

Citations in Supreme Court Opinions and Briefs: A Comparative Study*

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Mr. Manz surveys the use of authority by the United States Supreme Court during the October 1996 Term, comparing it to the authorities cited in the briefs submitted to the Court. He seeks to present a broader profile of the sources of authority cited by those involved with the appellate process, and to determine to what extent the Court's research locates materials not included in the briefs.

¶1 Although there have been numerous empirical studies of appellate court citation practices,¹ relatively little attention has been paid to what has been described as “the symbiosis between appellate brief[s] and supreme court opinion[s].”² To provide further information on this relationship, this article surveys the use of authority by the United States Supreme Court during the October 1996 Term³ and compares it to the authorities cited in the briefs submitted to the Court. In so doing, it seeks to present a broader profile of the sources of authority cited by those involved with the appellate process, and to determine to what extent the Court's research locates materials not included in the briefs it receives.⁴

¶2 The first part of this article describes the methodology used in gathering the statistics for the study. This is followed by an analysis that compares citations to cases in the majority opinions with those in the appellate briefs. A similar analysis compares citations to a wide variety of secondary authorities in the opinions

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1. See *infra* Appendix B for a bibliography of court citation studies.
2. John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 414 (1977). Various judges have also commented on the importance of the appellate brief. See, e.g., Thurgood Marshall, *The Federal Appeal*, in COUNSEL ON APPEAL 141, 146 (Arthur A. Charpentier ed., 1968) (“In the seclusion of his chambers the judge has only his briefs and the law books”), quoted in EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT 89 (8th ed. 1999); George Rossman, *Appellate Practice and Advocacy*, 34 OR. L. REV. 73, 73 (1955) (“[I]f better briefs are written, the court will produce better decisions”), quoted in Edward D. Re, *The Lawyer's Role in the Judicial Process*, CASE & COMMENT, Mar.–Apr. 1978, at 41, 41. For an earlier study comparing citations in opinions and briefs for the lower federal courts, see THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS—INFORMATION GATHERING IN THE ADVERSARY SYSTEM 132–36, 333–37 (1978).
3. Typically, the 1996 Term included cases covering a wide variety of issues, including the well-publicized *Clinton v. Jones*, 520 U.S. 681 (1997), and the right-to-die cases, *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksburg*, 521 U.S. 702 (1997). One decision, *United States v. Alaska*, 521 U.S. 1 (1997), was an original jurisdiction case involving the right to offer lands for mineral leasing.
4. Since the preparation of opinions is confidential, it is not possible to determine if the Court discovered a relevant authority in a brief, even if it is cited in both the brief and the subsequent opinion.

and the briefs. The article concludes with a short discussion of the citation practices of individual justices, and a summary of the most salient similarities and differences found when comparing the citations to authority in the opinions and briefs.

Method

¶3 This article derives its data on opinions from all officially published Supreme Court majority, concurring, and dissenting opinions for the 1996 October Term. Statistics for the briefs are taken largely from the tables of authorities of certiorari, merits, and amicus briefs as made available through LexisNexis and the Congressional Information Service microfiche set.⁵ For the purposes of this study, primary sources include judicial opinions and administrative decisions. All other material is categorized as secondary. Citations to constitutions, statutes, and regulations were not considered since these sources are often required by the subject matter of the case, and their use may not be an exercise of judicial discretion.⁶ Because of the relatively smaller number of dissenting and concurring opinions, and the wide variations in their length and in the number of authorities cited, the primary focus is a comparison of the authorities cited in the briefs⁷ and those included in the eighty majority opinions.

¶4 In order to reduce the number of secondary source groupings, the treatise category also includes practice books. The legal periodicals category includes law reviews and bar journals. Law dictionaries, maxims, digests, works of legal history, legal newspapers and newsletters, jury instructions, and canons of ethics are placed in a miscellaneous legal category. A citation to a particular authority was counted only the first time that it appeared in an opinion or brief. Citations appearing in footnotes were included. Most data were gathered manually, although in some instances LexisNexis or Westlaw was used. Unfortunately, minor errors are inevitable in such a large numerical compilation. The possibility of overlooking an item, double counting, or placing a number in the wrong column is always present, but since this study does not attempt to draw conclusions from small statistical variations, such errors should have no significant effect on the findings.⁸

5. Tables of authorities are not always entirely accurate, and in some instances additional authorities were located within the text of the briefs.

6. See John Henry Merryman, *The Authority of Authority—What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 652 n.131 (1954).

7. Although petitioners' reply briefs were examined to determine if additional authorities had been cited, their overall use of authority was not compared to the opinions because, for the most part, the authorities utilized in reply briefs duplicated those in the original brief. Similarly, certiorari briefs were surveyed to determine if they contained authorities not cited elsewhere, but were not otherwise considered.

8. Corrections made during the preparation of the statistical tables altered percentages by no more than a few tenths of one percent.

Citations to Cases

Numbers of Case Citations

¶5 Since petitioners' and respondents' briefs are invariably longer, may cover more issues than the subsequent decision, and brief writers are prone to cite large numbers of authorities,⁹ considerably more cases are cited in the briefs than in the majority opinions. (See table 1.) In fact, the average number of cases cited in petitioners' and respondents' briefs is almost twice as high as in the opinions. (See table 2.) In contrast, amicus briefs, which tend to be shorter and more narrowly focused, contained only slightly more case citations than did the opinions.

Table 1

Total Case Citations in Opinions and Briefs

	Supreme Court	Other Federal	States Decisions	Admin.	Foreign	Total
Majority Opinions	1334	374	195	8	4	1915
Petitioners' Briefs	2593	1316	366	21	1	4297
Respondents' Briefs	2741	3455	347	17	8	4427
Amicus Briefs	7669	3455	1249	63	56	12,492

Table 2

Case Citations per Opinion and Brief

	Supreme Court	Other Federal	States	Admin. Decisions	Foreign	Total
Majority Opinions	16.7	4.7	2.4	0.1	0.05	23.9
Petitioners' Briefs	27.0	13.7	3.8	0.2	0.01	44.8
Respondents' Briefs	28.0	13.4	3.5	0.2	0.08	45.1
Amicus Briefs	15.3	6.9	2.5	0.1	0.11	25.0

Sources of Case Citations

¶5 Any court with a significant stock of its own opinions shows a marked preference for citing them.¹⁰ Accordingly, almost 70% of the cases cited in the Court's

9. For the comment of a judge cautioning against excessive numbers of citations in briefs, see RE & RE, *supra* note 2, at 125. (Coauthor Edward D. Re is Chief Judge Emeritus of the United States Court of International Trade.)

10. See, e.g., William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121, 153 tbl. 6 (1995) (indicating that in every sample year since 1930, over 50% of the opinions cited by the New York Court of Appeals were its own decisions).

majority opinions during the 1996 Term were Supreme Court decisions. Citations of lower federal court opinions, primarily the courts of appeals, accounted for 19.5%, while 10.2% of the Court's citations were to state court decisions. (See table 3.) Decisions from the lower federal courts constituted a greater proportion of case citations in the briefs, while the percentage of state decisions was slightly less than that of the Court. For both opinions and briefs, the number of citations to administrative decisions and foreign court opinions was very low.¹¹

Table 3*Case Citation Percentages in Opinions and Briefs*

	Supreme Court	Other Federal	States	Admin. Decisions	Foreign
Majority Opinions	69.7	19.5	10.2	0.2	0.2
Petitioners' Briefs	60.3	30.6	8.5	0.1	0.0002
Respondents' Briefs	61.9	29.7	7.8	0.4	0.02
Amicus Briefs	61.4	27.7	10.0	0.3	0.2

¶7 The percentages of opinions or briefs that contain the various types of decisions are quite similar. (See table 4.) Every majority opinion, petitioners' brief, and respondents' brief contained a citation to at least one Supreme Court decision. More than 95% of both the opinions and the merits briefs included citations to the lower federal courts, with 40% to 50% containing references to state decisions. As with the opinions, the number of citations to administrative decisions or foreign cases in the briefs was negligible. Overall, the only difference between the opinions and the briefs was a slightly higher rate of citations by the merits briefs to the lower federal courts and to various state appellate courts.

Table 4*Percent of Opinions and Briefs Containing Case Citations*

	Supreme Court	Other Federal	States	Admin. Decisions	Foreign
Majority Opinions	100.0	95.7	48.7	3.8	2.5
Petitioners' Briefs	100.0	96.8	41.7	8.3	1.0
Respondents' Briefs	100.0	96.9	55.1	7.4	5.3
Amicus Briefs	96.8	85.6	41.0	4.0	5.6

11. The few decisions to foreign opinions were as follows: *Airedale N.H.S. Trust v. Bland*, 2 W.L.R. 316 (H.L. 1993), cited in *Vacco v. Quill*, 521 U.S. 793, 804 (1997); *Hales v. Petit*, 75 Eng. Rep. 387 (1561-1562), cited in *Washington v. Glucksberg*, 521 U.S. 702, 712 n.10 (1997); *Sentencia No. C-239/97* (Corte Constitucional, Mayo 20, 1997) (Columbia Constitutional Court), cited in *id.* at 718; *Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R.4th 342 (S.C. Can. 1993), cited in *id.* at 711 n.8, 718 n.16.

¶8 A comparison of cases cited in the briefs to those appearing in the opinions shows that approximately 73.5% of the case authority utilized by the Court appeared in one or more of the briefs.¹² (See table 5.) This means that despite the large number of cases included in the briefs, roughly one-quarter of the Court's case citations resulted from its own research.¹³

¶9 Accordingly, the number of cases cited in the briefs that also appeared in the opinions is rather low. (See table 6.) Only slightly more than 25% of Supreme Court opinions cited by the briefs were included in the opinions. This figure was even lower for federal and state decisions, which, as previously noted, are cited at a higher rate by the briefs than by the Court. There was little difference in the rate at which cited authority in petitioners', respondents', and even amicus briefs also appeared in the opinions, although authorities appearing in briefs from the winning side enjoyed a slight edge over those included in the losers' briefs.

