

Standing on Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act

Kristen M. Blankley

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**STANDING ON ITS OWN SHOULDERS: THE SUPREME
COURT’S STATUTORY INTERPRETATION OF THE
FEDERAL ARBITRATION ACT**

*Kristen M. Blankley**

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*Professor of Law, University of Nebraska College of Law. Professor Blankley would like to thank Lisa Pytlik-Zillig from the University of Nebraska Social and Behavior Science Research Consortium for her help in research design and statistical analysis, as well as Francia Baltazar Parra for her help in the statistical analysis. Thanks also to Anita Krishnakumar for her assistance in the design of my study. Thanks to Eric Berger, Steven Wilborn, Jeff Stempel, Carli Conklin, Brian Farkas, and Jonathan Dean for helpful comments on drafts of this paper. Additional thanks to Rachel Dick for her invaluable help as my research assistant; and to Stefanie Pearlman for coordinating this research assistance through the Schmid Research Fellowship Program at the University of Nebraska College of Law.

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“[T]he court is standing on its own shoulders” when it relies on its own opinions in interpreting the FAA. ~ *Circuit City v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, dissenting).

I. INTRODUCTION

Arbitration scholars have long questioned whether the Supreme Court treats the Federal Arbitration Act (FAA) like other statutes. Over the last two decades, individual Justices used tools of interpreting the FAA that are inconsistent with their overarching philosophies regarding statutory interpretation. For instance, Justice Scalia, a renowned textualist, often appeals to public policy and business-specific interests in interpreting the FAA.¹ Justice Breyer, a famous purposivist, cites textualists tools, such as dictionaries and canons in arbitration opinions.² This Article examines empirical data from all Supreme Court FAA cases to determine what tools of interpretation the Court finds most influential. Although scholars have completed similar analyses in other areas of the law, this Article is the first specifically analyzing arbitration cases.

Following the lead of statutory interpretation scholars, this Article is both empirical and doctrinal.³ This Article provides descriptive statistics

1. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 140 (2009) (Justice Scalia “is a devout supporter of textualism as an interpretive approach and a persistent critic of any reliance on legislative history.”); *Am. Express Co. v. Italian Colors*, 570 U.S. 228, 237–39 (2013) (citing the lack of inefficiency as a reason for interpreting the FAA to apply to bilateral arbitration but not classwide arbitration); *AT&T Mobility LLC v. Concepcion*, 536 U.S. 333, 348–50 (2011) (relying on broad, practical concerns in holding that the FAA is intended to regulate bilateral, but not classwide, arbitration).

2. See CROSS, *supra* note **Error! Bookmark not defined.**, at 140–41 (describing Justice Breyer as having “clearly expressed views” on the use of tools such as legislative history). See, e.g., *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1426 (2019) (Breyer, J., dissenting) (invoking a canon of construction of reading a statute to give meaning to all portions); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 274 (1995) (considering roughly contemporaneous dictionaries to determine the meaning of the phrase “involving” commerce).

3. See Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 *HASTINGS L.J.* 221, 222–26 (2010) [hereinafter *Roberts Court*] (describing the empirical and doctrinal aspects of her statutory interpretation project).

on statutory interpretation of the FAA since its inception in 1925.⁴ In addition, this Article provides doctrinal analysis of patterns unique to the arbitration docket. This analysis is intended to be compatible with and comparable to other studies involving analysis of tools of statutory interpretation.

This research shows empirically what Justice Stevens observed in the opening quotation—the Court’s arbitration jurisprudence is insular, building more off itself than anything else. Compared to other scholars’ studies, my analysis shows an overreliance on three key tools of interpretation: former Supreme Court precedent, the text of the FAA, and the arbitration canon.

Arbitration decisions appear more controversial over time, as evidenced by a rising number of dissenting and concurring opinions and narrower vote margins. As the reach of the FAA expands, more disputes are subject to arbitration, including consumer and employee disputes.⁵ Additionally, recent cases demonstrate a clear preference for bilateral arbitration (i.e., arbitration between two parties) at the exclusion of classwide arbitration (or arbitration involving unnamed class members).⁶ These two trends pose interesting questions of statutory interpretation because these types of arbitration cases did not exist at the time of the FAA’s passage.⁷

4. 9 U.S.C. §§ 1–14 (1925).

5. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (allowing arbitration of a claim under the Age Discrimination in Employment Act); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006) (requiring arbitration of claims of usury under Florida law for checking cashing customer).

6. The first case hostile to classwide arbitration was *Stolt-Nielsen, N.A. v. International AnimalFeeds, Int’l Corp.*, 599 U.S. 662 (2009) (holding arbitrator exceeded authority by reading a “silent” clause as permitting classwide arbitration). This precedent has been further expanded in cases such as *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (preempting a California precedent that would have invalidated class action waivers in arbitration), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (upholding class action waiver despite expert testimony that proving the substantive antitrust violation would cost significantly in excess of any individual putative class member’s potential recovery).

7. Class action rules were first promulgated in 1938, but the modern-day damages classes are a product of the revisions of the 1966 revisions to the Federal Rules. See Deborah R. Hensler, *Happy 50th Anniversary Rule 23! Shouldn’t We Know You Better After All This Time?*, 165 U. PA. L. REV. 1599, 1600 (2017) (providing history of Rule 23 of the Federal Rules of Civil Procedure). In addition, many of the employment and consumer claims now subject to arbitration did not exist at the time of the FAA’s passing. See Jean Sternlight, *Hurrah for the Consumer Financial Protection Bureau: Consumer Arbitration as a Poster Child for Regulation*, 48 ST. MARY’S L.J. 343, 346 (2016) (“Once upon a time, arbitration was a dispute resolution process that was adopted knowingly and voluntarily by two or more businesses that preferred to resolve disputes outside of court.”); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKLEY. J. EMP. & LAB. L. 5, 11–12 (2014) (recounting the history of the FAA how its purpose was to enforce arms-length agreements between businesses).

This Article proceeds in five parts. Part II provides an overview of notable principles in statutory interpretation. Part III presents a literature review of empirical work in statutory interpretation and arbitration. Part IV provides my methodology. Part V relates the conclusions of this research and compares this study to others done in the past. Finally, Part VI discusses the next steps for this research, particularly additional work that can be done as it relates to arbitration jurisprudence.

II. OVERARCHING PRINCIPLES

Judges have great latitude in how they interpret statutes.⁸ Judges usually look first to the statute to determine its meaning without interpretive aids,⁹ but no rule of law prohibits a judge from using such tools even if the language is clear.¹⁰ Although “there is nothing close to consensus regarding the correct way to engage in statutory interpretation,” the set of interpretive tools used by judges have been relatively consistent over time and have “not undergone all that much change for 200 years.”¹¹ Today’s primary theories of statutory interpretation include textualism, purposivism, and intentionalism.¹² A judge’s philosophy may limit or expand the types of tools used. This section outlines major theories of statutory interpretation and how those theories relate to specific tools of interpretation for judges adhering to those philosophies.

8. See CROSS, *supra* note **Error! Bookmark not defined.**, at 1–10 (describing the imperfect theory of the judiciary as the agent of Congress to determine how to interpret the laws passed by the legislative branch).

9. Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 73–74 (2018) (“When text straightforwardly suffices to answer a question, no further investigation is needed, and evidence about congressional purpose will not override it. Even ambiguous or unclear text can bound the range of permissible interpretations that interpretive strategies such as legislative purpose analysis might otherwise open up.”); Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 7 (2003) (“If the relevant statutory text is deemed to be clear and unambiguous (a.k.a. has a plain meaning), then the court simply applies that statutory text—unless there is some ill-defined exception, such as absurd results, or clearly expressed legislative intent to the contrary.”) (citations omitted) (internal citations omitted).

10. Mullins, *supra* note 9, at 8 (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”) (quoting *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 543–44 (1940)).

11. Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823, 832 (2019); Mullins, *supra* note 9, at 14–15.

12. Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH. L. REV. 1185, 1185 (2011) (noting that these labels and ideas are largely theoretical and “[w]hen it comes down to actually interpreting statutes, the differences between the Justices become quite small.”).

A. *Textualism*

Textualism is a method of statutory interpretation seeking meaning primarily from the language of the statute.¹³ Under this theory, the intent of the legislature is largely irrelevant.¹⁴ Some jurists subscribe to textualism because they consider the collective intent of legislators to be impossible to determine.¹⁵ Others, such as Justice Scalia, found textualism appealing because it theoretically binds judges to a narrower set of possible interpretations.¹⁶

If the statute is ambiguous, textualists often consider tools such as dictionaries, the whole act rule, and canons of interpretation.¹⁷ The intent of canons is to reduce bias in statutory interpretation.¹⁸ The canons have

13. Anita Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 981 (2016) [hereinafter *Dueling Canons*] (“Textualism is a formalist method of statutory interpretation that seeks answers primarily from the official language of the statute. It directs judges to identify the ordinary meaning, at the time of enactment, of the statutory term in question.”); see also Daniel J. Olds, *Ordinary Meaning, Context, and Textualism in Texas Statutory Interpretation*, 52 TEX. TECH. L. REV. 485, 489 (2020) (“[T]extualists believe that the best indication of legislative intent is the text of the statute itself.”).

14. See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010) (discussing the underlying theories for textualism).

15. *Id.* at 1661 (“Judge Easterbrook, for one, has insisted that no such ‘intent’ can be divined: ‘The meaning of statutes is to be found not in the subjective, multiple mind of Congress,’ he has argued, for the simple reason that a multimember body such as Congress cannot formulate or act upon a single intent as if it were a unitary entity.”) (citations omitted).

16. See *id.* (“Justice Scalia . . . condemned [using legislative history] in memorable terms as ‘that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction.’ In his view, legislative history materials provide ‘increasingly unreliable evidence of what the voting Members of Congress actually had in mind.’”) (citations omitted); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1762 (2010) (describing textualism as a “an interpretive approach that emphasizes textual analysis, interpretive predictability, and cabined judicial discretion”). Justice Scalia has a modified textualist view that relies primarily on the text, but he is also willing to consider the “apparent purpose” of the statute, as well as policy consequences of decisions. CROSS, *supra* note **Error! Bookmark not defined.**, at 140.

17. See Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363, 383 (2020) (noting that textualists are most likely to consider plain meaning, dictionaries, and language canons); *Dueling Canons*, *supra* note 13, at 982–83 (discussing the tools of interpretation most likely to be utilized by a textualist); Gluck, *supra* note 16, at 1763 (“[T]extualists place a heavy emphasis on text and text-based interpretive rules (for example, dictionary definitions, textual ‘context,’ and the so-called ‘linguistic’ or ‘textual’ canons—default presumptions based on common rules of grammar and word usage) rather than looking for other, extrinsic evidence.”); Olds, *supra* note 13, at 490 (“First, judges will often analyze the ambiguous word or phrase to determine what its ordinary meaning is. A favorite way to do this is by simply looking up the word’s definition in a dictionary.”).

18. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, xxviii (2012) (noting that canons “will narrow the range of acceptable judicial decision-making and . . . will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences”); Mendelson, *supra* note 9, at 80 (2018) (“Textual canons are often

different goals, some of which are grammatical,¹⁹ some seek rules to interpret words based on linguistic conventions,²⁰ while others invoke substantive policy.²¹ Arbitration law has generated many canons, including a presumption to enforce arbitration agreements in labor and non-labor settings, deference to arbitral awards, and a rule favoring arbitration of statutory claims.²² Yet, canon use is not without criticism. Different canons may lead to different outcomes, and the “sheer number and variety of canons” may end up “widening,” rather than constraining “judicial discretion.”²³

Textualists generally do not use legislative history to interpret statutes.²⁴ Textualists deny the ability to know the mental state of a collective legislating body and criticize picking and choosing pieces of

described as policy-neutral tools to decode the meaning of Congress’s language. They include grammatical and punctuation rules, as well as rules that assume internal consistency and nonredundancy in textual drafting.”)

19. See Cross, *supra* note **Error! Bookmark not defined.**, at 87 (describing canons that apply basic rules of grammar such as the difference between “may” and “must”); James Durling, Comment, *Diagramming Interpretation*, 35 YALE J. ON REG. 325, 339 (2018) (describing grammar canons as those that “identify a few specific syntactical rules”).

20. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005) [hereinafter *Canons of Construction*] (“Language canons consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the” statute.)

21. See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1240 (2009) [hereinafter *Warp and Woof*] (“Most of the statute-based substantive canons are couched in broadly applicable terms, but some relate to specific subject areas including a number of tax law-related substantive canons.”); *Canons of Construction*, *supra* note 20, at 13 (“Substantive canons, unlike their linguistic counterparts, are generally meant to reflect a judicially preferred policy position. . . . [They] reflect judicially-based concerns, grounded in the courts’ understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.”); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 97–108 (1994) (providing a comprehensive list of canons of statutory interpretation).

22. Eskridge & Frickey, *supra* note 21, at 106 (noting arbitration-related canons of construction).

23. See Michael Sinclair, “*Only a Sith Thinks Like That*”: Llewellyn’s “*Dueling Canons*,” *Eight to Twelve*, 51 N.Y.L. SCH. L. REV. 1002, 1004–08 (2006) (providing a background Karl Llewellyn’s of the fourteen “dueling canons” that can be used to arrive at different outcomes depending on which canon the judge chooses). Mendelson, *supra* note 9, at 77.

24. Law & Zaring, *supra* note 14, at 1658 (discussing the *possibility* that judges use legislative history “cynically” to achieve a desired outcome, rather than adhering to the true meaning of a statute).

legislative history to support an outcome.²⁵ Further, textualists worry that reliance on legislative history unduly elevates its status.²⁶

B. *Intentionalism*

The intentionalist theory considers the intent of the legislature passing the statute.²⁷ Many intentionalists consider the “constructive intent” by considering the intent of the bill sponsors or the committees first reviewing the legislation.²⁸ Others try to step into the shoes of the legislature to determine how it would have applied the statute to a given situation.²⁹ The intentionalist theory is grounded in principles of agency and democracy, with judges acting as agents of the legislature to interpret and follow its choices, advancing “democracy by carrying out the will of the elected legislators.”³⁰

If the text is ambiguous,³¹ intentionalist (and purposivist) judges may consider legislative history and other historical documents.³² While

25. Tushnet, *supra* note 12, at 1186 (“Justice Scalia abjures the use of the word ‘intent,’ believing that it refers to inner mental states of individual legislators and is therefore inappropriate in statutory interpretation.”); Law & Zaring, *supra* note 14, at 1662 (“Judge Leventhal of the D.C. Circuit famously likened the selective use of legislative history by judges to ‘looking over a crowd and picking out your friends.’ . . . [Given the vast material] from which they have to choose, it is all too tempting for a judge to take only what is convenient.”) (citation omitted); *Dueling Canons*, *supra* note 13, at 983 (“Textualists trust such bounded interpretive aids to lead courts to the proper statutory construction— and to restrict the opportunity for ‘strong-willed judges to substitute their own personal political views for those of the legislature.’”) (citation omitted).

26. Gluck, *supra* note 16, at 1763 (“Some textualists also argue that reliance on legislative history works an unconstitutional delegation of lawmaking authority to subportions of Congress (committees), or worse, congressional staffers (who write the reports).”).

27. Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Context Activism?*, 30 U. BALT. L. F. 4, 17 (“‘Intent,’ thus, reveals more of the text’s intended meaning, and ‘purpose’ is simply the broad goal of the statute.”).

28. *Id.* (describing constructive intentionalism and the tools of interpretation associated with the theory).

29. *Id.* (discussing “imaginative intentionalism” and how Judge Posner of the Seventh Circuit describes the theory).

30. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 1, 14 (1994); *see also* Madeline June Kaas, *A Least Bad Approach for Interpreting ESA Stealth Provisions*, 32 WM. & MARY ENV. L. & POL’Y REV. 427, 432 (2008) (noting that intentionalism upholds the tri-part system of government in the United States).

31. Law & Zaring, *supra* note 14, at 1658 (“A different and long-popular view, which in recent years has been most visibly championed by Justice Breyer, is that judges should and do cite legislative history for the innocuous reason that it is a useful aid to interpreting statutes that lack clear meaning.”); Tushnet, *supra* note 12, at 1192 (“Both Justices Scalia and Breyer agree that their differences over statutory interpretation arise only when the text is to some degree uncertain.”).

32. Choi, *supra* note 17, at 383 (noting how purposivist jurists are more likely to rely on legislative history than textualists); *Dueling Canons*, *supra* note 13, at 989 (“Purposive statutory interpretation typically involves inquiries into legislative history, the societal problem that prompted

legislative history is included in many documents, some bears greater weight than others.³³ Reports and other documents demonstrating legislative consensus are often considered the most reliable type of legislative history.³⁴ Conversely, statements by individuals hold less weight, with statements of witnesses and lobbyists carrying the least amount of weight.³⁵ Legislative history, while not part of the text, still helps “attribute meaning to text.”³⁶ When legislative history is expansive, this theory permits using pieces consistent with the text to determine meaning.

