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# “REMARKABLE INFLUENCE”: THE UNEXPECTED IMPORTANCE OF JUSTICE SCALIA’S DECEPTIVELY UNANIMOUS AND CONTESTED MAJORITY OPINIONS

Linda L. Berger  
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## I. INTRODUCTION

What constitutes judicial influence and how should it be measured? Justice Antonin Scalia was known for his memorable phrasing (“this wolf comes as a wolf,”<sup>1</sup> “[I]ike some ghoul in a late-night horror movie”<sup>2</sup>) and for being cited at a rate twice that of his colleagues.<sup>3</sup> Justice Elena Kagan gave him credit for transforming “all of us” into statutory textualists and constitutional originalists.<sup>4</sup> Since his death, critics have provided

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1. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

2. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia & Thomas, JJ., concurring in judgment).

3. Frank B. Cross, *Determinants of Citations to Supreme Court Opinions (and the Remarkable Influence of Justice Scalia)*, 18 SUP. CT. ECON. REV. 177, 191 (2010).

4. *In Scalia Lecture, Kagan Discusses Statutory Interpretation*, 8 HARV. L. TODAY 29 (Nov. 17, 2015) (advance toggle on scrubber bar in embedded video to 8:29) (declaring that, after Justice Scalia’s lessons on statutory interpretation, “we’re all textualists now”), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>; *Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62, 81 (2010) (testimony of Solicitor General Elena Kagan) (noting without mentioning Justice Scalia that the Framers “sometimes . . . laid down very specific rules” and “[s]ometimes . . . laid down broad principles,” acknowledging that “[e]ither way we apply what they say, what they meant to do,” and indicating that “in that sense, we are all originalists”).

mixed reviews of the extent of his influence on the Supreme Court, other judges, law students, and the general public.<sup>5</sup>

Curious about the broader role rhetoric plays in judicial influence over time, we undertook a rhetorical-computational analysis of the 282 majority opinions that Justice Scalia wrote during his thirty years on the Supreme Court. The resulting study casts doubt on the ability of judicial authors, including Justice Scalia, to control their influence on later courts, at least as far as influence is reflected in citation counts.

Blending rhetorical and computational methods, we explored potential connections between the rhetorical construction of the opinions Justice Scalia wrote for the Court and the ways in which later courts treated them as precedent.<sup>6</sup> One important finding from our study is that relying on only the vote counts of the Justices obscures the actual failures of unanimity that may generate long-lasting uncertainty. When there are concurring opinions in decisions whose vote counts are unanimous—opinions we reclassified as “deceptively unanimous”—later courts may continue to debate one or more issues over a long period of time, and that may result in a “long tail” of more frequent citations, not because of the majority opinion’s influence but because of the continuing conversation. If later courts diverge about the meaning or application of the rules established in the majority opinion, they may rely on a concurring opinion that gains or loses adherents over time. In these circumstances, both the original majority opinion and the concurring opinion will continue to be cited. And more frequent citations—to both the majority and the concurrence or concurrences—will extend long after the debate is settled as still-later cases recount the history of the dispute.<sup>7</sup>

A second finding emerging from our analysis is that Justice Scalia’s rhetorical statements appeared to be more or less attractive to later courts depending on the particular rhetorical

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5. See *infra* notes 33–36 and accompanying text.

6. Other researchers sought the same connections. See, e.g., Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 892 (“The significance of opinion language in giving effect to opinions merits investigation. . . . Opinions are certainly meant as communication to judges deciding future cases, so language could be measured against precedential impact, including measures such as the likelihood of an opinion being distinguished in a future case.” (footnote omitted)).

7. For discussion of this point, see text accompanying notes 131–38.

context of the later judicial author. Although this finding may seem obvious, our analysis provided specific details. The federal courts of appeals, for example, were more likely to “cite” than to “follow” Justice Scalia’s precedential rules.<sup>8</sup> Perhaps reflecting both their institutional role and their greater resources, the federal courts of appeals tended to more extensively discuss both the arguments made and the rules established in Justice Scalia’s majority opinions while the federal district courts and the state courts were somewhat more likely to simply follow the rules.<sup>9</sup> These tendencies toward more extensive discussion were somewhat more pronounced when the later courts were writing opinions they knew would be “reported” rather than “unreported.”<sup>10</sup>

Finally, our analysis illuminates how difficult and complex it is to discern and describe the effects of rhetorical structures, argument frames, and word choices on judicial decisionmaking and opinion writing. For example, we suspect that Justice Scalia’s stated preferences for constructing particular kinds of rhetorical rule statements—bright lines, broad categories, strict limits—may in fact have resulted in more frequent citations, which some observers might translate into an inference of greater influence. Our analysis, however, indicates that these more frequent citations over time often were the result of Scalia rule statements that either created or contributed to lingering disputes about interpretation or application or both.<sup>11</sup> That kind of sustained citation frequency likely is not the long-lasting influence Justice Scalia sought.

Our purpose in undertaking this rhetorical-computational analysis was to discern patterns and connections across a substantial data base and, because of the breadth of the project, to be able to support our inferential findings with some

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8. In using the terms “cite” and “follow,” we are adopting LexisNexis terms of art for mere citations of a precedential opinion without more (“cite”) as distinguished from citations that positively “follow” or adhere to an earlier precedent. *See* text accompanying notes 128–29.

9. *See* text accompanying Tables 7, 12, and 13.

10. *See* text accompanying notes 161–64. As discussed in Part VI, “unreported” opinions are not literally unreported or unpublished, but instead they are available in both published and electronic form. More accurately, these opinions are said to lack precedential value outside the specific line of lawsuits in which they are decided.

11. For discussion of this point, see Part VII.

confidence.<sup>12</sup> This “medium data” approach<sup>13</sup> provides a larger and more data-driven perspective than traditionally practiced by historians or rhetorical analysts, but it remains an interpretive mode, its data collection narrower and its assessment goals more modest than those asserted by researchers conducting quantitative analysis of so-called “big data.” In projects such as this one, analysis and interpretation of the collected data proceeds through recursive rounds of hypothesis, computation, depiction, and further hypothesis.<sup>14</sup>

We have made what we think are reasonable assumptions about the role of judicial discretion and ideology in judicial decisionmaking. First, we assume that ideology alone does not drive most of the decisions made by judges, especially judges in the lower federal and state courts who are bound by vertical precedent.<sup>15</sup> Second, we assume that these judges—though bound by precedent—often have choices among the precedents they refer to, and especially about the manner in which they do so, including whether to “cite” or to “follow” a particular precedent. Because we hope to better understand how a later judge has been influenced to select particular language to rely upon in an opinion’s reasoning or decision, we necessarily assume that the later judge was not compelled in every case to follow an earlier decision. That is, we think circumstances not controlled by precedent (at least according to the arguments of the parties) happen frequently enough to make our project worthwhile. And even when the opinion writer is compelled to follow a particular precedent, we expect that the judge retains discretion to choose among the elements in the earlier opinion and to emphasize those she finds more crucial. When judges are engaged in this process, aided by the arguments of lawyers for the parties, they are engaged in “an organized and systematic

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12. For discussion of this point, see text accompanying notes 43–45.

13. David S. Tanenhaus & Eric C. Nystrom, *Pursuing* Gault, 17 NEV. L.J. 351, 358 (2017) (crediting historians Kellen Funk and Lincoln Mullen for the term).

14. For discussion of this point, see text accompanying notes 46–48.

15. We recognize that higher rates of citation for Justice Scalia’s opinions may be influenced over time by political appointment patterns, that is, by the presence of greater numbers of federal district court and courts of appeals judges sympathetic to his views. Our project did not account for ideological preferences of judges, but unlike many studies, it did extend to judges at all levels of federal and state courts.

process of conversation by which our words get and change their meaning.”<sup>16</sup>

We know that language choices govern the content and affect the lasting influence of judicial opinions because lawyers and judges treat the words and phrases of earlier opinions as rules<sup>17</sup> with consequences for later cases. When an earlier opinion governs a later case, the earlier opinion’s text is treated as the “repository” of information that determines what the law is and what its impact might be.<sup>18</sup> But the author’s language choices alone do not determine the staying power of judicial opinions. It’s not only the rhetoric selected by the judicial opinion’s author that determines when, whether, and how a later judge will pick it up and use it, it’s the complex rhetorical situation in which the later judge finds herself.

## II. THE CHOICE TO STUDY JUSTICE SCALIA’S MAJORITY OPINIONS

*Scalia’s words were his most potent weapon in his struggle to get the Court to rethink first principles and apply his views of freedom. . . . But his words were also his greatest weakness.*<sup>19</sup>

In 2010, the Cross study of citations to Supreme Court opinions found an “extremely high rate” of citations to Justice Scalia’s majority opinions.<sup>20</sup> Professor Cross determined that the

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16. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 268 (1985).

17. An early note on one of our own language choices: we use the term “rules” broadly throughout most of this article, as here, to indicate the universe of legal principles that are relied upon by lawyers and judges to make choices about what happens in particular legal contexts. See the discussion in Part VI for more explanation of how we distinguished between “rules” and “arguments” in the coding process. In Part VII, we discuss the distinction between “rules” and “standards,” but this is not a distinction that we attempted to apply elsewhere in the article.

18. Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 *GEO. L. J.* 1283, 1328 (2008).

19. RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* 7 (2018).

20. Cross, *supra* note 3, at 191. Professor Cross studied citations to Supreme Court opinions over a ten-year period, tracing total citations, positive citations, and negative citations; he used Westlaw’s KeyCite for treatment citations and confined his research to

number of lower court citations and the number of positive citations to Justice Scalia's opinions occurred at more than twice the rate of the average of other Justices during the period of his study.<sup>21</sup> Scholarship like the Cross analysis—supported by Justice Scalia's nearly thirty years on the Court and his widespread reputation as a skilled judicial author—bolstered our choice of Scalia texts as the object of study.<sup>22</sup>

Because majority opinions are a richer source for study of a Justice's long-term influence, we focused on those 282 cases rather than on Justice Scalia's more well-known dissents.<sup>23</sup> We began with a couple of hypotheses about why Justice Scalia's majority opinions might be especially influential, if in fact they were.

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published opinions. *Id.* at 177–78 (describing selected period and approach), 180 n.8 (describing use of KeyCite), 181 (noting that study's "data are limited to published opinions"). In comparison, as will be discussed in Part IV, our analysis relied on LexisNexis headnotes and Shepard's treatment citations, and we included both reported and so-called unreported opinions, distinguishing in some analyses between the two.

21. This was such an important finding that it found its way into the title of the resulting article. See Cross, *supra* note 3; but see David Cole, *Scalia: The Most Influential Justice Without Influence in Supreme Court History*, NATION (Feb. 18, 2016), <https://www.the.nation.com/article/scalia-the-most-influential-justice-without-influence-in-supreme-court-history/> (arguing that to be an originalist is to look backward and that as constitutional law evolves, originalists are likely to be left behind).

22. An earlier project using similar techniques indicated that the later influence of one of Justice Scalia's more controversial majority opinions was limited. Linda L. Berger, *Rhetorical Constructions of Precedent: Justice Scalia's Free Exercise Opinion*, in JUSTICE SCALIA: RHETORIC AND THE RULE OF LAW 197, 212–13 (Brian G. Slocum & Francis J. Mootz III, eds. 2019) [hereinafter SCALIA: RHETORIC].

23. Justice Scalia's majority opinions are much more restrained in rhetorical style than his dissents. His style in dissent likely reflects Justice Scalia's perspective that the most important reason for dissenting is that it "renders the profession of a judge . . . more enjoyable." As he explained in a 1994 speech,

To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.

Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HISTORY 33, 42 (Dec. 1994).

According to one recent study, and as the reputation of Justice Scalia's dissents suggests, the use of memorable language increases the long-term impact of dissenting opinions. Rachael K. Hinkle & Michael J. Nelson, *How to Lose Cases and Influence People*, 8 STATISTICS, POLITICS & POL'Y 195 (2018) (available behind paywall at <https://doi.org/10.1515/spp-2017-0013>). But dissenting opinions are, of course, rarely cited.

*A. Rhetoric*

Our first hypothesis was the obvious one: Justice Scalia's rhetoric, his often-remarkable use of language. But we considered rhetoric broadly, from the author's choice among his sources of support to his construction of argument frames to his selection of images and words. Professor Cross had suggested that Justice Scalia's approach to writing opinions "translate[d] into considerable precedential influence for lower courts" and speculated that his "relatively maximalist" approach might be the reason for his greater precedential influence.<sup>24</sup> Because whether an opinion is maximalist or minimalist is more a matter of the scope of the decision than of the doctrine involved, the distinction is discernible primarily in contrast with the opinions of other Justices.<sup>25</sup>

More generally, Professor Cross had suggested that fundamentalist opinions—those that, like some Scalia opinions, make large, sweeping, or broad changes in the law—might offer more opportunities for citations while, somewhat paradoxically, opinions that establish clear rules—like other Scalia opinions—might yield less litigation, and thus fewer citations, than opinions containing standards.<sup>26</sup> Again, although rules and standards are notably difficult to differentiate without context and comparison, we thought qualities such as maximalism, fundamentalism, and the setting of rules rather than standards might be detected in the phrasing of Justice Scalia's majority

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24. Cross, *supra* note 3, at 191. Justice Scalia was first characterized as a "maximalist" opinion-writer by Professor Sunstein, who placed him at the far end of a continuum on which a minimalist decision is narrow and shallow and decides no more than is absolutely necessary to resolve the case. Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 123–24 (2005).

25. One study of the effects of the maximalist-minimalist distinction looked at differences between the judgments that the Justices reached in the cases and the reasoning they expressed in their opinions (assuming that narrowness and shallowness would be reflected in the opinions, not the judgments). The study developed an empirical measurement for minimalism and concluded that it had a statistically significant effect on opinions of the Justices on the Rehnquist Court. Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1045 (2009).

26. Cross, *supra* note 3, at 184.

opinions (for example, maximalism might be linked to judicial expressions of certainty).<sup>27</sup>

### B. Originalism

Another possible source of influence might be Justice Scalia's philosophy of originalism.<sup>28</sup> A number of authors have challenged the premise that this philosophy had any particular effects, rhetorical or otherwise, on his opinions.<sup>29</sup> Shortly after Justice Scalia joined the Court, Professor Sullivan concluded that his reliance on originalism or traditionalism amounted to a means of decisionmaking, not an end, because for Justice Scalia, "the rule's the thing."<sup>30</sup> Her conclusion did not change, but gathered support over time. More practically, the combination of rhetorical and computational analysis we used for our project<sup>31</sup> simply did not lend itself to tracing the influence of originalism, which likely would have required experts to read hundreds of citing cases. Other hypotheses—such as Justice Scalia's ideological leadership or his relationships with others on the Court—were rejected for similar reasons: they had already been tested by others more expert or they could not adequately be studied within the parameters of our proposed analysis.

Despite the results of the leading citation studies, some experts have found that Justice Scalia's influence with specific target audiences failed to match the outsize nature of his

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27. Even though one hallmark of all judicial opinion writing is the author's assumption of the inevitability of the result, see Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010–14 (2002), Justice Scalia expressed particularly high levels of certainty, Cross & Pennebaker, *supra* note 6, at 889, and consistently led the Court in his use of intensifiers in both majority and dissenting opinions, Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 952 (2013).

28. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997).

29. For example, scholars have challenged the claim that Justice Scalia's "originalist textualism" restrained his use of judicial discretion. In fact, "[e]xamination of his rhetoric evidences that he often is engaged not in the reduction but rather the enhancement of judicial discretion—his own." George H. Taylor, Matthew L. Jockers & Fernando Nascimento, *No Reasonable Person*, in SCALIA: RHETORIC, *supra* note 22, at 137.

30. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992).

31. See text accompanying notes 75–97.

reputation. For instance, it was often suggested that Justice Scalia's main goal was to reach law students and thus to influence future generations of lawyers and judges.<sup>32</sup> According to one study of legal textbooks, Justice Scalia made major contributions to the legal and interpretive theory these texts contained even though he often ended up on the losing side in high-profile cases.<sup>33</sup> Nonetheless, the authors concluded that the most important factor in whether a particular Justice's opinions were included in a casebook was seniority on the Court, that is, "chief justices and justices who led their ideological wings of the Court have a great deal of power to assign themselves opinions that are likely to end up in our casebooks."<sup>34</sup> Looking at "how often Scalia's opinions (for the Court, or his separate opinions) are excerpted in the principal cases and how often he is referred to by notes preceding and following the principal cases," the authors found that "Scalia is at or near the top of most of the metrics . . . but he does not tower over the competition."<sup>35</sup>

Similarly, Professor Hasen concluded after Justice Scalia's death that features of his institutional role on the court would diminish his long-term reputation as an influential Justice. For example, Justice Scalia was never the swing Justice; he wrote fewer majority opinions than other Justices; and he wrote few landmark majority opinions outside the field of criminal procedure.<sup>36</sup>

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32. And also, perhaps, to influence the general public. *See, e.g.*, Meghan J. Ryan, *Justice Scalia's Bottom-Up Approach to Shaping the Law*, 25 WM. & MARY BILL OF RTS. J. 297 (2016). *See also* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 253 (2017).

33. Brian T. Fitzpatrick & Paulson K. Varghese, *Scalia in the Casebooks*, 84 U. CHI. L. REV. 2231, 2232 (2017).

34. *Id.*

35. *Id.*

36. Richard Collins, *Ask the Author: Antonin Scalia* "The Justice of Contradictions," SCOTUSBLOG (Mar. 19, 2018), <https://www.scotusblog.com/2018/03/ask-author-antonin-scalia-justice-contradictions> (transcribing interview with Professor Richard Hasen about his then-new book—RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* (2018)—considering Justice Scalia's career). Still, Justice Scalia was influential because of the "sheer force of his writing and personality. . . . He had big ideas and wrote and spoke about them forcefully." *Id.* On the other hand, because "he was also a polarizer, . . . he helped usher in an era in which we have divided our justices into teams." *Id.*

### III. USING CONTENT ANALYSIS TO STUDY HOW PRECEDENT WORKS

For years, the legal academics studying how doctrine developed and the political science researchers examining how judges made decisions remained in separate lanes. While legal scholars used interpretive methods to identify the core themes and concepts running through the subject matter of the law, political and other social scientists were conducting quantitative analyses that correlated judicial characteristics (political ideology in particular) with the outcomes of judicial decisions.<sup>37</sup> More recently, increasing numbers of researchers have turned to empirical analysis to examine the content of judicial opinions, many relying on new linguistic tools.<sup>38</sup>

In their comprehensive survey published in 2008, Professors Hall and Wright emphasized that systematic content analyses using empirical methods would be relying on the same raw materials as traditional legal interpretation, studying “judicial reasoning as expressed through the legal and factual content of written opinions.”<sup>39</sup> To fall within the category of systematic analyses included in their survey, a study had to include three processes: “(1) selecting cases; (2) coding cases; and (3) analyzing the case coding, often through statistical

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37. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). A common criticism of the leading statistical studies of voting patterns and decision outcomes was the overwhelming emphasis they placed on “ideological explanations of judicial behavior to the exclusion of legal explanations.” David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1674 (2010) (citing, among others, Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1904–07 (2009) and Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 687–89 (2009)). These studies were said to ignore the opinions and miss the law: “Merely coding for the outcome misses most of the importance of the judicial decision.” Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?* 100 NW. U. L. REV. 517, 524 (2006).

38. Until the last ten years, “[e]mpirical studies of the reasons for which judges employ certain analytical techniques or justify their decisions in particular ways” were rare. Law & Zaring, *supra* note 37, at 1673 (citing, among others, Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 885 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007))).

39. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 66 (2008).

methods.”<sup>40</sup> Although not usually thought of in this way, West’s Key Number System and Shepard’s Citations are longstanding and widely used examples of content analyses.<sup>41</sup>

After an appropriate corpus or set of cases has been identified, content analysts define a set of elements for coding the content of the cases. In the Hall and Wright overview, for example, the authors included only those studies whose coding process “brought some legal judgment to bear on the judicial opinions analyzed, such as describing the content of the parties’ arguments or the judge’s reasoning, or studying the influence of legally relevant facts.”<sup>42</sup> Analysts can then test and evaluate tentative hypotheses about which factors persuade courts and they can confirm speculative insights into cases. “Although it is no substitute for legal analysis, the disciplined reading and analysis of the cases required to code them for computer analysis eliminates casual meandering through factors on a case-by-case basis.”<sup>43</sup> Coding provides a check on the analyst and thus “strengthens the objectivity and reproducibility of case law interpretation.”<sup>44</sup>

Content analysis allows the researcher to find patterns and associations across opinions and to be more confident that those patterns and associations are meaningful. This increased confidence relies on breadth rather than depth. As Professors Hall and Wright point out, “content analysis reaches a thinner understanding of the law than that gained through more reflective and subjective interpretive methods.”<sup>45</sup>

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40. *Id.* at 79. They found content analysis studies focusing on specific legal topics, ranging from administrative law to torts; questions of legal methods; judicial decision making; and statutory interpretation. *Id.* at 73. The difference between traditional methods and content analysis, the authors say, may be analogized as follows: “When Dean Prosser read cases for possible discussion in his Torts treatise, he was auditioning a crowd of singers to find the best soloists.” *Id.* at 76. His goal was to find particular cases that exemplified specific points. *Id.* In contrast, content analysts are not looking for soloists. “Instead, they assemble a chorus, listening to the sound that the cases make together. This distinction between the collective and individual insights drawn from judicial opinions is the starting point for the functional differences between content analysis and traditional literary legal analysis.” *Id.*

41. *Id.* at 121.

