# WHAT JUDGES CITE: A STUDY OF THREE APPELLATE COURTS

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## *I. INTRODUCTION*

Lawyers have a strong sense of what courts cite and what authority deserves attention. Yet how much do we know, in detail, about courts' tendencies and preferences? Do the hard numbers back up our hunches? Might the numbers include a few surprises about what courts cite and how often?

How frequently, for example, do courts rely on persuasive precedent? Unpublished opinions? Do state intermediate appellate courts prefer their own opinions or their state supreme court's opinions? How frequently do courts cite secondary authorities—and when they do, which do they prefer? Is a court more or less likely to rely on an encyclopedia entry than a law-review article? Do courts cite nontraditional sources like Wikipedia with statistically significant frequency? In this age of textualism,[1] do appellate judges bother with legislative history, or would they sooner rely on a dictionary?

Using opinions from the U.S. Supreme Court (every opinion from the 2015 term), the Virginia Court of Appeals (every reported opinion from 2017), and the Wisconsin Court of Appeals (every reported opinion from 2017), this study reports the hard numbers. The results, I hope, will give lawyers more concrete insight on what authorities are more or less likely to impress courts, will give Research & Writing professors a stronger foundation when teaching students what authorities might

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1. *See generally* Bryan A. Garner, *It Means What It Says: Old-Fashioned Textualism is All About Interpretation, Not Legislating from the Bench*, ABA J., Apr. 2019, at 28, passim.

sway a court's opinion, and will give journal editors a better feel for what article topics are ripe for judicial citation. And although I offer analytical takeaways and theories behind the numbers, my larger goal is to provide a body of statistics with which future researchers and commentators might pursue their own lines of inquiry.

This study is meant to offer a complete view of appellate courts' citation practices. By examining every citation in a pool of opinions, this study builds on past studies that focused entirely on citations to certain types of authority, such as law reviews, online sources, or nonlegal sources.[2] This study also expands on and updates studies that focused entirely on the Supreme Court's citation practices, that excluded codified law from the count, or that counted only initial citations.[3] This study considers it all, including short-form citations to previously cited sources, and does so for three different appellate courts. After describing the highlights and special points of interest, I'll offer statistical snapshots of a typical U.S. Supreme Court opinion and a typical state court-of-appeals opinion.

## *II. THE STUDY*

### A. Defining "Citation"

Counting citations sounds simple enough. And yet this seemingly robotic task quickly takes on nuance, becoming an exercise in judgment, prioritization, and purpose. As one scholar put it, "'authority' is a complex concept, not easily boiled down to a simple definition."[4] I've

2. See, for example, the many articles cited in footnote one of Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L.J. 1009 (2000) and listed in Appendix B of William H. Manz, *Citations in Supreme Court Opinions and Briefs*: *A Comparative Study*, 94 LAW LIBR. J. 267, 298–300 (2002). For articles on citation to nonlegal and web sources, see Ellie Margolis, *It's Time to Embrace the New—Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191 (2013) [hereinafter Margolis, *It's Time to Embrace the New*]; Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 913 (2011) [hereinafter Margolis, *Authority Without Borders*]; and Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 500–03, 501 tbl.1, 513 (2000).

3. *See* John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 431 (2002) (explaining that "items cited more than once by the same Justice in an opinion were counted only once"); Manz, *supra* note 2, at 268 (counting only the first citation to a given authority and omitting codified law from the count).

4. Margolis, *Authority Without Borders*, *supra* note 2, at 913.

outlined my methods below, recognizing that some may have approached the project differently.

### B. Citations Counted in this Study

For this study, my team tallied—with exceptions noted below—citations to (1) the law (primary authority), (2) sources that explain the law and its application (secondary authority), (3) nontraditional sources that appeared within a court's or judge's legal analysis, and (4) "other" traditional legal sources.

For primary authority, the caselaw count included initial and all repeat citations. Besides citations to binding and persuasive cases, and to cases followed under *stare decisis*, the caselaw count included the odd administrative or advisory opinion.

The codified-law count included not only statutes but also regulations, court rules, evidence rules, and constitutions. While the codified-law count included initial and repeat citations, it did not include shorthand, passing textual references to a previously cited provision. In other words, only *citations* were tallied, meaning a reference bearing at least some formal element of a full or short citation. I made an exception—and counted the first passing text reference—when a court never formally cited a controlling constitutional clause or amendment, presumably because of its universal familiarity. (E.g., *The First Amendment protects . . . . We have long interpreted the Commerce Clause to prohibit . . . .*) This was a fairly common scenario.

Secondary authority included the usual suspects: treatises, encyclopedias, periodicals (such as law reviews), American Law Reports, Restatements, and legal dictionaries. But I broadened that category to include model or standard jury instructions and their commentary, following Lexis's and Westlaw's lead. I also included the Federalist Papers, which Chief Justice Marshall once called "a complete commentary on our constitution."[5]

Occasionally, courts cited sources that were neither law nor traditional legal sources yet nevertheless supported (or at least appeared in the context of) the court's analysis. I counted those and put them in a "nontraditional sources" category, adopting the view that

5. Cohens v. Virginia, 19 U.S. 264, 418 (1821).

"authority is anything used as support for legal analysis in writing."[6] These nontraditional sources, which have been cited with increasing frequency in the internet age, "encapsulate the universe of information outside . . . traditional legal authority . . . , ranging from classical philosophy, to dictionary definitions, to social science data, to daily newspapers."[7] Professor Ellie Margolis, who has studied the evolving nature of authority extensively, observed that finding a neat label or category for nontraditional materials—especially those found online—is daunting:

> Perhaps the greatest confusion regarding electronic materials cited in legal writing is how to categorize them. This is due in part to the wide variety of types of materials cited, and in part to the fact that they are used in many different ways with few standards or guidelines governing their use.[8]

Government materials, now often accessed on government websites, posed a unique challenge. Online government materials sometimes closely resemble traditional secondary sources, explaining the law and its general application.[9] Other times, government websites provide statistical or factual information.[10] In the end, I put government materials in the nontraditional-sources category. But my relegation of government and other online materials to this fallback category may soon be seen as outdated given the proliferation of online sources in mainstream legal discourse.

Finally, my fourth broad category—for "other" sources—captures a number of *traditional* legal authorities that defy neat notions of precedent, codified law, or secondary authority. These sources include purely advisory opinions from outside the court system (such as ethics or attorney-general opinions), treaties, United Nations resolutions, presidential proclamations, and legislative history.

I weighed whether to treat legislative history as a primary or secondary authority. Commentators differ. Some take the primary

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6. Margolis, *Authority Without Borders*, *supra* note 2, at 913.
7. *Id.* at 919.
8. Margolis, *It's Time to Embrace the New*, *supra* note 2, at 195–96.
9. Margolis, *Authority Without Borders*, *supra* note 2, at 942 (describing an online handbook "prepared by the Department of Justice to implement the administration of a federal statute" as "clearly an interpretation of law much like traditional sources of authority").
10. *Id.* at 941–42 (reporting citations to government websites for "statistical information or other support for factual assertions of the Court").

side;[11] others, the secondary side.[12] At least one librarian–author treats it as primary,[13] while other librarians do not.[14] Courts seem to lean away from the primary category, speaking of "secondary sources such as legislative history"[15] or describing legislative history as "extrinsic evidence"[16] of a statute's meaning. Professor Mark Deforrest's comprehensive look at legislative history declares that "[l]egislative history is a secondary source that should be treated carefully" and notes that textualists' hostility toward legislative history "illuminates and emphasizes legislative history's nature as a secondary source."[17] Yet even the "secondary" label is an awkward fit for some legislative-history materials, which often mark the steps on a statute's journey more than they teach readers about the finished version's meaning and application (as a treatise or journal article might).

In the end, I decided to include legislative history in my tally of "other" sources that are undeniably legal in nature but that defy neat primary- or secondary-source categorization. Later in the article, you'll see special tables devoted to legislative history.

### C. Citations Not Included

I excluded some citations. Some exclusion choices were obvious, but others perhaps less so.

This study recorded only citations generated by the court's legal discussion or analysis. Thus, I did not count citations that merely charted a case's climb up the procedural ladder or that chronicled the lower-

11. G.L. RICHMOND, FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES 2 n.4 (4th ed. 1990); C.L. KUNZ, D.A. SCHMEDEMANN, C.P. ERLINDER & M.P. DOWNS, THE PROCESS OF LEGAL RESEARCH 4–5 (1989).

12. WILLIAM H. PUTMAN & JENNIFER R. ALBRIGHT, LEGAL RESEARCH, ANALYSIS, AND WRITING 192 (4th ed. 2018) (placing legislative history in chapter on "Secondary Authorities—Periodicals, Restatements, Uniform Laws, Dictionaries, Legislative History, and Other Secondary Authorities"); ANDREA B. YELIN & HOPE VINER SAMBORN, THE LEGAL RESEARCH & WRITING HANDBOOK: A BASIC APPROACH FOR PARALEGALS 211 (8th ed. 2015) (noting that legislative history "is not primary authority but is considered to be secondary authority").

13. Debora Person, *The Wyoming Supreme Court's Use of Secondary Sources*, 41 WYO. LAWYER 48, 48 (2018).

14. *See. e.g.*, Almas Khan, *A Compendium of Legal Writing Sources*, 50 WASHBURN L.J. 395, 420–21 (2011); Patrick Meyer, *Law Firm Legal Research Requirements and the Legal Academy Beyond Carnegie*, 35 WHITTIER L. REV. 419, 435 (2014).

15. State v. McDonald, 47 A.3d 669, 678 (N.J. 2012); *see also* Burlington Northern & Sante Fe Ry. Co. v. Brotherhood of Maintenance of Way Employees, 286 F.3d 803, 805 (5th Cir. 2002).

16. Soto v. Scaringelli, 917 A.2d 734, 741 (N.J. 2007).

17. Mark Deforrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 DAYTON L. REV. 37, 67–68 (2013).

court decision up for review. As a practical matter, this exclusion was only significant when calculating U.S. Supreme Court citations. The Court routinely describes a case's procedural history, and those historical rungs may produce citations to the Federal Supplement, the Federal Reporter—or both—or to a state reporter. I feared that counting those citations would distort the numbers and undermine my purpose.

I also ignored citations to a case's factual record, counting only citations to legal authority or to nonlegal, research-generated sources used to support legal analysis or a policy observation.

I also excluded, after some soul-searching, parenthetical citations. I don't deny that legal writers sometimes use parenthetical citations for more than mechanical obedience to citation-manual conventions. A legal writer might use parenthetical citations as a subtle means of buttressing a point or informing readers.[18] Yet for those citations, the citing Justice or judge did not think the parenthetical source worthy of an independent, direct citation. That truth made my decision for me. The *ALWD* and *Bluebook* citation manuals also support this choice, albeit obliquely. Both instruct that parenthetical citations do not rise to the level of intervening authority and thus do not break an *Id.* chain.[19]

I also did not count a court's citation to another portion of the same opinion or to a dissenting or concurring opinion in the same case. For example, if the Supreme Court referred to something it said a few pages earlier, using its typical *Ibid.* style, or cited a passage from a dissenting Justice's opinion while attempting to refute it, that did not count as a citation.

In the same vein, I did not count citations to briefs, whether a party's brief or an amicus brief. The briefs are not legal authority or the type of nonlegal support that this study was designed to track.

### D. A Caveat: Is Citation Reliance? Approval?

In her article on citations to nonlegal sources, Professor Margolis noted that the sheer "number of citations does not tell the whole

18. For an excellent treatment of how advocates use parenthetical explanatory notes for rhetorical aims, see Michael D. Murray, *The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs*, 10 LEGAL COMM. & RHETORIC 229 (2013).