C. *Purposivism*

The term *purposivism* is difficult to define because it is a “slippery term, with no single definition.”³⁷ The theory grew from the “Legal Process School,” and the techniques outlined by Henry Hart and Albert Sacks became highly influential in the mid-twentieth century.³⁸ Judges adhering to a purposivist philosophy try to determine what the legislature sought to accomplish in passing the legislation.³⁹ At its core, purposivism attempts to answer the following question: How would a “reasonable

the legislature to enact the statute, legislative intent, and other sources that might illuminate a statute’s objectives.”).

33. *Warp and Woof*, *supra* note 21, at 1243 (“[T]he legislative history most frequently invoked by courts is standing committee reports. 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.”).

34. See, e.g., Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 U. DAYTON L. REV. 37, 70 (2013) (“One type of legislative history that carries a good deal of weight is Committee Reports. These reports have long been used by courts when examining legislative history.”).

35. *Warp and Woof*, *supra* note 21, at 1244–45 (“Unlike the canons 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.”).

36. *Id.*, at 1244.

37. Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 92 (2009).

38. John David Ohlendorf, *Purposivism Outside Statutory Interpretation*, 21 TEX. REV. L. & POL. 235, 237 (discussing the history of purposivism).

39. *Dueling Canons*, *supra* note 13, at 989 (“In contrast to textualism, it advocates that jurists interpret the words of a statute by identifying the statute’s purpose and selecting the meaning that best effectuates that purpose.”); Herz, *supra* note 37, at 92–93 (“[P]urpose’ refers to what the legislature ultimately sought to accomplish. Intent is about means; purpose about ends.”); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 296 (2019) (“I shall emphasize the strand of purposivist thought that seeks to approximate the model of conversational interpretation by viewing purposes as closely analogous substitutes for, rather than a sharp alternative to, legislative intent as a basis for statutory interpretation.”).

legislator' . . . resolve[] the problem addressed by the statute?"⁴⁰ Other articulations of the question include: "What was the problem Congress was trying to solve? (This is the 'evil' rule.) What were Congress's purposes in enacting this provision? What did Congress have in mind when it enacted this provision?"⁴¹ Purposivism assumes that every statute has a purpose but recognizes that statutes may have multiple purposes.⁴² Once the purpose is determined, the statute is interpreted to meet the purpose.⁴³ Justice Breyer, a well-known purposivist, is comfortable relying on legislative history to determine both purpose and meaning.⁴⁴

Perhaps the biggest difference between intentionalism and purposivism is that the former considers intent at a locked point in time (when the statute was enacted) while the latter allows for a more dynamic view of legislation that considers the current needs of society.⁴⁵ Today, the practical difference in these philosophies is shrinking, largely because the textualist movement has reigned in purposivist judges.⁴⁶

III. LITERATURE REVIEW

This section considers two separate lines of research. The first considers studies in statutory interpretation, and the second considers empirical work in arbitration.

40. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006).

41. Tushnet, *supra* note 12, at 1198 (internal quotation marks omitted).

42. Ogune, *supra* note 27, at 15–16 (discussing difficulties with the purposivist theory).

43. See Daniel O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 194 (2008) ("Purposivism provides that judges should identify the statute's purpose and then determine which interpretation would best effectuate that purpose.").

44. Law & Zaring, *supra* note 14, at 1660 ("[Legislative history] can also help judges to avoid[] an absurd result, explain[] specialized meanings, choos[e] among reasonable interpretations of a politically controversial statute, and even illuminate drafting errors that courts should correct—as the Court itself has demonstrated on various occasions.") (internal quotation marks omitted).

45. O'Gorman, *supra* note 43, at 195 ("Because purposivism states Congress's purpose in more general terms than identifying what Congress's intent was or would have been with respect to the particular issue, purposivism allows statutory interpretation to be more flexible and to thereby change a statute's meaning in response to new circumstances."); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1081 (1992) ("Under the dynamic approach, judges interpreting statutes focus on the current needs or values of society.").

46. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36 (2006) ("[N]either side of the [legislation] debate has been eager to acknowledge just how much we have all become textualists."); see also Manning, *supra* note 40, at 78 ("Conversely, certain features of purposivism reflect textualist practices and assumptions more deeply than textualists sometimes acknowledge.").

A. *Statutory Interpretation Research*

Empirical analysis of court decisions by legal scholars is growing.⁴⁷ Studies examining the use of tools of statutory interpretation generally fall along two dichotomies. The first considers the breadth of cases. The second considers the types of tools the researcher considers within the analysis.

1. Breadth of Cases Researched

Research to date has varied in the number and types of cases studied. My study is modeled closely after the research of Professor Anita Krishnakumar, who published a series of articles analyzing all Supreme Court cases during the Roberts Court era. Her first article considers all statutory interpretation decisions in the first three years of the Roberts Court, leading to an examination of 166 cases and 352 opinions looking for broad trends in the Court's decisions.⁴⁸ Her second study expanded the timeframe, adding cases through 2010, leading to an examination of 255 cases and 528 opinions.⁴⁹ However, this second article had a narrower focus that looked primarily at a phenomenon known as *dueling canons*, or interpreting the same canon in multiple opinions.⁵⁰ Professor Krishnakumar's third article added cases through July 2017, resulting in 499 cases and 995 total opinions.⁵¹ The third article asked whether Supreme Court justices use *backdoor purposivism*, textualist tools used in an outcome-determinative way.⁵² Professor Nina Mendelson also studied the Roberts Court use tools of interpretation.⁵³ Her article examines the first decade of the Roberts Court, covering "838 majority, plurality, concurring, and dissenting opinions, found in 460 separate decisions."⁵⁴

Other scholars used smaller samples. For instance, Professor Frank Cross examined roughly 120 Supreme Court cases between 1994 and

47. CROSS, *supra* note **Error! Bookmark not defined.**, at 135–39 (providing a historical overview of the study of statutory interpretation).

48. *Roberts Court*, *supra* note 3, at 231.

49. *Dueling Canons*, *supra* note 13, at 921–22 (2016) (discussing methodology).

50. *Id.* at 925 (discussing how a "dueling canon" is one in which a majority or concurrence and a dissent all rely on the same canon to determine the outcome of a case).

51. Anita Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1292 (2020) [hereinafter *Backdoor Purposivism*] (describing methodology).

52. *Id.* at 1278 ("This Article is the first to expose and chronicle the decidedly purposivist and intentionalist undertones to the Roberts Court's use of textualist canons, interpretive tools, and practical consequences arguments.").

53. Mendelson, *supra* note 9.

54. *Id.* at 90.

2002 to determine interpretive tools used by individual justices.⁵⁵ Professor Cross's analysis considers each justice's vote in each case.⁵⁶ Similarly, Professor Nicholas Zeppos sampled cases by randomly selecting twenty terms between 1890 to 1990, yielding a study of 413 cases.⁵⁷ In contrast, Professors David Law and David Zaring considered "all Supreme Court statutory interpretation cases decided from the 1953 term through the 2006 term," provided the statute was interpreted nine or more times.⁵⁸ Law and Zaring's dataset involved 1479 cases and 3095 different opinions, making it one of the largest studies in statutory interpretation.⁵⁹

Other scholars focus on more limited inquiries, such as cases within specific subject matter. For example, Professor James Brudney has authored a number of studies analyzing labor and employment cases and comparing those cases to other areas of the law. In 2019, he published a study with Professor Lawrence Baum covering Supreme Court and circuit court labor and employment cases from 1969 to 2017.⁶⁰ These two professors also authored a study looking specifically at criminal, business, and labor and employment cases.⁶¹ An earlier study Professor Baum

55. CROSS, *supra* note **Error! Bookmark not defined.**, at 142–43 (discussing methodology); *see also Roberts Court*, *supra* note 3, at 229 ("Cross's aim was to measure the Court's and individual Justices' patterns of canon usage for consistency with the different theoretical approaches, as well as to test the various interpretive methodologies' ability to constrain ideological decisionmaking.").

56. CROSS, *supra* note 1, at 143 (noting that he studied "over one thousand separate justice-votes for analysis" with the "vote of each justice" as "the basic unit of analysis for this study").

57. Zeppos, *supra* note 45, at 1088. Unlike the other studies noted in this literature review, the Zeppos analysis only analyzed majority opinions, and not concurring or dissenting opinions. In contrast, Professor Schacter conducted a relatively small analysis (45 cases) of cases solely during the 1996 Term. *See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 10 (1998) (discussing cases analyzed).

58. Law & Zaring, *supra* note 14, at 1683–84.

59. *Id.* at 1685. Other studies of note include Matthew R. Christiansen & William N. Eskridge, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1329 (2014) ("286 overrides of 275 Supreme Court decisions that had interpreted a federal statute" between 1967 and 2011."); Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51, 61 (2017) (considering 166 Supreme Court "statutory interpretation cases subsequently overridden by Congress, 55 cases subsequently overruled by the Court, and a matched control group of 141 Supreme Court decisions that were neither overridden nor overruled"); William Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1094 (2008).

60. *See* Baum & Brudney, *supra* note 11, at 837–38 (reviewing "321 cases: 116 from the Burger Court, 100 from the Rehnquist Court, and 105 from the Roberts Court").

61. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 516–17 (2013) (analyzing "695 Supreme Court Cases from 1986–2010").

conducted with Professor Corey Distlear focused solely on statutory interpretation in workplace and tax laws.⁶² The Baum and Distlear study analyzed 623 cases involving “employees in their status as employees” since the beginning of the Berger Court.⁶³ Professor Jonathan Choi, in what may be an analysis of the largest number of decisions, studied all Internal Revenue Service publications since 1919 to consider whether the IRS and the Tax Court employed purposivist or originalist tools.⁶⁴ In another study of tax cases, a team of researchers led by Professor Nancy Staudt considered 922 cases from 1912 to 2000.⁶⁵ These studies give a flavor of research done to date, but this review is not comprehensive.⁶⁶

2. Breadth of Tools Examined

Scholars also vary in the type of tools considered for their research. For example, Professor Krishnakumar’s database is more extensive than other scholars, capturing the presence or absence of fourteen different interpretive tools.⁶⁷ However, Professor Krishnakumar only coded for tools an opinion actually relied on,⁶⁸ and her cases were coded by human

62. See Warp and Woof, *supra* note 21; Canons of Construction, *supra* note 20.

63. Canons of Construction, *supra* note 20, at 16.

64. Choi, *supra* note 17, at 382–83 (discussing data set).

65. See Nancy Staudt, Lee Epstein, Peter Wiedenbeck, René Linstedt & Ryan J. Vander Wielen, *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1297 (2005) (discussing case selection). A final study worth noting was a limited examination of 42 bankruptcy cases between 1983 and 2000, which considered a wide range of interpretive tools. See Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence*, 45 N.Y. L. SCH. L. REV. 149, 154–55, 197 (2001).

66. Additional studies of note include Lyman Johnson & Jason A. Cantone, *Justice Stevens and Securities Law*, 12 J.L. ECON. & POL’Y 77, 84 (2016) (analyzing eighty-six cases to determine Justice Stevens’ legacy in the area of securities), Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 144 (2008) (analyzing “a sample of forty-two randomly selected statutory interpretation dissents that Justice Scalia wrote between 1986 and 2006”).

67. *Roberts Court*, *supra* note 3, at 231–32. The fourteen interpretive tools are: (1) the text or plain meaning, (2) dictionary definitions, (3) grammar-based canons, (4) the whole act rule, (5) other statutes, (6) precedent, (7) substantive canons, (8) agency deference, (9) Supreme Court precedent, (10) purpose, (11) practical consequences, (12) intent, (13) legislative history, and (14) language canons. See also *Dueling Canons*, *supra* note 13, at 922 (coding for all the same tools, except agency deference); *Backdoor Purposivism*, *supra* note 51, at 1292–93 (providing a list of the fourteen tools used for coding the cases, which are the same as those from the *Roberts Court* article). While Krishnakumar’s fourteen coded categories cover more variables than most of these statutory interpretation studies, Professors Eskridge and Baer coded 156 different variables in their study of Supreme Court decisions involving agency interpretations. See Eskridge & Baer, *supra* note 59 at 1203–26 (providing codebook information).

68. *Roberts Court*, *supra* note 3, at 232 (“In recording the Court’s reliance on these interpretive tools, I counted only references that reflected substantive judicial reliance on the tool in reaching an interpretation.”); see also *Dueling Canons*, *supra* note 13, at 923 (noting a similar coding method).

beings who used a certain amount of discretion to determine reliance. Professor Krishnakumar's methodology followed the earlier work of Professors Brudney and Ditslear, who captured data on ten similar categories, also coded by human beings (as opposed to computers).⁶⁹ However, Professors Brudney and Ditslear coded not only reliance on tools but also situations in which a tool is referenced but not relied upon, thus creating a more nuanced dataset.⁷⁰ Professor Brudney's most recent paper modifies both the number of tools used and reverted to coding for presence or absence of tools relied on and when they coded each individual tool.⁷¹

Some scholars who code for a wide range of tools group them into categories corresponding with interpretive theories.⁷² For instance, Professor Cross grouped tools into four categories: textualism, legislative intent, pragmatism, and canons.⁷³ Professor Zeppos considered whether a tool used fell into one of the following: legislative, executive, judicial, constitutional, canons of interpretation, and other.⁷⁴ Professor Choi, using natural language searches and machine learning for his extraordinarily large database, grouped tools as: purposivist terms, textualist terms,

69. *Canons of Construction*, *supra* note 20, at 23–24 (using (1) the text or plain meaning, (2) dictionary definitions, (3) language canons, (4) legislative history, (5) purpose, (6) legislative inaction, (7) Supreme Court precedent, (8) common law precedent, (9) substantive canons, and (10) agency deference); *see also Warp and Woof*, *supra* note 21, at 1249 (discussing “ten distinct interpretive resources on which the Court relies with some frequency”). The Brudney and Ditslear list is similar to the nine categories of interpretive tools employed by Professor Schacter. *See* Schacter, *supra* note 57, at 11–12 (using the categories of: statutory language, legislative history, other statutes, judicial opinions, canons of construction, “administrative materials,” secondary sources, dictionaries, and “miscellaneous other”).

70. *Canons of Construction*, *supra* note 20, at 24 (discussing coding three levels of reliance); *see also Warp and Woof*, *supra* note 21, at 1249 (discussing levels of reliance). Professor Schacter's research considered “only opinions making substantive use of particular interpretive resources . . . as using the resource.” Schacter, *supra* note 57, at 13. However, she counted any tool “as long as an opinion identified an interpretive resource as a legitimate source of judicial guidance on the statute's meaning and did not conclude that the resource was inappropriate for judicial consideration.” *Id.*

71. Baum & Brudney, *supra* note 11, at 837 n. 69 (coding only for ordinary meaning, dictionaries, language canons, legislative history, purpose, and agency deference but not for prior precedent).

72. *See* Christiansen & Eskridge, *supra* note 59, at 1330 (coding for plain meaning, whole act, legislative history, precedent, agency deference, dictionaries, rule of lenity, and invocations by the Court for Congress to revisit the issue).

73. CROSS, *supra* note **Error! Bookmark not defined.**, at 143–44 (discussing each of these broad categories and the tools that fall within each of the categories).

74. Zeppos, *supra* note 45, at 1089 (“Each category contained further breakdowns. For example, in the broad category denominated “legislative” there were six subcategories. Category and subcategory totals were generated for each case. These totals then provided a basis for the data used in the analysis.”).

statutory terms, normative terms, and substantive canons.⁷⁵ The studies using computer assistance simply code for presence or absence and do not consider the weight of reliance on the tool, thus reducing some subjectivity on the part of human coders.

Other studies consider a limited number of tools, looking for answers to more detailed research questions. For example, the research conducted by Professors Law and Zaring only examined references to legislative history collected through electronic searches.⁷⁶ One study by Professors Brudney and Baum focused on dictionary use.⁷⁷ Professor Mendelson coded her data for the presence of, and reliance on, thirty-two different canons of construction, aggregating them into groups of textual and substantive canons.⁷⁸ Professor Staudt's research team focusing on tax cases specifically tracked the Court's use of fourteen canons,⁷⁹ and recorded the Court's level of reliance on the canons.⁸⁰

All of these studies track opinion type and author. Many also consider how many justices join an opinion as an indication of how controversial an opinion may be.⁸¹ These studies create a blueprint for

75. Choi, *supra* note 17, at 420–42 (discussing categories of terms). Most of the studies undertaken to date have involved human coders looking for the presence or absence of certain tools of interpretation. In contrast, because Professor Choi used machine learning and other computer technology, he was able to capture not only *whether* a tool was used but the *frequency* of various search terms. *Id.* at 384–86 (describing methodology). In her study based on Justice Scalia's opinions, Professor McGowan grouped the tools into three general categories: text, secondary sources, and canons. McGowan, *supra* note 66, at 195–98.