42. *Id.* at 81.

43. *Id.* at 80–81 (footnote omitted).

44. *Id.* at 81.

45. *Id.* at 87.

Most of the studies that emerge from this kind of content analysis are descriptive or explanatory—they map rather than test—and they fall into two general categories: studies that “examine the background of legal doctrines, case subject matter, or case outcomes” and studies that “focus on particular techniques of opinion-writing, such as syntax, semantics, citations, or reasoning style.”<sup>46</sup> In most studies, “[t]he approach is loosely structured, calling on the researcher simply to observe and document what can be found, as a naturalist might explore a new continent or even a familiar patch of woods by turning over stones to see what crawls out.”<sup>47</sup> Our Scalia-opinions project falls into this mapping category, an approach that “contrasts with more focused analytic projects that use formal, statistical hypothesis testing to generate definitive conclusions about cause-effect relationships that have theoretical significance.”<sup>48</sup>

### *A. Rhetorical-Pattern and Word-Choice Analyses*

#### *1. Rhetorical Patterns*

Studying how judges reason and present their reasoning in written opinions appears to be a potentially rich application of content analysis.<sup>49</sup> Given our goals, among the most helpful examples we studied was Professor Little’s search for rhetorical patterns in a body of procedural decisions.<sup>50</sup> She identified possible language patterns in decisions focused on jurisdictional or related procedural grounds by asking whether there were recurrent tropes and linguistic devices that served to obscure the effects of the decisions being made.<sup>51</sup> After completing her rhetorical analysis of the text, she added content analysis

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46. *Id.* at 90.

47. *Id.*

48. *Id.*

49. Existing research has overlooked “a crucial aspect of Supreme Court decisions: their rhetoric,” or their “reasoned arguments intended to persuade.” Chemerinsky, *supra* note 27, at 2008.

50. See, e.g., Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 80 (1998).

51. *Id.* at 80.

methodology, allowing her to generate the data necessary to perform complex comparisons.<sup>52</sup>

## 2. *Style*

Among the most recent content analyses, Professor Varsava studied the impact of “stylistic features” on the citation of published opinions issued by the Tenth Circuit from 2003 to 2015. Acknowledging that her results do not prove causality, she nonetheless concluded that they supported the conclusion that “judges will cite serious, formal, and solemn opinions over light-hearted, colloquial, and jocular ones.”<sup>53</sup>

## 3. *Word-Choice Analyses*

Rather than coding by expert readers, a growing number of studies rely on a linguistic-analysis program, Linguistic Inquiry and Word Count (LIWC),<sup>54</sup> that counts the words used in various categories. Some of the results that appeared relevant to our analysis follow.

Using this tool, one study examining opinions from the Roberts Court found “significant differences” in the language used depending on whether the opinion was written for the majority or was written as a separate opinion, and it found some differences related to individual authors.<sup>55</sup> Professors Cross and Pennebaker speculated that language differences detected in majority and separate opinions indicated the “significance of compromise at the Court.”<sup>56</sup>

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52. *Id.* at 80–81.

53. Nina Varsava, *The Citable Opinion: A Quantitative Analysis of the Style and Impact of Judicial Decisions* (Oct. 28, 2018) at 3, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3197209](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197209).

54. See, e.g., Yla R. Tausczik & James W. Pennebaker, *The Psychological Meaning of Words: LIWC and Computerized Text Analysis Methods*, 29 J. LANGUAGE & SOC. PSYCH. 24 (2010) (explaining how LIWC was created and tested and indicating that empirical studies demonstrated its ability to detect social and psychological meaning in a variety of experimental settings); see also *How It Works*, LIWC (n.d.), <https://liwc.wpengine.com/how-it-works/>.

55. Cross & Pennebaker, *supra* note 6, at 872–92.

56. *Id.* at 853; see also *id.* at 874–75 (discussing repeated circulation of drafts and compromise involved in preparing majority opinion).

Another recent study found that lower courts were more likely to treat Supreme Court opinions positively when the opinions contained “more certain” language.<sup>57</sup> Earlier studies had hypothesized more mixed rhetorical effects. Some analysts argued that an opinion’s use of words associated with breadth and certainty helped readers better understand the opinion’s rules.<sup>58</sup> Other researchers theorized that higher levels of certainty resulted from the opinion’s author expressing or portraying issues in a less complex way, and still others suggested that certainty is the result when an author is faced with an argument that is likely to lose: “winners and losers do write differently in appellate briefs and opinions depending on the perceived threat to the writer’s legal argument.”<sup>59</sup> In some researchers’ opinion, Justice Scalia was not only the most certain but also the clearest opinion writer.<sup>60</sup>

Scholars also differed on whether the use of word choices thought to reflect cognitive complexity helped or hindered the influence of judicial opinions. Professors Tetlock, Bernzweig, and Gallant suggested that greater cognitive complexity is a strength in judicial reasoning,<sup>61</sup> while Professors Owens and Wedeking thought it might be a weakness, diminishing the clarity of the opinion.<sup>62</sup> As for the use of words associated with emotions, another linguistic study found no great difference in the levels of anger expressed in majority, concurring, and dissenting opinions.<sup>63</sup> The same study found little difference in

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57. See Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 L. & SOC’Y REV. 35, 54 (2014).

58. Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC’Y REV. 1027, 1029–31 (2011).

59. Cross & Pennebaker, *supra* note 6, at 873 (noting also that “words of certainty may be used as a defensive mechanism when a justice is in fact uncertain”); see also Long & Christensen, *supra* note 27, at 958–59.

60. The Owens and Wedeking study concluded that Justices Scalia and Breyer wrote the clearest opinions. Their study found that all the Justices wrote clearer dissents than majority opinions, and that the clearest majority opinions were the result of “minimum winning coalitions.” The authors also concluded that “opinions that formally alter Court precedent render less clear law, potentially leading to a cycle of legal ambiguity.” Owens & Wedeking, *supra* note 58, at 1027.

61. Philip E. Tetlock et al., *Supreme Court Decision Making: Cognitive Style as a Predictor of Ideological Consistency of Voting*, 48 J. PERSONALITY & SOC. PSY. 1227 (1985).

62. Owens & Wedeking, *supra* note 58, at 1038–42.

63. Cross & Pennebaker, *supra* note 6, at 883.

expressions of positivity by opinion type, “though concurrences are somewhat more positive. Per curiam opinions are remarkably negative in emotionality.”<sup>64</sup>

### *B. Citation Analyses*

In contrast with content analyses, citation analyses may examine only the non-rhetorical aspects of opinions, such as the legal issues involved or the size of the majority coalition. Acknowledging that the use of citations is an imperfect proxy for influence or importance, researchers emphasize that citations are nonetheless “a facially clear measure of the importance of opinions, at least within the law itself.”<sup>65</sup> Professors Cross and Spriggs determined in their study of the “most important” and “best” opinions and Justices that citation rates for Justices Thomas and Scalia were “very high.”<sup>66</sup> As Professor Cross had already suggested in his companion study of Justice Scalia’s influence,<sup>67</sup> these authors hypothesized that having Justices Scalia and Thomas near the top and Justice Breyer near the bottom of their results was “some evidence” for the hypothesis that maximalist opinions have more influence over time.<sup>68</sup>

#### *1. Majority Coalitions*

As for the effects on citation patterns of the size of the majority coalition, results vary. One conventional view was that the more Justices joined an opinion, the more its precedential

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64. *Id.* at 883–84.

65. Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 411 (2010); *see also id.* at 420–30 (describing theoretical basis for citation-based study of Supreme Court opinions. Each citation is a “latent judgment” that indicates the case being cited is “precedent.” James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedents*, 30 SOC. NETWORKS 16, 17 (2008). Other researchers focus more narrowly on only positive citations. *See, e.g.*, Matthew P. Hitt, *Measuring Precedent in a Judicial Hierarchy*, 50 L. & SOC’Y REV. 57, 63–64 (2016) (emphasizing importance of later cases following a particular precedent).

66. Cross & Spriggs, *supra* note 65, at 495.

67. *See, e.g.*, Cross, *supra* note 3, at 201 (characterizing Justice Scalia as a maximalist).

68. Cross & Spriggs, *supra* note 65, at 495.

value.<sup>69</sup> Others argued that the more controversial and important decisions likely would not be decided by a unanimous court. Instead, they suggested that the cases that were decided unanimously were not very interesting to the Supreme Court, and so they would not be frequently cited by later courts. Others speculated that when the results were unanimous, the holdings would necessarily be narrower, and as a result, these opinions would be less frequently cited.<sup>70</sup> Professors Cross and Spriggs found that cases with unanimous coalitions were less often cited by the Supreme Court in the future but that those lesser citation rates did not hold true in the lower federal courts.<sup>71</sup>

## 2. *Longer Opinions*

Again, the results have been mixed, but some research suggests that longer opinions are more likely to be cited in the future.<sup>72</sup> Some analysts theorized that Justices who are committed to defining the law and increasing the influence of the Supreme Court write longer opinions; in comparison, Justices who write shorter opinions might be thought to be more open to greater flexibility by future courts.<sup>73</sup>

## 3. *Internal Citations*

As for the number of internal citations—or the number of times the studied opinion cited earlier cases—the Cross and Spriggs study found a “consistently positive and significant [effect]” between the number of later citations for an opinion

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69. Cross, *supra* note 3, at 193 (citing Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J 419 (1992)).

70. *Id.* at 194 (citing Frank B. Cross, et al., *Determinants of Cohesion in the Supreme Court's Network of Precedents* (presented Nov. 2007) (Second Annual Conference on Empirical Legal Studies)).

71. Cross & Spriggs, *supra* note 65, at 479.

72. *Id.* at 480; *but see* Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEG. STUD. 325 (2013) (positing depreciation over time as the primary factor in citation rates for Supreme Court opinions and cautioning against reliance on other potentially relevant variables without first accounting for the influence of depreciation).

73. Cross & Spriggs, *supra* note 65, at 480 (hypothesizing that Justices writing longer opinions might want “to project greater influence over future development of the law”).

and its number of internal citations. The authors speculated that the opinions with more internal citations were either actually “better grounded in the existing law” or more persuasive because they appeared to have more precedential support.<sup>74</sup>

#### IV. OUR RHETORICAL-COMPUTATIONAL RESEARCH APPROACH

Our project relied on a blended rhetorical-computational analysis of the 282 majority opinions written by Justice Scalia while on the Supreme Court. By weaving together rhetorical and computational methods, we hoped to strengthen our ability to gauge the influence of precedent on one of the most important audiences for judicial opinions, the later judges and Justices who read, interpret, and use them when making decisions in later cases.

Applying both computational and rhetorical methods to the construction and reception of judicial opinions has several potential benefits. First, the study is an effort to chart the movement and the evolution of legal principles through legal networks. Because judicial opinions constitute the law, “[t]heir power is enhanced by the common law doctrine that links them in a chain of influence and causation—the doctrine of precedent.”<sup>75</sup> Second, the study attempts to discern and begin to measure the influence of different rhetorical approaches on different audience members: “Judges intend their published opinions not only as a communication to the parties in the particular case that gave rise to the opinion, but also as a communication to other judges, other lawyers, other litigants, and other actual and potential participants in the legal system.”<sup>76</sup>

The project applied rhetorical methods to a sample that appears to lend itself to data analysis, that is, we were reading and coding the “rules” reflected in the LexisNexis headnotes in

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74. *Id.*

75. Hall & Wright, *supra* note 39, at 92–93 n.119 (quoting Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 773 (1981)).

76. *Id.* at 93 n.120 (quoting Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Variation in Business Bankruptcy Cases*, 55 UCLA L. REV. 357, 364–65 (2005)).

all 282 of the Scalia majority opinions.<sup>77</sup> Because they isolate headnote rules, the LexisNexis editors try to identify each legal issue discussed in an opinion, label each issue with a headnote number, and then extract much of the exact language of the opinion on that point.<sup>78</sup> But they omit all citations to authorities, including constitutional provisions, regulations, statutes, and case law, from the headnotes. This means that when we read the Lexis headnotes, we were reading the text Justice Scalia wrote with one major omission: the citations to authorities.

As any lawyer will tell you, a statement made in a brief without a citation to an authoritative source loses much of its ethos, credibility, and persuasiveness. Headnotes, however, are not part of the judicial opinion, but instead they are editorial additions used by attorneys early in the research and writing process as a way to quickly identify specific portions of an opinion that might be most useful for their focused attention. For the attorney reader of a headnote, the ethos function is served by the implicit citation of the entire statement in the headnote to the author of the opinion being excerpted.

Our initial goal was to examine the text of each headnote through a network of lenses suggested by the rhetorical canons

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77. Metadata about opinions is derived from the Supreme Court Database. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2018 Supreme Court Database*, WASH. U. L. (n.d.), <http://Supremecourtdatabase.org> (click “Data,” then “Previous Versions” and then click “Version 2018 Release 01”) [hereinafter SCDB]. Each opinion’s text was downloaded manually from LexisNexis. Note that the count of Scalia-authored opinions includes nine “Judgments of the Court” (decisionType=7), which are opinions on which a majority of the Justices could not agree. Following SCDB recommendations, these have been included in our data. See SCDB, *Online Code Book—Decision Type*, WASH. U. L. (n.d.), <http://scdb.wustl.edu/documentation.php?var=decisionType> (defining “decisionType=7” as a case in which “less than a majority of the participating justices agree with the opinion produced by the justice assigned to write the Court’s opinion” and indicating that cases classified as “decisionType=7 should be included in analyses of the Court’s formally decided cases”).

78. See Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citor Results in Westlaw and Lexis*, 32 LEGAL REFERENCE SERVS. Q. 13, 18–19 (2013) (explaining that, to prepare headnotes, Westlaw editors may summarize the legal points in their own words, but Lexis editors extract the precise language of the case) [hereinafter Mart, *Curation*]. The use of LexisNexis and Westlaw headnotes by researchers, both students and lawyers, raises interesting questions about how the presence of headnotes affects our unknowing assumptions about what is “important” in an opinion. See, e.g., Susan Nevelow Mart, *Every Algorithm has a Point of View*, 22 AALL SPECTRUM 40 (Sept./Oct. 2017) (surveying differences and similarities in results generated by searching various legal databases).

of *invention* (the creation of arguments), *arrangement* (the structure and sequencing of arguments), and *style* (the words, phrases, and images chosen to present arguments). Because of the nature of headnote text, only some kinds of rhetorical analysis worked effectively as a first level of categorization. We were able to identify with some confidence the headnotes that constituted the steps in Justice Scalia's argument in any given opinion (labeled "argument" in what follows) and also the headnotes that constituted statements of what Justice Scalia likely considered to be the rules established by or necessary to the decision in any given case (labeled "Scalia rules").<sup>79</sup>

Applying quantitative methods, we moved next to the immediate audience for his majority opinions, the judicial authors of later opinions at all levels of the state and federal court systems. There, we found some tentative linkages between the rhetorical construction and rhetorical framing of the Scalia majority opinions and the ways in which subsequent courts relied upon them. For example, in cases where the later court might have—or might appear to have—greater discretion, there is a small but noteworthy difference in citation patterns.<sup>80</sup>

### A. *The Research Question and the Research "Corpus"*

Our broad research question was to better understand whether Justice Scalia's majority opinions exerted a "remarkable influence" on particular categories of later judicial authors—as gauged by citations—and if so, what factors were important in influencing them. The majority opinions provided a reasonably convenient and coherent body of his work for study.

To address the question, we gathered all the majority opinions written by Justice Scalia, from his arrival on the Supreme Court in the fall of 1986 to his death in early 2016.<sup>81</sup>

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79. The classified data is available as Linda L. Berger & Eric C. Nystrom, *Classification of Majority Opinions and Headnotes Written by U.S. Supreme Court Justice Antonin Scalia* (July 12, 2019), DOI: 10.5281/zenodo.3333948. We also were able to identify the headnotes containing the rules that Justice Scalia likely intended to establish as rules answering the question posed in a particular case as stated by Justice Scalia (labeled "Scalia-intended rules"). A later research project may examine this connection further.

80. See, e.g., text accompanying notes 192–201.

81. As in the Cross and Pennebaker study, we studied only majority opinions. They "excluded all opinions of fewer than one hundred words, for which the program's

Most lawyers and judges would agree that “what matters is not merely what the court said [and did], but how it said it.”<sup>82</sup> The words and phrases used by the court are “regarded as consequential in (if not dispositive of) a subsequent case even if the language at issue was not directly implicated in the decision of the prior case.”<sup>83</sup> Because the text of the opinion is the only definitive source to which litigants, lawyers, and judges can refer,<sup>84</sup> compiling the full texts as the dataset was essential. The number of opinions was large enough to make observations at scale possible, but not so large as to make assembly of the dataset impossible.

The procedure involved collecting data from several sources. The SCDB compiles a range of helpful data about every Supreme Court case.<sup>85</sup> Using SCDB’s “majOpinWriter” variable, a spreadsheet was compiled of the 282 cases with majority opinions written by Justice Scalia from 1986 to 2015.<sup>86</sup> Recognizing that “majority opinions” often include contributions from a number of authors,<sup>87</sup> we concluded after review that the opinions on the whole reflect Justice Scalia’s rhetorical work, both in a narrow wordsmithing sense and in the broader sense of rhetorical structure. Working from the list of Justice Scalia’s majority opinions, we downloaded each case’s data from LexisNexis. Both the case opinion and the Shepard’s

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reliability was uncertain; these were generally separate opinions.” Cross & Pennebaker, *supra* note 6, at 872.

82. Oldfather, *supra* note 18, at 1327.

83. *Id.* (footnote omitted).

84. *Id.* (indicating that judicial opinions are “the embodiment of precedent”).

85. *See generally* SCDB, *supra* note 77.

86. *Online Code Book, Majority Opinion Writer*, SCDB, *supra* note 77 (identifying “AScalia” authorship as value 105).

87. A majority opinion must be joined by at least half the other Justices on the Court. Joining the majority opinion does not preclude Justices from expressing significant disagreement in the kinds of concurring opinions whose importance is underlined by our study. Court opinions at all levels are influenced by the clerks (if any) who work for the authoring Justice as well as the Justices in the majority. In this vein, Judge Wald has said that “the drafting of majority opinions is a delicate political and human relations undertaking, [which] precludes the exercise of pure stylistic preference by a judge in choosing relevant rationales, rhetoric, issues, legal doctrines, precedents, authorities, and even linguistic flourishes.” Cross & Pennebaker, *supra* note 6, at 875 (quoting Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner’s Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CINN. L. REV. 651, 658 (2000)).

report were downloaded in HTML format, in several pieces if necessary, and saved with filenames reflecting the SCDB ID and a standard notation about their contents.<sup>88</sup> After downloading, checks were made to ensure the completeness and correctness of the dataset, which ultimately comprised 653 downloaded files.

The Shepard's reports contained data used to address the second goal of understanding the reception of Justice Scalia's ideas over time. The primary element of a Shepard's report is a list of the subsequent cases that cited the opinion being Shepardized. With such a report for each opinion Justice Scalia wrote, we had the raw material to see how a crucial audience—judges, especially in lower courts—interpreted Justice Scalia's judicial opinions. Since each citing case was itself a product of a particular time and place, we could follow the use of his ideas over time.

The opinion text and the Shepard's reports provided another element to explore the reception of Justice Scalia's rhetoric. Each opinion, like all opinions on the LexisNexis database, was preceded by numbered LexisNexis headnotes that are “key legal points of a case drawn directly from the language of a court by LexisNexis attorney-editors.”<sup>89</sup> Inclusion of the headnotes in the online version of a case allows researchers to easily locate key points in what amounts to a table of contents at the beginning of the opinion. Having located the relevant headnote, “you can jump directly to the text point where each LexisNexis Headnote appears by selecting the down arrow associated with it.”<sup>90</sup>

In a Shepard's report showing subsequent citations to the case, LexisNexis also identifies, when possible, the headnote from the original case that seems to best represent the specific

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88. Downloading was done manually through the standard interface and took several weeks to complete. Professor Nystrom's “sheptools” programs were specifically created to work with the saved HTML exported report. The tools were developed against the HTML versions because they were slightly easier to work with programmatically than other electronic case reports. See Eric C. Nystrom, *Sheptools: Legal History Tools to Manipulate Downloaded Shepard's Citation Data*, <https://github.com/ericnystrom/sheptools> (providing software); see also DOI:10.5281/zenodo.3271794 (same). A caveat: Since these data were collected, the output format from LexisNexis has changed.