Table 5

*Percentage of Case Citations in Opinions
Also Cited in Briefs*

	Cited in Opinions	Also Cited in Briefs	Pct.
Supreme Court Cases	1334	981	73.5
Other Federal Cases	374	302	80.7
State Cases	195	134	68.7
Admin. Decisions	8	7	87.5
Foreign Cases	4	3	75.0
Total	1915	1427	74.5

¶10 As table 7 indicates, of decisions cited by both the opinions and briefs, approximately 30% were included in both petitioners' and respondents' briefs, while 32.7% were in either petitioners' or respondents' briefs. A far smaller num-

12. This is higher than the results in the Marvell study where the percentages of cited cases in the opinions that were also used in the briefs ranged from 46% to 66% depending on the origin of the cases. MARVELL, *supra* note 2, at 335. The percentages of opinions included in the briefs that were also cited in the decisions ranged from 8% to 39%. *Id.* The results of an earlier study of New Jersey Supreme Court opinions found an average of 3.5 case citations per opinion that did not appear in the briefs. Alfred Vanderbilt, *Our New Judicial Establishment: The Record of the First Year*, 4 RUTGERS L. REV. 353, 361 (1950). With eighty majority opinions containing 491 citations not appearing in the briefs, the comparable number for the October 1996 Term would be 6.1. In comparing the results, however, it should be kept in mind that state supreme courts of that period did not cite nearly as many cases per opinion as does the modern Court. See Lawrence Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 797 fig. A (1981) (indicating that state supreme courts during the time of the Vanderbilt study averaged thirteen citations per case).

13. When added together the number of citations contained in petitioners', respondents' and amicus briefs total over 21,000. There is, of course, much duplication of authority among the different briefs. See *supra* table 1 for a more detailed look at the statistical profile of the cases cited by the opinions and briefs.

ber were found only in certiorari briefs or in petitioners' reply briefs. Interestingly, 146 cases or 7.6% of the decisions cited by the Court were also found only in the sometimes-controversial amicus briefs.¹⁴

Table 6

Percent of Cases Cited in Briefs Also Cited in Majority Opinions

	Supreme Court	Other Federal	States	Admin. Decisions	Foreign	Total
Petitioners' Briefs	27.8	17.6	21.8	9.5	0.0	24.1
Respondents' Briefs	26.6	13.4	16.7	0.0	0.0	21.7
Amicus Briefs	28.0	16.1	19.8	0.0	11.8	23.7
Winning Briefs	30.5	16.3	21.6	0.0	0.0	25.3
Losing Briefs	26.2	14.9	17.8	10.0	0.0	22.1

Table 7

*Correlation of Cases Cited in Majority Opinions with
Cases Cited in Briefs*

	Total	Percent
In Petitioners' Briefs	327	17.1
In Respondents' Briefs	299	15.6
In Both Petitioners' and Respondents' Briefs	583	30.4
Added by Reply Briefs	37	1.9
In Certiorari Briefs Only	32	1.7
In Amicus Briefs Only	146	7.6
Total in Briefs	1427	74.5
Total Not in Briefs	491	25.6
Total	1915	

14. For discussions of amicus briefs, see, e.g., Robert C. Bradley & Paul Gardner, *Underdogs, Upperdogs, and the Use of Amicus Briefs: Trends and Explanations*, 10 JUST. SYS. J. 78 (1985); Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984); Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Amici Curiae in Environmental Cases Decided By the Supreme Court*, 10 VA. ENVTL. L.J. 187 (1991); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 742 (2000); Samuel Krisiov, *The Amicus Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave*, 41 AM. U. L. REV. 1243 (1992); Thomas R. Morris, *States Before the United States Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298 (1987); Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in the U.S. Supreme Court Litigation: An Appraisal of Halsman's "Folklore"*, 16 LAW & SOC'Y REV. 311 (1981).

Citations to Secondary Authorities

Table 8

Total Secondary Citations in Opinions and Briefs

	Legal Treat.	Legal Period.	Misc. Legal	Legal / Const. History	Misc. Govt.	Non- legal Treat.	Non- legal Period.	Misc. Non- legal	Total
Majority Opinions	84	59	71	133	22	37	19	16	441
Petitioners' Briefs	76	263	110	471	63	47	64	57	1051
Respondents' Briefs	103	200	97	329	59	113	88	75	1064
Amicus Briefs	402	981	406	800	420	779	949	701	5438

Table 9

Secondary Citations per Opinion and Brief

	Legal Treat.	Legal Period.	Misc. Legal	Legal / Const. History	Misc. Govt.	Non- legal Treat.	Non- legal Period.	Misc. Non- legal	Total
Majority Opinions	1.1	0.7	0.9	1.7	0.3	0.5	0.2	0.2	5.6
Petitioners' Briefs	0.8	2.7	1.1	4.9	0.7	0.5	0.7	0.6	12
Respondents' Briefs	1.1	2.0	1.0	3.4	0.6	1.2	2.3	0.8	12.2
Amicus Briefs	0.9	2.0	0.8	1.6	0.8	1.6	1.9	1.4	10.9

Table 10

Secondary Citation Percentages—Opinions and Briefs

	Legal Treat.	Legal Period.	Misc. Legal	Legal / Const. History	Misc. Govt.	Non- legal Treat.	Non- legal Period.	Misc. Non- legal
Majority Opinions	19.3	13.4	16.1	30.2	5.0	8.4	4.3	3.6
Petitioners' Briefs	6.6	22.9	9.6	44.8	8.7	4.1	5.6	5.4
Respondents' Briefs	9.7	18.9	9.1	30.9	5.6	10.6	8.3	7.0
Amicus Briefs	7.4	18.0	6.5	14.7	7.7	14.3	17.5	12.9

Table 11*Percent of Opinions and Briefs Containing Secondary Citations*

	Legal Treat.	Legal Period.	Misc. Legal	Legal / Const. History	Misc. Govt.	Non- legal Treat.	Non- legal Period.	Misc. Non- legal	All Sec. Cites
Majority Opinions	43.8	27.5	33.8	36.3	17.5	15.0	8.8	23.8	80.0
Petitioners' Briefs	35.4	51.0	41.7	67.7	31.3	24.5	12.5	21.8	93.8
Respondents' Briefs	46.9	65.3	41.9	52.0	24.5	24.5	16.3	28.5	89.8
Amicus Briefs	31.8	54.2	30.0	36.4	33.2	35.8	32.8	17.2	86.0

Table 12*Percent of Secondary Authorities Cited in Briefs Also Cited in Opinions*

	Legal Treat.	Legal Period.	Misc. Legal	Legal / Const. History	Misc. Govt.	Non- legal Treat.	Non- legal Period.	Misc. Non- legal	All Sec. Cites
Petitioners' Briefs	22.4	9.1	20.9	10.0	8.7	4.1	5.6	15.5	12.0
Respondents' Briefs	19.4	7.0	20.6	14.3	5.1	2.7	2.3	3.5	10.2
Amicus Briefs	12.2	4.8	4.2	13.1	14.5	1.7	0.8	1.2	5.3
Winning Briefs	24.4	9.5	21.9	12.0	17.5	4.0	2.9	3.5	12.9
Losing Briefs	17.0	7.0	19.0	11.6	9.0	4.1	5.1	11.9	10.0

Table 13*Percentage of Secondary Authorities Cited in Opinions Also Cited In Briefs*

Authority	Cited in Opinions	Also Cited in Briefs	Percentage
Legal Treatise	84	44	52.4
Legal Periodical	58	23	39.7
Misc. Legal	74	36	48.6
Legal & Constitutional History	107	61	57.0
Misc. Govt.	22	11	50.0
Nonlegal Treatise	37	19	51.4
Nonlegal Periodical	19	5	26.3

(cont.)

Misc. Nonlegal	40	23	57.5
Total	441	222	50.3

Table 14

*Correlation of Secondary Authorities Cited in Opinions
with Those Cited in Briefs*

	Total	Percentage
In Petitioners' Briefs	77	18.3
In Respondents' Briefs	51	11.6
In Both Petitioners' & Respondents' Briefs	29	6.6
Added by Reply Briefs	6	1.4
In Certiorari Briefs Only	1	0.2
In Amicus Briefs Only	64	14.5
Total Not in Briefs	213	48.3
Total	441	

Numbers of Citations

¶11 As with cases, briefs submitted to the Supreme Court during the October 1996 Term contained a far greater number of citations to secondary authorities than did the published majority opinions. The average brief, whether petitioners', respondents', or amicus, cited roughly twice as many secondary authorities as did the average opinion. (See table 9.) The typical brief was also far more likely to contain secondary sources. While only 20% of the majority opinions did not cite any secondary authorities,¹⁵ an even smaller percentage of the briefs failed to utilize these materials. (See table 11.)

Sources of Citations *Legal Treatises*

¶12 As it has for much of its history, the Court's most frequently utilized source of secondary authority for the October 1996 Term was the legal treatise.¹⁶ Treatises

15. Eighty percent of opinions utilizing secondary authorities represents a higher percentage than for other Terms studied in detail. Secondary authorities were cited in 22.6% of majority opinions in 1900, 28% in 1940, and 68.2% in 1978. Wes Daniels, "Far Beyond the Law Reports": *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978*, 76 LAW LIBR. J. 1, 5 tbl. 1 (1983). Another study found that in 1965 secondary sources were cited in 53% of majority opinions. Neil H. Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term*, 57 GEO. L.J. 55, 57 tbl. 1 (1968).

16. The citation totals for the October 1996 Term represent a reversion to the situation that existed during the nineteenth and earlier twentieth centuries when treatises were the Court's favorite source of secondary authority. See *infra* Appendix A, table B; Daniels, *supra* note 15, at 6 tbl. 2. Table B, however, reveals no real discernable trend. This is attributable to inherent limitations on the Court's use of treatises. Since treatises are usually written on a general level, resolving a specific issue will more often involve citing statutes and decisions. John Scurlock, *Scholarship and the Courts*, 32 U. MO. KAN. CITY L. REV. 228, 262-63 (1964).

appeared in 43.7% of the majority opinions, and constituted almost 20% of the secondary authorities cited.¹⁷

¶13 In all categories of briefs, legal treatises ranked second to legal periodicals in frequency of citation. There were more than three times as many citations to periodicals as treatises in petitioners' briefs, almost twice as many in respondents' briefs, and well over twice as many in amicus briefs. (See table 8.) The petitioners' averaged almost three times as many article citations per brief to treatise citations; the respondents' and amicus briefs averaged approximately twice as many. (See table 9.) Treatises constituted only 6.6% of secondary citations in petitioners' briefs, 9.7% in respondents' briefs, and 7.4% in amicus briefs. (See table 10.)

