

Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*

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The practice of law in the United States has come to depend increasingly on other disciplines. Courts rely on nonlegal resources to support, and in some cases to shape, their opinions. Illustrative of this development is the U.S. Supreme Court, whose application of nonlegal materials is surveyed over a ten-year period of time.

¶1 In April 1990, the Federal Courts Study Committee, appointed by Chief Justice Rehnquist fifteen months earlier to investigate congestion, delay, expense, and expansion of the Federal court system, issued its final report.¹ The Federal Courts Study Act² had established the committee and directed that it examine the federal judiciary. Composed of federal and state judges, federal congressmen and senators, federal and state agency attorneys, academics, and one member of the practicing bar,³ the committee's report examined such issues as reallocating business between the state and federal systems, creating additional capacity within the federal judicial branch, dealing with the appellate caseload crisis, concerns about sentencing, federal court administration, and ways to protect against bias and discrimination in the judicial branch and the judicial process.

¶2 The report also addressed ways to reduce the complexity of litigation and to expedite its flow.⁴ In particular, it recommended a "comprehensive examination of how courts handle scientific and technological complexity in litigation," including an identification of the "types of . . . scientific issues presented to the courts, their frequency, and the problems they present."⁵ In support of the Federal Courts

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** Director of the Law Library and Associate Professor of Law, University of Idaho College of Law, Moscow, Idaho. During the period of this study, the Supreme Court was remiss in providing full bibliographic information for the nonlegal materials cited in its opinions. First names of authors were lacking as a matter of course, with only initials provided. Getting the full names of authors involved a significant amount of OCLC searching and interlibrary loan requests, all of which were handled by Jane Lear, cataloging/interlibrary loan assistant at the University of Idaho College of Law Library. With Jane's assistance, all the gaps were filled, and I would like to thank her for her many efforts in helping complete this study.

1. FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter FEDERAL COURTS STUDY REPORT].

2. Federal Courts Study Act, Pub. L. No. 100-702, §§ 101-109, 102 Stat. 4644-45 (1988) (codified at 28 U.S.C. § 331 note (2000)).

3. FEDERAL COURTS STUDY REPORT, *supra* note 1, at 193-98 app. B (lists and provides biographies of committee members, senior staff, and reporters).

4. *Id.* at 89-108.

5. *Id.* at 97.

Study Committee's conclusion regarding the increasing application of scientific studies in federal court opinions were studies submitted to its Subcommittee on Workload. Among these was a memorandum prepared by the Carnegie Commission on Science, Technology, and Government.⁶

¶3 In pointing out the nature and extent of the use of such materials in federal court opinions, the Carnegie Commission observed that opinions were being generated addressing issues such as epidemiological studies bearing on the effects of toxic chemicals in the air, ground, and water; the noxious properties of such agents as Agent Orange and asbestos; ballistics science, chemical tests for blood-alcohol levels or the presence of narcotics, and DNA footprinting in criminal law decisions; and social science studies in specific disputes or in broad controversies such as racial discrimination when applied to the death penalty.⁷ Another issue paper submitted to the committee asserted that the complexity of some scientific and technical evidence made it difficult for judges even to "know what they do not know," to understand the scientific issues presented by such cases.⁸ This paper argued that court-appointed expert witnesses, or even panels of witnesses, would aid courts in getting a handle on what was critical in the evidence being presented to them.⁹

¶4 At the same time as it expressed concern for the increasing application of science and technology in complex federal court litigation, the Federal Courts Study Committee noted in passing that "economic, statistical, . . . and natural and social scientific data"—nonlegal information from disciplines outside science and technology—"are becoming increasingly important in both routine and complex litigation [in federal courts]."¹⁰ Interestingly, probably the ultimate U.S. Supreme Court opinion in terms of its reliance on nonlegal resources remains *Brown v. Board of Education of Topeka*,¹¹ an opinion whose outcome depended on sources from just about everything other than law, including myriad nonscientific, non-technical disciplines.

¶5 Case law until the time of *Brown* applied *Plessy v. Ferguson*,¹² the Supreme Court decision that established the concept of separate but equal when applied to transportation. With the exception of Justice Harlan's dissent in *Plessy* itself, little case law was available to counter that holding, but Chief Justice Warren chose not to use Harlan's dissent as the foundation of the *Brown* opinion. The intention of

6. Carnegie Comm'n on Sci., Tech., & Gov't, *The Work of the Federal Courts in Resolving Science-Based Disputes: Suggested Agenda for Improvement*, in 1 FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, WORKING PAPERS AND SUBCOMMITTEE REPORTS, Report of the Subcomm. on Workload, pt. 6, [§] 1 (1990) [hereinafter Subcomm. on Workload Report].

7. *Id.* at 1.

8. E. Donald Elliott, *Issues of Science and Technology Facing the Federal Courts*, in Subcomm. on Workload Report, *supra* note 6, pt. 6, [§] 2, at 7.

9. *Id.* at 9–24.

10. FEDERAL COURTS STUDY REPORT, *supra* note 1, at 97.

11. 347 U.S. 483 (1954).

12. 163 U.S. 537 (1896).

the Court was, in effect, to apply justice, not law, and it found its rationale for that justice in sources from a multitude of disciplines outside law.

¶6 The heart of the matter in *Brown* was whether racial separation in education deprived minority children of equal education opportunities.¹³ Chief Justice Warren stated that it did. “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.”¹⁴ To support that statement, he relied upon studies in the history of American education,¹⁵ psychology,¹⁶ and American history.¹⁷ It was the application of these nonlegal materials that created the holding in *Brown*.

¶7 While there have been no U.S. Supreme Court decisions since *Brown v. Board of Education of Topeka* that have had such a dramatic effect while relying so heavily on nonlegal materials, such items do find their way into the opinions of the Court with regularity. This article reports the results of a survey that attempted to determine the extent to which nonlegal materials have been used in U.S. Supreme Court opinions. The article also identifies the sorts of cases that appear to be most likely to cite to such materials, as well as the range and variety of sources and disciplines that have been utilized by the Court.

Method

¶8 Opinions surveyed covered those of the October Term 1989 through the October Term 1998. The Federal Courts Study Committee report was issued in April 1990, just before the completion of the 1989 Term. All signed opinions were examined, but *per curiam* opinions were not included in the study for purposes of determining percentages of opinions employing nonlegal materials. *Per curiam* opinions are generally too short to develop an argument and in most cases don’t lend themselves to using even legal sources. They also don’t identify which Justice is citing the materials unless it occurs in a dissenting opinion. This anonymity

13. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 704 (1987).

14. *Brown*, 347 U.S. at 494.

15. *Id.* at 489–90 (citing such titles as R. FREEMAN BUTTS & LAWRENCE A. CREMIN, *A HISTORY OF EDUCATION IN AMERICAN CULTURE* (1953); ELLWOOD P. CUBBERLY, *PUBLIC EDUCATION IN THE UNITED STATES* (1934); EDGAR W. KNIGHT, *PUBLIC EDUCATION IN THE SOUTH* (1922); HOWARD K. BEALE, *A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS* (1941)).

16. *Brown*, 347 U.S. at 494–95 (citing KENNETH B. CLARK, *EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT* (1950); HELEN LELAND WITMER & RUTH KOTINSKY, *PERSONALITY IN THE MAKING: THE FACT-FINDING REPORT OF THE MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH* (1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Isidor Chein, *What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?* 3 INT’L J. OPINION & ATTITUDE RES. 229 (1949); Theodore Brameld, *Educational Costs*, in *DISCRIMINATION AND NATIONAL WELFARE* (Robert M. MacIver ed., 1949)).

17. *Brown*, 347 U.S. at 495 (citing EDWARD FRANKLIN FRAZIER, *THE NEGRO IN THE UNITED STATES* (1949); GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944)).

makes it impossible to consider these opinions when surveying the application of nonlegal materials by individual Justices. In spite of these features of *per curiam* opinions, nonlegal materials did get cited in dissenting opinions in 3 of the 124 *per curiam* opinions generated during the time frame of the study.¹⁸

¶9 The Library of Congress Classification scheme was employed to identify the materials cited by the Court in the opinions issued during the survey period. To accurately identify “nonlegal” sources, no title that had been assigned to Class K or any of its subclasses (including KF) was included, thereby eliminating legal treatises and law reviews. To verify the classification of “close calls,” checks were made in the online catalogs of the University of Idaho College of Law, the University Library at the University of Idaho, CASCADE (the union catalog of public colleges and universities in Washington State), and OCLC. In most cases, there was consensus on whether a title qualified as law or nonlaw. In some cases, however, an individual title was assigned different classifications by different libraries. For example, *The Records of the Federal Convention of 1787*¹⁹ finds itself with both KF and JK classifications. In a situation like this, the title was treated as legal in nature and not included in the study.

The Numbers

¶10 During the period of time covered by this inquiry, the U.S. Supreme Court generated 942 signed opinions. Nonlegal materials were cited in 377, or 40%, of those signed opinions. The October Term 1990 experienced the smallest percentage of nonlegal material use, 29%, while the October Term 1993 had the largest percentage, 49%. (See table 1.) The range of materials cited is exceptionally broad, in both the formats of the materials and in the disciplines they represent. Also sig-

18. In an opinion dealing with a letter threatening President Reagan, discussion was generated regarding the National Council of Churches (NCC), as the letter identified the letter-writer as a member of that organization. In dissent, Justice Stevens cited Rael Jean Isaac, *Do You Know Where Your Church Offerings Go?* READER'S DIG., Jan. 1983, at 120; CHRISTIAN SCI. MONITOR, May 5, 1983, at 3 (reporting on a speech by Bishop James Armstrong, president of the NCC); L.A. TIMES, May 5, 1983, § 2, at 5 (reporting statement by Peter Reddaway of the London School of Economics that the NCC was involved in concealing and distorting the truth about the Soviet Union); L.A. TIMES, Apr. 25, 1985, § 5, at 1 (reporting statement of history professor at Seattle Pacific University to the effect that the NCC had performed a disservice to Christians in the Soviet Union by “buying the Soviet line” given them by official Soviet church leaders). *Hunter v. Bryant*, 502 U.S. 224, 232 (1991) (Stevens, J., dissenting). Justice Stevens also cited statements by physicians and other experts regarding execution by cyanide gas in *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 655–56 (1992) (Stevens, J., dissenting). The third *per curiam* opinion citing to nonlegal materials involved the application of state law to decide paternity under the Social Security Act. Chief Justice Rehnquist, dissenting from the Court's decision to vacate the decision of the Court of Appeals for the Fourth Circuit, cited statements made by William Howard Taft regarding such a decision. *Lawrence v. Chater*, 516 U.S. 163, 177 (1996) (Rehnquist, C.J., dissenting) (citing 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 997–98 (1939)).

19. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1966).

nificant is the fact that all the Supreme Court Justices cited to these materials, some decidedly more than others, but no one chose not to use them as supporting authority.²⁰

Table 1
Opinions with Nonlegal Citations, 1989–1998

Term	Signed Opinions during Term	No. of Opinions with Nonlegal Citations	% of Opinions with Nonlegal Citations
1989	129	49	38
1990	112	33	29
1991	107	36	34
1992	107	44	41
1993	84	41	49
1994	82	39	48
1995	75	35	47
1996	80	35	44
1997	91	32	35
1998	75	33	44
Total	942	337	40

¶11 As enlightening as the number of opinions involving nonlegal materials is the number and nature of the items cited in those opinions. (See table 2.) For the period of the survey, there were 1861 references to nonlegal materials. (For this survey, items cited more than once by the same Justice in an opinion were counted only once, but if an item was cited by *different* Justices in the same opinion, each reference was treated as a separate event to reflect not only what was being cited but also who was doing the citing). While a significant number of the nonlegal items cited were either books or periodical articles, there were three other categories of materials that exhibited significantly high numbers during this period: general dictionaries, *The Federalist*, and newspapers. In addition, one source began to show up only toward the end of the period: the Internet. The first three types of materials were cited 594 times (32% of the total nonlegal citations) and thus warrant some individual treatment because of their heavy application. The Internet also deserves special discussion because of its potential for expanded use in the future.