76. Law & Zaring, *supra* note 14, at 1685–88 (describing methodology). Law and Zaring also tracked whether more than one opinion in the same case discussed the legislative history. *Id.* at 1686 (“This we did simply by noting, for each opinion, whether any other opinion in the same case had made some reference to legislative history.”). Tracking specifically for multiple opinions discussing the same interpretive tool is similar to the analysis that Krishnakumar conducted in her *Dueling Canons* article. *Dueling Canons*, *supra* note 13.

77. Brudney & Baum, *supra* note 61, at 518, n.127 (coding for dictionary use and basic case information).

78. Mendelson, *supra* note 9, at 90 (describing methodology). Although this study considered whether the Court relied on a canon, it did not grade the amount of reliance (central reliance, reliance with other tools, etc.). *Id.* at 94–95.

79. Staudt, et al., *supra* note 65, at 1932–34 (discussing the tools considered in the study).

80. *Id.* at 1934 (coding “whether the Court (1) relied on it, (2) refused to rely on it, (3) found the canon inconclusive, or (4) did not discuss the canon but implicitly relied upon it”).

81. *Dueling Canons*, *supra* note 13, at 924 (“[E]ach case and opinion was recorded as unanimous, close margin, or wide margin (cases with six or more Justices in the majority).”); *Warp and Woof*, *supra* note 21, at 1258–59 (coding whether the “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 one of two)”); see also Brian J. Broughman & Deborah Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51, 62 (2017) (in a study about the continued use of overridden and overruled Supreme Court cases, the researchers coded for number of Justices signing on to the majority opinion).

additional work in this area. As discussed below, I fashioned my study to be comparable with previous works.⁸²

B. *Empirical Work in Arbitration*

This study appears to be the first study looking at statutory interpretation of Supreme Court arbitration precedent. Most arbitration studies look at some aspect of the arbitration process or decisions made by arbitrators.

Although the arbitration process is generally private and not open to the public, researchers have conducted studies on publicly available arbitration agreements and awards, and surveys to arbitrators and lawyers.⁸³ For example, arbitration scholars authored various studies on whether arbitrators follow the law and what types of authority arbitrators cite in their awards.⁸⁴ Some scholars used empirical means to determine whether arbitration or litigation is the more advantageous forum for certain claims,⁸⁵ while other scholars consider issues related to the agreement to arbitrate itself, such as readability and the substantive terms.⁸⁶ Empirical studies appear to be more common among scholars of

82. See discussion *infra* Part III (discussing methodology).

83. KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING ADR 180 (2017) (“Arbitration also permits the parties to agree to privacy.”).

84. See, e.g., Ariana R. Levinson, et al., *Predictability of Arbitrators’ Reliance on External Authority*, 69 AM. U. L. REV. 1827, 1844–51 (2020) (conducting literature review of empirical studies primarily consisting of labor arbitration awards); *id.* at 1856–57 (discussing findings on citation patterns to statutes, case law, administrative sources, and secondary sources); Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1111 (2012) (noting the citing patterns in arbitrator awards); Christopher Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 203 (2006) (noting that whether arbitrators “follow the law in their awards is inconclusive”).

85. See, e.g., David Horton, *Forced Remote Arbitration*, 108 Cornell L. Rev. __ (forthcoming 2022) (comparing outcomes of claimants in remote arbitration compared to in-person arbitration); Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitral and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 112 (2014) (“An analysis of approximately 700 contemporary employment discrimination cases shows outcomes in arbitration are starkly inferior to outcomes reported in litigation: employees are nearly forty percent more likely to win and receive average awards nearly twice as large in cases adjudicated in the civil litigation system compared to those that are arbitrated.”); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843, 845–46 (2010) (reporting on fees for arbitration, time lengths for arbitration, and relief provided in arbitration); See generally Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051 (2009) (discussing general trends in AAA consumer arbitration, including success rate for consumers).

86. See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (finding that organizations include arbitration clauses in contracts with employees and consumers, but not in their own business-to-business contracts);

international arbitration than domestic arbitration in the United States.⁸⁷ Because previous arbitration research focused on one aspect of arbitration—from arbitration agreement to award—this study adds to the body of empirical literature by looking at the law surrounding arbitration.

IV. METHODS

This study builds on the literature but focuses exclusively on Supreme Court cases interpreting the FAA. To collect the cases, I ran electronic searches of Supreme Court cases citing each of the sixteen sections of the FAA.⁸⁸ Although the statute was enacted almost 100 years ago, the sixteen searches yielded an initial data set of eighty-six unique cases. Of those, fifty-two interpreted the FAA. Those fifty-two cases yielded one-hundred and fourteen opinions. These cases primarily involve disputes among businesses, as well as disputes between businesses, consumers, and employees. This study does not consider Chapters 2 or 3 of Title 9, as those chapters deal with international arbitration.⁸⁹ This study also does not cover cases decided exclusively under statutes relating to labor arbitration, such as the Labor Management Relations Act (LMRA).⁹⁰ Under this methodology, the *Steelworkers Trilogy* was not included because the Court did not interpret the FAA in its decision.⁹¹ However, the data set does include cases that rely on interpretations of the FAA and labor law, such as *14 Penn Plaza v. Pyett* and *Epic Systems v. Lewis*.⁹²

Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840–41 (2008) (concluding that some fees in arbitration are more expensive than litigation, but overall fees may be less in arbitration, and also concluding that arbitration may be more accessible than litigation, while suggesting more research on class action issues).

87. See, e.g., Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223, 232 (2013) (“Some of the same questions that inspire research into judicial decision-making have also inspired empirical research into investment arbitrators’ decision-making.”); Chiara Giorgetti, *Is Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 263, 266 (2013) (“The increasing reliance on empirical data in legal scholarship focused on international investment arbitration is recent.”); Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767, 775–78 (2008) (discussing trends in empirical research in international arbitration).

88. 9 U.S.C. §§ 1–16 (1947).

89. 9 U.S.C. §§ 201–208, 301–307.

90. See, e.g., 29 U.S.C. § 173(f) (regarding arbitration under the LRMA).

91. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

92. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The *Pyett* decision was the first major Supreme Court case to rely on the FAA in

I read and coded each case. A research assistant also read approximately 45% of the case to ensure quality. The research assistant was assigned two tasks: (1) to determine whether the case interpreted the FAA; and (2) if so, to code the case for tools of statutory interpretation. For the first task, my research assistant and I agreed 100% of the time on cases that should be within the dataset. As to the second, we agreed over 70% of the time when we coded independently. Most of our disagreements concerned whether or which canon applied. Given the nuanced distinctions I was making regarding canon use, I was not particularly concerned about the number of disagreements in our independent coding.⁹³ After consultation, we used a consensus model to determine the proper coding for each case.⁹⁴ To the extent that I changed individual case coding based on this process, I would go back through the database to ensure consistency across cases.

I employed a coding system like Professors Krishnakumar, Brudney, Distlear, and Schacter. I collected basic information for each case, including case name, year, author, class action status, opinion type (majority, dissent, etc.), and the number of signatories for each opinion.⁹⁵ When I aggregated the data, I used the label “concurring opinion” for any opinion that was not a majority and not a dissent.⁹⁶ I did not record each Justice’s vote on each case.

I collected data regarding the type of question considered by the Court. I collected this data in two ways. First, I collected the statute numbers for each part of the FAA interpreted by the Court. Second, I coded each opinion for its arbitration subject matter by placing it into one of the following categories: (1) preemption; (2) arbitrability; (3) jurisdiction; (4) award review; (5) conflicting federal statutes; or (6) other.

deciding a case involving a collective bargaining agreement. See Roger B. Jacobs, *Supreme Court Tips Against Individual Rights—Again*, 27 HOFSTRA LAB. & EMP. J. 267, 280 (2010) (relying upon *Gilmer*, the Court found no reason to distinguish between agreements signed by unions or by individuals so long as those agreements were “clear and unmistakable.”). Prior to that time, the Court relied more heavily on labor law to decide those cases; since *Pyett*, the Court appears to have blended both labor law and law under the FAA to decide these cases.

93. My research assistant worked for me between her first and second years of law school and, therefore, had not had the opportunity to take a course on statutory interpretation. While I trained her for coding and provided her with my codebook, her relatively untrained eye relating to the various types of canons of construction led to most of our initial disagreements in coding.

94. The purpose of the exercise was to ensure accuracy of results, not to validate the coding methodology. The coding labels leave some room for interpretation by the coder, so comparing notes and consulting on different ideas seemed prudent to ensure the most accurate data possible.

95. I include a copy of my codebook as Appendix A.

96. This relatively small category (21 separate opinions) includes true concurring opinions, as well as one plurality opinion, five partially concurring/partially dissenting opinions, and one part majority/part concurring opinions.

The “other” category captured cases such as *Bernhardt v. Polygraphic Co. of America*, determining the meaning of “in commerce” in Section 2, and *Circuit City Stores Inc. v. Adams*, interpreting a definition of “employment” in Section 1.⁹⁷ I did not code any tools of statutory interpretation discussed solely in the case’s procedural history, i.e., I did not code references to tools of statutory interpretation by the lower courts as summarized by the Supreme Court.

In arbitration literature, the term *arbitrability* often includes two sets of cases, which I coded separately. The first category of cases I captured as “arbitrability” follows the line of *Prima Paint* and considers whether courts or arbitrators make certain determinations, such as the applicability of a defense.⁹⁸ The second category I coded considers whether disputes that fall within the protection of federal statutes may be arbitrated at all. This second line of cases begins with *Wilko v. Swan*, and I coded them as “conflicts” with other federal law.⁹⁹ I only coded the tools used to interpret the FAA and not any other statute involved in the case, as to not muddy the data between tools used to interpret the FAA and tools used to interpret other statutes. For instance, in cases such as *14 Penn Plaza*, I only coded the portions relating to the FAA, and I did not code portions related to the Age Discrimination in Employment Act.

I coded thirteen primary interpretive tools. Because the nature of interpretive tools remained largely consistent for the last 200 years, the longitudinal nature of this study should not encounter definitional inconsistencies over time.¹⁰⁰ I coded for the following: (1) the text or plain meaning; (2) the whole act rule; (3) other federal statutes; (4) Supreme Court precedent; (5) dictionary definitions; (6) grammar, or syntactic, canons; (7) language canons; (8) substantive law canons; (9) legislative history; (10) legislative inaction; (11) practical consequences;¹⁰¹ (12) Congress’s intent or purpose; and (13) agency deference. Similar to other studies in this area, I also imported the Spaeth ideology for the opinions.¹⁰²

97. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

98. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 403 (1967) (“Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration . . . is not in issue.’”).

99. *Wilko v. Swan*, 346 U.S. 427 (1953).

100. See Baum & Brudney *supra* note 11 and accompanying text.

101. I also collected data on four subcategories of practical consequences: (1) business consequences, (2) administrative consequences, (3) absurdities created by an interpretation, and (4) justice or fairness consequences.

102. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, 2020 Supreme Court Database Code Book, Version 2020 Release 1

Within the category of legislative history, I separately captured the type of legislative history, notably: committee reports, debate statements, statements made at a hearing by a Congressperson, and statements made at a hearing by a witness. For some categories, I separated arbitration-related tools from general tools. For instance, I captured both FAA and non-FAA precedent, as well as the arbitration canon separate from other substantive canons.

As noted above, scholars employed varying methods on whether and how to capture the Court's reliance on a particular tool.¹⁰³ I attempted to take a middle ground by coding one of three levels for each tool. I coded a "0" if the opinion did not reference it, a "1" if it was referenced but not relied on (including if the court rejected the tool), and a "2" if the opinion relied on the tool. This coding method preserves a level of granularity that is both inclusive and discriminating. The coding is inclusive because it picks up all references to a tool; it is discriminating because it judges whether or not the opinion relies on the tool. i. Human coding allows this level granularity, whereas AI data analysis or keyword searching cannot make these distinctions.

Prior to discussing the results of this study, a few words about the limitations of this data are in order. First, the dataset is relatively small, involving only fifty-one unique cases over eighty-five years. To create a richer data set, I coded for a large number of tools that fall within the major theories of statutory interpretation.

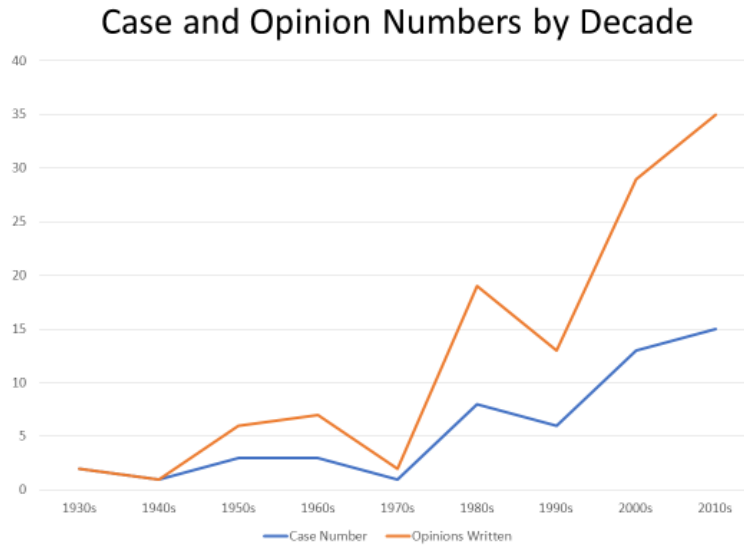
The data does not show any meaningful patterns when looking at individual years. However, grouping the cases by decade shows case trends despite the number of opinions varying from one decade to the next. For most purposes, I grouped the data by decade starting at 1980; all cases decided before 1980 appeared in their own group. I chose this start date because the Supreme Court decided key cases in the 1980s, which led to an explosion of arbitration law. Specifically, the 1984 case of *Southland v. Keating* and the 1989 case of *Rodriguez de Quijas v. Shearson/American Express*¹⁰⁴ opened the way to enforcing contractual arbitration agreements between companies and individuals. Chart 1 shows the volume of cases and opinions for each decade.

http://supremecourtdatabase.org/_brickFiles/2020_01/SCDB_2020_01_codebook.pdf
[<https://perma.cc/UFL7-697K>].

103. See *supra* Section II.B.

104. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

Chart 1



A second limitation to this study is my familiarity with most of the cases in the dataset. I do not approach this data with fresh eyes. I have written about and taught many of these cases, and I have preexisting ideas regarding how the Court has trended over time. I employed a research assistant to help check any biases I brought to the project.

I designed this study to be comparable with other studies in the literature; however, the subjective nature of human coding causes some limited variation across studies. Consider, for example, the case of *EEOC v. Waffle House*. When Professors Brudney and Distlear coded this case, they reported reliance on the text, Supreme Court precedent, and legislative inaction; they recorded citation, but no reliance on purpose and the arbitration canon.¹⁰⁵ When I coded the case, I coded reliance on the text, Supreme Court precedent, and practical considerations. I also coded citation, but not reliance on the arbitration canon. One reason for the difference in spotting legislative inaction and purpose is that those tools could have been used to code the court's interpretation of Title VII, not

105. *Canons of Construction*, *supra* note 20, at 26 (discussing coding of the *EEOC v. Waffle House* case).

the FAA, which would not be recorded in my data.¹⁰⁶ My coding of *practical consequences* was based on the Court's discussion of the potential for a double-recovery in these cases involving both EEOC proceedings and arbitration, but I may have coded this case with a slightly heavier hand than Professors Brudney and Distlear.¹⁰⁷

Despite my familiarity with the subject area and the data underlying this study (i.e., the Supreme Court cases), I had never systematically read the cases focused specifically on tools of statutory interpretation. My primary purpose of this study was to be exploratory, observe trends in the data, and ultimately look for surprising patterns. I also entered this project with an open mind regarding how the arbitration data may compare to other scholars' data and conclusions.

I began the study with certain hypotheses. I expected to find that the use of legislative history would be more prominent in the early decades interpreting the FAA compared with the last thirty years for two reasons: (1) purposivism was the predominant theory used by the Supreme Court before the appointment of Justice Scalia; and (2) more tools may have been necessary to interpret the statute earlier in time, and the precedential effect of those early determinations may make references to that history unnecessary.¹⁰⁸ In addition, given the Court's repeated description of the FAA as an "anomaly," I did not expect the Court to use many tools comparing the FAA to other legislation or relying on non-FAA precedent.¹⁰⁹ I also expected to see an increased reliance on the "arbitration canon" developed by the Court in the 1980s.¹¹⁰

V. RESULTS

This part considers the tools used in the opinions, focusing on how the tools relate to the judicial philosophies of textualism, purposivism, and

106. See *EEOC v. Waffle House*, 534 U.S. 279, 285 (2002) ("Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII. . . ."); *id.* at 288 (describing changes to the law that did not include any reference to arbitration, which is indicative of legislative inaction).