¶14 Overall, 52.4% of the treatises cited by the Court were found in one or more of the briefs, indicating that as with cases, the Court's own research found a considerable body of relevant material that had not been utilized by the brief writers. The percentage of treatises cited in the briefs that were also cited in the majority opinions is somewhat lower than that for cases. Only 22.4% of treatises cited in petitioners' briefs and 19.4% of those cited in respondents' briefs appeared in the opinions. (See table 12.) As with cases, there was a slightly greater tendency to cite from the winning merits brief. The Court was more selective in its use of treatises appearing in amicus briefs, citing only 12.2% of such sources. (See table 12.) As with cases, the Court's own research found a considerable number of authorities regarded as worth citing that did not originate in the briefs. As a result, almost half of the treatises included in the majority opinions are not found in the briefs. (See table 13.)

¶15 Given the relatively small number of treatise citations and the large number of potentially relevant treatise titles, no one work truly stood out. Different editions of *Federal Practice and Procedure* were cited in six of the Court's majority opinions, with no other treatise mentioned in more than two such opinions.¹⁸ Like the majority opinions, *Federal Practice and Procedure* was also the most cited treatise in merits briefs, appearing fourteen times.¹⁹ However, because of the large number of amicus briefs filed in many cases and the resulting duplication of citations, the overall statistical profile here is somewhat different. *Blackstone's Commentaries*, cited by ten amicus briefs in *Washington v. Glucksberg*, received

17. This represents a sharp decline from the nineteenth and early twentieth centuries when treatises represented a majority of all secondary sources cited. See *infra* Appendix B, table B; Daniels, *supra* note 15, at 6 tbl. 2.

18. This is similar to the findings for 1978 in the Daniels study where *Federal Practice and Procedure* ranked second with six citations, and large numbers of other treatises were mentioned only once. Daniels, *supra* note 15, at 6 tbl. 2.

19. The leading totals for the merits briefs were as follows: *Federal Practice and Procedure* (fourteen citations); *Moore's Federal Practice* (twelve); *Prosser & Keeton on Torts* (nine); Cohen, *Handbook of Federal Indian Law* (six); *Newberg on Class Actions* (six); Tribe, *American Constitutional Law* (six); Stern, et al., *Supreme Court Practice* (five); Story, *Commentaries on the Constitution* (five); Sutherland, *Statutory Construction* (five).

an overall leading total of nineteen cites.²⁰ When only the number of cases in which amicus briefs were filed is considered, Tribe's *American Constitutional Law* leads with nine, ahead of *Blackstone's Commentaries* (eight), and *Federal Practice and Procedure* (seven).²¹

Legal Periodicals

¶16 Despite being initially shunned by judges suspicious of law school publications,²² and later criticized by Justice Douglas as often a vehicle for "special pleaders . . . with axes to grind,"²³ law reviews had become a commonly cited source of authority in Supreme Court opinions by the 1940s.²⁴ In fact, they even replaced legal treatises as the Court's most-cited secondary source for much of the latter twentieth century.²⁵ Although legal periodicals slipped to second place among secondary sources during the 1996 Term, they still constituted 13.4% of all such authorities, far ahead of any other single category.²⁶

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20. The overall totals for amicus briefs were as follows: *Blackstone's Commentaries* (nineteen citations); Tribe, *American Constitutional Law* (thirteen); *Prosser & Keeton on Torts* (eleven); *Federal Practice and Procedure* (nine); *Coke's Institutes* (seven); Story, *Commentaries on the Constitution* (seven); Cohen, *Handbook of Federal Indian Law* (six).
 21. Treatises appearing in the most cases in which amicus briefs were filed included: Tribe, *American Constitutional Law* (nine cases); *Blackstone's Commentaries* (eight); *Federal Practice and Procedure* (seven); and Story, *Commentaries on the Constitution* (five).
 22. See Max Radin, *Sources of the Law—Old and New*, 1 S. CAL. L. REV. 411, 418 (1928); Benjamin N. Cardozo, *Introduction to ASS'N OF AM LAW SCH., SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LAW SCHOOLS*, at vii–viii (1931).
 23. William O. Douglas, *Law Reviews and Full Disclosures*, 40 WASH. L. REV. 227, 228–29 (1965).
 24. See Daniels, *supra* note 15, at 6 tbl. 2; Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 7 KAN. L. REV. 477, 478 tbl. 1 (1959); Louis Sirico, Jr., *The Citing of Law Reviews by the United States Supreme Court*, 75 IND. L.J. 1009, 1016–31 app. I–III (2000).
 25. See *infra* Appendix A, table F (In 1960, legal periodicals constituted 17.1% of the citations to secondary authorities; legal treatises were 10.4%.); Daniels, *supra* note 15, at 6 tbl. 2 (In 1978, legal periodicals constituted 37.2% of the citations to secondary authority; legal treatises were 31.2%.); Bernstein, *supra* note 15, at 65 tbl. 7 (In 1965 Term, law reviews constituted 45% of all secondary citations; legal treatises were 29%). Daniels's study suggests that the presence of law clerks who were former law review editors helped cause the increase in law review citations. Daniels, *supra* note 15, at 407.
 Other studies reported similar increases in other courts by the 1960s. The number of legal periodicals cited by the California Supreme Court more than doubled from 1960 to 1970, rising from 73 to 164 citations. Merryman, *supra* note 2, at 405 tbl. 14. A multistate study reported a rise in the law review citation rate from 3.8 for the period 1945–1955 to 11.9 for the period 1960–1970. Friedman, *supra* note 12, at 811 tbl. 10. In New York, citations to law reviews gained modestly between 1950 and 1970, before tripling by 1980. Manz, *supra* note 10, at 159 tbl. 16. This growth in periodical citations by state courts has been attributed to such factors as the increase in the number of legal periodicals and a judicial focus on newer problems in the criminal and constitutional area. Merryman, *supra* note 2, at 407. It has also been suggested that more innovative judicial attitudes played a role. Friedman et al., *supra* note 12, at 815.
 26. This may reflect a reported overall decline in the use of law reviews by the courts. McClintock reports a decline of over 40% in the use of law reviews by the United States Supreme Court, the United States Courts of Appeals, the United States District Courts, and state supreme courts between 1975–76 and 1995–96. Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 689 (1995). Another recent study shows a continuing decline between 1971–73 and 1996–98. Sirico, *supra* note 24, at 1011–13. Examples of expressions of judicial dissatisfaction with law reviews include: "[M]any of our law reviews are dominated by the rather exotic

¶17 As noted in the previous section, the briefs for the October 1996 Term were far more likely to use legal periodicals as authority than were the Court's opinions. Legal periodicals were cited in only 13.4% of the majority opinions, compared to 22.9% of petitioners' briefs, 18.9% of respondents' briefs, and 18.0% of amicus briefs. (See table 10.) There was an average of a mere 0.7 citations to legal periodicals in the majority opinions, but 2.7 per petitioners' brief and 2.0 each per respondents' and amicus briefs. (See table 11.)

¶18 Only 39% of the Court's law review articles citations were also included in the briefs, providing yet another example of the Court locating a significant amount of material not mentioned in the briefs.²⁷ (See table 13.) Given the disparity in the rate of citation to legal periodicals in the opinions and the briefs, and the very large amount of potentially relevant articles, it is also not surprising that the Court's usage of reviews also cited in the briefs was considerably lower than with legal treatises. Only 9.1% of articles cited by the petitioners, 7.0% cited by the respondents, and 4.8% cited by amicus curiae can be found in the majority opinions.²⁸ (See table 12.) Again, there was a slightly higher rate of citation for winning briefs. The Court's periodical citations included 9.5% of those in the winners' briefs, as compared to only 7.0% for the losers' briefs. (See table 12.) More significantly, despite the large number of articles brought to the Court's attention, only 39% of the articles cited in the majority opinions were also in the briefs.

¶19 During the October 1996 Term, the Court continued its tendency to cite more often to the reviews published by the elite law schools.²⁹ Receiving the most citations was the *Harvard Law Review* with six, followed by the *Duke Law*

offerings of increasingly out-of-touch faculty members." *United States v. Six Hundred and Thirty-Nine Thousand Five-Hundred and Fifty-Eight Dollars in U.S. Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring), *quoted in* Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?* 71 CHI.-KENT L. REV. 871, 871 (1996); "[T]here is an increasing divergence between the theoretical interests of the aspiring lawyer and the pragmatic interests of the successful practitioner." Judith S. Kaye, *One Judge's View of Academic Law Writing*, 39 J. LEGAL EDUC. 313, 320 (1989); "[D]octrinal analysis, which is, and should remain the core of legal scholarship, is endangered at leading law schools." Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1113 (1981); "I am disappointed not to find more in the law reviews that is of value and pertinence to our cases. . . ." Ellen A. Peters, *Reality and Language of the Law*, 90 YALE L.J. 1193, 1193 (1981). For a defense of modern legal scholarship, see Larry C. Backer, *Measuring the Penetration of Outsider Scholarship Into the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173 (2000).

27. This is a higher percentage than reported by Newland's study of the Supreme Court, where only 20% of the reviews cited by the justices were also mentioned in the briefs. Newland, *supra* note 24, at 480 tbl. 3. It also exceeds the rate in the Marvell study, where again only 20% of the reviews cited by the courts were also mentioned in the briefs. MARVELL, *supra* note 2, at 335.
28. The Marvell study found that only 7% of the law reviews cited by the briefs also appeared in the opinions. MARVELL, *supra* note 2, at 335.
29. See Sirico, *supra* note 24, at 1010-11. He suggests that the Court prefers journals from elite schools because they are more helpful, because they are included by brief writers who believe they make their arguments more persuasive, and because clerks from elite law schools prefer the elite journals. *Id.* at 1011.

Journal, the *Virginia Law Review*, and the *Yale Law Journal* with three each.³⁰ Six others were cited twice, and twenty-five only once.³¹ Since the briefs cited legal periodical articles at a higher rate than did the opinions, many more periodical titles were cited than in the opinions.³² However, despite this diffusion of citations among many reviews, articles from the elite journals, particularly *Harvard Law Review*, received the largest number of citations, although in some instances the totals were inflated by many duplicate citations in briefs submitted for the same case.³³

Other Legal Authorities

Table 15

Total Citations to Selected Secondary Legal Authorities in Opinions and Briefs

	Restatement	A.L.R.	Am. Jur.2d	C.J.S.	Law Dict.
Majority Opinions	7	1	0	0	5
Petitioners' Briefs	9	1	0	1	3
Respondents' Briefs	8	1	0	0	5
Amicus Briefs	17	3	5	4	15

30. If citations in dissenting and concurring opinions are added, the results are as follows: *Harvard Law Review* (ten citations); *Yale Law Journal* (nine); *Duke Law Journal* (four); *Virginia Law Review* (three); *Columbia Law Review* (three); *Cornell Law Review* (three); *Duquesne Law Review* (three, all in *Washington v. Glucksberg*, 521 U.S. 702 (1997) opinions); *Michigan Law Review* (three); *Southern California Law Review* (three); *Supreme Court Law Review* (three); *University of Chicago Law Review* (three).