20. See *infra* ¶ 63 and table 5.

Table 2
Number and Nature of Nonlegal Citations, 1989–1998

Term	Books	Journal	General	<i>Federalist</i>	Newspapers	Internet	Total
		Articles	Dictionaries				
1989	119 (53%)	36 (16%)	31 (14%)	18 (8%)	20 (9%)	0 (0%)	224
1990	61 (54%)	4 (4%)	19 (17%)	27 (24%)	3 (3%)	0 (0%)	114
1991	70 (61%)	19 (17%)	8 (7%)	10 (9%)	8 (7%)	0 (0%)	115
1992	70 (49%)	6 (4%)	47 (33%)	9 (6%)	11 (8%)	0 (0%)	143
1993	71 (55%)	5 (4%)	41 (32%)	9 (7%)	2 (2%)	0 (0%)	128
1994	189 (57%)	38 (12%)	28 (9%)	51 (16%)	23 (7%)	0 (0%)	329
1995	146 (70%)	25 (12%)	12 (6%)	10 (5%)	13 (6%)	2 (1%)	208
1996	117 (49%)	36 (15%)	18 (8%)	39 (16%)	27 (11%)	0 (0%)	237
1997	104 (55%)	28 (15%)	31 (16%)	5 (3%)	18 (10%)	2 (1%)	188
1998	106 (61%)	12 (7%)	36 (21%)	13 (7%)	7 (4%)	1 (1%)	175
Total	1053 (56.6%)	209 (11.2%)	271(14.6%)	191 (10.3%)	132 (7.1%)	5 (0.3%)	1861

Use of Dictionaries

¶12 During the decade of the study, there was a dramatic increase in the use of dictionaries in U.S. Supreme Court opinions.²¹ Indeed, the 1990s generated almost half of all the opinions in the Court's history in which dictionaries were relied upon.²² Before the 1990s, there were only three years in which the percentage of U.S. Supreme Court cases using dictionaries exceeded 10%.²³ Since the start of the decade, 15% or more has become the norm. (See table 2.)

¶13 A good deal of the explanation for this phenomenon can be found in the Justices who comprise the Court and their move away from relying on legislative history to looking at textual construction and the "plain meaning" of the words to interpret a statute.²⁴ Despite garnering a measure of criticism as the pattern has

21. Legal dictionaries, such as *Black's Law Dictionary* and *Ballentine's Law Dictionary*, and legal thesauri were not considered for purposes of this study since they are assigned a Library of Congress KF classification and thus are legal authorities.

22. Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 260 (1999). In addition to surveying the use of dictionaries, both general and legal, in the U.S. Supreme Court through the 1997 October Term, this article, in appendixes, identifies every term treated by a dictionary reference, the record of each Justice in using dictionaries (opinions, number of terms, dictionaries used), and dictionaries relied upon, by title and edition. It is an excellent tool for getting both an overview and the details of dictionary use by the Court.

23. For a graphic rendering of this fact, see Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1454 app. (1994). Very distinctive spikes occur in the 1990s in graphs showing the percentages of cases referring to dictionaries, 1935 Term–1992 Term, and the number of references to dictionaries, 1842 Term–1992 Term.

24. Thumma & Kirchmeier, *supra* note 22, at 260.

solidified in recent years, this tactic has begun to have greater importance in the outcome of some opinions.

¶14 The use of dictionaries by the Court is hardly consistent, and each application reflects an attempt to get just the “right” definition to affect the holding. There is a level of selectivity in the use of dictionaries,²⁵ and in the choice of definitions, sometimes among several, for individual terms.

¶15 Indicative of how the application of a dictionary definition can have a serious impact on an opinion is *Chapman v. United States*.²⁶ At issue was a federal statute²⁷ that mandated a minimum sentence of five years for distributing more than one gram of a “mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD).” Doses of LSD are prepared for sale by dissolving pure LSD and spraying the resulting solution on blotter paper. The paper is cut into one dose squares that users swallow, lick, or drop into a beverage to release the drug. Chapman was appealing his conviction of selling one thousand doses. The weight of the LSD-sprayed blotter paper was 5.7 grams, more than enough to trigger the minimum sentence under the statute. The weight of the drug trapped in the blotter paper, however, was only about fifty milligrams, well below the level required for the five-year sentence. Chief Justice Rehnquist chose a dictionary definition of “mixture” that supported the combined weight of the LSD and the blotter paper, resulting in the upholding of the conviction.²⁸

¶16 At times, the use of dictionaries by the Court to shore up or rationalize holdings begins to border on the bizarre. During the period of this study, dictionary definitions have been provided for “any,”²⁹ “attorney,”³⁰ “carry,”³¹ “coal,”³² “have,”³³ “medical,”³⁴ “nurse,”³⁵ “or,”³⁶ and “try.”³⁷ (For the record, there were no definitions of the word “is”).

¶17 Three opinions during this period provided dictionary definitions for “use,”³⁸ the majority opinions of which were all written by Justice O’Connor. As

25. *Id.* at 262–63 (indicating that through the 1997 October Term, *Webster’s Third New International Dictionary* had appeared in 102 opinions, *Webster’s Second International Dictionary* in 88, *Oxford English Dictionary* in 46, *Webster’s Ninth New Collegiate Dictionary* in 22, and *Worcester’s Dictionary* in 15).

26. 500 U.S. 453 (1991).

27. 21 U.S.C. § 841(b)(1)(B)(v) (2000).

28. *Chapman*, 500 U.S. at 462.

29. *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

30. *Kay v. Ehrler*, 499 U.S. 432, 436 n.6 (1991).

31. *Muscarello v. United States*, 524 U.S. 125, 128, 143 n.5 (1998).

32. *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 874 (1999).

33. *Walters v. Metropolitan Educ. Enter, Inc.*, 519 U.S. 202, 207 (1997).

34. *Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, 81 (1999).

35. *Id.*

36. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 255 (1994).

37. *Nixon v. United States*, 506 U.S. 224, 230 (1993).

38. *Davis v. United States*, 495 U.S. 472, 479 (1990); *Smith v. United States*, 508 U.S. 223, 229 (1993); *Bailey v. United States*, 516 U.S. 137, 145 (1995).

with *Chapman v. United States*³⁹ described earlier, *Smith v. United States*⁴⁰ hinged on the application of a dictionary definition. The case involved a federal statute⁴¹ that imposed specified penalties if a defendant “during and in relation to . . . [a] drug trafficking crime[,] uses . . . a firearm.” In Mr. Smith’s case, his use of a firearm was *in exchange* for drugs. Justice O’Connor applied a definition of “use” which resulted in the imposition of the statutory penalties.⁴²

¶18 While English dictionaries were by far the ones most frequently used, French dictionaries also found their way into opinions during this period.⁴³

¶19 It is not difficult to see why the use of general dictionaries in U.S. Supreme Court opinions has been criticized. A major issue is that dictionaries are generally used as starting points. The current Court has been accused of misapplying dictionaries to arrive at end points.⁴⁴ There are often several dictionary definitions for a term, resulting in a measure of impreciseness. What the Court has been perceived as doing is to uncritically apply these “imperfect dictionary categorizations to resolve controversies definitively.”⁴⁵ This, in spite of the fact that “dictionaries are not as authoritative, precise, or scholarly as we and the Justices often assume.”⁴⁶ But as long as the Court continues to apply textualism in its statutory interpretation, dictionaries will continue to find their way into its opinions.

Use of *The Federalist*

¶20 In rationalizing its interpretation of the Constitution, the Supreme Court has found ready explanations in *The Federalist*. Under the name of Publius, Alexander Hamilton, James Madison, and John Jay produced a series of eighty-five essays in

39. 500 U.S. 453 (1991).

40. 508 U.S. 223 (1993).

41. 18 U.S.C. § 924(c)(1) (2000).

42. *Smith*, 508 U.S. at 229. Justice Scalia, in dissent, complained that trying to define a word as elastic as “use” cannot be done in isolation, but must be drawn from the context in which it is applied. He argued that firearms are normally “used” as weapons, not as items for barter, and that the majority opinion had misapplied the definition in this case to justify the enhanced sentence. *Id.* at 241–43 (Scalia, J., dissenting).

43. *E.g.*, Justice Marshall relied on JULES JERAUTE, *VOCABULAIRE FRANCAIS-ANGLAIS ET ANGLAIS-FRANCAIS DE TERMES ET LOCUTIONS JURIDIQUES* 205 (1953) and 3 *GRAND LAROUSSE DE LA LANGUE FRANCAISE* 1833 (1987) to come to a proper meaning of “lesion corporelle” and “bodily injury” as used in the authentic version of the Warsaw Convention, *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 536 (1991); Justice Stevens, in attempting to come to an understanding of “refouler” in the United Nations Convention Relating to the Status of Refugees, used *THE NEW CASSELL’S FRENCH DICTIONARY* 440 (1973) and the *LAROUSSE MODERN FRENCH-ENGLISH DICTIONARY* 545 (1978), *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 181 (1993).

44. Thumma & Kirchmeier, *supra* note 22, at 297 (“More frequently, the Court strays from their analytical framework and relies too heavily on dictionaries to provide an end point and an answer for what an important term must mean.”).

45. Note, *supra* note 23, at 1452.

46. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 *ARIZ. ST. L.J.* 275, 277 (1998).

New York newspapers in 1787–1788. The essays were published almost simultaneously in book form and have come to be known as *The Federalist Papers* or simply, *The Federalist*. In these essays, the authors advocated the ratification of the Constitution by New Yorkers. Because of the reputations of the individuals involved, *The Federalist* is recognized as one of the most authoritative commentaries on the new Constitution.⁴⁷ The Supreme Court developed an abiding appreciation of *The Federalist* during the period of this study; it cited individual essays 191 times.⁴⁸

¶21 The use of *The Federalist* in U.S. Supreme Court opinions has received a considerable amount of criticism by legal scholars. The Court has established a policy in the past decade of supporting state sovereignty under the “New Federalism,”⁴⁹ and depended on *The Federalist* to explain the rationale for several of its opinions.

¶22 This application of *The Federalist* to support content-based arguments is in marked contrast to the way *The Federalist* was applied in earlier U.S. Supreme Court opinions, when it was considered solely for its commentary value.⁵⁰ Indeed, it has been argued that the current Court has, on occasion, treated quotations from *The Federalist* as almost equivalent to the text of the Constitution.⁵¹ Some have criticized this use of *The Federalist* as inapplicable, in that the essays serve as a precedent “for applying specific rules in the context of legal cases and controversies.”⁵² While there is recognition of the usefulness of *The Federalist* in providing historical and philosophical context to several Constitutional provisions as the Court has done in the past, the last decade’s opinions moved beyond that application.⁵³

¶23 Another major criticism of the Court’s dependence on *The Federalist* goes to the lack of relevance of the ideas of white male property owners from more than two centuries ago to contemporary issues dealing with constitutional law. *The Federalist* deals primarily with political power, and political institutions in the

47. Buckner F. Melton, Jr., *The Supreme Court on The Federalist: A Citation List and Analysis, 1789–1996*, 85 KY. L.J. 243, 245–46 (1996–97).

