

THE WARP AND WOOF OF STATUTORY INTERPRETATION: COMPARING SUPREME COURT APPROACHES IN TAX LAW AND WORKPLACE LAW

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ABSTRACT

Debates about statutory interpretation—and especially about the role of the canons of construction and legislative history—are generally framed in one-size-fits-all terms. Yet federal judges—including most Supreme Court Justices—have not approached statutory interpretation from a methodologically uniform perspective. This Article presents the first in-depth examination of interpretive approaches taken in two distinct subject areas over an extended period of time. Professors Brudney and Ditslear compare how the Supreme Court has relied on legislative history and the canons of construction when construing tax statutes and workplace statutes from 1969 to 2008.

The authors conclude that the Justices tend to rely on legislative history for importantly different reasons in these two fields. The Court regularly invokes committee reports and floor statements in the workplace law area for the traditional role of identifying and elaborating on the legislative bargain that Congress reached. By

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We are grateful to Larry Baum, Beth Garrett, Stephanie Hoffer, Allan Samansky, Donald Tobin, George Yin, and faculty workshop participants at the University of California Hastings College of the Law for thoughtful comments and suggestions on earlier drafts. Geoffrey Brounell, Jordan Carr, Katie Downing, Chris Hollon, Melanie Oberlin, and Jesse Thomas furnished excellent research support as well as valuable assistance in compiling the tax database. Jennifer Pursell provided first-rate secretarial support. The Moritz College of Law and its Center for Interdisciplinary Legal Studies contributed generous financial assistance.

contrast, the Justices often rely on the legislative history accompanying tax statutes to borrow expertise from key committee actors. The Court's use of tax legislative history for expertise-borrowing purposes relates to the distinctive nature of how tax legislative history is produced, featuring regular cross-party and interbranch cooperation that is virtually unimaginable in the workplace law setting. Although most Justices have appreciated the special character of tax legislative history, Justice Scalia remains steadfast in his unwillingness to do so.

With respect to the use of canons, Brudney and Ditslear find that the Court makes comparatively heavier use of the whole act rule and related structural canons in its tax majorities. The authors suggest that the Justices may recognize the Internal Revenue Code to be more of a coherent and self-contained regulatory scheme than the series of workplace law statutes scattered across multiple titles of the U.S. Code. As for substantive canons, the Justices are much more likely to invoke tax-based judicial policy norms than to rely on canons grounded in the specifics of workplace law. The authors contend that the Court's use of these tax law canons should be viewed as a derivative form of expertise borrowing.

Finally, Brudney and Ditslear explore the special role played by Justice Blackmun in the tax area. They demonstrate how Blackmun's expertise in tax law and his attentiveness to its legislative history anchored the Court's performance for twenty-four years. Since Blackmun's retirement, the other Justices have been less interested in reviewing tax cases and far less willing to use legislative history when they choose to decide such cases.

The evidence that familiar interpretive resources play distinctive roles in the area of tax law contributes to a subtler and richer texture for statutory interpretation than is often captured in scholarly debates. At the same time, the authors' results also indicate that the Court since the late 1980s has exhibited greater uniformity in its reasoning in tax law and workplace law cases. Brudney and Ditslear wonder whether the philosophical arguments favoring a more inflexible approach to statutory interpretation are beginning to trump a pragmatic orientation that is more sensitive to differences among particular subject matter areas of federal law.

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INTRODUCTION

Among judges and legal scholars, debates about statutory interpretation—and especially about the role of the canons of construction and legislative history—are generally framed in one-size-fits-all terms. The canons receive praise as interpretive rules that limit

judicial discretion and render statutory meaning more predictable;¹ they draw criticism for being readily manipulable and for frustrating the policy preferences of Congress.² Similarly, legislative history has both advocates and detractors: critics contend that judges should ignore such record materials because they are incoherent, unreliable, and politicized,³ whereas supporters identify the probative and democratic virtues of legislative materials in comparably systemic language.⁴

These debates can be productive and illuminating, but they tend to obscure the fact that federal judges—including most Supreme Court Justices—do not approach statutory interpretation from methodologically uniform perspectives.⁵ One important factor that Justices may recognize and incorporate, even if implicitly, is the diverse subject matter of the laws that come before them.⁶ Congress follows the same basic lawmaking process when enacting and updating regulatory schemes—whether they address criminal law, antitrust, labor relations, civil rights, or tax law. Yet salient

1. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 25–29 (1997); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 147–57 (1990); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943–45 (1992).

2. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 276–83 (1985); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562, 572 (1992); Edward L. Rubin, *Modern Statutes, Loose Canons and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 590 (1992).

3. See, e.g., SCALIA, *supra* note 1, at 31–37; ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 89–115 (2006); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812–14 (1998); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 447 (1990).

4. See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 304, 310–17 (2d ed. 2006); KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* 173–75 (1999); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 437–42 (2005); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 230–32.

5. See generally RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (arguing that judges use a pragmatic approach to decide cases); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (providing a strategic account of Supreme Court jurisprudence).

6. Other factors influencing judicial reasoning approaches include individual biography and institutional dynamics. See, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 50–154 (2006); EPSTEIN & KNIGHT, *supra* note 5, at 56–181; POSNER, *supra* note 5, at 125–73.

differences in semantic formulation and political dynamics help shape these enactments, and such differences can influence judicial efforts to understand what Congress has wrought. Relatedly, federal statutes reflect policy preferences that are straightforwardly ideological in certain subject areas, whereas in others the policy choices are couched in technically intricate and even obscure terms.

In this Article, we examine how the Supreme Court's uses of legislative history and the canons of construction vary based on the subject matter of laws enacted by Congress. We do so by comparing the Court's interpretive approach to a highly specialized and relatively collaborative area of lawmaking—the Internal Revenue Code—with the Court's methods of interpretation in the field of workplace law, which is among the most ideologically divisive and partisan areas of congressional activity. Our comparative assessment relies on two Supreme Court datasets we have compiled over a period of years: nearly 160 decisions construing the Internal Revenue Code from 1969–2008, and roughly 600 cases applying federal workplace statutes over the same thirty-nine year period.⁷ Our general hypothesis is that the Court's patterns of reasoning in the often-arcaic tax law field will differ in meaningful respects from its use of key interpretive resources when construing civil rights and labor relations texts that are generated through a more traditionally politicized legislative process.

Our findings support this hypothesis, often in striking ways. Initially, we determine that the Court is significantly⁸ more likely to rely on legislative history to help justify tax law decisions than it is to help explain workplace law outcomes. This difference arises in the Burger Court years (1969–86) and the Rehnquist and Roberts Court period (1986–2008);⁹ it has persisted until quite recently even as the Court's legislative history reliance declines over time in both subject matter areas. In addition, we find that the Court relies significantly more often on language canons in tax law than in workplace law,

7. For a discussion of how we assembled these datasets, see *infra* Part I.B.

8. For an explanation of statistical significance in this context, see *infra* note 82.

9. The Roberts Court has only three terms of decisions through June 2008 (including five cases construing the tax code and twenty-five cases applying workplace law statutes). This Court also includes seven of the nine Rehnquist Court Justices, including Justices Scalia, Breyer, and Stevens, whose views on statutory interpretation methods have been expressed and applied over an extended period. Accordingly, we have grouped the first three years of the Roberts Court with the Rehnquist Court for purposes of empirical analysis.

whereas the Court's use of substantive canons is comparable between the two statutory areas.¹⁰

Probing further, we conclude that the Justices tend to rely on legislative history for importantly different reasons in these two fields. The Court regularly invokes committee reports and floor statements in the workplace law area for the traditional role of identifying and elaborating on the legislative bargain that Congress reached. By contrast, the Justices often rely on the legislative history accompanying tax statutes to borrow expertise from key committee actors. We identify this difference in function by assessing the variation in types of legislative history relied on in each subject matter area, comparing the Justices' propensity to disagree about the meaning of legislative history in their nonunanimous decisions, and discussing illustrative majority opinions from the tax field.

The Court's use of tax legislative history for expertise-borrowing purposes is due in no small measure to the complex, specialized, and often opaque substantive concepts in dispute. But this expertise borrowing also relates to the unusual nature of how tax legislative history is produced, featuring regular cross-party and interbranch cooperation that is virtually unimaginable in the workplace law setting. Most Justices seem to appreciate the distinctive character of tax legislative history, in which the Joint Committee on Taxation (JCT) plays a central role. Justice Scalia, however, is unwilling to do so, as exemplified by one of his earliest opinions, which was critical of legislative history produced in the tax setting.¹¹

We also find some intriguing differences between the Court's use of the canons in tax cases and workplace decisions. With respect to language canons, the Court makes comparatively heavier use of the whole act rule and related structural canons in its tax majorities. We suggest that the Justices may recognize the Internal Revenue Code to be more of a coherent and self-contained regulatory scheme than the series of workplace law statutes scattered across multiple titles of the U.S. Code. As for substantive canons, the Justices are much more likely to invoke tax-based judicial policy norms than to rely on canons grounded in the specifics of workplace law. We contend that the

10. For an explanation of the difference between language canons and substantive canons, see *infra* Part I.A.1.

11. See *Hirschey v. FERC*, 777 F.2d 1, 7–8 (D.C. Cir. 1985); *infra* Part III.A.4 (discussing *Hirschey*).

Court's use of these tax law canons may be sensibly viewed as a subsidiary form of expertise borrowing.

In addition, we note one other difference in the Court's comparative approach to tax law decisions—the disproportionate role played by Justice Blackmun. During his twenty-four terms on the Court, Blackmun, a former tax law practitioner, authored 30 percent of the Court's majorities construing the Internal Revenue Code. Because this is almost double the frequency of authorship for any other Justice in the field of workplace law, we examine Justice Blackmun's interpretive approach in the tax law area. We find that his use of legislative history is high—close to 60 percent of his tax majorities—although legislative history reliance by Blackmun's colleagues during his tenure on the Court is even higher at 67 percent, including 64 percent during the first eight terms of the Rehnquist period.¹²

After Justice Blackmun's retirement in 1994, however, the Court's legislative history reliance in tax decisions declined significantly to 34 percent. In addition, the Court's appetite for deciding tax cases has diminished noticeably since 1994. Without the anchoring presence of Blackmun's expertise in tax law, the Justices seem both less interested in reviewing tax cases and less comfortable making use of legislative history when they choose to decide such cases. Justice Blackmun's reluctance to invoke tax-specific substantive canons also distinguishes him from his colleagues; this reluctance may well reflect Blackmun's confidence in his ability to reason through particular disputes over the meaning of tax law.

Our Article represents the first in-depth effort to compare the Court's interpretive approach in two distinct subject areas over an extended period of time.¹³ We view this comparative treatment as important because it demonstrates how the Justices apply key interpretive resources such as legislative history and the canons in ways that are more complex and nuanced than previously understood.

12. For our findings on Blackmun majorities and the Court's use of legislative history in tax cases before and after Blackmun's retirement, see *infra* Part II.D.

13. We are aware of one prior study that addressed legislative history use in an earlier era. See Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 LEGIS. STUD. Q. 353, 360–61 (1985) (comparing Supreme Court reasoning in antitrust and labor law from 1950 to 1972); see also Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1966–69 (2005) (presenting brief comparisons between Justices' rationales in civil rights and business cases, drawing on the Brudney and Ditslear database and analyses for the civil rights portion).

This complexity in turn points to the incomplete nature of recent debates about the admissibility *vel non* of legislative history and the canons' possible success as impartial or predictive interpretive assets. By exploring the diverse functions and values ascribed to these resources in different subject matter settings, we also hope to encourage further research from scholars engaged in the empirical analysis of judicial reasoning.¹⁴

Part I introduces the canons and legislative history as interpretive resources, and summarizes generic disagreements over their value. Part I also describes our two parallel datasets in workplace law and tax law. Part II presents our comparative findings, focused on the Court's uses of legislative history and the canons as well as the variations in majority authorship by subject area among individual Justices. Part III pursues key aspects of our findings from doctrinal and behavioral standpoints.

I. THE CANONS, LEGISLATIVE HISTORY, AND OUR DATASETS

A. *Tensions between the Canons and Legislative History*

Although it is ultimately the federal courts' role to resolve disputes about the meaning of statutory text, each of the three branches of government contributes important contextual resources on which courts regularly rely when performing their interpretive function. Beginning in the 1980s, considerable tension has arisen between supporters of the canons of construction, a judicially created interpretive asset, and defenders of legislative history, an interpretive resource generated by Congress. Because this tension informs much of the descriptive and normative debate about statutory interpretation, we provide a brief overview here.¹⁵

14. For a discussion of this emerging research area, see generally Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971 (2007); Elizabeth Garrett, *Legislation and Statutory Interpretation*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 360, 373–74 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decisionmaking*, 93 CORNELL L. REV. 873 (2008) (book review).

15. There is also lively debate among scholars and judges about the executive branch's distinctive interpretive asset—agency guidance in the form of rules and adjudications. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1097–196 (2008); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 852–89 (2001); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?*

1. *Canons of Construction and Legalistic Interpretation.* The canons of construction are background presumptions that judges have invoked for centuries as interpretive aids.¹⁶ These presumptions are useful because understanding congressional text inevitably requires relying on certain principles about “how words should ordinarily be understood [and about] how regulatory statutes should interact with constitutional structure and substantive policy.”¹⁷ Although canons of construction can be classified in numerous ways, we follow the prevailing taxonomy that identifies language canons and substantive canons as the two basic categories.¹⁸

Language canons relied on by the Supreme Court include linguistic inferences stemming from Congress’s use of certain words instead of others,¹⁹ grammar and syntax guidelines predicated on the configuration of words in a given sentence,²⁰ and principles of textual cohesion arising from the presumed relationship between particular words and language found in other parts of the same statute or in similar statutes.²¹ These language canons are avowedly content neutral: they purport to give effect to the “ordinary” or “common” meaning of statutory text based on what a rational Congress must have meant when it chose to enact the words in question.²²

An Empirical Investigation of Chevron, 73 U. CHI. L. REV. 823, 827–47, 865–71 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226–38 (2001); *id.* at 239–56 (Scalia, J., dissenting); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739–46 (1996). We plan to discuss how our datasets contribute to that debate in a subsequent article.

16. See Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 542–43 (1998) (discussing the use of canons in sixteenth century English case law); see also Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183–91 (describing the use of canons to construe ancient Hindu texts and Biblical commentary as well as Roman Law).

17. SUNSTEIN, *supra* note 1, at 150; see also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 228 (1975) (suggesting that many canons “reflect the probabilities generated by normal usage or legislative behavior”).

18. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005).

19. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* app. B at 19–21 (4th ed. 2007) (discussing, *inter alia*, the canons of *noscitur a sociis*, *expressio unius*, and ordinary usage).

20. See *id.* app. B at 21 (discussing, *inter alia*, the punctuation rule, the may-shall rule, and the rule of the last antecedent).

21. See *id.* app. B at 21–23 (discussing, *inter alia*, the whole act rule, the presumption against redundancy, the presumption of statutory consistency with respect to the same or similar terms, and the presumption that provisos and exceptions are to be read narrowly).

22. See Ross, *supra* note 2, at 563; Shapiro, *supra* note 1, at 927.

By contrast, substantive canons reflect a wide array of judicially based policy concerns. They are grounded not in semantic verities but rather in the courts' understanding of how to harmonize statutory text with judicially identified constitutional priorities,²³ judicially perceived statutory objectives,²⁴ or preenactment common law practices.²⁵ Most of the statute-based substantive canons are couched in broadly applicable terms,²⁶ but some relate to specific subject areas including a number of tax law-related substantive canons.²⁷

Ample support is expressed for both sets of canons based on the common-sense guidance they offer. As rules of thumb addressing how certain words or phrases often interrelate, or how Congress's authority might be reconciled with that of the president, a state legislature, or an international treaty, the canons "help uncover competing interpretive possibilities."²⁸ Moreover, when judges approach these rules of thumb as presumptive rather than conclusive, they can question or distinguish the rules in light of other interpretive factors.²⁹ By effectively encouraging courts to consider additional sources of legislative meaning, the canons promote a more reflective judicial conversation that helps provide structure and coherence for majority opinions. At the same time, there is a risk when canons are defended not simply as deepening the interpretive inquiry but also—

23. See ESKRIDGE ET AL., *supra* note 19, app. B at 29–34 (discussing, *inter alia*, the presumption against federal preemption of traditional state regulation, the rule of lenity, the presumption against interpretations that would jeopardize a statute's constitutionality, and the presumption favoring concurrent state and federal court jurisdiction over federal claims).

24. See *id.* app. B at 36–41 (discussing, *inter alia*, the presumption against repeals by implication, the strict construction of statutes authorizing appeals, and the presumption that each side bears its own costs in adjudications).

25. See *id.* app. B at 34–35 (discussing, *inter alia*, the rule against extraterritorial application of U.S. law, the rule against implied waivers of U.S. sovereign immunity, and the presumption favoring common law usage when Congress employs "words or concepts with well-settled common law traditions").

26. See *id.* app. B at 36–38 (listing examples of canons that apply generally across subject areas).

27. See *id.* app. B at 41 (discussing, *inter alia*, the presumption that IRS tax assessments are correct, the presumption against a taxpayer claiming income tax deduction, and the presumption that tax exemptions should be narrowly construed).

28. R.N. Graham, *In Defense of Maxims*, 22 STATUTE L. REV. 45, 68 (2001).

29. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (using a language canon to raise a question about congressional intent); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 261–62 (1991) (Marshall, J., dissenting) (arguing for using a substantive canon as a presumption that triggers consideration of legislative history and other "conventional techniques" of interpretation).

less accurately—as enhancing the predictability and impartiality of enacted law.

The contention that canons are an objective ordering mechanism, a set of “off the rack[] gap-filling” principles,³⁰ has been criticized on descriptive and normative grounds, by us as well as others.³¹ The language canons’ asserted predictive value is undermined by the fact that members of Congress and their staffs evidently do not consider these canons central to their lawmaking enterprise. Instead, they view drafting as a highly contextual and intensely pressured process that involves a shifting coalition of invited and uninvited players, a process into which generalized rules of construction are not readily incorporated.³² Further, the language canons tend to provoke principled disparate applications—this is true whether they address the structural integrity of the statute as a whole or the semantic consistency of its discrete parts.³³ Substantive canons often lack predictive value for a related but distinct reason—judges assign them varying weights in different case-specific circumstances. These canons may function as virtually irrebuttable clear statement rules or as mere tiebreakers, but most often they operate as presumptions that can be overcome by the persuasive force of other

30. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994) (internal quotation marks omitted); see also Shapiro, *supra* note 1, at 943 (“[T]wo interrelated values that are served are predictability and fair notice.”).

31. See POSNER, *supra* note 2, at 276–83; Brudney & Ditslear, *supra* note 18, at 103; Ross, *supra* note 2, at 562.

32. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 590–604 (2002) (describing the drafting process as perceived by key staff members); see also James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 16–17, 21–26 (1994) (discussing the fractured and politically sensitive nature of the congressional lawmaking process).

33. For examples of conflict about the proper application of the whole act rule, see *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 354–55 (1988); *id.* at 360 (White, J., dissenting); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981); *id.* at 371 (Rehnquist, J., dissenting); *Indus. Union Dep’t, AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 640 & n.45, 641 (1980); *id.* at 709 (Marshall, J., dissenting). For examples of conflict about the proper application of *expressio unius*, see *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168–69 (2003); *id.* at 180–81 (Scalia, J., dissenting); *Christensen v. Harris County*, 529 U.S. 576, 582–84 (2000); *id.* at 593–94 (Stevens, J., dissenting). For broader empirical evidence, see Brudney & Ditslear, *supra* note 18, at 65, 68, 96. We found that majority reliance on language canons is associated with a significant increase in dissent dependence on language canons as well and that a comparable association exists between majority and dissent reliance on substantive canons, *id.* at 68, and we inferred that in divided decisions the Justices are likely to view the canons as reasonably amenable to supporting either side, *id.* at 96.

interpretive resources.³⁴ Taken together, these uncertainties let judges exercise considerable discretion when applying both kinds of canons.

As for the canons' putative impartiality, our prior research on workplace law decisions indicates that canon reliance by liberal Justices is associated with liberal outcomes whereas canon usage by conservative Justices is linked to conservative results.³⁵ Given the absence of a constraining effect on judicial policy preferences, the canons may well function as a form of justification for outcomes that are favored for other reasons, rather than serving as overarching neutral principles.

Moreover, for the subset of Supreme Court workplace law decisions in which the majority invokes the canons but ignores legislative history while the dissent relies on legislative history, the results have been not content neutral but overwhelmingly conservative.³⁶ Our doctrinal analysis of these cases indicates that since the late 1980s, the Court's conservative majority has used the canons in such contested cases to frustrate the demonstrable policy preferences of Congress.³⁷ Tension between canons and legislative history has thus taken on a distinctly ideological texture at least in the area of workplace law.

2. Legislative History and Purposive Interpretation. The term "legislative history" in a federal setting refers primarily to the materials generated by Congress that manifest a bill's journey toward enactment, including any explanations, deliberations, or tradeoffs that

34. The Court's Employee Retirement Income Security Act (ERISA) decisions invoking the general antipreemption presumption convey the variable probative impact of a given substantive canon. Over an extended period, the Court has relied on the presumption in numerous cases to help justify restricting the scope of ERISA, whereas the Court has distinguished or ignored the presumption in a comparable number of other cases imposing ERISA preemption. See Brudney & Ditslear, *supra* note 18, at 106 nn.438-39 (citing six illustrative decisions). For an example of divergent understandings regarding both the weight attributable to the presumption against extraterritorial jurisdiction and how consistently the Court has applied this canon in prior years, compare *Arabian Am. Oil Co.*, 499 U.S. at 248-49, with *id.* at 260-66 (Marshall, J., dissenting).

35. See Brudney & Ditslear, *supra* note 18, at 57-60.

36. See *id.* at 68, 77-93.

37. See *id.* at 93-94, 108-09; see also Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 38-51 (1991) (arguing that the Court's reliance on civil rights statutes' "plain meaning" in the 1970s and 1980s invariably led the Court to construe the statutes at issue more narrowly than Congress intended); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 421-25 (suggesting that conservative reliance on "plain meaning" in an era of Democratic control of Congress may result in conservative outcomes that do not honor Congress's explicit intent).

are part of that enactment process.³⁸ In Congress's committee-based system of drafting, reviewing, and approving bills for consideration by the full chamber, the legislative history most frequently invoked by courts is standing committee reports.³⁹ Courts also rely on other legislative record items, including original bill language, committee hearings, floor statements and related developments such as proposed amendments and conference reports.⁴⁰

The primary rationale for crediting legislative history as helping to resolve or amplify textual meaning is that statutes are more than disembodied textual products—they are a form of communication that reflects a purposive group effort.⁴¹ In seeking to construe this purposive communication, courts may decide that a specific piece of legislative history is sufficiently persuasive in context to justify attributing to Congress as a whole the understanding and intent expressed in the document.⁴² The principle of reasonably imputed institutional approval rests on the assumption that legislative intent can be derived from Congress's structure and operation as a representative body—specifically from the formal and informal subgroups that Congress effectively charges with responsibility for

38. See ESKRIDGE ET AL., *supra* note 19, at 971–72. In addition to this horizontal narrative accompanying enactment of a particular text, legislative history also may include the vertical record of how the text under review has evolved or been modified from versions enacted by prior Congresses. See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 572–74 (1982) (discussing four earlier versions of a statute penalizing employers for nonpayment of seamen's wages); Bob Jones Univ. v. United States, 461 U.S. 574, 614–17 (1983) (Rehnquist, J., dissenting) (discussing multiple earlier versions of a statutory provision listing types of organizations entitled to tax-exempt status under Internal Revenue Code).

39. See ESKRIDGE ET AL., *supra* note 19, at 981 (“Most judges and scholars agree that committee reports should be considered as authoritative legislative history and should be given great weight . . .”).

40. See *id.* at 971–72, 1000, 1020–22; GREENAWALT, *supra* note 4, at 171.

41. See Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 967–81 (2007) (discussing various types of communication, especially within the majority party, that occur at the early stages of legislative process); James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001, 1004–08 (2007) (contending that “group intent” is attributable to Congress); Solan, *supra* note 4, at 437–49 (presenting a general theory for treating social groups as entities, and arguing specifically that Congress should be viewed as an entity with intent).