89. *Caselaw Summaries and Headnotes*, LEXISNEXIS (2008), [http://www.lexisnexis.com/tutorial/global/US/Academic/en\\_US/summaries\\_text.htm](http://www.lexisnexis.com/tutorial/global/US/Academic/en_US/summaries_text.htm).

90. *Id.*

point that the citing case is invoking. Headnotes are therefore units of content, smaller than the opinion as a whole, but composed (with very few exceptions)<sup>91</sup> of the original text from the opinion and connected to subsequent uses of that case. Incorporating both treatment citations and citations to specific headnote numbers allows for finer-grained interpretation and analysis than analyses based only on citation counts. We anticipated that (1) the headnotes could give us a more precise and narrower understanding of how a citing case was reading and using the original opinion and (2) the headnotes could be read for rhetorical content and context because they were excerpts of unaltered opinion text.

With these multiple purposes in mind, we extracted several types of information from the downloaded files. From the opinion texts, we gathered the LexisNexis headnotes for each case as well as the narrative summary information contained in the so-called syllabus at the beginning of each opinion about the facts of the case and the judgment. From the Shepard's report, we extracted information about subsequent cases that cited each Scalia case. We also added information from the SCDB about the case being cited. After processing each opinion and Shepard's report, and removing duplicate entries,<sup>92</sup> we had a total of 2,903 distinct headnotes, and a total of 510,705 citations to the 282 Scalia-authored opinions. Of these, only 15.5% (79,254) of the citations lacked any headnote information.<sup>93</sup>

### *B. Our Toolkit*

Rather than LIWC,<sup>94</sup> the linguistic analysis software that has often been used for content analysis, we used custom open-source software to analyze a combination of LexisNexis headnotes and Shepard's Citations. The data compilation and

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91. LexisNexis editors will change a word or two to make the headnotes readable; for example, "we hold" will become "the court holds."

92. Most duplicates were the result of errors in the process of downloading too-large Shepard's reports in several smaller pieces, but smaller numbers of duplicates are contained within the Shepard's reports themselves.

93. Descriptive statistics derived from tabular data, revision 0519, copy in possession of authors. This includes a number of corrections by the present authors to the Lexis-Nexis-owned data.

94. See Tausczik & Pennebaker, *supra* note 54.

analysis techniques used here were developed by Professor Nystrom in collaboration with Professor David Tanenhaus.<sup>95</sup> Professors Nystrom and Tanenhaus characterized their work as applying what historians have dubbed a “medium data” perspective.<sup>96</sup> As discussed earlier, this perspective is more data-driven than the approaches traditionally practiced by historians and rhetoricians, but unlike much quantitative analysis, it is still primarily interpretive. Our analysis and interpretation proceeded through recursive rounds of hypothesis, computation, depiction, and further hypothesis.

The toolkit was first applied to better understand how one important case was interpreted over time, but the potential to derive insights from analyzing a corpus of cases seemed clear, leading to the present project. Several elements influenced the start of our project. First, as noted above, scholars have suggested that Justice Scalia’s use of language is linked to the successful spread of his ideas. A legal rhetorician might closely read Justice Scalia’s opinions to discern the source of such a relationship, but would the links hold for the bulk of them?

A second element was the possibility that headnotes, because they contained the words of the opinion, might be read for their rhetorical content. True, a handful of text snippets—especially recognizing that LexisNexis tries to capture only the “rules” or legal principles stated in an opinion in the headnotes—represented the opinion as a whole only thinly, but these particular snippets had been selected to stand in for the most important points in the opinion.

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95. Tanenhaus & Nystrom, *supra* note 13. Using custom tools to convert a LexisNexis Shepard’s report into tabular data, Professors Tanenhaus and Nystrom examined how *In re Gault*, 387 U.S. 1 (1967), which established certain key due process protections for juveniles, had been cited over time. Tanenhaus & Nystrom, *supra* note 13, at 358–69; see also DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAULT AND JUVENILE JUSTICE* (2011). Professors Tanenhaus and Nystrom used Lexis-generated headnotes as proxies for the several strands of legal thought in Justice Fortas’s *Gault* opinion. Since nearly eighty-five percent of the cases identified in the Shepard’s report as having cited *Gault* included a Lexis-provided note about the legal issues (summarized as one or more headnotes) from *Gault* that had been invoked in the citing case, they traced the headnotes singly and in groups to uncover how the meaning of the classic case had shifted over time. Tanenhaus & Nystrom, *supra* note 13, at 358–69.

96. Tanenhaus & Nystrom, *supra* note 13, at 358 (referring to the work of Professors Funk and Mullen).

Third, we had already developed some tools and concepts to make an investigation at scale somewhat more feasible. In the course of earlier work, major components of the Shepard's data toolkit had been built and tested. Further, in thinking about how to analyze the headnotes, Professor Nystrom took inspiration from an earlier collaboration with Professor Tanenhaus, in which it proved relatively straightforward to use a custom database to present terms to be evaluated in batches by an expert.<sup>97</sup> Once the evaluations were gathered, they could be applied to the rest of the data by the computers without further difficulty. Finally, we began with an explicit commitment to an open-ended inquiry and an affirmation of our intent to situate that inquiry in the humanistic traditions of rhetoric and history.

## V. WHAT WE FOUND: THE BIG PICTURE

This section establishes overall patterns as a first sketch of the subsequent history of Justice Scalia's majority opinions. First, we explore Justice Scalia's most-cited majority opinions as a way to begin to think about explanations for his later influence. Next, we look at how citation patterns change when the later court is deciding to "follow" rather than merely "cite to" a Scalia majority opinion. Third, we explore the effects on citation patterns of the size and shape of the majority coalition. Finally, we look at how citation patterns differ by jurisdiction and level of the citing court.

To begin, our dataset included 282 majority opinions and a total of 510,705 citations to these opinions.<sup>98</sup> The mean number of citations for each Scalia-authored opinion is 1811.01, but the median is only 613, which suggests a distribution heavily

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97. Professor Tanenhaus, a juvenile justice expert, *see, e.g., David Tanenhaus, James E. Rogers Professor of History and Law, UNLV WILLIAM S. BOYD SCHOOL OF LAW*, <https://law.unlv.edu/faculty/david-tanenhaus> (2020) (summarizing professional expertise and linking to C.V.), had ranked terms from juvenile justice legislation for their relative association with "punitive" or "rehabilitative" approaches to youth crime. These weighted terms were then used to calculate an approximation of any particular bill's degree of punitiveness. Eric Nystrom & David S. Tanenhaus, *The Future of Digital Legal History: No Magic, No Silver Bullets*, 56 AM. J. LEG. HISTORY 150 (2016).

98. We froze our Shepard's data as of November 2017, due in part to the time-consuming nature of manually re-downloading Shepard's reports for all 282 cases if an update was desired.

skewed by a smaller number of very influential opinions. About 90% of opinions received fewer than 4648 citations; about 75% of opinions received 1626 citations or fewer; and the bottom quartile had 228 citations or fewer. In our data, one opinion got just two citations, though the opinion with the next-fewest cites had twenty-four. Eleven opinions received more than 10,000 citations (and the twelfth missed that mark by fewer than 300); these are listed in Table 1 below.

### *A. Justice Scalia's Most-Cited Opinions*

Justice Scalia's most-cited opinions do not constitute a top-ten list of landmark constitutional rulings. Instead, they include rulings on issues important to litigants frequently seen in the federal courts and legal questions likely to recur as federal judges manage the process of prisoner lawsuits, criminal prosecutions, and civil litigation.

Citations	SCDB ID	Case Name	Reference	Decision
25,982	1993-084	Heck v. Humphrey	512 U.S. 477	9-0
24,078	2003-080	Blakely v. Wash.	542 U.S. 296	5-4
21,456	1992-112	St. Mary's Honor Ctr. v. Hicks	509 U.S. 502	5-4
18,840	1991-085	Lujan v. Defenders of Wildlife	504 U.S. 555	6-3
16,257	1990-108	Wilson v. Seiter	501 U.S. 294	5-4
15,924	2003-040	Crawford v. Wash.	541 U.S. 36	9-0
15,382	1986-158	Anderson v. Creighton	483 U.S. 635	6-3

99. The SCDB ID is assigned according to the Supreme Court Term in which the opinion falls. Supreme Court terms begin on the first Monday in October and continue until late June or early July. The date of the decision, and thus of the published opinion, may reflect a different year. For example, *Heck v. Humphrey*, 1993-084, was published as 512 U.S. 477 (1994).

Note that the vote counts in the column labeled "Decision" are based on SCDB data reflecting the votes for the majority and the minority opinions rather than on our own analysis of the size and shape of the majority coalitions as explained further below in Table 4. We also looked at the top eleven Scalia-authored majority opinions counting only "reported" cases; the numbers of citations of course decreased, but there was little change in the order of cases cited.

Citations	SCDB ID	Case Name	Reference	Decision
13,908	1995-081	Lewis v. Casey	518 U.S. 343	8-1
12,865	1993-047	Kokkonen v. Guardian Life Ins. Co.	511 U.S. 375	9-0
12,287	1990-124	Ylst v. Nunnemaker	501 U.S. 797	6-3
11,792	2006-037	Scott v. Harris	550 U.S. 372	8-1

The subject matter of these opinions may seem to suggest a simple explanation for Justice Scalia's apparent influence as measured by their later citations: these legal questions make up much of the federal courts' dockets. For example, his most-often-cited opinion, *Heck v. Humphrey*,<sup>100</sup> is a prisoners' rights lawsuit, a category that is among the most often filed and heard in the federal courts. In fact, the category of "inmate litigation" is so common that the authors of the Cross study excluded prisoner "tort actions for liability" and prisoner actions involving "cruel and unusual punishment" because of their possible distorting effects on the comparison of citation rates among Justices.<sup>101</sup> Although excluding these cases makes sense in a quantitative comparison among the various Justices, we determined that including their citation rates would inform rather than distort our more inferential analysis of a single Justice's influence.

Based on the Court's statements of the subject matter of the controversy, the SCDB first assigns cases to very specific issues and then groups those together into the broader groups of issue areas noted in Table 2.<sup>102</sup> As the data in Table 2 suggest, looking

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100. 512 U.S. 477 (1994).

101. Cross, *supra* note 3, at 191.

102. When the SCDB identifies the issues, the focus is on the subject matter of the controversy stated by the Court. Quoting from the SCDB, the scope of these categories is as follows:

- Criminal procedure encompasses the rights of persons accused of crime, except for the due process rights of prisoners . . . .
- Civil rights includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage. . . .

at all of Justice Scalia's majority opinions together, almost twice as many fell into the area of criminal procedure as any other issue area, and the top three categories of criminal procedure, judicial power, and civil rights overwhelmed all other categories.

Case Issue Area	Citations	% Total Citations
Criminal Procedure	186,946	36.61
Judicial Power	97,149	19.02
Civil Rights	91,462	17.91
Economic Activity	50,726	9.93
Due Process	39,553	7.74
Attorneys	19,785	3.87
Federalism	9826	1.92
First Amendment	7342	1.44
Unions	5145	1.01
Privacy	1229	0.24
Miscellaneous	866	0.17
Federal Taxation	676	0.13

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- First Amendment encompasses the scope of this constitutional provision, but do note that not every case in the First Amendment group directly involves the interpretation and application of a provision of the First Amendment . . . .
  - Due process is limited to non-criminal guarantees . . . .
  - The four issues comprising privacy may be treated as a subset of civil rights.
  - Because of their peculiar role in the judicial process, a separate attorney category has been created, which also includes their compensation and licenses, along with those of governmental officials and employees. . . .
  - Unions encompass those issues involving labor union activity. . . .
  - Economic activity is largely commercial and business related; it includes tort actions and employee actions vis-a-vis employers. . . .
  - Judicial power concerns the exercise of the judiciary's own power. . . .
  - Federalism pertains to conflicts and other relationships between the federal government and the states, except for those between the federal and state courts. . . .
  - Federal taxation concerns the Internal Revenue Code and related statutes.
  - Miscellaneous contains three groups of cases that do not fit into any other category.
- SCDB, *supra* note 77 (describing categories in *Online Code Book* at <http://scdb.wustl.edu/documentation.php?var=issue>).

In addition to interpreting procedural and constitutional requirements in prisoner lawsuits, Justice Scalia's most-cited cases involved constitutional protections in criminal prosecutions, questions of standing for plaintiffs wishing to challenge a government agency's rule, and burdens of proof in employment discrimination lawsuits. Because these issues are so likely to recur, we might expect the Scalia opinions for that reason alone to be among those to which the lower courts are most likely to turn. But this explanation does not distinguish Justice Scalia's opinions from those of the other Supreme Court Justices who decide the same kinds of legal questions.

In Part VII, we will examine the subsequent citation histories of some of these most-cited opinions further. To provide context for the initial presentation of data, following is a brief summary of the decisions themselves.

### *1. Case Summaries*

#### a. Prisoner Cases

First, grouping together the prisoner lawsuits, Justice Scalia's most-cited opinion is his majority opinion in *Heck v. Humphrey*, where the Court held that a plaintiff cannot bring a § 1983 claim (a civil action for a civil-rights violation) unless there has been a previous favorable termination of a criminal conviction or reversal.<sup>103</sup> Without such a previous termination, the Court said, allowing the § 1983 case to proceed would be inconsistent with the outcome of the criminal case.<sup>104</sup>

Another major category of prisoner lawsuit is represented by *Wilson v. Seiter*,<sup>105</sup> in which the Court interpreted the Eighth Amendment prohibition on cruel and unusual punishment as applied to prisoners' conditions of confinement. There, Justice Scalia established a new standard that required plaintiffs to show both that the conditions were objectively cruel and unusual and

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103. 512 U.S. at 487 (holding that a claim for damages in relation to "a conviction or sentence that has not been . . . invalidated is not cognizable under § 1983").

104. *Id.* at 486–87.

105. 501 U.S. 294 (1991).

that they were the result of “deliberate indifference” by prison officials.<sup>106</sup>

In *Lewis v. Casey*,<sup>107</sup> the Supreme Court imposed standing requirements that protected state prison officials from federal court interference. The Court held that finding a “demonstrated harm from one particular inadequacy in government administration” would not permit the courts “to remedy *all* inadequacies in that administration.”<sup>108</sup>

And in *Ylst v. Nunnemaker*,<sup>109</sup> the Court ruled on one of the questions involved when a prisoner files a habeas petition in federal court collaterally attacking his state conviction. The “procedural default” rule says that if the prisoner failed to make his claim in the manner and within the time required by established state rules, and the state courts rejected his claim for that reason, the federal court cannot consider the claim unless one of the exceptions to the rule applies. *Ylst* established a “look through” rule for federal courts when the last state decision is a simple denial but an earlier decision has a full explanation, allowing courts to look through intervening decisions and assume that the later decisions relied on the earlier explanation.<sup>110</sup>

#### b. Constitutional Issues in Criminal Cases

The second group of most-cited opinions addressed constitutional issues in criminal prosecutions. In *Blakely v. Washington*,<sup>111</sup> the Court held that within the context of mandatory sentencing guidelines under state law, the Sixth Amendment right to a jury trial prohibited judges from enhancing criminal sentences based on facts not decided by a jury or admitted by the defendant.<sup>112</sup> Because it extended the holding for the first time to all the states, the opinion was characterized as “a legal haymaker that has sent the criminal

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106. *Id.* at 303–04.

107. 518 U.S. 343 (1996).

108. *Id.* at 357.

109. 501 U.S. 797 (1991).

110. *Id.* at 805–06.

111. 542 U.S. 296 (2004).

112. *Id.* at 303–05.

sentencing world reeling”<sup>113</sup> and a “sea change in the body of sentencing law.”<sup>114</sup>

A similarly sweeping change occurred as a result of Justice Scalia’s opinion in *Crawford v. Washington*,<sup>115</sup> holding that testimonial hearsay is inadmissible at trial unless the declarant is available for cross-examination. Justice Scalia reconfigured the standard for determining when the admission of hearsay statements in criminal cases is permitted under the Sixth Amendment’s Confrontation Clause.<sup>116</sup> Courts subsequently struggled to define “testimonial hearsay,” again leading to a long line of subsequent citations.

In *Anderson v. Creighton*,<sup>117</sup> the Scalia majority opinion expanded the doctrine of qualified immunity as a defense available to government officials in actions based on constitutional torts. A court now asks not only whether the right allegedly violated was clearly established but also whether a reasonable official in the defendant’s position would have known that his or her conduct violated the right.<sup>118</sup>

Finally, in the widely discussed *Scott v. Harris*,<sup>119</sup> the Court ruled on a fact question on the basis of the Justices’ own viewing of a videotaped police chase that left the fleeing driver a quadriplegic.<sup>120</sup> After viewing it, the Court found that the police officer’s actions were reasonable under the Fourth Amendment because his use of deadly force was justifiable.<sup>121</sup>

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113. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 377 (2005).

114. *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004).

115. 541 U.S. 36 (2004).

116. *Id.* at 68 (“Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” (footnote omitted)).

117. 483 U.S. 635 (1987).

118. *Id.* at 640–41.

119. 550 U.S. 372 (2007).

120. *Id.* at 378–80.

121. *Id.*; *but see id.* at 389–94 (Stevens, J., dissenting).

### c. Civil Cases in Federal Court

The third group of most-cited opinions addressed the process of civil lawsuits in federal courts. Justice Scalia's majority opinion in *St. Mary's Honor Center v. Hicks*<sup>122</sup> re-emphasized the allocation of the burden of persuasion to the plaintiff in Title VII employment discrimination cases.<sup>123</sup>

In *Lujan v. Defenders of Wildlife*,<sup>124</sup> Justice Scalia's majority opinion established a new principle of federal standing. Post-*Lujan* plaintiffs must show that they suffered a concrete, discernible injury—not a “conjectural or hypothetical one.”<sup>125</sup>

The power of federal district courts to exercise jurisdiction over settlement agreements was the topic of *Kokkonen v. Guardian Life Insurance Co. of America*.<sup>126</sup> The Court indicated in dicta that the trial court retains jurisdiction to enforce a settlement agreement if it either incorporates the settlement agreement into the dismissal order or specifically includes a clause in the dismissal order retaining jurisdiction.<sup>127</sup>

### B. Justice Scalia's Most-Followed Opinions

When we looked at Justice Scalia's most-followed—rather than his most-cited—opinions, there were few changes other than the expected decline in the number of citations. LexisNexis assigns subsequent cases to very specific treatment categories that can be grouped into more general categories. For example, “positive” citations include those that “follow” the precedent case, while “negative” citations include those that “question” the original decision or “caution” the researcher about its use. The most common category, “Cited,” is sometimes characterized as essentially neutral, but the mere citation of the case has also been interpreted to indicate that the author accepted its general

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122. 509 U.S. 502 (1993).

123. *Id.* at 507.

124. 504 U.S. 555 (1992).

125. *Id.* at 560 (citation omitted).

126. 511 U.S. 375 (1994).

127. *Id.* at 380–82 (declining to extend ancillary jurisdiction).

validity.<sup>128</sup> Of the 510,705 distinct citations in our dataset, 75% are labeled as “Cited” and nothing more (384,410 or 75.27%), and nearly 80% of the citations in the data at least include the “Cited” label (408,401 or 79.97%).

A smaller number of citations were labeled by LexisNexis as having used the case in a more active way. If we include variations<sup>129</sup> and those cases that have multiple labels identified, we see 94,490 citations that include the “Followed” label in some form, which is 18.5% of the total number of citations. Small shifts in order occurred when we examined the “most-followed” opinions rather than the most-cited opinions. The top eight opinions remained the same and were joined by three more not far behind on the list of most-cited opinions.

