw are accurate, or at least not inconsistent with other legislative-process clues about the statute's meaning. In some ways, such an approach would resemble the approach that Eskridge described the Rehnquist Court taking with respect to legislative inaction inferences—i.e., drawing inferences based on Congress's failure to act only when there was some legislative record evidence indicating that Congress paid attention to the relevant judicial decision or interpretive question.[250]

This approach would not require textualist judges to become purposivists, willing to consult traditional purposive interpretive tools in all cases. All it would require is that in those cases in which textualist judges see fit to draw interpretive inferences from statutory history, they check those inferences against other available contextual evidence of congressional purpose and intent, including the mischief that motivated Congress to enact the statute and traditional legislative history. If those other contextual tools corroborate the inference drawn from statutory history, then the Court should note that confirmatory evidence. Conversely, if other contextual evidence conflicts with the inference suggested by the statutory history, the Court should reconsider the inference it is drawing. In some cases, reconsideration may convince the Court that it should adopt a different interpretation; in others, the Court may conclude that its original interpretation was correct. In the latter situation, the Court may decide to stick with its original interpretation, but if it does, it should at least decline to rely on the statutory history inference that has been called into doubt.

Some may question whether the Court's textualist Justices would be willing to expand their interpretive toolkit in this manner, to consult a statute's mischief, purpose, traditional legislative history, and the like as a "check" on their statutory history inferences. Indeed, textualist jurists may have jurisprudential objections, beyond the lack of bicameralism and presentment, that make them reluctant to consult traditional

[250] See sources cited supra note 209 and accompanying text.

legislative history even in the limited category of cases recommended in this Article—e.g., a belief that traditional legislative history is more amorphous and manipulable than statutory history, or that the administrative costs of consulting statutory history are lower than the costs of consulting traditional legislative history because the universe of relevant statutory history is smaller and easier to identify than the universe of relevant traditional legislative history.

While such concerns certainly could prevent some textualist jurists from using purposive interpretive tools to check their statutory history inferences, there is at least some reason to expect that some of the Court's textualist and textualist-leaning Justices might be willing to expand their interpretive tool-kit in the limited manner I recommend: despite the absolute stance that textualism-in-theory has taken against traditional purposive interpretive tools, many of the Court's textualist and textualist-leaning Justices have, in practice, proved willing to consult these interpretive tools in some of the opinions they *author*, as well as to join (without partial dissent) opinions authored by others that invoke these interpretive tools.[251] Justices Alito and Kennedy, for example, referenced statutory purpose and traditional legislative history in a non-trivial percentage of the opinions they authored during the period studied.[252] And Chief Justice Roberts (in)famously has construed several high-profile statutes in light of the mischief that prompted Congress to enact them.[253] Even Justices Scalia, Thomas, and Gorsuch

[251] See, e.g., Astrue v. Capato, 566 U.S. 541, 555 (2012) (Ginsburg, J., joined by all textualist Justices) (unanimous) (purpose); Abbott v. United States, 562 U.S. 8, 20 (2010) (Ginsburg, J.) (unanimous) (purpose); Barber v. Thomas, 560 U.S. 474, 481–82 (2010) (Breyer, J., joined by Roberts, C.J. & Scalia, Thomas, & Alito, JJ.) (purpose); Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017) (Breyer, J., joined by all textualist Justices) (unanimous); Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237, 248–49 (2014) (Sotomayor, J., joined by Roberts, C.J. & Alito & Kennedy, JJ.) (purpose); Jerman v. Carlisle, 559 U.S. 573, 602, 609 (2010) (Sotomayor, J., joined by Roberts, C.J. & Thomas, J.) (purpose and legislative history); AT&T Corp. v. Hulteen, 556 U.S. 701,713 (2009) (Souter, J., joined by all textualist Justices) (legislative history); Cuozzo Speed Tech., LLC v. Lee, 136 S. Ct. 2131, 2139–40 (2016) (Breyer, J., joined by Roberts, C.J. & Thomas & Kennedy, JJ.) (legislative history and purpose); DePierre v. United States, 564 U.S. 70, 80 (2011) (Sotomayor, J., joined by all textualist Justices except Justice Scalia) (legislative history); Gelboim v. Bank of Am. Corp., 574 U.S. 405, 410 (2015) (Ginsburg, J., joined by all textualist Justices) (unanimous) (legislative history).