42. See Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 87–88 (2005); Solan, *supra* note 4, at 444–49; Tiefer, *supra* note 4, at 230–32.

drafting textual provisions and explaining or elaborating on their meaning.⁴³

A chorus of legislative history critics have characterized this interpretive resource as deeply flawed. Some argue that courts should ignore legislative history for constitutional reasons: it is neither voted on by Congress nor presented to the president, and the views of legislative subgroups ought not be elevated over the text approved by Congress as a whole.⁴⁴ Critics also contend that legislative history should be dismissed as conceptually incoherent because the legislature's intention or purpose is at best deeply muddled and at worst unknowable.⁴⁵

Legislative history supporters have responded to these comprehensive critiques in comparably systemic terms. At the constitutional level, they maintain that rather than viewing legislative history as "law" or as equivalent to text, courts consult this history to help attribute meaning to text, just as they do the dictionary, common law precedent, or the canons, which also are not enacted or approved by Congress.⁴⁶ And supporters defend the integrity of a group legislative purpose by applying lessons from political science,⁴⁷ analytic philosophy,⁴⁸ and developmental psychology,⁴⁹ as well as more traditional arguments from democratic theory.⁵⁰

An additional all-encompassing criticism of legislative history is that it lacks neutrality as an interpretive resource. Unlike the canons

43. See *Bank One Chi.*, 516 U.S. at 276–77 (Stevens, J., concurring); George A. 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, 60–73; Brudney, *supra* note 41, at 1007; Tiefer, *supra* note 4, at 230–32.

44. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring); Kozinski, *supra* note 3, at 813.

45. See, e.g., SCALIA, *supra* note 1, at 31–34; Kozinski, *supra* note 3, at 812–14; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 99, 102–03 (2006).

46. See, e.g., Breyer, *supra* note 4, at 862–64; Brudney, *supra* note 32, at 42–45; William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372–75 (1990).

47. See Tiefer, *supra* note 4, at 268 (invoking political science research on the institutional role of committees as producing and supplying superior information to enhance the chamber's performance).

48. See Solan, *supra* note 4, at 437–42 (discussing models of group intent as described by philosophers Margaret Gilbert and Michael Bratman); Tiefer, *supra* note 4, at 255–64 (examining the philosophical approaches of John Austin, H.L.A. Hart, and John Searle).

49. See Solan, *supra* note 4, at 449–53 (arguing that psychological research shows that it is common and coherent to understand plural subjects, such as Congress, as having intent).

50. See BREYER, *supra* note 42, at 15–16, 85–101.

or judicial precedent, committee and floor statements are produced by partisans—individuals with a policy stake in the lawmaking contest to which they are contributing. Disagreement about the implications of these statements inevitably becomes politically charged, especially because legislators and their staffs may craft the statements with an eye toward manipulating or misleading judges as to the meaning of text.⁵¹

Defenders of legislative history accept the political label but contend that this is an important dimension of its probative value. They observe that major legislative proposals are usually altered and occasionally recast by sponsoring committees or bill managers in an effort to accommodate concerns of wavering colleagues or to co-opt segments of the opposition. These substantial postintroduction changes in text are routinely accompanied by committee or floor commentaries. Accordingly, courts should appreciate that legislative bargains are an established feature of congressional lawmaking and that legislative history may illuminate a bargain's existence or help explain some of its details.⁵²

In sum, the canons are promoted for helping to clarify inconclusive text in relatively nonpolitical terms; legislative history is praised for helping to understand the collective political will that accounts for the text's successful passage. An implicit premise is that the virtues of each interpretive resource transcend particular subject matter areas addressed by Congress—that the canons and legislative history function in the same ways whether the regulatory scheme at issue involves criminal law or environmental law, banking law or military law, employment discrimination or income taxation.

3. *Expertise Borrowing as a Distinct Perspective.* Public choice accounts of language canon usage suggest a potential limitation on this premise of uniform applicability. Professors Macey and Miller assert that judges rely on language canons more often in statutory

51. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 637–38 (1987) (Scalia, J., dissenting); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994).

52. See Breyer, *supra* note 4, at 858–60; James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 146–51 (2008); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 724–27 (1992).

cases of technical complexity and minimal ideological interest.⁵³ They contend that judges in these instances worry about their lack of subject matter expertise and the consequent risk of making an embarrassing policy-related error, and that reliance on language canons offers a largely nonsubstantive basis for resolving the disputes.⁵⁴

Moreover, tax law scholars and commentators have long recognized that tax bills and their accompanying legislative history are generated in a unique fashion within Congress.⁵⁵ At the predrafting stage, during the drafting of text, and in the development of committee reports, the legislative process encourages production of and reliance on expertise through bipartisan cooperation and

53. See Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 659–65 (1992); cf. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 247 (suggesting that Justices use canons when they find the cases boring in policy terms).

54. See Macey & Miller, *supra* note 53, at 662–64, 668–70.

55. See Mary L. Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771, 786 & n.73, 818–19 (1997) (arguing that tax law is unique because of the complexity and ever-changing nature of the tax code and because the process surrounding its creation is relatively insulated from the influence of special interest groups); Beverly I. Moran & Daniel M. Schneider, *The Elephant and the Four Blind Men: The Burger Court and Its Federal Tax Decisions*, 39 HOW. L.J. 841, 891–95, 903–07 (1996) (outlining reasons why legislative history is particularly relevant to interpreting tax law and observing that the Burger Court heavily relied on legislative history in this area). The discussion in this Section and Part III.A.2 relies on observations and analyses from political science as well as law, reflecting perceptions of the tax legislation process from the 1950s to 2008. See Joint Comm. on Taxation, *About the Joint Committee on Taxation* 5–8, 16, http://www.house.gov/jct/About_Joint_Committee_On_Taxation.pdf (last visited Jan. 23, 2009); Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 832–42 (1991) (stating that Professor Livingston served as legislative attorney for the Joint Committee on Taxation from 1983–87); Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 809–12 (1989) (noting that the three authors, in private practice as of 1989, had direct and extensive experience in the tax legislative process between 1961 and 1980—Lubick as Tax Legislation Counsel of the Treasury Department (1961–64) and Assistant Secretary of the Treasury for Tax Policy (1977–81); Hickman as Assistant Secretary of the Treasury for Tax Policy (1972–75); and Ferguson as Tax Legislative Assistant to a Senate Finance Committee member (1975–77), Special Assistant to the Assistant Secretary of the Treasury for Tax Policy (1977–79), and Associate Tax Legislation Counsel of the Treasury Department (1979–80)); John F. Manley, *Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue Taxation*, 30 J. POL. 1046, 1048–65 (1968) (highlighting that Manley, a political scientist, interviewed twenty-three members of the House Ways and Means Committee, eight members of the Senate Finance Committee, five members of the congressional staff, and three high-ranking Treasury Department officials); Lawrence N. Woodworth, *Procedures Followed by Congress in Enacting Tax Legislation and the Role of the Joint Committee Staff in that Process*, 18 INST. ON FED. TAX'N 21, 23–32 (1966). Woodworth was an economist on the JCT from 1944–64 and Chief of Staff for the JCT from 1964–77.

interbranch dialogue. The lynchpin for this distinctively objective and collaborative effort is the Joint Committee on Taxation. The JCT includes five members from the Senate Finance Committee and five from the House Ways and Means Committee.⁵⁶ Supported by a nonpartisan staff of economists, lawyers, and other tax professionals, the JCT oversees the preparation of standing committee reports. As Part III of this Article explains,⁵⁷ tax committee report commentaries help legislators make sense of the highly technical and often obscure Internal Revenue Code language.⁵⁸

This concept of expertise borrowing is worth bearing in mind as we consider whether the Court's pattern of reasoning is somehow distinctive in federal tax decisions. With respect to language canon usage, however, Professors Macey and Miller offer a theoretical explanation, not an empirical assessment of the way the Court actually performs when construing statutes in a technically complex area.⁵⁹ Further, in addressing the potential role of language canons, Macey and Miller focus on error avoidance rather than expertise borrowing.⁶⁰ Although the avowedly content-neutral approach of language canons may at times help to reduce the risk of error, a court's reliance on interpretive assets to borrow subject matter expertise is more likely to occur with respect to substantive canons and legislative history, which are openly policy based and content driven.

At the same time, the possibility that the Court relies on legislative history in its tax decisions to borrow expertise is just that—a possibility. We noted how judges and scholars who defend legislative history typically point to its value as a resource identifying and describing the negotiated bargains that are an essential element

56. Joint Comm. on Taxation, *supra* note 55, at 2.

57. *See infra* Part III.A.2.

58. *See* Ferguson et al., *supra* note 55, at 810; Livingston, *supra* note 55, at 836.

59. *See* Macey & Miller, *supra* note 53, at 652–55, 667–71 (illustrating their argument with a single Court decision, *Breining v. Sheet Metal Workers International Ass'n Local Union No. 6*, 493 U.S. 67 (1989)).

60. *See id.* at 662–64. Language canon reliance tends to promote error avoidance by invoking a content-neutral rule or presumption that enables the Court *not* to engage the substantive issues. By contrast, if the Court borrows expertise from an interpretive resource such as Supreme Court precedent or legislative history, it *is* engaging the substantive subject matter at stake. But some language canons, such as the whole code rule in tax cases, can arguably be viewed as a form of second-order expertise borrowing. *See* text accompanying notes 276–80.

of congressional lawmaking.⁶¹ Our prior empirical findings supporting this justification were based on the Court's use of legislative history in its workplace law decisions.⁶² In short, the prospect that the Justices may invoke interpretive resources for distinctive reasons in the tax and workplace law areas warrants detailed examination with reference to both legislative history and the canons. Before proceeding to that examination, we describe our two parallel datasets of Supreme Court decisions.

B. Supreme Court Workplace Law and Tax Law Decisions

1. *Workplace Statutes.* Our workplace law dataset consists of every Supreme Court merits decision from the fall of 1969 to the spring of 2008 that construes one or more federal laws addressing an aspect of the employment relationship.⁶³ This universe features 597 decisions applying a range of congressional enactments.⁶⁴ The largest volume of cases involves union-management relations laws and race or gender discrimination statutes, but there also are a considerable number of decisions addressed to minimum wage and overtime standards, safety and health, retirement benefits, discrimination based on age or disability, and miscellaneous employment-related disputes

61. See sources cited *supra* note 52; see also Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1420–23 (2003); Nourse & Schacter, *supra* note 32, at 607.

62. See Brudney & Ditslear, *supra* note 52, at 146–51; James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 227–28 (2006).

63. We have analyzed different aspects of this dataset—jointly and individually—in a number of prior articles. See, e.g., Brudney & Ditslear, *supra* note 52 *passim*; James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1 *passim* (2007); Brudney & Ditslear, *supra* note 62 *passim*; Brudney & Ditslear, *supra* note 18 *passim*. For a detailed discussion of how we assembled the dataset, see Brudney & Ditslear, *supra* note 18, at 15–29. The complete dataset and codebook for workplace decisions and tax decisions addressed in this Article are available on the web. James Brudney & Corey Ditslear, *Liberal Justices*, http://www.psci.unt.edu/Ditslear/LH_data.htm (last visited Feb. 27, 2009).

64. The dataset also includes eighty-one decisions presenting workplace-related issues of constitutional law that do not implicate any federal statute. We omit these decisions from our analysis because we are comparing only the Court's approach to statutory interpretation in different subject matter areas. See Brudney & Ditslear, *supra* note 52, at 128 n.37 (discussing the ways in which legislative history of statutes differs from “constitutional history” such as convention proceedings, state ratification debates, and *The Federalist Papers*).

arising in connection with criminal, tax, social security, or immigration law.⁶⁵

To examine the rationales for each majority opinion, we identify ten distinct interpretive resources on which the Court relies with some frequency. In addition to legislative history, language canons, and substantive canons, these include (i) the meaning of the textual language and related appeals to plain or ordinary meaning, (ii) dictionaries, (iii) legislative purpose, (iv) legislative inaction, (v) Supreme Court precedent, (vi) common law precedent, and (vii) agency deference.⁶⁶ We omit items that the Justices rely on less frequently, such as law review articles and treatises.

When reviewing each opinion, we identify the interpretive resources being invoked and then determine whether a resource (a) is merely *referenced*, which includes being mentioned in background discussion or dismissed as substantively unpersuasive or (b) is *relied on* as affirmatively probative to advance the outcome endorsed by the majority author, which includes being invoked as “a” or “the” determining factor in the majority’s reasoning process.⁶⁷ Almost all majority opinions rely on at least two of the ten listed interpretive resources, and the vast majority rely on three or more resources to help explain or justify their holdings.

We apply the same coding distinctions used for majority opinions to identify the nature and extent of judicial reliance in all dissenting opinions that include an elaboration of reasons. In addition, we classify the votes by individual Justices for every decision, based on whether a Justice authored or joined a majority or plurality, a concurrence, a dissent, or some combination thereof. We are thus able to group the dataset based on the size of the Court majority, distinguishing close cases from decisions that are unanimous or nearly

65. For a fuller discussion of which statutes fall in each subject matter category, see Brudney & Ditslear, *supra* note 18, at 17–18. From the 1969 through the 2007 term, 192 of the 597 workplace law cases involved labor-management relations, 147 cases involved race or gender discrimination statutes, 59 cases construed provisions involving other forms of status discrimination (mostly age and disability), 74 cases addressed statutes setting minimum workplace standards, 66 cases involved retirement-related statutes, 25 cases involved general negligence-based provisions that apply primarily to workers in the railroad or maritime industries, and 48 cases addressed miscellaneous employment-related provisions. This total exceeds 597 because, in a number of cases, the Court construed statutes from more than one category.

66. For a fuller discussion of how we identify these ten resources, see *id.* at 23–24.

67. For a fuller discussion of the rationale for this approach to judicial reasoning, as well as challenges involved in distinguishing between reference and reliance, see *id.* at 25–26.

unanimous. We also can identify patterns of reliance on specific interpretive resources by individual Justices, including those who may author a disproportionate number of majority opinions in a given field.

2. *Tax Statutes.* Our tax law dataset consists of every Supreme Court merits decision from 1969 to 2008 that involves the interpretation of federal tax statutes. Although we compiled our workplace law dataset from scratch, the collection of tax law decisions borrows heavily from a database assembled by Professor Nancy Staudt and a team of legal scholars and social scientists.⁶⁸ Professor Staudt and her colleagues searched broadly for Supreme Court decisions mentioning the word “tax” but they retained only decisions involving the interpretation of a federal tax statute, excluding all state taxation cases as well as constitutional disputes that did not implicate a federal statute.⁶⁹

Using the Staudt database, we identified 153 Supreme Court cases decided between October 1969 and December 2005. Adopting the Staudt selection criteria, we have added five cases decided by the Court since January 2006. We then coded these 158 cases exactly as we did the workplace law decisions, using the same ten interpretive resources for majority and dissenting opinions, the same distinction between referencing and relying on a resource, and the same classification of votes by individual Justices for each decision.

Looking at respective contributions to the Court’s docket, we note that the Justices address far more federal workplace law disputes than federal tax controversies: they have decided nearly four times as many workplace law cases in our thirty-nine-year period. This gap is due in part to the sheer volume of major new workplace statutes, targeting various specific subdivisions of the private and public workforce and regulating a wide range of employment conditions.⁷⁰

68. See Staudt et al., *supra* note 13, at 1926–27. We are grateful to Professor Staudt and her coauthors, Professors Lee Epstein, Peter Wiedenbeck, René Lindstädt, and Ryan J. Vander Wielen, for providing us with their list of more than three hundred Supreme Court cases decided between January 1950 and December 2005. One of us analyzed a limited subset of these decisions in a prior article. See Brudney, *supra* note 63, at 29–35.

69. See Staudt et al., *supra* note 13, at 1927.

70. Among the federal statutes frequently applied by the Court are laws classified in Title 29 covering “Labor” (for example, the National Labor Relations Act, the Occupational Safety and Health Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Employee Income Retirement Security Act, and the Worker Adjustment Retraining Notification Act) but also laws codified as civil rights statutes under Title 42 (Title VII of the

That volume in turn reflects the enduring importance of work in modern American culture, and the Court's related attentiveness to continuing efforts by Congress and the president to reconcile provision of employee rights with recognition of employer interests. Conversely, despite the obvious importance of tax policy, the subject receives less high-profile attention from Congress than does workplace law. Congress has passed numerous statutes since 1970, but it has not innovated in the tax law area the same way it has in the workplace law area.⁷¹ In addition, the Justices may have less interest in or understanding of tax law issues, a possibility we explore in Part III.

The fact that congressional tax policy is set forth almost exclusively within a single title of the U.S. Code does not mean, however, that federal tax statutes are monolithic in nature. Like their workplace counterparts, the tax laws encompass diverse substantive issues, including core concepts such as defining taxable income⁷² and identifying contours and limits of various deductions⁷³ and exemptions.⁷⁴ The tax code also includes a range of procedural provisions implicating matters of jurisdiction,⁷⁵ limitation periods,⁷⁶

1964 Civil Rights Act, the Americans with Disabilities Act, and the Civil War era statutes), as well as laws addressed to specific industries or occupations (for example, federal civil service laws under Title 5, the Mine Safety and Health Act under Title 30, the Longshore & Harbor Workers Compensation Act under Title 33, the Davis-Bacon Act regulating construction workers under Title 40, and the Railway Labor Act under Title 45) and a separate statute regulating arbitration (the Federal Arbitration Act under Title 9).

71. See JOSHUA D. ROSENBERG & DOMINIC L. DAHER, *THE LAW OF FEDERAL INCOME TAXATION* 11 (2008) (noting that Congress enacted its major Internal Revenue Code revisions in 1939, 1954, and 1986); Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1818 n.68 (2006) (noting that the code's basic structure has been unchanged since 1954). By contrast, Congress since 1960 has created entire new areas of federal workplace law, regulating, *inter alia*, employment discrimination based on race, sex, age, and disability; occupational safety and health; and employee pensions.

72. See, e.g., *O'Gilvie v. United States*, 519 U.S. 79, 81 (1996); *Comm'r v. Clark*, 489 U.S. 726, 728–29 (1989); *Hillsboro Nat'l Bank v. Comm'r*, 460 U.S. 370, 372 (1983); *Comm'r v. Kowalski*, 434 U.S. 77, 82–83 (1977).

73. See, e.g., *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 825–26 (2001); *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578–79 (1991); *United States v. Hughes Props., Inc.*, 476 U.S. 593, 595 (1986); *Don E. Williams Co. v. Comm'r*, 429 U.S. 569, 570 (1977).

74. See, e.g., *Knight v. Comm'r*, 128 S. Ct. 782, 785 (2008); *United States v. Wells Fargo Bank*, 485 U.S. 351, 352 (1988); *United States v. Am. Coll. of Physicians*, 475 U.S. 834, 835–36 (1986); *Paulsen v. Comm'r*, 469 U.S. 131, 136–37 (1985).

75. See, e.g., *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1514 (2008); *Hinck v. United States*, 127 S. Ct. 2011, 2013 (2007); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310 (2005); *Comm'r v. Lundy*, 516 U.S. 235, 237 (1996).

and agency approaches to enforcement,⁷⁷ including criminal enforcement.⁷⁸ We suggest in Part III that the Court's distinctive uses of legislative history and canons in its tax law cases relate to both substantive and procedural decisions, although in somewhat different ways.

Finally, there are thirteen decisions (two from the Burger era and eleven from the Rehnquist years) that appear in both the workplace and tax law datasets. We classify them as workplace law decisions because they address the employment relationship, albeit in ancillary form.⁷⁹ They are part of our tax dataset because Professor Staudt and her colleagues identified them based on her criteria. We include them in our judicial reasoning analyses for both datasets because they legitimately belong in each. Given the small number of these cases, and their relatively representative character for our judicial reasoning purposes, we see no risk of distortion from this double counting.⁸⁰

II. RESULTS

A. *Comparative Reliance on Legislative History and Canons over Time*

We begin with a broad comparison between the Court's majority reasoning in its tax and workplace law decisions. Table 1 reports the

76. See, e.g., *EC Term of Years Trust v. United States*, 127 S. Ct. 1763, 1767–68 (2007); *United States v. Galletti*, 541 U.S. 114, 116 (2004); *United States v. Brockamp*, 519 U.S. 347, 348–49 (1997); *Badaracco v. Comm'r*, 464 U.S. 386, 389–90 (1984).

77. See, e.g., *United States v. Craft*, 535 U.S. 274, 276–78 (2002); *Drye v. United States*, 528 U.S. 49, 52 (1999); *United States v. Estate of Romani*, 523 U.S. 517, 519 (1998); *United States v. Stuart*, 489 U.S. 353, 355–56 (1989).

78. See, e.g., *Standefer v. United States*, 447 U.S. 10, 11–14 (1980); *United States v. Bishop*, 412 U.S. 346, 347–48 (1973); *Minor v. United States*, 396 U.S. 87, 90 (1969).

79. See, e.g., *Comm'r v. Schleier*, 515 U.S. 323, 324–27 (1995) (holding that the liquidated damages portion of an employee's age discrimination settlement is not excludable from gross income for tax purposes); *United States v. Burke*, 504 U.S. 229, 242 (1992) (holding that back pay awards under Title VII are not excludable from gross income); *St. Martin's Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (holding that parochial schools are exempt from unemployment taxes under a statute's exception for church employees).

80. Five of the thirteen majority opinions (38.5 percent) rely on legislative history, five rely on language canons, and three (23.1 percent) rely on substantive canons. Further, three of the six cases (50 percent) decided during Justice Blackmun's tenure were authored by him. All of these figures for duplicate cases are within two standard deviations from the mean of all cases, which is the generally accepted line for outlier status, thus suggesting that their impact on the larger analyses has not been skewed. See LARRY GONICK & WOOLLCOTT SMITH, *THE CARTOON GUIDE TO STATISTICS* 18–26 (1993).

extent to which the Court relies on our ten interpretive resources to justify its holdings in these two subject matter areas. For each resource, we report reliance as a percentage of the total number of majority decisions in that area (158 in tax, 597 in workplace law) over the thirty-nine Supreme Court terms.

Table 1: Mean Percent Reliance on Interpretive Resources in Tax and Workplace Law Cases, 1969–2008

Resource	Tax (N=158)	Workplace (N=597)
Text	66.5	60.6
Dictionary	6.3	4.4
Language Canons*	29.7	20.8
Legislative History*	55.7	41.5
Legislative Purpose*	51.9	79.4
Legislative Inaction	5.7	6.4
Supreme Court Precedent	81.6	81.6
Common Law Precedent*	5.1	13.6
Substantive Canons	14.6	12.1
Agency Deference	19.0	18.9
*Indicates significant difference between tax and workplace decisions.		

These results indicate that the Court invokes a number of important resources with comparable frequency when construing tax and workplace statutes. For instance, the Justices relied on the inherent or plain meaning of textual language in 66.5 percent of majority tax opinions and 60.6 percent of their majorities in workplace law. The extent of the Court's reliance is virtually identical with respect to agency deference (at 19 percent) and also Supreme Court precedent (at 82 percent). The Court's consistently high dependence on its own case law presumably reflects two constants: the parties' contentions that some aspect of Court precedent supports their position, and the Court's institutional interest in enhancing perceptions of stability and continuity by reference to its prior decisions.⁸¹

81. See, e.g., Aharon Barak, *The Supreme Court, 2001 Term—Foreword, A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 30–31 (2002) (emphasizing that judicial departures from precedent are the exception and should be made explicit to promote confidence in a stable and predictable legal order); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286–87 (1990) (stating that the Court's respect for its own previous opinions is a key element of the judicial power prescribed by the Constitution); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 (1983) (observing that the institutional strength of the judiciary is linked to

At the same time, the Court in tax law decisions relies significantly more on both legislative history and language canons—and somewhat more on substantive canons—than it does in labor and employment cases.⁸² Given the persistence of ideologically tinged tensions between the canons and legislative history in the workplace law area,⁸³ it is intriguing that tax law majorities rely so much more often on both the semantic resource of language canons and the political resource of legislative history. Both of these interpretive assets encompass a highly specified and discrete set of components. Legislative history includes nine basic types of particular legislative record documents,⁸⁴ and language canons incorporate a larger but still identifiable list of particular semantic or structural maxims.⁸⁵

By contrast, the Court relies significantly *less* on legislative purpose in tax law than in workplace law.⁸⁶ That the Justices invoke

the public perception of judges deciding like cases in the same way). *See generally* ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923) (describing law's challenge to reconcile the need for stability and the need for change).