48. This is not to say that *The Federalist* was not cited in Supreme Court opinions before the time period of this study, only that the number of cases in which it appeared, as well as the number of total citations, increased dramatically when compared with earlier time periods. For a very complete study of the application of *The Federalist* in Supreme Court opinions from 1789 to 1996, see Melton, *supra* note 47. This article contains charts that allow the reader to locate Supreme Court citations to *The Federalist* by case name, by subject, or by essay number. There are statistical summaries of the Supreme Court citations, including charts displaying the relative frequency of citations by essay number, timelines that plot frequency of all citations by year, a breakdowns of citations by Justice, by author of the essay cited, and by type of opinion (majority, concurring, dissenting, etc.).

49. Michael J. Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307, 309 (2000).

50. See David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 857 (2001).

51. *Id.*

52. Martinez & Richardson, *supra* note 49, at 309.

53. See *id.*

country have changed so dramatically since the 1780s as to render many of the ideas expressed in *The Federalist* of questionable value.⁵⁴

¶24 Some recent articles have attempted to downplay the value of *The Federalist* for analyzing Constitutional issues by pointing out that, basically, the essays were written in an effort to defend the Constitution from its critics.⁵⁵ The essays have been seen, in effect, as “propaganda documents,”⁵⁶ “a mere newspaper publication, written in the heat and hurry of the battle,”⁵⁷ and pieces of political advocacy, which at times reflect the “exigencies of debate, rather than a dispassionate account of constitutional meaning.”⁵⁸

¶25 The argumentative nature of the essays has caused some writers to look at what Hamilton and Madison, the two major contributors to *The Federalist*, may have really felt about things when removed from their public relations enterprise. The suggestion has been made that the true beliefs of *The Federalist* authors can be best understood by looking at what they said and did after the Constitution was ratified, not before.⁵⁹ There is a perception that Hamilton and Madison might have interpreted the Constitution differently at various times in their careers, and to best gauge how they might react to particular situations, their biographies should also be studied by the Justices; to consider the ideas of the authors only as they appear in *The Federalist* does not present an accurate representation of their deepest views on the proper relationship between the individual and the state.⁶⁰ There is also a feeling that because of the nature of the essays, written by three different authors, published sporadically, and devoid of any long-range planning, one cannot detect a central doctrine thesis.⁶¹

¶26 The argument has been made that in the case of *The Federalist* the character of the author should be considered along with what he said. As an example, while Hamilton may have advocated state’s rights in *The Federalist* No. 81, his argument should be tempered by his “consistent efforts to increase the power of the national government at the expense of the states.”⁶²

¶27 A cottage industry of critics of Justice Scalia has developed to analyze his

54. Peter E. Quint, *The Federalist Papers and the Constitution of the United States*, 77 KY. L.J. 369, 396 (1988–89). Quint contends that even though we still use the same words as the authors, such as “congress,” “president,” and “state,” these things would be almost unrecognizable today to people writing about them in 1787–88.

55. E.g., Michael P. Zuckert, *The Federalist at 200—What’s It to Us?* 7 CONST. COMMENT. 97, 106 (1990).

56. William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1309 (1998).

57. *Hunter v. Martin*, Devisee of Fairfax, 18 Va. (4 Munf.) 1, 27–28 (1815), quoted in Joseph M. Lynch, *The Federalists and The Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 26 (2000).

58. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998).

59. Lynch, *supra* note 57, at 28.

60. James G. Wilson, *The Most Sacred Text: The Supreme Court’s Use of the Federalist Papers*, 1985 BYU L. REV. 65, 119.

61. Melton, *supra* note 47, at 249–50.

62. McGowan, *supra* note 50, at 758.

penchant for using *The Federalist* as a sort of Constitutional legislative history while rejecting the elements of what constitutes legislative history for federal statutes in his opinions. His record has established a pattern of deeming any legislative discussion prior to a statute's enactment as unworthy of consideration while relying on *The Federalist* for providing an historical understanding of Constitutional provisions. Justice Scalia dismisses statutory legislative history not only when he writes for the Court or in dissent but also when he concurs with the court's judgment.⁶³ He ignores statutory history as a matter of course while embracing *The Federalist* as a primary guide for understanding the Constitution.

¶28 Most of the critics of the current Court's fixation with *The Federalist* feel that this dependence is misplaced. There is an appreciation of the contemporary value of *The Federalist* as a general work of political analysis.⁶⁴ It can be a useful aid for interpreting the Constitution, articulating "a series of political insights with respect to human nature, political attachment, and the behavior of political bodies, thus supplying a helpful backdrop against which the Constitution may be understood."⁶⁵ As discussed earlier, however, these critics believe the Court sometimes places undue emphasis on *The Federalist* in its treatment of constitutional law issues. The suggestion has been made that judges should refrain from taking *The Federalist* at face value, that they should not treat the essays "as *independently* probative evidence of constitutional meaning."⁶⁶ They were written to be persuasive, to support the ratification of the Constitution, and to reflect the opinions of three contemporaries of that process. They should be considered in that light, taken not as fact, but as the opinions of informed observers at the creation of the Constitution.⁶⁷ Considered in that light, Supreme Court Justices should apply a more critical treatment to *The Federalist* in their opinions.⁶⁸

Use of Newspapers

¶29 Newspaper articles were cited 132 times during the period of the study. In most cases, the number of newspaper article citations in an opinion that used them ranged from one to three. They were normally used to present background information on the individuals or incidents that were the subject of the litigation so they were usually close in time to the rendering of the opinion or to the events generating the conflict that led to the litigation that ultimately reached the Court.

¶30 Occasionally newspaper articles were cited in clusters larger than three to allow the Court to make a specific point. Such was the situation in *Arave v.*

63. Eskridge, *supra* note 56, at 1306.

64. Quint, *supra* note 54, at 397.

65. James W. Ducayet, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 854 (1993).

66. Manning, *supra* note 58, at 1359.

67. *Id.* at 1360.

68. *Id.* at 1365.

Creech.⁶⁹ Creech had been convicted in Idaho of murdering a fellow prisoner. Critical to the conviction and the death sentence was the interpretation of the Idaho statute that allowed for the death sentence if the murder was aggravated by an “utter disregard for life.” Upon affirmation of the sentence by the Idaho Supreme Court, Creech appealed to the United States District Court for the District of Idaho, which denied him relief; the Court of Appeals for the Ninth Circuit, however, found for Creech, holding that the term “utter disregard” was unconstitutionally vague.⁷⁰ The U.S. Supreme Court reversed that decision, holding that the term “cold-blooded,” used by the Idaho courts to describe “utter disregard,” was valid. In dissent, however, Justice Blackmun tried to show that the term “cold-blooded” was not as clear or precise as the majority felt it was. He cited newspaper articles in which that label had been used to describe “a murder by an ex-spouse angry over visitation rights, a killing by a jealous lover, a revenge killing, an ex-spouse ‘full of hatred,’ the close-range assassination of an enemy official by a foe in a bitter ethnic conflict, a murder prompted by humiliation and hatred, killings by fanatical cult members, a murderer who enjoyed killing, and perhaps most appropriately, *all* murders.”⁷¹ Justice Blackmun’s purpose in using these newspaper articles was to show that the metaphor “cold-blooded” did not have a specific meaning.⁷²

¶31 In *United States v. Lopez*,⁷³ the defendant had been convicted of violating the Gun-Free School Zones Act of 1990⁷⁴ for bringing a concealed .38 caliber handgun and five bullets to his high school. While charged earlier under Texas state law with firearms possession on school premises, that charge was dismissed when the federal charges were made. The defendant tried to get the grand jury indictment dismissed by contending it was unconstitutional for Congress to legislate control over public schools. The trial court held that the statute was a reasonable exercise of Congress’s power to regulate commerce and that interstate commerce was affected by the “‘business’ of elementary, middle and high schools.”⁷⁵

¶32 The guilty verdict was reversed by the Court of Appeals for the Fifth Circuit, and that decision was affirmed by the Supreme Court. In concurring with the majority opinion, Justice Kennedy argued that the states and local governments are best equipped to deal with weapons in schools and cited eight newspaper articles from around the country illustrating the existence of legislation to tighten gun-control laws on the local and state levels.⁷⁶

69. 507 U.S. 463 (1993).

70. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991)

71. *Arave*, 507 U.S. at 483–84 (Blackmun, J., dissenting) (citations omitted).

72. *Id.* at 484.

73. 514 U.S. 549 (1995).

74. 18 U.S.C. § 922(q)(1)(A) (2000).

75. *Lopez*, 514 U.S. at 552.

76. *Id.* at 582 (Kennedy, J., concurring) (citations omitted).

¶33 The application of older newspapers distinguished *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.⁷⁷ Camps Newfound/Owatonna ran church camps in Maine, which had an exemption for charitable institutions for real estate and personal taxes. There was a limited benefit for institutions operating for the benefit of Maine residents; if catering to nonresidents, benefits would apply only if weekly charges for services did not exceed \$30. Ninety-five percent of the appellant's campers were nonresidents, and weekly charges were \$400. Relief from its taxes was denied by the town of Harrison. The trial court granted relief to the camps on the basis of a violation of the Commerce Clause, but the decision was reversed by the Maine Supreme Court. The U.S. Supreme Court reversed that decision, holding that the denial of exemptions was indeed a violation of the Commerce Clause.

¶34 In dissent, Justice Thomas argued that the Import-Export Clause of the Constitution was more applicable in this case than was the Commerce Clause. He pointed out that the terms “import” and “export” as used for determining taxation had application in commerce in the 1700s, not only in trade with foreign nations but also in trade between and among the states. Justice Thomas cited to advertisements in eleven newspapers of the 1780s to illustrate that states had long considered exports and imports to and from the other states taxable.⁷⁸

¶35 American newspapers were the newspapers of choice during the period covered in this study, but sometimes, in order to prove its adherence to mainstream legal development, the Supreme Court looked to publications from outside the country. At issue in *Washington v. Glucksberg*⁷⁹ was the crime of assisted suicide. In his majority opinion, Chief Justice Rehnquist pointed out that the same debate was raging in the Commonwealth nations by citing to court opinions in Canada, Parliamentary documents in the UK, and a newspaper article from New Zealand.⁸⁰

¶36 *Muscarello v. United States*⁸¹ considered two cases involving the carrying of a firearm during and in relation to a drug-trafficking crime. Conviction under the applicable federal statute⁸² resulted in a mandatory five-year prison term. The first case involved a firearm found in a vehicle's glove compartment; the second dealt with guns found in the trunk of a car. In determining whether “carries a firearm” as used in the statute applied to these situations, Justice Breyer, in the

77. 520 U.S. 564 (1997).

78. *Id.* at 621–22 (Thomas, J., dissenting). Illustrative of the advertisements cited are GAZETTE OF THE STATE OF GA., Oct. 11, 1787, at 3 (“Just imported . . . Superfine Philadelphia flour”); S.C. WKLY. GAZETTE, Sept. 13, 1783, at 3 (“Just imported, In the Sloop Rosana, . . . from Rhode-Island, . . . Potatoes, Apples, Onions by the bunch and bushel, Beats, Carrots, and good warranted Cheese”); COLUMBIAN HERALD, Feb. 14, 1785, at 2 (complaint about legislation pending in Georgia—later adopted— taxing “all goods imported into the back part of that state from South Carolina”).

79. 521 U.S. 702 (1997).

80. *Id.* at 718 (citing Graeme Speden, *MPs Throw Out Euthanasia Bill*, DOMINION (Wellington), Aug. 17, 1995, at 1).

81. 524 U.S. 125 (1998).