Follow* Citations	SCDB ID	Title	Reference	Decision
12,310	1993-084	Heck v. Humphrey	512 U.S. 477	9-0
7161	1991-085	Lujan v. Defenders of Wildlife	504 U.S. 555	6-3
4852	1992-112	St. Mary’s Honor Ctr. v. Hicks	509 U.S. 502	5-4
4370	1990-108	Wilson v. Seiter	501 U.S. 294	5-4
3873	1995-081	Lewis v. Casey	518 U.S. 343	8-1
3350	2003-040	Crawford v. Wash.	541 U.S. 36	9-0
2173	1986-158	Anderson v. Creighton	483 U.S. 635	6-3
2104	2003-080	Blakely v. Washington	542 U.S. 296	5-4
1561	1996-056	Edwards v. Balisok	520 U.S. 641	9-0
1415	1993-028	Liteky v. United States	510 U.S. 540	9-0
1297	1987-147	Pierce v. Underwood	487 U.S. 552	6-2

Most notable is the sharp drop in the number of citing cases that “followed” rather than merely “cited” the majority opinion.

128. Cross, *supra* note 3, at 182 (suggesting that “[a]ny citation to a Supreme Court opinion might be regarded as a positive one, in that it recognizes the importance of the opinion, rather than simply ignoring it”).

129. The category included “Followed” as well as “Followed in Concurring” and “Followed by Questionable Precedent.”

The last three opinions were not in the most-cited list, but the subject matter of each has much in common with at least one case on the first list.<sup>130</sup>

### *C. Citation Rates by Shape and Size of Majority Coalition*

One way to assess the court's voting coalition is to look at the number of Justices recorded by SCDB as voting for the majority opinion or for a minority opinion. Using the SCDB data,<sup>131</sup> and assuming that a unanimous decision is one in which no Justice dissents even if there are one or more concurring opinions, 42.6% of Scalia-authored opinions were unanimous. By contrast, 39.4% were decided with slim majorities of five or six Justices, and 23.0% were decided by five-four majorities.

As other authors have pointed out, concurring opinions are very common in unanimous decisions.<sup>132</sup> Therefore, we decided that it would be more accurate to take concurring opinions into account because they so often indicate disagreement with, rather than “merely supplementation or extension of, the majority opinion.”<sup>133</sup> In a separate analysis, we counted opinions with concurrences as “deceptively unanimous” rather than “truly unanimous.” We extended our counting of concurrences and partial dissents to our categorization of “strong majority” and “contested majority” opinions. As a result, our analysis showed that only 23% of Scalia-authored majority opinions were truly unanimous, 20% were deceptively unanimous (that is, there was at least one concurrence), 21% were strong majority opinions (with one or two Justices filing full or partial dissents), and 36% were contested majority opinions (with three or more Justices filing full or partial dissents).

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130. *Edwards* was another § 1983 opinion; *Liteky* involved recusal by federal judges when their impartiality might be questioned; and *Pierce* was a dispute about attorneys' fees.

131. Data about majority/minority votes were taken from the SCDB for each of our Scalia opinions.

132. Lee Epstein, William M Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?* 106 NW. U.L. REV. 699, 700 (2012) (noting that “41% of the unanimous decisions in The Supreme Court Database include concurring opinions, compared to 38% for non-unanimous decisions”).

133. *Id.*

Majority Coalition	Scalia Opinions	% Opinions	Citations	% Citations
Truly Unanimous	65	23.13	72,373	14.19
Deceptively Unanimous	57	20.28	136,840	26.83
Strong Majority	59	21.00	95,518	18.73
Contested Majority	100	35.59	205,308	40.25

Using as a baseline the number of truly unanimous opinions within the database, Table 4 indicates that “truly unanimous” opinions (constituting 23% of the Scalia majority opinions) were under-represented in later citations (only 14% of the citations) while both “deceptively unanimous” (20% of the opinions and 27% of the citations) and “contested majority” opinions (36% of the opinions and 40% of the citations) were over-represented. One possible explanation for this result is suggested by the history of *Heck*.<sup>134</sup> The recorded majority-to-minority vote for *Heck* is nine to zero, but the majority opinion has been described as “a 5-4 decision on the rationale”<sup>135</sup> because of two concurrences, one joined by four Justices. The Scalia majority (based on a rationale from the common law of torts) was joined only by Justices Rehnquist, Kennedy, Thomas, and Ginsburg. Justice Thomas concurred, expressing a completely different view about the rationale,<sup>136</sup> and Justice Souter, joined by Justices Blackmun, Stevens, and O’Connor, concurred on the basis that the proper way to resolve the case was to construe § 1983 in light of the habeas corpus statute.<sup>137</sup> Justice Souter’s concurrence eventually led to a long-running split of authority in the federal courts of appeals that at least

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134. 512 U.S. 477.

135. Lyndon Bradshaw, Comment, *The Heck Conundrum: Why Federal Courts Should Not Overextend the Heck v. Humphrey Preclusion Doctrine*, 2014 BYU L. REV. 185, 193.

136. *Heck*, 512 U.S. at 490–91 (Thomas, J., concurring).

137. *Id.* at 503 (Souter, J., concurring) (concluding that “the proper resolution of this case . . . is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion”).

partially explains the frequency of citations to *Heck* over time (as discussed in Part VII).<sup>138</sup>

Several other often-cited opinions initially categorized as unanimous joined *Heck* as “deceptively unanimous” in our later analysis.<sup>139</sup> For example, in a related case, *Edwards v. Balisok*,<sup>140</sup> Justice Scalia held that the prisoner’s claim for damages and declaratory relief was not cognizable under § 1983, because the principal procedural defect complained of—exclusion of exculpatory evidence as a result of deceit and bias of the hearing officer—would, if established, necessarily have implied the invalidity of the deprivation of the good-time credits.<sup>141</sup> As in *Heck*, there was a concurrence, this time joined by three Justices, that expressed the view that some of the procedural defects were immediately cognizable under § 1983.<sup>142</sup> Similarly, in *Crawford v. Washington*,<sup>143</sup> Justice Scalia’s opinion overruling *Ohio v. Roberts*<sup>144</sup> was joined by six Justices while Justices Rehnquist and O’Connor concurred on the basis that the judgment followed from *Roberts* without the need for overruling.<sup>145</sup> Again, in *Liteky v. United States*,<sup>146</sup> Justice Scalia’s opinion on federal judges’ recusal where their impartiality might be questioned was joined by four Justices, but Justice Kennedy’s concurrence was joined by three.<sup>147</sup> Even though the concurrence agreed with the holding, Justice Kennedy said that “the Supreme Court’s opinion announced a mistaken, unfortunate precedent.”<sup>148</sup>

138. See *infra* text accompanying notes 189–94.

139. These were coded by Berger after reviewing each opinion’s syllabus. All unanimous opinions with concurrences were coded as deceptively unanimous.

140. 520 U.S. 641 (1997).

141. *Id.* at 648.

142. 520 U.S. at 649–50 (Ginsburg, Souter & Breyer, JJ., concurring).

143. 541 U.S. 36 (2003).

144. 448 U.S. 56 (1980).

145. *Id.* at 76 (Rehnquist, C.J., & O’Connor, J., concurring) (concluding that “[t]he result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases”).

146. 510 U.S. 540 (1994).

147. *Id.* at 557 (Kennedy, Blackmun, Stevens & Souter, JJ., concurring in the judgment).

148. *Id.* Our subsequent analysis also changed the shape of the majority coalition in several most-cited cases that were not first categorized as unanimous. For example, *Lewis*, 518 U.S. 343, was initially categorized as an eight-to-one opinion, but our later analysis

#### D. Citation Rates by Jurisdiction and Level of Court

A Supreme Court opinion may be cited by a federal or state court at various levels of each jurisdiction. The opinion might be cited as horizontal precedent on a federal issue (binding as the earlier decision under *stare decisis*) by the Supreme Court itself; more commonly, the opinion would be cited as vertical precedent on a federal issue (binding as the higher decision under hierarchical principles) by a federal court of appeals, federal district court, or special federal court; or by a state supreme court or state lower court.

Jurisdiction	Citations	% of Citations
Federal Appeals (including SCOTUS)	85,420	16.73
Federal (all other)	352,971	69.11
State Supreme Courts	16,788	3.29
State Courts (all other)	55,486	10.86
Jurisdiction not recognized	40	0.01
<b>Total</b>	510,705	

More than 85% of the citations of Justice Scalia's opinions came from the federal courts. Citations by other Supreme Court cases were few (2759 or 0.54% of all citations), an expected result given *stare decisis* and the relatively few Supreme Court grants of certiorari each year. State courts at all levels were responsible for only about 14% of the citations to Justice Scalia's opinions.

## VI. WHAT WE FOUND: THE DETAILS

Having broadly sketched the history of Justice Scalia's majority opinions in Part V, we describe in this Part our use of LexisNexis headnotes to explore when, whether, and how later judges or panels of judges might decide to select specific

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indicated that the majority opinion was contested by three or more Justices voting against some part of it.

language to rely upon for their reasoning or decision in a particular rhetorical situation.

*A. Coding: What Rhetorical Functions Might Be Identified by Analyzing the Language Captured in Headnotes?*

We began by testing whether each headnote, derived as it was from the opinion's text, might be effectively analyzed on its own for evidence of rhetorical framing or structure. Given the emphasis placed on Justice Scalia's memorable writing style, our first approach to rhetorically analyzing the language used in the headnotes focused on the Justice's use of surface rhetorical devices such as vivid images or characterizations. Our more successful second approach relied on the common syllogistic structure of most legal arguments. Using a combination of the language selected by Justice Scalia (primarily, did it state a proposition that could be applied beyond the present case?) and the headnote's place in the argument structure (primarily, did it seem to lead to the holding and did it appear in the appropriate part of a conventional syllogistic form?), we classified each headnote as

- a preexisting rule,
- an argument or a step along the route to a rule, or
- a Scalia-crafted statement of a rule.

To further explain this classification within the framework of a syllogism, the same statement might be classified as an argument if it appeared as a "premise" or as a Scalia rule if it appeared as a "conclusion."<sup>149</sup>

To place the headnotes in the initial schema we outlined—preexisting rule, argument, and Scalia rule—we created a website where Professor Berger<sup>150</sup> could read through

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149. See Appendix A for examples of our coding of representative headnotes. For illustrations of how the same statement might be classified as an argument or as a rule, see Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 819 (2002) (pointing out that opinions are not made up of individual syllogisms but instead are "chains of syllogisms . . . , in which the conclusions of syllogisms earlier in the chain supply the premises of syllogisms that are later in the chain").

150. When acting individually, the co-authors are referred to by last name.

preliminary information on each case<sup>151</sup> so that she understood the overall context of the opinion. She then read through the headnotes in sequence. The website stored Professor Berger's responses in a database, where they were collated with other data once complete. The website was created out of open-source tools<sup>152</sup> and was built in such a way that it could be used again with little or no modification by loading different data and/or a different set of questions. For a larger project, the website software could support multiple distinct user/evaluators, which would be helpful in determining inter-rater reliability. Because Professor Berger evaluated each headnote for this project, we could consider the entire set as an expression of her judgment and expertise. After several months, Professor Berger re-evaluated and made corrections to the initial coding. In all, Professor Berger coded 2,903 distinct headnotes, representing every headnote identified by LexisNexis in Justice Scalia's 282 majority opinions. Despite the challenges, these headnotes seemed likely to be our best opportunity to trace at least a skeletal rhetorical structure from 282 cases in fragmentary form across half a million citations and nearly three decades.

*B. Hypothesizing and Testing: How Do Later Courts Choose Among "Arguments" and "Rules," and Between "Citing" or "Following" Precedent?*

Having coded the headnotes as containing either an argument or a step along the route to a rule or a Scalia-crafted statement of a rule (and leaving aside the very small number of preexisting rules), we hypothesized about the rhetorical situations in which a later court might choose to rely on portions of a case represented by an argument headnote, a rule headnote, or (more likely) a combination of the two. Imagining the context within which a later court might be making these choices was necessary in order for us to begin to select from among the seemingly infinite number of potential computational analyses.

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151. The preliminary information was the syllabus containing a summary of the case, the holdings, and the votes. See Appendix A for examples.

152. The pages were written in PHP and utilized some JavaScript elements from Twitter Bootstrap. The database back-end was SQLite.

Generating these hypotheses helped shape our initial computations. An important note about the data to follow: each record of the citation of one case by another in the Shepard's data may contain a reference to one or more headnotes. These are the elements of the cited case (in this case, Justice Scalia's majority opinion) that LexisNexis determined were at issue in the citing case.<sup>153</sup> The headnote numbers themselves are those from the original case being cited (that is, Justice Scalia's opinion). If LexisNexis determined that a citing case invoked principles covered by more than one headnote in the original case, multiple headnotes may be listed. Therefore, a "headnote-citation" in our data is properly understood as a citation, with a headnote attached by Lexis to help specify the areas of the opinion that were invoked when the citing case cited it. The citing case does not specify the original case's headnote explicitly. Since our analysis of "rules" will eventually analyze the language used in individual headnotes, they must be disaggregated first. In disaggregated data, each entry (which we are calling here a "headnote-citation") represents one headnote invoked by one citing case. If a citing case was deemed to have invoked three headnotes when it cited Justice Scalia's opinion, then it appears in the disaggregated data three times (once for each headnote); similarly, if no headnotes were associated with a case's citation of Justice Scalia's opinion, then that case does not appear in the disaggregated data at all. The 510,705 citations in our dataset yield 794,060 headnote-citations when disaggregated.

Of the 2903 headnotes extracted from Scalia-authored majority opinions that Professor Berger evaluated, 1890 (65.1%)

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153. As already noted, Westlaw and LexisNexis prepare their headnote texts differently. They also use different systems for assigning their headnotes to particular classifications, as well as different algorithms for linking the headnotes in the original opinion to the citing references. According to one researcher, "the text of the headnote of the Shepardized case is compared algorithmically with language from the citing cases to identify references (within the citing case) that match the language of the LexisNexis headnote within the Shepard's report." Mart, *Curation*, *supra* note 78, at 21 (endnote omitted). According to this author, Westlaw relies on human editing to assign headnotes to a point in its classification system, while "LexisNexis relies primarily (although not exclusively) on algorithms to assign a headnote to a topic in the classification scheme." *Id.* at 18, 21. But "both systems use algorithms to link headnotes to matching headnotes in citing references, although the algorithms are different." *Id.* at 21. All this matters because researchers using different search engines will get different results.

were deemed to represent “arguments,” 241 (8.3%) represented “preexisting rules,” and 772 (26.6%) represented “Scalia rules.” Note that not all headnotes were actually found in headnote-citations. Only 757 distinct “Scalia rule” headnotes, 1828 distinct “argument” headnotes, and 140 “preexisting rule” headnotes appeared in headnote-citations. When we looked at citation patterns broadly, the headnotes referring to opinion language that we categorized as “Scalia rules” were cited more frequently: they represented 42.91% of headnote-citations despite being just 26.9% of all headnotes.

Type	# of HNs	% of HNs	# of HN-Cites	% HN-Cites
Argument	1890	65.11	448,748	56.51
Scalia Rule	772	26.59	340,718	42.91
Preexisting	241	8.3	4589	0.58

The single most frequently invoked headnote-citation, with 18,280 appearances, was Headnote 10 from *Heck*,<sup>154</sup> categorized in our rhetorical analysis as a “Scalia rule.”<sup>155</sup> This headnote-citation was invoked 5,000 more times than the next most-cited

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154. 512 U.S. 477.

155. Headnote 10 is an unusually long headnote that sums up the general rule of *Heck*:

In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a 42 U.S.C.S. § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C.S. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under 42 U.S.C.S. § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

*See* text accompanying notes 192–97, *infra*, for discussion of the rhetorical effect of this headnote.

one. The top ten headnote-citations by usage were split evenly between arguments and Scalia rules.<sup>156</sup>

As noted earlier, when examined as a whole, opinion language characterized as falling into Scalia-rule headnotes was cited much more frequently than opinion language characterized as falling into argument headnotes.<sup>157</sup> The mean number of headnote-citations for Scalia-rule headnotes was 450.09, while the mean for argument headnotes was 245.49, and the medians, respectively, were ninety-two and fifty-four.<sup>158</sup> In other words, later courts relied on Scalia rules much more often than they cited the language we coded as arguments.

Substantial variation was found from case to case. When a later judge (or panel of judges) relied on a majority opinion written by Justice Scalia, it was very likely that the later author would cite both arguments and rules from the prior opinion. Which arguments and rules, how many, and the way in which the reliance was expressed were questions we wished to explore further.

The headnote citations for a truly “average” Scalia majority opinion, should one exist, would be about 56% of the argument type, about 43% of the Scalia-rule type, and perhaps a smattering of preexisting ones. A few of our most-cited cases (mentioned in Table 1 above) can serve as examples.

For instance, *Wilson v. Seiter*<sup>159</sup> had 33,933 individual headnote-citations: that means among all the citations, from

156. Our rhetorical analysis of some of the most-cited headnotes can be found in Part VII. See *infra* text accompanying notes 170–227.

157. Remember that the later judges are not citing the headnotes themselves, but instead are citing the language of the opinion (which often includes citations to earlier authorities). LexisNexis has excerpted the language and designated it as a headnote, and we have characterized that language as an “argument” or as a “Scalia rule.”

158. Scalia-rule headnotes, number of headnote-citations:

- Mean: 450.0898
- 1st quartile: 27
- Median: 92
- 3rd quartile: 302.

Argument headnotes, number of headnote-citations:

- Mean: 245.4858
- 1st quartile: 15
- Median: 54
- 3rd quartile: 167.

159. 501 U.S. 294).

courts at all levels, LexisNexis determined that the citing court was discussing a part of the *Wilson* opinion represented by a specific headnote this many times. Of those later citations, 17,891 were citations to the “argument” headnotes in *Wilson* (52.7%), and 16,042 were citations to the Scalia-rule headnotes in *Wilson* (47.3%). This is reasonably close to the proportions a statistically “average” case might have.

By contrast, other highly cited cases revealed different patterns. *Heck* had 36,242 headnote-citations, but only 26.7% of them (9673) were of the argument type, while 72.9% (26,410) were Scalia rules. In *Heck*, therefore, the Scalia rules were cited by later courts much more often than the other headnotes, and more than would be the case in an average Scalia opinion. Two factors may have influenced this citation pattern. First, as noted earlier, the decision in *Heck* was deceptively unanimous, and its concurrences foreshadowed a continuing dispute. Second, as will be discussed in Part VII, the general rule stated in the *Heck* majority opinion appeared to hold rhetorical appeal for later judges no matter what their reasoning and judgment in a later dispute.

Some cases among Scalia’s most cited opinions illustrated the opposite pattern. In *Blakely v. Washington*,<sup>160</sup> the argument headnotes made up 88.9% of the case’s headnote-citations (30,903 headnote-citations) while the case’s Scalia-rule headnotes accounted for just 11.1% of the headnote-citations (3851). *Blakely* extended a Sixth Amendment right to mandatory sentencing guidelines under state law, but it specifically addressed Washington’s sentencing scheme. In this rhetorical situation—where the state courts in many other individual jurisdictions were left to grapple with and reason their way through the meaning or application of *Blakely* to the context of their particular state laws—it makes sense that subsequent decision makers would be citing more argument headnotes than rule headnotes from *Blakely*. The explanations of these later judges would necessarily be more extended than those of judicial authors who simply follow the governing rule from an earlier opinion because the precedent case is so similar to the situation before them. These differentiations suggest that the

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160. 542 U.S. 296.

influence of Justice Scalia's majority opinions depended not only on the rhetorical construction of his opinions and his rhetorical framing of the rules but also on the rhetorical situation in which the later judge found herself.

### *C. Rule-to-Argument Citation Patterns*

Given variations from one case to another in patterns of citation, the next question we addressed was whether these variations could be linked to the jurisdiction and level of court or to the reported or unreported status of the court's opinion.

#### *1. Court Characteristics*

##### *a. Type of Court: Federal or State*

If the headnote-citations are grouped by jurisdiction, do we see any differences? The table below compares the rule types of headnote-citations from citing cases originating in federal and state courts, respectively.

<b>Jurisdiction</b>	<b>Rule Type</b>	<b>HN-Cites</b>	<b>% of Jurisdiction</b>	<b>Difference: Average of All</b>
Federal	Argument	381,531	56.97	+0.46
Federal	Scalia Rule	283,757	42.37	-0.54
Federal	Preexisting	4402	0.66	+0.08
State	Argument	67,217	54.05	-2.46
State	Scalia Rule	56,961	45.8	+2.89
State	Preexisting	187	0.15	-0.43

Recall that Table 6 showed the average headnote-citations for all jurisdictions: 56.51% for argument headnotes and 42.91% for Scalia-rule headnotes. And recall that Scalia-rule headnotes were cited more often than their frequency (26.59%) and argument headnotes substantially less often (65.11%). Table 7 indicates that the relative distributions for all federal and all state courts were fairly close to the norm and fairly close to one another. Because, as Table 5 shows, by far the majority of citations to Scalia majority opinions came from federal courts (85%), it is not surprising that the percentages for the federal

courts closely matched the baseline. The largest difference appeared to be the increased proclivity of federal courts over state courts to use argument headnotes (57% to 54%). In contrast, state courts cited the opinion language excerpted as what we have categorized as Scalia-rules headnotes somewhat more often than did federal courts (46% to 42%). These differences might be explained by state courts' tending more frequently to encounter situations in which they can simply apply rules rather than engage in the kind of more detailed reasoning that requires the citation of arguments and rules.