82. The use of “significant” refers to results that are statistically significant using a two-tailed *t*-test for difference of means. A result that is significant at the .05 level ($Pr(|T|>|t|) \leq .05$) has no more than a 5 percent chance of occurring purely as a coincidence. R. MARK SIRKIN, *STATISTICS FOR THE SOCIAL SCIENCES* 178–89 (1995). All statistical analyses in this Article are run using Stata version 8. For simplicity, we refer to each result in this Article as “*t*=.xxx,” although the notation set forth above ($Pr(|T|>|t|)$) is more complete in that all reported values are probabilities of the *t*-value being based on chance. The differences identified in text are highly significant for both legislative history ($t = .001$) and language canons ($t = .008$); the difference is not significant for substantive canons ($t = .200$).

83. *See supra* text accompanying notes 35–37, 51–52.

84. The nine basic subsets for which we coded are House bills, Senate bills, House committee hearings, Senate committee hearings, House standing committee reports, Senate standing committee reports, House floor debates, Senate floor debates, and conference committee reports. Other legislative record documents (for example, joint committee reports, joint resolutions, presidential veto messages) are used less often by the Justices.

85. *See* ESKRIDGE ET AL., *supra* note 19, app. B at 19–23, 25–27. The language canons principally relied on by the Supreme Court are a subset of those listed in Appendix B—notably *expressio unius, noscitur a sociis, ejusdem generis*, the whole act rule and its “cousins” the presumption against redundancy and the presumption to avoid surplusage, the presumption of consistent usage of a term throughout the statute, and *in pari materia*.

86. This difference is again highly significant ($t = .000$). The Court's reliance on common law precedent also differs significantly between tax and workplace law, but we do not focus on it in our discussion. The Court's reliance on common law precedent in tax law is truly rare—lower than for any other resource. *But see, e.g.,* *Standefer v. United States*, 447 U.S. 10, 15, 19 (1980) (construing a criminal statutory provision of the Internal Revenue Code in light of former common law distinctions between principals and accessories); *United States v. Euge*, 444 U.S. 707, 712 (1980) (analogizing the taxpayer duty to comply with an IRS summons to the common-law duties attached to the issuance of a testimonial summons). The Court's greater reliance in workplace law (still only 13.6 percent) is driven by a very high reliance on common law

considerations of purpose in four-fifths of their workplace law majorities stems in part from this resource's soft and rather expansive boundaries. Unlike our coding of language canons and legislative history, in which we require the Court to refer to particular maxims or specific congressional documents, we code legislative purpose based on the Court's more open-ended reference to policies or values that the statute is meant to protect⁸⁷ or goals that Congress must have had in mind.⁸⁸ The inferential nature of such attributions broadens the domain of this interpretive asset in workplace law, in which remedial policies and redistributive goals are regarded as integral to congressional motivation, at least for the enacting coalition. This kind of explicitly purposive cross-referencing by the Court is somewhat less prevalent when it comes to tax statutes. The difference may arise because the Justices are not familiar or comfortable enough with the underlying tax policies to impute them to Congress on such a regular basis.⁸⁹ Further, the Court's greater reliance on specifically delineated resources like language canons and legislative history in tax cases may reduce the appeal of pursuing amorphous considerations of legislative purpose.⁹⁰

Our principal focus is on legislative history and the canons. Table 2 breaks down the Court's pattern of reliance over time for those

precedent for general negligence statutes (50 percent) along with an above-average reliance for retirement-related laws (27.5 percent) and labor relations statutes (20.2 percent).

87. See, e.g., *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 558–60 (1997) (relying on statutory purpose in the workplace context); *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 565 (1993) (relying on statutory purpose in the tax context).

88. See, e.g., *Pegram v. Herdrich*, 530 U.S. 211, 231–34 (2000) (relying on the purpose imputed to Congress in the workplace context); *United States v. Irvine*, 511 U.S. 224, 240 (1994) (relying on the purpose imputed to Congress in the tax context).

89. Policy preferences are embedded in tax statutes: even an avowedly revenue-neutral law like the Tax Reform Act of 1986 features important policy choices. See H.R. REP. NO. 99-426, at 62 (1985) (reporting the estimated revenue-neutral effect); *id.* at 94 (discussing reasons for expanding earned income credit); *id.* at 82–89 (discussing reasons for adjusting marginal tax rates). And there are a substantial number of tax majority opinions that explain tax policies or concepts by imputing purposive considerations to Congress. See, e.g., *Irvine*, 511 U.S. at 234, 240 (discussing the purpose behind a code provision addressing the federal gift tax treatment of disclaimers); *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 16 (1974) (discussing the purpose behind the code provision regulating depreciation of capital equipment). Still, our suggestion in the text is meant to help explain why purpose is invoked in only one-half of the tax majority opinions (51.9 percent) as opposed to four-fifths of the workplace law majorities (79.4 percent). That the Court relies significantly more often on purpose in workplace law majorities may well reflect the Justices' greater levels of confidence when explaining and amplifying workplace policies. See generally *infra* Part III.

90. For a discussion of why tax law decisions feature distinctive kinds of reliance on legislative history and language canons, see *infra* Parts III.A–B.

resources, along with text and legislative purpose, by distinguishing between the Burger Court era and the Rehnquist/Roberts years.

These results suggest that the Court's reasoning approach has evolved in two distinct ways. First, key differences between tax law and workplace law reasoning during the Burger period have narrowed since 1987. In the Burger years, the Justices were significantly more likely to rely on both text and language canons in tax cases than in workplace decisions; those discrepancies are no longer significant for cases decided during the Rehnquist/Roberts era. The Court's propensity in tax cases to invoke legislative history more, and legislative purpose less, than in workplace decisions remains significant across both periods. But the convergence of the Justices' reliance on the two major textualist resources—even as reliance on each resource has increased over time—suggests that the Court has adopted a more uniform approach to semantic reasoning.

Table 2: Reliance on Selected Interpretive Resources—Burger Court Decisions and Rehnquist/Roberts Court Decisions

Resource	Tax Percentage	Workplace Percentage
<i>Burger Court</i>	(N=86)	(N=301)
Text*	64.0	54.2#
Language Canons*	26.7	14.0#
Legislative History*	62.8#	52.2#
Legislative Purpose*	53.5	85.7#
Substantive Canons	12.8	8.6#
<i>Rehnquist/Roberts Court</i>	(N=72)	(N=296)
Text	69.4	67.2#
Language Canons	33.3	27.7#
Legislative History*	47.2#	30.7#
Legislative Purpose*	50.0	73.0#
Substantive Canons	16.7	15.5#
*Indicates significant difference between tax and workplace law decisions.		
#Indicates significant difference between Burger Court and Rehnquist/Roberts court decisions.		

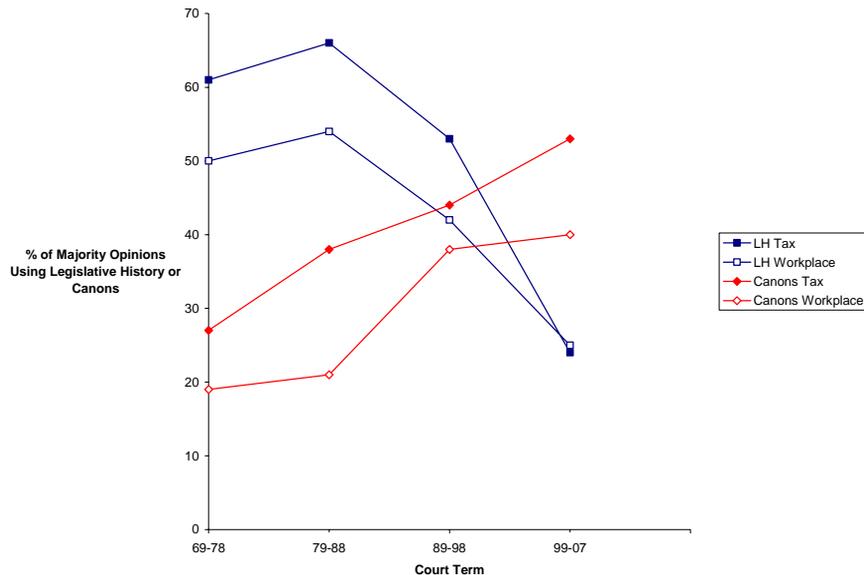
Second, the Court's reliance on key resources is more volatile over time in workplace law than in tax law. For labor and employment decisions, reliance on all five of the resources listed in Table 2 changed dramatically between the Burger era and the Rehnquist/Roberts years: the Justices' use of text, language canons, and substantive canons significantly increased, whereas their use of

legislative history and legislative purpose significantly decreased. By contrast, the only significant change between eras in the Court's use of resources for tax cases involved the declining use of legislative history. The lack of significant change in reliance on text, language canons, substantive canons, and legislative purpose reflects a greater continuity in methodological approach with regard to tax decisions. Relatedly, whereas we previously found an ideological tension between majority use of canons and dissent reliance on legislative history in workplace law cases during the Rehnquist years,⁹¹ this tension is absent from the Justices' relatively stable use of those resources in tax law cases.⁹² The Justices' unwillingness to use the canons in such an instrumental or policy-conscious manner is consistent with the contention that tax law and tax litigation in general are not as ideologically focused or divisive as workplace law.

91. See *supra* text accompanying notes 36–37.

92. Indeed, there are only two Rehnquist-era tax decisions in which the majority relies on canons but not legislative history while the dissent relies on legislative history: *Commissioner v. Lundy*, 516 U.S. 235 (1996) (a progovernment decision) and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (a protaxpayer decision). By contrast, there are sixteen such workplace law decisions during the Rehnquist era, including the *Sigmon Coal* case, which is also in the tax dataset. See Brudney & Ditslear, *supra* note 18, at 68. During the Burger era this tension between canons and legislative history was not a factor; there were three workplace decisions and three tax decisions in which the majority relied on canons but not legislative history while the dissent relied on legislative history. *Id.* (noting the existence of three workplace decisions).

***Trends in Reliance: Legislative History and Canons,
Majority Opinions 1969–2008***



Still, a key theme across subject matter areas is that the Court's reliance on legislative history has declined and its reliance on canons has increased, as shown in the graph above.⁹³ Indeed, there has been a precipitous decline in legislative history usage for tax decisions in the past decade, eliminating the differential in reliance on that resource between tax and workplace law cases.

A final element of our overview of the differences between tax law and workplace law reasoning involves the possibility that the Court may be more closely divided in one area than the other. To explore this possibility, we grouped each dataset into four categories, depending on whether the Court's decision (i) was unanimous (zero dissenters); (ii) enjoyed a wide margin of support (vote differential of five, six, or seven); (iii) was supported by a moderate-size majority (vote margin of three or four); or (iv) was a close case (vote margin of

93. For this graph, we grouped cases by ten-year intervals. Thus, for instance, for the period from 1979–88, the Court relied on legislative history in 66 percent of its tax majorities and 54 percent of its workplace majorities; it relied on canons in 38 percent of its tax majorities and 21 percent of its workplace majorities. Although the same trends occur when measured at eight-year or five-year intervals, the normal fluctuations in intervals smaller than ten years resulted in largely incomprehensible graphs.

one of two). Table 3 reports the size of majorities for tax and workplace law cases over the entire thirty-nine year period.

Table 3: Comparing the Size of Majority Opinion Margins, 1969–2008

Size of Majority	Tax Majorities Percentage (N=158)	Workplace Majorities Percentage (N=597)
Unanimous	42.4	42.7
Wide*	26.0	19.1
Moderate	21.5	16.8
Close*	10.1	21.4
*Indicates significant difference between tax and workplace decisions.		

Tax law decisions are significantly less likely to be close cases and significantly more likely to be decided by a wide margin (meaning either one or two dissenting votes). Remarkably, there have been only two close tax law cases in the entire Rehnquist/Roberts period, whereas almost one-fifth of all workplace law cases were close during this same period.⁹⁴ The differential on close cases further contributes to the impression that tax law cases are less ideologically divisive than their workplace law counterparts.⁹⁵

We also examined the proportion of close cases for each subject area in which the majority invokes legislative history, language canons, or substantive canons. We found that the Court relies on legislative history significantly more often in close workplace law cases than in all other workplace decisions, and the Court's added reliance on substantive canons in close workplace law decisions

94. The exact differential is 2.8 percent versus 19.2 percent, which is highly significant ($t = .0003$). During the Burger era, tax law decisions were close 16.3 percent of the time, whereas workplace law cases were close 23.6 percent of the time; that difference only approaches significance ($t = .075$).

95. There is some debate among tax law scholars about whether and in what ways federal judges may be ideologically divided in this area. *See, e.g.*, Staudt et al., *supra* note 71, at 1815–21 (finding that Justices' political preferences have explanatory value for the subset of Supreme Court decisions involving corporate taxpayers but not for the subset involving individual taxpayers); Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?*, 25 VA. TAX. REV. 201, 204, 237 (2005) (finding that appellate judges appointed by Democratic presidents are more likely to issue protaxpayer decisions in certain settings). We do not explore the influence of judicial ideology in this Article not only for reasons of space but also based on lingering doubts as to a proper classification approach. *See generally infra* note 289. Still, given that only one in ten tax cases is closely decided and more than two-thirds are unanimous or have at most two dissents, the area does appear less divisive than workplace law.

approaches significance.⁹⁶ By contrast, the Court's reliance on legislative history, substantive canons, and language canons in close tax law cases versus all others does not even approach being significant.⁹⁷ The fact that legislative history is disproportionately invoked in 5–4 workplace decisions—but not in closely divided tax cases—suggests that the Justices are comfortable seeking guidance from such history when they have strong disagreements about the meaning of workplace law text. This variation with respect to close cases points toward an important difference in legislative history justifications between tax and workplace law decisions.

B. Comparing Reliance on Types of Legislative History

In previous articles analyzing the role of legislative history in workplace law cases, we determined that the Court regularly relied on this history to help illuminate or explain the details of legislative bargains.⁹⁸ Our findings focused on the eight most liberal Justices and how often they invoked legislative history to identify or describe these bargains, including compromises that supported results inconsistent with their presumed policy preferences.⁹⁹ Other scholars have recognized the importance of legislative history to reflect or elaborate on the negotiated deals that are integral to congressional lawmaking.¹⁰⁰

Legislative history's role in capturing elements of this dealmaking may be especially robust in certain ideologically charged areas of substantive law, where bill managers and principal sponsors agree to postintroduction changes to build majority support or overcome a filibuster. Labor relations and civil rights are two examples, but environmental law is another field in which such

96. For reliance on legislative history, the difference is 51 percent in close cases versus 39 percent in all others ($t = .008$). For reliance on substantive canons, the difference is 16 percent in close cases versus 11 percent in all others ($t = .052$).

97. Complete results for these analyses are on file with the *Duke Law Journal*.

98. See Brudney & Ditslear, *supra* note 52, at 146–60; Brudney & Ditslear, *supra* note 62, at 226–28.

99. See Brudney & Ditslear, *supra* note 52, at 137–60.

100. See, e.g., Schacter, *supra* note 32, at 607; Rodriguez & Weingast, *supra* note 61, at 1420–23.

tradeoffs or compromises are relatively common and are often reflected in legislative history.¹⁰¹

Not every area of federal law is as ideological or partisan as labor relations and civil rights. In this regard, we have observed that the Court's general approach and reasoning in tax law cases seem less policy oriented and less polarized than its treatment of workplace law. The Justices issue far fewer closely divided decisions in tax law, their reasoning patterns are more stable or consistent between major time periods, and they pay notably less attention to broad considerations of congressional purpose.¹⁰² Given these initial findings, plus the fact that tax law involves more technically complex and specialized concepts than most other areas of federal law, it is reasonable to consider whether the Court relies on legislative history in the tax area for distinct reasons—specifically to borrow expertise from knowledgeable congressional sources rather than primarily to identify the legislative bargain reached by competing interested parties.

With this expertise-borrowing hypothesis in mind, we identify ten different types of legislative history on which the Justices rely when their decisions feature majority use of legislative history. Table 4 reports findings for our two subject matter areas.

101. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61–63 (1987); *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125–29 (1985); *Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 11–23 (1976).

102. See *supra* Table 2: Reliance on Selected Interpretive Resources—Burger Court Decisions and Rehnquist/Roberts Court Decisions, Table 3: Comparing Size of Majority Opinion Margins, 1969–2008 and accompanying text.

Table 4: Mean Percent Reliance on Legislative History Sources When Legislative History Is Present, 1969–2008

Resource	Tax (N=88)	Workplace (N=247)
House Committee Report*	68.2	56.9
Sen. Committee Report*	78.4	54.0
Conference Committee Report*	14.8	26.6
House Floor Debate*	12.5	30.2
Senate Floor Debate*	14.8	53.6
House Hearing	11.4	15.3
Senate Hearing	17.0	14.5
House Bill	3.4	6.9
Senate Bill	4.5	8.9
Other Legislative History	14.8	22.6
*Indicates significant difference between tax and workplace decisions.		

These results support our theory that the Court is more inclined to invoke legislative history for expertise-borrowing reasons in tax law cases but more apt to use that history to explain legislative compromises in workplace law decisions. The Justices are significantly more likely to invoke floor debates and conference committee reports in their workplace law decisions than in tax law opinions.¹⁰³ These forms of legislative record evidence tend to address changes in text that are agreed to between introduction and enactment: amendments and failed amendments proposed on the floor to alter the text approved by a standing committee, and conference committee action reconciling the different versions of text approved by the two chambers. Such legislative history, narrating and accompanying a bill's internal progress toward congressional approval, is useful principally to help understand the components and implications of the final legislative deal.

On the other hand, the Justices are significantly more likely to rely on House and Senate standing committee reports in tax opinions

103. For House and Senate floor debates, the differences are significant not only over the entire thirty-nine-year period but also in both the Burger era and the Rehnquist/Roberts years. For conference committee reports, the differences approach significance in both the Burger era ($t = .052$) and the Rehnquist/Roberts years ($t = .059$). In addition, Senate bill language is relied on more often in workplace than in tax cases; this difference approaches significance for the thirty-nine-year period ($t = .097$) and also the Burger era ($t = .064$).

The subset of "other legislative history"—notably reports by joint or advisory committees, special commissions, and executive agencies, as well as postenactment history or "constitutional history" from eighteenth or nineteenth century debates—also is used more often in workplace law cases; this difference approaches significance ($t = .060$).

than is true for workplace law decisions.¹⁰⁴ Indeed, there is a striking disparity in tax cases between the Court's reliance on standing committee reports and any other legislative history sources. As the following graph indicates, the Justices invoke these committee reports in their tax majorities five to six times more often than records of hearings, floor debates, or conference committee deliberations.¹⁰⁵ We observed in Part I.A¹⁰⁶ that the reports issued by the House and Senate standing committees—reports drafted primarily by the staff of the Joint Committee on Taxation—are a key source of technical and specialized knowledge in producing and explaining tax legislation. The Court's extraordinarily high reliance on reports from those standing committees suggests a judicial mindset oriented toward expertise borrowing.

We are not contending that the Justices invoke legislative history in a given case simply to borrow expertise or solely to help explain a bargain. The Court generally includes two or more different kinds of legislative record documents as part of its workplace law reasoning;¹⁰⁷ in doing so, the Court may well be benefitting from expert contributions as well as describing the deal.

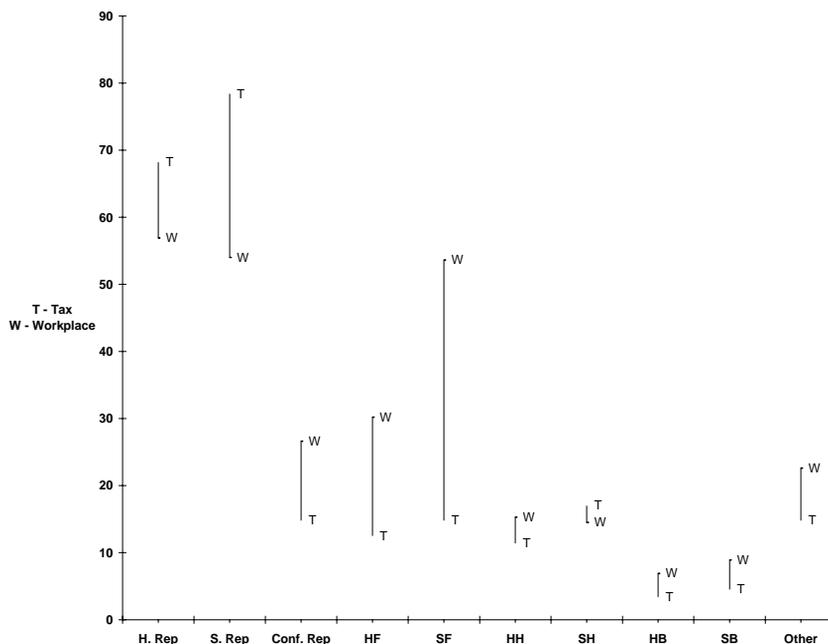
104. For Senate committee reports, the difference is significant both in the Burger era ($t = .000$) and during the Rehnquist/Roberts years ($t = .027$). For House Committee reports, the difference is significant in the Burger era ($t = 0.32$).

105. In workplace law cases, the Justices rely on committee reports two to three times more often than most other legislative record documents—and they invoke Senate floor debates virtually the same amount as committee reports.

106. See *supra* Part I.A.3.

107. The Court relies on almost three legislative record sources for each workplace law decision invoking legislative history, but on less than 2.5 sources in each tax law case. This difference (a 2.90 mean versus a 2.40 mean) is highly significant for the thirty-nine year period ($t = .004$); it also is significant for both the Burger years ($t = .030$) and the Rehnquist/Roberts era ($t = .018$).

***Supreme Court Reliance on Types of Legislative History:
Tax Decisions versus Workplace Decisions***¹⁰⁸



Further, the Court relies on standing committee reports from each chamber more than half the time in workplace law as well as tax law decisions, and those reports sometimes describe or elaborate on legislative bargains as well as explaining complex or technical aspects of text. Still, the Court's pattern of reliance in tax cases—invoking committee reports three-fourths of the time but largely ignoring other documents on which it so often relies in workplace decisions—suggests that something distinctive takes place in the tax law area.

In considering the different functions that legislative history may serve in tax and workplace decisions, we also examined how often dissent reliance on legislative history accompanies majority reliance on that history. We determined that when the majority invokes legislative history in its nonunanimous workplace law decisions, the dissent is significantly more likely to use legislative history than when such history is not part of the majority's reasoning.¹⁰⁹ It may be that

108. For identification of the principal types of legislative history that we coded, see *supra* note 84.

109. The likelihood is highly significant for the Burger years ($t = .000$), the Rehnquist/Roberts years ($t = .000$), and the entire thirty-nine-year period ($t = .000$).

the Justices are prepared to argue about what exactly the legislative deal or bargain *was* because the legislative record contains plausible (at least to the Justices) competing understandings.¹¹⁰ For tax law decisions relying on legislative history, however, the likelihood of dissent reliance on legislative history is not close to significant.¹¹¹ Table 5 reports the percentage of decisions for both subject areas in which the majority's reliance on legislative history in nonunanimous decisions is accompanied by dissent use of legislative history.

Table 5: Comparing Frequency of Legislative History Reliance in Both Majority and Dissent for Nonunanimous Cases

	Tax	Workplace
Percent of All Years (Tax N=51; Workplace N=162)	35*	62
Percent of Burger Years (Tax N=35; Workplace N=109)	40*	65
Percent of Rehnquist/Roberts Years (Tax N=16; Workplace N=53)	25*	55
*Indicates significant difference between tax and workplace decisions.		