82. 18 U.S.C. § 924(c)(1) (2000).

majority opinion, sought to determine the ordinary meaning of the word “carry” by consulting a variety of sources. Six different dictionaries were cited, along with the Bible, *Robinson Crusoe*, and *Moby Dick*, to show that “carry” had a meaning that applied to conveying something in a vehicle.⁸³ In addition to these materials, he also cited five newspaper articles supporting the application of the term to an automobile.⁸⁴

¶37 In dissent, Justice Ginsburg attempted to show that the word “carry” had several meanings that bore no relationship to a vehicle of any sort and that those meanings should be applicable to the situation at issue. Her argument was that “carry” should not be considered at large, but in a more limited sense, that is, upon a person. She, as Justice Breyer, looked at dictionaries, the Bible, works of literature, and even a speech by Theodore Roosevelt.⁸⁵ She also cited seven newspaper articles that, in describing the conveying of firearms in vehicles, used the word “transport” to discuss that activity; Justice Ginsburg found that to be a better word than “carry” for the situation presented in this case.⁸⁶

Use of the Internet

¶38 The Internet has only recently become a serious source for information on virtually anything. The Supreme Court has very slowly come to look to the Internet for information. While the number of citations to the Internet was small during the period covered by this study, some innovation in sites that were used marked the entry of this resource into Supreme Court opinions.

¶39 Justice Souter was the first U.S. Supreme Court Justice to cite the Internet in an opinion. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*⁸⁷ addressed challenges to statutes that dealt with the broadcasting of “patently offensive” sex-related material on cable television. In concurring with the majority, Souter argued that cable should be treated in many respects the same way as broadcast and the Internet, as they were approaching the day of using a common receiver,⁸⁸ and that establishing standards for one of these media would probably have an effect on the other two. In presenting his view, he provided two URLs as the citations for the sources he was relying on for his information.⁸⁹

83. *Muscarello*, 524 U.S. at 128–29 (citations omitted).

84. *Id.* at 129–30 (citations omitted).

85. *Id.* at 144 (Ginsburg, J., dissenting) (citations omitted; the Roosevelt reference was to the “Speak softly and carry a big stick” speech given at the Minnesota State Fair in 1901).

86. *Id.* at 142 n.3 (Ginsburg, J., dissenting) (citations omitted).

87. 518 U.S. 727 (1996).

88. *Id.* at 776–77 (Souter, J., concurring).

89. *Id.* at 777 (Souter, J., concurring) (citing David J. Lynch, *Speedier Access: Cable and Phone Companies Compete* (June 17, 1996), at <http://www.usatoday.com/life/cyber/bonus/cb006.htm>; *Gateway Ships First Destination Big Screen TV-PCs* (Apr. 29, 1996), at <http://www.gw2k.com/corpinfo/press/1996/destin.htm>).

¶40 *Muscarello v. United States*,⁹⁰ discussed earlier for its citation of newspapers,⁹¹ provided an opportunity for Justice Ginsburg, writing in dissent, to consult the Internet to show how “carry” had several applications different from that provided by Justice Breyer in the majority opinion. She used the Internet as sources for dialogue from the film *The Magnificent Seven*⁹² and the television series *M*A*S*H*⁹³ that she felt supported her position.

¶41 Lastly, Justice Souter, in a dissenting opinion, presented figures on state employees in March 1997, relying upon the Internet for his data.⁹⁴ (During the two Terms following this study, URLs were cited in eleven opinions; most of them dealt with legal information.)

The Use of Other Nonlegal Sources

¶42 Moving beyond the Supreme Court opinions that cite to dictionaries (271 citations), *The Federalist* (191 citations), newspaper articles (132 citations), and the Internet (5 citations), one finds a breadth of materials, in virtually every discipline, that the Court looked to during this period for building persuasive arguments in its opinions. That is not to say that there were not random sources that show up in citations seemingly by themselves, frequently as throw-ins at the end of a string cite.⁹⁵ When the Court uses nonlegal materials, there is a tendency to make an argument by citing to clusters of items dealing with the same topic. If nothing else, strength in numbers appears to be an operative rule.

90. 524 U.S. 125 (1998).

91. See *supra* ¶¶ 36–37.

92. *Muscarello*, 524 U.S. at 144 n.3 (Ginsburg, J., dissenting) (citing http://us.imdb.com/M/search_quotes?for=carry as a source for the line uttered by the character O’Reilly, played by Charles Bronson: “You think I am brave because I carry a gun; well, your fathers are much braver because they carry responsibility, for you, your brothers, your sisters, and your mothers.”).

93. *Muscarello*, 524 U.S. at 144 n.3 (Ginsburg, J., dissenting) (citing <http://www.geocities.com/Hollywood/8915/mashquotes.html> as a source for the line uttered by the character Hawkeye Pierce, played by Alan Alda: “I will not carry a gun. . . . I’ll carry your books, I’ll carry a torch, I’ll carry a tune, I’ll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I’ll even ‘hari-kari’ if you show me how, but I will not carry a gun.”).

94. *Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting) (citing STATE GOVERNMENT EMPLOYMENT DATA: MARCH 1997, available at <http://www.census.gov/pub/govs/apes97stus.txt>).

95. For example, citations to the Bible appeared in *Payne v. Tennessee*, 501 U.S. 808, 819 (1991); *Lee v. Weisman*, 505 U.S. 577, 604 (1992); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 550 (1995); and *Muscarello v. United States*, 524 U.S. 125, 129 (1998). Citations to works of fiction were also used, e.g., ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 325 (1927), cited in *Chisum v. Roemer*, 501 U.S. 380, 396 (1991); W. SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (Penguin ed. 1992), cited in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 592 (1994); DANIEL DEFOE, ROBINSON CRUSOE 174 (J. Crowley ed., 1972), and HERMAN MELVILLE, MOBY DICK 43 (U. Chicago 1952), cited in *Muscarello v. United States*, 524 U.S. 125, 129 (1998). Encyclopedias were also cited in several cases, including *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 588 (1991) (citing 16 THE NEW ENCYCLOPEDIA BRITANNICA 935 (1989) (description of “performance dance”)), and *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 572 (1994) (citing NORTON-GROVE CONCISE ENCYCLOPEDIA OF MUSIC 613 (1988) (description of “rap”)).

¶43 While the *Report of the Federal Courts Study Committee* took special notice of the increasing use of scientific and technical sources in federal court opinions, as one reviews recent U.S. Supreme Court opinions, it is evident that virtually every discipline, scientific or not, has become fair game for citation. The application of most materials is understandable based on the nature of the litigation (e.g., PCB mortality studies of workers used in an opinion dealing with asbestos), but the Court very often applies more than one discipline in its opinions. And occasionally there is an opinion that looks to seemingly unrelated information to support its holding.

¶44 Reviewing individual opinions is the best way to illustrate the types of other sources relied on by the Supreme Court during the time frame of this study. Doing so shows not only which disciplines are represented but also the types of litigation in which the Court has come to depend on these materials.

¶45 One might expect political science to find heavy application by the Court, and that was the case for this period of time. Political science sources were cited by Justice Brennan in writing for the Court in *Rutan v. Republican Party of Illinois*,⁹⁶ a case dealing with patronage; in concurring, Justice Stevens expanded considerably on Justice Brennan's list,⁹⁷ as did Justice Scalia in dissent.⁹⁸ Other opinions in which political science materials were cited as supporting authority include *Burson v. Freeman*,⁹⁹ dealing with the display or distribution of campaign

96. 497 U.S. 62, 74–75 (1990) (citing LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE 67 (2d ed. 1983); CONGRESSIONAL QUARTERLY, INC., STATE GOVERNMENT: CQ'S GUIDE TO CURRENT ISSUES AND ACTIVITIES 134 (Thad L. Beyle ed., 1989–1990); Frank J. Sorauf, *Patronage and Party*, 3 MIDWEST J. POL. SCI. 115, 118–20 (1959)).
97. *Rutan*, 497 U.S. at 83, 88–89 (Stevens, J., concurring) (citing RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 2–3 (1969); GERALD POMPER, VOTERS, ELECTIONS, AND PARTIES 282–304 (1988); DAVID E. PRICE, BRINGING BACK THE PARTIES 22–25 (1984); Raymond E. Wolfinger, *Why Political Parties Have Not Withered Away and Other Revisionist Thoughts*, 34 J. POL. 365, 398 (1972); JUDSON JAMES, AMERICAN POLITICAL PARTIES IN TRANSITION 85 (1974); Michael Johnston, *Patrons and Clients, Jobs and Machines: A Case Study of the Use of Patronage*, 73 AM. POL. SCI. REV. 385 (1979); William J. Grimshaw, *The Political Economy of Machine Politics*, 4 CORRUPTION & REFORM 15 (1989); Anne Freedman, *Doing Battle With the Patronage Army: Politics, Courts and Personnel Administration in Chicago*, 48 PUB. ADMIN. REV. 847 (1988); MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR . . . ; POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 36 (1971)).
98. In addition to citing the Sorauf article mentioned by Justice Brennan, and the works by Pomper, Price, Wolfinger, Grimshaw, and Tolchin & Tolchin mentioned by Justice Stevens, Justice Scalia relied on a number of other political science sources. *Rutan*, 497 U.S. at 93, 96–97, 108 (Scalia, J., dissenting) (citing WILLIAM RIORDAN, PLUNKITT OF TAMMANY HALL 13 (1963); Roy Gardner, *A Theory of the Spoils System*, 54 PUBLIC CHOICE 171, 181 (1987); Marie-France Toinet & Ian Glenn, *Clientelism and Corruption in the "Open" Society: The Case of the United States*, in PRIVATE PATRONAGE AND PUBLIC POWER: POLITICAL CLIENTELISM IN THE MODERN STATE 193, 202 (Christopher Clapham ed., 1982); Elmer E. Cornwell, Jr., *Bosses, Machines and Ethnic Politics*, in ETHNIC GROUP POLITICS 190, 195–97 (Harry A. Bailey, Jr. & Ellis Katz eds., 1969); N.Y. AMSTERDAM NEWS, Apr. 1, 1978, at A-4, quoted in Charles V. Hamilton, *The Patron-Recipient Relationship and Minority Politics in New York City*, 94 POL. SCI. Q. 211, 212 (1979)).
99. 504 U.S. 191, 200, 201, 202, 204 (1992) (citing ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1–6 (1917); JOSEPH PRATT HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 15–16 (1934); JERROLD G. RUSK, THE EFFECT OF THE AUSTRALIAN BALLOT

literature within one hundred feet of a polling place; *Holder v. Hall*,¹⁰⁰ addressing the composition of county government; *Miller v. Johnson*,¹⁰¹ a redistricting and gerrymandering case; and *Timmons v. Twin City Area New Party*,¹⁰² dealing with the constitutionality of multiple party or “fusion” candidates for public office.

REFORM ON SPLIT TICKET VOTING: 1876–1908, at 8–11 (1968); SPENCER DELANCEY ALBRIGHT, THE AMERICAN BALLOT 14–19 (1942); VALDIMER ORLANDO KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 649 (1952); JOHN FRANCIS REYNOLDS, TESTING DEMOCRACY: ELECTORAL BEHAVIOR AND PROGRESSIVE REFORM IN NEW JERSEY, 1880–1920, at 36 (1988); JAMES LINDSAY GORDON, THE PROTECTION OF SUFFRAGE 13 (1891); LIONEL E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 24 (1968); JOHN HENRY WIGMORE, THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES 69, 71, 78, 79 (1889); 2 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 738 (1892)).