31. As these results indicate, the law reviews from elite schools lead in the number of citations, but because of a diversification in the Court's citation practices, they no longer dominate as in the past. In 1993, for example, the court cited to 108 periodical articles in all its opinions. The twenty-one total citations to the *Harvard Law Review*, *Yale Law Journal*, and *Columbia Law Review* represented only 19.4% of that amount. In contrast, in 1940, the seventeen citations to those law reviews were 54.8% of a total of thirty-one legal periodical citations. Daniels, *supra* note 15, at 31 app. 2.

32. One hundred sixty-one titles were cited in merits briefs, and 264 in amicus briefs. Only thirty-five titles were cited in the majority opinions.

33. Reviews receiving five or more citations in petitioners' briefs were as follows: *Harvard Law Review* (twelve citations); *Texas Law Review* (eight); *Cornell Law Review* (five); *New York University Law Review* (five); *University of Chicago Law Review* (five); *Journal of the Patent & Trademark Office Society* (five, all in briefs for *Warner-Jenkinson v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997)). The following journals were cited five or more times in respondents' briefs: *Harvard Law Review* (sixteen citations); *Columbia Law Review* (fourteen); *Cornell Law Review* (thirteen); *Yale Law Journal* (six); *New York University Law Review* (five).

When duplicate citations are counted in the amicus briefs, the most-cited reviews include: *Harvard Law Review* (fifty-eight citations); *Duquesne Law Review* (forty-six, all in briefs for *Washington v. Glucksberg*, 521 U.S. 702 (1997), or *Vacco v. Quill*, 521 U.S. 793 (1997)); *Columbia Law Review* (forty-two); *Yale Law Journal* (thirty-nine); *Issues in Law and Medicine* (thirty-eight, all in briefs for *Washington v. Glucksberg* or *Vacco v. Quill*); *Cornell Law Review* (twenty-one); *New York University Law Review* (twenty-one); *University of Pennsylvania Law Review* (twenty-one). Eliminating the duplicate citations produces the following results: *Harvard Law Review* (forty-six); *Yale Law Journal* (thirty-four); *Issues in Law and Medicine* (thirty-two); *Columbia Law Review* (twenty-eight); *Duquesne Law Review* (twenty-three); *Cornell Law Review* (sixteen); *University of Pennsylvania Law Review* (sixteen); *New York University Law Review* (fifteen); *University of Chicago Law Review* (fifteen).

Table 16*Percent of Opinions and Briefs Containing Selected Secondary Legal Authorities*

	Restatement	A.L.R.	Am. Jur.2d	C.J.S.	Law Dict.
Majority Opinions	6.3	1.3	0.0	0.0	5.0
Petitioners' Briefs	5.2	1.0	0.0	1.0	3.1
Respondents' Briefs	7.1	2.0	0.0	0.0	5.1
Amicus Briefs	3.0	0.8	1.0	0.8	3.4

Table 17*Percent of Selected Secondary Legal Authorities Cited in Briefs Also Cited in Opinions*

	Restatement	A.L.R.	Am. Jur.2d	C.J.S.	Law Dict.
Petitioners' Briefs	55.6	0.0	—	0.0	33.3
Respondents' Briefs	37.5	0.0	—	—	20.0
Amicus Briefs	0.6	0.0	0.0	0.0	0.0

¶20 **The Restatement.** Courts have steadily cited the *Restatement* over the years, but its use by the Supreme Court has never been great.³⁴ This was true for the 1996 Term where the Court's majority opinions only cited the *Restatement* seven times, with six of these citations also appearing in the briefs.³⁵ The *Restatement* also appeared relatively few times in the briefs. It was cited only nine times in petitioners' briefs, only eight times in respondents' briefs, and seventeen times in amicus briefs.³⁶ (See table 15.) The number of *Restatement* citations in the briefs that also appeared in the majority opinions varied, with five cited by the peti-

34. From 1932 to 1937, the Court cited the *Restatement* fourteen times. Half of these were by Justice Cardozo. William H. Manz, *Cardozo's Use of Authority: An Empirical Study*, 32 CAL. W. L. REV. 31, 80 tbl. II-A (1995). There were only three citations to the *Restatement* in 1940, and only nine in 1978. Daniels, *supra* note 15, at 38 app. 4. A Westlaw search for citations to the *Restatement* in majority, concurring, and dissenting opinions produced the following results: 1950, three citations; 1960, three; 1970, three; 1980, fifteen; 1990, ten; 2000, twelve. This low rate of citation has also been found in studies of state supreme court citations. Merryman, *supra* note 2, at 405 tbl. 14 (encyclopedias and annotations were cited much more often than the *Restatement* in the 1950–1970 sample years); Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39, 58 tbl. VII-A (1979) (In 1977, the North Carolina Supreme Court's citation totals were encyclopedias, 113; annotations, 45; and the *Restatement*, 14.); Manz, *supra* note 10, at 157–59 tbls. 14–16 (noting a low rate of citation since 1930); Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453, 470 (1996) (only 3% of 1994 Montana Supreme Court opinions cited the *Restatement*).

35. The citation count refers only to cites to a specific *Restatement*. Multiple citations to different sections of the same *Restatement* were not counted. However, a *Restatement* citation by the Court was not considered to have also been in the briefs unless it was to the same section.

36. See *supra* note 35 for an explanation of how citations to the *Restatement* were counted.

tioners, and three from both the respondents and amicus curiae. The low citation rate to the *Restatement*, both historically and in the opinions and briefs reviewed in the current study, can be attributed to its providing less insight into expanding areas of the law.

¶21 **American Law Reports Annotations.** Although *American Law Reports* (A.L.R.) annotations are widely regarded as case finders, not persuasive authority, they are nevertheless sometimes cited by the courts.³⁷ Compared to certain state appellate courts, the Supreme Court's historical use of these materials has been relatively low.³⁸ This pattern continued during the October 1996 Term, where only one majority opinion cited an A.L.R. annotation.³⁹ (See table 15.) This annotation did not appear in the briefs, which also contained few citations to A.L.R. annotations. They appeared only once in petitioners' briefs, twice in respondents' briefs, and four times in amicus briefs.

¶22 **Legal Encyclopedias.** Useful as case finders or as basic sources of information, legal encyclopedias generally are not considered to be persuasive authority.⁴⁰ Despite criticism of the practice, courts still make modest use of the encyclopedias.⁴¹ The Supreme Court's overall use of encyclopedias, however, has been very low.⁴² The 1996 Term was typical, with no citations to the encyclopedias in any Court opinion. (See table 15.) Use of encyclopedias in briefs during the 1996 Term was similarly negligible. *C.J.S.* was cited just once in a petitioners' brief, and four times in amicus briefs. *American Jurisprudence 2d* appeared in no merits briefs, but was cited five times in amicus briefs.⁴³

¶23 **Law Dictionaries.** Since the 1860s, the Court has made limited but steady use of law dictionaries, particularly the various editions of *Bouvier's* and *Black's*

37. See Manz, *supra* note 10, at 157–59 tbls. 14–16; Merryman, *supra* note 2, at 405 tbl. 14; Snyder, *supra* note 34, at 490 tbl. 8.

38. One study found no citations at all in 1900 and 1940, and only two in 1978. Daniels, *supra* note 15, at 6 tbl. 2. A Westlaw search for A.L.R. annotations cited by the Court produced the following results: 1990–99, twelve citations; 1980–89, thirteen; 1970–79, twenty-eight; 1960–69, thirteen.

39. O'Gilvie v. United States, 519 U.S. 79, 91 (1997) (citing C. Clifford Allen, III & Patricia J. Lambkin, *When a Statute of Limitations Begins to Run Against Action to Recover Money Paid By Mistake*, 79 A.L.R.3d 754, 766–69 (1977), to show that an action to recover money paid by mistake accrues in certain states upon the discovery of the mistake). A.L.R. annotations were also cited in Justice Ginsberg's concurring and dissenting opinion in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 449 (1997), and in Justice Scalia's dissent in *Richardson v. McKnight*, 521 U.S. 399, 415 (1997).

40. Merryman, *supra* note 6, at 387. For a thorough discussion of the use of legal encyclopedias as authority, see Merryman, *supra* note 2, at 632–46. He cautions against using them as anything but a finding tool. *Id.* at 645–46.

41. See Manz, *supra* note 10, at 157 tbl. 14 (showing that the New York Court of Appeals cited encyclopedias three times in 1990 and five times in 1993); Snyder, *supra* note 34, at 490 tbl. 8 (showing continuing use of encyclopedias by the Montana Supreme Court).

42. See Daniels, *supra* note 15, at 6 tbl. 2 (indicating no cites to encyclopedias in 1900 and 1940, and only two in 1978). A Westlaw search for cites to *American Jurisprudence 2d* in all Supreme Court opinions produced the following results: 1990–99, eleven citations; 1980–89, six; 1970–79, four; 1960–69, one. The totals for *Corpus Juris Secundum* were as follows: 1990–99, one citation; 1980–89, seven; 1970–79, five; 1960–69, six. Since 1960, there also have been nine citations to *Halsbury's Laws of England* and one to *Ruling Case Law*.

43. There was also one cite to *California Jurisprudence* in an amicus brief.

law dictionaries.⁴⁴ During the October 1996 Term, the Court's majority opinions cited *Black's* only four times and an old edition of *Bouvier's* once.⁴⁵ There were also relatively few citations to the law dictionaries in the briefs. They were cited in three petitioners' briefs, five respondent's briefs, and seventeen amicus briefs. (See table 15.) Two of these citations were also in the majority opinions. Of these, one was in both the petitioner's and the respondent's brief for *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*.⁴⁶ The other appeared in the petitioner's brief for *Dunn v. Commodity Futures Trading Commission*.⁴⁷

¶24 **Other.** Other law-related materials cited by the Court included such authorities as opinions of attorneys general, appellate briefs,⁴⁸ the *Uniform Laws Annotated*,⁴⁹ agency memoranda,⁵⁰ and executive orders,⁵¹ together comprising 11.6% of the Court's citations to secondary authority. Just over 41% of these sources were also cited in the briefs. These materials represented only a small fraction of the total included in the briefs. Only 17% of sources from the petitioners' briefs, 20% of those from the respondents' briefs, and a mere 5.5% from the amicus briefs found their way into majority opinions.