The Justices disagree far less about the meaning of legislative history in tax cases than in workplace decisions. This conclusion is consistent with our theory that the Justices' use of tax legislative history is more about borrowing expertise than understanding the bargain. It seems reasonable to infer that the Justices' infrequent level of disagreement about legislative history in tax cases is due in part to a comparatively modest level of contested understandings among key congressional actors about the evolving meaning of text from bill introduction to enactment. The accompanying tax legislative history—especially committee reports on which the Justices so heavily rely—is therefore more likely to focus on explicating the arcane and technical substance of tax law. Conversely, the Justices' tendency to disagree about the meaning of legislative history in workplace law cases, and to invoke documents from multiple stages of the legislative process to buttress their respective positions, suggests that the Justices' focus in these cases is on understanding the legislative bargain.

110. Apart from the floor debates and conference committee reports discussed, *see supra* note 103 and accompanying text, another possible source for these competing understandings is standing committee reports that include extensive minority views. These minority views are present far more often in committee reports accompanying workplace statutes than reports accompanying tax statutes. *See infra* notes 176–77 and accompanying text.

111. The likelihood is not close to significant for the thirty-nine-year period ($t = .41$), nor is it close to significant for the Burger period ($t = .46$) or the Rehnquist/Roberts years ($t = .43$).

C. *Comparing Reliance on Types of Language and Substantive Canons*

As discussed in Section A, the Court has relied increasingly on language canons and substantive canons to help explain or justify its tax and workplace law decisions.¹¹² Although the Justices' use of the canons has expanded dramatically in the workplace law area, reliance on both language and substantive canons remains somewhat higher for tax cases than workplace decisions. In this Section, we address certain subsets of language and substantive canons invoked by the Justices in their tax and workplace law opinions. Our interest here is in whether—as appears true for legislative history—the Court uses canons in somewhat different ways for each subject area, and, if so, what factors might explain or account for this variation.

For these purposes, we have grouped language canons into two categories: (i) presumptions about the meaning attributed to individual words¹¹³ or the linguistic inferences to be drawn from how those words are included, omitted, or arranged in a single phrase or sentence,¹¹⁴ and (ii) presumptions about the larger cohesion or structural integrity of the text, including especially the whole act rule and the related presumption against surplusage, and also presumptions about the relationship between words used more than once in different parts of the same statute or in similar statutes.¹¹⁵ Table 6 reports our findings in the two subject matter areas, separating the two subsets of language canons for all cases that involve majority reliance on language canons.

112. See *supra* Table 2: Reliance on Selected Interpretive Resources—Burger Court Decisions and Rehnquist/Roberts Court Decisions, Table 3: Comparing Size of Majority Opinion Margins, 1969–2008 and accompanying text.

113. We refer here primarily to the plain meaning rule, the presumption to follow ordinary rather than technical usage of terms, and the distinction between “may” and “shall.”

114. We refer here to maxims such as *expressio unius, ejusdem generis*, and *noscitur a sociis*.

115. We refer here to the presumption of statutory consistency (the same or similar terms in a statute should be interpreted the same way), the rule of *in pari materia* (similar statutory provisions in two comparable statutes should be applied in the same way), and the presumption that when two statutory provisions conflict the specific provision controls the general.

**Table 6: Mean Percent Reliance on Language Canon Subsets
when Language Canons are Present, 1969–2008***

Years	Individual Words or Sentences	Structural Cohesion or Integrity
Tax		
All Years (N=47)	17.0 (8 of 47)	91.5 (43 of 47)
Burger Years (N=23)	17.4 (4 of 23)	87.0 (20 of 23)
Rehnquist/Roberts Years (N=24)	16.7 (4 of 24)	95.8 (23 of 24)
Workplace		
All Years (N=123)	34.1 (42 of 123)	75.6 (93 of 123)
Burger Years (N=42)	28.6 (12 of 42)	78.6 (33 of 42)
Rehnquist/Roberts Years (N=81)	37.0 (30 of 81)	74.1 (60 of 81)
*Percentages in each row add up to more than 100 because some cases rely on both types of canons.		

Although the number of majority opinions relying on language canons is only about one-half the number that rely on legislative history,¹¹⁶ certain interesting differences emerge between tax law and workplace law cases. The Court is significantly more likely to invoke structural cohesion canons and significantly less likely to rely on word- or sentence-meaning canons in its tax decisions than in its workplace law majorities. The Court's heavier reliance on structural canons in tax cases stems primarily from shifts in use arising since 1986.¹¹⁷ Put differently, the Court relies on structural canons five to six times more often than word- or sentence-meaning canons in tax majorities, whereas the ratio is only two or three to one in workplace law majorities.

One possible explanation for the Court's tilt toward structural canons in the tax area involves the unified and self-contained nature of American tax laws. Virtually all revenue statutes reviewed by the Court exist as additions or revisions to a single title of the U.S. Code.¹¹⁸ The Justices may well believe, even if subconsciously, that

116. In its tax law cases, the Court relied on legislative history in 89 majorities but on language canons in 48; in its workplace law cases the Court invoked legislative history in 247 majorities and invoked language canons in 123 decisions. Although the lower sample size makes it harder to obtain statistical significance, *see* GONICK & SMITH, *supra* note 80, at 146–50, our key findings with respect to both language canons and substantive canons are significant.

117. For structural canons, the difference in reliance between tax and workplace cases is not significant during the Burger years ($t = .351$) but is highly significant for the Rehnquist/Roberts period ($t = .008$).

118. We refer to Title 26, the Internal Revenue Code. Occasionally tax cases arise under Title 11, the bankruptcy code, or Title 29, which contains ERISA. But the overwhelming majority of federal taxation cases arise under Title 26.

presumptions about structural integrity—such as interpreting terms consistently or avoiding redundancies—deserve special respect in a regulatory scheme that is continuously amended and highly self-referential.¹¹⁹

On the other hand, workplace law statutes are more likely to be discrete and separate entities, located in numerous different titles of the U.S. Code.¹²⁰ The Court is still committed to invoking structural integrity canons to help resolve the meaning of inconclusive text. But the presence of so many relatively minor workplace statutes, including many that are in essence “one-off” enactments,¹²¹ may have led the Justices to rely more often on narrower language-based maxims that address the meaning of individual words or sentences within each body of enacted text.

Turning to the substantive canons, we group these into two categories as well. The first category consists of policy norms based on generally applicable legal principles such as presumptions to avoid constitutional issues or repeals by implication and rules disfavoring federal preemption of core state functions or implied waivers of sovereign immunity. The second category consists of policy norms grounded in particular subject matter policies such as presumptions favoring labor arbitration or respect for international maritime trade and presumptions disfavoring implied tax exemptions or restrictions on the Internal Revenue Service’s (IRS) summons power. Table 7 reports our findings, separating reliance on these two subsets of substantive canons for all decisions that rely on substantive canons.

119. See, e.g., ROSENBERG & DAHER, *supra* note 71, at 11 (observing that the major code revisions occurred in 1939, 1954, and 1986, but that Congress has enacted code amendments almost every year); RICHARD GERSHON, A STUDENT’S GUIDE TO THE INTERNAL REVENUE CODE § 1.02, at 2 (4th ed. 1999) (discussing Congress’s regular amendments to the 1986 code, including “fairly major changes” in 1991, 1993, and 1996); see also Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 895 (1987) (book review) (referring to dozens of revisions in the code since its birth in 1913, and adding that from 1976 to 1984, “six different tax bills each affected more provisions than the 1969 [Reform] Act, even though none of these acts purported to reorganize the Code”).

120. For a list of workplace statutes found in eight separate titles of the U.S. Code, see *supra* note 70.

121. Examples of these one-off enactments are the Occupational Safety and Health Act, the Worker Adjustment Retraining Notification Act, and until 2008 the Americans with Disabilities Act. Even regulatory schemes amended several times, such as the National Labor Relations Act and the Age Discrimination in Employment Act, do not compare with the Internal Revenue Code, which is amended on an almost annual basis. See *supra* note 119.

Because the overall number of cases invoking substantive canons is relatively small, we do not break them down between the two eras.

Table 7: Mean Percent Reliance on Substantive Canon Subsets when Substantive Canons are Present, 1969–2008*

	General Applicability	Subject Matter Specific
Percent of All Years, Tax (N=24)	66.7 (16 of 24)	45.8 (11 of 24)
Percent of All Years, Workplace (N=78)	93.2 (68 of 73)	6.8 (5 of 73)
*Percentages in each row may add up to more than 100 because some cases rely on both types of canons.		

Once again, there are notable differences between the types of canons relied on in tax and workplace law. The Court in both areas relies heavily on substantive canons of general application. The Justices invoke the constitutional avoidance canon and the canon disfavoring implied repeals somewhat more often in tax cases,¹²² while relying far more on presumptions against waiving sovereign immunity and against preempting core state functions in workplace law.¹²³

The most striking distinction, however, involves how often the Court invokes judicial policy norms tailored to particular statutory subject matter. The Justices rely on tax-based canons in almost half the tax decisions in which they invoke substantive canons, but they turn to canons grounded in particular workplace-related issues in only 7 percent of the workplace cases in which they use canons.¹²⁴ The heavy focus on tax-specific substantive canons can be seen as a form of expertise borrowing, albeit less direct or rigorous than reliance on tax legislative history. The Justices may invoke policy norms like construing exceptions against the taxpayer or favoring the IRS's summons power to support if not shape their responses to difficult doctrinal issues of tax law. They may well feel less need to make use of such targeted policy presumptions in workplace law because they

122. The Court's use of the constitutional avoidance canon in tax decisions that rely on substantive canons is 16.7 percent (four of twenty-four cases) whereas in workplace law it is 12.3 percent (nine of seventy-three cases). The Court's use of the implied repeals canon in tax cases is 12.5 percent (three of twenty-four cases) whereas in workplace law it is 8.2 percent (six of seventy-three cases).

123. The Court in its workplace law decisions has relied on the sovereign immunity canon in eight majorities and the presumption against preemption in ten decisions. *See* Brudney & Ditslear, *supra* note 18, at 106 nn.438–39 (discussing six cases invoking the antipreemption canon). The Court in its tax law majorities has relied on either of the two canons in only one decision.

124. This difference in the use of subject-specific canons is highly significant ($t = .000$).

are more confident in their ability to resolve the underlying doctrinal questions.

D. Justice Blackmun's Impact in Tax Cases

Individual Justices typically acquire diverse background experiences and considerable areas of expertise by the time they reach the Supreme Court. Justices Marshall and Ginsburg spent many years planning and litigating important employment discrimination and civil rights cases.¹²⁵ Justices Breyer and Scalia taught administrative law and wrote about that subject in depth from a scholarly vantage point.¹²⁶ Justice Blackmun was an accomplished tax lawyer for more than two decades before his appointment to the Eighth Circuit in 1959. During sixteen years with a private firm in Minneapolis and nine years as general counsel to the Mayo Clinic,¹²⁷ Blackmun not only practiced federal and state tax law; he also gave speeches and wrote articles reflecting his abiding interest in and knowledge of the field.¹²⁸

Justice Blackmun's area of expertise seems to have dramatically impacted his majority opinion assignments. Table 8 lists the four most prolific majority opinion writers in tax and workplace law. We

125. See RANDALL W. BLAND, JUSTICE THURGOOD MARSHALL: CRUSADER FOR LIBERALISM 30–177 (2001) (discussing Justice Marshall's central role in litigating race discrimination lawsuits from 1934 to 1960); Neal A. Lewis, *High Court Nominee Faces Easy Road Through Senate*, N.Y. TIMES, July 20, 1993, at A15 (discussing Justice Ginsburg's role as a leading litigator for women's rights).

126. See, e.g., STEPHEN G. BREYER, REGULATION AND ITS REFORM *passim* (1982); Antonin Scalia, *Separation of Functions: Obscurity Preserved*, 34 ADMIN. L. REV. v *passim* (1982); see also Cindy Skrzycki, *Interest Grows in Resurrecting Administrative Conference*, WASH. POST, May 25, 2004, at E1 (describing Justices Scalia and Breyer as influential members of the Administrative Conference of the United States during their careers as law professors).

127. See TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 40–62 (2008) (discussing Justice Blackmun's career in a Minneapolis law firm from 1934 to 1950 and at the Mayo Clinic in Rochester, Minnesota from 1950 to 1959); *Nomination of Harry A. Blackmun, of Minnesota, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 91st Cong. 7 (1970) (identifying Blackmun's professional background from 1934–59).

128. For speeches and panel appearances, see, for example, *Blackmun Talks to Junior Bar on Income Tax Returns*, HENNEPIN LAW., Feb. 23, 1939, at 6 (on file with the Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 12 [hereinafter *Blackmun Papers*]); *Blackmun Named to Expert Panel*, ROCHESTER POST BULLETIN, Oct. 5, 1953 (on file with the *Blackmun Papers*, *supra*, Box 12). For articles, see, for example, Harry A. Blackmun, *The Marital Deduction and Its Use in Minnesota*, 36 MINN. L. REV. 50 (1951); Harry A. Blackmun, *The Physician and His Estate*, 36 MINN. MED. 1033 (1953); Harry A. Blackmun, *Federal Income Taxation of Trusts and Estates*, 33 MINN. L. REV. 800 (1949) (book review).

calculated the Justices' rankings based on the percentage of the Court's tax or workplace decisions they authored during their tenure.¹²⁹

Table 8: Percentage of Majority Opinions Authored by the Four Most Prolific Justices in Tax and Workplace Law during Their Tenure on the Court

	Tax Majorities		Workplace Majorities
Blackmun	30.4 (34 of 112)	Brennan	16.5 (62 of 376)
Souter	18.8 (9 of 48)	Stewart	14.4 (27 of 188)
Marshall	16.5 (18 of 109)	White	14.1 (59 of 418)
Powell	13.7 (10 of 73)	Thomas	14.0 (25 of 178)

Justice Blackmun authored over 30 percent of all signed majority opinions in tax law during his twenty-four years of service. This proportion of the Court's tax majorities is almost double that assigned to his nearest colleagues in tax law cases, Justices Souter and Marshall. It also is close to twice the proportion of workplace law majorities written by Justice Brennan, who was assigned more workplace law decisions than any other Justice.¹³⁰ Blackmun authored a remarkable 40 percent of the federal tax decisions in which he voted for the majority result, and he wrote concurring opinions in an additional 7 percent of those decisions.¹³¹ Another way to understand Blackmun's domination of the tax law area is to observe that in his twenty-four terms on the Court, he wrote as many tax majorities as were authored collectively by five other Justices—Brennan, White, Stevens, Rehnquist, and Scalia—who on average served over twenty-six terms within our dataset.¹³²

129. Each Justice authored at least nine majorities in tax law or workplace law. We excluded from our calculations the five per curiam decisions in tax law and the twenty-one per curiam statutory opinions in workplace law.

130. As the senior Associate Justice for fifteen terms (1975–76 through 1989–90), Justice Brennan would have assigned himself many of these workplace majorities. Justice Blackmun was senior Associate Justice for only his final term (1993–94) and would therefore have been assigned almost all of his tax majorities by others.

131. The exact figures are 39.1 percent (34 of 87) and 6.9 percent (6 of 87). The next highest Justice in tax decisions is Souter, who wrote 20.9 percent of the decisions in which he voted with the majority (9 of 43) and also authored concurrences in 7.0 percent of those cases (3 of 43). In workplace law, Brennan wrote 21.9 percent of the decisions in which he voted with the majority (62 of 283), and he wrote concurrences in another 8.5 percent (24 of 283).

132. Justice Brennan wrote eleven tax majorities from 1969–70 to 1989–90; Justice White wrote eight majorities from 1969–70 to 1992–93; Justice Stevens wrote seven majorities from 1975–76 to 2007–08; Justice Rehnquist wrote five majorities from 1971–72 to 2004–05; Justice Scalia wrote three majorities from 1986–87 to 2007–08.

Justice Blackmun's unusual influence in the tax law area extends beyond his role in majority decisions. He also authored seventeen dissents—more than any other Justice during his twenty-four terms on the Court. Indeed, Blackmun wrote a dissenting opinion in over one-third of the nonunanimous tax decisions in which he had not authored the majority opinion.¹³³ In addition, the Court issued five per curiam tax opinions, based only on the certiorari papers, between 1970 and 1994. Blackmun authored three of these cases and dissented in the two others,¹³⁴ and his dissent in one decision prompted a colleague to request more time to review the papers in the case.¹³⁵ Such per curiam opinions, decided without full briefing or oral argument, often reflect a certain level of subject matter confidence from the Justices, as they are rationalized primarily in terms of correcting perceived lower court errors rather than addressing close or complex legal questions.¹³⁶ Since Blackmun retired in 1994, the Justices have issued no per curiam opinions in tax law although they have decided five workplace law statutory cases in summary fashion over the same period.¹³⁷ Some of the Justices likely deferred to Justice

133. There were 67 nonunanimous tax decisions out of the 117 cases (including five per curiam decisions) during Justice Blackmun's tenure. He authored 19 of those 67 nonunanimous opinions, and he wrote dissents in 17 of the remaining 48, or 35.4 percent.

134. See Letter from Lewis Powell to Harry Blackmun (Jan. 15, 1973) (on file with the *Blackmun Papers*, *supra* note 128, Box 167) (asking Justice Blackmun to “[p]lease join me in your per curiam” opinion in *United States v. Chandler*, 410 U.S. 257 (1973)); Memorandum from Harry Blackmun to the Conference (Dec. 18, 1980) (on file with the *Blackmun Papers*, *supra* note 128, Box 334) (introducing his per curiam opinion for *HCSC-Laundry v. United States*, 450 U.S. 1 (1981)); Memorandum from Harry Blackmun to the Conference (Oct. 2, 1987) (on file with the *Blackmun Papers*, *supra* note 128, Box 504) (attaching his per curiam opinion for *Commissioner v. McCoy*, 484 U.S. 3 (1987)); *Fausner v. Comm’r*, 413 U.S. 838, 839 (1973) (Blackmun, J., dissenting); *Comm’r v. Asphalt Prods. Co.*, 482 U.S. 117, 123 (1987) (Blackmun, J., dissenting in part).

135. Letter from John Paul Stevens to Antonin Scalia (May 12, 1987) (on file with the *Blackmun Papers*, *supra* note 128, Box 484) (requesting more time to take into account Justice Blackmun's opinion in *Asphalt Products*).

136. See generally EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 349–51 (9th ed. 2007) (pinpointing and criticizing the purported justifications for per curiam opinions); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 825–33 (1983) (cataloguing trends in the Court's per curiam opinions throughout the 1970s). Although both Gressman and Heller are critical of this summary decisionmaking process, the Court's absence of plenary consideration does seem to reflect a certain level of interest and assuredness. See, e.g., *HCSC-Laundry*, 450 U.S. at 5–8 (summarily reversing a circuit court tax ruling that conflicts with several other courts); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001) (summarily reversing a circuit court workplace law decision in conflict with the decisions of other circuits).

137. The five per curiam decisions addressing workplace law statutory issues are *Whitman v. Department of Transportation*, 126 S. Ct. 2016 (2006); *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195

Blackmun simply because they were not interested in tax law—something Blackmun recognized inside the Court as well as in public statements.¹³⁸ It is also quite likely, though, that Blackmun’s fellow Justices lacked confidence in their own knowledge about tax law concepts, and thus deferred to him more than they would in most other statutory areas.¹³⁹

Given Blackmun’s extraordinary role as a majority author in tax cases, we compare his approach to legislative history reliance with that of his colleagues. Table 9 presents our findings, broken down into three time periods: Blackmun’s sixteen terms on the Burger Court, his eight terms on the Rehnquist Court, and the fourteen terms since Blackmun left the Court.

During Blackmun’s time on the Court, his fellow Justices relied heavily on legislative history to help explain their majority opinions—indeed they did so slightly more often than Justice Blackmun did.¹⁴⁰ This substantial reliance persisted during the first eight years of the Rehnquist Court, even as Justice Scalia was directing sharp criticism at his colleagues for using legislative history at all, criticism that seemed to have a substantial effect on patterns of legislative history

(2006); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001); *Clark County School District v. Breeden*, 532 U.S. 268 (2001); *Hetzel v. Prince William County*, 523 U.S. 208 (1998).

138. See Memorandum from Harry Blackmun to the Conference (Dec. 18, 1980) (on file with the *Blackmun Papers*, *supra* note 128, Box 334) (referring humorously to “the eager appetite [I know] all of you have for tax cases” and introducing his per curiam opinion for *HCSC-Laundry*); Stuart Taylor, *Reading the Tea Leaves of a New Term*, N.Y. TIMES, Dec. 22, 1986, at B14 (“If one’s in the doghouse with the Chief, he gets the crud. He gets the tax cases and the Indian cases, which I like, but I’ve had a lot of them.” (quoting Harry Blackmun, J., United States Supreme Court)).

139. See Erwin Griswold, *Preface* to BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES*, at xii (1975) (“[E]xcept for Justice Blackmun, it is hard to find a member of the present Court who has a real ‘feel’ for tax law.”). See generally Robert A. Green, *Justice Blackmun’s Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109 (1998) (describing Justice Blackmun’s background in taxation issues and his jurisprudence in different classes of tax cases); Karen Nelson Moore, *Justice Blackmun’s Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLIN L. REV. 29, 43–49 (1985) (clarifying Justice Blackmun’s role in harmonizing inconsistent decisions related to taxes affecting interstate and foreign commerce). Tax law also is not an area in which law clerks can readily compensate for their Justice’s own felt inadequacies. Law clerks are likely to have taken only a single basic tax course in law school, and they tend to be less interested in tax than other public law subjects.

140. We do not attach special importance to this difference in reliance: the fact that other Justices invoked legislative history so regularly while Justice Blackmun was on the Court is the salient point. For a suggestion that Blackmun’s use of legislative history may have served as a cue for his colleagues, see *infra* note 308 and accompanying text.

reliance in workplace law.¹⁴¹ Although Scalia pointedly refused to join some tax majorities that used legislative history during this eight-year period,¹⁴² there was no appreciable decrease in the use of legislative history while Blackmun remained on the Court. After Blackmun departed, however, the Court's willingness to invoke legislative history in its tax majorities significantly declined.¹⁴³

Table 9: Comparing Justice Blackmun's Reliance on Legislative History in Tax Cases with the Reliance of Other Justices*¹⁴⁴

	Blackmun Percent Reliance	Others' Percent Reliance
Burger Years, 1970–86	60 (15 of 24)	69.4 (34 of 49)
Rehnquist Years, 1987–94	50 (5 of 10)	64.3 (18 of 28)
Without Blackmun, 1995–2008	—	34.4 (11 of 32)

*Per curiam opinions are omitted from this analysis.

This later development may to some extent be viewed as part of the broader downturn in reliance on legislative history dating from Scalia's arrival in 1986. Yet the lack of a downturn in tax cases until the late 1990s stands in marked contrast to the pattern in workplace law, in which the other Justices' reliance on legislative history declined sharply in the early years of the Rehnquist Court even as

141. See, e.g., Brudney & Ditslear, *supra* note 52, at 133 (reporting a substantial decline in legislative history reliance after 1986 for both proemployee and proemployer decisions); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 384–95 (1999) (discussing the decline since the 1980s). See generally John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006) (arguing that Justice Scalia has caused the Court to focus more on the text of the statute than legislative purpose).

142. See *United States v. Stuart*, 489 U.S. 353, 371–73 (1989) (Scalia, J., concurring) (criticizing the Brennan majority for invoking a Senate floor debate to discern legislative intent); *Comm'r v. Clark*, 489 U.S. 726, 728 (1989) (Scalia, J., concurring) (declining to join a portion of Justice Stevens's majority that relies on House and Senate committee reports). Justice Scalia has continued this criticism since Justice Blackmun's retirement. See *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 215 (1996) (Scalia, J., concurring) (declining to join a portion of Justice Souter's majority opinion); *Chickasaw Nation v. United States*, 534 U.S. 84, 86 (2001) (Scalia, J., concurring) (declining to join a portion of Justice Breyer's majority opinion).

143. The difference between the early Rehnquist years and the post-Blackmun period is highly significant ($t = .002$). The decline did not begin in the initial years after Justice Blackmun's retirement, but by the late 1990s the Justices were relying substantially less on legislative history than they had during Blackmun's tenure. Copies of year-by-year results during the 1990s are available from the authors.