[252] See supra Table 2d.

[253] See Anita S. Krishnakumar, Passive Avoidance, 71 Stan. L. Rev. 513, 538–39, 541–42, 545–46, 551 (2019) (describing Court's reliance on the mischief rule in *Bond v. United*

referenced statutory purpose in roughly 10.0% of the opinions they authored (and Justice Gorsuch employed traditional legislative history in 8.7% of the opinions he authored).[254] Moreover, the textualist and textualist-leaning Justices, as a group, referenced traditional legislative history in half of the drafting history opinions they authored[255]—perhaps recognizing, at least implicitly, that inferences based on drafting history involve judicial speculation and could benefit from confirmation from other legislative process materials. Given all of this, it might not be such a big lift for the textualist and textualist-leaning Justices to broaden their interpretive practices to also consult the mischief rule and other purposive tools—as a double-checking mechanism—in the balance of cases in which they see fit to infer meaning from statutory history, particularly once the fragility of the distinctions they have drawn between statutory history and traditional purposive interpretive tools has been made clear.

CONCLUSION

This Article has sought to illuminate the manner in which the U.S. Supreme Court uses statutory history to determine a statute's substantive meaning. It has catalogued the different forms of interpretive inferences the Court draws from, such as history, and has evaluated the theoretical justifications and implications associated with textualist Justices' use of this interpretive resource. In particular, it has noted that many of the Court's statutory history inferences parallel the negative implication, logic-puzzle-type reasoning that characterizes the linguistic canons and other textualist-preferred interpretive tools—and it has argued that such inferences enhance judicial discretion and power. This Article also has highlighted some important discrepancies between textualist Justices' formalist defense of statutory history as distinct from traditional legislative history and textualists' on-the-ground use of statutory history. And it has suggested that while there are salient differences between statutory history and traditional legislative history, judicial inferences based on the former can benefit from corroboration by the latter. In the

States, *Yates v. United States*, *Adoptive Couple v. Baby Girl*, and *King v. Burwell*); Richard M. Re, The New Holy Trinity, 18 Green Bag 2d 407, 410–11, 413–14 (2015) (describing Court's reliance on "the 'principle evil motivating' the law" in *Bond*, *Yates*, and *King*).

[254] See supra Table 2d.

[255] Six of twelve textualist-authored drafting history opinions also referenced traditional legislative history. See infra Appendix I (listing cases).

end, this Article argues that textualist Justices' willingness to use statutory history to interpret statutes is theoretically inconsistent with an absolute refusal to consider other kinds of background statutory context, including, most conspicuously, legislative inaction and the mischief rule. Throughout, this Article's aim has been to shine a light on statutory history as an interpretive tool and to deepen our theoretical understanding of this under-studied interpretive resource.

Appendix I **The Roberts Court's Use of Statutory History** **2006–2018**			
Case Name	**Form of Comparison / Level of Reliance**	**Opinion**	**Drafting / Amendment History**
Abbott v. United States (2010)	Effective Reenactment + Overrides & Underwrites / Some Reliance	Majority (Ginsburg, J.)	Amendment History
AT&T Corp. v. Hulteen (2009)	Overrides & Underwrites / Some Reliance	Dissent (Ginsburg, J.)	Amendment History*
Abuelhawa v. United States (2009)	Meaningful Revision / Some Reliance	Majority (Souter, J.)	Amendment History
Advoc. Health Care Network v. Stapleton (2017)	Meaningful Revision / Some Reliance	Majority (Kagan, J.)	Amendment History
Ali v. Fed. Bureau of Prisons (2008)	Rejected Proposal / Heavy Reliance	Dissent (Breyer, J.)	Drafting History*
Am. Broad. Cos. v. Aereo, Inc. (2014)	Overrides & Underwrites / Heavy Reliance	Majority (Breyer, J.)	Amendment History
Arizona v. United States (2012)	Rejected Proposal / Some Reliance	Majority (Kennedy, J.)	Drafting History*
Ayestas v. Davis (2018)	Meaningful Revision / Some Reliance	Majority (Alito, J.)	Amendment History
Azar v. Allina Health Servs. (2019)	Meaningful Revision / Minimal Reliance	Majority (Gorsuch, J.)	Drafting History*
Azar v. Allina Health Servs. (2019)	Meaningful Revision / Some Reliance	Dissent (Breyer, J.)	Drafting History*