100. Justice O’Connor relied on Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 5 (Chandler Davidson ed., 1984), and Victor S. DeSantis, *County Government: A Century of Change*, in THE MUNICIPAL YEARBOOK 1989, at 80, 83 (1989). *Holder v. Hall*, 512 U.S. 874, 888, 889 (1994) (O’Connor, J., concurring). Justice Scalia relied on LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 49 n.58 (1994); THE MUNICIPAL YEARBOOK 14 tbl. (1988); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–91 (1967); Arend Lijphart, *Proportionality by Non-PR Methods: Ethnic Representation in Belgium—Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe*, in ELECTORAL LAWS AND THEIR CONSEQUENCES 113, 116 (Bernard Grofman & Arend Lijphart eds., 1986); THOMAS HARE, THE ELECTION OF REPRESENTATIVES, PARLIAMENTARY AND MUNICIPAL: A TREATISE (4th ed. 1873); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861); Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in CHOOSING AN ELECTORAL SYSTEM 191, 198 (Arend Lijphart & Bernard Grofman eds., 1984); Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375 (1981). *Holder*, 504 U.S. at 894, 898, 900, 906, 925 (Scalia, J., concurring).
101. 515 U.S. 900, 936–37, 944, 945 (1995) (Ginsburg, J., dissenting) (citing Laughlin McDonald et al., *Georgia*, in QUIET REVOLUTION IN THE SOUTH 68 (Chandler Davidson & Bernard Grofman eds., 1994); ALFRED HOLT STONE, STUDIES IN THE AMERICAN RACE PROBLEM 354–55 (1908); Ralph Wardlaw, *Negro Suffrage in Georgia, 1867–1930*, at 69 (1932) (unpublished manuscript); NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT 19–20 (1963); EDGAR LITT, ETHNIC POLICIES IN AMERICA: BEYOND PLURALISM 2 (1970); *Preface to ETHNIC GROUP POLITICS*, at ix (Harry A. Bailey, Jr. & Ellis Katz eds., 1969); STEVEN P. ERIE, RAINBOW’S END: IRISH-AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840–1985, at 91 (1988)).
102. 520 U.S. 351, 356, 357, 361, 362, 368 (1997). Chief Justice Rehnquist, in the majority opinion, made use of Peter H. Argersinger, “*A Place on the Ballot*”: *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288–90 (1980); S. COBBLE & S. SISKIND, FUSION: MULTIPLE PARTY NOMINATION IN THE UNITED STATES 8 (1993); RICHARD M. VALELLY, RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY (1989); JOHN EARL HAYNES, DUBIOUS ALLIANCE: THE MAKING OF MINNESOTA’S DFL PARTY 9 (1984); MILLARD L. GIESKE, MINNESOTA FARMER-LABORISM: THE THIRD-PARTY ALTERNATIVE (1979); BERNARD L. HYINK ET AL., POLITICS AND GOVERNMENT IN CALIFORNIA 76 (12th ed. 1989); DANIEL A. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 134 (1974). Justice Stevens, in dissent, cited the Mazmanian and Argersinger works used by Rehnquist. In addition, he relied on ALEXANDER M. BICKEL, REFORM & CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 80 (1971); STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 4–9 (1984). *Timmons*, 520 U.S. at 375, 378, 380, 381 (Stevens, J., dissenting). Justice Souter, also in dissent, cited to WILLIAM J. CROTHY, AMERICAN PARTIES IN DECLINE 26–34 (2d ed. 1984); Richard Jensen, *The Last Party System: Decay of Consensus*, in THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS 219, 225 (Paul Kleppner et al. eds., 1981); James L. Sundquist, *Party Decay and the Capacity to Govern*, in THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE 42–69 (Joel L. Fleishman ed., 1982). *Timmons*, 520 U.S. at 383–84 (Souter, J., dissenting).

¶46 Medical publications were heavily used in *Cruzon v. Director, Missouri Department of Health*,¹⁰³ dealing with the foregoing of life-sustaining treatment for the terminally ill; *Metro-North Commuter Railroad Co. v. Buckley*,¹⁰⁴ where a pipefitter's exposure to asbestos was the issue; and *General Electric Co. v. Joiner*,¹⁰⁵ a case dealing with small-cell lung cancer contracted by exposure to PCBs manufactured by or present in materials manufactured by General Electric. Justice Breyer supplemented the Chief Justice's medical titles with additional sources in his concurring opinion.¹⁰⁶

¶47 Business-related materials were used in *Eastman Kodak v. Image Technical Services*,¹⁰⁷ where the issue was the accusation of monopolizing service to

103. 497 U.S. 261, 288–89 (1990) (O'Connor, J., concurring) (citing COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, AMA ETHICAL OPINION 2.20, WITHHOLDING OR WITHDRAWING LIFE-PROLONGING MEDICAL TREATMENT, CURRENT OPINIONS 13 (1989); HASTINGS CTR., GUIDELINES ON THE TERMINATION OF LIFE-SUSTAINING TREATMENT AND THE CARE OF THE DYING 59 (1987); David Major, *The Medical Procedures for Providing Food and Water: Indications and Effects*, in BY NO EXTRAORDINARY MEANS: THE CHOICE TO FOREGO LIFE-SUSTAINING FOOD AND WATER 25 (Joanne Lynn ed., 1986)). Representative of the sources cited by Justice Brennan in dissent are Ronald E. Cranford, *The Persistent Vegetative State: The Medical Reality*, 18 HASTINGS CTR. REP. 27, 28, 31 (1988); Helene Levens Lipton, *Do-Not-Resuscitate Decisions in a Community Hospital: Incidence, Implications and Outcomes*, 256 JAMA 1164, 1168 (1986); Carey P. Page et al., *Techniques in Delivery of Liquid Diets*, in NUTRITION IN CLINICAL SURGERY 66–67 (Mervyn Deitel ed., 1985); Marie Bernard & Loretta Forlaw, *Complications and Their Prevention*, in ENTERAL AND TUBE FEEDING 553 (John L. Rombeau & Michael D. Caldwell eds., 1984); Laura E. Matarese, *Enteral Alimentation*, in SURGICAL NUTRITION 726 (Josef E. Fischer ed., 1983); *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient*, 39 NEUROLOGY 125 (1989). *Cruzon*, 497 U.S. at 303, 307, 308 (Brennan, J., dissenting). Justice Stevens, also in dissent, presented statistics on deaths occurring in institutional settings to show that as medicine has improved, people expire more often in hospitals and long-term care institutions, citing to DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 17–18 (1983) (quoting Lewis Thomas, *Dying as Failure*, 447 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 3 (1980)). *Cruzon*, 497 U.S. at 340 n.11 (Stevens, J., dissenting).
104. 521 U.S. 424, 434–35, 441 (1997). In his majority opinion, Justice Breyer relied upon William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980–2030*, 3 AM. J. INDUS. MED. 259 (1982); U.S. DEPT OF HEALTH & HUMAN SERVICES, 1 SEVENTH ANNUAL REPORT ON CARCINOGENS 71 (1994); James L. Pirkle et al., *Exposure of the U.S. Population to Environmental Tobacco Smoke*, 275 JAMA 1233, 1237 (1996); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 94 (1996); AM. CANCER SOC'Y, CANCER FACTS AND FIGURES —1997, at 1; REPORT OF THE U.S. PREVENTIVE SERVICES TASK FORCE, GUIDE TO CLINICAL PREVENTIVE SERVICES, at xxvii, xxx–xxxi, xlvii–xcii (2d ed. 1996).
105. 522 U.S. 136, 145–46 (1997). Chief Justice Rehnquist, in the majority opinion, cited Pier Alberto Bertazzi et al., *Cancer Mortality of Capacitor Manufacturing Workers*, 11 AM. J. INDUS. MED. 165 (1987) (study of Italian workers); J. Zack & D. Musch, *Mortality of PCB Workers at the Monsanto Plant in Sauget, Illinois* (Dec. 14, 1979) (unpublished report); A. Ronneberg et al., *Mortality and Incidence of Cancer Among Oil Exposed Workers in a Norwegian Cable Manufacturing Company*, 45 BRITISH J. INDUS. MED. 595 (1988); M. Karatsune et al., *Analysis of Deaths Seen Among Patients with Yusho—A Preliminary Report*, 16 CHEMOSPHERE 2085 (1987) (study of Japanese workers).
106. *General Electric*, 522 U.S. at 148 (Breyer, J., concurring) (citing NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, UNITED STATES 1996–97 AND INJURY CHARTBOOK 117 (1997); NAT'L TOXICOLOGY PROGRAM, U.S. DEP'T OF HEALTH & HUMAN SERVICES, 1 SEVENTH ANNUAL REPORT ON CARCINOGENS, at v–vi (1994)).
107. 504 U.S. 451, 476 (1992). In his majority opinion, Justice Blackmun cited Steven Salop & Joseph Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV.

Kodak's copying and micrographing equipment by limiting the availability of replacement parts. *Edenfield v. Fane*,¹⁰⁸ dealing with the direct solicitation of new clients by certified public accountants, and *United States v. Winstar Corp.*,¹⁰⁹ involving the enforceability of contracts between the federal government and regulated industries, also included a variety of business sources used as supporting authority.

¶48 Technology of various types was explored in *Norfolk & Western Railway v. Hiles*,¹¹⁰ which dealt with injuries to a railroad employee sustained while trying to align an off-center drawbar on a railroad car; *Denver Area Educational Telecommunications Consortium v. FCC*,¹¹¹ which dealt with "patently offensive"

ECON. STUDIES 493 (1977); Steven Salop, *Information and Market Structure—Information and Monopolistic Competition* 66 AM. ECON. REV. 240 (1976); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); F. SCHERER & D. ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 16–17 (3d ed.1990). In dissent, Justice Scalia cited ALFRED RICHARD OXENFELDT, INDUSTRIAL PRICING AND MARKET PRACTICES 378 (1951). *Eastman Kodak*, 504 U.S. at 502 (Scalia, J., dissenting).

108. 507 U.S. 761, 769, 771–72, 775 (1993). Justice Kennedy, in his majority opinion, cited 1 AM. INST. OF CERTIFIED PUBLIC ACCOUNTANTS, PROFESSIONAL STANDARDS AU § 110.01 (1991); AM. INST. OF CERTIFIED PUBLIC ACCOUNTANTS, REPORT OF THE SPECIAL COMMITTEE ON SOLICITATION, at app. 29 (1981); PHILIP G. COTTELL & TERRY M. PERLIN, ACCOUNTING ETHICS 39–40 (1990); GARY JOHN PREVITS, THE SCOPE OF CPA SERVICES: A STUDY OF THE DEVELOPMENT OF THE CONCEPT OF INDEPENDENCE AND THE PROFESSION'S ROLE IN SOCIETY 142 (1985); GEN. ACCOUNTING OFFICE, CPA AUDIT QUALITY: STATUS OF ACTIONS TAKEN TO IMPROVE AUDITING AND FINANCIAL REPORTING OF PUBLIC COMPANIES 36 (1989); HARRY T. MAGILL & GARY JOHN PREVITS, CPA PROFESSIONAL RESPONSIBILITIES: AN INTRODUCTION 105–08 (1991).
109. 518 U.S. 839, 847–49, 852, 857 (1996). Justice Souter's majority opinion applied eighteen different titles, among them: Carl Horowitz, *The Continuing Thrift Bailout*, INVESTOR'S BUSINESS DAILY, Feb. 1, 1996, at A1; LAWRENCE J. WHITE, THE S & L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION 157 (1991); MARTIN E. LOWY, HIGH ROLLERS: INSIDE THE SAVINGS AND LOAN DEBACLE 37 (1991); ANTHONY PHILLIPS ET AL., BASIC ACCOUNTING FOR LAWYERS 121 (4th ed. 1988); JERRY M. ROSENBERG, DICTIONARY OF BANKING AND FINANCIAL SERVICES 233 (2d ed. 1985); RALPH ESTES, DICTIONARY OF ACCOUNTING 29 (1981); OFFICE OF THRIFT SUPERVISION, CAPITAL ADEQUACY: GUIDANCE ON THE STATUS OF CAPITAL AND ACCOUNTING FORBEARANCES AND CAPITAL INSTRUMENTS HELD BY A DEPOSIT INSURANCE FUND, THRIFT BULLETIN No. 38-2 (Jan. 9, 1990).
110. 516 U.S. 400, 402–05 (1996). In his majority opinion, Justice Thomas made use of RICHARD REINHARDT, WORKIN' ON THE RAILROAD 274 (1970); JOHN H. WHITE, AMERICAN RAILROAD FREIGHT CAR: FROM THE WOOD-CAR ERA TO THE COMING OF STEEL 490 (1993); Frank J. Wilner, *Safety: "A Great Investment,"* RAILWAY AGE, Mar. 1993, at 53; Charles H. Clark, *Development of the Semiautomatic Freight-Car Coupler, 1863–1893*, 13 TECH. & CULTURE 170, 180–82 (1972).
111. 518 U.S. 727, 744–45, 761 (1996). Justice Breyer, in his majority opinion, cited a variety of sources, including Carrie Heeter et al., *Parental Influences on Viewing Style*, in CABLEVIEWING 140 (Carrie Heeter & Bradley S. Greenberg eds., 1988); Kenneth Jost, *The Future of Television*, 4 CQ RESEARCHER 1131, 1146 (1994); LELAND L. JOHNSON, TOWARD COMPETITION IN CABLE TELEVISION (1994); PATRICIA AUFDERHEIDE, PUBLIC ACCESS CABLE PROGRAMMING, CONTROVERSIAL SPEECH, AND FREE EXPRESSION (1992); DIANE AGOSTA ET AL., THE PARTICIPATE REPORT: A CASE STUDY OF PUBLIC ACCESS CABLE TELEVISION IN NEW YORK STATE 28 (1990). In addition to the Agosta and Aufderheide works, Justice Kennedy, in dissent, also cited to DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 3.01[3] (1996). *Denver Area Educ. Telecommunications Consortium*, 518 U.S. at 788, 808 (Kennedy, J., dissenting). Justice Thomas, also in dissent, cited only to the Brenner book. *Denver Area Educ. Telecommunications Consortium*, 518 U.S. at 830 (Thomas, J., dissenting).