144. We omitted the 1969–70 term from Table 9 because it precedes Justice Blackmun's arrival on the Court. Blackmun was confirmed by the Senate in May 1970.

Justice Blackmun’s reliance held steady.¹⁴⁵ We suggest in Part III that the delayed decrease in legislative history use for tax cases occurred only when Justice Blackmun—the Court’s reigning expert in this arcane field—retired. The remaining Justices had less of an appetite for the technical and specialized discussions of tax law concepts contained in committee reports.

One of our findings with respect to the Court’s use of substantive canons appears consistent with the idea that other Justices may have been “reluctant specialists” when confronting tax law issues. We noted in Section C that the Justices relied on tax-specific substantive canons in eleven of their twenty-four majorities using substantive canons.¹⁴⁶ It turns out that Justice Blackmun authored only one majority decision invoking such a tax-specific canon¹⁴⁷ while his colleagues wrote ten. It is quite possible that Blackmun’s knowledge of tax law left him more comfortable using content-specific resources such as legislative history and past Supreme Court tax decisions, whereas his colleagues who understood tax law less clearly (and also had less substantive interest) were prepared to borrow more heavily from tax-based policy presumptions.¹⁴⁸

III. EXPLORING SUPREME COURT REASONING IN TAX CASES

Our discussion examines three principal areas of difference, identified in our results, between the Court’s approach to tax law and workplace law. Our prior articles on the Justices’ reasoning in

145. We compared legislative history reliance by Blackmun in workplace law majorities with reliance by all other Justices, using the same three time periods set forth in Table 9:

Table 9A: Comparing Justice Blackmun’s Reliance on Legislative History in Workplace Cases with Reliance of Other Justices*

	Blackmun Percent Reliance	Others’ Percent Reliance
Burger Years, 1970–86	50 (12 of 24)	53.6 (136 of 253)
Rehnquist Years, 1987–94	50 (9 of 18)	33.3 (42 of 126)
Without Blackmun, 1995–2008	—	27.6 (40 of 145)

*Per curiam opinions are omitted from this analysis.

146. See *supra* Table 7: Mean Percent Reliance on Substantive Canon Subsets When Substantive Canons Are Present, 1969–2008.

147. See *Badaracco v. Comm’r*, 464 U.S. 386, 401 (1984).

148. Justice Blackmun’s reliance on Supreme Court precedent tends to support this hypothesis: he relied on prior decisions in 91.2 percent of his majority opinions (31 of 34), compared to 80.1 percent reliance (96 of 119) by all of the other Justices.

workplace law serve as a baseline¹⁴⁹: we devote primary attention here to pursuing how the Court's reasoning in tax cases diverges from this baseline. We first address variations in the Court's approach to legislative history because we believe this reflects the Justices' appreciation for the distinctive ways in which Congress produces tax legislative history. We then discuss more briefly the Court's differential approaches to the canons of construction: although less dramatic than the legislative history story, we suggest that these too reflect an understanding of certain distinctive elements in tax law. Finally, we consider the impact of Justice Blackmun's prominent role in tax law cases and how deference to a single Justice in a subject matter area may affect the Court's reasoning approach in that area.

A. *Legislative History*

Our results provide ample evidence that the Court's use of legislative history varies markedly between tax and workplace law. Table 2 indicates that in both the Burger era and the Rehnquist/Roberts years the Court has relied on legislative history more often to help justify tax decisions than workplace decisions.¹⁵⁰ Table 4 establishes that when the Court relies on legislative history, it is significantly more likely to invoke standing committee reports in tax cases than in workplace cases but far more inclined to rely on conference committee reports and floor debates in its workplace decisions. And Table 5 establishes that for majority opinions invoking legislative history in nonunanimous cases, the dissent is significantly more likely to disagree about the meaning of that history in workplace decisions than in tax cases. We believe these results—especially from Tables 4 and 5—reveal that the Justices value legislative history in the tax setting for distinctive reasons, quite apart from courts' ordinary reliance on that history to help unpack the legislative bargain captured in text.

1. *Discerning Deals Versus Borrowing Expertise.* As many

149. See Brudney & Ditslear, *supra* note 52; Brudney & Ditslear, *supra* note 62; Brudney & Ditslear, *supra* note 18.

150. The Court's use of legislative history in tax cases declined sharply starting in the 2001 term and continuing precipitously over the next six terms (2002–07). See *supra* note 93 and accompanying text and graph. Comparative data for the 2001–07 terms are available from the authors. The significant difference in reliance that persisted through most of the Rehnquist years has disappeared. We suggest why Justice Blackmun's departure may be partly responsible in Part III.C.

scholars have observed, the inherent inefficiencies of Congress's lawmaking process mean that substantial adjustment and compromise in the text of a bill following the bill's introduction is the rule rather than the exception.¹⁵¹ The legislative history that accompanies each stage of the lawmaking process may shed light on the textual modifications or compromises that occur during this process. Because legislative deals are a well-recognized feature of congressional lawmaking, courts traditionally regard legislative history as valuable to help identify the existence of a negotiated compromise or to explain specific aspects of a bargain.¹⁵²

The Court's workplace law decisions invoking legislative history regularly rely on this history to help discern or describe the deal. As we have previously demonstrated, the Justices emphasize legislative record evidence of explicit bargains reached during a bill's postintroduction journey through Congress to indicate when and why specific employee rights or protections were traded away or secured.¹⁵³ Further, legislative history often describes or elaborates on certain compromises reached at the preintroduction stage (such as employer defenses or exceptions) that were agreed to among interested parties.¹⁵⁴

We do not mean to suggest that the Court's tax law jurisprudence never involves the interpretation of legislative bargains, especially bargains negotiated by members of Congress after a bill is introduced. In their tax law opinions, the Justices have on occasion used legislative history to help identify the point at which a compromise was reached and the specifics of that compromise. In

151. See, e.g., JAMES MACGREGOR BURNS ET AL., *GOVERNMENT BY THE PEOPLE* 353–59 (16th ed. 1995); ALAN GRANT, *THE AMERICAN POLITICAL PROCESS* 45–52, 65–66, 302 (5th ed. 1994); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 84–86 (2d ed. 1995). For a discussion of the contrast with parliamentary efficiency in lawmaking and its implications for how courts use legislative history, see Brudney, *supra* note 63, at 43–48.

152. See Nourse & Schacter, *supra* note 32, at 596; Rodriguez & Weingast, *supra* note 61, at 1422. See generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 877–79 (1975) (discussing the judiciary's role in interpreting statutes to fulfill or further the original negotiated legislative deal).

153. See Brudney & Ditslear, *supra* note 52, at 150–51 & nn.113–16 (discussing the use of legislative history to identify compromises and citing seven Court decisions as examples); see also, e.g., *Doe v. Chao*, 540 U.S. 614, 622–23 (2004); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250–63 (1994); *Mohasco Corp. v. Silver*, 447 U.S. 807, 820–23 (1980).

154. See, e.g., *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 570–74 (1999); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 72–75 (1982); *Beasley v. Food Fair of N.C.*, 416 U.S. 653, 659–62 (1974); see also Brudney & Ditslear, *supra* note 52, at 149 nn.93–98 (citing six additional decisions).

HCSC-Laundry v. United States,¹⁵⁵ the issue was whether a nonprofit corporation providing laundry and linen supply services to public hospitals qualified for an income tax exemption under section 501 of the Internal Revenue Code.¹⁵⁶ The Court found “conclusive support” for a negative answer in the legislative history, which revealed that the Senate’s effort to cover hospital-related laundry services in the text of section 501(e) was rebuffed by the House in conference, and that a Senate amendment proposed eight years later to add laundry services was defeated on the Senate floor.¹⁵⁷ Similarly, in *Bob Jones University v. United States*,¹⁵⁸ the Court invoked committee report commentary and Congress’s failure to act on proposed amendments to support its decision that racially discriminatory private schools did not qualify for tax-exempt status under section 501(c)(3).¹⁵⁹ And in *Commissioner v. Engle*,¹⁶⁰ the Court—rejecting the IRS position—relied heavily on floor debates and conference committee narrative to justify its decision allowing taxpayers to take percentage-depletion deductions on revenues from their oil and gas leases.¹⁶¹

Notwithstanding these examples, however, a far larger number of Court decisions construing the statutory meaning of substantive tax provisions¹⁶² rely on legislative history primarily for a different reason.

155. *HCSC-Laundry v. United States*, 450 U.S. 1 (1981).

156. *Id.* at 3–5.

157. *Id.* at 6–7.

158. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

159. *See id.* at 600–01.

160. *Comm’r v. Engle*, 464 U.S. 206 (1984).

161. *Id.* at 217–22; *see also* *United States v. Sotelo*, 436 U.S. 268, 275–81 (1978) (relying on Bankruptcy Act legislative history to establish that Congress meant to respond to the Treasury Department’s stated concerns by providing that a bankrupt company’s withholding taxes, collected from its employees but not paid over to the IRS, were nondischargeable).

162. We distinguish here between substantive and procedural aspects of the Internal Revenue Code. Certain sections of the code, such as subchapter C dealing with corporations, may present especially challenging or complex substantive questions. *See infra* Part III.A.3 (discussing *United States v. Davis*, 397 U.S. 301 (1970); *Comm’r v. Clark*, 489 U.S. 726 (1989)). By contrast, tax decisions that arise from procedural disputes tend to present issues with which the Justices are more familiar and about which they have more confidence—in these instances the Court’s reliance on legislative history is less likely to involve expertise-borrowing considerations. *See, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (relying on legislative history to support the text-based conclusion that the equitable tolling doctrine does not apply to the limitations period for filing tax-refund claims); *Bufferd v. Comm’r*, 506 U.S. 523, 530 n.10 (1993) (relying on legislative history to confirm that the three-year period for assessing shareholder tax liability runs from the filing date of a shareholder’s individual return, not the date of a corporation’s return); *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 730 & n.14 (1985) (relying on legislative history to help justify enforcement of an IRS levy against a taxpayer bank); *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 310 & n.13 (1978)

The Justices in these cases use commentary and elaboration from standing committee reports as a form of expertise borrowing to help them understand and apply the often arcane and complex concepts contained in Internal Revenue Code legislation.¹⁶³ Expertise-borrowing majority opinions sometimes invoke committee report explanations to confirm or reinforce the apparent plain meaning of the text at issue.¹⁶⁴ On other occasions, these majority opinions use committee report analyses and discussions to resolve disputes in which the Court acknowledges that the text at issue is ambiguous or indefinite.¹⁶⁵ Whether the legislative record materials are used to resolve inconclusive language or to reinforce apparent meaning, the congressional commentary on which these opinions rely is less partisan or ideologically colored than much of the legislative history invoked in workplace law decisions. Before discussing some illustrative expertise-borrowing opinions, we explain why this more neutral and objective legislative history reflects the distinctiveness of the tax legislative process, especially the unique role played by the Joint Committee on Taxation.

(relying on legislative history to help justify enforcement of an IRS summons to obtain evidence for use in a criminal prosecution).

We also omit from consideration in this context Court decisions that rely on legislative history to help resolve a nonprocedural constitutional dispute. *See, e.g.*, *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 859–60 (1996) (relying on the legislative history of the Export Clause to help support a conclusion invalidating a federal excise tax on premiums for insurance purchased by the taxpayer's foreign subsidiaries); *United States v. Lee*, 455 U.S. 252, 258–59 (1982) (invoking legislative history to help support a conclusion that statutes requiring an Amish employer to pay social security taxes do not violate the First Amendment Free Exercise Clause); *Massachusetts v. United States*, 435 U.S. 444, 450–51 (1978) (using legislative history to help support a conclusion that a federal tax on state-owned aircraft used for patrolling highways does not violate the implied immunity of a state from federal taxation).

163. The Court, of course, deals with complex disputes on a regular basis. The complexity that encourages reliance on expertise tends to involve issues of an unusually technical nature, issues that judges view themselves as less capable of managing without input from specialists. *See* HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 165 & n.54 (1973); *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* 1 (1994).

164. *See, e.g.*, *Portland Golf Club v. Comm'r*, 497 U.S. 154, 161–63, 165–66 (1990); *Comm'r v. Kowalski*, 434 U.S. 77, 83–84, 90–93 (1977); *Don E. Williams Co. v. Comm'r*, 429 U.S. 569, 575–76, 580–82 (1977); *United States v. Foster Lumber Co.*, 429 U.S. 32, 42–46 (1976). For a discussion of the *Williams* and *Foster Lumber* decisions, see *infra* Part III.A.3.

165. *See, e.g.*, *Clark*, 489 U.S. at 741–43; *Hillsboro Nat'l Bank v. Comm'r*, 460 U.S. 370, 378 n.10, 393–94, 399 & n.55 (1983); *Fed. Power Comm'n. v. Memphis Light, Gas, & Water Div.*, 411 U.S. 458, 461–62, 467–70, 471–73 (1973); *Davis*, 397 U.S. at 308–12. For a discussion of the *Clark* and *Davis* decisions, see *infra* Part III.A.3.

2. *The Joint Committee on Taxation and the Production of Nonpartisan Expertise.* Established under the Revenue Act of 1926,¹⁶⁶ the JCT consists of ten members of Congress: five members of the Senate Finance Committee and five members of the House Ways and Means Committee. JCT staff—including some forty economists, lawyers, and other tax professionals—are nonpartisan, serve both the House and Senate, and are concerned exclusively with tax-related issues.¹⁶⁷ The JCT staff from early on have been integrally involved at every stage of the tax legislation process.¹⁶⁸

Most important for our purposes, the JCT staff are principally responsible for preparing committee reports, soliciting input from House and Senate committee staff, the Treasury Department, and the

166. Pub. L. No. 69-20, § 1203, 44 Stat. 9, 127–28 (1926) (codified as amended at 26 U.S.C. §§ 8022–23 (2006)).

167. See Joint Comm. on Taxation, *supra* note 55, at 3–4 (discussing the Committee staff's role as nonpartisan, joint, and solely tax oriented). Our review of Congressional Directories going back to the 74th Congress indicates the JCT had five professional staff in 1936; that number grew to twelve in 1953 (83d Congress), twenty in 1973 (93d Congress), thirty-four in 1983 (98th Congress), and thirty-eight in 2003 (108th Congress). Copies of relevant pages from Congressional Directories are on file with the *Duke Law Journal*.

168. At the predrafting stage, JCT staff work closely with Treasury Department officials as well as members of Congress to refine their revenue-related concepts into workable proposals. Both the House Ways and Means Committee and the Senate Finance Committee often hold hearings on these emerging tax legislative proposals. JCT staff prepare a hearing pamphlet examining and analyzing the concepts to be addressed; they also may brief House and Senate committee members and answer questions raised by members and their staffs during the hearings. Until recently, markup in the House and Senate committees was based on these concepts and proposals instead of on the actual statutory language that is the focus of committee markups and votes for virtually every other law Congress produces. See, e.g., *id.* at 5–6, 16; Ferguson et al., *supra* note 55, at 809–12; Livingston, *supra* note 55, at 833–34; Manley, *supra* note 55, at 1050–65; Woodworth, *supra* note 55, at 23–32.

Since the mid 1990s, there has been a shift toward having statutory language available at markup, especially in the House. See Lecture, *The Role of Tax Policy in the Development of Tax Legislation: Larry Woodworth's Era and Now*, 32 OHIO N.U. L. REV. 1, 7 (2006). For a discussion of the more traditional committee markup in which committee members examine, bargain over, and vote on the actual text of the bill, see CONG. QUARTERLY PRESS, CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 482–84 (5th ed. 2000); WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 98–105 (7th ed. 2007). JCT staff also work with minority committee members and their staffs, upon request, to prepare markup alternatives. See Kenneth F. Thomas & William R. Stromsem, *The Joint Committee on Taxation*, TAX ADVISOR, Mar. 1980, at 181, 182 (discussing how the JCT staff advised members on opposite sides during floor debate). During or after the markup, JCT staff are part of an ad hoc team of experts drafting the text of the approved bill; they work with staff from the House and Senate committees, tax specialists in the House and Senate legislative counsel's office, and the Treasury Department, with IRS staff at times providing technical advice.

IRS.¹⁶⁹ These reports typically include detailed narrative explanations of the technical bill language, specific illustrations of how the bill is to apply in certain settings, and more general discussion of the problems with present law that the bill is meant to address and the ways in which the committee's proposed solution will address them.¹⁷⁰ The committee reports along with the text are thus collaborative staff efforts to translate and amplify the conceptual and policy decisions reached by House and Senate committees.¹⁷¹

Tax law policies tend to be very complex, involving arcane terminology and highly technical concepts. The key participants in tax legislation recognize that the text alone cannot fully explicate these concepts.¹⁷² Indeed the technical, self-referential, and often obscure nature of Internal Revenue Code language means that explanatory materials are particularly important in an area likely to affect so much of the public.¹⁷³ It is therefore not surprising that members voting on the House and Senate floor rely especially heavily on committee

169. See Joint Comm. on Taxation, *supra* note 55, at 6; Livingston, *supra* note 55, at 835; Ferguson et al., *supra* note 55, at 811–12. The JCT staff drafted only the more general explanatory portions of the committee reports in the 1960s; the technical explanations were initially written by the IRS and then reviewed and modified by JCT staff and others. See Woodworth, *supra* note 55, at 28.

170. See Ferguson et al., *supra* note 55, at 810; Woodworth, *supra* note 55, at 28; see also H.R. REP. NO. 83-1337 *passim* (1954); S. REP. NO. 99-313 *passim* (1986).

171. See Ferguson et al., *supra* note 55, at 810; Livingston, *supra* note 55, at 835; Moran & Schneider, *supra* note 55, at 892. JCT staff also play a central role during floor debates and in conference committee. Indeed, they are primarily responsible for incorporating relevant contributions into the statement of managers that is part of the conference agreement. See Joint Comm. on Taxation, *supra* note 55, at 6–7; Livingston, *supra* note 55, at 835–36; Ferguson et al., *supra* note 55, at 810; Woodworth, *supra* note 55, at 28–29.

172. See Ferguson et al., *supra* note 55, at 810; Woodworth, *supra* note 55, at 28–29; Joint Comm. on Taxation, *supra* note 55, at 6.

173. See Livingston, *supra* note 55, at 841; Moran & Schneider, *supra* note 55, at 892 (contending that in light of tax language opacity, “a paragraph in a committee report can often illuminate a bit of aspiration that a sub-sub-subsection can only hint at”). In addition to committee reports, the JCT staff also prepares a postenactment legislative history document, commonly known as the Blue Book, in connection with major tax bills. Although it is principally a collation of the various preenactment committee reports, the Blue Book does include explanatory materials written following enactment. In spite of traditional concerns regarding the validity and value of postenactment legislative history, the Blue Book has been invoked on numerous occasions by lower courts and at least once by the Supreme Court. See Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of “Subsequent” Tax Legislative History*, 11 AM. J. TAX POL'Y 91, 98–122 (1994).

report explanations and elaborations to help them understand the technical bill language.¹⁷⁴

The value of this history, for both members and the Treasury Department, is enhanced because the committee reports are produced in such an unusually bipartisan and objective manner.¹⁷⁵ One clear indicator of the bipartisan nature of tax committee reports is the remarkable dearth of substantive minority views. Reports on major tax legislation often feature hundreds of pages of explanatory material with virtually no minority submission at all.¹⁷⁶ By contrast, major workplace statutes enacted across the same decades (the 1940s through the 1990s) are replete with in-depth discussion and argument by members of the committee minority.¹⁷⁷ Finally, tax committee reports perform a miniregulation function when, as often happens, the Treasury Department takes years to issue formal regulations on particular topics.¹⁷⁸

Admittedly, Congress's overall lawmaking process has become increasingly partisan in recent times. This is particularly true in the House, in which the leadership after 1995 became more active in shaping legislation, standing committee roles were consequently somewhat diminished, and cooperation ebbed between the two

174. See Ferguson et al., *supra* note 55, at 810; Livingston, *supra* note 55, at 836. Tax committee reports typically include detailed, in-depth amplifications of what is contained in text. For examples, see *infra* note 176. This information is more comprehensive and often more comprehensible than what is found in floor debates or conference reports involving tax bills.

175. See Joint Comm. on Taxation, *supra* note 55, at 3–4; Ferguson et al., *supra* note 55, at 807; Woodworth, *supra* note 55, at 24–25; Manley, *supra* note 55, at 1050–52.

176. See, e.g., H.R. REP. NO. 77-2333 (1942) (187-page report accompanying the Revenue Act of 1942 with one member contributing a one-page dissent); S. REP. NO. 83-1622 (1954) (628-page report accompanying the Internal Revenue Code of 1954 with no minority views); H.R. REP. NO. 99-426 (1985) (1072-page report accompanying the Tax Reform Act of 1986 with eleven members signing minority views totaling three pages); S. REP. NO. 105-33 (1997) (376-page report accompanying the Taxpayer Relief Act of 1997 with no minority views).

177. See, e.g., H.R. REP. NO. 80-245 (1947) (115-page report accompanying the Taft-Hartley Act with six members contributing 51 pages of minority views); H.R. REP. NO. 88-114 (1964) (133-page report accompanying the 1964 Civil Rights Act with eight members contributing 52 pages of minority views); S. REP. NO. 100-62 (1987) (95-page report accompanying the Worker Adjustment and Retraining Notification Act with five Senators signing 15 pages of minority views); S. REP. NO. 101-263 (1990) (73-page report accompanying the Older Workers Benefit Protection Act with five Senators contributing 21 pages of minority views). Whether the tax lawmaking process has become more partisan since 2000 is an open question. See H.R. REP. NO. 107-7 (2001) (31-page report accompanying the Economic Growth and Tax Relief Act of 2001 with 17 members—every Democrat on the committee—signing the five-page dissenting views); see also *supra* notes 173–74 and accompanying text.

178. See Livingston, *supra* note 55, at 841.

chambers.¹⁷⁹ These larger changes have not coincided with the development of a major tax reform measure such as the 1954 or 1986 laws, but they may have made it harder for the JCT to perform its nonpartisan functions with respect to regular tax bills.¹⁸⁰ Whether these trends will continue or the House will revert to a more traditional committee-dominated legislative approach is not yet clear.

Still, the distinctive aspects of the tax lawmaking process described here remain substantially in place.¹⁸¹ Accordingly, the nature of tax legislation continues to make committee reports especially useful to members of Congress and other key participants in the lawmaking enterprise. As we now illustrate, the Supreme Court's reliance on those reports reflects at least implicitly an appreciation for their special qualities.

3. *Illustrative Expertise-Borrowing Opinions.* There are some direct indications that the Justices understand the special nature of tax legislative history and its relationship to their own ability to master the enigmas and intricacies of the Internal Revenue Code. Justice Douglas, hardly one to shrink from construing technical statutory schemes, complained with some frequency that the Court does not hear enough tax cases to develop the needed level of expertise, and that the better route for resolving ambiguities in the tax code or its regulations would be to present the dispute to the Joint Committee on Taxation.¹⁸² There also have been a number of instances in which the Court majority relied on a JCT report or analysis (apart from the House and Senate committee reports drafted

179. See generally John H. Aldrich & David W. Rhode, *Congressional Committees in a Partisan Era*, in CONGRESS RECONSIDERED 249, 254–65 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005); Eric Schickler & Kathryn Pearson, *The House Leadership in an Era of Partisan Warfare*, in CONGRESS RECONSIDERED, *supra*, at 207, 208; George K. Yin, Lecture, *Is the Tax System Beyond Reform?*, 58 FLA. L. REV. 977, 1020–23 (2006).

180. Cf. Yin, *supra* note 179, at 1029–38 (discussing challenges posed by these larger trends with respect to undertaking major tax reform in the future). Another influence on the substance and politics of tax legislation—changes in congressional budget procedures—is beyond the scope of this Article. See generally Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998).