19. ALWD & COLEEN M. BARGER, ALWD GUIDE TO LEGAL CITATION 49 (6th ed. 2017); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 14 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

story."[20] Most notably, the raw numbers don't necessarily tell whether the court cited a source to support the court's legal analysis or for some other purpose.[21] Legal citations "serve multiple purposes."[22] So lawyers studying a case's citations quickly appreciate that not all citations are created equal—or, more accurately, not all citations play the same role.

As stated, for this study I've excluded citations to the lower-court record or to procedural history, classic examples of citations that do not signal support or approval.[23] Yet this study still includes any number of citations that might not signal direct or indirect support for the court's legal analysis.

For instance, citations for attribution "give credit to the original authors of text and ideas,"[24] but the court might ultimately reject the author's text and ideas. Some citations merely give examples, like a string citation to statutes showing a national trend among state legislatures. Other citations are historical, showing the past state of the law or tracking the law's evolution.[25] These citations also don't necessarily signal approval. After all, when the Iowa Supreme Court cited "the infamous *Dred Scott* case" in 2017, the court hardly cited it with approval or for support.[26] Courts also use comparative citations whose sole purpose is to compare one case or codified law to another.[27]

A citation count for persuasive precedent can be especially misleading. Courts sometimes cite cases—often repeatedly—when distinguishing them. For instance, in a Wisconsin Court of Appeals case included in this study, the court cited a New York appellate decision no fewer than nine times—only to declare that it did "not find [the case] persuasive" and that it "disagree[d] with the [New York] court's reasoning."[28] At most, these citations were a backhanded recognition that the case was one to be reckoned with.

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20. Margolis, *Authority Without Borders*, *supra* note 2, at 939.

21. *Id.*

22. ALWD & BARGER, *supra* note 19, at xxiii.

23. *See* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1088–89 (1992) (excluding from empirical study "citations describing the procedural history or the background of a case").

24. ALWD & BARGER, *supra* note 19, at xxiii.

25. Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1347 (1986).

26. Godfrey v. State, 898 N.W.2d 844, 862 (Iowa 2017) (tracing Iowa's history as a civil-rights forerunner and proudly noting its pre-*Dred Scott* refusal to succumb to pervasive and institutional racism).

27. *See, e.g.*, Lorenzo v. SEC, 139 S. Ct. 1094, 1100 (2019) (citing two U.S. Court of Appeals cases that took different views on the issue when describing the scope of its certiorari grant).

28. Great Lakes Beverages, LLC v. Wochinski, 892 N.W.2d 333, 340–41 (Wis. Ct. App. 2017).

Likewise, a court citing legislative history while fleshing out a statute's meaning might ultimately reject that history.

Scholars have even coined the "window dressing" moniker for citations that do little more than create an air of assiduousness—or, for the more cynical among us, create an analytical smoke screen.[29]

This diversity in citation usage prompted Frederick Schauer and Virginia Wise to add a disclaimer to their study on citations to nonlegal sources:

> [W]e have been examining citation, or what journalists might call "sourcing," rather than reliance. We make no claims that the material cited has in fact influenced the judges doing the citing . . . .[30]

Well put, and I share that disclaimer.

### E. Human Error

Three people took painstaking care in counting, compiling, checking, and rechecking citations for this study. But we're human, so it's possible that a few citations escaped our eyes or slipped into a misfit category. My hope (and firm belief) is that given the sheer volume of data—more than 13,000 citations from three different appellate courts—any stray miscounts or miscategorizations are, for all practical purposes, insignificant.

## *III. PREVIEW OF THE RESULTS*

This study tells a tale of two types of appellate courts: the button-down intermediate appellate court versus the comparatively freewheeling court of last resort.

The Virginia and Wisconsin Court of Appeals' decisions were practically devoid of dissenting or concurring opinions. And these courts largely ignored secondary and nontraditional sources, sticking to primary authority—i.e., actual law—98% of the time. They cited binding state precedent for more than 80% of their case citations, and citations

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29. Schauer & Wise, *supra* note 2, at 513; *see also* Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 500 (2010) (noting that studies on ideological voting "have led to the theory that citations serve only as a mask for Justices voting their preferences"); Margolis, *Authority without Borders*, *supra* note 2, at 940.

30. Schauer & Wise, *supra* note 2, at 513.

to U.S. Supreme Court precedent pushed that figure to nearly 90%. When citing persuasive precedent, the state appellate courts favored U.S. Court of Appeals cases and eschewed unpublished cases, much preferring published cases from other states' appellate courts to their own unpublished opinions. In fact, the state appellate courts combined for 32 citations to unpublished cases compared to 272 citations to other states' published appellate decisions.

On the rare occasions when the state appellate courts cited secondary sources, their tastes tended toward the practical: treatises and standard jury instructions. These courts virtually ignored theoretical scholarship; of their combined 7,509 citations, they cited law-review articles just nine times.

In contrast, the U.S. Supreme Court had more dissenting opinions than majority opinions, and less than a quarter of its 2015-term opinions were unanimous. The Justices made comparatively robust use of secondary and nontraditional sources. Roughly one of every twenty Supreme Court citations was to a secondary source. And the Court's 251 citations to nontraditional sources were four times greater than the state courts' *combined* 63 citations to those sources. Yet the Supreme Court did share the state courts' disdain for unpublished opinions. The Court's three citations to unpublished cases fell far short of its sixty-nine citations to websites.

As for secondary-source preferences, authors who have suggested that treatises, legal periodicals, and Restatements hold more sway than other secondary sources seem to be on target, at least for the Supreme Court. The Court cited encyclopedias twice during the 2015 term and an ALR just once. But the Court cited treatises 136 times, periodicals 112 times (including 102 law reviews), and Restatements 40 times. The state appellate courts spread their few secondary-source citations more evenly.

The law-review results confirm a continued downturn from the 1970s and 1980s, yet the Supreme Court still cites law-review articles with some regularity—and still shows a preference for historically elite journals. Most of these citations appeared in separately authored opinions, with dissenting and concurring opinions producing 77% of the Court's law-review citations. Student editors hoping to guide their journal onto the pages of a Supreme Court opinion may enhance their odds by publishing articles on criminal law and procedure, constitutional law, or jurisprudence.

This study's results also buttress earlier scholarship on the increase in citations to nontraditional sources—and especially online, nonlegal sources. But these sources appeared far more frequently in the Supreme Court's opinions than in the state appellate opinions. The state courts' citations to nontraditional sources were mostly to dictionaries, and that practice is longstanding.[31] The Supreme Court's citations to nontraditional sources were heavy on books, government materials, government websites, and nongovernment websites. And while this study is hardly definitive on the point, the lack of a single Wikipedia citation may reveal that courts have become somewhat more discriminating when citing nontraditional sources.

Finally, some of the results suggest that U.S. Supreme Court Justices are not as easy to package and label as some might suspect. For instance, if text-focused "conservative" Justices have an aversion to theoretical law-review articles and legislative history, their citations sometimes belie that aversion. In fact, conservative Justices led the way in both law-review citations (Thomas) and citations to legislative history (Alito, in a tie with Ginsburg). Meanwhile, two of the Court's top three dictionary citers were not conservative textualists cherry-picking definitions but, rather, "liberal" Justices (Kagan and Sotomayor). The Court's most renowned textualist, Justice Scalia, did not once cite a nonlegal dictionary and made just a single citation to a legal dictionary—exactly the same as Justice Ginsburg.

## *IV. THE RESULTS*

### A. Primary Authority vs. Secondary/Nontraditional Sources

The Virginia and Wisconsin appellate courts relied almost entirely on primary authority. Of the courts' combined 7,509 citations in 2017, roughly 98% were to primary authority. And counting separately, each court cited primary authority 98% of the time.

The Virginia Court of Appeals cited secondary sources just 35 times (1% of the court's total citations). The Wisconsin Court of Appeals cited secondary sources just 52 times (also 1% of the court's total citations).

31. Margolis, *Authority without Borders*, *supra* note 2, at 919–20 (describing pre-internet studies showing that "most" citations to nonlegal sources "were citations to the dictionary" and that, in the U.S. Supreme Court, "all of the nonlegal citations cited in the years 1940 and 1978 were to dictionaries," with just one exception).

Citations to nontraditional and miscellaneous sources added less than 1% to each court's tally.

| **Virginia/Wisconsin Courts of Appeals Combined Citations** (7,509 total) | | | |
|---|---|---|---|
| *Primary* | *Secondary* | *Nontraditional* | *Other* |
| 7,344 | 87 | 63 | 15 |

Compared to the state appellate courts, the U.S. Supreme Court showed a relatively free hand with secondary and nontraditional sources. Combining unanimous, majority, concurring, dissenting, and *per curiam* opinions, the Court cited primary authority 88% of the time.[32] Secondary sources accounted for 6% of the Court's total citations,[33] while citations to nontraditional sources added another 4%.[34] These percentages are hardly staggering, but the numbers reflect secondary sources' more conspicuous presence in Supreme Court jurisprudence.

| **U.S. Supreme Court Citations** (5,784 total) | | | |
|---|---|---|---|
| *Primary* | *Secondary* | *Nontraditional* | *Other* |
| 5,109 | 358 | 251 | 66 |

32. 5,109 citations to primary authority divided by 5,784 total citations, for .883.
33. 358 citations to secondary sources divided by 5,784 total citations, for .062.
34. 251 citations to nontraditional sources divided by 5,784 total citations, for .043.

This enhanced valuation of secondary and nontraditional sources may be rooted in the Supreme Court's mission of shaping the law rather than simply applying it. (A more detailed breakdown of the Court's citations to secondary sources appears later.)

### B. Caselaw vs. Codified Law

Citations to cases made up a comfortable majority of the state appellate courts' citations to primary authority. Of the Virginia Court of Appeals' citations to primary authority, 58% were to cases and 41% to codified law. The Wisconsin Court of Appeals relied more heavily on cases. When citing primary authority, the court cited cases slightly more than 70% of the time, compared to 29% for codified law. Combined, 65% of the state appellate courts' citations to primary authority were to cases.

The U.S. Supreme Court's 2015 term showed similar tendencies. For its citations to primary authority, the Court cited cases 77% of the time[35] and codified law 23% of the time. Again, these figures do not include the Court's passing shorthand references to statute sections or case names. Only references bearing some traditional element of a full or short citation, or a signal, were tallied.

### C. Types of Codified Law

In both the U.S. Supreme Court and the state appellate courts, binding statutory law drew, by far, the most citations to codified law. More than 80% of the state appellate courts' citations to codified law were to binding statutes. For the Supreme Court, the federal-statute figure approached 60%.

Besides statutes, the state appellate courts' citations to their home states' codified law were spread fairly evenly among court rules, regulations, evidence rules, and constitutions. The state courts also cited federal statutes with some frequency.

35. 3,921 citations to cases divided by 5,109 citations to primary authority, for .767.

| **Virginia/Wisconsin Court of Appeals Citations to Codified Law (combined)** | | | |
|---|---|---|---|
| *Type* | *Number* | *Percentage of Citations to Codified Law* | *Percentage of Citations to All Primary Authority* |
| State Statute | 2,128 | 83% | 29% |
| State Court Rule | 123 | 5% | 2% |
| State Regulation | 42 | 2% | 1% |
| State Evidence Rule | 56 | 2% | 1% |
| State Constitution | 30 | 1% | < 1% |
| Ethics Rule | 2 | < 1% | < 1% |
| Fed. Statute | 96 | 4% | 1% |
| Fed. R. Civ. Pro. | 0 | 0% | 0% |
| Fed. R. Crim. Pro. | 1 | < 1% | < 1% |
| Fed. Regulation | 21 | 1% | < 1% |
| Fed. R. App. Pro. | 1 | < 1% | < 1% |
| Fed. R. of Evid. | 6 | < 1% | < 1% |
| U.S. Constitution | 7 | < 1% | < 1% |

| | | | |
|---|---|---|---|
| Other State's Statute | 19 | 1% | < 1% |
| Other State's Constitution | 22 | 1% | < 1% |
| Military Rule | 3 | < 1% | < 1% |

As mentioned, for codified law, the Supreme Court cited federal statutes most frequently by far, at 58%. Some may be surprised to learn that citations to state statutes were next in line, albeit 42 percentage points behind federal statutes.