More interesting, however, is the difference in the argument-to-rule selection rates for the federal and state courts. In most situations, later courts decided to cite both argument and rule headnotes. Table 7 indicates that federal courts chose to rely on argument headnotes 57% of the time and Scalia-rule headnotes 42% of the time (that is, they selected opinion language representing arguments 15% more often than they selected rule headnotes), while state courts chose to rely on argument headnotes 54% of the time and Scalia rule headnotes 46% of the time (about 8% more often). A greater reliance on argument headnotes—recognizing that the judicial author is likely relying on both—may indicate that the author is engaging in more explanation and exposition.

#### b. Type of Court: Levels of Federal and State Courts

The next table shows differences with somewhat more finely divided jurisdiction information. Recall that Table 6 showed that across the whole dataset, 56.51% of headnote-citations are argument type, and 42.91% are Scalia-rule type.

As Table 8 demonstrates, the Supreme Court was the least likely to cite opinion language we categorized as “Scalia rules.” When an earlier Scalia majority opinion is cited in the Supreme Court, the reason most likely is that the issue has been raised again and so the opinion authors would be more likely look to the arguments from the prior opinion rather than to the rules. At the other end of the spectrum, state supreme courts cited Scalia-rule headnotes in greater proportion than any other jurisdictional group. Although not reflected in this table, we found little

difference in citation rates between the federal courts of appeals and the federal district courts.

<b>Jurisdiction</b>	<b>Rule Type</b>	<b>HN-Cites</b>	<b>% of Jurisdiction</b>	<b>Difference from Average</b>
SCOTUS	Argument	2501	62.68	+6.17
SCOTUS	Scalia Rule	1438	36.04	-6.87
SCOTUS	Preexisting	51	1.28	+0.7
Other Federal	Argument	379,030	56.94	+0.43
Other Federal	Scalia rule	282,319	42.41	-0.5
Other Federal	Preexisting	4351	0.65	+0.07
State Supreme	Argument	15,871	52.69	-3.82
State Supreme	Scalia Rule	14,192	47.12	+4.21
State Supreme	Preexisting	54	0.18	-0.4
State	Argument	51,346	54.48	-2.03
State	Scalia Rule	42,769	45.38	+2.47
State	Preexisting	133	0.14	-0.44

Again, the most striking difference in the argument-to-rule selection gap is between the jurisdictions. The Supreme Court cited argument headnotes 62.68% of the time and Scalia-rule headnotes only 36.04% of the time, favoring argument headnotes by a difference of 27% (in contrast to the difference of 13.6% for all jurisdictions). The argument-over-rule difference for all other federal courts was 15%, and the difference for the two levels of state courts was under 10%.

### c. Type of Court: Geography and Controlling Circuit

The preceding tables indicate that although substantial variation in the citation use of argument headnotes and Scalia-rule headnotes might exist from one case to another, the average proportions generally remained within a few percentage points of each other when aggregated on a national level. Table 9, which appears on the following page, shows notable geographic variation in citation practice.

In Table 9, which shows only the Scalia-rule figures for clarity, all courts were grouped by the federal court of appeals that is controlling in their states and territories. (The Ninth

Circuit group, for example, contains both the federal district courts in the Ninth Circuit and the state or territorial courts of each state and territory within the geographic boundaries of the Ninth Circuit.) Those courts with nationwide jurisdiction, such as the Supreme Court and special-purpose courts for patents, military justice, and so on, are in the “National Courts” group. The highest and lowest percentages have been bolded, and because it may be helpful to recall that the average percentage of headnote-citations to Scalia rules for all courts combined is 42.90%, Table 9 shows that figure as well.

<b>Table 9</b> <b>Headnote-Citations for Scalia Rules Only,</b> <b>by Controlling Circuit</b>		
<b>Controlling Circuit</b>	<b>HN-Cites</b>	<b>% of Circuit</b>
Ninth	69,907	<b>38.56</b>
Third	27,885	42.01
First	9504	42.64
Eighth	17,540	42.81
<i>Overall Average</i>		<i>42.90</i>
Eleventh	25,918	43.42
Tenth	19,211	43.70
Fifth	32,088	44.07
National Courts	5546	44.27
DC	8642	44.86
Seventh	24,548	45.04
Fourth	26,492	45.06
Sixth	42,361	45.08
Second	31,076	<b>45.97</b>

The highest proportion of headnote-citations came from cases in the geographic region of the Second Circuit, which includes New York. This figure was certainly above the overall federal court average of 42.37%, but was under the 47.12% for state supreme courts nationally. At the other end, it is striking how much lower the figure for use of Scalia rules was for state and federal courts in the Ninth Circuit. The only comparably low jurisdiction was the Supreme Court itself, at 36.04%, which is shown in Table 8.

## 2. *Reported or Unreported Status*

Judges might be expected to follow different writing practices when they are working on opinions that they know will be unreported. Unreported opinions exist as records of the decisions in the cases that they decide—and they are readily accessible on electronic databases—but their precedential value is limited, at least in federal courts.<sup>161</sup> For any opinion issued on or after January 1, 2007, under Federal Rule of Appellate Procedure 32.1(a), attorneys practicing in any federal court may freely cite to a federal judicial opinion or other written disposition that has been designated by the issuing court as “unpublished,” “not for publication,” “non-precedential,” “not precedent” or anything similar. Before this rule was enacted, the local rules of the federal courts of appeals typically restricted or even prohibited the citation of unpublished opinions in court filings.

In the early days of the practice, “unreported” opinions not only had no precedential value, they were difficult to find. LexisNexis and Westlaw began to offer them for view, and since 2001, unreported opinions from the federal courts of appeals have also been published in the *Federal Appendix*.<sup>162</sup> Given their existence in Lexis without a traditional reporter citation or in the *Federal Appendix*, we were able to distinguish “unreported” opinions in our dataset in two ways: (1) if they appeared in the *Federal Appendix* or (2) if the first citation in the Shepard’s report, which is supposed to be the primary one, is a “LEXIS” citation, indicating that there are no more-traditional reporter citations to be had. In Table 10 below, we consider a

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161. For discussion of the history and continuing controversy, see, for example, Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683 (2018); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Scott Rempell, *Unpublished Decisions and Precedent Shaping: A Case Study of Asylum Claims*, 31 GEO. IMMIGR. L.J. 1 (2016).

162. According to Thomson Reuters, the *Federal Appendix* “is a federal case law reporter series in West’s® National Reporter System® . . . [that] covers opinions and decisions from 2001 to date issued by the U.S. courts of appeals that are not selected for publication in the *Federal Reporter*.” See *Federal Appendix (National Reporter System)*, THOMSON REUTERS (n.d.), <https://store.legal.thomsonreuters.com/law-products/Reporters/Federal-Appendix-National-Reporter-System/p/100000796>.

case to be unreported if it meets either of those criteria, and treat any case that fails to satisfy either as “reported” in a recognized reporter.

Rule Type	HN-Cites Reported	% Reported	HN-Cites Unreported	% Unreported
Argument	145,141	56.27	303,607	56.63
Scalia Rule	110,500	42.84	230,218	42.94
Preexisting	2295	0.89	2294	0.43

A first glance at Table 10 suggests that, examined broadly, reported and unreported cases use the different types of headnotes in much the same way. The sheer number of headnote-citations in unreported opinions is also quite striking, reflecting the large number of unreported cases generally. When reported and unreported cases are distinguished according to jurisdictional groups, however—as in Table 11 below—the data suggest important differences in practice at different court levels. (The percentage of each reported and unreported court-type grouping that used Scalia rules is bolded, to aid in visual comparison.)

Jurisdiction	Rule Type	HN-Cites, Reported Cases	% Reported, Court Type	HN-Cites, Unreported Cases	% Unreported, Court Type
Fed. Appeals	Argument	46,283	58.85	27,149	54.03
Fed. Appeals	Scalia Rule	31,467	<b>40.01</b>	22,848	<b>45.47</b>
Fed. Appeals	Preexisting	902	1.15	254	0.51
Fed. Other	Argument	60,481	57.37	247,618	56.88
Fed. Other	Scalia Rule	43,690	<b>41.44</b>	185,752	<b>42.67</b>
Fed. Other	Preexisting	1256	1.19	1990	0.46
St. Supreme	Argument	147,54	52.38	1117	57.11
St. Supreme	Scalia Rule	13,355	<b>47.42</b>	837	<b>42.79</b>
St. Supreme	Preexisting	52	0.18	2	0.10
St. Other	Argument	23,623	51.70	27,723	57.10
St. Other	Scalia Rule	21,988	<b>48.12</b>	20,781	<b>42.80</b>
St. Other	Preexisting	85	0.19	48	0.10

In the federal courts of appeals, the judges writing opinions that would be unreported cited significantly more Scalia rules and significantly fewer argument headnotes than when they were writing opinions in reported cases.<sup>163</sup> When federal appellate judges were writing opinions that would be reported, they cited the argument headnotes at a rate 18% higher than their citations of Scalia-rule headnotes, while the gap between argument headnotes and rule headnotes in unreported opinions was about half as much. This difference might be explained because judges writing opinions that they know will be reported—and that therefore will have precedential value—will take more time to justify their decisions. As part of the decisionmaking and opinion-writing process, they may include more of the reasoning from the majority opinion that they are relying on, resulting in more citations of argument headnotes as well as citation to the rules.<sup>164</sup>

#### *D. Cite-to-Follow Citation Patterns*

If Justice Scalia's influence were directly linked to the rhetorical construction of his opinions, we might expect to find the clearest links in cases where his opinion was followed by the later court. In those cases, the rule or the argument has a discernible effect on the outcome, that is, the later judge "follows" it rather than simply re-stating the rule or the argument with implicit approval. Most citations in a Shepard's report are notes that the case was cited by the later opinion. Indeed, of the 510,705 distinct citations in our dataset, 75% are labeled as "Cited" and nothing more (384,410, or 75.27%), and nearly 80% of the citations in the data at least include the "Cited" label (408401, or 79.97%). If we include variations<sup>165</sup>

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163. In the federal courts of appeals, decisions generally are made by panels, but the opinions are presented as if they have been written by individual judges. We use "significantly" here not in the statistical sense but in its ordinary meaning.

164. In contrast to the relatively uniform, although controversial, federal practices regarding nonprecedential cases, the rules and practices for unreported or unpublished cases at the state level are inconsistent and confusing. Lauren S. Wood, Comment, *Out of Cite, Out of Mind: Navigating the Labyrinth that Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BAL. L. REV. 561 (2016).

165. Again, the category included "Followed" as well as "Followed in Concurring" and "Followed by Questionable Precedent."

and those cases that have multiple labels identified, 94,490 citations included the “Followed” label in some form, which is 18.5% of the total number of citations.

### *1. Court Characteristics*

When we grouped the citations by jurisdiction group first, then examined patterns of Following or Citing, we found some differences. (Note that other types of treatment are ignored in Table 12 below.)

<b>Jurisdiction</b>	<b>All Citations</b>	<b>Follow* Citations</b>	<b>% Follow</b>	<b>Cited-Only Citations</b>	<b>% Cited-Only</b>
Fed. Appeals	85,420	13,668	16	61,971	72.55
Fed. Other	352,971	69,967	19.82	269,685	76.4
St. Supreme	16,788	3069	18.28	10,537	62.77
St. Other	55,486	7786	14.03	42,217	76.09

According to these data, the federal courts of appeals followed Justice Scalia’s Supreme Court majority opinions 16% of the time, compared with 20% for federal district courts. This may suggest that the judges who make up the panels in the federal courts of appeals—given that they generally are the recipients of more briefs and have greater resources and more time to devote to the individual case—exercised their discretion somewhat differently than did federal district judges. A decision to cite rather than to follow an earlier opinion may indicate that the earlier opinion will be one of several to be discussed before a more independent decision is reached rather than the one whose decision is to be followed.

### *2. Reported or Unreported Status*

Table 13 below examines the same data with additional attention to the reported status of the case. Here, we found that the federal courts of appeals were slightly more likely to “follow” a Scalia opinion if the citing case was reported. This difference is much more pronounced, however, in state lower courts and state supreme courts.

Jurisdiction	Citations, Reported/Unreported	Follow*, Reported	% Follow, Reported	Follow, Unreported	% Follow, Unreported
Fed. Appeals	48,189/37,231	8175	16.96	5493	14.75
Fed. Other	64,216/288,755	12,455	19.4	57,512	19.92
St. Supreme	15,245/1543	2917	19.13	152	9.85
St. Other	25,424/30,062	4741	18.65	3045	10.13

### *E. Effects of Majority Coalitions*

As explored above in Part V, the size and shape of the majority coalition may have an effect on the rate at which a case is cited. In the corpus of Justice Scalia’s majority opinions, for example, what Professor Berger labeled as “deceptively unanimous” cases were 20.28% of cases, but 26.83% of citations. Similarly, “contested-majority” opinions were 35.59% of cases, but 40.25% of citations.<sup>166</sup> Table 14 breaks out these voting-coalition categories by the four jurisdiction groups and compares how cases from courts in each group differ from the percentage of citations attributable to each voting coalition when citations are considered without reference to court level.

#### *1. Court Characteristics*

Table 4 showed that the frequency of citations for deceptively unanimous opinions (26.83%) outstripped their distribution among Scalia majority opinions (20.28%).<sup>167</sup> The same was true of the frequency of citations for Scalia contested-majority opinions (40.25%) compared with their distribution among his majority opinions (35.59%). But the opposite was true—fewer citations than percentage of total opinions—for truly unanimous and strong majority opinions. Thus, Table 14 below suggests that while the over-representation of deceptively unanimous and contested majority opinions affects all levels of courts, the relatively higher than expected citation rates for deceptively unanimous opinions were linked to the federal

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166. See Table 4, *supra* page 266.

167. See text accompanying notes 134–48, *supra*.

district courts while the relatively higher than expected citation rates for contested majority opinions were linked to the federal courts of appeals (as well as to the state courts). One possibility for the very high rates of citation in the state courts is that the issues that resulted in those cases being decided by contested majorities were so controversial that they remained hotly contested for at least several years after the decisions were made.

<b>Jurisdiction</b>	<b>Majority Coalition</b>	<b>Citations</b>	<b>% of Jurisdiction</b>	<b>Difference From Average for Majority Type in All</b>
Fed. Appeals	Truly unanimous	10,886	12.74	-1.45
Fed. Appeals	Deceptively unanimous	20,234	23.69	-3.14
Fed. Appeals	Strong majority	17,630	20.64	+1.91
Fed. Appeals	Contested majority	36,558	<b>42.8</b>	<b>+2.55</b>
Fed. Other	Truly unanimous	55,063	15.6	+1.41
Fed. Other	Deceptively unanimous	99,621	28.22	+1.39
Fed. Other	Strong majority	68,389	19.38	+0.65
Fed. Other	Contested majority	129,374	<b>36.65</b>	<b>-3.6</b>
State Supreme	Truly unanimous	1715	10.22	-3.97
State Supreme	Deceptively unanimous	3967	23.63	-3.2
State Supreme	Strong majority	2834	16.88	-1.85
State Supreme	Contested majority	8252	<b>49.15</b>	<b>+8.9</b>
State Other	Truly unanimous	4702	8.47	-5.72
State Other	Deceptively unanimous	13,018	23.46	-3.37
State Other	Strong majority	6636	11.96	-6.77
State Other	Contested majority	31,120	<b>56.09</b>	<b>+15.84</b>

168. As discussed earlier,

- Deceptively unanimous opinions are unanimous opinions with concurrences,
- Strong majority opinions are opinions with one or two Justices dissenting or failing to join the full majority opinion, and
- Contested majority opinions are opinions with three or more Justices dissenting or failing to join the full majority opinion.

Another study found higher than expected citation rates at the Supreme Court for so-called “doctrinal paradoxes” (where every rationale is rejected by a majority) but those higher citation rates were not repeated in the federal courts of appeals or the federal district courts. Hitt, *supra* note 65, at 67–68.

## 2. Reported or Unreported Status

The voting coalition on Scalia-authored opinions might also be expected to have an impact on whether an opinion is cited in cases that are reported or unreported.

Majority Coalition	Reported Citations	% Reported Citations	Unreported Citations	% Unreported Citations
Truly unanimous	23,784	15.53	48,589	13.59
Deceptively unanimous	32,560	21.27	104,280	29.16
Strong majority	30,646	20.02	64,872	18.14
Contested majority	65,812	42.98	139,496	39.01
Uncategorized	307	0.2	359	0.1
<b>Total</b>	153,109		357,596	13.59

Next, we might add to our analysis a finer breakdown by jurisdictional groupings of the citing courts. Comparison of Table 15, above, with Table 16, below, suggests the degree to which courts in different jurisdictions might make differential use of precedent depending on both the voting coalition in the precedential case and the reporting status of the case citing that precedent. For example, contested-majority opinions represent about 39% of all citations by unreported cases. However, in the case of the federal courts of appeals, those contested-majority cases represent almost 45% of citations by unreported cases, suggesting a willingness for judges who are deciding an unreported case to use precedent that was decided on a contested vote.

In Table 16, we compare three factors that may impact citations of any particular opinion: the jurisdiction level, the makeup of the original case's voting coalition, and the reported or unreported status.<sup>169</sup> Again, what stands out is the state courts' high rates of citation to contested-majority cases.

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169. A handful of citing cases are missing information for analysis in one of these three categories, so any citing case without all elements is left out. The percentages are calculated from the total of citing cases for which all information is known, hence the totals in the table.

**Table 16**  
**Citations by Voting Coalition, Jurisdiction Group,**  
**and Reported/Unreported Status**

Jurisdiction	Majority Coalition	Reported Citations	% Jurisdiction (Reported)	Unreported Citations	% Jurisdiction (Unreported)
Fed. Appeals	Truly unanimous	7788	16.2	3098	8.32
Fed. Appeals	Deceptively unanimous	10,372	21.57	9862	26.49
Fed. Appeals	Strong majority	10,078	20.96	7552	20.29
Fed. Appeals	Contested majority	19,844	41.27	16,714	44.9
<b>Total</b>		<b>48,082</b>		<b>37,226</b>	
Fed. Other	Truly unanimous	11,936	18.64	43,127	14.95
Fed. Other	Deceptively unanimous	12,663	19.77	86,958	30.15
Fed. Other	Strong majority	14,491	22.63	53,898	18.69
Fed. Other	Contested majority	24,951	38.96	104,423	36.21
<b>Total</b>		<b>64041</b>		<b>288,406</b>	
St. Supreme	Truly unanimous	1629	10.7	86	5.57
St. Supreme	Deceptively unanimous	3650	23.97	317	20.54
St. Supreme	Strong majority	2602	17.09	232	15.04
St. Supreme	Contested majority	7344	48.24	908	58.85
<b>Total</b>		<b>15,225</b>		<b>1543</b>	
St. Other	Truly unanimous	2426	9.54	2276	7.57
St. Other	Deceptively unanimous	5875	23.11	7143	23.76
St. Other	Strong majority	3449	13.57	3187	10.6
St. Other	Contested majority	13,669	53.77	17451	58.06
<b>Total</b>		<b>25,419</b>		<b>30,057</b>	

### *3. Rule-to-Argument Ratio by Voting Coalition*

Our interest in the impact of voting coalitions on subsequent citations might also extend to look at whether particular parts of the cases are cited more or less frequently depending on the vote in the original case. A look at the headnote-citations classified by the type of rule they presented suggests that the shape of the voting coalition of the original case may play a role in what parts of it are used by subsequent courts.

Majority Coalition	Rule Type	HN-Cites	Rule % of Coalition	Difference From Average for all HN-Cites
Truly unanimous	Argument	58,414	63.3	+6.69
Truly unanimous	Scalia Rule	33,146	35.92	-6.99
Truly unanimous	Preexisting	727	0.79	+0.21
Deceptively unanimous	Argument	100,892	46.35	-10.26
Deceptively unanimous	Scalia Rule	116,208	53.38	+10.47
Deceptively unanimous	Preexisting	583	0.27	-0.31
Strong majority	Argument	78,441	52.23	-4.38
Strong majority	Scalia Rule	71,107	47.34	+4.43
Strong majority	Preexisting	647	0.43	-0.15
Contested majority	Argument	210,680	63.16	+6.55
Contested majority	Scalia Rule	120,257	36.05	-6.86
Contested majority	Preexisting	2632	0.79	+0.21

As can be seen in Table 17 above, Scalia rules were cited more often when they were found in deceptively unanimous opinions. The same phenomenon was visible with Scalia rules emerging from opinions that had a strong but not unanimous voting coalition. By contrast, “arguments” were cited more frequently both when they emerged from opinions that were truly unanimous as well as from opinions that were decided by a contested majority. Possible explanations for these findings await further analysis.