107. *Id.* at 296–98 (discussing the possibility of a double recovery for an employee and how such recovery can be avoided).

108. See James J. Brudney & Corey Distlear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 143–45, tbl.6 (2008) [hereinafter, *Legislative History*] (reporting on a "Scalia Effect").

109. See, e.g., *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (labeling the FAA as an "anomaly" because the law is substantive with preemptive power yet does not confer subject-matter jurisdiction on the federal courts); *Hall St. Assoc. LLC v. Mattel*, 552 U.S. 576, 581–82 (2008).

110. See *infra* note 151–54 and accompanying text for additional explanation of the arbitration canon and its variations.

intentionalism. This section is organized by giving a general summary of results, followed by a discussion of the Court's reliance on precedent, and then a discussion of the tools associated with the different philosophies. As appropriate, I compare my results with the work of previous scholars discussed above in the literature review.

A. *Summary of Results*

Considering the raw data, the Court relies on some tools more than others. Majority, dissenting, and other opinions have patterns of their own. Table 1 breaks down the percentage reliance on each tool overall and by opinion type. Table 1 also shows the chi-square analysis results for pairwise comparisons of individual tools across the type of opinion (e.g., majority v. dissent). The data show that the Court has a clear preference for relying on the text of the FAA and prior FAA precedent, and those rates of reliance become more pronounced in majority opinions.

Perhaps the most interesting item from Table 1 is the use of the arbitration canon. Majority opinions rely on the arbitration canon in 47% of cases, while dissents and concurrences do not. Comparing the arbitration canon to other substantive canons is equally interesting. While majority opinions rely on the arbitration canon in roughly half of the cases, majority opinions rarely invoke other canons. However, dissenting and concurring opinions are twice as likely to invoke a substantive canon *other than* the arbitration canon. The chi-squared analysis indicates a statistical significance in the use of the arbitration canon across opinion types, but it indicates no significance regarding other canon use.

Table 1

Tool of Interpretation	Percent Reliance on Tools of Interpretation by Opinion Type			
	Majority & Per Curium Opinions (n.50)	Dissenting Opinions (n.43)	Concurring and Other Opinions (n.21)	All Opinions (n.114)
Text / Plain Meaning	86.0% AB***, AC***	46.5% AB***, BC	28.6% AC***, BC	60.5%
Whole Act Rule	38.0% AB**, AC*	14.0% AB**, BC	9.5% AC*, BC	23.7%

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Other Federal Statutes	14.0% AB, AC	11.6% AB, BC	4.8% AC, BC	11.4%
FAA Supreme Court Precedent	86.0% AB ^{***} , AC ^{**}	44.2% AB ^{***} , BC	52.4% AC ^{**} , BC	64.0%
Non-FAA Supreme Court Precedent	48.0% AB, AC	32.6% AB, BC	28.6% AC, BC	38.6%
Dictionaries	2.0% AB, AC	0.0% AB	0.0% AC	.9%
Grammar Canons	0.0%	0.0%	0.0%	0.0%
Language Canons	14.0% AB, AC	7.0% AB, BC	4.8% AC, BC	9.6%
Arbitration Canon	46.0% AB ^{***} , AC ^{**}	7.0% AB ^{***} , BC	4.8% AC ^{**} , BC	23.7%
Non-Arbitration Substantive Canon	8.0% AB, AC	14.0% AB, BC	19.0% AC, BC	12.3%
Legislative History (Combined)	12.0% AB, AC	20.9% AB, BC	4.8% AC, BC	14.0%
Legislative Inaction	4.0% AB, AC	4.7% AB, BC	0.0% AC, BC	3.5%
Practical Considerations	56.0% AB, AC*	39.5% AB, BC	28.6% AC*, BC	44.7%
Intent or Purpose	44.0% AB, AC*	51.2% AB, BC ^{**}	14.3% AC*, BC ^{**}	41.2%
Agency Deference	0.0%	0.0%	0.0%	0.0%

Superscripts are used to indicate the significance of Chi-squared tests results for pairwise comparisons between pairs of columns for separate types of opinions.
 “AB” indicates the significance of results for the pairwise comparison for Column A (Majority & Per Curium Opinions) and Column B (Dissenting Opinions).

“AC” indicates the significance of results for the pairwise comparison for Column A (Majority & Per Curium Opinions) and Column C (Concurring and Other Opinions).

“BC” indicates the significance of results for the pairwise comparison for Column B (Dissenting Opinions) and Column C (Concurring and Other Opinions).

No asterisks indicate a p-value higher than 0.05, i.e. no statistical significance.

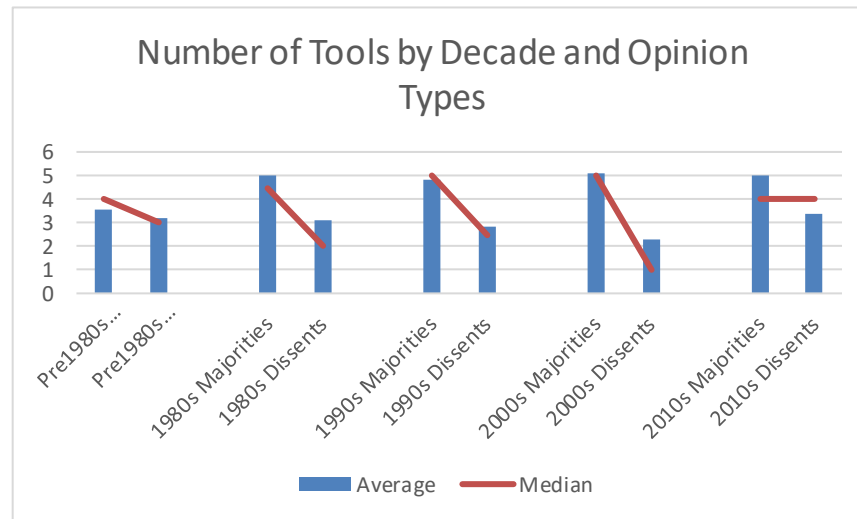
* indicates a p-value between 0.05 and 0.01.

** indicate a p-value of 0.01 and 0.001.

*** indicate a p-value below 0.001.

When I compare this arbitration data to other studies, a trend shows overreliance on three key tools, particularly in majority opinions: the FAA text/plain meaning, FAA precedent, and the arbitration canon. The result of such overreliance is the creation of an insular body of case law that increasingly expands the reach of the FAA. The FAA’s expansion has become controversial, as shown by a growing number of concurring and dissenting opinions, as well as closer vote counts. The other interesting trend is the increased reliance on a higher number of tools in the last decade. Chart 2 indicates the average and median number of tools used in an opinion by decade. Of note is the increase in the median number of tools in the 2010s. An increase in the use of tools may indicate frustration with existing precedent and justices searching for a new interpretation of an old statute.

Chart 2



B. *Reliance on Prior Precedent*

Justice Stevens astutely noted that “the court is standing on its own shoulders” by relying on its own precedent to expand the FAA.¹¹¹ Justice O’Connor similarly referred to the Court’s FAA rulings as an “edifice of its own creation.”¹¹² These observations are confirmed in my data, and even more so in the last two decades. Among all opinions, 64% of cases relied on a prior FAA case to interpret the FAA, 12% of cases mentioned but did not rely on a prior FAA case, and 24% of opinions did not rely on a prior FAA case at all.¹¹³ These rates of reliance are the highest compared to all other tools. Majority opinions rely on prior FAA cases at a rate of 86% and dissents at a rate of only 44%. In other words, majority opinions

111. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, dissenting). This phrase appears to be a nod to the phrase “Standing on the Shoulders of Giants,” first attributed to Bernard de Chartres. Although the classic phrase refers to the role of building on prior wisdom, Justice Stevens uses the phrase tongue-in-cheek to depict the court relying on itself.

112. *See Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, concurring) (“Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”).

113. Twenty-seven opinions do not cite any FAA precedent. Of those twenty-seven cases, only six of them are majority or per curiam opinions, thirteen are dissents, and the remaining nine opinions are concurrences and other opinions. Given the terse nature of many dissents and concurrences, the lack of reliance on previous arbitration cases is understandable.

are twice as likely to rely on prior FAA precedent than dissents. This phenomenon is statistically significant. Rarely is FAA precedent dismissed or rejected— only 12% of total opinions. When FAA precedent was rejected, it occurred overwhelmingly in dissenting opinions (twelve of the fifteen instances). The sole majority opinion rejecting a prior FAA case was *Bernhardt v. Polygraphic Co. of America*, which was decided in 1956. This opinion rejected an arbitration case from the 1930s relying on an interpretation of the FAA no longer supported under the Erie Doctrine.¹¹⁴

Reliance on FAA precedent becomes even more prevalent over time. Chart 3 presents this data by decade. Two items are worth noting. First, the lowest numbers of reliance on FAA precedent understandably occurred before 1980 because the precedent was still being developed. During the 1980s and 1990s, overall reliance on prior cases was at an all-time high. Not a single majority opinion rejected prior FAA precedent since 1956. The overwhelming support for FAA precedent in the 1980s and 1990s is explainable in the historical context of the wider alternative dispute resolution (ADR) movement. The 1976 “Pound Conference” articulated significant problems with litigation and touted the various alternative processes, explaining the possibility that those ADR processes might yield more efficient and more satisfying results to disputes.¹¹⁵ This enthusiasm included a preference for arbitration over court processes, partly based on the admirable interests of party autonomy and efficiency.¹¹⁶

This enthusiasm has simultaneously grown and waned in the twentieth century, resulting in a split based primarily on politically ideological lines. The increased use of arbitration agreements has drawn criticism from the Court and the scholarly community.¹¹⁷ Given this

114. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202 (1956) (citing *Shanferoke Coal & Supply Corp. of Del. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935)).

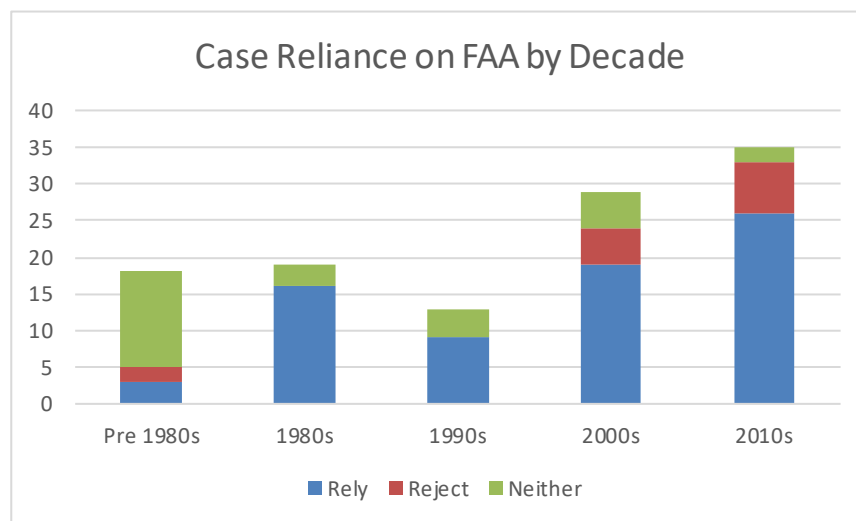
115. See Kristen M. Blankley, Ashley M. Votruba, Logen M. Bartz & Lisa M. PytlikZillig, ADR is Not a Household Term: Considering Ethical and Practical Consequences of the Public’s Lack of Understanding of Mediation and Arbitration, 99 NEB. L. REV. 797, 798 (2021) (discussing the history of the Pound Conference); see also Lara Traum & Brian Farkas, The History and Legacy of the Pound Conferences, 18 CARDOZO J. CONFLICT RESOL. 677, 683–86 (2017) (providing information on the history and purposes of the Pound Conference).

116. See, e.g., Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1145–47 (2019) (noting the expansion of judicial support for arbitration following the Pound Conference).

117. See Imre Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127, 141 (2018) (“With the spread of arbitration, society also loses the many benefits of having reported, public judicial decisions, such as the punitive and deterrent effects on wrongdoers and potential wrongdoers and the development, pronouncement, and clarification of

background, one might expect that the increased rejection of FAA precedent comes from the liberal members of the bench. However, the Court's modern liberal justices have rejected FAA precedent on several occasions: Justice Ginsberg (three cases), Justice Stevens (one case), Justice Breyer (one case), and Justice Sotomayor (one case). The more surprising finding, however, is the "Thomas Effect." In six cases, Justice Thomas filed a dissenting opinion based on his belief that the Federal Arbitration Act "does not apply to proceedings in state courts."¹¹⁸ Four of these occurrences are in dissenting opinions, breaking from other conservative colleagues.¹¹⁹

Chart 3



Overall, the reliance on prior FAA cases depicts a small, self-contained world of arbitration precedent. Indeed, while 64% (seventy-three opinions) of total opinions rely on FAA cases, only 36% (forty-one

legal doctrines which can serve as a published guide to others."); Richard Chernick, "ADR" Comes of Age: What Can We Expect in the Future?, 4 PEPP. DISP. RESOL. L.J. 187, 190 (2004) (discussing the business community's increased preference for arbitration following favorable Supreme Court rulings); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 TUL. L. REV. 1, 4-5 (1997) (discussing the downsides of increased use of arbitration, including waiver of jury rights and trial protections).

118. *Dr's Assocs., Inc. v. Cararotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting).

119. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J. dissenting); *Kindrad Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429-30 (2017) (Thomas, J., dissenting); and *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 59 (2015) (Thomas, J., dissenting).

opinions) rely on non-FAA Supreme Court precedent to interpret the FAA. In twenty-six of the forty-one opinions citing outside law, the Court relied on FAA and another type of precedent to interpret the FAA. These patterns show that the Court relies on itself more and more over time to determine the meaning of the statute.

Comparing reliance on Supreme Court precedent between this and other studies is difficult because the numbers other scholars report for this category vary widely. Professor Staudt's research shows a low reliance on precedent, around 35%, which will be explored in more detail below.¹²⁰ Professors Brudney and Ditslear report reliance on Supreme Court precedent considerably higher, around 81%.¹²¹ Professor Krishnakumar's most recent cumulative study shows reliance on precedent in the middle of these two, around 57%.¹²² These differences may result from coding and methodological variances.

Given the varying questions the previous studies sought to answer, only a few of them separated controlling versus noncontrolling precedent. Studies not limited by subject area were less likely to consider whether prior precedent was under the same statute or had *stare decisis* effect. Other studies explicitly answer this question, but with conflicting results, again making comparisons with this study difficult.¹²³

Consider Professor Staudt's study. Her research team reaches a similar conclusion—justices rely primarily on judge-made law compared to other types of tools, including the plain meaning of the text and legislative history. Her study concluded: “Our investigation also suggests that the justices are often willing to allocate power and discretion to themselves, not as co-equal partners, but rather, as the only relevant players in the interpretive game.”¹²⁴ Her study, like this one, involves a limited subject matter (tax), which may make the determination of controlling v. noncontrolling precedent easier for coders.¹²⁵ The Staudt study's rate of “reliance” on past precedent at only 35% appears to be due

120. Staudt et al., *supra* note 65, at 1955 (reporting reliance on Supreme Court precedent in tax cases). See *infra* notes 124–27124127 and accompanying text.

121. *Warp and Woof*, *supra* note 21, at 1253 (showing relatively equal rates of reliance on Supreme Court precedent for tax and employment cases).

122. *Backdoor Purposivism*, *supra* note 51, at 1297 (chart showing rates of reliance).

123. See, e.g., McGowan, *supra* note 66, at 165 (“Justice Scalia follows case law that interpreted the same statute or a similar statute when interpreting statutes about a third of the time in my sample [of dissenting opinions].”).

124. Staudt, et al., *supra* note 6565, at 1953.

125. *Id.* (“In reading the tax cases, it was apparent that the Court regularly relied on judge-made rules for purposes of interpreting the tax code.”)

to coding issues.¹²⁶ Staudt’s study appears to have a higher burden of what constitutes “reliance” than other scholars because her study required the prior case to be a “basis” of the decision.¹²⁷ Ultimately, what is notable for this paper is that reliance on Supreme Court precedent is the most frequently used tool of interpretation, consistent with the majority of the literature in the field.¹²⁸

C. *Textualist Tools*

This section considers the textualist tools used by the Court in deciding arbitration cases. This part begins with a discussion of the use of the text or plain meaning of a statute, followed by the use of canons of interpretation, dictionaries, and other textualist tools.