Legislative and Constitutional History Materials

Table 18

Total Legislative and Constitutional History Citations in Opinions and Briefs

	Hrg./ Rpt.	Cong. Record	Bills	Federalist	Other Con.	Misc.	Total
Majority Opinions	46	19	34	16	10	8	107
Petitioners' Briefs	187	212	31	17	5	19	248

(cont.)

44. For a history of the Court's use of law dictionaries and a complete list of citations through the 1997–1998 Term, see Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999). Daniels reports one cite to *Black's Law Dictionary* in 1900 and two cites in 1978. Daniels, *supra* note 15, at 39 app. 7. For a discussion of the perceived merits of *Black's* and *Bouvier's*, see Mary Whisner, *Bouvier's, Black's, and Tinkerbell*, 92 LAW LIBR. J. 99, 2000 LAW LIBR. J. 8.
45. *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470 (1997) (citing *Black's* for the definition of "in"); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 255 (citing *Black's* for the definition of "entitle"); *McMillian v. Monroe County*, 520 U.S. 781, 794 (citing *Bouvier's* for the definition of "sheriff"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997) (citing *Black's* for the definition of "employed"); *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (citing *Black's* for the definition of "maximum").
46. 519 U.S. 248, 256 (1997).
47. 519 U.S. 465, 471 (1997).
48. *E.g.*, *Chandler v. Miller*, 520 U.S. 953, 964 (1997) (citing Brief for the United States as Amicus Curiae in *NT v. Von Raab*).
49. *E.g.*, *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 964 (1997) (citing 3B U.L.A. 127).
50. *E.g.*, *United States v. Alaska*, 521 U.S. 1, 28, 48 (1997) (citing memoranda from the Director of the Bureau of Sport Fisheries and Wildlife to the Bureau of Land Management and the Department of State to Members of the Baseline Commission).
51. *E.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265 (1997) (citing Exec. Order of Nov. 8, 1873).

Respondents' Briefs	145	118	24	18	10	14	301
Amicus Briefs	348	340	37	39	14	8	733

Table 19*Legislative and Constitutional History Citations per Opinion and Brief*

	Hrg./ Rpt.	Cong. Record	Bills	Federalist	Other Con.	Misc.	Total
Majority Opinions	0.6	0.2	0.4	0.2	0.1	0.1	1.3
Petitioners' Briefs	2.0	2.2	0.3	0.2	0.05	0.2	4.7
Respondents' Briefs	1.5	1.2	0.2	0.2	0.1	0.1	3.0
Amicus Briefs	0.7	0.7	0.1	0.1	0.03	0.02	1.5

Table 20*Percent of Opinions and Briefs Containing Legislative History Materials*

	Hrg./ Rpt.	Cong. Record	Bills	Federalist	Other Con.	Misc.
Majority Opinions	23.8	8.8	2.5	8.8	3.8	6.3
Petitioners' Briefs	53.1	27.1	15.6	8.3	6.2	11.5
Respondents' Briefs	40.8	26.5	6.1	4.1	9.2	7.1
Amicus Briefs	54.2	29.0	15.6	5.6	2.2	1.4

Table 21*Percent of Legislative and Constitutional History Materials Also Cited in Opinions*

	Hrg./ Rpt.	Cong. Record	Bills	Federalist	Other Con.	Misc.
Petitioners' Briefs	21.4	2.2	0.3	11.8	0.0	10.5
Respondents' Briefs	20.0	1.7	12.5	33.3	30.0	28.6
Amicus Briefs	17.8	4.7	26.3	27.8	23.1	15.0

¶25 **Congressional Hearings and Reports.** The Court's use of congressional materials has grown steadily during the twentieth century, fueling the debate about the uses of legislative history.⁵² These sources were also frequently present during the October 1996 Term, appearing in 41.3% of the majority opinions. Most-cited

52. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (1997); Orrin Hatch, *Legislative History: Tool of Construction or Destruction?*, 11 HARV. J.L. & PUB. POL'Y 43 (1988); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999); Alex Kozinski, *Should*

were congressional hearings and reports, included in 23.8% of majority opinions and constituting 43% of all legislative material cited. These materials were far more likely to appear in the briefs than in the opinions. Hearings and reports were cited in 53.1% of petitioners' briefs, 40.8% of respondents' briefs, and 54.2% of amicus briefs. (See table 20.)

¶26 Since hearings and reports are key components of federal legislative history⁵³ and the number of potentially relevant documents is usually limited, it is not surprising that these materials were far more likely to appear in both opinions and briefs than most other secondary sources. Eighty-seven percent of the hearings and reports cited by the Court were also cited in the briefs. This, however, included a small selection of all those cited by the brief writers. The opinions contained 21.4% of hearings and reports cited in the petitioners' briefs, 20% cited in respondents' briefs, and 17.8% of amicus briefs. (See table 21.) Again, because of the limited number of potential authorities, there was only a slight edge for winning over losing briefs. The opinions contained 21.9% of hearings and reports cited in winning briefs, and 19.8% of those cited in losing briefs.

¶27 **Congressional Record.** During the October 1996 Term, 19.2% of the citations to legislative materials were to the *Congressional Record*. Although they appeared in only 8.8% of the majority opinions, citations to the *Congressional Record* were included in 27.1% of petitioners' briefs, 26.5% of respondents' briefs, and 54.2% of amicus briefs. (See table 20.) Compared with hearings and reports, there was less of a correlation between opinions and briefs in citations to the *Congressional Record*. Although 57.9% of the Court's citations also appeared in the briefs, these cites represented only a small fraction of those offered by the brief writers. Majority opinions included only 2.2% of *Congressional Record* citations in petitioners' briefs, 1.7% in the respondents' briefs, and 4.7% in the amicus briefs. (See table 21.) Perhaps because of the small number of citations involved, more *Congressional Record* citations in the majority opinions also appeared in losing briefs (2%) than in winning briefs (0.8%).

¶28 **Bills.** Bills appeared in only three opinions, but because of the large number cited in *Washington v. Glucksberg* by Justice Rehnquist, they account for 34 percent of the congressional materials cited by the Court. As with the opinions,

Reading Legislative History be an Impeachable Offense?, 31 SUFFOLK U. L. REV. 807 (1998); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205; Jane S. Schachter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573 (1996); Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term: Scalia Rails but Legislative History Remains on Track*, 23 SW. U. L. REV. 47 (1993).

53. For a current detailed discussion of the sources of legislative history and legislative history research, see RICHARD J. MCKINNEY, *FEDERAL LEGISLATIVE HISTORY RESEARCH: A PRACTITIONER'S GUIDE TO COMPILING THE DOCUMENTS AND SIFTING FOR LEGISLATIVE INTENT*, Law Librarians' Soc'y of Wash., D.C., at <http://www.llsdc.org/sourcebook/fed-leg-hist.htm> (last updated July 13, 2001).

citations to bills in the briefs appeared far less frequently than cites to hearings, reports, and the *Congressional Record*. They appeared in 15.6 percent of both petitioners' and amicus briefs, and 6.1 percent of respondents' briefs. (See table 20.)

¶29 Because of the large number of citations to bills in *Washington v. Glucksberg*, the total number of citations to bills in the opinions exceeded those in both the petitioners' and respondents' briefs, and was only slightly smaller than those appearing in amicus briefs. (See table 18.) Only four cites to bills, or 11.7 percent of the total cited by the Court, also appeared in the briefs.⁵⁴ Accordingly, the percentage of bills cited in briefs that were also cited by the Court was also relatively small. Only 0.3% of bills cited by petitioners' briefs, 12.5% cited by respondents' briefs, and 26.3% cited by amicus briefs were included in the majority opinions. (See table 21.)

¶30 *The Federalist*.⁵⁵ When faced with issues involving constitutional interpretation, including the controversial area of original intent, the Supreme Court often cites to *The Federalist*.⁵⁶ During the October 1996 Term, the Court cited *The Federalist* sixteen times in seven majority opinions.⁵⁷ Seventeen citations to *The Federalist* appeared in petitioners' briefs for nine cases, and eighteen in respondents' briefs for four cases, including seven for *Printz*. Thirty-nine citations appeared in amicus briefs for ten cases, including thirty-one cites contained in nine briefs submitted for *Printz*.

¶31 Nine of the sixteen *Federalist* citations appearing in the majority opinions also appeared in the briefs, including seven of the eight citations by Justice Scalia in *Printz*.⁵⁸ Thus, aside from *Printz*, only two of eight, or 25%, of the Court's citations to *The Federalist* also appeared in the briefs. Even including *Printz*, the per-

54. None of the thirty bills cited by Justice Rehnquist in *Washington v. Glucksberg* appeared in the briefs.

55. Citations to different issues of *The Federalist* within an individual opinion or brief were counted as separate citations. A citation was regarded as being in both an opinion and brief only if it was to the same issue of *The Federalist*.

56. For views on the Court's use of *The Federalist*, see William N. Eskridge, *Should the Supreme Court Read The Federalist but not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996*, 85 KY. L.J. 243 (1996/1997); James G. Wilson, *The Most Sacred Text: The Supreme Court's Use of the Federalist Papers*, 1985 BYU L. REV. 65.

For a discussion of the difficulties in using *The Federalist* for constitutional interpretation, see Melton, *supra*, at 249-52. An early skeptical view of utilizing *The Federalist* to determine original intent was expressed by Chief Judge Roan in *Hunter v. Martin, Devisee of Fairfax*, 18 Va. (4 Munf.) 1, 27 (1815), *quoted in* Joseph M. Lynch, *The Federalists and The Federalist: A Forgotten History*, 31 SETON HALL L. REV. 19, 26 (2000): "With respect to the work styled 'the Federalist' while it's [sic] general ability is not denied, it is liable to the objection, of having been a mere newspaper publication, written in the heat and hurry of the battle, (If I may so express myself), before the constitution was adopted."

57. Half of these citations were in *Printz v. United States*, 521 U.S. 898 (1997), a case involving the constitutionality of a provision in the Brady Handgun Violence Act, 18 U.S.C. § 922 (1994), that commanded state chief law enforcement officers to conduct background checks on prospective handgun purchasers.