The citation elephant in the room is the U.S. Constitution, which drew only modest numbers in this study: 9% of the Supreme Court's citations to codified law. But as noted above, the Court rarely cited the Constitution in a formal fashion. Instead, it usually referred to familiar amendments or clauses only in passing. In those scenarios, only the first passing textual reference drew a tally.

| **U.S. Supreme Court Citations to Codified Law** | | | |
|---|---|---|---|
| *Type* | *Number* | *Percentage of Citations to Codified Law* | *Percentage of Citations to All Primary Authority* |
| Fed. Statute | 692 | 58% | 14% |
| U.S. Constitution | 102 | 9% | 2% |
| Fed. R. Civ. Pro. | 43 | 4% | 1% |
| Fed. R. Crim. Pro. | 7 | 1% | < 1% |

| | | | |
|---|---|---|---|
| Fed. Regulation | 103 | 9% | 2% |
| Fed. R. App. Pro. | 2 | < 1% | < 1% |
| Fed. R. of Evid. | 8 | 1% | < 1% |
| U.S. Sup. Ct. Rule | 1 | < 1% | < 1% |
| Ethics Rule | 2 | < 1% | < 1% |
| State Statute | 189 | 16% | 4% |
| State Court Rule | 0 | 0% | 0% |
| State Regulation | 23 | 2% | < 1% |
| State Evidence Rule | 0 | 0% | 0% |
| State/Territory Constitution | 16 | 1% | < 1% |
| Military Rule | 0 | 0% | 0% |
| International/Other | 1 | < 1% | < 1% |
| **Total** | **1,189** | **—** | **23%** |

### D. Caselaw: Binding vs. Persuasive

Of the Virginia Court of Appeals' citations to cases, 91% were to binding Virginia precedent. About 6% were to U.S. Supreme Court opinions, which bind the court on points of federal law. (Because of this, and for practical reasons, I've excluded Supreme Court citations from my tally of the state courts' citations to persuasive precedent.)

The Wisconsin Court of Appeals relied on binding state precedent slightly less, citing Wisconsin cases for 78% of its case citations. But the court relied more heavily on U.S. Supreme Court precedent than did its

Virginia counterpart. U.S. Supreme Court cases accounted for 8% of the Wisconsin court's case citations.

The U.S. Supreme Court is not truly bound by its precedent, of course, adhering instead to the *stare decisis* doctrine.[36] Eighty-eight percent of the Court's case citations in the 2015 term were to *stare decisis* cases or to Justices' separate opinions in those cases.[37]

### E. Binding Precedent: High Court vs. Intermediate Court

The Virginia Court of Appeals' citations to binding Virginia precedent were roughly split between citations to Virginia Supreme Court opinions (49%) and citations to its own opinions (51%), with a slight preference for its own opinions.

In contrast, the Wisconsin Court of Appeals relied heavily on Wisconsin Supreme Court cases, which made up 64% of the court's citations to binding state precedent. The court's own decisions made up just 36% of its citations to state precedent. Thus, the court showed a 28% higher citation rate for its state supreme court's opinions.

These figures may signal a modest philosophical divide. The Virginia Court of Appeals' ready reliance on its own precedent speaks of a court that embraces its role in advancing and establishing its state's jurisprudence. Meanwhile, the Wisconsin Court of Appeals seems more conscious of its subordinate status, dutifully applying its high court's precedent to fulfill its error-correcting function.

### F. Persuasive Precedent: General Preferences

When citing persuasive precedent, the state appellate courts preferred U.S. Court of Appeals opinions, which accounted for 30% of their citations to persuasive precedent. Citations to other states' supreme-court decisions followed closely, accounting for 29%. The state appellate courts cited agency and unpublished opinions as frequently as they cited U.S. District Court opinions.

36. Payne v. Tennessee, 501 U.S. 808, 827–28 (1991).
37. 3,444 *stare decisis* case citations divided by 3,921 total case citations for .878.

| **Virginia/Wisconsin Court of Appeals (combined) Citations to Caselaw** | | | |
|---|---|---|---|
| *Cited Court/Tribunal* | *Number of Citations* | *Percentage of Case Citations* | *Percentage of Persuasive-Case Citations* |
| Binding State Precedent | 3,865 | 81% | — |
| U.S. Supreme Court | 358 | 7% | — |
| U.S. Court of Appeals | 170 | 4% | 30% |
| U.S. District Court | 40 | 1% | 7% |
| U.S. Bankruptcy Court | 1 | .02% | 0.2% |
| Another State's Highest Court | 165 | 3% | 29% |
| Another State's Intermediate Appellate Court | 107 | 2% | 19% |
| Agency Decision | 40 | 1% | 7% |
| Unpublished | 32 | 1% | 6% |
| Other | 2 | .04% | 0.4% |

Looking at the state courts individually, just over 9% of the Virginia Court of Appeals' case citations were to persuasive precedent: 175 of the court's 1,921 total citations to caselaw. When citing persuasive precedent, the court's strong preference was for caselaw from other states' supreme courts, which made up 42% of its persuasive-case citations. It cited other states' intermediate appellate courts about half as frequently: 22% of the time. And it cited U.S. Court of Appeals cases

with the exact same frequency as other states' appellate courts: 38 times, for 22% of its citations to persuasive caselaw. In contrast, the court cited U.S. District Court opinions just twice in 2017, 1% of its citations to persuasive precedent.

For the Wisconsin Court of Appeals, just over 13% of case citations were to persuasive precedent. Roughly one-third of those (34%) were citations to U.S. Court of Appeals decisions. This far surpassed the court's citations to other states' supreme courts (24%) and other states' intermediate appellate opinions (18%). The balance of the court's citations to persuasive precedent were mostly to U.S. District Court opinions (10%) and, perhaps surprisingly, to agency decisions (9%).

When the U.S. Supreme Court cited other courts, it preferred U.S. Court of Appeals precedent. Nearly half the Court's citations to persuasive precedent (49%) were to U.S. Court of Appeals decisions.[38] Again, this figure does not include procedural-history citations.

By comparison, the Supreme Court largely ignored U.S. District Court opinions, citing them just 40 times all term. This amounted to 8% of the Court's citations to persuasive precedent.[39]

The Court cited state supreme-court opinions 147 times during the term; this made up 31% of the Court's citations to persuasive precedent.[40] By comparison, the Court's citations to state intermediate appellate courts were sparse, accounting for only 29 citations, or 6%.[41]

The Supreme Court's remaining citations to persuasive cases were to agency decisions (14), U.S. Bankruptcy Court decisions (2), or decisions by other miscellaneous courts (10). The Court cited just three unpublished opinions.

38. 232 U.S. Court of Appeals citations divided by 477 total citations to persuasive precedent, for .486.

39. 40 district-court citations divided by 477 total citations to persuasive precedent, for .084.

40. 147 citations to state supreme courts divided by 477 total citations to persuasive precedent, for .308.

41. 29 citations to state courts of appeals divided by 477 total citations to persuasive precedent, for .061.

| **U.S. Supreme Court Citations to Caselaw** | | |
|---|---|---|
| *Cited Court/Tribunal* | *Number of Citations* | *Percentage of Case Cites* |
| U.S. Supreme Court | 3,444 | 88% |
| U.S. Court of Appeals | 232 | 6% |
| U.S. District Court | 40 | 1% |
| U.S. Bankruptcy Court | 2 | < 1% |
| State Supreme Court | 147 | 4% |
| State Intermediate Appellate Court | 29 | 1% |
| Agency Decision | 14 | < 1% |
| Unpublished | 3 | < 1% |
| Other | 10 | < 1% |
| **Total** | **3,921** | — |

Readers anticipating a higher percentage of citations to persuasive precedent in concurring or dissenting opinions may be surprised by the relative uniformity across the opinion categories. Dissenting Supreme Court Justices cited persuasive (i.e., non-Court) cases 144 times, which amounted to 10% of dissenters' case citations.[42] Concurring Justices cited persuasive cases 46 times, which totaled 11% of their case

42. 144 dissent citations to persuasive precedent divided by 1,397 total dissent case citations, for .103.

citations.[43] Justices writing for the majority cited persuasive cases 13% of the time.[44]

The most noticeable (albeit modest) spike in the Court's citations to persuasive cases appeared in unanimous opinions. Unanimous opinions cited persuasive precedent 16% of the time.[45]

As for individual Justices, a majority relied on persuasive cases for 10% or more of their case citations: Ginsburg (21%),[46] Breyer (16%),[47] Sotomayor (16%),[48] Alito (12%),[49] Kagan (12%),[50] and Thomas (10%).[51] Justices Scalia[52] and Kennedy[53] followed close behind, citing persuasive cases 7% of the time.

The outlier was Chief Justice Roberts, who cited persuasive precedent just 2% of the time.[54]

### G. Persuasive Precedent: Published vs. Unpublished

Unpublished cases accounted for few of the three courts' citations. For instance, the Virginia Court of Appeals cited unpublished cases just 19 times, which represented 1% of the court's citations to caselaw.

The Wisconsin Court of Appeals showed an even greater reluctance to cite unpublished cases, citing them just 13 times. This accounted for less than 1%—0.5% to be exact—of the court's case citations.

The U.S. Supreme Court cited three unpublished cases during its 2015 term—bona fide rarities among the Court's 477 citations to persuasive precedent. For the curious, they were two unreported

43. 46 concurring citations to persuasive precedent divided by 404 total concurrence case citations, for .114

44. 210 majority citations to persuasive precedent divided by 1,640 total majority case citations, for .128

45. 46 unanimous-opinion citations to persuasive precedent divided by 285 total unanimous-opinion case citations, for .161.

46. 87 citations to persuasive precedent divided by 410 total case citations, for .212.

47. 45 citations to persuasive precedent divided by 289 total case citations, for .156.

48. 60 citations to persuasive precedent divided by 379 total case citations, for .158.

49. 66 citations to persuasive precedent divided by 535 total case citations, for .123.

50. 49 citations to persuasive precedent divided by 398 total case citations, for .123.

51. 101 citations to persuasive precedent divided by 1,022 total case citations, for .099.

52. 9 citations to persuasive precedent divided by 136 total case citations, for .066.

53. 25 citations to persuasive precedent divided by 339 total case citations, for .074.

54. 4 citations to persuasive precedent divided by 218 total case citations, for .018.

Minnesota Court of Appeals opinions[55] and one Board of Patent Appeals and Interferences memorandum opinion.[56]

### H. Persuasive Precedent: Unpublished In-State vs. Published Out-of-State

When citing persuasive precedent, the state appellate courts were far more likely to cite a published case from another state's appellate court, or a published federal case, than to cite one of their own unpublished opinions. And even when the state appellate courts cited unpublished cases, those opinions—for the Wisconsin Court of Appeals, at least—were just as likely to be from other courts.

The Virginia Court of Appeals cited unpublished opinions 19 times in 2017. All those citations were to the court's own unpublished opinions except for three from the Virginia Workers' Compensation Commission. These citations accounted for just 1% of the Virginia Court of Appeals' case citations and 11% of its citations to persuasive precedent. The 11% figure falls well short of the court's citations to other state supreme courts (42% of persuasive-case citations), other states' intermediate appellate courts (22%), and the U.S. Court of Appeals (22%).

Thus, the Virginia Court of Appeals was four times as likely to cite another state's supreme court, and about twice as likely to cite a federal or out-of-state court-of-appeals decision, as it was to cite one of its own unpublished cases. But the court still showed a 16-to-2 preference for its own unpublished opinions over U.S. District Court opinions.