1. Text or Plain Meaning

The tool with the second-highest rate of reliance by the Court is the statutory text. Justices relied on the text in 59.6% of all opinions. Unlike other tools, the text was rarely rejected or cited without use. I coded only two opinions (1.8%) in which the text was cited but not substantively relied on, one unanimous opinion and one dissent.¹²⁹ In the remaining 38.5% of cases the text was not cited at all. Majority and per curiam decisions overwhelmingly relied on the text of the FAA, at 84.0%. Dissenting opinions relied on the text in just under half of the opinions, or 46.5%. Concurring and other opinions were least likely to rely on the text, at 28.6%.

Over time, the reliance on text appears to coincide with the increased conservative nature of the Court. Following the lead of other scholars, I

126. *Id.* at 1955 (“Overall, the Court used precedent in this manner in 35.02 percent (n=347) of the 991 tax cases; and in over a third of the 347 cases (n=118), precedent was the only rationale the Court gave for its decision.”).

127. *Id.* at 1954 (“Beginning with precedent, our protocols called for us to code cases in which the majority opinion writer asserted that a prior ruling served as a, or the, basis for interpretation (mere citations were insufficient).”).

128. See *Backdoor Purposivism*, *supra* note 51, at 1297–98 (chart showing rates of reliance with precedent reliance as the highest); *Warp and Woof*, *supra* note 21, at 1253 (showing overall reliance rates with precedent as the highest).

129. In *Mosely v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167, 172–73 (1963), Chief Justice Warren’s concurrence states hypothetically and without further explanation: “Can the Arbitration Act, in light of its language and legislative history, be applied to laborers and materialmen or to construction projects subject to the Miller Act?” In *First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938 (1995), the unanimous, majority opinions cites a number of FAA provisions but without any discussion of the text. See *id.* at 942 (citing 9 U.S.C. § 10 in a *see, e.g.* citation); *id.* at 948 (citing 9 U.S.C. § 16 but relying on other precedent, not the text, in determining the outcome).

utilized the Spaeth Database as a starting point for delineating whether an opinion was “conservative” or “liberal.”¹³⁰ Chart 4 displays the percentage use of reliance on text over time, comparing all opinions with majority and dissenting opinions. Chart 5 provides a comparison of the percentages of cases in each decade with a conservative or liberal rating in the Spaeth database, with additional lines for my revised assessment of whether the case was liberal or conservative-leaning. I changed the political ideology of nine cases (five from liberal to conservative and four from conservative to liberal), with an overall net gain of one conservative case.¹³¹ Under the adjusted ideology labels, the Supreme Court’s overall ideology was more conservative than liberal during each decade studied.

The parallels are notable. Decades marked by high reliance on the text of the FAA also tend to lead to conservative case outcomes. The Court’s opinions in the 1980s and 2010s show a high reliance on the text and a related high rate of conservative outcomes. By contrast, the 1990s involved the lowest levels of reliance on the text, and the percentage of liberal-leaning cases is much higher than the 1980s and 2020s. Although the trends are not exact, they are noticeable. Because the FAA is historically a business piece of legislation championed by the Chamber of Commerce and other business interests, the apparent correlation between the text- and business-friendly or “conservative” outcomes should be unsurprising.

130. See, e.g., Law & Zaring, *supra* note 14, at 1718–19 (describing variables, including items used from the Spaeth database); *Canons of Construction*, *supra* note 20, at 21 (relying on ideologies for individual Justices from the Spaeth database); *Legislative History*, *supra* note 108, at 130–31; Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 845 (2017) [hereinafter *Reconsidering*] (“In order to minimize errors and to make this study as replicable as possible, I coded for ideology by importing the ideological-direction coding from Professor Harold Spaeth’s Supreme Court Database for the cases in my data set.”); Spaeth, et al., *supra* note 102.

131. For instance, I coded as conservative two preemption cases that the Spaeth database listed as liberal. See *Preston v. Ferrer*, 552 U.S. 346 (2008) (preempting state administrative scheme that did not permit arbitration of cases); *Dr’s Assoc. v. Casarotto*, 517 U.S. 681 (1996) (preempting consumer protection law regarding arbitration). Conversely, I coded as liberal two cases in which arbitrators allowed class action procedures within arbitration that was ultimately overruled with instruction to proceed in bilateral arbitration. See *Oxford Health Plans v. Sutter*, 569 U.S. 564 (2013) (holding that arbitrator did not exceed powers in allowing class arbitration under the terms of the contract); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion suggesting that arbitrators may decide whether to permit class arbitration in the first instance).

Chart 4

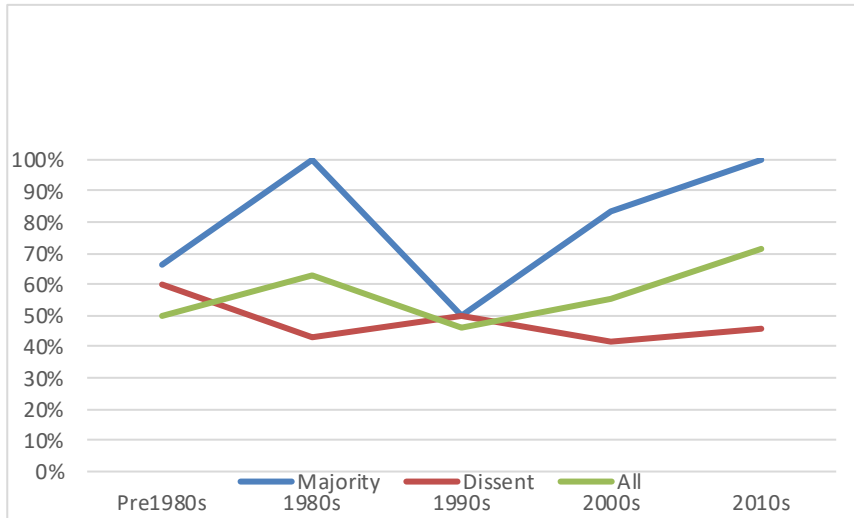
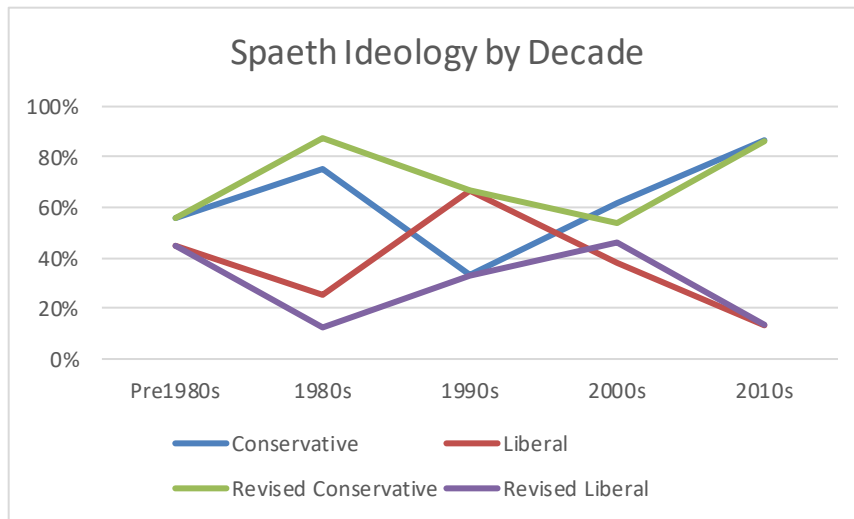


Chart 5



The arbitration findings here show a slightly higher reliance rate on the text than other studies. Professor Krishnakumar's study over the first eleven years of the Roberts Court shows reliance at a rate of 47.4% across

all opinions.¹³² In Professors Brudney and Dislear’s study of workplace cases from 1986 to 2002, they found that 55.1% of all opinions relied on the statute’s text.¹³³ In a different study, these authors reported a text reliance rate of 66.5% in tax cases and 60.6% in workplace cases, demonstrating that some areas of law may see higher reliance on the text than others.¹³⁴

The FAA text reliance rate of 59.6% is comparable with the 60.6% of text reliance in the Brudney and Distlear workplace dataset. One reason for the high rate of reliance on the text may be that the FAA is a simpler statute to interpret, and the text’s plain meaning is easy to determine based on the words Congress used. The statute is short, and it does not use technical language, so reliance on the plain meaning might be more appropriate in this situation compared to statutes that are more complex or technical.

2. Linguistic Canons of Interpretation

Following Professor Krishakumar’s lead, I separately coded grammar, language, and substantive canons.¹³⁵ I also separately coded for the arbitration canon. In my analysis, not one opinion referenced pure grammar or punctuation canon, whereas other scholars found varying but low, use of grammar and punctuation canons.¹³⁶

The Court similarly relies on linguistic canons with less frequency than other scholars observed. Justices relied on or cited linguistic canons in twelve opinions, or 10.5% of all opinions. Of those, half (or six) appeared in majority opinions, five in dissenting opinions, and the remaining one in a concurrence. When cited, the linguistic canon was nearly always relied on (twelve of fourteen appearances). The two instances in which the canon was rejected were both in dissents, in cases involving “dueling canons.”¹³⁷ The two most common canons referenced, although not always by name, were *ejusdem generis* and the canon against

132. Backdoor Purposivism, *supra* note 51, at 1297.

133. Canons of Construction, *supra* note 20, at 30 tbl. 1.

134. *Warp and Woof*, *supra* note 21, at 1253.

135. See *Roberts Court*, *supra* note 33, at 230; *Dueling Canons*, *supra* note 13, at 924; *Backdoor Purposivism*, *supra* note 51, at 1293.

136. See *Roberts Court*, *supra* note 3, at 236 (reporting an overall use of grammar canons at 5.1%); Staudt, et al., *supra* note 65, at 1935 (reporting punctuation/grammar canons at under .05% for tax decisions); Mendelson, *supra* note 9, at 102 (“Meanwhile, some of the grammatical and punctuation canons were among the least frequently engaged.”).

137. *Dueling Canons*, *supra* note 13, at 912 (defining a dueling canon as one in which a majority or concurring opinion reaches an opposite conclusion as a dissent using the same canon).

surplusage.¹³⁸ Both instances of dueling canons involved the application of *ejusdem generis*.¹³⁹

Among arbitration scholars, the most recognizable and impactful use of *ejusdem generis* can be found in the Court's interpretation of FAA Section 1 in *Circuit City v. Adams*.¹⁴⁰ Section 1 provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁴¹ The *Circuit City* case interpreted the last clause, i.e., what constitutes "any other class of workers engaged in foreign or interstate commerce." The plaintiff argued that the FAA did not apply to his age discrimination claim because his work at defendant Circuit City's store fell within the exception as a class of workers engaged in interstate commerce.¹⁴² In an opinion authored by Justice Kennedy, the Court rejected this argument and instead applied *ejusdem generis*, holding that the catchall phrase was limited to *transportation workers*.¹⁴³ Justice Souter dissented, arguing that the canon's use was inapplicable because of the practical considerations of the 1920s when many employment cases fell outside the FAA.¹⁴⁴ This case opened the door to enforce nearly all arbitration agreements in employment contracts.¹⁴⁵ The timing of the case

138. See, e.g., *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428–29 (2017) (applying a linguistic canon to give effect to all words in the statute); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 355 (2011) (applying a canon similar in operation to the surplusage canon in requiring that the Court must give effect to all of the words in the statute); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 81 (2010) (applying a language canon to give effect to all words in the statute).

139. See *Hall St. Assoc. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (relying on *ejusdem generis* to determine if the categories of judicial review in Sections 10 and 11 of the FAA are exclusive); *id.* at 594–95 (Stevens, J., dissenting) (rejecting the application of *ejusdem generis*); *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (relying on the canon of *ejusdem generis* to determine the meaning of a catch-all category of employees); *id.* at 138 (Souter, J., dissenting) (rejecting the application of *ejusdem generis*). Professors Brudney and Ditslear analyzed the specific use of linguistic canons in the *Circuit City* case, concluding that "promoting a coherent interaction between the FAA's coverage and exemption provisions, it seems impossible to view the majority's linguistic analysis as so obviously correct that it renders irrelevant any consideration of legislative intent." *Canons of Construction*, *supra* note 20, at 88.

140. *Cir. City*, 532 U.S. 105.

141. 9 U.S.C. § 1 (1947) (emphasis added).

142. See *Cir. City*, 532 U.S. at 113–14 (outlining Adams' reading of Section 1).

143. See *id.* at 114–15 (applying canon).

144. See *id.* at 139–40 (Souter, J., dissenting) (discussing historical context and arguing that resort to the canon was unnecessary).

145. See, e.g., Rachel S. Amow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 470 (2009) ("These decisions allow employers to insist on ex ante agreements to submit any employment claims, including those arising under federal discrimination statutes, to private resolution."); Jonathan H. Peyton, *What Arbitration Clause? The "Appropriate" Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 746 (2003)

also falls in line with the shift in textualist tools and conservative-leaning cases.

Compared to other studies, the rate of citation and reliance on grammar and other linguistic canons is low.¹⁴⁶ The data also shows fewer canons used than other studies.¹⁴⁷ Even when combined with the whole act rule, the FAA reliance on linguistic tools remains low.¹⁴⁸ One explanation may be that the Court's reliance on its own FAA precedent and text is so high.¹⁴⁹ In other words, the Court continues to expand the reach of the FAA from case to case and refuses to take a fresh look at the text.

3. Substantive Canons of Interpretation

For substantive canons, I separately coded the arbitration canon from the others.¹⁵⁰ The arbitration canon first arose in the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction, Co.* when the Court declared: "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements."¹⁵¹ By 1989, the Court generalized the policy as "federal policy favoring arbitration," and in 1990, Professor Eskridge characterized the arbitration canon as an "established" policy, while other scholars believe the canon is in development.¹⁵²

("Furthermore, employers will most likely continue to utilize arbitration to resolve employee claims in light of the Supreme Court's recent decision in *Circuit City Stores, Inc. v. Adams*, which approved the enforcement of arbitration clauses found in employment contracts.")

146. See, e.g., Mendelson, *supra* note 9, at 101 (finding that the *expression unius* canon appeared in 18.6% of the dataset of contested statutory issues); *Roberts Court*, *supra* note 33, at 236 (reporting use of linguistic canons in over 5% of the dataset).

147. See, e.g., Mendelson, *supra* note 9, at 101 (depicting a variety of canons utilized in the dataset); *Backdoor Purposivism*, *supra* note 51, at 1305 ("Perhaps the most interesting doctrinal discovery is that the textualist and textualist-leaning Justices on the Roberts Court regularly used two tried-and-true textualist canons, *noscitur a sociis* and *eiusdem generis*, to infer an underlying statutory purpose.").

148. See *infra* notes 157–58 and accompanying text. Many scholars combine the grammar canons with the linguistic canons and the whole act rule, among other tools. See, Mendelson, *supra* note 9, at 101 (using an inclusive list of canons that include the whole act rule, as well as substantive canons); *Canons of Construction*, *supra* note 20, at 12–13 (noting that the whole act rule is one of the most commonly applied linguistic canons in employment cases).

149. See *supra* Section IV.B (prior precedent) and Section IV.C.1 (reliance on text).

150. Substantive canons are "principles and presumptions that judges have created to protect important background norms derived from the Constitution, common-law practices, or policies related to particular subject areas." *Reconsidering*, *supra* note 130, at 833.

151. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 24 (1983) (emphasis added).

152. *Volt Inf. Scis., Inc. v Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). William N. Eskridge, *The New Textualism*, 27 UCLA L. REV. 621, 664 (1990) ("For example, the

The Court cites the arbitration canon more than all other substantive canons combined. Twenty-seven opinions, or 23.7% of opinions, relied on the arbitration canon, and another thirteen opinions, or 11.4% of all opinions, referenced but did not rely on it. Among majority opinions, twenty-three separate cases, or 46.0% of all cases, relied on the canon, thus building the canon over time. On the other hand, seven of the thirteen opinions rejecting the use of the arbitration canon are dissenting opinions. These numbers indicate that while the Court, through its majority opinions, appears to have established the arbitration canon, its use is controversial, particularly with Justice Stevens, who rejected its use in six different opinions.

My hypothesis that reliance on the arbitration canon would steadily increase over time was not borne out. Although the frequency of citation to the arbitration canon increases slightly over time (except for the small caseload in the 1990s), the percentage of reliance on the arbitration canon appears to be decreasing. The 1980s saw the greatest percentage reliance on the arbitration canon, with 36.8% of all opinions in that decade relying on it. The percentage dipped to 23% in the 1990s, increased to 27.9% in the 2000s, and fell slightly to 25.7% in the 2010s. In addition, the sheer number of opinions rejecting or not relying on the arbitration canon is increasing both in absolute numbers and percentage of opinions. Table 2 provides both the counts and percentages associated with the use of the arbitration canon. Perhaps the reason for the high rate of reliance on the arbitration canon in the 1980s was to establish this new canon. As the arbitration cases have become more controversial, reliance decreased in percentage of cases, but it appears more frequently. The controversial nature of the canon is shown through the increased rejection of its use, particularly in the 2000s and 2010s.

canon favoring arbitration is now an established proceduralist policy of the Court.”); *see also* *Canons of Construction*, *supra* note 20, at 26 (noting that the Court relied on the substantive arbitration canon in the *EEOC v. Waffle House* decision). *See* Mendelson, *supra* note 9, at 121 (describing the arbitration canon as “fledgling”); *see also* Jeffrey W. Stempel, *Tainted Love: An Increasing Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 796, 818 (2012) (“These factors suggest that there is not a strong national consensus in favor of arbitration.”).