Begay v. United States (2008)	Rejected Proposal / Some Reliance	Majority (Breyer, J.)	Drafting & Amendment History*
Bilski v. Kappos (2010)	Effective Reenactment + Overrides & Underwrites / Heavy Reliance	Concurrence (Stevens, J.)	Amendment History*
Bloate v. United States (2010)	Rejected Proposal / Minimal Reliance	Majority (Thomas, J.)	Drafting History
BNSF Ry. Co. v. Loos (2019)	Effective Reenactment / Some Reliance	Majority (Ginsburg, J.)	Amendment History
BNSF Ry. Co. v. Loos (2019)	Meaningful Revision / Some Reliance	Dissent (Gorsuch, J.)	Amendment History
Boumediene v. Bush (2008)	Overrides & Underwrites / Some Reliance	Majority (Kennedy, J.)	Amendment History*
Burgess v. United States (2008)	Meaningful Revision / Some Reliance	Majority (Ginsburg, J.)	Amendment History
Burwell v. Hobby Lobby Stores, Inc. (2014)	Effective Reenactment / Some Reliance	Dissent (Ginsburg, J.)	Amendment History*
Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc. (2017)	Meaningful Revision / Some Reliance	Majority (Kennedy, J.)	Amendment History
Carcieri v. Salazar (2009)	Meaningful Revision / Some Reliance	Dissent (Stevens, J.)	Drafting History
U.S. Chamber of Com. v. Whiting (2011)	Meaningful Revision / Some Reliance	Dissent (Breyer, J.)	Amendment History*
Corley v. United States (2009)	Meaningful Revision / Some Reliance	Majority (Souter, J.)	Drafting History*

Dean v. United States (2009)	Overrides & Underwrites / Some Reliance	Dissent (Stevens, J.)	Amendment History*
Dean v. United States (2009)	Overrides & Underwrites / Heavy Reliance	Dissent (Breyer, J.)	Amendment History
Domino's Pizza, Inc. v. McDonald (2006)	Overrides & Underwrites / Some Reliance	Majority (Scalia, J.)	Amendment History
Encino Motorcars, LLC v. Navarro (2018)	Meaningful Revision / Some Reliance	Dissent (Ginsburg, J.)	Amendment History*
Entergy Corp. v. Riverkeeper, Inc. (2009)	Meaningful Revision / Heavy Reliance	Dissent (Stevens, J.)	Drafting History*
Entergy Corp. v. Riverkeeper, Inc. (2009)	Meaningful Revision / Heavy Reliance	Partial Concurrence/ Dissent (Breyer, J.)	Drafting History*
EPA v. EME Homer City Generation, L.P. (2014)	Meaningful Revision / Some Reliance	Dissent (Scalia, J.)	Amendment History
Epic Sys. Corp. v. Lewis (2018)	Meaningful Revision / Some Reliance	Dissent (Ginsburg, J.)	Drafting History*
FAA v. Cooper (2012)	Meaningful Revision / Some Reliance	Dissent (Sotomayor, J.)	Drafting History
Forest Grove Sch. Dist. v. T.A. (2009)	Effective Reenactment / Some Reliance	Majority (Stevens, J.)	Amendment History
4th Est. Pub. Benefit Corp. v. Wall-Street.com, LLC (2019)	Rejected Proposal / Heavy Reliance	Majority (Ginsburg, J.)	Drafting & Amendment History*
FTC v. Actavis, Inc. (2013)	Rejected Proposal / Minimal Reliance	Dissent (Roberts, C.J.)	Drafting History