## VII. THE INTERPLAY OF RHETORICAL FRAMES, MAJORITY COALITIONS, AND CITATIONS OVER TIME

So far, we have been focusing on one rhetorical function played by the language excerpted in a headnote: What role did the language play within the rhetorical framework of the syllogism put together by Justice Scalia? From the beginning, we assumed that the language of Justice Scalia’s opinions influenced the choices made by later judges in ways not captured by this question. By engaging in rhetorical analysis of

the most-cited headnotes (a bit of reverse engineering), we identified some additional potential sources of influence.<sup>170</sup>

### A. *The Rhetoric of the Rule Statement*

Much has been written about whether Supreme Court Justices prefer to state the conclusive principles that summarize their decisions in the form of rules or standards.<sup>171</sup> Opinions establishing newly discovered bright-line *rules* are sometimes linked to so-called maximalist Justices, and opinions revolving around more flexible and incremental *standards* are thought to be produced by more minimalist decision makers.<sup>172</sup> Whatever purpose rules and standards serve for the authoring Justice, our focus was on how the difference might affect the choices made by later judges as they write their own opinions.

Justice Scalia was known as a proponent of rules rather than standards, and our rhetorical analysis of his most-cited opinion language (represented by the top fifty most-cited headnotes) supported this characterization. Recognizing the

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170. The top fifty most-cited headnotes included multiple headnotes from almost all the top eleven most-cited or most-followed cases (among them *Heck*, *Lujan*, *Crawford*, *Blakely*, *Lewis*, *St. Mary's*, *Wilson*, *Ylst*, *Anderson*, and *Liteky*), plus one or more headnotes each from well-known opinions including *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551 (2014) (finding the definition of violent felony in the Armed Career Criminal Act to be unconstitutionally vague); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, (1997) (holding that Title IV's prohibition against discrimination because of sex applies when the harasser and the harassed employee are of the same sex); and *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (holding that a guerrilla organization's attempt to coerce a person into performing military service is not necessarily persecution on account of political opinion).

171. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 (1991); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Sullivan, *supra* note 30.

172. See Sunstein, *supra* note 24. The simplest distinction between rules and standards is the extent to which the content of the "law" is determined in advance, rules being the most predetermined. Kaplow, *supra* note 171, at 559. Professor Sullivan places rules and standards on a continuum depending on the "relative discretion they afford the decision maker. . . . A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." In comparison, a "legal directive is 'standard'-like when it tends to collapse decision making back into the direct application of the background principle or policy to a fact situation." For example, the constitutional law debate between categorical rules and balancing tests is the debate between rules and standards. Sullivan, *supra* note 30, at 58–62.

impossibility of precisely applying the definitions of rules and standards, we undertook a broad-brush analysis. That analysis indicated nearly thirty of his fifty most-cited headnotes were stated in the form of rules,<sup>173</sup> while only twelve qualified as standards, with the remainder falling outside either category. From the perspective of the later judge, a precedent stating a bright-line rule might seem the better choice because the rule appears to more readily resolve the issue and to be more easily applied. On the other hand, even though a more flexible standard might not so clearly resolve the issue, the later judge might prefer it because it affords her more discretion.

The difficulty of distinguishing rules from standards, and the complex ramifications for subsequent citations by later courts, are illustrated by Justice Scalia's discussion in *Anderson v. Creighton*.<sup>174</sup> The Court held there that a plaintiff could defeat a qualified-immunity defense to an action based on a constitutional tort only if the constitutional right was "clearly established" at the time of the government official's violation of the right.<sup>175</sup> The "clearly established" language likely was chosen in an effort to limit unnecessary litigation. But what does "clearly established" mean? The opinion went on to say that it "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" and that "in the light of pre-existing law the unlawfulness must be apparent."<sup>176</sup> But explanations like these are difficult to apply to later facts without concrete examples. As a result, even rules intended to limit debate may generate more, rather than less, litigation as well as more frequent references simply citing the original opinion rather than following its rules.<sup>177</sup>

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173. This includes so-called decision rules. See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (categorizing as decision rules the Court's judicial directions about how courts should decide whether operative rules have been satisfied).

174. 483 U.S. 635.

175. *Id.* at 638–39.

176. *Id.* at 640.

177. As in the *Anderson* example, it is not surprising that a rule requiring petitioning prisoners to show that prison officials had engaged in the "unnecessary and wanton" infliction of pain or had exhibited "deliberate indifference" to "serious" medical needs did not put an end to litigation over cruel and unusual punishment of those convicted of crimes. *Wilson v. Seiter*, 501 U.S. 294, 303–04 (1991). After *Wilson*, beyond the need for further litigation to clarify the application of the standard, debate also continued over whether an

Perhaps more important to the lower-court opinion writer is the rhetorical usefulness of Justice Scalia's rule statements within the conventional format of judicial opinion writing. Judging by his most-cited headnotes, Justice Scalia's majority opinions provided a ready source of general-rule frameworks, which are essential to that format. Judicial opinion writers invariably begin their analyses by stating and citing to the most general rule that governs the issue before the court. For complex issues, what's often most helpful to the current opinion writer is to find that an earlier author has created an entire rule framework, one that provides a visual collection and restatement in convenient and capsule form of the entire structure of the analysis, together with a corresponding series of statutory and case citations that add visual and rhetorical weight. The mere statement of such a rule framework boosts the credibility of the original and subsequent opinion authors. When he was able to provide organized and memorable rule frameworks on legal issues that would recur, Justice Scalia ensured that his opinions would be looked to as sources of authority in the future.

From the opinion-writing point of view, lower-court judges likely welcomed this familiar aspect of Justice Scalia's approach to precedential construction.<sup>178</sup> For example, the most-cited headnote in *Lujan*<sup>179</sup> is a broad general rule that significantly narrows many plaintiffs' pathways to litigation. The rule's phrasing underlines its potential usefulness to the federal judge who must decide whether a range of plaintiffs have established standing, the essential first step to remain in court:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains

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objective or subjective standard was appropriate in the first place. *See, e.g.,* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018).

178. As Professor Sullivan succinctly summarized Justice Scalia's approach to precedential construction:

[F]irst, state the general rule; second, rationalize the existing messy pattern of cases by grandfathering in a few exceptions and doing the best you can to cabin their reach; and third, anticipate future cases in which the rule might be thought problematic and dispose of them in advance by writing sub-paragraphs and sub-sub-paragraphs qualifying the rule with clauses beginning with "unless" or "except."

Sullivan, *supra* note 30, at 87.

179. 504 U.S. 555.

three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest that is (a) concrete and particularized, see *id.*, at 756; *Warth v. Seldin*, 422 U.S. 490, 508, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” *Whitmore*, *supra*, at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.” *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Id.*, at 38, 43.<sup>180</sup>

This three-step analytical framework is neatly packaged and numbered, and Justice Scalia’s word choices seemingly apply to a broad range of plaintiffs. They limit every potential plaintiff’s opportunity to stay in federal court because the minimum for standing is not only a high bar, it is an “irreducible” one: the injury must be “concrete and particularized” as well as “actual or imminent”; it must be linked to the defendant; and it must be “likely” that the injury will be redressed by a favorable decision.

As *Lujan* illustrates, general-rule statements may be most valuable to the later opinion writer when they are phrased broadly, but framed to lead to a particular result. Phrased in that manner, general-rule statements are set free from the facts of the immediate case and can be applied to very dissimilar circumstances. Moreover, the categories constructed and the definitions provided lead to predetermined outcomes rather than remaining open to interpretation.

*Scott v. Harris*,<sup>181</sup> the controversial ruling based on the Justices’ viewing of a videotape of a police chase, is another example. In the majority opinion Justice Scalia described the

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180. *Id.* at 560–61 (footnote omitted).

181. 550 U.S. 372 (2007).

pursuit that left a criminal defendant permanently disabled very differently from the version of the facts that the court below had accepted as true.<sup>182</sup> Despite the unusual circumstances, the language captured in *Scott*'s most-cited headnote is phrased as a broad general rule. It could apply to any summary judgment motion in which the judge is able to decide that one version of the facts is "blatantly contradicted by the record":<sup>183</sup>

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.<sup>184</sup>

Judging by the most-cited headnotes, later opinion writers also found Justice Scalia's statements of policy to be attractive, perhaps on the same basis as the general propositional rules exemplified by *Lujan* and *Scott*. These policy pronouncements similarly were framed in a manner that led to a favored

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182. *Id.* at 379–80. Despite the majority's conclusion, the interpretation of the facts in *Scott* might have been found to be very much in contention. *See id.* at 389–97 (Stevens, J., dissenting).

183. *Id.* at 380.

184. *Id.* at 380.

conclusion, as shown by the most-cited headnote in *Kokkonen v. Guardian Life Insurance*.<sup>185</sup>

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see *Willy v. Coastal Corp.*, 503 U.S. 131, 136-137, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986), which is not to be expanded by judicial decree. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 U.S. 8, 4 Dall. 8, 11, 1 L. Ed. 718 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183, 80 L. Ed. 1135, 56 S. Ct. 780 (1936).<sup>186</sup>

### *B. Citations over Time*

Finally, we used Shepard's Citations data to uncover nuanced information about how an opinion was treated by later courts over time. Based on a comprehensive study of Supreme Court precedent and in line with other similar studies, Professors Black and Spriggs reported a typically curved citation history, with most citations in the early years after the decision was issued, and then trailing off as the case fell into obscurity.<sup>187</sup> Shepard's data in tabular form can be used in a similar way to plot the number of citations per year, generating a curve. Spikes in the curve might indicate a rediscovery of the case, perhaps because an issue it addressed became newly relevant in society, or perhaps for more idiosyncratic reasons such as a particular judge's affinity for a favorite case.<sup>188</sup>

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185. 511 U.S. 375.

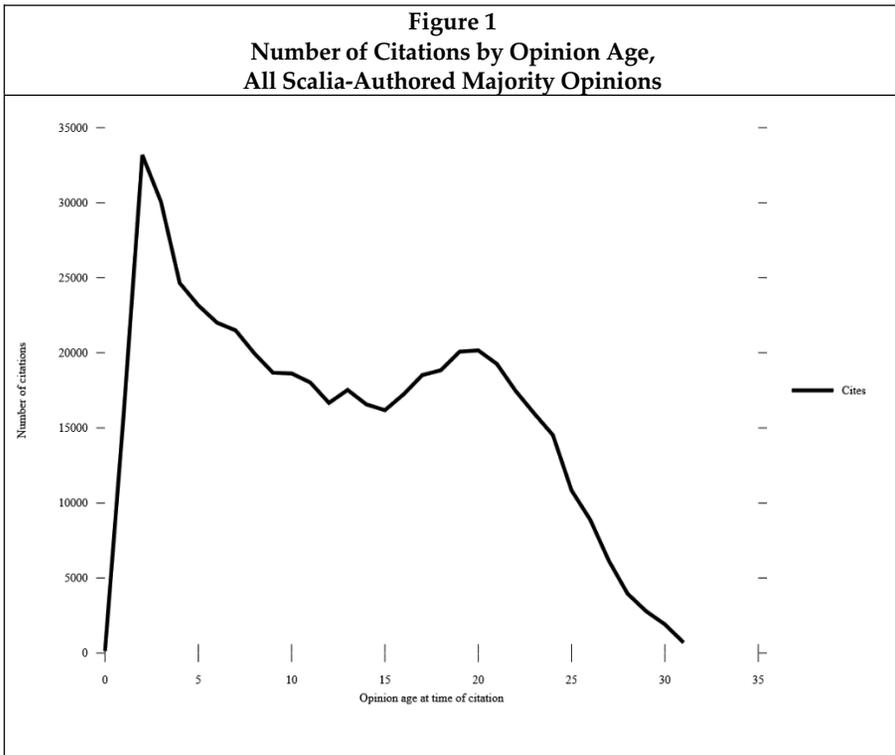
186. *Id.* at 377.

187. Black & Spriggs, *supra* note 72, at 341-43 (including tabular and graphical information).

188. *See, e.g.*, Tanenhaus & Nystrom, *supra* note 13, at 365-66.

### 1. *Effects of Opinion Age over Time*

Simply plotting citations by year is less meaningful when considering 282 cases over a thirty-year period, as in this analysis. Instead, we adjusted each citation to determine the “opinion age” when the later opinion cited the earlier case.<sup>189</sup> (That is, a case from 1996 citing a case decided in 1988 would have an opinion age of eight years.) Grouping and plotting citations by their opinion age—rather than by the year they were decided—omits spikes or lulls in response to societal events or cultural trends, placing emphasis instead on the case and its use over time.

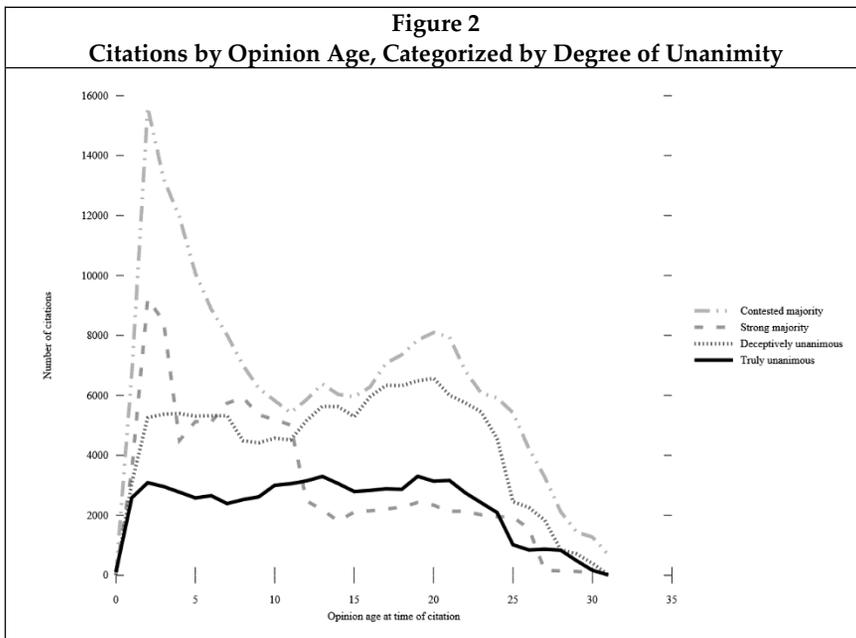


189. This was done by subtracting the year of the SCOTUS term from the year of the decision in a citing case, provided by Shepard’s. For a more fine-grained measure, it should be possible to utilize the decision date (MM/DD/YYYY) reported for each case in the SCDB, but given occasional inconsistencies between the full date information in LexisNexis and the SCDB, the yearly measure seemed useful enough for our purposes.

A graph of all the citations of all Scalia-authored majority opinions, grouped by opinion age, appears above in Figure 1. As might be expected, citations quickly spiked in the first year or two after a case was decided and researchers readily found it. Within a few years, citations began to drop off, but the curve did not slide quickly toward zero. Between five and fifteen years, cases saw a steady decline in citation but were clearly still in circulation. Even more interesting is the bump between opinion ages fifteen and twenty-three, where the total number of citations increased, then slowly returned to their previous level. Beyond an opinion age of about twenty-five, citations declined rapidly. Because the oldest Scalia opinions are only slightly more than thirty years old, this trend might need qualification.

## 2. *Effects of the Shape of the Majority Coalition over Time*

We found higher than expected citation rates for opinions decided by contested majorities and for deceptively unanimous opinions. This result was discussed earlier and illustrated in Table 4,<sup>190</sup> but is illustrated here in Figure 2 over time.



190. See text accompanying notes 134–48.

As Figure 2 confirms, citation rates started out higher for truly unanimous and strong majority opinions. Over time, the opinions that contained alternative reasoning in the form of concurrences and dissents gained ground.

### 3. *Comparative Histories of Scalia Majority Opinions over Time*

To illustrate their different trajectories, Figures 3 through 5 compare the citation histories of six Scalia majority opinions. Using pairs of cases, the “Follow” citations of a Scalia majority opinion are compared with the number of later cases that “Cited” the same precedent case. As discussed earlier, “follow” citations are clearly positive, indicating that the judge or judges in the later case are following, or adhering to, the decision of the precedent case while a “cited” citation reflects a recognition that the earlier case is relevant as precedent.<sup>191</sup> In Figures 3 through 5, the gap between the two lines—depicted in each figure for each case in the pair—suggests the gap between the “governing” influence of the majority opinion, as shown by “follow” citations, and its usefulness in a continuing conversation, as shown by “cited” citations.

#### a. “Live” Issues in Prisoners’ Rights Lawsuits

We classified *Heck v. Humphrey*,<sup>192</sup> which limited prisoners’ § 1983 lawsuits, as a deceptively unanimous opinion. *Wilson v. Seiter*,<sup>193</sup> which restricted lawsuits based on prison conditions, was decided by a five-to-four majority. As discussed earlier,<sup>194</sup> the presence of both concurring and dissenting opinions may foreshadow continuing controversy, indicating that one or more issues in the case will remain alive for decades after the majority opinion. That “live-ness” rather than the influence of the majority opinion may explain the subsequent high citation rate. Both in rough outline and in the gap between the follow and cited citation lines, these opinions affecting prisoners’ rights lawsuits had similar histories.

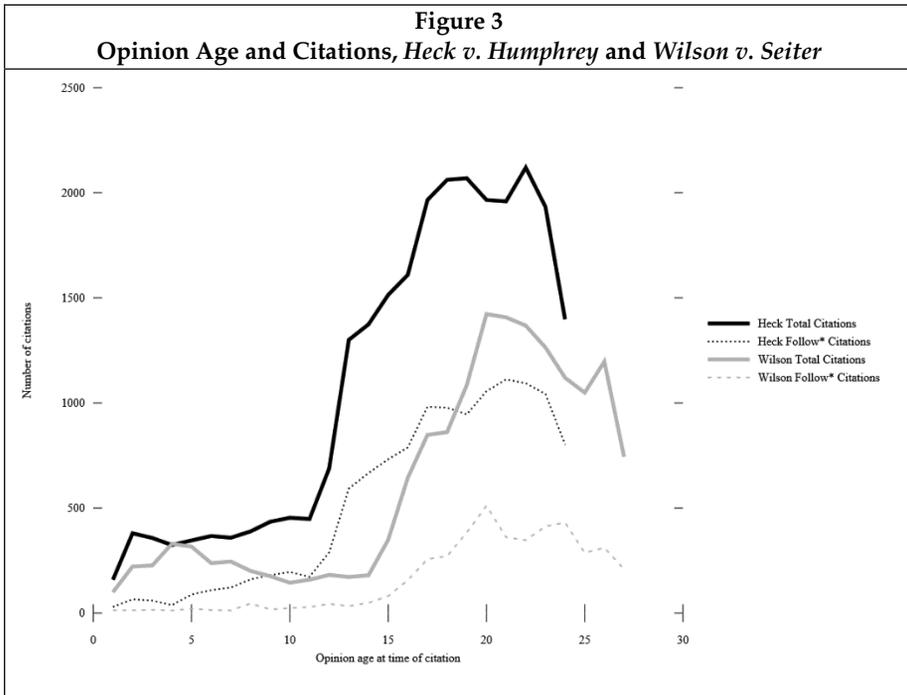
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191. See text accompanying notes 128–29.

192. 512 U.S. 477.

193. 501 U.S. 294.

194. See text accompanying notes 134–38.



One of the best examples of the deceptively unanimous phenomenon is *Heck*, Justice Scalia's most-cited majority opinion, and the Scalia rule reflected in its most-cited headnote, headnote 10. The language excerpted in that headnote pulled together everything a later judge would need to state a general rule about § 1983 lawsuits brought by prisoners:

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or

sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.<sup>195</sup>

The opinion-age curve for *Heck* shown above in Figure 3 illustrates the historical outcome for this deceptively unanimous opinion: the issues apparently resolved by the opinion were controversial for decades. Twenty-five years later, several circuit splits—the result of the original concurring opinions in *Heck*, a follow-up Supreme Court decision, and later “dicta-parsing”<sup>196</sup>—remained. Among other questions, according to a petition for certiorari that was denied in January of 2018, the federal courts of appeals were almost evenly split on whether an exception to *Heck* applies when the plaintiff was never in custody or was so briefly in custody that habeas corpus would be futile.<sup>197</sup>

A different kind of unresolved issue followed *Wilson*,<sup>198</sup> a contested majority opinion in which Justice Scalia provided a state-of-mind definition in the most-cited headnote:

The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 666, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), prohibits the infliction of “cruel and unusual punishments” on those convicted of crimes. In *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), we first acknowledged that the provision could be applied to some deprivations

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195. 512 U.S. at 486–87.