sex-related programming on cable television; and *Kumho Tire Co. v. Carmichael*,¹¹² which involved a discussion of industry studies on standards for tires.

¶49 History is generally considered in decisions involving Indian sovereignty, and such was the case in *Duro v. Reina*,¹¹³ where the issue was criminal jurisdiction over a defendant who was not an Indian. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*,¹¹⁴ histories of St. Patrick's Day, Evacuation Day, and parades in America were cited to reach a decision in a challenge to denial of participation in an annual parade in Boston.

¶50 Psychiatric articles were consulted in *Washington v. Harper*,¹¹⁵ a case addressing the issue of whether a judicial hearing was required before antipsychotic drugs could be administered to a mentally ill prisoner against his will. The constitutionality of a Kansas statute establishing procedures for the civil commitment of persons was the focus in *Kansas v. Hendricks*,¹¹⁶ causing the Court to consult several psychiatric studies.

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112. 526 U.S. 137, 142–43, 157 (1999). In the majority opinion, Justice Breyer cited JOHN C. DIXON, TIRES, SUSPENSION AND HANDLING 68–72 (2d ed. 1996); MIKE MARVIGIAN, PERFORMANCE WHEELS AND TIRES 81, 83 (1998); ALEX MARKOVICH, HOW TO BUY AND CARE FOR TIRES 4 (1994) (illustration of the construction of a radial-ply tire); Stephen Bobo, *Tire Flaws and Separations*, in MECHANICS OF PNEUMATIC TIRES 636–37 (Samuel K. Clark ed., 1981); Cheryl Schnuth et al., Compression Grooving and Rim Flange Abrasion as Indicators of Over-Deflected Operating Conditions in Tires, Address presented to Rubber Division of the American Chemical Society (Oct. 21–24, 1997); J. D. Walter & R. K. Kiminecz, Bead Contact Pressure Measurements at the Tire-Rim Interface, Address presented to the Society of Automotive Engineers, Inc. (Feb. 24–28, 1975).
113. 495 U.S. 676, 691, 695 (1990). Justice Kennedy, writing for the majority, cited S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 70–150 (1973); ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 201–300 (1970); SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS (1983); HAROLD E. DRIVER, INDIANS OF NORTH AMERICA (1961); LESLIE SPIER, YUMAN TRIBES OF THE GILA RIVER (1933).
114. 515 U.S. 557, 560, 568 (1995). Justice Souter's majority opinion cited JOHN DAVID CRIMMINS, ST. PATRICK'S DAY: ITS CELEBRATION IN NEW YORK AND OTHER AMERICAN PLACES, 1737–1845, at 15, 19 (1902); 1 HENRY STEELE COMMAGER & RICHARD B. MORRIS, THE SPIRIT OF 'SEVENTY SIX: THE STORY OF THE AMERICAN REVOLUTION AS TOLD BY PARTICIPANTS 138–83 (1985); THE AMERICAN BOOK OF DAYS 262–65 (Jane M. Hatch ed., 3d ed. 1978); CELEBRATION OF THE CENTENNIAL ANNIVERSARY OF THE EVACUATION OF BOSTON BY THE BRITISH ARMY (George W. Ellis ed., 1876); SUSAN G. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986).
115. 494 U.S. 210, 223, 227, 231, 234 (1990). In his majority opinion, Justice Kennedy relied upon Am. Psychiatric Ass'n, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, in CODES OF PROFESSIONAL RESPONSIBILITY 129–35 (Rena A. Gorlin ed., 1986); Paul H. Soloff, *Physical Controls: The Use of Seclusion and Restraint in Modern Psychiatric Practice*, in CLINICAL TREATMENT OF THE VIOLENT PERSON 119–37 (Loren Roth ed. 1987); Harold I. Schwartz et al., *Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication*, 39 HOSP. & COMMUNITY PSYCHIATRY 1049 (1988); Paul S. Applebaum, *The Right to Refuse Treatment With Antipsychotic Medications: Retrospect and Prospect*, 145 AM. J. PSYCHIATRY 413, 417–18 (1988).
116. 521 U.S. 346, 357, 359, 360 (1997). Justice Thomas, in his majority opinion, made use of ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA (1949); GERALD N. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 (1973); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xxiii, xxvii (4th ed. 1994) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL]; AM. PSYCHIATRIC ASS'N, TREATMENT OF PSYCHOTIC DISORDERS 617–33 (1989); Gene G. Abel & Joanne-L. Rouleau, *Male Sex Offenders*, in HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS: NONPSYCHOTIC MENTAL DISORDERS 271 (Michael E. Thase et al. eds., 1990). Justice Kennedy used only DIAGNOSTIC AND STATISTICAL MANUAL, *supra*, at 524–25, 527–28. *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring). In addition to the APA manual and the Abel & Rouleau article

¶51 What constitutes a “mixture” of LSD was the issue in *Chapman v. United States*.¹¹⁷ Justice Stevens, in dissent, argued that, instead of applying weight as a determination for enhanced punishment, dosage should be the measure. He cited to Judge Posner’s dissent in *United States v. Marshall*¹¹⁸ and included the citations to publications on drug abuse to which Posner had referred.¹¹⁹ Focusing on the issue of cruel and unusual punishment, *Harmelin v. Michigan*¹²⁰ employed studies linking drug addiction and crime.

¶52 Religious studies were looked at in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹²¹ a case involving an ordinance prohibiting cruelty to animals, including the sacrificial killing of animals for religious reasons and outside areas zoned for slaughterhouses. Science in general was consulted in reaching a decision regarding the admissibility of expert scientific testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²² Geological studies and their relation to coal and natural gas were used in *Amoco Production Co. v. Southern Ute Indian Tribe*,¹²³ a

and Deutsch study cited by Thomas, Justice Breyer, in dissent, also cited to RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 57 (1995); Am. Psychiatric Ass’n, *Guidelines for Legislation on the Psychiatric Hospitalization of Adults*, 140 AM. J. PSYCHIATRY 672, 673 (1983); Frank H. DeLand & Neal Borenstein, *Medicine Court II, Rivers in Practice*, 147 AM. J. PSYCHIATRY 38 (1990). *Hendricks*, 521 U.S. at 375–77 (Breyer, J., dissenting).

117. 500 U.S. 453 (1991).

118. 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting).

119. *Chapman*, 500 U.S. at 475 (Stevens, J., dissenting) (citing JEROME J. PLATT, HEROIN ADDICTION: THEORY, RESEARCH, AND TREATMENT 50 (2d ed. 1986); DIAMORPHINE IN MEDICAL PRACTICE 63, 98 (D. Bruce Scott ed., 1988); ARNOLD WASHTON, COCAINE ADDICTION: TREATMENT, RECOVERY AND RELAPSE PREVENTION 18 (1989); COCAINE USE IN AMERICA: EPIDEMIOLOGIC AND CLINICAL PERSPECTIVES 214 (Nicholas J. Kozel & Edgar H. Adams eds.) (National Institute on Drug Abuse Pamphlet No. 61, 1985)).

120. 501 U.S. 957, 1002–03 (1991) (Kennedy, J., concurring) (citing Paul J. Goldstein, *Drugs and Violent Crime*, in PATHWAYS TO CRIMINAL VIOLENCE 16, 24–36 (Neal Alan Weiner & Marvin E. Wolfgang eds., 1989); NAT’L INST. OF JUSTICE, 1989 DRUG USE FORECASTING ANNUAL REPORT 9 (1990); NAT’L INST. OF JUSTICE, 1988 DRUG USE FORECASTING ANNUAL REPORT 4 (1990); U.S. DEP’T OF HEALTH & HUMAN SERVICES, EPIDEMIOLOGICAL TRENDS IN DRUG ABUSE 107 (1990)).

121. 508 U.S. 520, 524–25 (1993). Justice Kennedy’s majority opinion relied upon 13 ENCYCLOPEDIA OF RELIGION 66 (Mircea Eliade ed., 1987); 1 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE 183 (Charles H. Lippy & Peter W. Williams eds., 1988); 14 ENCYCLOPAEDIA JUDAICA 600, 600–05 (1971); CYRIL GLASSE, ENCYCLOPEDIA OF ISLAM 178 (1989); MIGENE GONZALEZ-WIPPLER, SANTERIA: THE RELIGION; A LEGACY OF FAITH, RITES, AND MAGIC 3–4 (1989).

122. 509 U.S. 579, 593–94 (1993). Justice Blackmun’s majority opinion cited CARL GUSTAV HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (1966); KARL L. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989); David F. Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 JAMA 1438 (1990); SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS 61–76 (1990); JOHN M. ZIMAN, RELIABLE KNOWLEDGE: AN EXPLORATION OF THE GROUNDS FOR BELIEF IN SCIENCE 130–33 (1978); Arnold S. Relman & Marcia Angell, *How Good Is Peer Review?* 321 NEW ENG. J. MED. 827 (1989).

123. 526 U.S. 865, 871–73, 875–76 (1999). Justice Kennedy, writing for the majority, applied Maurice Ducloux & Ann G. Kimm, *Coal Beds: A Source of Natural Gas*, OIL & GAS J., June 16, 1975, at 47; Martin L. Gorbaty & John W. Larsen, *Coal Structure and Reactivity*, in 3 ENCYCLOPEDIA OF PHYSICAL SCIENCE AND TECHNOLOGY 437 (Robert A. Meyers ed., 2d ed. 1992); DIRK WILLEM VAN KREVELEN, COAL 90 (3d ed. 1993); RUDY E. ROGERS, COALBED METHANE: PRINCIPLES AND PRACTICE 148 (1994); DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER 543 (1991); ELWOOD S. MOORE, COAL: ITS PROPERTIES, ANALYSIS, CLASSIFICATION, GEOLOGY, EXTRACTION, USES AND DISTRIBUTION 308 (1922); Harry Pery, *The Gasification of Coal*, SCI. AM., Mar. 1974, at 19–25.

decision that hinged on whether coalbed methane gas should be considered as part of the reservation of “coal” to the United States in land sold to settlers in 1909 and 1910.