58. Not surprisingly, Justice Scalia is one of the leading citers to *The Federalist* on the current Court. See Melton, *supra* note 56, at 341-43 chart 4.

centage of *Federalist* citations appearing in the briefs that also appeared in the majority opinions is relatively low. Only 11.8% of the citations in petitioners' briefs, 33.3% in respondents' briefs, and 27.8% in amicus briefs were also cited by the Court. (See table 21.) If the *Printz* decision is omitted, the percentages drop to 0% for petitioners' and amicus briefs, and 10% for respondents' briefs.

¶32 **Miscellaneous Sources of Constitutional and Legislative History.** Only three October 1996 Term majority opinions also cited documentary sources of constitutional history other than *The Federalist*. These materials included several documentary compilations⁵⁹ and early volumes of the *Annals of Congress*.⁶⁰ Of the Court's ten citations to these materials, six were also included among the twenty-five citations in the briefs.⁶¹

¶33 Other citations included miscellaneous materials relating to rules of procedure,⁶² historical or explanatory notes,⁶³ and a proposed amendment to the Federal Rules of Civil Procedure.⁶⁴ Majority opinions had eight citations to such materials with five of these also included in the briefs. Larger numbers of citations to miscellaneous documents were contained in the briefs, but only a minority of them also appeared in the majority opinions: 10.5% of the materials in the petitioners' briefs, 28.6% in the respondents' briefs, and 15% in the amicus briefs.

Other Secondary Sources

¶34 **Nonlegal Treatises and Periodicals.** Citations to nonlegal periodicals and treatises also regularly appear in Supreme Court opinions.⁶⁵ During the October 1996 Term, the Court averaged a mere 0.5 citations to nonlegal treatises per opin-

59. RECORDS OF THE FEDERAL CONVENTION (Max Ferrand ed., 1911), cited in *Edmond v. United States*, 520 U.S. 651, 660 (1997), and *Printz*, 521 U.S. at 915 n.9. (During the October 1996 Term, the Court cited exclusively to the 1911 edition, although the briefs also utilized the 1937 and 1966 editions.); DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993), cited in *Printz*, 521 U.S. at 898; DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1976), cited in *Printz*, 521 U.S. at 922–23; JONATHAN ELLIOT, DEBATES ON THE CONSTITUTION (2d ed. 1891), cited in *Printz*, 521 U.S. at 947 n.6, and *Clinton v. Jones*, 520 U.S. 681, 695 (1997); DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, cited in *Clinton*, 520 U.S. at 695; THE ESSENTIAL ANTIFEDERALIST (W. Allen & Gordon Lloyd eds., 1985), cited in *Printz*, 521 U.S. at 921.

60. 1 ANNALS OF CONG. (1789), cited in *Printz*, 521 U.S. at 909, and *Boerne v. Flores*, 521 U.S. 505, 535 (1997).

61. A citation to a documentary compilation was considered to be in both an opinion and brief only if it was to the same document within the compilation.

62. See *Old Chief v. United States*, 519 U.S. 172, 179–80, 184 (1997) (citing Advisory Committee Notes on Federal Rules of Civil Procedure 401, 403, and 404); *United States v. Hyde*, 520 U.S. 670, 677 (1997) (citing Advisory Committee Notes on the Federal Rules of Criminal Procedure); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (citing Advisory Committee Notes on Federal Rules of Civil Procedure 23, 28 U.S.C. App. at 696–97 (1994)).

63. See *United States v. Wells*, 519 U.S. 482, 497 (1997) (citing Historical Revision Notes, 18 U.S.C. § 1014 (1994)); *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (citing Advisory Committee Note on Habeas Corpus Rule 6, 28 U.S.C. at 479 (1994)).

64. See *Amchem Prods.*, 521 U.S. at 619 (citing Proposed Amendment of Federal Rules of Civil Procedure 23(b), 117 S.Ct. No. 1 cxix, cliv–clv (Aug. 1997)).

65. The Court's use of this type of secondary authority has sometimes been controversial, particularly in the area of science. See, e.g., *Bernstein*, *supra* note 15, at 68 (“[Lawyers] probably would not know

ion, representing 8.4% the Court's cites to secondary authority.⁶⁶ (See tables 9 and 10.) Nonlegal treatise citations in petitioners' briefs averaged 0.5 per brief and constituted only 4.1% of such citations. Cites to nonlegal treatises were more common in respondents' and amicus briefs. For the respondents, they appeared at a rate of 1.2 per brief and made up 10.6% of all secondary authorities cited. Nonlegal treatises were most common in amicus briefs. Here, they averaged 1.6 per brief and constituted 14.3% of cites to secondary authorities.

¶35 The Court made less use of nonlegal periodicals than treatises. These citations appeared at a rate of only 0.2 per majority opinion and made up just 4.3% of secondary authority citations. (See tables 9 and 10.) The relative use of nonlegal periodicals in the briefs was similar to that for nonlegal treatises. They appeared least in petitioners' briefs, cited at a rate of 0.7 per brief and constituted 5.6% of citations to secondary authority. The comparable statistics were 2.3 and 8.3% for respondents' briefs and 1.9 and 17.5% for amicus briefs.

¶36 The percentage of citations to both nonlegal periodicals and treatises that appeared in both opinions and briefs was slightly lower for nonlegal treatises and considerably lower for nonlegal periodicals. Just over half of the nonlegal treatises and slightly more than a quarter of the nonlegal periodicals cited by the Court were also cited by the briefs. (See table 13.) The percentages of nonlegal treatises and periodicals cited by the briefs that also appeared in the opinions were considerably lower than that for legal materials. The majority opinions cited only 4.1% of the nonlegal treatises that were cited in petitioners' briefs, 2.7% cited in respondents' briefs, and 1.7% cited in amicus briefs. (See table 12.) The comparable figures for

whether [an] anthropological article was accurate or balderdash, nor would they feel confident that the Supreme Court could tell the difference."); Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far Reaching Implication of the Daubert Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55, 64 (1995) (citation omitted) ("[W]henever a court addresses a scientific question, a danger arises that the judge will simply misunderstand."); J. Alexander Tanford, *The Limits of Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 145 (1990) ("[T]he Justices ignored, misused, distorted and misinterpreted psychological literature about trials to justify decisions at odds with empirical data."). For a discussion of the use of social science materials, see Daniels, *supra* note 15, at 20–24. For commentary on the use of history, see John P. Reid, *Law and History*, 27 LOYOLA L.A. L. REV. 193 (1993).

66. Examples of nonlegal treatises cited by the Court include RICHARD M. VALLELY, *RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY* (1989), *cited in* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 n.9 (1997); JOHN E. HAYNES, *DUBIOUS ALLIANCE: THE MAKING OF MINNESOTA'S DFL PARTY* (1984), *cited in id.*; MILLARD L. GIESKE, *MINNESOTA FARMER LABORISM: THE THIRD PARTY ALTERNATIVE* (1979), *cited in id.*; BERNARD L. HYINK ET AL., *POLITICS AND GOVERNMENT IN CALIFORNIA* (12th ed. 1989), *cited in id.* at 368; DANIEL A. MAZMANIAN, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* (1974), *cited in id.*; ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* (1949), *cited in Kansas v. Hendricks*, 521 U.S. 346, 375 (1997); GERALD N. GROB, *MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875* (1973), *cited in id.*; BLAKE MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915* (1968), *cited in Richardson v. McKnight*, 521 U.S. 399, 405 (1997); STANLEY WEBB & BEATRICE WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENT* (1922), *cited in id.* at 406; GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES* (1833), *cited in id.* at 405; CARLOS F. GOMEZ, *REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS* (1991), *cited in Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

nonlegal periodicals were 6.5% for petitioners' briefs, 2.8% for respondents' briefs, and only 0.8% for amicus briefs. (See table 12.) There was no tendency to favor authorities from winning briefs. The Court cited 4.0% of nonlegal treatises and 2.9% of nonlegal periodicals from winning briefs, and 4.1% of nonlegal treatises and 5.1% of nonlegal periodicals from losing briefs. (See table 12.)

¶37 How infrequently nonlegal periodical articles that are cited in briefs also appear in opinions is illustrated by the right-to-die cases. The briefs submitted for *Glucksberg* and *Vacco* contained citations to 209 articles in sixty-seven different medical periodicals.⁶⁷ Only one of these articles was cited in both majority opinions.⁶⁸ Others were cited by the *Glucksberg* majority and Justice Stevens's concurrence,⁶⁹ and by the *Vacco* majority and Justice Souter's concurring and dissenting opinion,⁷⁰ with six others appearing only in concurrences.⁷¹ Thus, only eleven articles, or 5.3% of the total included in the briefs, were cited by Court opinions. Three of the articles cited by the Court were also included in petitioners', respondents', and amicus briefs. One other was also in both the respondent's brief and an amicus brief, while three were included only in amicus briefs.⁷²

¶38 **Miscellaneous Government Documents.** A variety of government docu-

67. The leading titles cited in the briefs were as follows: *New England Journal of Medicine*, fifty citations; *JAMA*, thirty; *Archives of Internal Medicine*, fifteen; *American Journal of Psychology*, ten; and *American Medical News*, seven.

68. Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1999), cited in *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997), and *Vacco v. Quill*, 521 U.S. 793, 801 n.6 (1997).

69. Anthony L. Back et al., *Physician-Assisted Suicide and Euthanasia in Washington State*, 275 JAMA 919, 924 (1996), cited in *Glucksberg*, 521 U.S. at 730, 750 n.12 (Stevens, J., concurring).

70. Paul Rousseau, *Terminal Sedation in the Care of Dying Patients*, 156 ARCHIVES INTERNAL MED. 1785 (1996), cited in *Vacco*, 521 U.S. at 808, and *Glucksberg*, 521 U.S. at 780 (Souter, J., concurring and dissenting).