The Wisconsin Court of Appeals also strongly preferred published persuasive cases to unpublished cases. It cited unpublished cases just 13 times in 2017. This barely registered against the court's 2,862 total case citations (0.5%). And it also accounted for just 3% of the court's 385 cites to persuasive precedent.

When the Wisconsin Court of Appeals did cite an unpublished case, more often than not it was an opinion from another court rather than itself. Of the court's 13 citations to unpublished opinions, 9 were from

55. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2192 n.8 (2016) (Sotomayor, J., with Ginsburg, J., concurring in part and dissenting in part).

56. *See* Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131, 2145 (2016); *see also* Bamberger v. Cheruvu, 55 U.S.P.Q.2d 1523 (Feb. 18, 1998) (noting atop caption that the "opinion was not written for publication").

federal courts. Only 4 of the court's 385 citations to persuasive caselaw were to unpublished Wisconsin Court of Appeals cases. This is a negligible figure compared to the court's 132 citations to the U.S. Court of Appeals, 92 citations to other states' supreme courts, and 69 citations to other states' courts of appeals. It even pales in comparison to the court's 16 citations to agency decisions.

When the dust settles, what emerges is a strong preference for U.S. Court of Appeals precedent and out-of-state published opinions as persuasive precedent. Based on the 2017 figures, the Wisconsin Court of Appeals is 33 times more likely to cite a U.S. Court of Appeals opinion than one of its own unpublished opinions. And it is 17 times more likely to cite another state's published court-of-appeals opinion than to cite one of its own unpublished opinions.

## I. Age of Precedent

Most lawyers assume that courts prefer citing recent precedent. The numbers support that assumption, with a few interesting turns along the way.

Combining statistics for the three courts, cases from the 2010s made up 25% of citations to binding or *stare decisis* cases.[57] Cases from the 2000s accounted for 29%.[58] Thus, when citing binding precedent or, for the Supreme Court, *stare decisis* opinions, the three courts chose cases from the 2000s or 2010s (roughly within the past two decades) more than half the time.

When citing binding precedent, the Virginia Court of Appeals cited cases from the 2010s 43% of the time. It cited cases from the 2000s 38% of the time. So more than 80% of the binding cases were from the past two decades. From there came a precipitous drop-off, with just under 11% of binding cases from the 1990s and just under 4% from the 1980s. The court did cite binding precedent from before 1980, but those cases

57. Virginia Court of Appeals' 642 citations to 2010s binding state cases plus Wisconsin Court of Appeals' 580, plus U.S. Supreme Court's 624 citations to 2010 Court opinions, for a total of 1,846 citations. Combined, the three courts cited 7,309 binding/*stare decisis* cases. Thus, the courts' combined citations to 2010s binding/*stare decisis* cases were 25% (.253) of the courts' total citations to binding/*stare decisis* cases.

58. Virginia Court of Appeals' 561 citations to 2000s binding state cases plus Wisconsin Court of Appeals' 798, plus U.S. Supreme Court's 727 citations to 2000 Court opinions, for a total of 2,086. Combined, the three courts cited 7,309 binding/*stare decisis* cases. Thus, the courts' combined citations to 2000s binding/*stare decisis* cases were 29% (.285) of the courts' total citations to binding/*stare decisis* cases.

made up less than 4% of the court's total citations to binding precedent. (In the entire year, the court cited only 46 binding cases from the 1970s—and fewer than ten binding cases from the 1960s or 1950s.)

The Wisconsin Court of Appeals had a more even distribution. It cited more binding state cases from the 2000s (36%) than from any other era—10% more than its citations to more recent cases from the 2010s (26%). Its citations from the 1990s, 2000s, and 2010s accounted for 80% of its citations to binding state precedent. Less than 10% were from before 1980.

**Virginia/Wisconsin Court of Appeals (combined)**
**Citations to Binding State Precedent by Age**

| *Decade/Era* | *Number* | *Percentage* |
|---|---|---|
| 2010s | 1,222 | 32% |
| 2000s | 1,359 | 35% |
| 1990s | 591 | 15% |
| 1980s | 397 | 10% |
| 1970s | 163 | 4% |
| 1960s | 49 | 1% |
| 1950s | 13 | < 1% |
| Before 1950 | 61 | 2% |
| Before 1900 | 9 | < 1% |

The U.S. Supreme Court's citations to its own opinions show a greater willingness to rely on older cases, though the percentages

sometimes spike or dip depending on whether the opinion is for a unanimous Court, a majority, a dissent, or a concurrence.

In unanimous opinions, the Court cited its opinions from the 2010s—opinions five years old or less—16% of the time.[59] The rest were spread fairly evenly across the modern decades, with a significant number of cases from the 2000s (13%),[60] the 1990s (29%),[61] the 1980s (15%),[62] and the 1970s (13%).[63] Some might be surprised to see the unanimous Court relying as heavily on its 1970s opinions, which were roughly four decades old, as its opinions from the 2000s.

Majority opinions generally followed suit, with a notable exception: the Court cited its opinions from the 2000s nearly 22% of the time.[64] This was almost a 10% jump from what was seen in unanimous opinions. At the same time, majority-opinion citations to 1990s cases dipped 12% from the 29% seen in unanimous opinions.[65]

*Per curiam* opinions, in contrast, showed a marked preference for the Court's recent decisions. Opinions from the 2010s made up 38% of *per curiam* citations to Supreme Court precedent,[66] while 27% were cases from the 2000s.[67] This means that for *per curiam* decisions, 65% of citations to Supreme Court precedent were to cases decided in the previous 15 years. This dwarfs the figures for unanimous (29%)[68] and majority (40%)[69] opinions, in which the Court's reliance on cases from the previous 15 years was heavy but not predominant.

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59. 39 unanimous-opinion citations to 2010s Court opinions divided by 239 total unanimous-opinion citations to Court opinions, for .163.

60. 31 unanimous-opinion citations to 2000s Court opinions divided by 239 total unanimous-opinion citations to Court opinions, for .130.

61. 69 unanimous-opinion citations to 1990s Court opinions divided by 239 total unanimous-opinion citations to Court opinions, for .289.

62. 36 unanimous-opinion citations to 1980s Court opinions divided by 239 total unanimous-opinion citations to Court opinions, for .151.

63. 32 unanimous-opinion citations to 1970s Court opinions divided by 239 total unanimous-opinion citations to Court opinions, for .134.

64. 308 majority citations to 2000s Court opinions divided by 1,430 total majority citations to Court opinions, for .215.

65. 240 majority citations to 1990s Court opinions divided by 1,430 total majority citations to Court opinions, for .168.

66. 62 citations to 2010s Court opinions divided by 164 total *per curiam* citations to Court opinions, for .378.

67. 44 citations to 2000s Court opinions divided by 164 total *per curiam* citations to Court opinions, for .268.

68. See *supra* notes 59–60 for previously calculated unanimous-opinion figures of 16% for 2010s Court cases plus 13% for 2000s Court cases.

69. 261 majority citations to 2010s Court opinions out of 1,430 total (for .183, or 18%) plus 308 out of 1,430 total to 2000s cases (for .215, or 22%). Total of majority citations to 2000s and 2010s Court opinions divided by 1,430 total majority Court citations, for .398 (40%).

Concurring and dissenting Justices showed roughly the same preferences. For instance, Justices writing majority opinions cited cases from the previous 15 years 40% of the time.[70] Dissenting Justices cited these recent-vintage cases 37% of the time,[71] and concurring Justices did so 41% of the time.[72] The similar percentages are logical considering that no matter the Justice's ultimate vote, the relevant cases are usually the same.[73]

| **Supreme Court's Citations to Supreme Court Opinions by Age** | | | | | |
|---|---|---|---|---|---|
| *Decade/ Era of Cited Case* | *Unanimous* | *Majority* | *Concurring* | *Dissent* | *Per Curiam* |
| 2010s | 16% | 18% | 11% | 18% | 38% |
| 2000s | 13% | 21% | 30% | 19% | 27% |
| 1990s | 29% | 17% | 16% | 20% | 13% |
| 1980s | 15% | 14% | 8% | 15% | 13% |
| 1970s | 13% | 10% | 9% | 9% | 2% |
| 1960s | 3% | 6% | 13% | 4% | 2% |
| 1950s | < 1% | 3% | 2% | 4% | 0.6% |

70. Majority citations to 2000s Court opinions (308) plus 2010s Court opinions (261), for a 15-year total of 569, divided by 1,430 total majority Court citations, for .398 (40%).

71. Dissent citations to 2000 Court opinions (235) plus 2010s Court opinions (224), for a 15-year total of 459, divided by 1,252 total dissent citations to Court opinions, for .367 (37%).

72. Concurrence citations to 2000 Court opinions (109) plus 2010s Court opinions (38), for a 15-year total of 147, divided by 358 total concurrence citations to Court opinions, for .411 (41%).

73. I should note that for this study, I counted any separate opinion with a dissent as a dissenting opinion even if the author also concurred in part.

| | | | | | |
|---|---|---|---|---|---|
| Before 1950 | 5% | 7% | 6% | 7% | 4% |
| Before 1900 | 5% | 3% | 6% | 5% | 0.6% |
| Before 1800 | 0% | < 1% | 0% | < 1% | 0% |

### J. Secondary Sources

As stated, the Virginia and Wisconsin appellate courts cited secondary sources sparingly: less than 100 times combined in 2017. The Virginia Court of Appeals cited secondary sources 35 times, compared to 2,922 citations to primary authority. Even with such a small sampling of citations to secondary sources, it is evident that treatises were the most popular choice. The court cited treatises 21 times, which accounted for 60% of its citations to secondary authority. Legal dictionaries made up another 12 citations, or 34% of the court's citations to secondary sources. The court cited only one law-review article in its reported 2017 opinions, which concerned a point of criminal procedure.

The Wisconsin Court of Appeals cited secondary sources 52 times in 2017, compared to 4,422 cites to primary authority. The court's most popular choice was commentary to standard jury instructions, which accounted for 16 citations, or 30% of the court's citations to secondary sources. Encyclopedias (12 citations, 23%), periodicals (10 citations, 19%), and treatises (7 citations, 13%) followed. The rest were a smattering of odd cites to legal dictionaries (3), Restatements (2), American Law Reports (1), and the Federalist Papers (1).

Combined, the state appellate courts cited secondary sources with the following frequency and distribution:

| **Citations to Secondary Sources**<br>Virginia/Wisconsin Courts of Appeals (combined) | | |
|---|---|---|
| *Source* | *Number of Citations* | *Percentage of Secondary Sources* |
| American Law Reports | 1 | 1% |
| Encyclopedias | 12 | 14% |
| Periodicals (including Law Reviews) | 11 | 13% |
| Treatises | 28 | 32% |
| Restatements | 2 | 2% |
| Uniform Codes/ Model Acts | 0 | 0% |
| Legal Dictionaries | 15 | 17% |
| Commentary to Standard Jury Instructions | 17 | 20% |
| The Federalist Papers | 1 | 1% |

The combined figures reveal that the state appellate courts were more likely to cite jury-instruction commentary than periodicals, encyclopedias, American Law Reports, Restatements, or legal dictionaries. Of the classic secondary sources, only treatises drew more citations than jury-instruction commentary.