181. See Joint Comm. on Taxation, *supra* note 55, at 1, 5–8; Lecture, *supra* note 168, at 6–7, 12.

182. See, e.g., *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) (Douglas, J., dissenting); *United States v. Generes*, 405 U.S. 93, 114–15 (1972) (Douglas, J. dissenting); see also Bernard Wolfman et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 320–25 (1973) (analyzing Justice Douglas's evolution on tax cases to a point of mistrust of special interest favoritism of the Internal Revenue Code and viewing his contention that the Court should avoid tax cases altogether in light of this deep mistrust).

by JCT staff) to help understand what Congress truly meant to accomplish—by curatively limiting a tax deduction provision,¹⁸³ designing a particular windfall-profits tax scheme,¹⁸⁴ or restricting utilities to certain depreciation methods.¹⁸⁵ For the most part, however, the Court's reliance on legislative history to borrow expertise occurs through its use of House and Senate committee reports. One example in which the Court invoked this legislative history to give meaning to inconclusive text is *United States v. Davis*,¹⁸⁶ the Court had to determine whether a shareholder's redemption of stock in his own closely held corporation was taxable as ordinary income or capital gains.¹⁸⁷

The taxpayer in *Davis* received \$25,000 when the company redeemed the one thousand shares of preferred stock he had previously purchased for \$25 per share.¹⁸⁸ He claimed that the purchase and redemption were undertaken for a valid business purpose and thus qualified as an exchange with no gain recognized. The IRS contended that the distribution constituted payment of dividends taxable as ordinary income.¹⁸⁹ A corporation's redemption of its stock is often taxed as a dividend, but section 302(b)(1) of the Internal Revenue Code treats redemptions "not essentially equivalent to a dividend" as exchanges.¹⁹⁰

Most courts of appeals had determined that a redemption was "not essentially equivalent to a dividend" if it was the final step in a course of conduct that had a business motivation rather than a tax-avoidance purpose,¹⁹¹ but the Supreme Court held otherwise. Relying on House and Senate committee reports, Justice Marshall for the Court explained how the 1954 code's predecessor language had developed in response to concerns that closely held corporations might avoid taxation by making certain kinds of distributions to their

183. See *United States v. Carlton*, 512 U.S. 26, 31–32 (1994).

184. See *United States v. Ptasynski*, 462 U.S. 74, 85–86 n.15 (1983).

185. See *Fed. Power Comm'n v. Memphis Light, Gas, & Water Div.* 411 U.S. 458, 471–72 (1973).

186. *United States v. Davis*, 397 U.S. 301 (1970).

187. *Id.* at 303–04.

188. *Id.* at 302–03.

189. *Id.*

190. *Id.* at 303–04 (discussing language of 26 U.S.C. § 302(b)(1) (1954)).

191. See *id.* at 303 n.2.

stockholders.¹⁹² Faced with widespread confusion generated by lower court interpretations of that earlier text, the authors of the 1954 Code sought to facilitate tax planning by providing “objective tests to govern the tax consequences of stock redemptions.”¹⁹³

Justice Marshall then explained how the “essentially equivalent” language had been added by the Senate Finance Committee as a means of narrowing the circumstances in which corporate redemptions would receive capital gains treatment.¹⁹⁴ The Court quoted at length from the Senate report providing a “detailed technical evaluation of § 302(b)(1).”¹⁹⁵ The Court’s excerpts from the report explained that

in applying this test for the future . . . the inquiry will be devoted *solely* to . . . whether or not the transaction by its nature may properly be characterized as a sale of stock by the redeeming shareholder to the corporation. For this purpose the presence or absence of earnings and profits of the corporation is not material.¹⁹⁶

The Court inferred from this legislative history discussion that “by making the sole inquiry relevant for the future the narrow one whether the redemption could be characterized as a sale, Congress was apparently rejecting past court decisions that had also considered factors indicating the presence or absence of a tax-avoidance motive.”¹⁹⁷ Justice Marshall also drew on Senate and House committee analyses of tax consequences associated with other types of corporate transactions to confirm that business purpose factors were not meant to be relevant under the “essentially equivalent” language of section 302(b)(1).¹⁹⁸ The Court in *Davis* thus relied heavily on detailed technical explanations contained in the tax committees’ reports to overturn a fairly widespread precedent in the lower courts.¹⁹⁹

192. *See id.* at 308–09 (quoting from a House committee report accompanying the 1926 Revenue Act).

193. *Id.* at 309–10 (discussing a House committee report accompanying the 1954 code revision).

194. *Id.* at 310.

195. *Id.* at 311.

196. *Id.* (emphasis added) (quoting S. REP. NO. 83-1622, at 234 (1954)).

197. *Id.* at 311–12.

198. *See id.* at 311 n.11 (discussing the committee’s treatment of distributions involving partial corporate liquidations).

199. Justice Douglas, in a short dissent for himself and two other Justices, relied only on the text and made no reference to the legislative history. *See id.* at 313 (Douglas, J., dissenting).

A second, somewhat related, example of borrowing expertise from standing committee reports to resolve textual ambiguity is *Commissioner v. Clark*.²⁰⁰ The taxpayer in *Clark*—the president and sole shareholder of a business—agreed to merge his company into the wholly owned subsidiary of a publicly traded corporation.²⁰¹ Under the terms of the merger, Clark was offered the choice of a large volume of common stock or a somewhat smaller volume of shares combined with a cash payment or “boot” of more than three million dollars.²⁰² He took the latter offer: the issue was whether the boot was taxable as a long-term capital gain under the general rule of section 356(a)(1) of the tax code or—as the IRS contended—taxable as ordinary income because the exchange had “the effect of the distribution of a dividend” under the exception provided in section 356(a)(2).²⁰³

Justice Stevens, writing for the majority, distinguished at the outset the Court’s earlier holding in *Davis* because this case involved an exchange pursuant to a merger of two corporations.²⁰⁴ Accordingly, the relevant code section was not 302(b)(1) but 356(a), covering exchanges pursuant to a corporate reorganization accompanied by additional consideration referred to as “boot.”²⁰⁵ Justice Stevens noted that the circuits were split on the rules for determining whether such exchanges had “the effect of the distribution of a dividend” and that the text itself was “admittedly ambiguous.”²⁰⁶

After invoking Congress’s purpose generally to treat boot in reorganizations as capital gain and the general judicial preference to avoid an “expansive reading of a somewhat ambiguous exception,”²⁰⁷ Justice Stevens turned to the legislative history. The House and Senate committee reports accompanying the Revenue Act of 1924 elaborated on provisions later carried forward in substantially

200. *Comm’r v. Clark*, 489 U.S. 726 (1989).

201. *Id.* at 731.

202. *Id.* “The term ‘boot’ is used because shareholders of the transferor corporation have received stock or securities of the acquiring corporation plus money (or other property) to boot.” See Allan J. Samansky, *Taxation of Nonqualifying Property Distributed in Reorganizations*, 31 CASE W. RES. L. REV. 1, 1 n.1 (1980–81).

203. *Clark*, 489 U.S. at 731–32.

204. *Id.* at 728–29, 732 (finding that the merger qualified as a “reorganization” under 26 U.S.C. § 368(a)(1)(A) (1954)).

205. *Id.* at 736–38; see also *supra* note 202.

206. *Clark*, 489 U.S. at 736–37, 741. For a thoughtful treatment of this issue prior to *Clark*, see Samansky, *supra* note 202, at 15–38.

207. *Clark*, 489 U.S. at 739.

identical form as section 356(a)(2).²⁰⁸ Justice Stevens inferred from this legislative history that Congress’s primary concern was to “prevent[] corporations from ‘siphon[ing] off’ accumulated earnings and profits at a capital gains rate through the ruse of a reorganization.”²⁰⁹ He then quoted at length from the one example relied on in both committee reports to illustrate what they meant when seeking to “prevent evasion.”²¹⁰ Unlike the arm’s-length stock-for-stock transaction at issue here, the committee report example set forth a situation involving “merely the creation of a wholly owned subsidiary as a mechanism for making a cash distribution to the shareholders.”²¹¹

Importantly, Justice Stevens found it persuasive that in the committee’s most extensive consideration of the disputed text, there was no indication that bona fide exchanges between unrelated parties as part of a reorganization should be classified under the “avoiding tax evasion” purposes of section 356(a)(2).²¹² Indeed, although he recognized that the “has the effect . . . of a dividend” language of section 356 was “certainly similar” to the “essentially equivalent to a dividend” language of section 302, Justice Stevens noted that the Senate committee’s discussion of section 302(b)(1) focused on bypassing considerations of taxpayer motive whereas the committee reports here stressed the centrality of a motive standard.²¹³ As in *Davis*, the Court in *Clark* invoked detailed committee report explanations to help explain ambiguous text in an area of technical complexity.²¹⁴

In a third instance, *Don E. Williams Co. v. Commissioner*,²¹⁵ the Court borrowed expertise from legislative history to reinforce its reliance on text and other resources. The question presented was whether a company that contributed a promissory note to its

208. *See id.* at 742–43.

209. *Id.* at 742.

210. *Id.* at 742–43.

211. *Id.* at 742.

212. *Id.* at 743.

213. *Id.* at 743–44.

214. In a dissenting opinion, Justice White contended that the Court’s decision in *Davis* was controlling; he relied on the similarity in textual language and asserted that Congress in 1924—as in 1954—intended the broadest possible reach for its tax treatment of corporate reorganization transactions. *See id.* at 747–48 (White, J., dissenting). Justice Scalia joined the majority in its discussion of purpose, text, and canons, but not in its extensive reliance on legislative history. *Id.* at 728 n.* (majority opinion).

215. *Don E. Williams Co. v. Comm’r*, 429 U.S. 569 (1977).

employee profit-sharing plan “paid” the amount and therefore could deduct it in the earlier year under section 404(a) of the Internal Revenue Code, although the check satisfying the liability was not issued until the following year.²¹⁶ The Court, supporting the IRS, held that the deduction was only allowed for the year the amount was paid, even for taxpayers using an accrual method of accounting.²¹⁷

Justice Blackmun, writing for the majority, relied initially on the text of section 404(a) and its relation to other sections of the code. He recognized that the tax code allows for both cash and accrual methods of accounting and that many of the code’s deduction provisions use the words “paid or accrued” or “paid or incurred.”²¹⁸ He noted, though, that section 404’s simple use of “contributions . . . *paid*”²¹⁹ under a profit-sharing plan “stands in obvious contrast” to those numerous other provisions, and he reasoned that Congress meant to allow deductions for profit-sharing plan contributions only when actually paid rather than when accrued or incurred on a taxpayer’s books.²²⁰

Justice Blackmun next reviewed the legislative history, which he found to be “consistent with the theme of the statute’s language.”²²¹ He invoked the House and Senate committee reports accompanying section 404’s substantially identical predecessor text from 1939 and 1942; these reports discussed how an accrual-basis taxpayer’s deferred compensation to its employees was initially to be deductible in the year that “compensation is *paid*.”²²² Blackmun turned to Senate hearing testimony from 1942 and committee report discussions from 1948 and 1954 to explain that Congress responded to concerns about computational problems associated with this compensation-based approach by first creating and then extending a grace period for filing returns that allowed for the deduction of plan *contributions* when they were actually paid.²²³

216. *Id.* at 571–72.

217. *Id.* at 574–83.

218. *Id.* at 574.

219. *Id.* (quoting 26 U.S.C. § 404(a) (1954)).

220. *Id.*

221. *Id.* at 575.

222. *Id.* (quoting H.R. REP. NO. 77-2333, at 106 (1942)); S. REP. NO. 77-1631, at 141 (1942)).

223. *Id.* at 575–76. Blackmun also relied on the conference report accompanying changes to the 1974 tax code that were part of ERISA to show that Congress in 1974 “reaffirmed the actual-payment requirement of § 404(a), and strengthened its enforceability.” *Id.* at 580 n.11 (relying on H.R. REP. NO. 93-1280, at 308 (1974) (Conf. Rep.)).

Finally, the majority used legislative history to refute the reasoning of the three circuits that had ruled against the IRS. The appellate courts had assumed that the word “paid” must encompass delivery of a promissory note because that same term in a different section of the tax code had been so applied. But Justice Blackmun pointed to the House and Senate committee report discussions accompanying that separate section to help explain why the policy concerns there were not analogous to those at stake under section 404(a).²²⁴

The majority in *Don E. Williams Co.* did not quote as extensively from committee report language as the Court did in *Davis* and *Clark*. Rather, Justice Blackmun used committee report excerpts from four different Congresses to establish a narrative that reinforced and elaborated on the majority’s formal textual analysis. In our final example, *United States v. Foster Lumber Co.*,²²⁵ the Court also referenced committee reports in more summary terms to reinforce the apparent plain meaning of text.

In *Foster Lumber*, the taxpayer experienced a net operating loss of \$42,000 and sought to carry over the loss as a deduction to offset taxable income from prior years, pursuant to section 172 of the code.²²⁶ The issue was whether the loss carryover was absorbed only by the ordinary income earned in a prior year, as the taxpayer argued, or was also absorbed by capital gains in that prior year, the IRS position.²²⁷ Justice Stewart, writing for the Court, stated that the “dispute . . . center[ed] on the meaning of ‘taxable income’ as used in §172(b)(2).”²²⁸ He then relied on code definitions of “gross income” as well as structural canon arguments, reasoning that taxable income is gross income minus allowable deductions and that gross income is “all income from whatever source derived,” including capital gains as “[g]ains derived from dealings in property.”²²⁹

224. *Id.* at 580–82. Justice Stewart, dissenting for himself and Justice Powell, relied on lower court decisions that he contended had properly construed the word “paid” to allow deductions for promissory notes; he found the majority’s use of legislative history unpersuasive. *See id.* at 583–88 (Stewart, J., dissenting).

225. *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976).

226. *Id.* at 33–36.

227. *Id.* The taxpayer had \$7,000 in ordinary income and argued that it therefore should have \$35,000 of the \$42,000 loss carryover available to offset income the following year. *Id.* at 35–36. The IRS contended that because the taxpayer had capital gains of \$167,000, the entire loss carryover was absorbed in the first tax year.

228. *Id.* at 36.

229. *Id.* at 36–37 (alteration in original) (quoting 26 U.S.C. § 61(a) (1964)).

As in *Don E. Williams*, the majority in *Foster Lumber* turned to legislative history for confirmation—“to consider, in short, whether the construction sought is in harmony with the statute as an organic whole.”²³⁰ Invoking an earlier Supreme Court opinion, the taxpayer argued that Congress’s sole purpose in allowing loss carryovers was to reduce the unduly harsh impact of taxing income strictly on a system of annual accounting.²³¹ Justice Stewart responded that in deciding to allow income averaging, Congress was not seeking simply to eliminate arbitrary consequences but was pursuing other policy objectives as well.²³² He cited a JCT report to explain that Congress also had in mind allowing shareholders in companies with fluctuating incomes to regularize their own tax treatment so that they did not in effect have to pay a tax on capital when compared to the owners of businesses with a more stable year-to-year income.²³³ And he relied on a House Report to maintain that loss carryovers were allowed in part “to stimulate enterprise and investment, particularly in new businesses or risky ventures where early losses can be carried forward to more prosperous years in the future.”²³⁴ Given these additional policy considerations, Justice Stewart reasoned that Congress’s willingness to provide for a more limited form of loss carryover comported with the pursuit of multiple goals.²³⁵

The four decisions discussed here illustrate how the Court has used tax legislative history to elucidate the meaning of complex tax code concepts. The *Davis* and *Clark* decisions involve issues that arise out of subchapter C, dealing with corporations, in which one might expect to find unusually challenging concepts.²³⁶ But the Court’s expertise borrowing is not limited to this traditionally complex area, as the *Don E. Williams* and *Foster Lumber* cases demonstrate. Further, a number of Justices besides the four majority authors identified here have relied on legislative history for expertise-

230. *Id.* at 42 (internal quotation marks omitted).

231. *Id.* at 42–43.

232. *Id.* at 42–44.

233. *Id.* at 42 & n.9.

234. *Id.* at 43 (paraphrasing H.R. REP. NO. 83-1337, at 27 (1954); H.R. REP. NO. 76-855, at 9 (1939)).

235. *See id.* at 43–46. Justice Blackmun, writing in dissent for himself and three colleagues, relied on different portions of the legislative history to support his view that Congress since 1939 had steadily expanded the periods for loss carryover to maximize taxpayers’ ability to absorb their losses against income. *See id.* at 56 (Blackmun, J., dissenting).

236. *See* Robert Charles Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90, 90 (1977).

borrowing purposes.²³⁷ One Justice who has not done so, however, is Justice Scalia, as we now explain.

4. *What Justice Scalia Missed.* Since joining the Court, Justice Scalia has regularly criticized his colleagues for relying on legislative history in their majority opinions.²³⁸ In a series of concurrences and dissents, Scalia has contended that legislative history is very likely to be generated for strategic or insincere reasons,²³⁹ that it is drafted or understood by at best small subgroups of members,²⁴⁰ and that for these and other systemic reasons it is fundamentally unreliable.²⁴¹

Justice Scalia has adopted this implacable stance in tax law cases as well. Although he occasionally joins majority opinions that invoke tax legislative history,²⁴² he more often disparages such reliance even when he agrees with the Court's holding. He has criticized majority use of legislative history in numerous separate concurrences²⁴³ and

237. See, e.g., *Davis v. United States*, 495 U.S. 472, 479–85 (1990) (O'Connor, J., majority opinion); *Hillsboro Nat'l Bank v. Comm'r*, 460 U.S. 370, 378, 393–94, 399 (1983) (O'Connor, J., majority opinion); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26–28 (1982) (Brennan, J., majority opinion); *Comm'r v. Kowalski*, 434 U.S. 77, 83–84, 90–93 (1977) (Brennan, J., majority opinion); *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 255–57 (1981) (Powell, J., majority opinion); *United States v. Basye*, 410 U.S. 441, 448 n.8, 453 n.14 (1973) (Powell, J., majority opinion); *O'Gilvie v. United States*, 519 U.S. 79, 84–86 (1996) (Breyer, J., majority opinion). In addition, Justice Blackmun—the Court's principal authority on federal tax law—often invoked legislative history to borrow expertise. See, e.g., *Comm'r v. Tufts*, 461 U.S. 300, 315–16 (1983) (Blackmun, J., majority opinion); *Cent. Tablet Mfg. Co. v. United States*, 417 U.S. 673, 680–82, 689–91 (1974) (Blackmun, J., majority opinion); see also *infra* Part III.C (analyzing Blackmun's role in tax cases).

238. For a detailed summary of Scalia's record on this score, see Brudney & Ditslear, *supra* note 52, at 161–62. The article cites to twenty separate opinions from 1987 to 2006. *Id.*

239. See, e.g., *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279–80 (1996) (Scalia, J., concurring in part and concurring in the judgment); *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Edwards v. Aguillard*, 482 U.S. 578, 637–38 (1987) (Scalia, J., dissenting).

240. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (2004) (Scalia, J., concurring in the judgment); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29–30 (1989) (Scalia, J., concurring in part and dissenting in part); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring in the judgment).

241. See, e.g., *Zedner v. United States*, 126 S. Ct. 1976, 1990–91 (2006) (Scalia, J., concurring in part and concurring in the judgment); *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., concurring in the judgment); *Rose v. Rose*, 481 U.S. 619, 642–43 (1987) (Scalia, J., concurring in part and concurring in the judgment).

242. See, e.g., *Davis v. United States*, 495 U.S. 472, 479–85 (1990); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 139–42 (1989); *Colonial Am. Life Ins. Co. v. Comm'r*, 491 U.S. 244, 259 (1989).

243. See, e.g., *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring in the judgment); *Begier v. IRS*, 496 U.S. 53, 67–70 (1990) (Scalia, J., concurring in

also has refused to join the legislative history portions of majority decisions.²⁴⁴ One of Scalia's earliest and most-cited critiques of legislative history involves an excerpt from the floor debate accompanying a tax statute, an excerpt reproduced at some length by then-Judge Scalia of the D.C. Circuit.

In *Hirschey v. FERC*,²⁴⁵ Judge Scalia, in a concurring opinion, complained that deference to committee reports was "converting a system of judicial construction into a system of committee-staff prescription."²⁴⁶ The concurrence included a footnote that reproduced extended portions of a 1982 floor exchange between Senator Armstrong, a first-term Republican Senator, and Senator Dole, who was then chairman of the Finance Committee.²⁴⁷ The excerpts, which Scalia described as an "illuminating exchange," featured Armstrong expressing concern that the committee report was not written or voted on by senators and may not have been read by them in its entirety, and suggesting that courts, agencies, and practicing attorneys should look for congressional intent in the words of the statute and not in such committee reports.²⁴⁸ It is worth noting, in passing, that many more members of Congress since the 1980s have urged that courts *should* pay attention to legislative history as a general matter.²⁴⁹

the judgment); *United States v. Stuart*, 489 U.S. 353, 372–73 (1989) (Scalia, J., concurring in the judgment).

244. See, e.g., *Chickasaw Nation v. United States*, 534 U.S. 84, 85–86 (2001); *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 214–15 (1996); *Comm'r v. Clark*, 489 U.S. 726, 728 (1989).

245. *Hirschey v. FERC*, 777 F.2d 1 (D.C. Cir. 1985).

246. *Id.* at 8 (Scalia, J., concurring).

247. *Id.* at 7 n.1. Senator Armstrong (R-Colo.) was a member of the Senate from 1979 to 1991, and a very junior Republican on the Finance Committee from 1981 to 1991. See 1 GARRISON NELSON, COMMITTEES IN THE U.S. CONGRESS 1947–1992, at 139–44 (1993). Senator Dole, elected in 1968, was a member of the Senate Finance Committee for twenty-four years (from 1973 to 1996). See BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774–1996, at 951 (Joel D. Treese ed., 1997); 1 NELSON, *supra*, at 139–44. He served as chairman from 1981 to 1984, as ranking minority member from 1979 to 1980, and as second-ranking Republican member from 1985 to 1986; he also served as Senate Majority Leader (from 1985 to 1986 and from 1995 to 1996) and Senate Minority Leader (from 1987 to 1994). See BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774–1996, *supra*, at 951; 1 NELSON, *supra*, at 139–44.

248. See *Hirschey*, 777 F.2d at 7 n.1 (Scalia, J., concurring).

249. See, e.g., *Nomination of Stephen G. Breyer to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 170–74 (1994) (statement of Sen. Charles F. Grassley, Member, S. Comm. on the Judiciary); *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 223–25 (1993) (statement of Sen. William S. Cohen, Member, S. Comm. on the Judiciary); *id.* at 325–26 (statement of Sen. Dennis

Scalia later reproduced exactly the same excerpts—taken from his concurrence in *Hirshey*—in his well-known book on how federal courts should interpret the Constitution and laws.²⁵⁰ The Armstrong-Dole colloquy is rather long and it is understandable that Scalia would have edited it down for his own purposes.²⁵¹ What interests us, though is one particular explanation from Senator Dole that Scalia omitted. We reproduce the omitted portion in italics, along with the immediate context for the omission.

Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

Mr. DOLE. Did I write the committee report?

Mr. ARMSTRONG. Yes.

Mr. DOLE. No; the Senator from Kansas did not write the committee report.

Mr. ARMSTRONG. Did any Senator write the committee report?

Mr. DOLE. I have to check.

Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the Committee report?

Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. *As I recall, during the July 4 recess week there were about five different working groups of staff from both parties, the joint committee, and the Treasury working on different provisions.*²⁵²

DeConcini, Member, S. Comm. on the Judiciary); Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 45–48 (1988); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385–86; Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. 913, 917 (1990) (relating Senator Specter's view). Members of both parties have continued to participate in negotiating and relying on legislative history, further suggesting that complaints such as Senator Armstrong's are isolated voices.

250. See SCALIA, *supra* note 1, at 32–34.

251. Judge Scalia's concurrence in *Hirshey* does include additional excerpts from the Dole-Armstrong colloquy apart from the excerpt reproduced in text. See *Hirshey*, 777 F.2d at 7 n.1 (Scalia, J., concurring).

252. 128 CONG. REC. 16,918 (1982) (emphasis added). There are other omissions from the colloquy excerpts that Judge Scalia reproduced in the *Hirshey* footnote and his book. These omissions suggest that Senator Armstrong was concerned that committee reports not be treated by courts or agencies “as if they were something better than statutes” and that such an approach would be especially dangerous in the area of tax law. *Id.* at 16,919 (statement of Sen. Armstrong). Senator Dole did not argue that legislative history is superior to text, but he did state that he “certainly hope[d]” the IRS and the courts would “take guidance as to the

For Scalia, focused on what he regards as the systemic flaws of legislative history, the particular aspects of tax legislative history were not relevant. But for Senator Dole, who spent over a decade as one of the key architects of federal tax legislation, the legislative history drafting process was of considerable relevance. Dole was apparently attempting to educate his freshman colleague about how this legislative history was produced—in deliberative bipartisan fashion, with interbranch cooperation and a prominent role for the Joint Committee on Taxation.