¶53 A challenge to the plan for the 2000 Census required the Court in *Department of Commerce v. United States House of Representatives*¹²⁴ to look at histories of the census and the methods that had been employed in earlier population counts. Extensive use of health studies was made in both Justice O’Connor’s majority opinion¹²⁵ and the dissent of Justice Stevens¹²⁶ in *Sutton v. United Air Lines, Inc.*, a case involving the Americans with Disabilities Act

124. 525 U.S. 316, 322–24, 336, 341 (1999). Justice O’Connor, in her majority opinion, used MARGO ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 221–22 (1988); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *REPORT TO CONGRESS: THE PLAN FOR CENSUS 2000*, at 2 & n.1 (1997); NAT’L RESEARCH COUNCIL, *MODERNIZING THE U.S. CENSUS* 30–31 (Barry Edmonston & Charles Schultze eds., 1995); NAT’L RESEARCH COUNCIL, *PREPARING FOR THE 2000 CENSUS: INTERIM REPORT II* (Andrew A. White & Keith Rust eds., 1997); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *CENSUS 2000 OPERATIONAL PLAN* (1997); W. STULL HOLT, *THE BUREAU OF THE CENSUS: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 1–94 (1929); NAT’L RESEARCH COUNCIL, *COUNTING PEOPLE IN THE INFORMATION AGE* 1 (Duane L. Steffey & Norman M. Bradburn eds., 1994). In addition to providing three dictionary definitions of the word “enumerate,” Justice Scalia in his concurring opinion cited to HYMAN ALTERMAN, *COUNTING PEOPLE: THE CENSUS IN HISTORY* 168–70 (1969). *Dep’t of Commerce*, 525 U.S. at 347–48 (Scalia, J., concurring). Justice Breyer, also concurring, cited to BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *200 YEARS OF CENSUS TAKING: POPULATION AND HOUSING QUESTIONS, 1790–1990*, at 5 (1989); ROBERT M. JENKINS, *PROCEDURAL HISTORY OF THE 1940 CENSUS OF HOUSING AND POPULATION* 13–15 (1985); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *REPORT TO CONGRESS: THE PLAN FOR CENSUS 2000*, at 23 (1997); NAT’L RESEARCH COUNCIL, *PANEL TO EVALUATE ALTERNATIVE CENSUS METHODS, COUNTING PEOPLE IN THE INFORMATION AGE* 100 (Duane L. Steffey & Norman M. Bradburn eds., 1994); MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 210–11 (1988); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *EFFECT OF SPECIAL PROCEDURES TO IMPROVE COVERAGE IN THE 1979 CENSUS* (1974). *Dep’t of Commerce*, 525 U.S. at 351–52, 356, 364 (Breyer, J., concurring).
125. 527 U.S. 471, 484–87 (1999) (citing Steven T. Johnson, *Antipsychotics: Pros and Cons of Antipsychotics*, RN, Aug. 1997, at 45; *Liver Risk Warning Added to Parkinson’s Drug*, FDA CONSUMER, Mar. 1, 1999, at 5; William J. Curry & David L. Kulling, *Newer Antiepileptic Drugs*, 57 AM. FAM. PHYSICIAN 513 (1998); NAT’L COUNCIL ON DISABILITY, *TOWARD INDEPENDENCE* 10 (1986); NAT’L COUNCIL ON DISABILITY, *ON THE THRESHOLD OF INDEPENDENCE* (1988); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *DISABILITY, FUNCTIONAL LIMITATION, AND HEALTH INSURANCE COVERAGE: 1984/85*, at 2 (1986); NAT’L INST. ON DISABILITY AND REHABILITATIVE RESEARCH, *DATA ON DISABILITY FROM THE NATIONAL HEALTH INTERVIEW SURVEY 1983–1985*, at 61–62 (1988); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 106 tbl. 168 (1989); MATHEMATICA POLICY RESEARCH, INC., *DIGEST OF DATA ON PERSONS WITH DISABILITIES* 25 (1984); NAT’L CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH & HUMAN SERVICES, *VITAL AND HEALTH STATISTICS, CURRENT ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, 1989*, Series 10, at 7–8 (1990); NAT’L ADVISORY EYE COUNCIL, U.S. DEP’T OF HEALTH & HUMAN SERVICES, *VISION RESEARCH—A NATIONAL PLAN: 1999–2003*, at 7 (1998); NAT’L INST. OF HEALTH, *NATIONAL STRATEGIC RESEARCH PLAN: HEARING AND HEARING IMPAIRMENT*, at v (1996); William Tindall, *Stalking a Silent Killer: Hypertension*, BUS. & HEALTH, Aug. 1998, at 37).
126. *Sutton*, 527 U.S. at 507, 512 (Stevens, J., dissenting) (citing JEAN ROBERTS, *BINOCULAR VISUAL ACUITY OF ADULTS, UNITED STATES, 1960–1962*, at 3 (National Center for Health Statistics, Series 11, No. 30, 1968); NAT’L COUNCIL ON DISABILITY, *TOWARD INDEPENDENCE* 12 (1986); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *DISABILITY, FUNCTIONAL LIMITATIONS, AND HEALTH INSURANCE COVERAGE: 1984/85*, at 33 (1988); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 114–15 tbls. 114–115 [sic] (1989); MATHEMATICA POLICY RESEARCH, INC., *DIGEST OF DATA ON PERSONS WITH DISABILITIES* 3 (1984)).

(ADA). The ADA was also the focus in *Braydon v. Abbott*,¹²⁷ which dealt with the refusal of a dentist to fill the cavity of an HIV-positive patient in his office; Justice Kennedy, in the majority opinion, cited to thirty-two studies dealing with HIV.

¶54 The evolution of land use was addressed in *West Lynn Creamery, Inc. v. Healy*,¹²⁸ a challenge to an assessment on all fluid milk sold by dealers to Massachusetts retailers. The history of the education of women was discussed in *United States v. Virginia*,¹²⁹ a challenge to the all-male admissions policy of Virginia Military Institute.

¶55 Very often the Supreme Court goes beyond the application of one non-legal discipline and considers two or more in order to reach a decision. In a concurring opinion in *Employment Division, Department of Human Resources v. Smith*, Justice O'Connor relied primarily on materials dealing with peyote as used in religious practices¹³⁰ in a case involving termination of employment for the ingestion of peyote at a religious ceremony of the Native American Church. Justice Blackmun, in dissent, went beyond those cultural studies and looked at

127. 524 U.S. 624, 633–35, 640, 653 (1998). In his majority opinion, Justice Kennedy cited titles such as: CTRS. FOR DISEASE CONTROL & PREVENTION, RECOMMENDED INFECTION-CONTROL PROTECTION FOR DENTISTRY (1993); AM. DENTAL ASS'N, POLICY ON AIDS, HIV INFECTION AND THE PRACTICE OF DENTISTRY (1991); Robert C. Gallo et al., *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCI. 500 (1984); Thomas M. Folks & Clyde E. Hart, *The Life Cycle of Human Immunodeficiency Virus Type I*, in AIDS, ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION 29–39 (Vincent DeVita et al. eds., 4th ed. 1997); Silviya I. Staprans & Mark B. Feinberg, *Natural History and Immunopathogenesis of HIV-1 Disease*, in MEDICAL MANAGEMENT OF AIDS 29, 39 (Merle Sande & Paul Volberding eds., 5th ed. 1997); *Report of a Consensus Workshop, Maternal Factors Involved in Mother-to-Child Transmission of HIV-1*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 1019, 1020 (1992); Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173, 1176 (1994); Gregory K. Johnson & William S. Robinson, *Human Immunodeficiency Virus-1 (HIV-1) in the Vapors of Surgical Power Instruments*, 33 J. MED. VIROLOGY 47 (1991).
128. 512 U.S. 186, 205–06 (1994). In his majority opinion, Justice Stevens employed JOHN H. FOSTER & WILLIAM MACCONNELL, AGRICULTURAL LAND USE CHANGE IN MASSACHUSETTS 1951–1971, at 5 (Research Bulletin No. 640, Jan. 1977); DEP'T OF AGRICULTURE, ARTHUR BERRY DAUGHERTY, MAJOR USES OF LAND IN THE UNITED STATES: 1987, at 4, 13 (Agricultural Economic Rep. No. 643, 1991); Geoffrey P. Miller, *The Industrial Organization of Political Production: A Case Study*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 769 (1993).
129. 518 U.S. 515, 521, 536–37, 544 (1996). Representative of the items cited by Justice Ginsburg in her majority opinion are ANNE FIROR SCOTT, THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS, 1830–1930, at 32 (1970); EDWARD H. CLARKE, SEX IN EDUCATION: OR, A FAIR CHANCE FOR THE GIRLS 38–39, 62–63 (1873); HENRY MAUDSLEY, SEX IN MIND AND IN EDUCATION 17 (1874); ELENE WILSON FARELLO, A HISTORY OF THE EDUCATION OF WOMEN IN THE UNITED STATES 163 (1970); REGINA MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE: WOMEN PHYSICIANS IN AMERICAN MEDICINE 51–54, 250 (1985); MARY ROTH WALSH, “DOCTORS WANTED, NO WOMEN NEED APPLY”: SEXUAL BARRIERS IN THE MEDICAL PROFESSION, 1835–1975, at 121–22 (1977).
130. 494 U.S. 872, 903–04 (1990) (O'Connor, J., concurring) (citing OMER C. STEWART, PEYOTE RELIGION: A HISTORY 327–36 (1987); EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS 41–65 (1980); TEACHINGS FROM THE AMERICAN EARTH: INDIAN RELIGION AND PHILOSOPHY 96–104 (Dennis Tedlock & Barbara Tedlock eds., 1975); ROBERT M. JULIEN, A PRIMER OF DRUG ACTION 149 (3d ed. 1981)).

materials dealing with psychiatry.¹³¹ Medical, psychological, and family-related publications were heavily relied upon by the dissent in *Hodgson v. Minnesota*,¹³² which involved a Minnesota statute prohibiting an abortion on a woman under eighteen years of age until at least forty-eight hours after both her parents had been informed of her intentions.