The U.S. Supreme Court was more inclined to cite secondary sources than the state courts. During its 2015 term, the Court cited secondary sources 358 times, which was 6% of the Court's 5,784 citations. Though a relatively small fraction of the Court's citations, this

nevertheless represented one of every twenty citations. Some might be surprised to learn that the Court cites secondary sources so frequently.

| **Citations to Secondary Sources**<br>U.S. Supreme Court | | |
|---|---|---|
| *Source* | *Number of Citations* | *Percentage of Secondary Sources* |
| American Law Reports | 1 | < 1% |
| Encyclopedias | 2 | 1% |
| Periodicals (including Law Reviews) | 112 | 31% |
| Treatises | 136 | 38% |
| Restatements | 40 | 11% |
| Uniform Codes/ Model Acts | 11 | 3% |
| Legal Dictionaries | 25 | 7% |
| Commentary to Standard Jury Instructions | 9 | 3% |
| The Federalist Papers | 22 | 6% |
| **Total** | **358** | — |

Secondary sources were more prevalent in concurring opinions and, to a lesser extent, dissenting opinions. This might reflect their value to Justices urging a different path and the relative freedom that Justices

feel while writing individually rather than for the Court.[74] In the Court's 2015 term, it cited secondary sources just 19 times in unanimous opinions (4% of total unanimous-opinion citations[75]) and 118 times in majority opinions (5% of total majority citations[76]). Concurring Justices cited secondary sources 77 times (12% of citations in concurring opinions[77]). This was more than double the percentage for majority opinions and three times the percentage for unanimous opinions. Dissenting Justices cited secondary sources 143 times (7% of dissent citations[78]), meaning that dissenters cited secondary sources at a 2% higher rate than Justices writing for the majority and a 3% higher rate than Justices writing for a unanimous Court.

**Secondary-Source Citations by Justice**

| *Justice* | *Unan.* | *Maj.* | *Concur.* | *Dissent* | *Per Curiam* | *Total* |
|---|---|---|---|---|---|---|
| CJ Roberts | 1 | 4 | 0 | 14 | — | 19 |
| Scalia | 1 | 1 | 0 | 1 | — | 3 |
| Kennedy | — | 8 | 0 | 4 | — | 12 |
| Thomas | 12 | 20 | 52 | 65 | — | 149 |
| Ginsburg | 0 | 19 | 6 | 16 | — | 41 |
| Breyer | 0 | 17 | 0 | 4 | — | 21 |

74. *See* Interview by Bryan A. Garner with Elena Kagan, Assoc. Justice, U.S. Supreme Court, in D.C. (July 16, 2015) (http://www.lawprose.org/bryan-garner/garners-interviews/judges-lawyers-writers-writing/hon-elena-kagan-associate-justice-part-2-of-4/) (noting at 7:52 that she writes "more formally" when writing a majority opinion for the Court than she does in her dissenting opinions); Margolis, *Authority Without Borders*, *supra* note 2, at 940 (noting that dissenting "judges may be less constrained by traditional legal reasoning").

75. 19 divided by 534 total unanimous-opinion citations, for .036.

76. 118 divided by 2,419 total majority citations, for .049.

77. 77 divided by 627 total concurrence citations, for .123.

78. 143 divided by 1,984 total dissent citations, for .072.

| | | | | | | |
|---|---|---|---|---|---|---|
| Alito | 0 | 15 | 19 | 22 | — | 56 |
| Sotomayor | 4 | 17 | 0 | 11 | — | 32 |
| Kagan | 1 | 17 | 0 | 6 | — | 24 |
| *Per Curiam* | — | — | — | — | 1 | 1 |
| **Total** | 19 | 118 | 77 | 143 | 1 | **358** |

K. Law Reviews

School-affiliated law reviews carried the day for legal periodicals. Of the 112 legal periodicals cited by the U.S. Supreme Court during its 2015 term, 91% were school-affiliated law reviews.

Others have catalogued the Supreme Court's citations to law-review articles.[79] In a 1986 study, Professor Louis Sirico, Jr. and Jeffrey Margulies reported that the Court cited law reviews less frequently in the early 1980s than it had in the early 1970s, calling the decline "substantial."[80] Professor Sirico's 2000 follow-up study, which added data from the early and late 1990s, revealed "a continuing decline in [the] number of times the Court cited legal periodicals."[81]

Unlike Sirico and Margulies, who studied the Court's citation practices in three-term blocks, my study only considered the Court's 2015 term. But a comparison is still possible. Professor Sirico reported that during the Court's 1996, 1997, and 1998 terms, it cited law reviews 271 times,[82] for an average of 90.3 citations per term. Thus, the Court's 102 law-review citations during the 2015 term showed a mild uptick. And yet this 2015 figure remains much lower than what was seen in previous decades.

Professor Sirico recorded a total of 577 law-review citations during the Court's combined 1991, 1992, and 1993 terms,[83] for an average of

79. *See* Sirico, *supra* note 2, at 1009 n.1.

80. Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986).

81. Sirico, *supra* note 2, at 1010.

82. *Id.* at 1018.

83. *Id.* at 1022.

192.3 citations per term. This is nearly double the Court's law-review citations during the 2015 term and reaffirms the decline that Professor Sirico described. By using averages and adding my study to the previous studies, the larger picture is one of a Court far less inclined to cite law-review articles than it used to be:

| **U.S. Supreme Court Citations to Law Reviews** | |
|---|---|
| *Court Term* | *Number of Citations* |
| 1971–73 | 321 (per-term avg.)[84] |
| 1981–83 | 255 (per-term avg.)[85] |
| 1991–93 | 192 (per-term avg.) |
| 1996–98 | 90 (per-term avg.) |
| 2015 | 102 |

As this table shows, the Court's relative inattention to law-review articles, compared to the Burger era's heady numbers, remains a reality. Some scholars have wondered whether this drop-off was a byproduct of the Court's incremental rightward lean under Chief Justices Rehnquist and Roberts.[86] With this jurisprudential shift, the thought was, came a preference for ruling on narrow grounds and without resort to "the

84. Sirico & Margulies, *supra* note 80, at 134 (counting 963 total citations to law reviews during the Court's 1971, 1972, and 1973 terms).

85. *Id.* (counting 767 total citations to law reviews during the Court's 1981, 1982, and 1983 terms).

86. Sirico, *supra* note 2, at 1011–12.

theoretical scholarship that most often appears in the elite journals."[87] But the numbers add a twist to this hypothesis:

| **Law-Review Citations by Justice** | | | | | |
|---|---|---|---|---|---|
| *Justice* | *Unan.* | *Maj.* | *Concur.* | *Dissent* | *Total* |
| CJ Roberts | 0 | 1 | 0 | 4 | 5 |
| Scalia | 1 | 1 | 0 | 0 | 2 |
| Kennedy | 0 | 2 | 0 | 0 | 2 |
| Thomas | 0 | 6 | 12 | 24 | 42 |
| Ginsburg | 0 | 4 | 4 | 17 | 25 |
| Breyer | 0 | 3 | 0 | 3 | 6 |
| Alito | 1 | 2 | 9 | 0 | 12 |
| Sotomayor | 0 | 1 | 0 | 5 | 6 |
| Kagan | 0 | 1 | 0 | 1 | 2 |
| **Total** | 2 | 21 | 25 | 54 | **102** |

As this table reflects, so-called conservative Justices[88] accounted for more than 60% of the Court's citations to law reviews during the 2015 term. And two of the Court's three most active law-review citers were

87. *Id.* at 1011.

88. Michael A. McCall, Madhavi M. McCall & Christopher Smith, *Criminal Justice and the 2014-2015 United States Supreme Court Term,* 61 S.D. L. REV. 242, 244 (2016) (noting that "[m]ost accounts group Chief Justice Roberts and Justices Alito, Thomas, Scalia, and Kennedy into the conservative wing of the Court").

conservatives: Justices Thomas and Alito.[89] So although the Supreme Court's journal citations remained low compared to the Burger era, there was no conservative aversion to academic writings. In fact, based on these numbers and the numbers reported elsewhere,[90] Justice Thomas, by far, gives academic authors their best chance at a coveted Supreme Court citation. During the 2015 term, he accounted for 41% of the Court's citations to law reviews.

In the end, law-review citations might be more about personal preference than anything. While Justices Thomas and Ginsburg value law-review articles and are not reluctant to cite them—doing so a combined 67 times in the 2015 term—Justices Scalia, Kennedy, and Kagan combined for just six law-review citations. So these citation preferences did not seem to fall along ideological lines. And the dissent factor surely plays a role. Law reviews were most prevalent in dissenting opinions (see below), so higher law-review numbers will logically follow Justices who, like Justice Thomas, dissent more frequently.

Ignoring for the moment whether the numbers were historically up or down, it is fair to say that during the Court's 2015 term, Justices cited law-review articles with some regularity. Citations to law reviews appeared in 42% of cases decided with an opinion. These citations spiked in separately authored opinions, with 53% appearing in dissenting opinions and 25% in concurring opinions. Combined, dissenting and concurring opinions produced 77% of the Court's law-review citations.

By comparison, the state appellate courts' law-review citations were sparing, to put it mildly. Six of the Wisconsin court's eight law-review citations were in a single case, and five of those six were in a single footnote.[91] The Virginia Court of Appeals published just one 2017 opinion that cited a law-review article.

89. *Id.*

90. Adam Feldman, *Empirical SCOTUS: With a Little Help from Academic Scholarship*, SCOTUSBLOG (Oct. 31, 2018, 5:22 PM), https://www.scotusblog.com/2018/10/empirical-scotus-with-a-little-help-from-academic-scholarship/.

91. Seng Xiong v. Vang, 904 N.W.2d 814, 817–20 n.1 (Wis. Ct. App. 2017).

| **Citations to Law Reviews** | | | | |
|---|---|---|---|---|
| *Court* | *Number of Citations* | *Number of Opinions Citing* | *Percentage of Opinions* | *Percentage of Secondary Sources* |
| U.S. Supreme Court | 102 | 31 (of 74) | 42% | 29%[92] |
| Virginia Ct. of App. | 1 | 1 (of 65) | 1.5% | 3% |
| Wisconsin Ct. of App. | 8 | 3 (of 74) | 4% | 15% |

### L. Law-Review Articles by Topic

The topical breakdown of a court's law-review citations necessarily depends, in part, on the types of cases on the court's docket. So the U.S. Supreme Court statistics may indirectly gauge the Court's tendencies or priorities when granting certiorari. Some might counter that the figures better reflect which issues demand more analytical or historical depth and thus invite scholarly insight. After all, the state courts in this study cited law reviews in just four cases, and the Supreme Court cited them in less than half its cases. This selectivity may suggest more than a simple tracking of a court's docket menu.

92. 102 law-review citations divided by 358 secondary-source citations, for .285.

| **U.S. Supreme Court — Law-Review Citations by Article Topic** | | |
|---|---|---|
| *Area of Law* | *Number of Citations* | *Percent of Law-Review Citations* |
| Antitrust | 0 | 0% |
| Bankruptcy | 2 | 1.9% |
| Business Organizations | 0 | 0% |
| Civil Procedure/ Jurisdiction | 10 | 9.8% |
| Civil Rights/§1983 | 1 | .9% |
| Commercial/UCC | 0 | 0% |
| Constitutional Law/Justiciability | 27 | 26.5% |
| Criminal Law/ Procedure | 31 | 30.4% |
| Employment/Labor | 0 | 0% |
| Environmental Law | 0 | 0% |
| Equities/Remedies | 3 | 2.9% |
| Ethics | 3 | 2.9% |
| Evidence | 0 | 0% |

| | | |
|---|---|---|
| Family Law/Domestic Relations | 0 | 0% |
| Insurance/ERISA | 4 | 3.9% |
| Intellectual Property | 0 | 0% |
| International Law /Sovereignty | 2 | 1.9% |
| Jurisprudence/ Statutory Construction | 17 | 16.7% |
| Property/ Eminent Domain | 0 | 0% |
| Tax | 0 | 0% |
| Torts/ Fed. Torts Claims Act | 0 | 0% |
| Tribal Law | 2 | 1.9% |
| Workers' Comp | 0 | 0% |

Again, the state intermediate appellate courts showed far less interest in law-review articles, citing them a combined nine times in their reported 2017 opinions. Nevertheless, a breakdown of topics is interesting if only to note the courts' shared interest in articles on criminal law and procedure: roughly 30% in the Supreme Court and 22% in the state courts:

| **State Appellate Courts (Combined) — Law-Review Citations by Article Topic** | | |
|---|---|---|
| *Area of Law* | *Number of Citations* | *Percent of Law-Review Citations* |
| Criminal Law/ Procedure | 2 | 22.2% |
| Family Law/Domestic Relations | 5 | 55.6% |
| Tax | 2 | 22.2% |

The state courts' law-review citations were so few that the results are of dubious value. But the three courts' combined figures reveal some truth in what many lawyers, law-review editors, and academics perceive: scholars who write about constitutional law or criminal law/procedure may increase their odds of showing up in a court opinion. In fact, articles about constitutional and criminal law (especially criminal procedure) accounted for 54% of the three courts' law-review citations. Adding articles on jurisprudence pushes the figure to nearly 70%. Editors and scholars, take note.