As we described,²⁵³ this approach to the production of committee reports has been an essential feature of the tax law-writing enterprise for at least fifty years. Senator Dole, like other central players in the tax legislation process, fully anticipated that the expert elaborations contained in these reports would furnish valuable insights for courts and agencies as to what Congress meant to accomplish when enacting new tax code provisions.²⁵⁴ Most Supreme Court Justices serving since 1970 seem to have endorsed Dole's position, even if subconsciously, by relying on committee reports to borrow expertise when construing the technical and complex concepts enacted into the tax code. By insisting that legislative history be deemed inadmissible on an across-the-board basis, Justice Scalia has overlooked or disregarded the special role played by tax legislative history in the production of tax statutes.

B. *The Canons of Construction*

Our findings regarding subject matter variations in the way the Court uses the canons are somewhat less dramatic than our results with respect to legislative history. Initially, the Court invokes the two

intention of Congress from the committee report which accompanies this bill." *Id.* at 16,918 (statement of Sen. Dole); see also *infra* note 254 (reproducing this exchange).

253. See *supra* text accompanying notes 55–58, 169–78.

254. In another part of the exchange with Armstrong, also omitted from the footnote in *Hirschey*, Senator Dole makes explicit his intent in this regard:

Mr. ARMSTRONG. My question, which may take him by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?

Mr. DOLE. I would certainly hope so, plus not only the committee report but hopefully in the debate on certain compliance provisions that we will probably have lengthy discussions on the next few days.

types of canons in a smaller number of majority opinions.²⁵⁵ Further, regarding the categories we identified in Tables 6 and 7, the Justices tend to rely on the same types of canons in both tax and workplace decisions. For language canons, the Court in both subject matter areas invokes structural integrity presumptions like the whole act rule more often than linguistic presumptions about the meaning attributable to particular words.²⁵⁶ Similarly for substantive canons, the Justices rely more often on policy norms derived from generally applicable legal principles (like avoiding constitutional questions or repeals by implication) than on policy norms tailored to the particular subject matter of tax or workplace law.²⁵⁷

Still, we identified certain differences in canons usage that warrant further examination. Table 7 establishes that the Justices rely on tax-based substantive canons almost half the time they use substantive canons—this is far more often than the Court invokes substantive canons that are tailored to workplace law. We posit that this is a form of subsidiary expertise borrowing by the Justices in the tax law area. Table 6 indicates that the Court relies on structural integrity language canons more heavily in tax than in workplace law. We suggest that this reflects the Court’s understanding of tax statutes as part of a single unified code. To illustrate our findings, we discuss particular tax opinions in which the Court exhibits these two canonical proclivities.

1. *Borrowing Expertise from Tax-Based Substantive Canons.* In *United States v. Wells Fargo Bank*,²⁵⁸ the Court held that

255. For both tax and workplace law decisions over the thirty-nine year period, the Court relied on language canons about half as often as it invoked legislative history and relied on substantive canons less than one-third as often as it used legislative record materials. *Compare* Table 4: Mean Percent Reliance on Legislative History Sources When Legislative History is Present, 1969–2008 (finding that the Court used legislative history in 88 tax decisions and 247 workplace decisions), *with* Table 6: Mean Percent Reliance on Language Canon Subsets When Language Canons Are Present, 1969–2008 (finding that the Court relied on language canons in 47 tax cases and 123 workplace cases), *and* Table 7: Mean Percent Reliance on Substantive Canon Subsets When Substantive Canons Are Present, 1969–2008 (finding that the Court invoked substantive canons in 24 tax decisions and 73 workplace decisions).

256. For a showing of 91 percent reliance on structural integrity language canons in tax law and 76 percent reliance in workplace law, see *supra* Table 6: Mean Percent Reliance on Language Canon Subsets When Language Canons Are Present, 1969–2008.

257. For a showing of 93 percent reliance on generally applicable substantive canons in tax law and 67 percent reliance in tax law, see *supra* Table 7: Mean Percent Reliance on Substantive Canon Subsets When Substantive Canons Are Present, 1969–2008.

258. *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988).

congressionally authorized “Project Notes,” issued by state and local housing authorities to stimulate local financing of housing projects, were not statutorily exempt from federal estate taxation.²⁵⁹ Justice Brennan, writing for the majority, relied heavily on the substantive canon that “exemptions from taxation are not to be implied; they must be unambiguously proved.”²⁶⁰ This canon provided the framework for the Court’s opinion and is the key justification driving the majority analysis. Referring to the estate executors’ various arguments, Justice Brennan concluded that

the factors appellees rely upon, whether considered alone or in combination, are insufficient to demonstrate that Congress intended to exempt Project Notes from estate taxation in contravention of the understood meaning of §5(e), *a demonstration which must be unambiguous under the principle disfavoring implied tax exemptions.*²⁶¹

More recently, in *Commissioner v. Banks*,²⁶² the Court held that the portion of taxpayers’ monetary settlement paid directly to their attorneys under a contingent fee agreement constituted taxpayers’ gross income under the Internal Revenue Code.²⁶³ Justice Kennedy, writing for the majority, relied heavily on the substantive canon that “gains should be taxed to those who earned them.”²⁶⁴ Kennedy referred to this canon as “a maxim we have called the first principle of income taxation,”²⁶⁵ and as the rationale for the established doctrine of anticipatory assignment of income.²⁶⁶ The Court considered taxpayer arguments that this maxim was limited to preventing taxpayer fraud, but concluded that the maxim applied more broadly and encompassed contingent fee agreements.²⁶⁷

Finally, *United States v. Arthur Young & Co.*²⁶⁸ involves a tax-specific substantive canon covering IRS enforcement powers. The

259. *Id.* at 354–59.

260. *Id.* at 354.

261. *Id.* at 356 (emphasis added); *see also id.* at 359 (“The understood meaning of § 5(e) and the presumption against implied tax exemptions are too powerful to be overcome by the indicia of congressional intent put forward by appellees.”).

262. *Comm’r v. Banks*, 543 U.S. 426 (2005).

263. *Id.* at 433–35.

264. *Id.* at 433–34 (internal quotation marks omitted).

265. *Id.* at 434 (internal quotation marks omitted).

266. *Id.* at 433–34.

267. *Id.* at 434–35.

268. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

Court held that the work papers of an independent certified public accountant were not protected from disclosure in response to an IRS summons.²⁶⁹ Chief Justice Burger, writing for the majority, relied primarily on the canon that “restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress,”²⁷⁰ and he found no unambiguous evidence in this instance.²⁷¹

In each of these decisions, the majority regarded a tax-specific substantive canon as integral to its reasoning. All three cases featured unanimous opinions and none involved majority use of legislative history. Instead, the majority invoked a canon favoring broad tax coverage or broad IRS authority and relied on that judicial policy norm to frame the Court’s analysis. The Court borrows from tax-based canons to help justify its results in a number of other cases, often in majority opinions that command broad support and omit reliance on legislative history.²⁷² By contrast, the Court virtually never invokes a workplace-specific substantive canon to help support its holding.²⁷³

The Court’s substantially greater reliance on subject-specific

269. *See id.* at 815–21.

270. *Id.* at 816.

271. *See id.* at 817–21.

272. *See* *Knight v. Comm’r*, 128 S. Ct. 782, 790 (2008) (9–0 decision) (invoking the canon that “an income tax deduction is a matter of legislative grace” and the taxpayer bears the burden of demonstrating eligibility (quoting *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 84 (1992))); *Badaracco v. Comm’r*, 464 U.S. 386, 401 (1984) (8–1 decision) (invoking the canon that a clear statement from Congress is needed for an exception favoring the taxpayer); *United States v. Euge*, 444 U.S. 707, 711 (1980) (6–3 decision) (invoking the clear statement rule for an exemption to an IRS summons); *see also* *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (7–2 decision) (invoking the canon that tax exemptions must be clearly expressed; five members of Court also rely on legislative history); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 145 (1989) (9–0 decision) (invoking the canon that “tax provisions . . . incorporate domestic tax concepts absent a clear congressional exemption that foreign concepts control” and relying on legislative history). The large number of tax-specific substantive canons may be related to the presence of specialized tax courts that are perhaps more inclined to generate these norms based on their expert understanding of federal tax policies. We hope a tax law scholar will explore the origins and development of tax canons as a separate project.

273. Of the five instances in which the Court relied on a subject specific canon to help justify a workplace law result, four instances actually involve subjects *other than* workplace law. *See* *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S. Ct. 2105, 2116 (2006) (bankruptcy law); *Norfolk & W. Ry. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991) (antitrust); *Loeffler v. Frank*, 486 U.S. 549, 554–55 (1988) (commercial law); *Windward Shipping (London), Ltd. v. Am. Radio Ass’n*, 415 U.S. 104, 109–10, 112–13 (1974) (international maritime trade). The fifth case invoked the presumption favoring labor arbitration. *Nolde Bros., Inc. v. Local 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 254–55 (1977).

canons in tax cases is consistent with our finding of reliance on legislative history for expertise borrowing. In a field in which many Justices lack confidence in their mastery of the technical and conceptual intricacies, and may also have minimal interest in pursuing such mastery, relying on particularized policy norms is understandable. The same concerns that led Justice Douglas to complain about the Court's lack of tax expertise will encourage the Justices—even if subconsciously—to reach for tax-based policy presumptions that constitute a kind of derivative expertise.²⁷⁴ In this regard, it is notable that Justice Blackmun—the Justice most knowledgeable about tax law during this period—almost never invoked these policy norms. Blackmun's preference for reliance on text, history, purpose, and precedent presumably reflects greater self-assurance regarding his own situational judgment in this subject area.

2. *Using Structural Language Canons to Construe a Self-Contained Tax Code.* More than nine times out of ten in which the Court invokes language canons in its tax decisions, those canons consist of the whole act rule or similar presumptions implicating the larger cohesion or structural integrity of the text.²⁷⁵ Sometimes, this reliance involves applying the whole act rule or the presumption against surplusage to a single section of the Internal Revenue Code²⁷⁶ or to closely adjacent related sections.²⁷⁷ Very often however, the Court invokes what one might refer to as a whole code rule.

The Court in these whole code instances reasons that when Congress expresses or describes a tax law concept in one part of the Internal Revenue Code, that expression or description should be deemed probative regarding Congress's treatment of the concept in a

274. The most plausible justification for such subject-specific norms is a judicial belief that Congress intends its tax legislation to be interpreted in this manner. Granting *arguendo* that Congress generally wants tax exemptions to be narrowly construed and gains to be assigned to those who earn them, reliance on these presumptions allows the Justices to minimize in-depth or de novo inquiry into what Congress meant to accomplish through a particular exemption or income provision. For this reason, we refer to the Court's reliance on substantive tax canons as a subsidiary or derivative form of expertise borrowing.

275. See *supra* Table 6: Mean Percent Reliance on Language Canon Subsets when Language Canons Are Present, 1969–2008 (finding that the court involved structural cohesion or integrity canons in forty-three of forty-seven language canon decisions).

276. See *e.g.*, *Knight*, 128 S. Ct. at 787–89 (interpreting 26 U.S.C. § 67(e)); *Badaracco*, 464 U.S. at 395–97 (interpreting 26 U.S.C. § 6501).

277. See *e.g.*, *Baral v. United States*, 528 U.S. 431, 437 (2000) (contrasting 26 U.S.C. §§ 6511 and 6513); *Comm'r v. Lundy*, 516 U.S. 235, 249–50 (1996) (contrasting 26 U.S.C. §§ 6511(a) and 6512).

separate part of the code. One code provision may shed light on the meaning of another either because several sections should be read as embodying a consistent approach²⁷⁸ or because differences between two or more sections indicate that Congress intended the sections to have distinct consequences.²⁷⁹ The Justices also have extended the code's self-contained status in order to harmonize provisions and sections enacted years or decades apart.²⁸⁰

The Court's whole code approach rests on an implicit assumption that Congress is a collection of relatively omniscient drafters who generate coherent and integrated provisions over many decades of legislating.²⁸¹ That assumption has been criticized by legal scholars for projecting an unrealistic level of congressional foresight and for ignoring the purposive framework in which Congress drafts each statute.²⁸² The omniscient drafter assumption does appear suspect when contemplating the possibility of consistent use or expression across several separate statutes or even across several distinct enactments within a single regulatory regime.

One might argue, however, that concerns about disregard for historical context and intent resonate less when it comes to the largely unified and self-referential regulatory scheme embodied in the internal revenue laws. For this discrete portion of the U.S. Code, which is amended in some fashion almost annually and substantially updated at regular intervals, perhaps congressional drafters are better able to anticipate and avoid semantic residues or repetitions. The

278. See, e.g., *Drye v. United States*, 528 U.S. 49, 56–57 (1999) (“The absence of any recognition of disclaimers in [26 U.S.C.] §§ 6321, 6322, 6331(a) and 6334(a) and (c) . . . contrasts with § 2518 of the Code . . .”); *United States v. Hill*, 506 U.S. 546, 555–56 & n.7 (1993) (attributing a consistent meaning to the phrase “improvements and betterments” in 26 U.S.C. § 263 and § 1016 regulations, as distinct from “improvements” in 26 U.S.C. § 611).

279. See, e.g., *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 222–23 (1996) (distinguishing 26 U.S.C. §§ 4971, 4401, 7806 and 507); *United States v. Dalm*, 494 U.S. 596, 601–02 (1990) (using § 7422(a) and § 6511(a) to narrow the breadth of § 1346(a)(1)); *United States v. Rodgers*, 461 U.S. 677, 695–98 (1983) (comparing § 7403 with § 6331); *Laing v. United States*, 423 U.S. 161, 176–77 (1976) (recognizing that, unlike § 6861 *et seq.*, exceptions to § 6871(b) are explicit).

280. See, e.g., *Yates v. Hendon*, 541 U.S. 1, 13–16 (2004) (examining provisions of and amendments to ERISA as a whole); *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 745–46 (1977) (harmonizing the Revenue Act of 1921 with § 820, added in 1959).

281. See SUNSTEIN, *supra* note 1, at 150–53; William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1148 (1992).

282. See, e.g., POSNER, *supra* note 2, at 279–82, 280; William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 176–77, 230–45 (2000); Popkin, *supra* note 281, at 1148–52; Ross, *supra* note 2, at 572.

Court's tendency to assume thoroughness and cohesion in tax statutory language may in turn be less naive or aspirational given the bipartisan, interbranch, and professionalized drafting process that has long characterized the tax area. Once again, the Justices—however subconsciously—seem to be expressing their respect for this distinctive lawmaking process.

We are not contending that increased reliance on a whole code approach should be accompanied by diminished attention to legislative intent or purpose. Numerous tax scholars have counseled against that interpretive strategy.²⁸³ Moreover, for most of our thirty-nine year period, the Court's greater reliance on structural language canons (relative to workplace law decisions) was accompanied by a greater reliance on legislative history as well. This raises the possibility that the Justices may have found the two resources to be mutually reinforcing given the special features of tax legislation. At the same time, the precipitous decline in the use of legislative history in tax cases since 1998 may well be related to the Court's loss of expertise and interest in this area, as we discuss.

C. Justice Blackmun

We noted in Part II.D the unusual degree to which Justice Blackmun anchored the Court's treatment of tax law during his twenty-four terms.²⁸⁴ Although all Justices bring distinctive professional backgrounds and experiences to the Court, Blackmun's role as a tax law expert—one who practiced in the area for over two decades and also wrote articles and taught courses on the subject²⁸⁵—may help account for his exceptional role in this specialized field. Blackmun's contributions to the volume of federal tax opinions have no parallel in the Court's workplace law docket. He authored twice as many majorities as any other Justice, he wrote more dissents than his colleagues (especially remarkable given his high number of majority

283. See, e.g., Livingston, *supra* note 55, at 829–31, 831; Moran & Schneider, *supra* note 55, at 892; Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 630 (1986).

284. See *supra* text accompanying notes 129–34.

285. See *supra* note 128 (referencing several articles and speeches by Justice Blackmun); HARRY A. BLACKMUN AS INTERVIEWED BY HAROLD HONGJU KOH, TRANSCRIPT: THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT 97 (1997), available at <http://lcweb2.loc.gov/diglib/blackmun-public/series.html?ID=D09> (discussing Blackmun teaching a tax law course at St. Paul College of Law, which has become William Mitchell College of Law, in 1930s and 1940s).

opinions), and, for every tax law per curiam decision during his tenure, he either authored the opinion or wrote a dissent.²⁸⁶

Justice Blackmun also anchored the Court's approach to tax law from a qualitative standpoint. Assuming that one classifies the Court's decisions as either progovernment or protaxpayer, Blackmun's majorities are slightly more progovernment than the Court's as a whole, both for the Burger period and during the Rehnquist/Roberts years.²⁸⁷ As Table 10 indicates, Blackmun's 76 percent progovernment majority opinions place him roughly in the middle compared to other Justices who authored five or more tax majorities.²⁸⁸ In this regard, it is notable that Justice Blackmun's 76 percent progovernment figure makes his Court opinions *less* supportive of the government's legal position than the opinions of both some Justices who are routinely viewed as liberal (Marshall, Brennan) and some others who are generally regarded as conservative (Burger, Rehnquist). At the same time, Blackmun's majorities are *more* progovernment than still other Justices who are traditionally thought of as liberal (Souter, Ginsburg) and conservative (Powell, Thomas).²⁸⁹

286. See *supra* Table 8: Percentage of Majority Opinions Authored by the Four Most Prolific Justices in Tax and Workplace Law during Their Tenure on the Court and accompanying text.

287. The Court's eighty-six tax decisions in the Burger period favored the government 73.3 percent of the time and the taxpayer 23.3 percent of the time, whereas Blackmun's twenty-four majorities were 79.2 percent progovernment and 16.7 percent protaxpayer. During the Rehnquist/Robert years, the Court's seventy-two tax decisions were 68.1 percent progovernment and 29.2 percent protaxpayer, whereas Blackmun's ten majorities in those years were 70 percent progovernment and 30 percent protaxpayer. Some of these percentages do not add up to 100 because five Court decisions (one authored by Blackmun) are coded as a mixed result.

288. The six Justices with higher progovernment ratios than Blackmun authored a total of fifty-two majority opinions during our thirty-nine-year period. The eight Justices with lower progovernment ratios authored fifty-seven majority opinions in this period.

289. We find the distinction between progovernment and protaxpayer outcomes easier to rely on than the liberal-conservative distinction we used in our prior research involving workplace law. See Brudney & Ditslear, *supra* note 18, at 27 & n.105 (explaining why Congress's essentially unidirectional legislative goals in the workplace law area—augmenting employee protections to improve the conditions of employment—make it relatively easy to code outcomes on a liberal (proemployee) versus conservative (proemployer) scale). Justice Blackmun's cohort of tax majorities exemplifies that progovernment decisions may plausibly be deemed liberal if corporations or wealthy individuals are forced to pay taxes, see, e.g., *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 90 (1992); *Portland Golf Club v. Comm'r*, 497 U.S. 154, 171 (1990); *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 488–89 (1979); *United States v. Chi., Burlington & Quincy R.R.*, 412 U.S. 401, 415–16 (1973), yet conservative if law-enforcement powers are applied to limit procedural or due process-type protections, see, e.g., *United States*

Table 10: Percent of Progovernment and Protaxpayer Majorities By Justices Authoring at Least Five Tax Majorities*

Justice	Progovernment	Protaxpayer
Burger (8)	100	0
Rehnquist (5)	100	0
Marshall (18)	83	11
Brennan (11)	82	18
Breyer (5)	80	20
Kennedy (5)	80	20
Blackmun (34)	76	21
Powell (10)	70	30
O'Connor (6)	67	17
Souter (9)	56	44
Thomas (6)	50	50
Stevens (7)	43	57
White (8)	38	50
Ginsburg (6)	33	67
Douglas (5)	20	80

*Number of majorities for each Justice in parentheses. Percentages do not add up to 100 in all instances due to mixed-result majorities.

Blackmun's location at the center of this continuum comports with the view that his practical reasoning approach to tax law commanded respect for being neither ideological nor result oriented. Tax professors have observed that law school casebooks typically focus on Blackmun opinions far more than decisions authored by his contemporaries.²⁹⁰ During his time on the Court, Blackmun received correspondence from prominent tax scholars regarding his majority opinions that suggest an underlying esteem for the way he addressed

v. Carlton, 512 U.S. 26, 35 (1994); *United States v. Zolin*, 491 U.S. 554, 556–57 (1989); *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 865 (1986); *Donaldson v. United States*, 400 U.S. 517, 536 (1971). Likewise, protaxpayer results may sensibly be labeled liberal if they vindicate the rights of individual or small business taxpayers against an encroaching IRS, *see, e.g.*, *Comm'r v. Groetzinger*, 480 U.S. 23, 35–36 (1987); *Cent. Ill. Pub. Serv. Co. v. United States*, 435 U.S. 21, 33 (1978), but conservative if they allow wealthy individuals or “special interest” corporations to prevail on a claimed deduction or exemption, *see, e.g.*, *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 570 (1993); *Frank Lyon Co. v. United States*, 435 U.S. 561, 583–84 (1978).

290. Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109, 110 (1998); Stephen B. Cohen, *Thurgood Marshall: Tax Lawyer*, 80 GEO. L.J. 2011, 2011 (1992). One leading tax law casebook reproduces eleven principal Supreme Court cases from 1970–94, six authored by Blackmun and no more than two by any other Justice. *See* ALAN GUNN & LARRY D. WARD, FEDERAL INCOME TAXATION xv–xxv (6th ed. 2006); *see also* RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION xiii–xxvi (2d ed. 2007) (reproducing nine principal Supreme Court cases from 1970–94, five of which were authored by Blackmun).

the issues.²⁹¹ Since Blackmun retired, scholars have noted his insistence on approaching the interpretation of tax statutes the same way he approached other laws—by relying on legislative history and the underlying purposes or equities of the Internal Revenue Code rather than simply invoking the plain meaning of text so as to minimize doing harm or committing error in a complex and technical field.²⁹²

We wondered whether correspondence among the Justices on individual tax decisions might reflect Justice Blackmun's role as the dominant figure in construing federal tax statutes. In an effort to explore that question, one of us reviewed this correspondence for the 117 federal tax law cases decided by the Court during Justice Blackmun's tenure.²⁹³ In about one-fourth of the cases, there are exchanges between Blackmun and other Justices that in the aggregate support the distinctive role he played in tax cases.²⁹⁴ A record of correspondence alone is hardly conclusive, but it does tend to confirm different aspects of Blackmun's impact.

291. See, e.g., Letter from Bernard Wolfman to Harry Blackmun (June 14, 1994) (on file with the *Blackmun Papers*, *supra* note 128, Box 640) (praising Blackmun's opinion in *United States v. Carlton*, 512 U.S. 26 (1994), as "particularly cogent"); Letter from Erwin Griswold to Harry Blackmun (Dec. 20, 1991) (on file with the *Blackmun Papers*, *supra* note 128, Box 95) (discussing *Freytag v. United States*, 501 U.S. 868 (1991)); Letter from Bernard Wolfman to Harry Blackmun (May 9, 1983) (on file with the *Blackmun Papers*, *supra* note 128, Box 376) (discussing *Commissioner v. Tufts*, 463 U.S. 1215 (1983)); Letter from Erwin Griswold to Harry Blackmun (Mar. 15, 1977) (on file with the *Blackmun Papers*, *supra* note 128, Box 245) (discussing *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977)). This is not to suggest that Blackmun's tax law jurisprudence was immune to criticism by those same scholars. See, e.g., Bernard Wolfman, *The Supreme Court in the Lion's Den: A Failure of Judicial Process*, 66 CORNELL L. REV. 1075 *passim* (1981) (critical of Blackmun's holding and reasoning in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978)); Letter from Erwin Griswold to Harry Blackmun (May 22, 1974) (on file with the *Blackmun Papers*, *supra* note 128, Box 180) (criticizing Blackmun's dissenting opinion in *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974)).