Table 2

Decade	Reliance – Count	Rejection – Count	Reliance – Percentage	Rejection – Percentage
Pre-1980s	0	0	0%	0%
1980s	7	2	36.8%	10.5%
1990s	3	2	23.0%	15.4%
2000s	8	4	27.9%	13.8%
2010s	9	6	25.7%	14.3%

The Court cites the arbitration canon far more frequently than any other canon, as depicted in Chart 6. Other substantive canons occurring in the data include the presumption against implied repeal, the harmonious reading of statutes (appearing in six opinions, twice in a “dueling” manner),¹⁵³ and canons relating to federalism and preemption (appearing in four opinions).¹⁵⁴ The cases citing canon use are primarily in the

153. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (“Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it’s the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.”); *id.* at 1646 (Ginsburg, J., dissenting) (“Enacted later in time, the NLRA should qualify as ‘an implied repeal’ of the FAA, to the extent of any genuine conflict.”); *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (applying doctrine against implied repeal between FAA and Carriage of Goods by Sea Act); *id.* at 555 (Stevens, J., dissenting) (“According to the Court of Appeals, reading COGSA to invalidate foreign arbitration clauses would conflict directly with the terms and policy of the FAA. Unfortunately, in adopting a contrary reading to avoid this conflict, the Court has today deprived COGSA § 3(8) of much of its force.”); *Southland Corp. v. Keating*, 465 U.S. 1, 20 (1984) (Stevens, J., concurring in part and dissenting in part) (“Repeals by implication are of course not favored, and we did not suggest that Congress had intended to repeal or modify the substantive scope of the Arbitration Act in passing the Securities Act.”); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 467–68 (1957) (Frankfurter, J., dissenting) (“I would add that the Court, in thus deriving power from the unrevealing words of the Taft-Hartley Act, has also found that Congress ‘by implication’ repealed its own statutory exemption of collective-bargaining agreements in the Arbitration Act, an exemption made as we have seen for well-defined reasons of policy.”).

154. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 367 (2011) (Breyer, J., dissenting) (“But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State’s action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California’s law, not to strike it down.”); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (discussing traditions for dealing with preemption); *id.* at 292 (Thomas, J., dissenting) (“Even if the interstate commerce requirement raises uncertainty about the original meaning of the statute, we should resolve the uncertainty in light of core principles of federalism.”); *Volt Inf. Scis., Inc. v. Bd. Of Trs. Of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) (“The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”).

Court's FAA preemption cases.¹⁵⁵ One unexpected result in this data is that only one opinion relied on *both* the arbitration canon *and* an additional substantive canon.¹⁵⁶ Overall, the Supreme Court cited substantive, nonarbitration canons in 12.3% of opinions, which is similar to the numbers reported by other scholars.¹⁵⁷

The selective use of canons in the Court's arbitration preemption docket lends credence to the idea that the Court may be using textualist tools to reach a desired outcome. In other areas of the Court's preemption jurisprudence, the Court invokes canons to *limit* the preemptive effect of federal statutes.¹⁵⁸ None of these canons are cited in the arbitration preemption cases, and all the cases resulted in preemption of state law. Instead, the Court is more likely to cite to the arbitration canon to expand preemptive effect, starting with *Southland v Keating*.¹⁵⁹ The *Southland* case, authored by Justice Burger, utilizes eight unique tools of interpretation, and plainly states: "In enacting § 2 of the federal Act, Congress *declared a national policy favoring arbitration* and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."¹⁶⁰ The Court then relies on this, and similar language, in six other cases preempting state law without citing countervailing preemption canons.¹⁶¹

155. See, e.g., William M. Eskridge & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 643–44 (1992) (discussing federalism canons and instances in which the Court favored federalism and those instances in which the Court favored a national policy protecting individual liberties).

156. *Epic Sys. Corp.*, 138 S. Ct. at 1621 ("The Act, this Court has said, establishes a liberal federal policy favoring arbitration agreements") (internal quotation marks removed); *id.* at 1624 (invoking the canon to read statutes harmoniously).

157. See, e.g., *Reconsidering*, *supra* note 130, at 850 (reporting the Roberts Court's reliance on substantive canons at 14.4%); *Canons of Construction*, *supra* note 20, at 30 (reporting canon use in 11.6% of opinions).

158. CROSS, *supra* note 1, at 90 (commenting on various canons and tests to limit preemptive power and preserve state sovereignty); Mendelson, *supra* note 9, at 120 ("The Roberts Court has continued to broaden the federalism canons, announcing that federal statutes will be narrowly interpreted if they intrude via overlapping jurisdiction into areas of "traditional" state regulatory authority.").

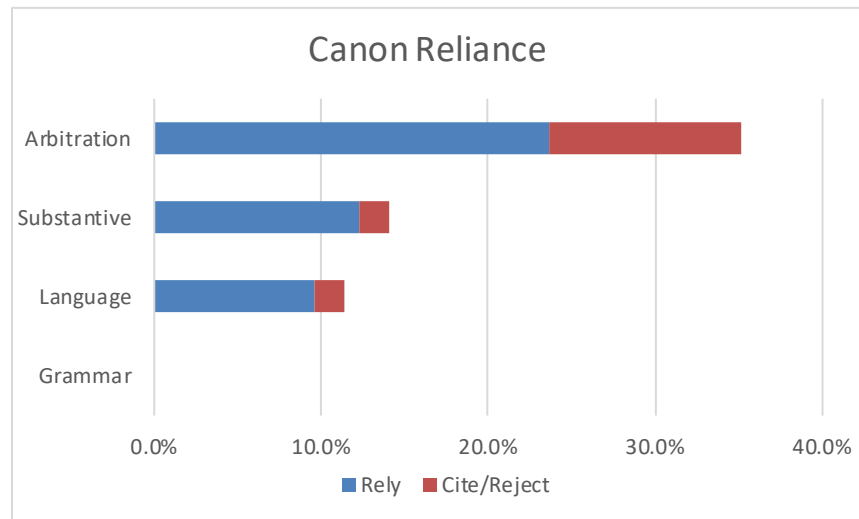
159. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

160. *Id.* at 10.

161. In chronological order, those cases are: *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (citing arbitration canon in case preempting a portion of the California Labor Code); *Dr's Assos. v. Casarotto*, 517 U.S. 681, 687 (1996) (citing the "equal footing" version of the arbitration canon when invalidating a portion of Montana's consumer protection law); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 443 (2006) (citing arbitration canon in case invalidating a portion of Florida's usury law); *Preston v. Ferrer*, 552 U.S. 346, 343 (2008) (citing arbitration canon in case preempting a portion of California labor law as promulgated by a California agency); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing arbitration canon in case preempting California common law in the

One could legitimately argue that the 1984 *Southland* case set the precedent before the Roberts Court's resurgence of the federalism canons, but the absence of discussion of federalism canon may indicate a substantive preference in picking and choosing among the textualist tools to achieve a desired outcome.

Chart 6



4. Other Textualist Tools

A few additional textualist tools are worth noting. I coded twenty-seven opinions, or 23.7% of all opinions, as relying on the whole act rule. An additional five opinions, or 4.4%, cited the whole Act without reliance, and the remaining eighty-two opinions, or 71.9%, did not reference the whole act rule at all. Of the cases relying on the whole act rule, nineteen are majority opinions, or 38.0% of all majority opinions, and six are dissents, or 14% of all dissents.¹⁶² These numbers are slightly lower than those reported in Professor Krishnakumar's most recent article, in which she reports reliance on the whole act rule for all cases between 2005 and 2016 at 27.0%.¹⁶³

area of class actions); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425 (2017) (relying on arbitration canon in case preempting a portion of Kentucky law regarding nursing homes).

162. The remaining two opinions citing the whole act rule are concurring opinions.

163. *Backdoor Purposivism*, *supra* note 51, at 1313 ("The members of the Roberts Court referenced whole-act-rule arguments in 27 percent (269 of 995) of the opinions they authored during

The greatest use of the whole act rule can be found in the Court's earliest FAA cases, including four of the first five majority opinions decided by the Court.¹⁶⁴ Broken down by decade, the percent of opinions relying on the whole act rule is: 33% before 1980; 11% in the 1980s, 23% in the 1990s; 31% in the 2000s; and 20% in the 2010s. Justices cited the whole Act, but did not rely on it, in five majority opinions. Prior to conducting this analysis, I expected the use of the whole act rule to be higher. The FAA is a short statute with sections that cross-reference one another.¹⁶⁵ Perhaps the high rates of reliance on the text and FAA precedent make resorting to the whole act rule unnecessary.

Finally, dictionary use in FAA cases is low. The court relied on dictionaries in just one case (.9% of all cases) and rejected the use of a dictionary in one case (.9% of all cases). The remainder of the cases do not mention dictionaries at all. In 1995, the *Allied–Bruce Terminix v. Dobson* Court used a dictionary from 1933 to determine if the words *involving* and *affecting* are the same in a commerce clause analysis.¹⁶⁶ More recently, Justice Gorsuch rejected the use of a recent Black's Law definition of *employment* to determine that term's meaning in *New Prime v. Olivera*.¹⁶⁷ Otherwise, dictionaries are not mentioned.

Other scholars report higher dictionary usage. For instance, Professor Krishnakumar cites a 20.5% reliance rate on dictionaries for the Roberts' Court, while Professors Brudney and Distlear found only 6.3% dictionary reliance in tax cases and 4.4% in workplace cases.¹⁶⁸ The *Warp and Woof* data, however, is more like the FAA data in terms of subject matter

the period between January 31, 2006 and July 1, 2017.”). I followed the lead of Professor Krishnakumar and recorded the whole act rule separately. Other scholars consider it to fall within other linguistic canons.

164. In order from earliest to latest: *Marine Trans. Corp. v. Dreyfus*, 284 U.S. 263, 274–75 (1932) (interpreting Section 8 of the FAA in connection with Section 3); *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449, 452–53 (1935) (interpreting Section 3 in conjunction with Section 4); *The Anaconda v. Am. Sugar Refin. Co.*, 322 U.S. 42, 45–46 (1944) (interpreting Section 8 in conjunction with Section 4); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (“Sections 1, 2, and 3 are integral parts of a whole.”).

165. See Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 720–23 (2015) [hereinafter *Impact Preemption*] (describing how the “front end” and “back end” provisions work together within each category).

166. *Allied–Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 274 (1995) (The dictionary finds instances in which “involve” and “affect” sometimes can mean about the same thing.”) (citing OXFORD ENG. DICTIONARY 466 (1st ed. 1933)).

167. *New Prime v. Olivera*, 139 S. Ct. 532, 539 (2019) (“But this modern intuition isn’t easily squared with evidence of the term’s meaning at the time of the Act’s adoption in 1925.”).

168. *Backdoor Purposivism*, *supra* note 51, at 1297 (citing table data); *Roberts Court*, *supra* note 3, at 236 (citing 18.5% reliance on dictionary definitions in the first three years of the Roberts Court); *Warp and Woof*, *supra* note 21, at 1253; see also Choi, *supra* note 17, at 397 (finding that “in many recent years, the IRS made almost no reference to . . . dictionaries.”).

limitations over a much longer period. Importantly, dictionary use is a relatively new tool for the Supreme Court, gaining popularity in the Rehnquist Court.¹⁶⁹ By the time Chief Justice Rehnquist was elevated to the bench, the FAA was over sixty years old, and the Supreme Court had already decided fourteen FAA cases.

D. *Intentionalist Tools*

Intentionalism examines the intent of Congress at the time of a statute's passing to determine its meaning. The best evidence of intentionalism is legislative history. Unfortunately, the "legislative history of the FAA is scant, at best," focusing primarily on the enforcement of arbitration agreements as written involving interstate commerce.¹⁷⁰ Business interests sought passage of the bill, and they were the primary users of arbitration at the time.¹⁷¹ The advent of consumer and employment arbitration came later, as did the phenomenon of asking an arbitrator to resolve a claim arising under a statute.¹⁷²

Overall, the Supreme Court's reliance on legislative history in the FAA dataset was low compared to other tools. Approximately 14% of all opinions relied on legislative history, and another 9% cited or rejected the use of legislative history. The remaining 77% of opinions failed to mention legislative history at all. Dissenting opinions were twice as likely, while concurring opinions were four times as likely, to rely on legislative history than majority opinions. Majority opinions rejected legislative history the most. Table 3 shows the frequency and percentage of legislative history by opinion type.

169. Brudney & Baum, *supra* note 61, at 494–95 (discussing the dearth of opinions citing dictionaries prior to 1986).

170. *Impact Preemption*, *supra* note 165, at 725. The FAA was primarily a response to judges' refusal to enforce arbitration agreements as executory contracts. "A party could shirk the duty to arbitrate by filing a lawsuit at any time prior to the issuance of an arbitrator's award. Breaching an arbitration agreement resulted in nominal legal damages, and the courts deemed arbitration agreements as unenforceable." *Id.* at 719.

171. *See id.* at 725 (discussing the role of Julius Henry Cohen, the "primary drafter" of the FAA who championed the interests of the New York Chamber of Commerce and the American Bar Association Committee on Commerce, Trade, and Commercial Law).

172. Historically, arbitration sought to resolve contract issues between businesses, and expert businesspersons served as arbitrators. Business parties expected arbitrators to apply industry standards to disputes on matters such as workmanship, quality, and timeliness. *See* BLANKLEY & WESTON, *supra* note 83, at 176–77 (describing arbitration's history back to medieval European practice).

Table 3

	Majority (n.50)	Dissent (n.43)	Concur (n.21)	All (n.114)
Reliance	n.6 (12%)	n.9 (21%)	n.1 (5%)	n.16 (14%)
Reference/Reject	n.8 (16%)	n.1 (2%)	n.1 (5%)	n.10 (9%)
Neither	n.32 (72%)	n.33 (77%)	n.19 (90%)	n.88 (77%)

The percentage of FAA cases relying on legislative history is low compared with other scholars's studies. For example, the research by Professors Zaring and Law found an average use of legislative history at just under 48%, with no statute studied involved less than 13.9% of opinions citing legislative history.¹⁷³ Professor Cross similarly reported a frequency of legislative history use in 42% of the opinions he studied.¹⁷⁴ In her study of the first three years of the Roberts Court, Professor Krishnakumar reported a lower number of legislative history use than other studies (overall use at 23%), and her most recent work reports similar rates of reliance.¹⁷⁵

The FAA, with 23% of its opinions citing legislative history in some way, would fit among the studies with the lowest percentages of reliance.¹⁷⁶ Breaking this number down further, only 9% of majority decisions and 21% of dissenting decisions rely on legislative history in the opinion. These numbers are far lower than other reported studies, and the fact that dissenting opinions rely on legislative history more than twice as often as majority opinions is also out of line with previous research.¹⁷⁷ One explanation of the low reliance on legislative history is that the FAA

173. Law & Zaring, *supra* note 14, at 1705–06. The Food and Drug Act is the statute with the highest percentage of opinions citing legislative history, at 73.7%. *Id.* This study reported that 47.9% of all opinions cited legislative history.

174. CROSS, *supra* note **Error! Bookmark not defined.**, at 145 (“In the data used for my analysis, some legislative history was used in 42% of the justices’ opinions.”).

175. *Roberts Court*, *supra* note 3, at 236 (finding legislative history referenced in 26.5% of majority opinions, 28.2% of dissenting opinions, and 6.2% of concurring opinions); *Backdoor Purposivism*, *supra* note 51, at 1298; *see also* Zeppos, *supra* note 45, at 1093 (“Legislative history is also frequently cited: congressional reports appear in 32% of the cases, congressional debates in 16.9% of the cases, and congressional hearings in 12.6% of the cases.”).

176. Law & Zaring, *supra* note 14, at 1705–06 (reporting the following rates of reliance of legislative history for the following: Jones Act, 13.9%; Habeas Corpus 16.8%; Federal Employers’ Liability Act 26.5%; and Sherman Antitrust 30.6%).