### M. Law Reviews by Tier

If the state appellate courts had preferences on which journals to cite, geography seemed to be the common denominator. The Virginia Court of Appeals' lone 2017 law-review citation was to a Virginia law school's journal: the *Washington and Lee Law Review*. Likewise, with one exception, the Wisconsin Court of Appeals cited only law-review articles published by local schools: Marquette and the University of Wisconsin. The lone outlier was the *Tulane Law Review*.

For the U.S. Supreme Court's citations to law reviews, it was a case of the rich staying rich. This was consistent with Professor Sirico's 1986

study, which found that "[t]he Court most frequently cited journals that normally are regarded as elite,"[93] and his 2000 follow-up study, which found that "[m]ost of the Court's citations continue to refer to journals that are generally regarded as elite."[94] Indeed, the only law reviews that garnered five or more citations during the Court's 2015 term were those published by Harvard (thirteen), Yale (twelve), NYU (nine), University of Chicago (eight), Columbia (six), Georgetown (six), UCLA (six), and Michigan (five)—all law schools that were (and remain) ranked firmly in the top twenty, with most falling in the top ten.[95]

### N. Nontraditional Sources

A number of scholars have reported an increase in citations to nontraditional, and especially nonlegal, sources despite their place at "the bottom" of the legal-authority hierarchy.[96] The Virginia Court of Appeals' reported opinions from 2017 provide some evidence of this: the court cited government policy manuals seven times as often as it cited law-review articles. The rise of nontraditional sources is most evident in citations to online government materials, though the Supreme Court's 2015 term revealed a nearly two-to-one preference for citing conventional, offline government materials (see table below).

A nontraditional source's import to a court's decision is always uncertain.[97] And yet a court's decision to cite a nontraditional (or nonlegal) source still raises interesting questions about why judges, with what some see as increasing frequency, "would think it important or useful to justify their judgments in terms of nonlegal materials."[98] Citations to these sources may also lend insight to "changes in the culture that makes certain citations respectable at certain times rather than others."[99]

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93. Sirico, *supra* note 2, at 1009, 1010.

94. Sirico & Margulies, *supra* note 80.

95. Evan Jones, *The 2015 US News Law School Rankings are Out!*, LAWSCHOOLI, https://lawschooli.com/2015-us-news-law-school-rankings/ (last visited June 17, 2020) (reflecting rankings during the Court's 2015 term).

96. Margolis, *Authority Without Borders*, *supra* note 2, at 919; Schauer & Wise, *supra* note 2, at 497.

97. Margolis, *Authority Without Borders*, *supra* note 2, at 921 ("The fact that nonlegal citations in opinions are increasing does not necessarily mean that those nonlegal sources are being used as authority . . . ."); Schauer & Wise, *supra* note 2, at 513, 514 ("Citation may say little about what produces legal results . . . .").

98. Schauer & Wise, *supra* note 2, at 514.

99. *Id.*

The standout nontraditional/nonlegal sources in this study were books, government materials, and dictionaries—usually a version of *Webster's* or occasionally *American Heritage* or the *Oxford English Dictionary*. In the U.S. Supreme Court's 2015 term, nonlegal dictionaries accounted for 36 citations, or 14% of the Court's citations to nontraditional sources.[100] "Lay" books accounted for an even higher 26%.[101] But government materials—both online and offline—took the crown with 39%.[102] The Supreme Court cited websites for 28% of its citations to nontraditional sources[103]: 14% to government sites (usually with a .gov, .mil, or state domain),[104] 11% to nongovernmental sites,[105] and 2% to online newspapers.[106]

In the state appellate opinions, dictionaries dominated, making up 55% of the Virginia Court of Appeals' citations to nontraditional sources and 54% of the Wisconsin Court of Appeals' nontraditional sources.

All three courts cited hardbound dictionaries almost exclusively. Of the courts' combined 70 citations to nonlegal dictionaries, only 4 citations (by the Wisconsin Court of Appeals) indicated an online version. This accounted for just 6% of the combined nonlegal-dictionary citations.

Despite early concerns about Wikipedia's encroachment into legal decision-making,[107] my study found no citations to Wikipedia. One wonders whether this seeming restraint was simple coincidence or, instead, evidence that judges heard the early alarms sounded by scholars and commentators.

100. 36 dictionary citations divided by 251 total citations to nontraditional sources, for .143.

101. 65 book citations divided by 251 total citations to nontraditional sources, for .259.

102. 98 combined citations to online and offline government materials divided by 251 total citations to nontraditional sources, for .390.

103. 69 combined citations to online newspapers, government websites, and other websites divided by 251 total citations to nontraditional sources, for .275.

104. 36 citations to government websites divided by 251 total citations to nontraditional sources, for .143.

105. 28 citations to nongovernment websites divided by 251 total citations to nontraditional sources, for .112.

106. 5 citations to online newspapers divided by 251 total citations to nontraditional sources, for .020.

107. See, e.g., Daniel J. Baker, *A Jester's Promenade: Citations to Wikipedia in Law Reviews, 2002–2008*, 7 I/S 361 (2012); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1 (2009).

| **Citations to Nontraditional Sources** | | | |
|---|---|---|---|
| *Source* | *U.S. Supreme Ct* | *Virginia Court of Appeals* | *Wisconsin Court of Appeals* |
| Dictionary (nonlegal) | 36 | 12 | 18 |
| Dictionary (online) | 0 | 0 | 4 |
| Book | 65 | 0 | 0 |
| Newspaper (print) | 12 | 0 | 0 |
| Newspaper (online) | 5 | 0 | 4 |
| Magazine (print) | 0 | 2 | 1 |
| Magazine (online) | 0 | 0 | 0 |
| Wikipedia | 0 | 0 | 0 |
| Gov't Material (traditionally reported/published) | 62 | 0 | 4 |
| Gov't Website | 36 | 7 | 5 |
| Other Website | 28 | 1 | 5 |
| Cultural/Arts | 1 | 0 | 0 |
| Political/Historical incl. Correspondence | 6 | 0 | 0 |
| **Total** | 251 | 22 | 41 |

### O. Legislative History v. Dictionaries

In 2015, Justice Elena Kagan remarked, "[W]e're all textualists now."[108] If one were to broadly characterize textualism as an aversion to legislative history combined with an affinity for "plain meaning" dictionary definitions, then the citations seem to back her up—though, perhaps ironically, to a lesser degree in her own Court.

In 2017, two years after Justice Kagan's remark, the Virginia Court of Appeals cited legislative history just four times. Meanwhile, the court cited dictionaries 24 times: 12 times to nonlegal dictionaries and 12 times to legal dictionaries. Thus, the court was six times more likely to rely on a dictionary definition than on legislative history and three times more likely to rely on a nonlegal dictionary.

The Wisconsin Court of Appeals showed a similar reluctance to cite legislative history and a similar affinity for dictionaries. In 2017, it cited legislative history just five times. Meanwhile, it cited nonlegal dictionaries 22 times, including 4 citations to online versions. It also cited legal dictionaries 3 times, raising its total dictionary count to 25 citations. Thus, the court was five times more likely to cite a dictionary, and roughly four times more likely to cite a nonlegal dictionary, than it was to cite legislative history.

Combining the two courts, we see that these state intermediate appellate courts cited nonlegal dictionaries 34 times compared to 9 citations to legislative history. Adding citations to legal dictionaries widens that gap to 49 to 9.

The U.S. Supreme Court's opinions for the 2015 term showed much more balance, with occasional citations to legislative history and dictionaries—and with each source drawing nearly the same number of citations. The Court's opinions contained 58 citations to legislative history. Meanwhile, the Court cited dictionaries 61 times (36 citations to nonlegal dictionaries and 25 to legal dictionaries).

For legislative history, Justices Ginsburg and Alito led the way with 15 citations each. Justice Sotomayor cited legislative history seven times, while Justices Thomas, Breyer, and Kagan cited it six times each. Chief Justice Roberts cited legislative history three times. Neither Justice Scalia nor Justice Kennedy cited legislative history that term.

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108. *In Scalia Lecture, Kagan Discusses Statutory Interpretation*, HARVARD LAW TODAY (Nov. 25, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/ (noting this at 8:29 in a video containing Justice Kagan's remarks).

| **Legislative History** | |
|---|---|
| Alito | 15 |
| Breyer | 6 |
| Ginsburg | 15 |
| Kagan | 6 |
| Kennedy | 0 |
| CJ Roberts | 3 |
| Sotomayor | 7 |
| Scalia | 0 |
| Thomas | 6 |
| **Total** | **58** |

Of the Court's 61 dictionary citations, Justice Thomas led the way. He cited legal dictionaries 9 times and nonlegal dictionaries 13 times, for a total of 22 dictionary citations. His closest rival was Justice Kagan, who cited dictionaries 17 times, with 7 citations to legal dictionaries and 10 to nonlegal dictionaries. Combined, Justices Thomas and Kagan accounted for 64% of the Court's dictionary citations during the 2015 term.

As the table below shows, the remaining Justices cited dictionaries occasionally (Sotomayor), rarely (Roberts, Scalia, Ginsburg, Alito), or not at all (Kennedy, Breyer). Justices Scalia, Kennedy, Ginsburg, and Breyer did not cite a nonlegal dictionary all term.

| **Dictionaries** | *Legal* | *Nonlegal* |
|---|---|---|
| Alito | 2 | 2 |
| Breyer | 0 | 0 |
| Ginsburg | 1 | 0 |
| Kagan | 7 | 10 |
| Kennedy | 0 | 0 |
| CJ Roberts | 1 | 3 |
| Sotomayor | 4 | 8 |
| Scalia | 1 | 0 |
| Thomas | 9 | 13 |
| **Total** | **25** | **36** |

P. Curiosities

A number of citations were relatively novel or held special cultural or historical interest. For instance, Chief Justice Roberts cited Ira Gershwin and DuBose Heyward's libretto from *Porgy and Bess* in a dissenting opinion.[109] In another opinion, the Chief Justice cited a 1972 book on the Alaska Gold Rush.[110]

European legal traditions reasserted their influence. The Supreme Court's citations included, for example, the writings of French judge and philosopher Montesquieu.[111] But English sources predominated. A 2016 bankruptcy case prompted citations to an Elizabethan statute known as

109. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).