71. Jerald G. Bachman et al., *Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia*, 334 NEW ENG. J. MED. 303 (1996), cited in *Glucksberg*, 521 U.S. at 749 n.12 (Stevens, J., concurring); Susan D. Block & J. Andrew Billings, *Patient Request to Hasten Death*, 154 ARCHIVES INTERNAL MED. 2039 (1994), cited in *id.* at 748 (Stevens, J., concurring); Ira R. Byock, *Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia*, 9 J. PALLIATIVE CARE 25 (1993), cited in *id.* at 791 (Breyer, J., concurring); David J. Doukas et al., *Attitudes and Behaviors on Physician Assisted Death: A Study of Michigan Oncologists*, 13 J. CLINICAL ONCOLOGY 1055 (1995), cited in *id.* at 749 n.12 (Stevens, J., concurring); Melinda A. Lee et al., *Legalizing Assisted Suicide: Views of Physicians in Oregon*, 335 NEW ENG. J. MED. 310 (1996), cited in *id.*; Timothy E. Quill, *Death and Dignity, A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991), cited in *id.* at 748; Lee Slome et al., *Physicians' Attitudes Toward Assisted Suicide in AIDS*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 712 (1992), cited in *id.* at 749 n.12; Robert Truog et al., *Barbituates in the Care of the Terminally Ill*, 327 NEW ENG. J. MED. 1678 (1992), cited in *id.* at 780 (Souter, J., concurring and dissenting).

72. For analyses of the amicus briefs in *Glucksberg* and *Vacco*, see Richard Church, *The Rhetoric of Neutrality and the Philosophers' Brief: A Critique of the Amicus Brief of Six Moral Philosophers in Washington v. Glucksberg and Vacco v. Quill*, 61 LAW & CONTEMP. PROBS. 233 (1998); Frederick R. Parker, Jr., *Washington v. Glucksberg and Vacco v. Quill: An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions*, 43 ST. LOUIS U. L.J. 469 (1999).

For discussions of science-related material presented to the Court by amicus briefs, see James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae*, 14 LAW & HUM. BEHAV. 25 (1990); Gerald W.

ments comprise 5% of the Court's secondary citations and appear in eighteen majority opinions from the October 1996 Term. These include such items as an EEOC notice,⁷³ an FDIC history of the banking industry,⁷⁴ the *EEOC Compliance Manual*,⁷⁵ the *IRS Data Book*,⁷⁶ and several special reports.⁷⁷ This type of authority was cited at a slightly higher rate in the briefs, constituting 5.5% of secondary citations in both petitioners' and respondents' briefs, and 7.7% of amicus briefs. The amount of such material cited in both the opinions and briefs varied. Majority opinions cited 8.7% of the titles included in petitioners' briefs, only 5.1% in respondents' briefs, and 14.5% in amicus briefs. (See table 12.)

¶39 **Nonlegal Dictionaries.** Since the 1870s, the Supreme Court has regularly utilized dictionaries to construe phrases and define terms.⁷⁸ This use expanded dramatically during the 1970s and has continued to increase.⁷⁹ During the October 1996 Term, the Court cited nonlegal dictionaries eleven times to define terms in three majority opinions and one dissent.⁸⁰ In contrast, the briefs cited nonlegal dictionaries seventy-eight times in twenty-five cases. Only three of these citations, a

Barrett & Scott B. Morris, *The American Psychological Association's Amicus Curiae Brief in Price Waterhouse v. Hopkins: The Values of Science Versus the Values of the Law*, 17 LAW & HUM. BEHAV. 201 (1993); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993); Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1 (1991).

73. Equal Employment Opportunity Commission Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees Are Employees (Apr. 1990), *cited in* Walters v. Metropolitan Educ. Enters., 519 U.S. 202, 206 (1997).
74. 1 FED. DEPOSIT INS. CORP., STATISTICS ON BANKING: A STATISTICAL HISTORY OF THE UNITED STATES BANKING INDUSTRY (1995), *cited in* Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 212, 220 (1997).
75. 2 EEOC COMPLIANCE MANUAL, *cited in* Robinson v. Shell Oil Co., 519 U.S. 337, 345 (1997).
76. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, 1995 IRS DATA BOOK, *cited in* United States v. Brockamp, 519 U.S. 347, 352 (1997).
77. *E.g.*, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED (1994), *cited in* Maryland v. Wilson, 519 U.S. 408, 412 (1997); T. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996), *cited in* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); N.Y. STATE TASK FORCE ON LIFE & THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994), *cited in* Glucksberg, 521 U.S. 702, 711, 719, 729-34 (1997).
78. *See generally* Thumma & Kirchmeier, *supra* note 44, for a detailed discussion of the Court's use of dictionaries.
79. *Id.* at 253-60.
80. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (1981), *cited in* O'Gilvie v. United States, 519 U.S. 79, 83 (1997) (defining "for the sake of: by reason of: because of"); 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1198 (1993), AMERICAN HERITAGE DICTIONARY 828 (3d ed. 1992), and WEBSTER'S NEW INTERNATIONAL DICTIONARY 1145 (2d ed. 1950), *cited in* Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202, 207 (1997) (defining "has" and "have"); AMERICAN HERITAGE DICTIONARY 1788 (3d ed. 1992) and WEBSTER'S NEW INTERNATIONAL DICTIONARY 2509 (2d ed. 1950), *cited in* Auer v. Robbins, 519 U.S. 452, 461 (1997) (defining "subject to"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1396 (2d ed. 1958), *cited in* United States v. LaBonte, 520 U.S. 751, 757 (1997) (defining "maximum"); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789), *cited in* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 637 (1997) (Thomas, J., dissenting) (defining "impost"); T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796), S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785), BARCLAY'S UNIVERSAL ENGLISH DICTIONARY 471 (B. Woodward rev. 1782), 7 OXFORD ENGLISH DICTIONARY 733 (2d ed. 1989), *cited in id.* at 638 n.20 (Thomas, J., dissenting) (defining "impost").

small fraction of those cited by briefs, were among those cited by the Court.⁸¹

Table 22

Citations to Nonlegal Dictionaries

	Citations	Cases
Majority Opinions	7	4
Dissenting Opinions	4	1
Petitioners' Briefs	12	11
Respondents' Briefs	17	12
Amicus Briefs	45	14
Reply Briefs	4	3
Total in Opinions	11	5
Total in Briefs	78	25

Internet Materials

¶40 Although briefs submitted for cases decided during the October 1996 Term were written before the real onset of the Internet information explosion, there were still references to Web sites in seventeen briefs from four cases.⁸² Of the approximately 184 URLs included in the briefs, sixty-eight secondary sources were included in the tables of authorities.⁸³ None of these were cited by the Court, which included only one Internet citation in its opinions. This cite was merely a notation that a work by John Donne was available online.⁸⁴ Since the 1996 Term,

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81. A citation was counted as being in both the briefs and the opinions only if it was to the same dictionary for the same word or term.
 82. These included *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (appellant and ten amici); *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997) (petitioner and three amici); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) (one amicus); and *Glickman v. Wileman Bros.*, 521 U.S. 457 (1997) (one amicus).
 83. Examples include: Chris Docker, *Euthanasia in Holland*, <http://www.euthanasia.org.html>, cited in Brief of Amici Curiae Gay Men's Health Crisis et al. at 20, *State of Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 96-110, 95-1858); L. Slome et al., *Attitudes Toward Assisted Suicide in AIDS: A Five Year Comparison Study*, *National Library of Medicine* (conference abstract), <http://www.sis.nlm.nih.gov/aidsabs.htm>, cited in Brief of Amici Curiae of Law Professors at 12, *Vacco v. Quill*, 521 U.S. 793 (1997) (Nos. 95-1858, 96-110); Ctr. for Democracy & Tech., *CDT Policy Post, Number 31* (Dec. 4, 1995), <http://www.cdt.org/publications/pp311204.html>, cited in Brief of Amicus Curiae of the Chamber of Commerce of the United States of America at 18, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (No. 96-511); Palmer Museum of Art, *The PalmerONLINELobby*, <http://www.cac.psu.edu/mtdl20/palmer/lobby.html>, cited in Brief of Amicus Curiae American Association of University Professors et al. at 13-14, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (No. 96-511); Griffin, *Tort Reform in the U.S. Liability System*, <http://www.brobeck.com/docs/meddevic.htm>, cited in Brief of Amicus Curiae Industrial Indemnity Co. et al. at 13, *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) (No. 95-1621).
 84. *Glucksberg*, 521 U.S. at 741 n.8 (Stevens, J., concurring) (stating that John Donne's *Meditation No. 17, Devotions Upon Emergent Occasions* (1623) was available at http://www.kfu.com/pl...om_the_bell_tolls.html).

the citation of Internet sources by brief writers has increased considerably. However, despite a small recent increase, the use of online sources in Supreme Court opinions has remained very small,⁸⁵ with only a fraction of Internet sources noted in the briefs also appearing in the opinions. As with many other types of secondary sources,⁸⁶ when the Court does cite such material, it usually is not an item that was included in any of the briefs.⁸⁷

Individual Justices

¶41 While the data in tables 23–28 indicate variations in the number and types of citations included in opinions authored by individual justices during the 1996 October Term, it is not really possible to draw any real conclusions since the number of majority opinions for each justice ranged from only eight to eleven.⁸⁸ Although one might safely assume that the virtual absence of citations to congressional material in Justice Scalia’s opinions results from his well-publicized aversion to legislative intent,⁸⁹ it is also true that the relatively large number of nonlegal

85. A Westlaw search for opinions or briefs citing one or more URLs in a given calendar year, using “http” as a search term, produced the following results:

	1995	1996	1997	1998	1999	2000	2001
Fed. Dist. Ct. Opinions	1	0	15	37	101	183	269
Fed. Cir. Ct. Opinions	0	0	10	21	32	55	111
State Court Opinions	0	3	8	21	50	95	213
Supreme Court Opinions	0	1	1	1	2	7	3
Supreme Court Briefs	0	7	21	44	79	144	181