Global-Tech Appliances, Inc. v. SEB S.A. (2011)	Effective Reenactment / Some Reliance	Majority (Alito, J.)	Amendment History
Gonzales v. Carhart (2007)	Overrides & Underwrites / Heavy Reliance	Majority (Kennedy, J.)	Drafting History*
Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson (2010)	Meaningful Revision / Minimal Reliance	Majority (Stevens, J.)	Drafting & Amendment History*
Gross v. FBL Fin. Servs., Inc. (2009)	Effective Reenactment + Other Inference / Heavy Reliance	Majority (Thomas, J.)	Amendment History
Halo Elecs., Inc. v. Pulse Elecs., Inc. (2016)	Rejected Proposal / Minimal Reliance	Majority (Roberts, C.J.)	Amendment History & Drafting History
Hamdan v. Rumsfeld (2006)	Rejected Proposal / Some Reliance	Majority (Stevens, J.)	Drafting History*
Harbison v. Bell (2009)	Effective Reenactment / Some Reliance	Majority (Stevens, J.)	Drafting History*
Harbison v. Bell (2009)	Other Inference / Some Reliance	Dissent (Scalia, J.)	Drafting History
TC Heartland LLC v. Kraft Foods Grp. Brands LLC (2017)	Effective Reenactment / Heavy Reliance	Majority (Thomas, J.)	Amendment History
Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc. (2019)	Effective Reenactment / Heavy Reliance	Majority (Thomas, J.)	Amendment History
Hertz Corp. v. Friend (2010)	Rejected Proposal / Some Reliance	Majority (Breyer, J.)	Drafting History*
Home Depot U.S.A., Inc. v. Jackson (2019)	Other Inference / Some Reliance	Dissent (Alito, J.)	Amendment History*

Husky Int'l Elecs., Inc. v. Ritz (2016)	Meaningful Revision / Heavy Reliance	Majority (Sotomayor, J.)	Amendment History
Jefferson v. Upton (2010)	Overrides & Underwrites / Some Reliance	Majority (per curiam)	Amendment History
Jennings v. Rodriguez (2018)	Effective Reenactment / Minimal Reliance	Majority (Alito, J.)	Amendment History
Jones v. Bock (2007)	Other Inference / Some Reliance	Majority (Roberts, C.J.)	Amendment History
Jones v. Harris Assocs. L.P. (2010)	Rejected Proposal / Some Reliance	Majority (Alito, J.)	Amendment History & Drafting History*
Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp. (2010)	Effective Reenactment / Some Reliance	Majority (Kennedy, J.)	Amendment History*
Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter (2015)	Effective Reenactment / Heavy Reliance	Majority (Alito, J.)	Amendment History*
Kirtsaeng v. John Wiley & Sons, Inc. (2013)	Meaningful Revision / Some Reliance	Majority (Breyer, J.)	Amendment History*
Kucana v. Holder (2010)	Effective Reenactment / Some Reliance	Majority (Ginsburg, J.)	Amendment History
Lamar, Archer & Cofrin, LLP v. Appling (2018)	Effective Reenactment / Some Reliance	Majority (Sotomayor, J.)	Amendment History
Leegin Creative Leather Prods., Inc. v. PSKS, Inc. (2007)	Meaningful Revision / Some Reliance	Dissent (Breyer, J.)	Amendment History*
Lewis v. City of Chicago (2010)	Overrides & Underwrites / Some Reliance	Majority (Scalia, J.)	Amendment History

Life Techs. Corp. v. Promega Corp. (2017)	Overrides & Underwrites / Some Reliance	Majority (Sotomayor, J.)	Amendment History
Lockhart v. United States (2016)	Meaningful Revision / Some Reliance	Dissent (Kagan, J.)	Amendment History*
Martel v. Clair (2012)	Effective Reenactment / Heavy Reliance	Majority (Kagan, J.)	Amendment History (New Statute)
Michigan v. Bay Mills Indian Cmty. (2014)	Rejected Proposal / Some Reliance	Majority (Kagan, J.)	Amendment History & Drafting History
Mission Prods. Holdings, Inc. v. Tempnology, LLC (2019)	Effective Reenactment / Minimal Reliance	Majority (Kagan, J.)	Amendment History*
Mohamad v. Palestinian Auth. (2012)	Meaningful Revision / Some Reliance	Majority (Sotomayor, J.)	Drafting History*
Murphy v. Smith (2018)	Meaningful Revision / Some Reliance	Majority (Gorsuch, J.)	Amendment History (New Statute)
Nichols v. United States (2016)	Meaningful Revision / Heavy Reliance	Majority (Alito, J.)	Amendment History
Nken v. Holder (2009)	Meaningful Revision / Some Reliance	Dissent (Alito, J.)	Amendment History
NLRB v. Sw. Gen., Inc. (2017)	Meaningful Revision / Minimal Reliance	Majority (Roberts, C.J.)	Drafting History*
NLRB v. Sw. Gen., Inc. (2017)	Effective Reenactment / Some Reliance	Dissent (Sotomayor, J.)	Amendment History (New Statute)
Obduskey v. McCarthy & Holthus LLP (2019)	Rejected Proposal / Some Reliance	Majority (Breyer, J.)	Drafting History