110. Sturgeon v. Frost, 136 S. Ct. 1061, 1065 (2016) (citing D. WHARTON, THE ALASKA GOLD RUSH 186–87 (1972)).

111. *Bank Markazi*, 136 S. Ct. at 1330 (Roberts, C.J. dissenting).

the Fraudulent Conveyances Act of 1571.[112] English cases from 1601,[113] 1611,[114] 1613,[115] and 1693[116] also appeared in the Court's opinions, along with a case from 1765.[117] And, more than two centuries after his death, Sir William Blackstone's *Commentaries on the Laws of England* was alive and well, appearing in seven cases.[118] In one case, Justice Breyer cited Blackstone's 1765 treatise and followed with a more recent (relatively speaking) treatise: English lawyer Joseph Chitty's 1816 *Practical Treatise on the Criminal Law*.[119] Also drawing a citation was Dr. Samuel Johnson's landmark *A Dictionary of the English Language*—the 1785 seventh edition.[120]

A few sources from this side of the Atlantic had a similar vintage, including a 1799 Supreme Court case.[121] In fact, the Supreme Court cited pre-1900 cases 139 times. Those citations made up roughly 4% of the Court's total citations to caselaw.[122]

Historical correspondence also appeared. Justice Thomas cited James Madison's April 23, 1787 letter to Thomas Jefferson reporting on, among other things, Massachusetts' efforts to quell the Shays' Rebellion.[123] Chief Justice Roberts cited the John Jay Court's 1793 letter to George Washington, which declined the President's request for an advisory opinion on the United States' role in the war between England and France.[124] Chief Justice Roberts also cited Justice Oliver Wendell Holmes's 1915 letter to Harvard law professor Felix Frankfurter (sent

112. Husky Int'l Electronics, Inc. v. Ritz, 136 S. Ct. 1581, 1587 (2016) (citing Statute of 13 Elizabeth, also known as the Fraudulent Conveyances Act of 1571).

113. *Id.* (citing *Twyne's Case,* 3 Co. Rep. 80b, 76 Eng. Rep. 809 (K.B. 1601)).

114. Luis v. United States, 136 S. Ct. 1083, 1099 (2016) (Thomas, J., concurring) (citing *Fleetwood's Case,* 8 Co. Rep. 171a, 171b, 77 Eng. Rep. 731, 732 (K.B. 1611)).

115. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (citing *Robert Marys's Case,* 9 Co. Rep. 111b, 112b, 77 Eng. Rep. 895, 898–899 (K.B. 1613)).

116. *Luis*, 136 S. Ct. at 1099–100 (Thomas, J., concurring) (citing *Jones v. Ashurt,* Skin, 357, 357–358, 90 Eng. Rep. 159 (K.B. 1693)).

117. *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring) (citing *Entick v. Carrington,* 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (1765)).

118. *E.g.*, *Luis*, 136 S. Ct. at 1094; *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

119. *Luis*, 136 S. Ct. at 1094.

120. Evenwel v. Abbott, 136 S. Ct. 1120, 1139 (2016) (Thomas, J., concurring) (defining *republick* and *republican*).

121. Lockhart v. United States, 136 S. Ct. 958, 963 (2016) (citing Sims Lessee v. Irvine, 3 U.S. (3 Dall.) 425 (1799)).

122. 139 citations to pre-1900 cases divided by 3,921 total case citations, for .035.

123. *Evenwel*, 136 S. Ct. at 1138 (Thomas, J., concurring).

124. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 678 (2016) (Roberts, C.J., dissenting).

more than two decades before Frankfurter's appointment to the Court) discussing some finer points of pleading tort claims.[125]

The Court also cited a number of presidential proclamations,[126] along with the 1867 treaty documenting the Alaska Purchase[127] and the 1898 Treaty of Paris.[128] The curiosities also tended toward the contemporary, including a citation to Apple's online instructions for setting up an iPhone.[129]

A number of Justices cited works by their colleague Antonin Scalia. Justice Scalia's treatise *Reading Law: The Interpretation of Legal Texts*, coauthored with Bryan Garner, appeared four times, drawing citations by Justices Kagan,[130] Sotomayor,[131] and Thomas.[132] And Justice Thomas cited two different Scalia-penned law-review articles.[133]

The state appellate courts offered fewer forays into the historical or the offbeat. The Virginia Court of Appeals cited a medical dictionary, *Taber's Cyclopedic Medical Dictionary*, in a manslaughter case.[134] The Wisconsin Court of Appeals cited the social-media blogging website *Tumblr*[135] and, in another case, the Uniform Code for Military Justice alongside the U.S. Military's rules for courts-martial.[136]

## *V. CONCLUSION: SNAPSHOTS OF A TYPICAL OPINION*

### A. State Intermediate Appellate Court

From counting and categorizing 7,509 citations in 138 reported decisions by two different state intermediate appellate courts, a picture

125. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 397 (2015).

126. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1879 (2016) (Breyer, J., dissenting) (President Taft's 1912 proclamation of New Mexico's statehood); Sturgeon v. Frost, 136 S. Ct. 1061, 1065 (2016) (President Carter's 1978 proclamations designating federal land in Alaska as national monuments).

127. *Sturgeon*, 136 S. Ct. at 1064.

128. *Sanchez Valle*, 136 S. Ct. at 1868.

129. Torres v. Lynch, 136 S. Ct. 1619, 1626 n.5 (2016).

130. Lockhart v. United States, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting).

131. *Id.* at 963 (majority opinion).

132. Luis v. United States, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring).

133. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Thomas, J., dissenting) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989)); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting) (citing Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581–86 (1990)).

134. Levenson v. Commonwealth, 808 S.E.2d 196, 198 n.2 (Va. Ct. App. 2017).

135. State v. Silverstein, 902 N.W.2d 550, 554 n.5 (Wis. Ct. App. 2017).

136. General Court-Martial Case of Riemer, 900 N.W.2d 326, 331–32 (Wis. Ct. App. 2017).

of a typical state appellate-court opinion emerges. Of the Virginia and Wisconsin courts' 138 opinions in 2017, just five had dissents (4%), and seven had concurrences (5%). No case had multiple separate opinions. All said, the courts issued 126 unanimous opinions, which accounted for 91% of their reported opinions. Since more than 90% of the courts' decisions were unanimous, a hypothetical "typical opinion" would be unanimous.

Within this hypothetical unanimous opinion, 52 total citations would appear,[137] citing 21 unique authorities.[138] Almost every citation would be to primary authority (51, or 98%).[139] Caselaw would account for 32 citations, meaning 62% of the opinion's total citations[140] and 63% of its citations to primary authority.[141]

Of the 32 citations to cases, 80%, or 26, would be to binding state precedent.[142] Of those 26 citations to binding state precedent, 15, or 57%,[143] would be to the state supreme court, and 11, or 43%, would be to the court of appeals' own published precedent.[144] Of the citations to binding state precedent, eight, or 30%, would be to cases decided in the 2010s (here, within the previous seven years).[145] Nine of those citations, or 36%, would be to cases from the 2000s.[146] Four (15%) would be to

137. 6,529 total unanimous-opinion citations divided by 126 unanimous opinions, for 51.82 citations per opinion.

138. 2,636 total unique citations (unanimous opinions) divided by 126 unanimous opinions, for 20.92 unique citations.

139. 6,403 citations to primary authority (unanimous opinions) divided by 6,529 total citations, for .981; 52 total citations in hypothetical opinion times .98, for 50.96.

140. 4,066 citations to cases divided by 6,529 total citations, for .623; 52 total citations in hypothetical opinion times .62, for 32.24 citations to cases; 32 cases divided by 52 total citations, for .615.

141. 32 case citations divided by 51 citations to primary authority, for .627.

142. 3,250 citations (unanimous opinions) to binding state precedent divided by 4,066 total cases citations, for .799. 32 citations to cases in hypothetical opinion times .80, for 25.6.

143. 1,841 unanimous-opinion citations to binding state supreme court cases divided by 3,250 citations to binding cases, for .566; 26 binding state cases times .57, for 14.82.

144. 1,409 (unanimous opinion) citations to the court of appeals' own published cases divided by 3,250 total citations to binding state precedent, for .434; 26 hypothetical case citations to binding state precedent times .43, for 11.18.

145. 968 of the state courts' 3,250 total unanimous-opinion citations in 2017 were to binding state cases from the 2010s, for a 30% citation rate; 26 hypothetical-opinion citations to binding state cases times .3, for 7.8 cases in this age category.

146. 1165 of the state courts' 3,250 total unanimous-opinion citations in 2017 were to binding state cases from the 2000s, for a 36% citation rate; 26 hypothetical-opinion citations to binding state cases times .36, for 9.36 cases in this age category.

cases from the 1990s[147] and three (11%) to cases from the 1980s.[148] This would leave just two more citations to binding state precedent, which would be to cases from the 1970s or older.[149]

Of the six citations to caselaw other than binding state precedent, the most likely choice would be U.S. Supreme Court precedent, which accounted for 8% of the unanimous-decision case citations in this study. The next likely choices would be opinions from the U.S. Courts of Appeals (4% citation rate) or from another state's supreme court (also a 4% citation rate). Half as likely would be opinions from another state's intermediate appellate court (2% citation rate).[150]

Citations to codified law would contribute 19, or 36%, of the opinion's citations.[151] Of those, 16, or 84%, would be citations to binding state statutes.[152] The remaining three citations to codified law would likely be to state court rules, which accounted for 5% of unanimous-decision citations to codified law—or possibly citations to federal statutes (3%), state evidence rules (2%), or state regulations (2%).

This leaves a single citation unaccounted for. A secondary authority might fill this wildcard slot, and if so, the most likely choice would be a treatise, followed by a legal dictionary, or, close behind, commentary to a standard jury instruction.[153] Less likely still would be a citation to a nontraditional source.[154]

147. 497 of the state courts' 3,250 total unanimous-opinion citations in 2017 were to binding state cases from the 2000s, for a 15% citation rate; 26 hypothetical-opinion citations to binding state cases times .15, for 3.9 cases in this age category.

148. 356 of the state courts' 3,250 total unanimous-opinion citations in 2017 were to binding state cases from the 2000s, for an 11% citation rate; 26 hypothetical-opinion citations to binding state cases times .11, for 2.86 cases in this age category.

149. The state appellate courts cited binding state precedent from the 1970s for 5% of their binding precedent, followed by 1% from the 1960s, and less than 1% from the 1950s.

150. Other states' courts of appeals comprised 2% of the unanimous-opinion case citations, being cited 93 times compared to 148 state supreme court cases and 147 U.S. Court of Appeals cases.

151. 2,337 unanimous-opinion citations to codified law divided by 6,529 total citations, for .358. 52 total citations in hypothetical opinion times .36, for 18.72 citations to codified law.

152. 1,960 (unanimous-opinion) citations to statutes divided by 2,337 total citations to codified law, for .839; unanimous-opinion citation rate of 84% times 19 hypothetical-opinion citations to codified law, for 15.96.

153. In the state appellate courts' unanimous decisions (combined), the courts cited treatises 25 times, legal dictionaries 14 times, and jury-instruction commentary 11 times. These secondary sources were cited with the greatest frequency in unanimous opinions.

154. Secondary sources drew 67 unanimous-opinion citations, compared to 48 citations to nontraditional sources.

## B. U.S. Supreme Court

Of the U.S. Supreme Court's 74 opinions in the 2015 term, 51 (or 69%) included a dissent or a concurrence—or both. Thirty-eight cases (51%) had at least one dissenting opinion. Twenty-eight cases (38%) had at least one concurring opinion. Fifteen cases (20%) had both dissenting and concurring opinions. Only 17 of the Court's 74 opinions (23%) were unanimous.

Given the frequency of opinions with dissents or concurrences—together with the comparatively low number of unanimous opinions—the typical Supreme Court opinion would be better described as *opinions*, and presenting a "typical" opinion is undeniably slippery.

If forced to speculate on whether a dissent or a concurrence, or both, would be most typical, the numbers offer some clues. During the Court's 2015 term, there were 50 dissenting opinions, compared to 36 concurring opinions, meaning 28% more dissents than concurrences. The 50 dissents eclipsed the 45 majority opinions.

Weighing all this, the typical Supreme Court decision—if there could be such a thing—would likely consist of a majority opinion and a dissent.[155] There were 17 such cases during the 2015 term and 24 cases with a majority opinion accompanied by one or more dissents (but no concurrence).