86. Only one Internet citation by the Court since 1996 was to a judicial opinion. *Knight v. Florida*, 528 U.S. 990, 463 (1999) (Breyer, J., dissenting) (citing Catholic Comm’n for Justice and Peace in Zimbabwe v. Attorney-General, [1993] 1 Zimb. L.R. 239, available at <http://www.law.wits.ac.za/salr/catholic.html>). The remainder were to sources that could be classified as miscellaneous government documents, miscellaneous legal materials, or nonlegal materials. See, e.g., Calif. Secretary of State, Statement of Vote, Report of Registration, May 1998, available at http://primary98.ss.ca.gov/Final/Official_Results.htm, cited in *Calif. Democratic Party v. Jones*, 530 U.S. 567, 578 (2000); Health Care Financing Admin., U.S. Dep’t. of Health and Human Services, Highlights, National Health Expenditures, 1998, tbl. 9 (May 11, 2000), available at <http://www.hcfa.gov/stats/nhe-oact/tablet9.htm>, cited in *Fischer v. United States*, 529 U.S. 667, 672 (2000); Judicial Council of Calif., Approved Form CR-120 (Notice of Appeal—Felony) (Jan. 5, 2000), available at <http://www.courtinfo.ca.gov/cgi-bin/forms.cgi>, cited in *Roe v. Flores-Ortega*, 528 U.S. 470, 473 (2000); Nat’l Ctr. for State Courts, A National Perspective: Court Statistics Project, available at <http://www.ncsc.dni.us/divisions/research/csp/csp98-fscf.html>, cited in *Muscarello v. United States*, 524 U.S. 125, 144 n.6 (O’Connor dissenting); Alan Alda/Hawkeye Pierce quote from *MASH*, available at <http://www.geocities.com/Hollywood/891/mashquotes.html>, cited in *Muscarello v. United States*, 524 U.S. 125, 144 n.6 (1998).
87. A Westlaw search using “http” as a search term located twenty Internet citations by the Court from 1996 through 2001. Only four of these also appeared in briefs.
88. The number of authorities cited per case for a given justice can vary widely from year to year. For example, the average number of case citations in Justice Brandeis’s opinions dropped from 42 in 1935 to 13.08 in 1936, before rising to 27.23 in 1937. *Manz*, *supra* note 34, at 86 tbl. II-12.
89. For a recent comment by Justice Scalia on the subject of statutory interpretation, see *Johnson v. United States*, 529 U.S. 694, 718 (2000) (“Of course the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.”).

materials cited by Justice Rehnquist is not a true indicator of any special fondness for such sources, but rather the result of his majority opinion in *Washington v. Glucksberg*, a case whose topic, assisted suicide, required the use of nonlegal materials.

Table 23*Citations to Cases*

Justice	Supreme Court	Other Federal	State	Admin. Decisions	Foreign	Total
Breyer	98	72	50	0	0	220
Ginsberg	162	45	15	0	0	222
Kennedy	152	26	10	3	0	191
O'Connor	151	28	1	3	0	183
Rehnquist	146	50	60	0	4	260
Scalia	150	34	21	0	0	205
Souter	137	56	6	2	0	201
Stevens	236	27	25	0	0	286
Thomas	102	36	7	0	0	145

Table 24*Case Citations per Majority Opinion*

Justice	Supreme Court	Other Federal	State	Admin. Decisions	Foreign	Total
Breyer	12.3	9.0	6.3	0.0	0.0	27.5
Ginsberg	18.0	5.0	5.6	0.0	0.0	24.7
Kennedy	19.0	5.6	1.9	0.3	0.0	23.8
O'Connor	16.8	3.1	0.1	0.3	0.0	20.3
Rehnquist	13.3	4.5	5.5	0.0	0.4	23.6
Scalia	16.7	3.8	2.3	0.0	0.0	22.8
Souter	17.1	7.0	0.8	0.3	0.0	25.1
Stevens	23.6	2.7	2.5	0.0	0.0	28.6
Thomas	12.8	4.5	0.9	0.0	0.0	18.1

Table 25*Percent of Cases Cited in Opinions Also Cited in Briefs*

Justice	Supreme Court	Other Federal	State	Admin. Decisions	Foreign	Total
Breyer	83.6	84.7	66.0	—	—	80.0
Ginsberg	66.0	82.2	40.0	—	—	67.6

(cont.)

Kennedy	75.7	88.5	10.0	100.0	—	74.3
O'Connor	80.8	89.3	100.0	100.0	—	82.5
Rehnquist	81.5	70.0	81.7.0	—	75.0	79.2
Scalia	66.7	91.2	85.7	—	—	72.7
Souter	54.0	64.3	66.7	50.0	—	57.2
Stevens	72.9	88.9	64.0	—	—	74.1
Thomas	88.2	83.3	100.0	—	—	87.6

Table 26*Citations to Secondary Authorities*

Justice	Legal Treat.	Legal Period.	Misc. Legal	Legal /		Nonlegal Treat.	Nonlegal Period.	Misc. Nonlegal	Total
				Const. History	Misc. Govt.				
Breyer	16	6	12	13	4	8	3	2	64
Ginsberg	7	12	7	10	1	2	0	2	41
Kennedy	11	7	4	25	0	0	2	3	52
O'Connor	3	2	31	3	4	0	0	1	44
Rehnquist	27	7	8	36	9	11	10	1	109
Scalia	3	8	3	12	1	4	0	5	36
Souter	10	10	1	11	0	1	4	2	39
Stevens	6	5	5	12	1	7	0	2	38
Thomas	1	1	3	3	2	4	0	4	18

Table 27*Secondary Citations per Majority Opinion*

Justice	Legal Treat.	Legal Period.	Misc. Legal	Legal /		Nonlegal Treat.	Nonlegal Period.	Misc. Nonlegal	Total
				Const. History	Misc. Govt.				
Breyer	2.0	0.8	1.5	1.6	0.5	1.0	0.4	0.3	8.0
Ginsberg	0.8	1.5	0.8	1.1	0.1	0.2	0.0	0.2	4.6
Kennedy	1.4	0.9	0.5	3.1	0.0	0.0	0.3	0.3	6.5
O'Connor	0.3	0.2	3.4	0.3	0.4	0.0	0.0	0.1	4.8
Rehnquist	2.5	0.6	0.7	3.3	0.8	1.0	0.9	0.1	9.9
Scalia	0.3	0.9	0.3	1.3	0.1	0.4	0.0	0.3	4.0
Souter	1.3	1.3	1.3	1.4	0.0	1.3	0.5	0.3	4.9
Stevens	0.6	0.5	0.5	0.9	0.1	0.7	0.0	0.5	3.8
Thomas	0.1	0.1	0.4	0.4	0.3	0.5	0.0	0.5	2.3

Table 28*Percent of Secondary Authorities Cited in Opinions Also Cited In Briefs*

Justice	Legal Treat.	Legal Period.	Misc. Legal	Legal /		Nonlegal Treat.	Nonlegal Period.	Misc. Nonlegal	Misc. Total
				Const. History	Misc. Govt.				
Breyer	43.8	66.7	58.3	76.9	50	0.0	0.0	50.0	48.4
Ginsberg	71.4	16.7	100.0	80	0.0	100.0	0.0	50.0	56.1
Kennedy	18.2	42.9	75.0	84.0	0.0	0.0	0.0	66.7	59.6
O'Connor	100.0	100.0	35.5	100.0	25.0	0.0	0.0	0.0	50.0
Rehnquist	55.6	57.1	0.0	71.4	77.8	54.5	50.0	0.0	42.2
Scalia	66.7	37.5	0.0	75.0	0.0	50.0	0.0	40.0	50.0
Souter	40.0	20.0	100.0	63.6	0.0	0.0	0.0	0.0	35.9
Stevens	83.3	60.0	60.0	66.7	0.0	71.4	0.0	60.0	65.8
Thomas	100.0	0.0	66.7	100.0	50.0	100.0	0.0	50.0	72.2

Conclusion

¶42 Overall, the statistical profiles of the majority opinions rendered by the Supreme Court during the 1996 October Term and the briefs submitted in these cases showed certain overall similarities and some definite differences. They may be summarized as follows:

1. A generally similar profile of case citations for both briefs and opinions, but with a somewhat greater proportion of cites to lower federal courts in the briefs
2. The virtual absence of administrative decisions and foreign opinions from both opinions and briefs
3. Slightly more than 25% of Supreme Court decisions cited in the briefs also appeared in the opinions, with even lower percentages for other types of decisions
4. Approximately 25% of the Court's case citations did not appear in any of the briefs
5. A far lower correlation between citations to secondary sources in opinions and briefs than for cases, with almost half of the Court's citations not appearing in the briefs
6. A greater tendency for the briefs to cite to legal periodical articles rather than to legal treatises
7. A far higher rate of citation to legal periodicals by all types of briefs, with an even lower correlation between these citations and those utilized by the Court than for judicial opinions

8. More frequent citation to bills and the *Congressional Record* by the briefs, but with few of these cites also appearing in the opinions
9. A greater tendency for the briefs to cite nonlegal materials, but with only a small percentage of these citations also appearing in the opinions
10. A very low rate of citation in both opinions and briefs to the *Restatement*, A.L.R. annotations, legal encyclopedias, and legal dictionaries
11. A significant amount of both primary and secondary authority cited only by the opinions and the amicus briefs, indicating that in addition to presenting the views of interested parties, amicus briefs did provide additional authorities that the Court also believed to be relevant

Appendix A:
United States Supreme Court Citations, 1840–1996/97

Table A

Total Citations to Cases—Majority Opinions

Year	Supreme Court	Other Federal	States	Admin. Decisions	Foreign	Total
1996/97	1334	374	195	8	4	1915
1960	982	401	140	57	0	1580
1930	1064	184	200	37	8	1493
1900	1060	65	453	10	82	1676
1870	417	68	250	0	128	863
1840	59	0	14	0	32	105

Table B

Total Citations to Secondary Authorities—Majority Opinions

Year	Legal /								Total
	Legal Treat.	Legal Period.	Misc. Legal	Const. History	Misc. Govt.	Nonlegal Treat.	Nonlegal Period.	Misc. Nonlegal	
1996/97	84	59	71	107	22	37	19	42	441
1960	44	72	44	208	6	19	2	27	422
1930	20	1	17	24	4	2	0	4	72
1900	51	1	7	3	0	3	0	5	70
1870	107	0	7	4	0	0	0	3	121
1840	25	0	0	0	0	0	0	2	27

Table C

Case Citations per Majority Opinion

Year	Supreme Court	Other Federal	States	Admin. Decisions	Foreign	Total
1996/97	16.7	4.7	2.4	0.1	0.05	23.9
1960	9.2	3.7	1.3	0.5	0.0	14.9
1930	7.8	1.4	1.9	0.3	0.06	11.0
1900	6.3	0.4	2.7	0.1	0.5	9.9
1870	2.7	0.4	1.6	0.0	0.8	5.5
1840	1.4	0.0	0.3	0.0	0.7	2.4

Table G*Legislative and Constitutional History Citations—Majority Opinions*

Year	Hearing/Report	Cong. Record	Bills	Misc.	Total
1996/97	46	19	34	8	107
1960	133	49	25	1	208
1930	19	5	0	0	24
1900	1	2	0	0	3
1870	4	0	0	0	4
1840	0	0	0	0	0

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