196. John P. Collins, *Has All Heck Broken Loose? Examining Heck's Favorable Termination Requirement in the Second Circuit After Poventud v. City of New York*, 42 FORDHAM URBAN L.J. 451, 453 (2014).

197. Pet. for Cert., *Henry v. City of Mt. Dora* (No. 17-652) (U.S. Oct. 26, 2017), cert. denied, Jan. 8, 2018, available at <https://www.scotusblog.com/wp-content/uploads/2017/11/17-652-petition.pdf>. In addition, other disputes remained about whether *Heck* applied in particular circumstances. See Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals who Lack Access to Habeas Corpus?* 121 HARV. L. REV. 868 (2008).

198. 501 U.S. 294.

that were not specifically part of the sentence but were suffered during imprisonment. We rejected, however, the inmate's claim in that case that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs—because he had failed to establish that they possessed a sufficiently culpable state of mind. Since, we said, only the “unnecessary *and wanton* infliction of pain” implicates the Eighth Amendment, *id.*, at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (joint opinion) (emphasis added)), a prisoner advancing such a claim must, at a minimum, allege “deliberate indifference” to his “serious” medical needs. 429 U.S. at 106. “It is *only* such indifference” that can violate the Eighth Amendment, *ibid.* (emphasis added); allegations of “inadvertent failure to provide adequate medical care,” *id.*, at 105, or of a “negligent . . . diagnosis,” *id.*, at 106, simply fail to establish the requisite culpable state of mind.<sup>199</sup>

Four Justices agreed with the result in *Wilson*, but they did not agree that the subjective intent of government officials should measure Eighth Amendment challenges to conditions of confinement.<sup>200</sup> As Figure 3 illustrates and as predicted by the concurrence, basic issues remained open after *Wilson*, starting with the intent requirement, which “will likely prove impossible to apply.”<sup>201</sup>

#### b. Bright-Line Rules Intended to Enforce the Sixth Amendment

The opinion-age graphs in two of Justice Scalia's Sixth Amendment opinions, *Blakely v. Washington*<sup>202</sup> and *Crawford v. Washington*,<sup>203</sup> illustrate radically different trajectories.

199. *Id.* at 297.

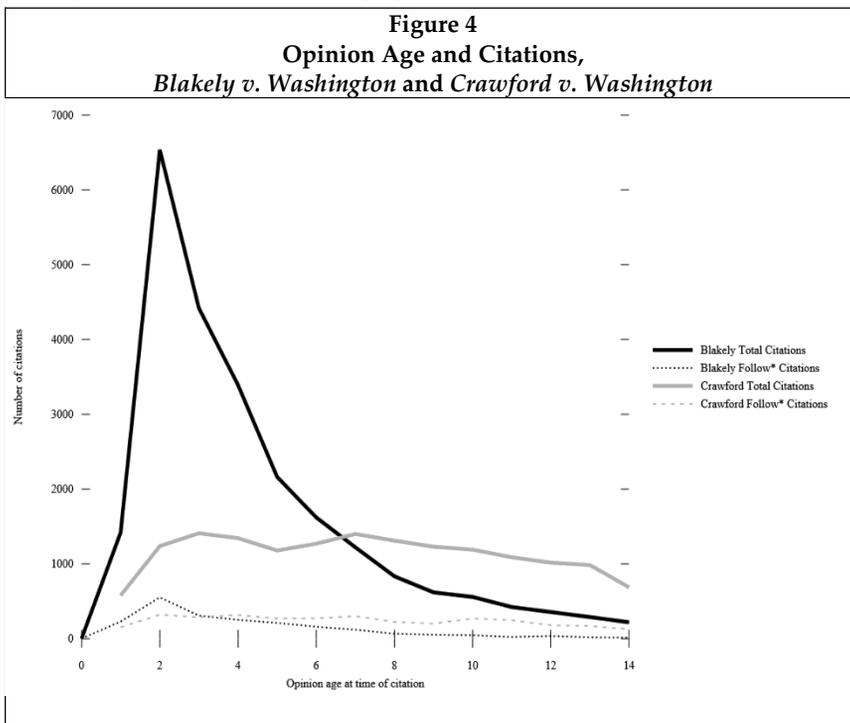
200. The concurrence argued that “inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time.” *Id.* at 310 (White, Marshall, Blackmun & Stevens, JJ., concurring). In those situations, “it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.” *Id.* (footnote omitted). See also Schlanger, *supra* note 177.

201. 501 U.S. at 310 (White, Marshall, Blackmun & Stevens, JJ., concurring).

202. 542 U.S. 296 (2003).

203. 541 U.S. 36 (2004).

The Scalia majority opinion in *Blakely v. Washington* effectively invalidated key aspects of state sentencing guidelines for failure to comply with the Sixth Amendment’s jury-trial requirement.<sup>204</sup> The ruling questioned those parts of the guidelines that permitted judges to impose sentences higher than the presumptive guideline range based on facts found by the judge using the preponderance-of-the-evidence standard, rather than by the jury using the beyond-a-reasonable-doubt standard.<sup>205</sup> After *Blakely*, state courts faced challenges to their many distinctive sentencing systems.<sup>206</sup>



According to our analysis, among the most-cited headnotes from *Blakely* is one discussing Washington’s Sentencing Reform Act, what it specifies as a “standard range” for a particular offense, and how a judge may impose a sentence

204. 542 U.S. at 303-04.

205. *Id.* at 313-14.

206. Frank O. Bowman, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 369–70 (2010).

above the standard range.<sup>207</sup> A state judge deciding the constitutional question about her own state's sentencing system likely would cite the language excerpted in that headnote because the judge would apply the ruling in *Blakely* by comparing the sentencing guidelines before her court with those at issue in *Blakely*. Another frequently cited *Blakely* headnote is one we characterized as "argument" because it took the next step in the argument framework, stating the prior rule before it was applied to a new situation:

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see 530 U.S., at 476-483, 489-490, n 15, 147 L. Ed. 2d 435, 120 S. Ct. 2348; *id.*, at 501-518,

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207. 542 U.S. at 299-300. As discussed earlier, see note 153, *supra*, Lexis applies unique algorithms to attribute the language of cited cases to headnotes, to match the language of citing cases to the headnotes in cited cases, and to calculate the numbers of headnote citations. Because our data was generated by Lexis itself, our results include any judgment calls Lexis may have needed to make in these first two areas. But counting relevant headnotes may be another matter. Since our data reports were collected in late 2017, Lexis has rolled out new web interface software, which among other features offers "highly relevant results" for searches, see, e.g., *NexisUni FAQs*, NEXISUNI (2017), <https://www.lexisnexis.com/pdf/academic/nexis-uni/nexis-uni-faq.pdf>, meaning that potential matches are filtered more aggressively and less transparently for potential relevance than before. Other than new citations added since our data was collected, this is the likely source of any substantial differences between our computations and Lexis's displays of headnote citations counts.

147 L. Ed. 2d 435, 120 S. Ct. 2348 (Thomas, J., concurring), and need not repeat them here.<sup>208</sup>

Figure 4 illustrates the initially very high citation rates for *Blakely*—presumably reflecting many early challenges at the state level—and the steep drop-off thereafter. Soon after *Blakely*, the Court decided whether an application of the Federal Sentencing Guidelines also violated the Sixth Amendment. In *United States v. Booker*, the Court held in an opinion by Justice Stevens that the Sixth Amendment applied to the Sentencing Guidelines.<sup>209</sup> In a separate opinion by Justice Breyer, the *Booker* Court further concluded that two provisions of the federal statute that had effectively made the Guidelines mandatory must be invalidated.<sup>210</sup> In federal courts, *Booker* appeared to supersede *Blakely* as the precedent of choice, thus accounting for at least some of the rapid decline in citations.

The history of the opinion in *Crawford v. Washington*<sup>211</sup> contrasts with *Blakely*'s history. A long-running dispute over interpretation followed Justice Scalia's majority opinion holding that the Sixth Amendment's Confrontation Clause makes testimonial hearsay inadmissible unless the declarant is available for cross-examination.<sup>212</sup> The opinion reconfigured the standard for determining when the Confrontation Clause permits admission of hearsay statements in criminal cases, and both state and federal courts subsequently struggled to define "testimonial hearsay," again leading to a long line of subsequent citations.

Here are the *Crawford* rule and most-cited headnote as formulated by Justice Scalia:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such

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208. *Id.* at 302 (referring to the rule in *Apprendi v. N.J.*, 530 U.S. 466 (2000), which provides that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt") (footnote omitted).

209. 543 U.S. 220, 226–27 (2005) (concluding that *Apprendi* and *Blakely* require "juries, not judges, to find facts relevant to sentencing").

210. *Id.* at 245 (acknowledging that decision makes Guidelines "effectively advisory") (Breyer, J., Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting).

211. 541 U.S. 36 (2004).

212. *Id.* at 68–69.

statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.”<sup>10</sup> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

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10. We acknowledge the Chief Justice’s objection . . . that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. . . . The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.<sup>213</sup>

That *Crawford* did not resolve the issue is vividly illustrated by Justice Scalia’s joining Justice Kagan in dissent nine years later in *Williams v. Illinois*.<sup>214</sup> Referring to *Crawford* as one of the opinions of which he was most proud,<sup>215</sup> Justice Scalia foresaw that later decisions might overturn it.<sup>216</sup>

### c. Citation Standbys Narrowing Plaintiffs’ Options in Federal Court

Two Scalia majority opinions restricting plaintiffs’ access to federal courts are often cited, but less frequently followed.

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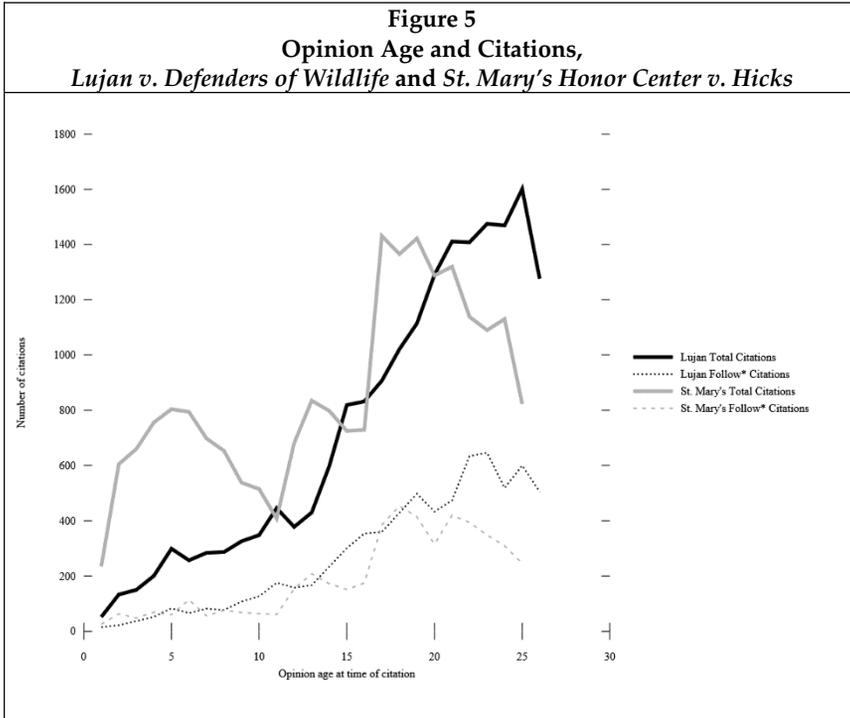
213. *Id.* at 68.

214. 567 U.S. 50, 118 (2012) (Kagan, Scalia, Ginsburg & Sotomayor, JJ, dissenting); see also Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 Wash. U. L. Rev. 847, 875–76 (2012) (arguing that Justice Scalia in *Crawford* adopted a seemingly bright-line rule that turned on the meaning of “testimonial,” not recognizing that the rule would prove to be unworkable in practice).

215. Joan Biskupic, *Scalia Replacement Could Move Court Rightward on Criminal Justice*, CNN (Dec. 7, 2016), <http://www.cnn.com/2016/12/07/politics/scalia-criminal-justice-trump/index.html> (referring to Justice Scalia’s mention of “groundbreaking opinions that enhanced the ability of criminal defendants to challenge witnesses face-to-face in court”) (quoted in HASEN, *supra* note 19, at 153).

216. Justice Scalia wrote separately in *Ohio v. Clark*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2173, 2184 (2015) (Scalia & Ginsburg, JJ, concurring), “to protest the Court’s shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford*.”

*Lujan*<sup>217</sup> imposed stringent standing requirements on plaintiffs in environmental lawsuits, while *St. Mary's*<sup>218</sup> made it more difficult for plaintiffs to pursue their employment discrimination claims.



Writing for a six-to-three majority, with one section garnering only a plurality, Justice Scalia found in *Lujan* that a group of environmental organizations lacked standing to challenge federal regulations.<sup>219</sup> The opinion established a new principle: standing requires plaintiffs to show a concrete, discernible injury, not a “conjectural or hypothetical one.”<sup>220</sup> *Lujan* additionally marked a more fundamental shift because Constitutional standing requirements had never before been used “to prevent a litigant from pursuing a cause of action statutorily

217. 504 U.S. 555 (1992).

218. 509 U.S. 502 (1993).

219. 504 U.S. 555 (1992).

220. *Id.* at 560–61.

authorized by Congress.”<sup>221</sup> Since *Lujan*, the Supreme Court has interpreted the injury requirement to preclude speculative or hypothetical injuries but has never precisely defined what constitutes an “imminent injury.” Instead, the imminent-injury test has been interpreted in different ways by different courts.<sup>222</sup> Although *Lujan* was controversial, and a dispute about its correctness might be expected to endure, one empirical study of D.C. Circuit decisions found that *Lujan* had influenced judges of all political stripes similarly by prompting them to discuss standing more often, and it had measurably pushed conservative judges to dismiss more cases for lack of justiciability.<sup>223</sup>

Narrowing plaintiffs’ opportunities to pursue employment discrimination claims under Title VII, the Scalia majority opinion in *St. Mary’s* adjusted the reach of the *McDonnell-Douglas* framework.<sup>224</sup> Unlike *Lujan*, where a more compact rule statement (discussed in part VII(A) above) was the one most-cited headnote, several headnotes from *St. Mary’s* were frequently cited, but together they constituted a similar rule framework. The first step recounted and manipulated the *McDonnell-Douglas* framework:

Under the McDonnell-Douglas scheme, “establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. Burdine, *supra*, at 254.” To establish a “presumption” is to say that a finding of the predicate fact (here, the prima facie case) produces “a required conclusion in the absence of explanation” (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, *Federal Evidence* § 67, p. 536 (1977). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of “producing evidence” that the adverse employment actions were taken “for a legitimate nondiscriminatory reason.”

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221. Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 933 (2008).

222. Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?* 81 TENN. L. REV. 211, 220–22 (2014).

223. Fleisher, *supra* note 221, at 923–24.

224. *St. Mary’s*, 509 U.S. at 510 (pointing out that if the defendant “has succeeded in carrying its burden of production, the *McDonnell Douglas* framework . . . is no longer relevant”).

Burdine, 450 U.S. at 254. “The defendant must clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.” *Id.*, at 254–255, and n. 8. It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, “the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” 450 U.S. at 253.

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“If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,” *Burdine*, 450 U.S. at 255,” and “drops from the case,” *id.*, at 255, n. 10.” The plaintiff then has “the full and fair opportunity to demonstrate,” through presentation of his own case and through cross-examination of the defendant’s witnesses, “that the proffered reason was not the true reason for the employment decision,” *id.*, at 256,” and that race was. He retains that “ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.” *Ibid.*<sup>225</sup>

The language captured in the second-most-frequently cited headnote reiterated that the burden of production becomes irrelevant after the defendant introduces evidence of legitimate reasons for its action and that the plaintiff has the burden of persuasion. And the third-most-frequently cited headnote recaps:

If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was “produced” to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.” 450 U.S. at 254. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply

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225. *Id.* at 506–08.

drops out of the picture,” at 255. . . . The defendant’s “production” (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven “that the defendant intentionally discriminated against [him]” because of his race, at 253. The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, “[n]o additional proof of discrimination is required.”<sup>226</sup>

Within the decade, a conflict had arisen among the federal courts of appeals about how to interpret *St. Mary’s* and its precedential network.<sup>227</sup> Like *Lujan*, *St. Mary’s* remains a frequently cited standby, but the gap between its “follow” and “cited” citations is large.

## VIII. CONCLUSION

*The most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of a continuing and collective process of conversation and judgment.*<sup>228</sup>

Although outcomes and subsequent citations contribute significantly to the development of the law, the language of the majority opinion is the precedent that lower courts are expected

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226. *Id.* at 510–11.

227. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146 (2000) (noting that court of appeals had “misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence”); see also Kenneth R. Davis, *The Equality Principle: How Title VII Can Save Insider Trading Law*, 39 *CARDOZO L. REV.* 199, 227 n. 178 (2017) (noting that the *St. Mary’s* Court eviscerated *McDonnell Douglas’s* burden-shifting approach); Ann C. McGinley *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 *OHIO ST. L.J.* 1443, 1458–59 (1996) (“[T]he *St. Mary’s* decision, in effect, requires the plaintiff to produce direct evidence of discrimination or to rebut all of the potential reasons for firing her, even those never articulated by the defendant”).

228. *WHITE*, *supra* note 16, at 264.

to turn to for direct guidance that speaks to their current decision. Most of us assume that an opinion's influence is largely determined by its language because the language decides not only this case but all future interpretations: the language creates flexible standards or black-and-white rules, the language contracts or expands preexisting rules, the language may be determined to cover many or few cases. We suspect that some opinions are more powerfully written than others and will thus be more influential. As in other kinds of persuasion, we expect that rhetorical persuasiveness (however that can be obtained) will ease the way for later judges to accept and more readily follow an opinion's rules.

Following the suggestion that Justice Scalia's opinions might be written in a fashion that projects greater precedential significance,<sup>229</sup> we based our study on the rhetoric, defined broadly, of the Scalia majority opinions. Our analysis revealed small but important connections between the rhetoric of Justice Scalia's majority opinions and the ways in which later courts relied upon their language.

We focused first on the rhetorical construction of Justice Scalia's opinions, and in particular on the rhetorical framing of his rules and the rhetorical structure of his argument frames. Justice Scalia was universally known for averring that "the rule of law is a law of rules"<sup>230</sup> and that the only appropriate argument frame is the syllogism.<sup>231</sup> Although critics have pointed out that Justice Scalia's arguments, like the purported syllogisms in most legal briefs and opinions, rely on missing, unstated, or only arguably true premises, his opinions are framed in take-no-prisoners syllogistic form.<sup>232</sup> Because one appropriate measure of rhetorical effectiveness is audience response, we used citations by federal and state courts at all levels over time to explore that aspect of the Scalia majority opinion.

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229. Cross, *supra* note 3, at 191.

230. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

231. In their book about persuading judges, legal writing guru Bryan Garner and Justice Scalia recommended that legal writers "think syllogistically" and write the same way. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 41 (2008).

232. See, e.g., Taylor et al., *supra* note 29, at 137 (introducing an analysis of Justice Scalia's penchant for calling others' views "absurd").

*A. What Factors Appeared Most Important in How Precedent Was Used over Time?*

We found that the shape of the majority coalition appeared to contribute more than any other factor to citation rates, especially over time.<sup>233</sup> Compared with what might have been expected given their distribution among Justice Scalia's majority opinions, we found relatively higher citation rates for deceptively unanimous opinions and contested majority opinions. Looking at these opinions together, citations continued or sometimes re-emerged after an initial period of quiet. This citation curve might be explained because the concurring or dissenting opinions gained adherents as the years passed and later courts continued to debate the meaning or application of a rule established in a majority opinion.

Next, we found that the characteristics of the audience mattered both in how a particular opinion would be selected and in how specific elements of that opinion would be used by later courts. When the citing court was a federal court of appeals—that is, when the typical audience for the majority opinion constituted a panel of three judges along with their career and recent law-graduate clerks—there was a greater tendency to rely more extensively on the entire argument framework established by a Scalia majority opinion. These courts tended to discuss both the arguments advanced in support of, and the rules established in, Justice Scalia's majority opinions; federal district courts and state courts were somewhat more likely to simply follow the rules. The institutional role of the lower courts, including the federal courts of appeals, is to look to precedent for guidance and either to follow it or to explain its effects on the lower court's reasoning. In our project, it appeared that the federal courts of appeals were spending substantial time on their reasoning and explanatory functions.