### *1. The Majority*

The majority opinion would contain 54 total citations.[156] Forty-nine (91%) of those citations would be to primary authority.[157] Caselaw would account for 36 citations,[158] meaning 67% of the opinion's total citations[159] and 74% of its citations to primary authority.[160]

155. Seven cases had multiple dissents yet no concurrences. Eight cases had one dissent and one concurring opinion. Cases with both dissenting and concurring opinions, with more than one in either or both categories, made up five of the 2015-term cases. So although a variety of combinations exist, the one-dissent model seems to be the most prevalent outcome.

156. 2,417 total majority citations divided by 45 majority opinions, for 53.71 citations per majority opinion.

157. 2,204 majority citations to primary authority divided by 45 majority opinions, for 48.98 citations per majority opinion; 49 citations to primary authority divided by 54 citations, for .907.

158. 1,640 total majority citations to caselaw divided by 45 majority opinions, for 36.44 citations to caselaw per majority opinion.

159. 36 citations to caselaw divided by 54 total citations, for .667.

160. 36 citations to caselaw divided by 49 citations to primary authority, for .735.

Of the 36 citations to cases, 32, or 89%, would be to the Supreme Court's own opinions.[161] Of those, six, or 18%, would be to cases decided within the previous five years (here, in the 2010s).[162] Seven of those citations, or 22%, would be to Court opinions between 5 and 15 years old.[163] Five (17%) would be to cases between 15 and 25 years old,[164] and four (14%) to cases between 25 and 35 years old.[165] This would leave ten more citations to Court opinions, which would likely consist of three (10%) to cases between 35 and 45 years old (here, from the 1970s)[166] and seven to cases more than 45 years old (here, from before the 1970s).

For the four citations to persuasive precedent, the most likely choice would be U.S. Court of Appeals cases, which accounted for 54% of the Court's majority-opinion citations to persuasive precedent.[167] The next likeliest choice would be state supreme-court opinions, which made up 26% of majority-opinion citations to persuasive precedent.[168]

Codified law would contribute 13 citations, or 24% of the opinion's total citations.[169] Of those, seven, or roughly 50%, would cite a federal statute.[170] The remaining six citations to codified law would most likely include state statutes—a surprising 21% of majority citations to codified

161. 1,430 citations to Supreme Court opinions divided by 45 majority opinions, for 31.78 per majority opinion; 32 citations to Supreme Court opinions divided by 36 total case citations, for .889.

162. 261 majority citations to 2010s Supreme Court opinions divided by 1,430 total majority-opinion citations to Court opinions, for .183; 32 hypothetical citations to Court opinions times .183, for 5.86 cases from 2010s.

163. 308 majority citations to 2000s Supreme Court opinions divided by 1,430 total majority-opinion citations to Court opinions, for .215; 32 hypothetical citations to Court opinions times .215, for 6.88 cases from 2000s.

164. 240 majority citations to 1990s Supreme Court opinions divided by 1,430 total majority-opinion citations to Court opinions, for .168; 32 hypothetical citations to Court opinions times .168, for 5.38 cases from 1990s.

165. 207 majority citations to 1980s Supreme Court opinions divided by 1,430 total majority-opinion citations to Court opinions, for .145; 32 hypothetical citations to Court opinions times .145, for 4.64 cases from 1980s.

166. 139 majority citations to 1970s Supreme Court opinions divided by 1,430 total majority-opinion citations to Court opinions, for .097; 32 hypothetical citations to Court opinions times .097, for 3.1 cases from 1970s.

167. 114 majority citations to U.S. Court of Appeals cases divided by 210 total citations to persuasive precedent, for .543.

168. 55 majority citations to state supreme court cases divided by 210 total citations to persuasive precedent, for .262.

169. 565 majority citations to codified law divided by 45 majority opinions, for 12.56 per majority opinion; 13 citations divided by 54 total citations in hypothetical majority opinion, for .241.

170. 280 majority citations to federal statutes divided by 565 total citations to codified law, for .496; 13 hypothetical citations to codified law times .496, for 6.45 citations to federal statutes.

law[171]—and federal regulations, which accounted for 15% of the Court's majority-opinion citations to codified law.[172] After that, the most likely codified authorities would be the Constitution (5%)[173] or the Federal Rules of Civil Procedure (4%).[174] It's worth noting again that in this study, only formal citations were counted—not passing text references. So if the Court omitted the elements of a traditional, formal citation when referring to a constitutional amendment or clause, only the first textual reference drew a tally.

Besides the 36 citations to caselaw and 13 to codified law, only five slots (of the 54 total) would remain for our hypothetical majority opinion. These might be filled by secondary authorities, which represented 5% of the Court's majority-opinion citations.[175] If so, the most likely choice by far would be treatises, which made up 41% of majority-opinion citations to secondary sources.[176] The next likeliest choice would be a law-review article, which accounted for 18% of majority-opinion secondary sources.[177]

Another possibility would be nontraditional sources, which made up 3% of the Court's majority-opinion citations.[178] If so, government materials would be a strong bet. Government materials accounted for 57—or 69% of—majority-opinion citations to nontraditional sources,[179] with 46 citations to traditionally published material (55%)[180] and 11

171. 117 majority citations to state statutes divided by 565 total citations to codified law, for .207; 13 hypothetical citations to codified law times .207, for 2.69 citations to state statutes.

172. 82 majority citations to federal regulations divided by 565 total citations to codified law, for .145; 13 hypothetical citations to codified law times .145, for 1.89 citations to federal regulations.

173. 27 majority citations to the Constitution divided by 565 total citations to codified law, for .048; 13 hypothetical citations to codified law times .048, for .624 citations to the Constitution.

174. 25 majority citations to the Federal Rules of Civil Procedure divided by 565 total citations to codified law, for .044; 13 hypothetical citations to codified law times .044, for .572 citations.

175. 118 majority citations to secondary sources divided by 2,417 total majority-opinion citations, for .049.

176. 48 majority citations to treatises divided by 118 total majority-opinion citations to secondary sources, for .407.

177. 21 majority citations to law reviews divided by 118 total majority-opinion citations to secondary sources, for .178.

178. 83 majority citations to nontraditional sources divided by 2,417 total majority-opinion citations, for .034.

179. 57 majority citations to government materials (11 online, 46 offline) divided by 83 total citations to nontraditional sources, for .687.

180. 46 majority citations to traditionally published government materials divided by 83 majority citations to nontraditional sources, for .554.

citations to online material (13%).[181] This was followed by citations to nonlegal dictionaries (16%)[182] and nongovernment websites (6%).[183]

### *2. The Dissent*

The dissenting opinion would have 40 citations to authority.[184] Of those, 34 would be citations to primary authorities,[185] including 28 citations to caselaw.[186] Almost all the cited cases—25, or 90%—would be Supreme Court cases.[187] Of those, four, or roughly 18%, would likely be to cases decided in the previous five years.[188] Five more, or roughly 19%, would be to cases 5 to 15 years old,[189] and another five, or roughly 20%, would be to cases 15 to 25 years old.[190] This would leave 11 more citations to Supreme Court opinions, with 4, or 15%, between 25 and 35 years old[191] and 2, or 9%, between 35 and 45 years old.[192] The remaining five citations to Supreme Court opinions could be any combination of older cases, and could easily include three cases predating 1950, which accounted for 12% of dissent citations to Court precedent.[193]

The dissenting Justice's three citations to persuasive precedent would account for almost 11% of the dissent's citations to caselaw.[194]

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181. 11 majority citations to government websites divided by 83 majority citations to nontraditional sources, for .133.

182. 13 majority-opinion citations to nonlegal dictionaries divided by 83 total citations to nontraditional sources, for .157.

183. 5 majority citations to nongovernment websites divided by 83 total citations to nontraditional sources, for .060.

184. 1,984 total citations in dissenting opinions divided by 50 dissenting opinions in 2015 term, for 39.68.

185. 1,703 dissent citations to primary authorities divided by 50 dissenting opinions, for 34.06.

186. 1,397 dissent citations to caselaw divided by 50 dissenting opinions, for 27.94.

187. 1,252 dissent citations to Supreme Court opinions divided by 1,397 dissenting citations to caselaw, for .896; 28 citations to caselaw times .896, for 25.09.

188. 224 dissent citations to 2010s-era Court opinions divided by 1,252 total dissent citations to Court opinions, for .179; 25 hypothetical citations to Court opinions times .179, for 4.48.

189. 235 dissent citations to 2000s-era Court opinions divided by 1,252 total dissent citations to Court opinions, for .188; 25 hypothetical citations to Court opinions times .188, for 4.7.

190. 247 dissent citations to 1990s-era Court opinions divided by 1,252 total citations to Court opinions, for .197; 25 hypothetical citations to Court opinions times .197, for 4.93.

191. 185 dissent citations to 1980s-era Court opinions divided by 1,252 total citations to Court opinions, for .148; 25 hypothetical citations to Court opinions times .148, for 3.70.

192. 117 dissent citations to 1970s-era Court opinions divided by 1,252 total citations to Court opinions, for .093; 25 hypothetical citations to Court opinions times .093, for 2.33.

193. 147 dissent citations to pre-1950 Court opinions—including 59 pre-1900 cases and 1 from before 1800—divided by 1,252 total citations to Court opinions, for .117; 25 hypothetical citations to Court opinions times .117, for 2.93.

194. 3 (hypothetical) dissent citations to persuasive precedent divided by 28 dissent citations to caselaw, for .107.

For those citations, the most likely choice would be—in a possible bump against expectations—state supreme-court opinions, which comprised 42% of dissent citations to persuasive precedent.[195] U.S. Court of Appeals cases would be the next likeliest choice. They comprised 32% of dissenters' citations to persuasive precedent.[196]

The dissenting opinion would include six formal citations to codified law.[197] The most frequent (three, or 55%) would be to a federal statute or statutes.[198] The dissent's remaining three citations to codified law would most likely include, in another possible surprise, a state statute (17% of dissent citations to codified law)[199] or the Constitution (15%).[200]

This leaves six citations to secondary or nontraditional sources (or both). Dissenting Justices cited secondary authorities 143 times, for 7% of their total citations,[201] and cited nontraditional sources 119 times, for 6%.[202] The most likely secondary sources would be law reviews, which drew 54 dissent citations, or 38% of dissent citations to secondary sources.[203] Treatises would also be likely choices, having accounted for 42, or 29%, of dissent citations to secondary sources.[204]

For nontraditional sources, the most likely choice would be nongovernment websites, which drew 31% of dissent citations to nontraditional sources.[205] Less likely would be government websites (23%)[206] or traditionally published government materials (18%).[207]

195. 60 dissent citations to state supreme-court opinions divided by 144 citations to persuasive precedent, for .417.

196. 46 dissent citations to U.S. Court of Appeals opinions divided by 144 citations to persuasive precedent, for .319.

197. 278 dissent citations to codified law divided by 50 dissenting opinions, for 5.56.

198. 152 dissent citations to federal statutes divided by 278 citations to codified law, for .547; 6 hypothetical dissent citations to codified law times .547, for 3.28.

199. 48 dissent citations to state statutes divided by 278 citations to codified law, for .173.

200. 41 citations to the Constitution divided by 278 dissent citations to codified law, for .147.

201. 143 dissent citations to secondary authorities divided by 1,984 total dissent citations, for .072.

202. 119 dissent citations to nontraditional sources divided by 1,984 total dissent citations, for .06.

203. 54 dissent citations to law reviews divided by 143 citations to secondary sources, for .378.

204. 42 dissent citations to treatises divided by 143 citations to secondary sources, for .294.

205. 37 dissent citations to nongovernment websites divided by 119 citations to nontraditional sources, for .311.

206. 27 dissent citations to government websites divided by 119 citations to nontraditional sources, for .227.

207. 22 dissent citations to traditionally published government materials divided by 119 citations to nontraditional sources, for .185.