Osborn v. Haley (2007)	Overrides & Underwrites / Some Reliance	Partial Concurrence/Dissent (Breyer, J.)	Amendment History* (New Statute)
Parker Drilling Mgmt. Servs., Ltd. v. Newton (2019)	Effective Reenactment / Some Reliance	Majority (Thomas, J.)	Amendment History
Pepper v. United States (2011)	Effective Reenactment / Heavy Reliance	Majority (Sotomayor, J.)	Amendment History*
Pereira v. Sessions (2018)	Other Inference / Some Reliance	Dissent (Alito, J.)	Amendment History
Rapanos v. United States (2006)	Rejected Proposal / Some Reliance	Dissent (Stevens, J.)	Drafting History*
Rehaif v. United States (2019)	Meaningful Revision / Minimal Reliance	Majority (Breyer, J.)	Amendment History*
Republic of Sudan v. Harrison (2019)	Rejected Proposal / Minimal Reliance	Majority (Alito, J.)	Drafting History
Ricci v. DeStefano (2009)	Overrides & Underwrites / Heavy Reliance	Dissent (Ginsburg, J.)	Amendment History*
Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (2006)	Overrides & Underwrites / Heavy Reliance	Majority (Roberts, C.J.)	Amendment History
Star Athletica, LLC v. Varsity Brands, Inc. (2017)	Overrides & Underwrites / Some Reliance	Majority (Thomas, J.)	Amendment History
Stokeling v. United States (2019)	Effective Reenactment / Heavy Reliance	Majority (Thomas, J.)	Amendment History
Scheidler v. Nat'l Org. for Women, Inc. (2006)	Effective Reenactment / Some Reliance	Majority (Breyer, J.)	Amendment History*
Schindler Elevator Corp. v. United States ex rel. Kirk (2011)	Effective Reenactment / Minimal Reliance	Majority (Thomas, J.)	Amendment History

Skilling v. United States (2010)	Overrides & Underwrites / Some Reliance	Majority (Ginsburg, J.)	Amendment History (New Statute)
Smith v. Berryhill (2019)	Other Inference / Minimal Reliance	Majority (Sotomayor, J.)	Amendment History
United States v. Davis (2019)	Overrides & Underwrites + Effective Reenactment / Some Reliance	Majority (Gorsuch, J.)	Amendment History
Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (2015)	Effective Reenactment + Rejected Proposal / Some Reliance	Majority (Kennedy, J.)	Amendment History & Drafting History*
United States v. O'Brien (2010)	Effective Reenactment + Overrides & Underwrites / Some Reliance	Majority (Kennedy, J.)	Amendment History*
United States v. Quality Stores, Inc. (2014)	Meaningful Revision / Some Reliance	Majority (Kennedy, J.)	Amendment History*
United States v. Ressam (2008)	Other Inference / Some Reliance	Majority (Stevens, J.)	Amendment History
United States v. Ressam (2008)	Other Inference / Some Reliance	Dissent (Breyer, J.)	Amendment History*
Va. Uranium, Inc. v. Warren (2019)	Effective Reenactment / Some Reliance	Plurality (Gorsuch, J.)	Amendment History*
Wachovia Bank, N.A. v. Schmidt (2006)	Effective Reenactment / Some Reliance	Majority (Ginsburg, J.)	Amendment History
WesternGeco LLC v. ION Geophysical Corp. (2018)	Overrides & Underwrites / Heavy Reliance	Dissent (Gorsuch, J.)	Amendment History

Wis. Cent. Ltd. v. United States (2018)	Rejected Proposal / Some Reliance	Dissent (Breyer, J.)	Drafting History*
Yates v. United States (2015)	Other Inference / Some Reliance	Plurality (Ginsburg, J.)	Drafting History*

* Denotes an opinion that also referenced traditional legislative history.