Finally, we found that the rhetorical framing of the rules might have influenced citation rates in contradictory ways. For example, if a lower court judge had a hypothetical choice between a bright-line and easy-to-apply rule and one that required her to look into many facts or to examine legislative

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233. See Parts IV and VII, *supra*.

history or other sources for interpretation, she might choose the time- and cost-effective route. But lower court judges do not usually have such choices, and instead most have to determine what to do with the precedent that appears to govern their issue. In those situations, bright-line rules that are easy to apply may lead to more “follow” citations by the lower courts, but more complex and time-consuming applications may lead to a greater number of total citations over time as the interpretations and applications are worked out. On the other hand, we suspect that one possible result of Justice Scalia’s tendency to formulate maximalist or fundamentalist rules was that more Justices chose to write concurring or dissenting opinions, and those sources of alternative reasoning may have resulted in more citations (for all the opinions) as the lingering disputes resolved themselves over time.

Many of the recent citation studies rely on sophisticated analyses that combine various influence measures, but some researchers have assumed that more citations mean greater influence. Our results cast doubt on that assumption because of the finding that Justice Scalia’s contested majority and deceptively unanimous opinions were more frequently cited by all levels of lower courts than their distribution among his opinions would suggest. This leads us to infer that the reason is not the governing influence of his opinions but the continuing disputes about the questions presented.<sup>234</sup>

Together, these results leave us optimistic about the process of judicial decisionmaking by lower court judges.<sup>235</sup> Our findings indicate that later opinion authors are making thoughtful selections as they engage in the shifting “process of conversation and judgment” that is carried on among many different levels of legal communicators.<sup>236</sup>

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234. Final resolutions of legal disputes are of course rare. Still, we expect that “influence” means something other than being cited for one side of an argument.

235. *See, e.g.*, Fleisher, *supra* note 221, at 925 (“[A]re precedential opinions a gross bludgeon constraining lower court judges only at the broadest level of rhetoric, or a subtle tool swaying those decision makers in a more nuanced manner? . . . [T]he latter is a more accurate description.”).

236. WHITE, *supra* note 16, at 264.

*B. Does the Rhetorical-Computational Method Hold Promise for Future Research and Analysis?*

Coding the content of the large numbers of cases necessary for content analysis is difficult and time consuming. Incorporating the headnotes compiled by LexisNexis and Westlaw into the analysis takes advantage of content analysis techniques that are widely accepted and have been subject to some reliability testing. The use of the headnotes should allow careful researchers to trace and begin to account for networks of influence of legal doctrine. We found the use of headnotes as substitutes for rhetorical analysis of full or partial opinions to be more complicated.

The most important shortcoming of headnotes as tools for rhetorical analysis is that they are taken out of context, a shortcoming we tried to accommodate in part by reading the syllabus of the opinion first and then reading the headnotes in sequence. In addition, headnotes do not include citations (which themselves are important for many rhetorical reasons), and because headnotes are taken out of context, when they are read separately, even in sequence, the reader may make inferences about language and structure that do not necessarily reflect the intent of the author. Again, reflecting the important absence of context, no headnotes are extracted from the facts section of an opinion or from the concurring and dissenting opinions, so analysis of the headnotes alone is incomplete. In future work, we might adjust our use of headnotes in several ways, including identifying the portions of the opinion in which the author intended to establish a new rule. We could trace the influence of the author's intended doctrine against the propositions that actually ended up being influential (that is, other portions of the opinion that were more often cited by subsequent courts). On the whole, while the techniques we explore here will never replace "close reading" for the purposes of rhetorical analysis, this project has illuminated some of the potential challenges and analytical promise of attempting to understand judicial authors and judicial audiences by harnessing a combination of rhetorical and computational techniques.

## APPENDIX

Following are four randomly selected examples of the headnote-coding framework we followed. The syllabus, holding, and Justices' votes are taken from the electronic versions of the opinions available on LexisNexis.\*

1. *INS v. Pangilinan*, 486 U.S. 875 (1988).

**SYLLABUS**

Respondents, 16 Filipino nationals who served with the United States Armed Forces during World War II, seek United States citizenship pursuant to §§ 701 through 705 of the Nationality Act of 1940, as amended in 1942. Under § 702 of the Act, the Commissioner of Immigration and Naturalization was authorized to designate representatives to receive petitions, conduct hearings, and grant naturalization outside the United States. In August 1945, the American Vice Consul in Manila was designated pursuant to § 702 to naturalize aliens. The Philippine Government, however, expressed its concern that a mass migration of newly naturalized veterans would drain the soon-to-be independent country's manpower, and so the naturalization officer's authority was revoked for a 9-month period between October 1945 and August 1946. Respondents would have been eligible for citizenship under the provisions of the 1940 Act if they had filed naturalization applications before the Act expired on December 31, 1946, but did not do so. More than 30 years later, they petitioned for naturalization, claiming that the 9-month absence of a § 702 naturalization officer violated the 1940 Act and deprived them of rights secured by the Fifth Amendment. The naturalization examiner, in all of the cases consolidated here, recommended against naturalization, and the District Courts rejected the naturalization petitions. On respondents' appeals (some of which were consolidated), heard in two cases by different Ninth Circuit panels, the Court of Appeals ultimately held that the revocation of the Vice Consul's naturalization authority violated what it characterized as the 1940 Act's

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mandatory language, and that the naturalization of respondents was an appropriate equitable remedy.

*Held:*

1. Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of the limitations imposed by Congress in the exercise of its exclusive constitutional authority over naturalization. Since respondents have no current statutory right to citizenship under the expired provisions of the 1940 Act, the Ninth Circuit lacked authority to grant the petitions for naturalization. The reasoning of *INS v. Hibi*, 414 U.S. 5—which held that the same official acts as those alleged here did not give rise to an estoppel that prevented the Government from invoking the December 31, 1946, cutoff date in the 1940 Act—suggests the same result as to the “equitable remedy” theory in this case. Even assuming that, in reviewing naturalization petitions, federal courts sit as courts of equity, such courts can no more disregard statutory provisions than can courts of law. Congress has given the power to the federal courts to make someone a citizen as a specific function to be performed in strict compliance with the terms of 8 U.S.C. § 1421(d), which states that a person may be naturalized “in the manner and under the conditions prescribed in this subchapter, and not otherwise.” Pp. 882–885.

2. Assuming that respondents can properly invoke the Constitution’s protections, and granting that they had statutory entitlements to naturalization, there is no merit to their contention that the revocation of the Vice Consul’s naturalization authority deprived them of their rights under the Due Process Clause of the Fifth Amendment and under its equal protection component. Respondents were not entitled to individualized notice of any statutory rights and to the continuous presence of a naturalization officer in the Philippines from October 1945 until July 1946. Moreover, the historical record does not support the contention that the actions at issue here were motivated by any racial animus. Pp. 885–886.

3. There is no merit to the separate arguments of respondents Litonjua and Manzano, including the argument that the Government did not introduce any evidence in their

cases concerning the historical events at issue. It is well settled that the burden is on the alien applicant to establish his eligibility for citizenship. Pp. 886–887.

**JUDGES:** SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and O’CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. KENNEDY, J., took no part in the consideration or decision of the cases.

### **LexisNexis® Headnotes**

*Preexisting Rule* [HN1] See § 701 of the Nationality Act of 1940, 54 Stat. 1137.

*Preexisting Rule* [HN2] See § 702 of the Nationality Act of 1940, 54 Stat. 1137.

*Preexisting Rule* [HN3] See § 705 of the Nationality Act of 1940, 54 Stat. 1137.

*Preexisting Rule* [HN4] See U.S. Const. art. I, § 8, cl. 4.

*Argument* [HN5] Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law.

*Scalia Rule* [HN6] An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

*Scalia Rule* [HN7] Once it has been determined that a person does not qualify for citizenship, the district court has no discretion to ignore the defect and grant citizenship.

*Argument* [HN8] The burden is on the alien applicant to show his eligibility for citizenship in every respect.

2. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

**SYLLABUS**

During a routine traffic stop, a Wyoming Highway Patrol officer noticed a hypodermic syringe in the driver's shirt pocket, which the driver admitted using to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what respondent, a passenger in the car, claimed was her purse. He found drug paraphernalia there and arrested respondent on drug charges. The trial court denied her motion to suppress all evidence from the purse as the fruit of an unlawful search, holding that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband. Respondent was convicted. In reversing, the Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search; but, if the officer knows or should know that a container belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection. Applying that rule here, the court concluded that the search violated the Fourth and Fourteenth Amendments.

*Held:*

Police officers with probable cause to search a car, as in this case, may inspect passengers' belongings found in the car that are capable of concealing the object of the search. In determining whether a particular governmental action violates the Fourth Amendment, this Court inquires first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed, see, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 931, 131 L. Ed. 2d 976, 115 S. Ct. 1914. Where that inquiry yields no answer, the Court must evaluate the search or seizure under traditional reasonableness standards by balancing an individual's privacy interests against legitimate governmental interests, see, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653, 132 L. Ed. 2d 564, 115 S. Ct. 2386. This Court has concluded that the Framers would have regarded as reasonable the warrantless search of a car that police had probable cause to

believe contained contraband, *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, as well as the warrantless search of containers *within* the automobile, *United States v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157. Neither *Ross* nor the historical evidence it relied upon admits of a distinction based on ownership. The analytical principle underlying *Ross*'s rule is also fully consistent with the balance of this Court's Fourth Amendment jurisprudence. Even if the historical evidence were equivocal, the balancing of the relative interests weighs decidedly in favor of searching a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583, 590, 41 L. Ed. 2d 325, 94 S. Ct. 2464. The degree of intrusiveness of a package search upon personal privacy and personal dignity is substantially less than the degree of intrusiveness of the body searches at issue in *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 and *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338. In contrast to the passenger's reduced privacy expectations, the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since an automobile's ready mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained, *California v. Carney*, 471 U.S. 386, 85 L. Ed. 2d 406, 105 S. Ct. 2066; since a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver, cf. *Maryland v. Wilson*, 519 U.S. 408, 413-414, 137 L. Ed. 2d 41, 117 S. Ct. 882; and since a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, see, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 102, 65 L. Ed. 2d 633, 100 S. Ct. 2556. The Wyoming Supreme Court's "passenger property" rule would be unworkable in practice. Finally, an exception from the historical practice described in *Ross* protecting only a passenger's property, rather than property belonging to *anyone* other than the driver, would be less sensible than the rule that a package may be searched, whether or not its owner is present as a passenger or otherwise, because it might contain the object of the search. Pp. 3-11.

956 P.2d 363, reversed.

**JUDGES:** SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O’CONNOR, KENNEDY, THOMAS, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

### **LexisNexis® Headnotes**

**Argument** [HN1] U.S. Const. amend. IV protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. In determining whether a particular governmental action violates this provision, the court inquires first whether the action was regarded as an unlawful search or seizure under the common law when amend. IV was framed. Where that inquiry yields no answer, the court must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

**Argument** [HN2] Contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant where probable cause exists.

**Scalia Rule** [HN3] If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This applies broadly to all containers within a car, without qualification as to ownership.

**Argument** [HN4] The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.

**Scalia Rule** [HN5] When there is probable cause to search for contraband in a car, it is reasonable for police officers to examine packages and containers without a showing of individualized probable cause for each one. A passenger’s

personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are in the car, and the officer has probable cause to search for contraband in the car.

3. *Kansas v. Ventris*, 556 U.S. 586 (2009).

**SYLLABUS**

Respondent Donnie Ray Ventris and Rhonda Theel were charged with murder and other crimes. Prior to trial, an informant planted in Ventris's cell heard him admit to shooting and robbing the victim, but Ventris testified at trial that Theel committed the crimes. When the State sought to call the informant to testify to his contradictory statement, Ventris objected. The State conceded that Ventris's Sixth Amendment right to counsel had likely been violated, but argued that the statement was admissible for impeachment purposes. The trial court allowed the testimony. The jury convicted Ventris of aggravated burglary and aggravated robbery. Reversing, the Kansas Supreme Court held that the informant's statements were not admissible for any reason, including impeachment.

*Held:*

Ventris's statement to the informant, concededly elicited in violation of the Sixth Amendment, was admissible to impeach his inconsistent testimony at trial. Pp. 590-594.

(a) Whether a confession that was not admissible in the prosecution's case in chief nonetheless can be admitted for impeachment purposes depends on the nature of the constitutional guarantee violated. The Fifth Amendment guarantee against compelled self-incrimination is violated by introducing a coerced confession at trial, whether by way of impeachment or otherwise. *New Jersey v. Portash*, 440 U.S. 450, 458-459, 99 S. Ct. 1292, 59 L. Ed. 2d 501. But for the Fourth Amendment guarantee against unreasonable searches or seizures, where exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee, admissibility is determined by an exclusionary-rule balancing test. See *Walder v. United States*, 347 U.S. 62, 65, 74 S. Ct. 354, 98 L. Ed. 503. The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct. See, e.g., *Harris v. New York*, 401 U.S. 222, 225-226, 91 S. Ct. 643, 28 L. Ed. 2d 1. The core of the Sixth Amendment right to counsel is a trial right, but the right covers pretrial interrogations to ensure that police manipulation does not deprive the defendant of "effective representation by counsel at the only stage when legal aid

and advice would help him.” *Massiah v. United States*, 377 U.S. 201, 204, 84 S. Ct. 1199, 12 L. Ed. 2d 246. This right to be free of uncounseled interrogation is infringed at the time of the interrogation, not when it is admitted into evidence. It is that deprivation that demands the remedy of exclusion from the prosecution’s case in chief. Pp. 590-593.

(b) The interests safeguarded by excluding tainted evidence for impeachment purposes are “outweighed by the need to prevent perjury and to assure the integrity of the trial process.” *Stone v. Powell*, 428 U.S. 465, 488, 96 S. Ct. 3037, 49 L. Ed. 2d 1067. Once the defendant testifies inconsistently, denying the prosecution “the traditional truth-testing devices of the adversary process,” *Harris, supra*, at 225, 91 S. Ct. 643, 28 L. Ed. 2d 1, is a high price to pay for vindicating the right to counsel at the prior stage. On the other hand, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence for officers, who have an incentive to comply with the Constitution, since statements lawfully obtained can be used for all purposes, not simply impeachment. In every other context, this Court has held that tainted evidence is admissible for impeachment. See, e.g., *Oregon v. Hass*, 420 U.S. 714, 723, 95 S. Ct. 1215, 43 L. Ed. 2d 570. No distinction here alters that balance. Pp. 593-594.

285 Kan. 595, 176 P. 3d 920, reversed and remanded.

**JUDGES:** Scalia, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Souter, Thomas, Breyer, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined, *post*, p. 594.

### **LexisNexis® Headnotes**

**Argument** [HN1] The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that in all criminal prosecutions, the accused shall have the assistance of counsel for his defense. The core of this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial. However, the right extends to having counsel present at various pretrial

“critical” interactions between the defendant and the State, including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge.

*Argument.* [HN2] Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not. The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise. The Fourth Amendment, on the other hand, guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee. Inadmissibility has not been automatic, therefore, but the U.S. Supreme Court has instead applied an exclusionary-rule balancing test. The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct.

*Argument* [HN3] The core of the right to counsel is indeed a trial right, ensuring that the prosecution’s case is subjected to the crucible of meaningful adversarial testing. But U.S. Supreme Court opinions under the Sixth Amendment, as under the Fifth, have held that the right covers pretrial interrogations to ensure that police manipulation does not render counsel entirely impotent—depriving the defendant of effective representation by counsel at the only stage when legal aid and advice would help him.

*Argument* [HN4] The Massiah right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That is when the assistance of counsel is denied.

*Argument* [HN5] Post-charge deliberate elicitation of statements without the defendant’s counsel or a valid waiver of counsel is not intrinsically unlawful when the questioning is unrelated to charged crimes—the Sixth Amendment right is offense specific. However, officers may not badger counseled defendants about charged crimes so long as they do not use information they gain.

**Scalia Rule** [HN6] The game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are outweighed by the need to prevent perjury and to assure the integrity of the trial process. It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can provide himself with a shield against contradiction of his untruths. Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of the traditional truth-testing devices of the adversary process is a high price to pay for vindication of the right to counsel at the prior stage.

4. *Whitfield v. United States*, 135 S. Ct. 785 (2015).

**SYLLABUS**

Petitioner Whitfield, fleeing a botched bank robbery, entered 79-year-old Mary Parnell’s home and guided a terrified Parnell from a hallway to a room a few feet away, where she suffered a fatal heart attack. He was convicted of, among other things, violating 18 U.S.C. §2113(e), which establishes enhanced penalties for anyone who “forces any person to accompany him without the consent of such person” in the course of committing or fleeing from a bank robbery. On appeal, the Fourth Circuit held that the movement Whitfield required Parnell to make satisfied the forced-accompaniment requirement, rejecting his argument that §2113(e) requires “substantial” movement.

*Held:*

A bank robber “forces [a] person to accompany him,” for purposes of §2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance, as was the case here. At the time the forced-accompaniment provision was enacted, just as today, to “accompany” someone meant to “go with” him. The word does not, as Whitfield contends, connote movement over a substantial distance. Accompaniment requires movement that would normally be described as from one place to another. Here, Whitfield forced Parnell to accompany him for at least several feet, from one room to another, and that surely sufficed. The severity of the penalties for a forced-accompaniment conviction—a mandatory minimum of 10 years, and a maximum of life imprisonment—does not militate against this interpretation, for the danger of a forced accompaniment does not vary depending on the distance traversed. This reading also does not make any other part of §2113’s graduated penalty scheme superfluous. Pp. \_\_\_ - \_\_\_, 190 L. Ed. 2d, at 659-661.

548 Fed. Appx. 70, affirmed.

**JUDGES:** Scalia, J., delivered the opinion for a unanimous Court.

**LexisNexis® Headnotes**

**Argument** [HN1] Federal law establishes enhanced penalties for anyone who forces any person to accompany him in the course of committing or fleeing from a bank robbery. 18 U.S.C.S. § 2113(e).

**Preexisting Rule** [HN2] See 18 U.S.C.S. § 2113(e).

**Scalia Rule** Congress enacted the forced-accompaniment provision that appears in 18 U.S.C.S. § 2113 in 1934 after an outbreak of bank robberies committed by John Dillinger and others. Section 2113 has been amended frequently, but the relevant phrase—“forces any person to accompany him without the consent of such person”—has remained unchanged, and so presumptively retains its original meaning. In 1934, just as today, to accompany someone meant to go with him. The word does not connote movement over a substantial distance. It was, and still is, perfectly natural to speak of accompanying someone over a relatively short distance, for example: from one area within a bank to the vault; to the altar at a wedding; up the stairway; or into, out of, or across a room.

**Scalia Rule** [HN4] It is true enough that accompaniment does not embrace minimal movement—for example, the movement of a bank teller’s feet when a robber grabs her arm. It must constitute movement that would normally be described as from one place to another, even if only from one spot within a room or outdoors to a different one.

**Scalia Rule** [HN5] It does not seem that the danger of a forced accompaniment varies with the distance traversed. Consider, for example, a hostage-taker’s movement of one of his victims a short distance to a window, where she would be exposed to police fire; or his use of a victim as a human shield as he approaches the door. And even if the United States Supreme Court thought otherwise, it would have no authority to add a limitation the statute plainly does not contain. The Congress that wrote 18 U.S.C.S. § 2113(e) may well have had most prominently in mind John Dillinger’s driving off with hostages, but it enacted a provision which goes well beyond that. It is simply not in accord with English usage to give “accompany” a meaning that covers only large distances.

**Argument** [HN6] 18 U.S.C.S. § 2113’s graduated penalty scheme prescribes: (1) a 20-year maximum sentence for bank robbers who use force and violence or intimidation, 18 U.S.C.S. § 2113(a); (2) a 25-year maximum sentence for those who assault or put in jeopardy the life of another by the use of a dangerous weapon or device, 18 U.S.C.S. § 2113(d); and (3) a minimum sentence of 10 years, and a maximum sentence of life, for forced accompaniment, 18 U.S.C.S. § 2113(e).

**Argument** [HN7] Even if bank robbers always exert some control over others, it does not follow that they always force others to accompany them somewhere—that is, to go somewhere with them. And because 18 U.S.C.S. § 2113(a), (d), and (e) all cover distinct conduct, an interpretation of “accompany” to mean that a bank robber forces a person to go somewhere with him does not make any part of § 2113 superfluous.

**Scalia Rule** [HN8] A bank robber forces a person to accompany him, for purposes of 18 U.S.C.S. § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance.