177. *Id.* at 1725 (“Our estimation of the model also revealed that the Justices were significantly less likely to cite to legislative history when authoring dissenting or concurring opinions than when authoring majority opinions.”).

is short and not particularly complex, suggesting that the Court does not need to use legislative history to determine its meaning.¹⁷⁸

Looking at the use of legislative history over time, the raw number of opinions utilizing legislative history charts is a V-shaped distribution with the lowest number of opinions in the 1990s. When those numbers are converted to percentages of total opinions, the normalized distribution shows a general decline in the use of legislative history over time. Interestingly, no majority opinion has relied on legislative history since 1995, when the Court decided *Allied–Bruce Terminix v. Dobson*.¹⁷⁹ Since then, only dissenting opinions have relied on legislative history.¹⁸⁰ In contrast, over the whole dataset, eight majority opinions declined to rely on legislative history, four post-date *Terminix*, meaning that nearly all modern FAA majority opinions ignore legislative history altogether.¹⁸¹ Charts 7 and 8 show the number and percentage of opinions using legislative history by decade. Perhaps the timing of *Allied–Bruce* is evidence of the controversial *Scalia effect*, theorizing that the Court relied on legislative history significantly less since Antonin Scalia was appointed as a Justice.¹⁸²

178. *Id.* at 1720–21 (discussing complexity as a statistically significant variable in predicting the use of legislative history).

179. *Allied–Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 274 (1995) (relying on committee reports).

180. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642–43 (2018) (Ginsberg, J., dissenting) (“The legislative hearings and debate leading up to the FAA’s passage evidence Congress’ aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes.”); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 477 (2015) (Ginsberg, J., dissenting) (citing legislative history to determine Congress’ intent); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 359–60 (2011) (Breyer, J., dissenting) (using legislative history to determine Congressional intent); *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 126–27 (2001) (Stevens, J., dissenting) (“Nevertheless, the original bill was opposed by representatives of organized labor, most notably the president of the International Seamen’s Union of America, because of their concern that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements.”); *id.* at 136 (Souter, J., dissenting) (“That conclusion is in fact borne out by the statement of the then-Secretary of Commerce, Herbert Hoover.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (relying on multiple pieces of legislative history).

181. *See Epic Sys. Corp.*, 138 S. Ct. at 1631 (“By contrast, the dissent rests its interpretation on legislative history. But legislative history is not the law.”); *AT&T Mobility LLC*, 563 U.S. at 345 (relying on prior FAA precedent rather than legislative history); *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009) (referencing legislative history in a citation but without any discussion); *Cir. City*, 532 U.S. at 119 (“As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.”).

182. *Legislative History*, *supra* note 108, at 143–44 & tbl. 6; *see also Warp and Woof*, *supra* note 21, at 1256–57 (noting decrease in use of legislative history during the Rehnquist and Roberts Courts, particularly in the area of employment cases). *But see Law & Zaring*, *supra* note 14, at 1729 (finding no evidence of a “Scalia effect”).

Chart 7

Number of Opinions Using Legislative History by Decade

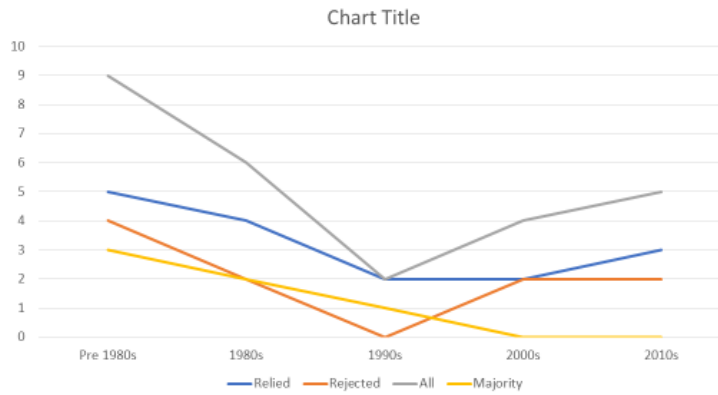
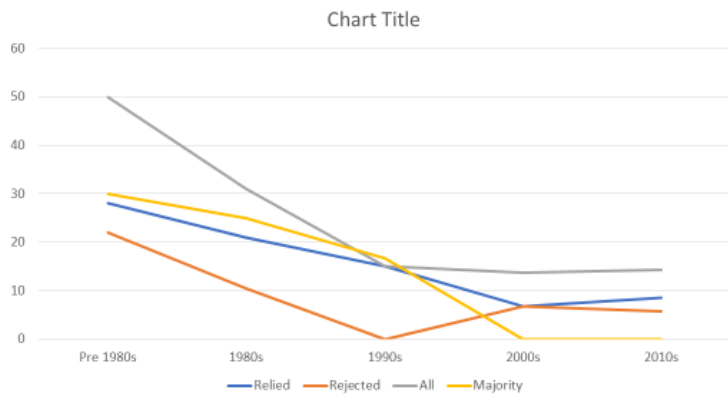


Chart 8

Percentage of Opinions Using Legislative History by Decade



This downward trend is also explainable. Congress did not generate much legislative history when it passed the FAA.¹⁸³ Legislative history use usually goes down over time as the Court interprets the statute.¹⁸⁴ Professors Zaring and Law noticed similar trends among other statutes and hypothesized that as a statute ages, precedent develops and legislative history is not needed to the same extent.¹⁸⁵ They also note that when a statute turns approximately ninety, the Court begins to use legislative history again¹⁸⁶ to either address unanticipated problems¹⁸⁷ or move in a new direction after being “hemmed in” with precedent “in need of repair.”¹⁸⁸ Under this theory, if the Court began relying on legislative history again, it would fit in a trend with other roughly ninety-year-old statutes.

One surprising finding is the type of legislative history the Court used. Committee reports are generally considered the most reliable form of legislative history because that material speaks for the whole committee. Statements made at hearings are among the least reliable.¹⁸⁹ Previous studies confirm that the Court also finds committee reports most reliable by citing them most frequently, followed by debate statements, and then hearing statements.¹⁹⁰ In the arbitration data, sixteen opinions

183. See *Impact Preemption*, *supra* notes 170–71 and accompanying text.

184. Law & Zaring, *supra* note 14 at 1720–21 (discussing age as a statistically significant variable in predicting the use of legislative history). In Professor Staudt’s study shows nearly the exact opposite phenomenon examining tax statutes. See Staudt, et al., *supra* note 65, at 1944–45 (describing phenomenon). Her data show almost no use of legislative history in the first sixty years of the statute’s existence, with reliance on legislative history “jumping” since the mid 1990s. *Id.*

185. Law & Zaring, *supra* note 14, at 1724 (“The older the statute becomes, however, the more substantial the body of precedent the Court develops, thus reducing the need for resort to legislative history.”).

186. *Id.* at 1722 (“Initially, the probability of legislative history usage decreases with age and bottoms out when a statute is approximately ninety years old. Beyond that age, however, the likelihood of legislative history usage begins to increase as the statute gets older.”).

187. *Id.* at 1724 (“It may be that, beyond a certain age, the guidance of precedent and the benefit of experience can no longer compensate for the interpretive uncertainty that surrounds an increasingly antiquated statute.”).

188. *Id.* at 1725 (noting that Justices may feel “hemmed in by case law that strikes them as unmanageable, incorrect, or otherwise in need of repair. At that point, legislative history may constitute a useful tool for overcoming the restraint of stare decisis.”).

189. CROSS, *supra* note **Error! Bookmark not defined.**, at 144–45 (discussing the difference among types of legislative history and citing the significantly higher use of committee reports compared to other types of legislative history in his data set).

190. *Warp and Woof*, *supra* note 21, at 1262 (chart depicting types of legislative history used by the Court in employment and tax cases); see also Law & Zaring, *supra* note 14, at (noting that the Court “cited congressional reports in approximately one-third of its statutory interpretation cases, congressional debates in another 17%, and congressional hearings in another 13% of cases”); Schacter, *supra* note 57 at 15 (“This is not entirely surprising, given that committee reports are widely

cited legislative history; fourteen unsurprisingly relied on a committee report; however, seven relied on the testimony of a *witness* at a Congressional hearing, while only five relied on the testimony of a *Congress member*. Of the opinions that merely referenced or outright rejected the use of legislative history, in seven of the ten cases, the Court rejected the use of a committee report, while only one opinion rejected the testimony of a witness and one rejected the testimony of a Congress member. Why might a witness receive such deference? That witness was Julius Henry Cohen, who served as general counsel for the New York State Chamber of Commerce and was a principal drafter of the FAA.¹⁹¹ Thus, the Court understandably relies on Cohen's statements to determine the intent of the FAA, even though overall use of legislative history is comparatively low.

I originally hypothesized that reliance on legislative history would be most prominent in the earliest cases. This theory is supported by the data, although I cannot tell from the data whether this trend exists because the Court was more open to legislative history in the first half of the twentieth century or because the FAA was a newer statute with fewer interpretive cases. The somewhat surprising finding is the increased mention of legislative history in dissenting opinions in the most recent decade, supporting Professors Zaring and Law's theory that Justices return to an examination of legislative history to find a way to counter the weight of prior precedent.

E. Purposivist Tools

This section considers two remaining: (1) practical consequences of its interpretation; and (2) statements of Congress's purpose and intent. Both tools seek to determine how the FAA would interpret the question today – as opposed to 1925. In the FAA cases, the Court relies on practical considerations in 51 of its 114 opinions, relying on this tool of interpretation in 44.7% of all opinions. Majority opinions relied on practical considerations in roughly 56% of all majority opinions, and dissents relied on this tool in roughly 63% of all dissenting opinions. Concurring and other opinions only relied on practical consideration 29% of the time, but many of those opinions are short and do not rely on a large

regarded as a more credible form of legislative history than, for example, the statements made by individual legislators.”).

191. Stephen E. Freidman, *The Lost Controversy Limitation of the Federal Arbitration Act*, 46 U. RICH. L. REV. 1005, 1034 (2012); see also Stephen E. Friedman, *Trusting Courts with Arbitration Provisions*, 68 CASE W. RESV. L. REV. 821, 826 (2018) (referring to Cohen as a “key driving force behind and advocate for the FAA”).

number of tools. These numbers greatly exceed the percentage of opinions relying on practical considerations by other scholars; the FAA cases rely on practical considerations ten percentage points or more compared to other studies.¹⁹²

For every case involving practical consequences, I captured the type of practical concern addressed by the court. The Court's top practical concern was an administrative concern. Chart 9 depicts the breakdown of all the practical consequences discussed, and Chart 10 breaks down those numbers further by isolating the majority and dissenting opinions. Of the fifty-four cases discussing practical consequences (fifty-one relying on practical consequences, and three rejecting or not relying on the argument), twenty-nine considered administrative aspects, or 53.7% of all these references. Among majority opinions, administrative concerns arose nineteen times, or 38% of all majority opinions; dissenting opinions rely on administrative concerns only six times, or 15% of all dissents. Administrative concerns ranged from an arbitrator's ability to interpret arbitration forums rules,¹⁹³ to forum shopping between federal and state courts,¹⁹⁴ to the practical differences between bilateral and classwide arbitration, among others.¹⁹⁵ The individual justices invoking practical consideration include both liberal and conservative justices, as well as originalist, purposivist, and intentionalist jurists. The high reliance on administrative concerns is not surprising given the subject matter at issue.

The second most frequently cited practical concern is fairness. The Court discussed fairness concerns in nineteen opinions, or 35.8% of all opinions discussing practical consequences. Unlike administrative concerns, fairness concerns appear disproportionately in dissenting

192. *Backdoor Purposivism*, *supra* note 51, at 1297 (finding reliance on practical consequences at 33.9%); *see id.* at 1319–20 (finding textualist judges “regularly invoked practical reasoning in the opinions they authored . . . [at a rate of 31.2%]. This in itself is significant, because practical considerations are entirely external to the statutory text and because textualists regularly denounce consequentialism as an inappropriate basis for judicial decision-making.”); *Roberts Court*, *supra* note 3, at 236 (finding an overall rate of relying on practical consequences at 33.2%); McGowan, *supra* note 66, at 174 (finding that Justice Scalia's dissents invoke practical consequences 55% of the time); Zeppos, *supra* note 45, at 1107 (finding practical considerations cited in 28.8% of cases).

193. *See* *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (“Moreover, the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.”).

194. *See* *Vaden v. Discover Bank*, 446 U.S. 49, 67–70 (2009) (discussing a number of practical consequences for interpreting the statute, particularly in refuting a contrary reading by the dissent).

195. *See* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (“Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347–50 (2011) (discussing a litany of practical differences between class arbitration and bilateral arbitration).

opinions. Fairness concerns arise in nine dissenting opinions, or a rate of 22% of dissenting opinions, and only five times in majority opinions, or 10% of all majority opinions. Fairness concerns arise most commonly in opinions written by liberal-leaning justices, but these concerns are not new. As early as the overruled *Wilko v. Swan* case, the Court considered the implications of its ruling to individual investors in language that rings of fairness, even if that word is not expressly used.¹⁹⁶ In more recent years, fairness concerns most frequently occur in dissents in cases limiting the availability of classwide procedures in arbitration.¹⁹⁷

A more recently articulated practical concern is the business consequences of an interpretation. Overall, five opinions rely on business concerns—three majority opinions and two dissents. The most notable decision relying on business concerns is Justice Scalia’s majority opinion in *AT&T Mobility v. Concepcion*.¹⁹⁸ The *Concepcion* case preempted a California rule that would have invalidated most class action waivers in consumer contracts and opened the door for class procedures in arbitration.¹⁹⁹ The Court reasoned that “class arbitration greatly increases the risks to defendants” and that arbitration “is poorly suited to the higher stakes of class litigation.”²⁰⁰ The Court further stated: “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.”²⁰¹ However, the majority opinion’s discussion of practical concerns is limited to business defendants. The Court does not engage in a similar analysis of the practical considerations for plaintiffs who would likely forego bringing a

196. *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953) (discussing the potential harm to investors if non-lawyer arbitrators determine the applicability of statutory rights); *see also* *Commonwealth Coatings v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968) (positing that certain arbitrator disclosure requirements will result in a fairer process if the parties are satisfied that the arbitrator is not biased).

197. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting) (“The widely experienced neglect he identified cries out for collective treatment. Blocking Varela’s path to concerted action, the Court aims to ensure the authenticity of consent to class procedures in arbitration.”); *id.* at 1427 (Sotomayor, J., dissenting) (“Where, as here, an employment agreement provides for arbitration as a forum for all disputes relating to a person’s employment and the rules of that forum allow for class actions, an employee who signs an arbitration agreement should not be expected to realize that she is giving up access to that procedural device.”); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 477 (2015) (Ginsburg, J. dissenting) (“These decisions have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws.”).

198. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

199. *Id.* at 352 (“California’s Discover Bank rule is pre-empted by the FAA.”).

200. *Id.* at 350.

201. *Id.* at 351.

claim at all if the case cannot proceed in a class.²⁰² Instead, the Court appears to be selectively using the tool of practical consequences to achieve the ultimate outcome—a limitation to class procedures.

Chart 9

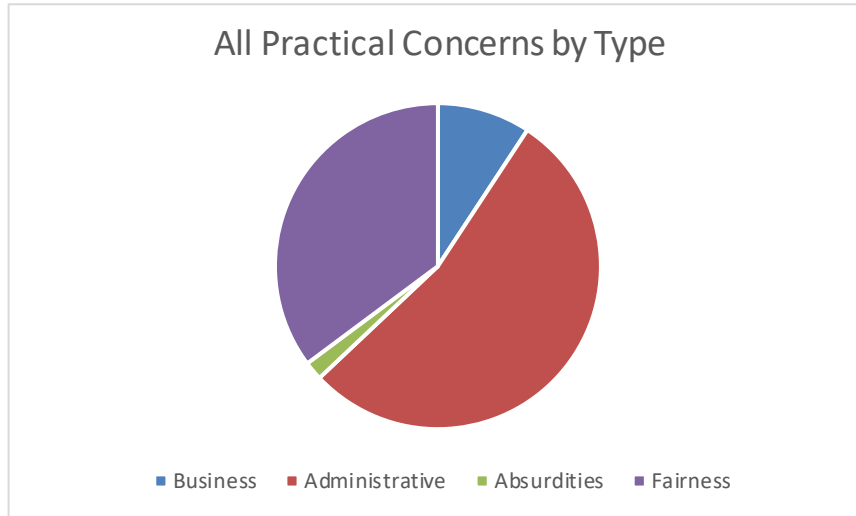
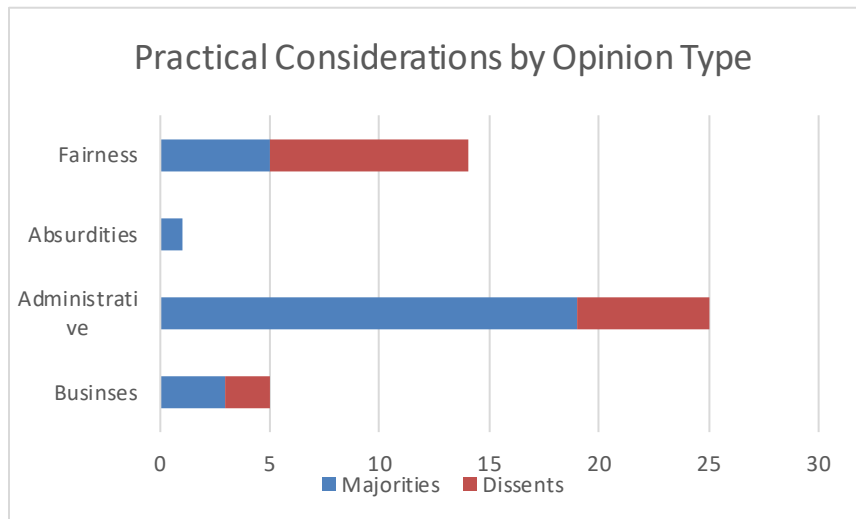


Chart 10



202. The *Concepcion* case involved such a situation: a low dollar claim that would not be worth pursuing on its own. The Concepcions suffered an economic loss of only \$30.22. *Id.* at 337.