292. See Green, *supra* note 290, at 130, 136–38 (discussing Blackmun's "practical reasoning approach to statutory interpretation"); see also Karen Nelson Moore, *Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLINE L. REV. 29, 43–49 (1985) (discussing Blackmun's leadership role in shaping the Court's approach to state tax cases involving interstate or foreign commerce concerns).

293. Professor Brudney visited the Manuscript Division of the Library of Congress on August 19–20 and September 11–12, 2008; he examined memos to Justice Blackmun from his law clerks and conference notes in the Justice's handwriting as well as correspondence between the Justices during the opinion-writing process. Copies of all documents cited to the Blackmun Papers are on file with the *Duke Law Journal*.

294. For twenty-eight of the cases, we found exchanges of some substance involving Blackmun.

In Blackmun's initial years on the Court, notes from other Justices praising the quality of a draft tax opinion or stating that his opinion led them to change their votes may reflect collegial courtesy or flattery directed at a newcomer.²⁹⁵ Moreover, one Justice often appeared relieved to have a colleague so willing to wield a laboring oar, confiding with some humor his own minimal interest in tax law.²⁹⁶ But there also are a large number of decisions in which Blackmun's genuine influence is on display.

In one early case, Blackmun's draft dissent from a denial of the writ of certiorari was quickly joined by three colleagues.²⁹⁷ The Court agreed to grant cert, and Blackmun ultimately wrote the majority opinion, converting an additional dissenting vote from conference.²⁹⁸ In a number of other instances, Blackmun's majority opinion led dissenting colleagues to switch their votes and join him.²⁹⁹ There also

295. See, e.g., Letters from Potter Stewart to William Douglas and Harry Blackmun (Mar. 17, 1971) (on file with the *Blackmun Papers*, supra note 128, Box 125) (joining Blackmun's dissent in *United States v. Randall*, 401 U.S. 513 (1971)); Letter from Hugo Black to Harry Blackmun (Mar. 18, 1971) (on file with the *Blackmun Papers*, supra note 128, Box 125) (same); Memorandum from Warren Burger to the Conference (Mar. 22, 1971) (on file with the *Blackmun Papers*, supra note 128, Box 125) (same); Letter from Lewis Powell to Harry Blackmun (Jan. 15, 1973) (on file with the *Blackmun Papers*, supra note 128, Box 167) (joining Blackmun's per curiam opinion in *United States v. Chandler*, 410 U.S. 257 (1973)).

296. See, e.g., Note from William Rehnquist to Harry Blackmun (Feb. 23, 1981) (on file with the *Blackmun Papers*, supra note 128, Box 329) (conceding that he "simply cannot get a handle on a useful dissent" in *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981)); Letter from William Rehnquist to Harry Blackmun (Dec. 15, 1981) (on file with the *Blackmun Papers*, supra note 128, Box 350) (expressing relief that Blackmun would write a dissent in *Jewett v. Commissioner*, 452 U.S. 305 (1981)); Letter from William Rehnquist to Harry Blackmun (Nov. 11, 1974) (on file with the *Blackmun Papers*, supra note 128, Box 195) (joining Blackmun's opinion rather than "pursuing . . . a dissent" in *Otte v. United States*, 419 U.S. 43 (1974)).

297. See First Draft Dissent of Justice Blackmun in *United States v. Chicago, Burlington & Quincy R.R.J.* (Oct. 17, 1972) (on file with the *Blackmun Papers*, supra note 128, Box 166) (dissenting from a denial of certiorari); Letter from William Douglas to Harry Blackmun (Oct. 17, 1972) (on file with the *Blackmun Papers*, supra note 128, Box 166) (joining Blackmun's dissent in *Chicago, Burlington & Quincy R.R.J.*); Letter from Byron White to Harry Blackmun (Oct. 18, 1972) (on file with the *Blackmun Papers*, supra note 128, Box 166) (same); Letter from Warren Burger to Harry Blackmun (Oct. 20, 1972) (on file with the *Blackmun Papers*, supra note 128, Box 166) (same).

298. See Memorandum from Randy [Bezanson, law clerk] to Justice Blackmun (Apr. 30, 1973) (on file with the *Blackmun Papers*, supra note 128, Box 166) (discussing Justice Stewart's stated intention to dissent in *Chicago, Burlington & Quincy R.R.* for Justice Rehnquist as well as himself, and adding "I did not mention anything about Justice Rehnquist's statement to you this morning."); Letter from William Rehnquist to Harry Blackmun (May 4, 1973) (on file with the *Blackmun Papers*, supra note 128, Box 166) (joining Blackmun's majority opinion in *Chicago, Burlington & Quincy R.R.*).

299. See, e.g., Letters from William Brennan to Harry Blackmun (May 26 and May 31, 1978) (on file with the *Blackmun Papers*, supra note 128, Box 273) (stating he is switching his vote

is ample evidence of fellow Justices expressing admiration for the clarity and persuasiveness of Blackmun's opinion writing in the tax law area.³⁰⁰ And on one occasion, a colleague writing separately from Blackmun evidently asked privately for technical feedback on his own draft opinion.³⁰¹

This level of respect did not prevent other Justices from offering substantive critiques of or suggesting modifications to Blackmun opinions. On a number of occasions, Justice Blackmun's colleagues proposed revisions to his draft majority.³⁰² Blackmun made the

from conference and joining Blackmun's opinion in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978)); Letters from Thurgood Marshall to Harry Blackmun (May 26 and May 31, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 273) (same); Letter from Potter Stewart to Harry Blackmun (Jan. 8, 1979) (on file with the *Blackmun Papers*, *supra* note 128, Box 282) (joining Blackmun's opinion in *Thor Power Tool v. Commissioner*, 439 U.S. 522 (1979)); Letter from Lewis Powell to Harry Blackmun (Jan. 10, 1979) (on file with the *Blackmun Papers*, *supra* note 128, Box 282) (same); Letter from Clarence Thomas to Harry Blackmun (May 12, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 617) (joining Blackmun's opinion in *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993)); Letter from Thurgood Marshall to Harry Blackmun (May 7, 1986) (on file with the *Blackmun Papers*, *supra* note 128, Box 455) (indicating a plan, later abandoned, to prepare a dissent in *United States v. Hughes Properties, Inc.*, 476 U.S. 593 (1986)); *cf.* Letter from John Paul Stevens to Harry Blackmun (May 21, 1986) (on file with the *Blackmun Papers*, *supra* note 128, Box 455) ("Unlike Thurgood I remain unpersuaded and therefore will prepare a dissenting opinion [in *Hughes Properties*] . . .").

300. *See, e.g.*, Letters from John Paul Stevens and William Brennan to Harry Blackmun (Jan. 8, 1979) (on file with the *Blackmun Papers*, *supra* note 128, Box 282) (complimenting and joining Blackmun's opinion in *Thor Power Tool*); Letter from Lewis Powell to Harry Blackmun (Jan. 10, 1979) (on file with the *Blackmun Papers*, *supra* note 128, Box 282) ("In view of the universal acclaim of your fine opinion . . . I cheerfully join you, despite continuing reservations as to the inventory issue."); Letter from John Paul Stevens to Harry Blackmun (May 16, 1983) (on file with the *Blackmun Papers*, *supra* note 128, Box 376) ("I wonder if the case would have been decided the same way if the taxpayers' brief [in *United States v. Rodgers*, 461 U.S. 677 (1983)] had been even half as persuasive as your opinion."); Letter from John Paul Stevens to Harry Blackmun (Jan. 9, 1987) (on file with the *Blackmun Papers*, *supra* note 128, Box 470) (complimenting Blackmun's knowledge and humor in his opinion in *Commissioner v. Groetzing*, 480 U.S. 23 (1987)); Letter from Anthony Kennedy to Harry Blackmun (Feb. 24, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 613) ("Your opinion [in *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993)] is very fine in all respects.");

301. *See* Letter from Harry Blackmun to John Paul Stevens (Feb. 21, 1983) (on file with the *Blackmun Papers*, *supra* note 128, Box 368) (discussing Stevens's concurrence in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983)).

302. *See, e.g.*, Letters from William Brennan to Harry Blackmun (Jan. 13, 19, and 23, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 264) (discussing Blackmun's draft opinion in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978)); Letter from John Paul Stevens to Harry Blackmun (Feb. 10, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 264) (same); Letter from Lewis Powell to Harry Blackmun (Feb. 14, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 264) (same); Letter from Lewis Powell to Harry Blackmun (Mar. 20, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 259)

requested adjustments or negotiated a compromise in some instances³⁰³ whereas in other cases he refused to make a change.³⁰⁴ Still, the overall impression that emerges from correspondence among the Justices is one of fairly regular substantive exchanges on the merits of tax draft opinions with Blackmun playing a central role in many if not most of the exchanges.³⁰⁵

(suggesting edits to Blackmun's draft opinion in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978)); Letter from Sandra Day O'Connor to Harry Blackmun (April, 25, 1983) (on file with the *Blackmun Papers*, *supra* note 128, Box 470) (suggesting changes to Blackmun's opinion in *Commissioner v. Tufts*, 461 U.S. 300 (1983)); Letter from John Paul Stevens to Harry Blackmun (Apr. 14, 1983) (on file with the *Blackmun Papers*, *supra* note 128, Box 470) (same); Letter from Sandra Day O'Connor to Harry Blackmun (May 10, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 617) (suggesting edits to Blackmun's draft opinion in *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993)); Letter from Anthony Kennedy to Harry Blackmun (May 11, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 617) (same), Letter from Clarence Thomas to Harry Blackmun (May 13, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 617) (same).

303. See, e.g., Letter from Harry Blackmun to John Paul Stevens (Feb. 10, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 264) (accepting Stevens's suggestion in *Central Illinois*); Letter from Harry Blackmun to Lewis Powell (Mar. 21, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 259) (accepting Powell's suggestions in *Frank Lyon Co.*); Letter from Harry Blackmun to Sandra Day O'Connor (May 17, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 617) (omitting a section of his draft opinion in *Keystone Consolidated Industries* per O'Connor's request).

304. See, e.g., Letters from Harry Blackmun to William Brennan (Jan. 16 and 20, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 264) (declining Brennan's suggested statement in *Central Illinois*); Letters from Harry Blackmun to Anthony Kennedy and Clarence Thomas (May 17, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 617) (refusing to accommodate Kennedy's and Thomas's suggested changes in *Keystone Consolidated Industries*); see also Letter from Harry Blackmun to Sandra Day O'Connor (Jan. 12, 1987) (on file with the *Blackmun Papers*, *supra* note 128, Box 470) (making some but not all of the changes requested in *Groetzinger*); Letter from Harry Blackmun to Lewis Powell (Oct. 27, 1976) (on file with the *Blackmun Papers*, *supra* note 128, Box 238) (making some but not all of the changes requested in a dissent to *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976)).

305. There are an ample number of exchanges between Justices other than Blackmun on draft opinions not authored by Blackmun. See, e.g., Letters Between Justices Stevens and Brennan (January 24, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 264) (discussing Brennan's draft opinion in *Fulman v. United States*, 431 U.S. 928 (1977)); Letters Between Justices Kennedy and Souter (Jan. 7 and 11, 1993) (on file with the *Blackmun Papers*, *supra* note 128, Box 615) (negotiating edits in Souter's draft opinion in *United States v. Hill*, 506 U.S. 546 (1993)); Letters Between Justices O'Connor and Souter (Apr. 5 and 12, 1994) (on file with the *Blackmun Papers*, *supra* note 128, Box 638) (suggesting edits to Souter's draft opinion in *United States v. Irvine*, 511 U.S. 224 (1994)). At the same time, there are exchanges in which the majority author negotiates to secure Blackmun's support even as Blackmun also drafts a concurring opinion. See, e.g., Letters Between William Rehnquist and Harry Blackmun (Apr. 28 and May 11, 1983) (on file with the *Blackmun Papers*, *supra* note 128, Box 381) (discussing O'Connor's draft opinion and Blackmun's draft concurrence in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983)); Letters Between Byron White and Harry Blackmun (Nov. 10, Dec. 1, 4, and 6, 1978) (on file with the *Blackmun Papers*, *supra* note 128, Box 283)

Assuming *arguendo* that Blackmun was in fact and to an unusual degree a pivotal influence on tax law jurisprudence during his twenty-four terms, what impact if any might this have had on the Court's reasoning approach? There have been only thirty-two federal tax decisions in the fourteen terms since Blackmun's departure. In these decisions, the post-Blackmun Court has relied somewhat more on text and language canons in these decisions,³⁰⁶ and the Court has relied significantly less on legislative history.³⁰⁷

During Blackmun's tenure, he invoked legislative history regularly in his majorities, and so did the Court as a whole. It seems at least plausible that Blackmun's understanding of tax law and his attentiveness to the intricacies of legislative history often accompanying tax law disputes may have served as a cue, helping to stimulate a similar willingness by his colleagues to engage this resource.³⁰⁸ In that regard, four of the Justices who most frequently interacted with Blackmun on the merits of his draft opinions were Justices Stevens, Powell, O'Connor, and Brennan.³⁰⁹ These four Justices relied on legislative history in 77 percent of the thirty tax majorities they authored while serving with Blackmun.³¹⁰ Encouraged by Blackmun's example and leadership, they and other Justices may

(withdrawing a proposed concurrence after White circulated a second draft in *United California Bank v. United States*, 439 U.S. 180 (1978)).

306. Reliance on text since 1994 has been 71.9 percent (23 of 32 cases) versus 65.5 percent of cases during Blackmun's tenure (76 of 116 cases from the 1970–94 terms). Reliance on language canons since 1994 has been 40.6 percent (13 of 32 cases) versus 27.6 percent of cases in the Blackmun years (32 of 116 cases from the 1970–94 terms).

307. Reliance on legislative history since 1994 has been 34.4 percent of cases (11 of 32 of cases), which contrasts with 62.9 percent during the Blackmun period (73 of 116 of cases for the 1970–94 terms). This difference is highly significant ($t = .001$).

308. Our suggestion that Blackmun's use of tax legislative history functioned as a cue for many of his colleagues may help account for why, collectively, they relied on this resource slightly more often even than he did, *see supra* Table 9: Comparing Justice Blackmun's Reliance on Legislative History in Tax Cases with the Reliance of Other Justices, and then continued to rely on it at a high level for the first several years after he retired, *see supra* note 143. Once the reinforcing "lesson" of Blackmun's approach wore off, however, it was replaced by the more generic reinforcement of Justice Scalia's hostility to legislative history.

309. *See* sources cited *supra* notes 300–04.

310. For O'Connor the figure is 100 percent (four of four cases); for Stevens the figure is 80 percent (four of five cases); for Brennan 91 percent (ten of eleven cases); and for Powell 50 percent (five of ten cases). O'Connor and Stevens invoked legislative history in one of the four majorities they authored after Blackmun's departure.

have been more willing to treat tax law seriously—even if they also expressed on occasion some distaste for the subject.³¹¹

The readiness of Justice Blackmun's colleagues to rely on legislative history does not mean they were always as comfortable with this expertise-laden resource as was Blackmun himself. Some indication of the other Justices' differing level of confidence may be seen when examining their respective approaches to invoking legislative history in dissents if the majority had relied on that history. Justice Blackmun was much more likely than his colleagues to use legislative history in dissent to counter legislative history reliance in a majority opinion.³¹² And his colleagues were especially reluctant to rely on this history when Blackmun authored the majority.³¹³ Nonetheless, it remains true that other Justices used legislative history more often than not in their majority opinions until Blackmun departed from the Court.

Further, since Blackmun's retirement, tax cases have comprised a smaller share of the Court's decisions. During Blackmun's twenty-four years of service, federal income tax cases comprised 3.53 percent of the Court's docket—including 4.04 percent in the first eight terms of the Rehnquist Court.³¹⁴ Since 1994, that proportion has fallen to

311. For instances of the occasional expression of distaste for tax law, see, for example, Letter from John Paul Stevens to Harry Blackmun (Jan. 8, 1979) (on file with the *Blackmun Papers*, *supra* note 128, Box 282) (“Dear Harry, As you know, I am no fan of tax cases. But I must confess that if I had known that this case [*Thor Power Tool v. Commissioner*, 439 U.S. 522 (1979)] was going to result in such a fine opinion, I would have voted to grant cert.”); Letter from William Rehnquist to Harry Blackmun (Dec. 15, 1981) (on file with the *Blackmun Papers*, *supra* note 128, Box 350) (“Dear Harry: As you might have guessed, I am delighted that you are willing to take on the dissent in this case [*Jewett v. Commissioner*, 455 U.S. 305 (1982)].”).

312. In fifty nonunanimous tax law cases in which the majority relied on legislative history, the dissent relied on legislative history sixteen times, or 32 percent of the time. When Justice Blackmun wrote the dissent he used legislative history to counter majority reliance on legislative history 50 percent of the time (five of ten cases); when other Justices authored the dissent they invoked legislative history 28 percent of the time (eleven of forty cases).

313. Of the forty dissents authored by other Justices, thirty-one occurred during Justice Blackmun's tenure and nine of them invoked legislative history. When Blackmun authored the majority, dissent reliance was only 17 percent (two of twelve cases). When others authored the majority, dissent reliance rose to 37 percent (seven of nineteen cases).

314. From the 1970 Term through the 1993 Term, the Court decided 116 federal tax cases out of 3,287 total merits decisions. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 87–92 tbl.2-11 (4th ed. 2007); Brudney & Distlear, *supra* note 63. During the first eight years of the Rehnquist Court, the Justices decided 40 tax cases out of 990 merits decisions. EPSTEIN ET AL., *supra* at 87–92 tbl.2-11; Brudney & Distlear, *supra* note 63.

2.95 percent,³¹⁵ a one-sixth decline from the overall Blackmun era average. Other factors may be contributing to this decline apart from the diminished interest and confidence of the Justices. Congress has enacted fewer comprehensive or conceptually innovative federal tax laws in recent decades; one result may be a gradual decline in appellate litigation about new interpretive matters.³¹⁶ In addition, a growing IRS interest in settling disputes at a pre-judicial stage may lead to fewer cert-worthy cases.³¹⁷ But whatever the weight attributable to each factor, it seems that the Court is less interested in—and perhaps less invested in grappling with—expertise-related issues of federal tax law since Blackmun’s departure. At a minimum, this development suggests that the judicial asset of diverse professional experience deserves further scholarly attention.

CONCLUSION

At the outset, we described how statutory interpretation debates have generally assumed that the virtues or vices of key interpretive resources are systemic in nature. Against this backdrop, our review of the Court’s interpretive approach in tax law reveals some intriguing differences from the Justices’ reasoning in the workplace law area. Because normative discussion and empirical research (including our own) have focused primarily on ideologically charged areas such as labor and civil rights, the reasoning patterns we have observed for tax

315. From the 1994 Term through the 2007 Term, the Court decided 32 federal tax cases out of 1,084 merits decisions. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM*, Table 2–11, 1946–2006 Terms (4th ed. revised 2007), available at CQ Press Electronic Library, The Supreme Court Compendium Online Edition, http://library.cqpress.com/sccm/scc4thR_tab2-11 (last visited Feb. 5, 2009) (subscription required) (reporting 1015 total decisions from the 1994 term through the 2006 term); *Statistics for the Supreme Court’s October Term 2007*, 77 U.S.L.W. 3063, 3072 (Aug. 5, 2008) (reporting 69 total merits opinions from argued and non-argued cases).

316. See Staudt et al., *supra* note 71, at 1818 n.68 (observing that Congress revised the tax code twenty-three times between 1913 and 1954, but that the code’s basic structure has been unchanged since 1954).

317. See, e.g., *IRS Launches New Settlement Initiative for Corporate Tax Shelters*, TAX NOTES TODAY, Aug. 7, 2008, LEXIS, 2008 TNT 153-1; *IRS Announces Settlement Initiative for Wide Array of Transactions*, TAX NOTES TODAY, Oct. 28, 2005, LEXIS, 2005 TNT 208-13; *IRS Announces Employer-Provided Meals Settlement Initiative*, TAX NOTES TODAY, Aug. 5, 1998, LEXIS, 98 TNT 150-8. See generally Gregory P. Mathews, *Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 709 (2004) (examining the use of alternative dispute resolution (ADR) techniques by the IRS); David Parsly, *The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy*, 8 CARDOZO J. CONFLICT RESOL. 677 (2007) (detailing types of ADR programs implemented by the IRS).

law reveal an underappreciated judicial angle of vision on the legislative process.

The Court in its tax law decisions relies significantly more often on both language canons and legislative history, for seemingly related reasons. The Justices' extraordinary focus on language canons promoting structural integrity suggests a belief, even if implicit, that the federal tax code is best viewed as a single integrated whole notwithstanding its size and its construction over many decades. That belief presumably derives in part from an appreciation for the legacy of professional and nonpartisan legislative drafting on tax matters.

These same qualities of objectivity, nonpartisanship, and cross-branch cooperation also apply to the drafting of tax legislative history. The Court's record of crediting standing committee reports reflects an understanding that these committee narratives—prepared by experts—assume special value in an area where the textual language and policy concepts are technically complex and less readily decipherable. The majority opinions we reviewed illustrate how the Court uses tax legislative history to borrow expertise, in contrast to the more familiar reliance on this history to help discern the existence or details of a congressional compromise. The Court's interest in expertise borrowing is also manifested in a more derivative way with respect to the substantive canons. Although the Justices' overall use of substantive canons is no heavier in tax law than workplace law, their disproportionate reliance on tax-based canons reflects a willingness to invoke tax policy presumptions as a way of shaping and simplifying their analyses.

In our prior empirical research addressing the Court's statutory workplace decisions, we demonstrated that the Justices' use of legislative history to identify and describe legislative bargains was more principled than some critics have suggested, whereas the Rehnquist Court's reliance on the canons was more instrumental and politicized than had previously been recognized.³¹⁸ For the Court's statutory tax decisions, different functional priorities seem to apply—specifically, expertise borrowing is a central value for the Justices. The fact that familiar interpretive resources play distinctive roles in the area of tax law contributes to a subtler and richer texture for statutory interpretation than is often captured in scholarly debates. In

318. See Brudney & Ditslear, *supra* note 52, at 137–60 (reporting and discussing the legislative history results); Brudney & Ditslear, *supra* note 18, at 53–69, 77–97 (reporting and discussing the canons results).

addition, the Blackmun effect suggests that at least for a field perceived as tepid in terms of ideology and also judicial interest, the Justices may be willing to follow the interpretive example of a knowledgeable colleague when grappling with statutory challenges.

Most Justices who served during the Burger or Rehnquist/Roberts periods seem to have participated in this relatively nuanced approach to statutory construction. That is not necessarily true, however, for Justices with a more inflexible vision of the interpretive enterprise. Moreover, our results also suggest that the Court has recently exhibited greater uniformity in its patterns of reasoning in tax law and workplace law cases.³¹⁹ Perhaps the philosophical arguments favoring one-size-fits-all statutory interpretation are beginning to trump a pragmatic orientation that is more sensitive to differences among particular subject matter areas of federal law. We hope other scholars will pursue this question by examining the Court's reasoning in potentially distinctive fields such as criminal or environmental law.

Insofar as we are witnessing the advent of a more monolithic Court position toward interpreting statutes, this trend is likely to influence the behavior of other judges and practicing attorneys.³²⁰ A clear signal from the Justices that canons and legislative history should be valued or discounted with little attention to the law's varying substantive contexts would effectively encourage lawyers and lower courts to modify their own reasoning methods and techniques. Before such a trend accelerates, we hope that Justices and judges with a more pragmatic orientation will consider whether a standardized approach to interpretation adequately respects the diverse and intricate features of the American statutory fabric.

319. See *supra* text accompanying Table 2: Reliance on Selected Interpretive Resources—Burger Court Decisions and Rehnquist/Roberts Court Decisions; *supra* text accompanying note 93.

320. See Brudney & Ditslear, *supra* note 52, at 170–71 (discussing the normative implications of Justice Scalia's impact on colleagues with respect to legislative history use).