The Court's reliance on the FAA's purpose and intent, like its reliance on practical considerations, is surprisingly high. Overall, 41.2% of all opinions relied on intent or purpose (47 of 114), and only five opinions (or 4.4%) invoked but rejected or refused to rely on the intent on Congress or the purpose of the statute. By decision type, 44.0% of all majority opinions and 51.2% of all dissents relied on Congress' intent or purpose, while only 14.3% of concurring and other opinions relied on these practical considerations. These numbers are difficult to compare to other scholars because every study includes different things in this category.²⁰³ In the arbitration dataset, invoking purpose or intent cuts across time, political leanings, and legal category.

The Court and individual Justices cite to several different purposes and intents, giving rise to the question of whether Congressional intent or legislative purpose leads to consistent results or simply an end to a preferred outcome. Perhaps the most cited Congressional intent is that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," requiring rigorous enforcement of agreements to arbitrate.²⁰⁴ Indeed, the arbitration canon first pronounced in *Moses H. Cone Memorial Hospital* is based on this Congressional intent.²⁰⁵ Similarly, the Court noted that the purpose of the FAA is to "place arbitration agreements on the same footing as other contracts."²⁰⁶ Since roughly 2010, the Court has consistently presumed that Congress did not intend for arbitration to proceed on a classwide basis, even though class procedures did not exist in 1925 the way they do now.²⁰⁷

203. See, e.g., *Backdoor Purposivism*, *supra* note 51, at 1298 (finding 24.9% of all Roberts' Court opinions relying on the statute's purpose and 11.9% of opinions relying on legislative intent); *Canons of Construction*, *supra* note 20, at 30 (finding that 81.2% of opinions rely on "legislative purpose," which appears to include purpose, intent, and practical consequences); Staudt, et al., *supra* note 57, at 1946 (including a broad range of tools and finding that "nearly 50 percent of the Court's decisions invoked materials associated with congressional intent and purpose.").

204. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (the Court's first arbitration provision contained similar language, albeit in the area of admiralty); *Marine Trans. Corp. v. Dreyfus*, 284 U.S. 263, 275 (1932) ("The intent of section 8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement.").

205. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (regarding the "liberal federal policy favoring arbitration agreement").

206. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

207. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2010) ("First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").

A final purposivist tool is *legislative inaction*, inferring the legislature's intent from its failure to amend a statute following the Court's precedent. Only two majority opinions rely on legislative inaction.²⁰⁸ Given the age of the statute, I expected to see legislative inaction relied on more frequently, particularly given the increased number of arbitration cases heard by the courts since 2000.

F. *Overarching Observations and Musings on the Future of the FAA*

In many respects, this discussion demonstrates that the Court frequently interprets the FAA like other statutes, with some exceptions. Two of the most interesting exceptions are reliance on substantive canons—notably the arbitration canon—and reliance on the practical effects of the given cases. These two types of tools are malleable and can support a number of outcomes. While practical considerations are an obvious purposivist tool, the use of canons has come under criticism for being as outcome-determinative as other purposivist tools, such as legislative history.²⁰⁹ This section considers the outcome-determinative nature of the Court's arbitration jurisprudence and Congress's likelihood to engage in an override of these cases.

1. The Court Interprets the FAA in an Outcome-Determinative Manner

This research appears to overlap with other scholars' observations that the Supreme Court acts in ways that are purposivist and, at times, outcome determinative. Even as the Court relied less on legislative history over the last three decades, the Court may simply be replacing the tools of interpretation to achieve certain ends, a technique that Professor Krishnakumar calls "backdoor purposivism."²¹⁰ Professor McGowan's study of Justice Scalia dissents concludes that despite his textualist rhetoric, he commonly relies on legislative purpose, including "his own sense of a statute's aims."²¹¹

208. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001) ("In *Allied-Bruce* the Court noted that Congress had not moved to overturn *Southland*, and we now note that it has not done so in response to *Allied-Bruce* itself."); *Allied-Bruce Terminix Co., v. Dobson*, 513 U.S. 265, 272 (1995) ("Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration.").

209. See *supra* notes 23–24 and accompanying text.

210. *Backdoor Purposivism*, *supra* note 51, at 1290–91 (describing the phenomenon of textualist justices using new tools to achieve the ends those justices have criticized of purposivist jurists).

211. McGowan, *supra* note 66, at 189.

This study aligns with an overarching theme within the literature that tools are used subjectively, even when the stated intent of the tool is to reduce subjectivity. For instance, Professors Brudney and Baum concluded that the Court’s “highly subjective and ad hoc approach to choosing dictionaries” is not subject to any specific practice or rules.²¹²

If the results of this data suggest that the Court is highly purposivist in its opinions, what are those purposes? While the primary purpose of the FAA is to enforce arbitration agreements, that purpose has expanded greatly to include enforcement of arbitration agreements at almost all costs. Beginning in the 1980s and continuing to the present, the Court has found more agreements subject to arbitration, and using arbitration law (such as the doctrine of arbitrability) increased the power of arbitrators and put them in self-interested positions. Additionally, the Court has used arbitration to further limit the availability of class actions. Stated differently, increasing arbitration and decreasing class action processes appear to be the Court’s twin purposes.

The other overarching theme evident from this data is the insular nature of the Court’s arbitration jurisprudence. Compared to other studies, the Court’s overreliance on FAA precedent, the text of the FAA, and the arbitration canon (created by FAA precedent) builds a body of law more reliant on the Court than any outside source. This self-reliance leads to the expanded applicability of the FAA. As a result, the Court’s cases are becoming increasingly controversial, as evidenced by increased concurring and dissenting opinions and the recent emergence of arguments based on legislative history in dissenting opinions.

These themes are clear in some of the most recent cases decided by the Supreme Court—notably the *Epic Systems* and the *Lamps Plus* decisions. Although both cases involve the availability of class action arbitration, the cases pose different legal questions for the Court. In *Epic Systems*, Justice Gorsuch authored the majority opinion in a five to four decision of the Court.²¹³ This may be considered among the cases involving a *Thomas Effect*, Justice Thomas providing the critical fifth vote while also authoring a concurring opinion critical of aspects of the Court’s FAA jurisprudence.²¹⁴ The question for the Court was whether the National Labor Relations Act (NLRA) required the availability of class

212. Brudney & Baum, *supra* note 61, at 566.

213. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

214. *Id.* at 1632 (Thomas, J., concurring) (noting disagreement with the Court’s interpretation of Section 2 of the FAA).

procedures in labor and employment arbitration.²¹⁵ In answering this question in the negative, the Court began by relying on the text, prior precedent, and a statement of Congress's intent to enforce agreements to arbitrate as written, even when an employer includes a class action waiver in an employment contract.²¹⁶ After considering whether the NLRA provided a contrary congressional command, the Court's decision relied on a series of precedent and the fact that no Supreme Court opinion had ever found such command to override the FAA.²¹⁷ The Court also relied on the practical consequence that class action procedures may unfairly pressure corporate defendants into settling unmeritorious lawsuits as it holds that NLRA's language does not prohibit employers and employees from agreeing to bilateral arbitration.²¹⁸ Stated another way, the Court relies on the text, prior precedent, and purpose in a decision that extends the enforcement of arbitration agreements in the employment context at the expense of classwide procedures—even classwide procedures in arbitration.

In the following term, the *Lamps Plus* majority decision, again authored by Justice Gorsuch, further limits the availability of class actions by expanding on prior precedent.²¹⁹ The case involved courts' authority to determine whether an arbitration agreement supported an order to compel classwide arbitration.²²⁰ The FAA does not address classwide arbitration, so the Court turned to previous FAA precedent hostile to classwide arbitration and policy reasons favoring individual arbitration.²²¹ The Court further relies on practical considerations such as expense, time, and formality, as additional reasons for its holding hostile to classwide arbitration.²²² The *Lamps Plus* decision also involves the *Thomas Effect*: Justice Thomas joins the majority of the five-to-four decision with a separate concurring opinion. All four dissenting justices

215. *Id.* at 1619 (“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”).

216. *Id.* at 1621 (discussing intent, text, and prior precedent).

217. *Id.* at 1627–28.

218. *Id.* at 1632 (noting business pressures involved in class action procedures).

219. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

220. *Id.* at 1413 (reviewing the 9th Circuit decision allowing the order of classwide arbitration).

221. *Id.* (citing *Stolt-Nielsen, N.A. v. International AnimalFeeds, Int'l Corp.*, 599 U.S. 662, 684 (2009) and *Epic Sys. Corp.*, 138 S. Ct. at 1623).

222. *Id.* at 1416 (“Our reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice[] the principal advantage of arbitration.”) (internal quotation marks and citations omitted).

wrote opinions in the matter. *Lamp's Plus'* six separate opinions marks the most separate decisions in a single arbitration case.

However, even in the Court's less controversial decisions, the themes of reliance on prior precedent and expanded power for arbitration continue to shine through. For example, Justice Kavanaugh's unanimous decision in *Henry Schein v. Archer & White* begins with the arbitrator's broad powers to determine matters of arbitrability, i.e., the arbitrator's own jurisdiction: "Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes."²²³ Although this statement is not itself controversial, it is telling that the Court's authority for this proposition does *not* include the text of the FAA but relies only on FAA precedent.²²⁴ Indeed, the Court cannot cite the FAA because it does not speak directly to the issue of arbitrability. Ultimately, the *Henry Schein* Court broadens the scope of arbitrators' powers primarily on precedent and, to a lesser degree, practical considerations (such as the interplay between courts and arbitrators).²²⁵

2. Congressional Override of FAA Jurisprudence?

Finally, a question arises as to what this research shows about the future of the FAA in Congress. Research on congressional overrides (i.e., Congress's overturning a Supreme Court decision by revising a statute) suggests that certain factors may predict whether Congress will amend a statute, including: (1) close vote margins; (2) the United States on the losing end of a decision; (3) decisions relying on highly textualist tools, such as the whole act rule; and (4) Justices inviting Congress to amend the statute.²²⁶ Applying these criteria to the FAA, one might expect Congress to override current arbitration jurisprudence by amending the Act. For the first criterion, recent cases such as *Epic Systems v. Lewis* and *Lamps Plus v. Varela* involved close vote counts and multiple opinions. While the second criterion is not applicable, this analysis shows the

223. *Henry Schein Inc. v. Archer & White Sales, Inc.* 139 S. Ct. 524, 527 (2019).

224. *Id.* (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) and *First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1955)); *see also id.* at 529 ("We conclude that the 'wholly groundless' exception is inconsistent with the text of the Act and with our precedent.").

225. *Id.* at 531 (discussing practical concerns). This particular case is an interesting example of a conservative leaning justice rejecting the application of the whole act rule because prior precedent leaned towards providing the arbitrator additional power to render the decision at hand. *Id.* at 530 (noting "that ship has sailed" regarding a different reading of Section 4 of the FAA).

226. Christiansen & Eskridge, *supra* note 59, at 1387–90 (discussing prior literature and providing brief summary of results).

reliance on textualist tools, including the whole act rule. As for the fourth criterion, the *Epic Systems* Court, while not exactly inviting Congress to amend the FAA, specifically notes that Congress is “always free to amend” the statute if it disagrees with the Court.²²⁷ These factors indicate that the time may be right for Congress to override the Court’s decision.

Arbitration scholars have been asking Congress to amend the FAA in some way, shape, or form for years.²²⁸ Professors Christiansen and Eskridge theorize that one reason Congress has not overridden the FAA is that the business entities benefiting from Court’s rulings are effective in keeping the matter off “the congressional agenda.”²²⁹ Although Congress has not engaged in an overhaul of the FAA, it has passed legislation regulating arbitration in niche areas, such as mortgage lending and cases involving sexual harassment.²³⁰

Another reason why Congress may be hesitant to step in and override is that while the decisions since the mid-1980s have largely expanded the powers of arbitrators and favored business interests, a sprinkling of well-timed cases have leaned in favor of consumer and employee interests, which might lessen political will to change the statute. For instance, *First Options of Chicago v. Kaplan* clarified the role of courts in determining whether an agreement to arbitrate exists,²³¹ *Green Tree v. Randolph* preserved the possibility of court if the arbitral forum is prohibitively expensive, and *Oxford Health Plans v. Sutter* preserved an arbitrator’s

227. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018); see also *Compucredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring) (“Of course, if we have misread Congress’ intent, then Congress can correct our error by amending the statute.”).

228. See, e.g., Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U.C. DAVIS L. REV. 921, 971 (2015) (noting that many have called for Congress to amend the FAA and the difficulties with that suggestion); Imre Stephen Szalai, *Correcting a Flaw in the Arbitration Fairness Act*, 2013 J. DISP. RESOL. 271, 272–73 (2013) (noting that the FAA intended to cover only business disputes and Congress needs to amend it to achieve those original goals); Richard A. Bales & Sue Irion, *How Congress Can Create a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081, 1083–84 (2009) (“This article proposes amending the FAA to ensure more equitable arbitration contracts and procedures. An amended FAA will save time and expense in predispute contract enforcement litigation.”).

229. Christiansen & Eskridge, *supra* note 59, at 1380 n.228.

230. See 9 U.S.C. §402 (2022) (prohibiting enforcement of pre-dispute arbitration agreements for cases of sexual assault and sexual harassment); Kristen M. Blankley, *Creating a Framework for Examining Agency Rules Impacting Arbitration*, 63 WASH. U. J.L. & POL’Y 9, 11–12 (2020) (discussing Congress’ inability to pass sweeping arbitration legislation and success in some smaller areas).

231. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (finding no agreement to arbitrate under the facts of the case).

reading of a contract allowing for classwide arbitration.²³² Most recently, in *New Prime v. Oliveria*, the Court affirmed that independent contractors in the trucking industry fall outside of the FAA, and thus courts cannot compel them to arbitrate.²³³ This push and pull may make arbitration reform less urgent.²³⁴ If Congress attempts to rein in arbitrator power and the business interests advanced in many of these decisions, it will likely only have the will to amend the FAA with a liberal Congress and liberal White House.

VII. CONCLUSION AND FURTHER RESEARCH

Under other circumstances, this statutory interpretation analysis may show an upcoming tipping point in FAA jurisprudence. On the one hand, the increasingly divided Court on arbitration issues, the closer vote counts in recent years, and the renewed interest in legislative history might indicate that the interpretation of the FAA has reached its limits. On the other hand, the current ideological makeup of the Court with six conservative-leaning and three liberal-leaning Justices may indicate that the business interests protected in recent cases—particularly class action cases—will continue to be protected into the future.

This research raises additional questions to be explored in future papers. While the purpose of this Article is to compare the arbitration dataset with previous research by other scholars, it should be examined for trends specific to arbitration. Notably, a future article should examine whether different analytical trends emerge among different arbitration issues, i.e., the data should be analyzed to determine if the court utilizes different tools in arbitrability cases compared to preemption cases. Similarly, an analysis comparing the tools of interpretation used on the FAA and those used to interpret other statutes in arbitration cases might yield interesting patterns. Additional research should also consider the tools used in class action arbitration cases compared to non-class action cases to see if significant differences exist between those cases. Further,

232. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum.”); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) (“The arbitrator’s construction holds, however good, bad, or ugly.”).

233. *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 544 (2019) (finding the FAA not applicable).

234. *But see* Imre Szalai, *The Supreme Court’s Landmark Decision in New Prime v. Oliveira: A Panoptic View of America’s Civil Justice System and Arbitration*, 68 EMORY L. J. ONLINE 1059, 1068 (2019) (describing the Court’s precedent as more akin to a “decades-long, steady, pro-arbitration” march).

analyses related to individual justices may uncover interesting trends, particularly Justice Thomas's role in arbitration cases.

While most arbitration scholarship considers the substance of *what* the Supreme Court decides, this article begins a scholarly conversation on *how* the Court conducts its analyses. This new interpretive lens provides new insight into an old statute and uncovers analytical trends over time. Additional work in this area will continue to illuminate arbitration jurisprudence and provide further granularity.