¶56 The enforcement of a desegregation plan in DeKalb County, Georgia, was the issue in *Freeman v. Pitts*; statistical and sociological studies were cited.¹³³ An Establishment Clause question involving an invocation made by a rabbi at a public middle school graduation ceremony was decided in *Lee v. Weisman*; sociology and psychology were the disciplines applied. This opinion is an example of the Court's application of material that, on the surface, would seem to have no relevance to the issue at hand. A classic separation of church and state controversy, it is difficult to imagine how psychology could enter the picture. But in trying to illustrate how the school system could impose its will on an impressionable audience, Justice Kennedy relied on studies of peer pressure on adolescents to prove his point.¹³⁴

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131. *Smith*, 494 U.S. at 913–14, 920 (Blackmun, J., dissenting) (citing JULIEN, *supra* note 130, at 148; James S. Slotkin, *The Peyote Way*, in TEACHINGS FROM THE AMERICAN EARTH, *supra* note 130, at 96, 104; Robert L. Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 AM. J. PSYCHIATRY 695 (1971); ANDERSON, *supra* note 130, at 161; Paul Pascaros & Sanford Futterman, *Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church*, 8 J. PSYCHEDELIC DRUGS 215 (1976); Bernard J. Albaugh & Philip O. Anderson, *Peyote in the Treatment of Alcoholism Among American Indians*, 131 AM. J. PSYCHIATRY 1247, 1249 (1974); STEWART, *supra* note 130, at 75 (1987); TONY HILLERMAN, *PEOPLE OF DARKNESS* 153 (1980)).
132. 497 U.S. 417, 464–67 (1990) (Marshall, J., dissenting) (citing, among others, Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAMILY PLANNING PERSPECTIVES 284, 287–88, 290 (1980); Joy D. Osofsky & Howard J. Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 CLINICAL OBSTETRICS & GYNECOLOGY 1161, 1164–65 (1978); Willard Cates, Jr. et al., *The Risks Associated With Teenage Abortion*, 309 NEW ENG. J. MED. 621, 623 (1983); Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397, 399 (1986); Catherine C. Lewis, *Minors' Competence to Consent to Abortion*, 24 AM. PSYCHOLOGIST 84, 87 (1987)).
133. 503 U.S. 467, 495 (1992). Justice Kennedy, writing for the majority, cited BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 19 tbl. 25 (111th ed. 1991); Franklin D. Wilson & Karl L. Taeuber, *Residential and School Segregation: Some Tests of Their Association*, in DEMOGRAPHY OF RACIAL AND ETHNIC GROUPS 57–58 (Frank D. Bean & W. Parker Frisbie eds., 1978). Justice Scalia, concurring, cited KARL TAEUBER, *NEGROES IN CITIES* 36 (1965). *Freeman*, 503 U.S. at 502 (Scalia, J., concurring). Justice Blackmun, also concurring, used Karl Taeuber, *Housing, Schools, and Incremental Segregative Effects*, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1979); Gary Orfield, *School Segregation and Residential Segregation*, in SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 227, 234–37 (Walter G. Stephan & Joe R. Feagin eds., 1980); Stanley M. Elam, *The 22nd Annual Gallup Poll of Public's Attitudes Toward the Public Schools*, 72 PHI DELTA KAPPAN 41, 44–45 (1990). *Freeman*, 503 U.S. at 513 (Blackmun, J., concurring).
134. 505 U.S. 577, 593–94 (1992) (citing Clay Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385 (1963); Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. YOUTH & ADOLESCENCE 451 (1985); B. Bradford Brown et al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCHOL. 521 (1986)).

¶57 Family, social work, and public health made their way into *Planned Parenthood of Southeastern Pa. v. Carey*,¹³⁵ a challenge to *Roe v. Wade*. Differences in the procedures for involuntary civil commitment for the mentally retarded and those who were mentally ill formed the issue in *Heller v. Doe*;¹³⁶ the Court looked to studies dealing with mental retardation, dangerous behavior, and the use of drugs in behavior therapy.

¶58 Religion, education, and sociology intersected in *Board of Education of Kiryas Joel School District v. Grumet*,¹³⁷ an Establishment Clause case involving the drawing up of a school district excluding all but members of the Satmar Hasidim, practitioners of a strict form of Judaism.

¶59 Standards for salaries and funding for remedial programs by a federal District Court in enforcing a segregation plan in Kansas City formed the issue in

135. 505 U.S. 833, 856, 891–92 (1992) (citing ROSALIN POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133, n.7 (rev. ed. 1990); COUNCIL ON SCIENTIFIC AFFAIRS, AM. MED. ASS'N, VIOLENCE AGAINST WOMEN 7 (1991); Shields & Hanneke, *Battered Wives' Reactions to Marital Rape*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 131, 144 (Daniel Finkelhor et al. eds., 1983); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 27–28 (1984); Tracy Bennett Herbert et al., *Coping With an Abusive Relationship: I. How and Why Do Women Stay?* 53 J. MARRIAGE & FAM. 311 (1991); B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 J. NAT'L ASS'N SOC. WORKERS 350, 352 (1985); James A. Mercy & Linda E. Saltzman, *Fatal Violence Among Spouses in the United States, 1976–1985*, 79 AM. J. PUB. HEALTH 595 (1989); Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 44 (1989)).
136. 509 U.S. 312, 322–23, 325 (1993). In his majority opinion, Justice Kennedy cited eight sources, including AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5, 16–18 (9th ed. 1992); GEOFFREY KEPPEL, DESIGN AND ANALYSIS: A RESEARCHER'S HANDBOOK 65–68 (1973); JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 71–72 (1981); Berger, *Medical Treatment of Mental Illness*, 200 SCI. 974 (1978). Justice Souter, dissenting, also cited eight studies, examples of which are Bradley K.Hill et al., *A National Study of Prescribed Drugs in Institutions and Community Residential Facilities for Mentally Retarded People*, 21 PSYCHOPHARMACOLOGY BULL. 279, 283 (1985); Michael G. Aman & Nirbhay N. Singh, *Pharmacological Intervention*, in HANDBOOK OF MENTAL RETARDATION 347, 348 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991); William I. Gardner, *Use of Behavior Therapy With the Mentally Retarded*, in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 250–75 (Frank J. Menolascino ed., 1970). *Heller*, 509 U.S. at 343, 345 (Souter, J., dissenting).
137. 512 U.S. 687, 691, 700, 704, 708, 735–36, 744 (1994) (citing WILLIAM M. KEPHART & WILLIAM W. ZELLNER, EXTRAORDINARY GROUPS (4th ed. 1991); ISRAEL RUBIN, SATMAR, AN ISLAND IN THE CITY (1972); STATE UNIV. OF N.Y. & STATE EDUC. DEP'T, MASTER PLAN FOR SCHOOL DISTRICT REORGANIZATION IN NEW YORK STATE 10–11 (rev. ed. 1958); ROBERT L. CHURCH & MICHAEL W. SEDLAK, EDUCATION IN THE UNITED STATES: AN INTERPRETIVE HISTORY 162, 167–69 (1976); U.S. DEP'T OF INTERIOR, FRANKLIN K. VANZANDT, BOUNDARIES OF THE UNITED STATES AND THE SEVERAL STATES 250–57 (Geological Survey Bulletin 1212, 1966). Justice Scalia, in dissent, referred to W. SWEET, THE STORY OF RELIGION IN AMERICA 9 (1950); BUREAU OF THE CENSUS, SPECIAL REPORTS, RELIGIOUS BODIES, at 55 (1910); MARTIN B. BRADLEY ET AL., CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES 1990: AN ENUMERATION BY REGION, STATE, AND COUNTY, BASED ON DATA REPORTED FOR 133 CHURCH GROUPINGS 46, 112–13, 246, 265, 283, 365, 380, 393 (1992); 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 524–27 (1950). *Grumet*, 512 U.S. at 735–36, 744 (Scalia, J., dissenting).

Missouri v. Jenkins;¹³⁸ the Court looked to education and sociology to come to its decision. Education, economics, and labor were very heavily cited in Justice Breyer's dissent in *United States v. Lopez*.¹³⁹ He cited to thirty-five different items and, in addition, also included a bibliography in an appendix that listed twenty-five congressional hearings and reports; seventeen other items produced by the federal government, such as statistics, agency reports, and studies; and 126 nonlegal items described as "Other Readily Available Materials."¹⁴⁰

¶60 Random urinalysis of high school athletes was the issue in *Vernonia School Dist. 42J v. Acton*;¹⁴¹ cited were materials dealing with education, health, psychiatry, and sports management. Studies in the ethics of psychiatrists, psychologists, social workers, and counselors were cited in *Jaffe v. Redmond*,¹⁴² a case involving the psychotherapist-patient privilege. In *Washington v. Glucksberg*, a case challenging a Washington State assisted-suicide statute, Chief Justice Rehnquist cited ethics and medical materials in the majority opinion;¹⁴³ additional

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138. 515 U.S. 70, 120 (1995) (Thomas, J., concurring) (citing Laurence A. Bradley & Gifford W. Bradley, *The Academic Achievement of Black Students in Desegregated Schools*, 47 REV. EDUC. RES. 399 (1977); NANCY H. ST. JOHN, *SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN* (1975); Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839 (1983); David J. Armor, *Why Is Black Educational Achievement Rising?* 108 PUB. INT. 65, 77-79 (1992)).
139. 514 U.S. 549, 619-21 (1995) (Breyer, J., dissenting) (citing Joseph F. Sheley et al., *Gun-Related Violence in and Around Inner-City Schools*, 146 AM. J. DISEASES IN CHILD. 677 (1992); NAT'L INST. OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *VIOLENT SCHOOLS—SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO CONGRESS* 118-19 (1978); AUGUST C. BOLINO, *A CENTURY OF HUMAN CAPITAL BY EDUCATION AND TRAINING* (1989); Edward Denison, *Education and Growth*, in *ECONOMICS AND EDUCATION* 237 (Daniel C. Rogers & Hirsch S. Ruchlin eds., 1971); RICHARD M. CYERT & DAVID C. MOWERY, *TECHNOLOGY AND EMPLOYMENT: INNOVATION AND GROWTH IN THE U.S. ECONOMY* 68 (1987); JOHN E. CHUBB & ERIC A. HANUSHEK, *Reforming Educational Reform*, in *SETTING NATIONAL PRIORITIES* 213 (H. Aaron ed., 1990)).
140. *Lopez*, 514 U.S. at 631-44 app. (Breyer, J., dissenting) (The thirty-five items cited in the text of Justice Breyer's dissent are also listed in the appendix.).
141. 515 U.S. 646, 652, 656, 661-62 (1995) (citing ROBERT FREEMAN BUTTS, *PUBLIC EDUCATION IN THE UNITED STATES: FROM REVOLUTION TO REFORM* 102-03 (1978); 1 *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 467-68 (Robert Hamlett Bremner ed., 1970); COMM. ON SCH. HEALTH, AM. ACAD. OF PEDIATRICS, *SCHOOL HEALTH: A GUIDE FOR HEALTH PROFESSIONALS* 2 (1987); CTRS. FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *STATE IMMUNIZATION REQUIREMENTS 1991-1992*, at 1; Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 PHI DELTA KAPPAN 310, 314 (1990); Todd W. Estroff et al., *Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects*, 28 CLINICAL PEDIATRICS 550 (1989); Denise B. Kandel et al., *The Consequences in Young Adulthood of Adolescent Drug Involvement*, 43 ARCH. GEN. PSYCHIATRY 746 (1986); Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance*, in *MANAGING SPORTS AND RISK MANAGEMENT STRATEGIES* 90, 90-91 (Herb Appenzeller ed., 1993)).
142. 518 U.S. 1, 11, 13 (1996) (citing GROUP FOR ADVANCEMENT OF PSYCHIATRY, *CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY* 92 (Report No. 45, 1960); AM. PSYCHOLOGICAL ASS'N, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT*, Standard 5.01 (1992); NAT'L FED'N OF SOCIETIES FOR CLINICAL SOC. WORK, *CODE OF ETHICS V(a)* (1988); AM. COUNSELING ASS'N, *CODE OF ETHICS AND STANDARDS OF PRACTICE A.3a* (1995)).
143. 521 U.S. 702, 711, 716, 730-31, 734 (1997) (citing N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT* 77-82 (1994) [hereinafter *WHEN DEATH IS SOUGHT*]; PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DECIDING TO FOREGO LIFE-*

sources from these disciplines were used in concurring opinions by Justices Stevens,¹⁴⁴ Souter,¹⁴⁵ and Breyer.¹⁴⁶ The credibility of polygraph testing was the focus of *United States v. Scheffer*. In dissent, Justice Stevens¹⁴⁷ applied more focused studies than those used by Justice Thomas in his majority opinion,¹⁴⁸ including psychological studies on how to beat the testing.

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- SUSTAINING TREATMENT 16–18 (1983); WASH. STATE DEP'T OF HEALTH, ANNUAL SUMMARY OF VITAL STATISTICS 1991, at 29–30 (1992); Anthony L. Back et al., *Physician-Assisted Suicide and Euthanasia in Washington State*, 275 JAMA 919, 924 (1994); HERBERT HENDIN, SEDUCED BY DEATH: DOCTORS, PATIENTS AND THE DUTCH CURE 24–25 (1997); AM. MED. ASS'N, CODE OF ETHICS § 2.211 (1994); Council on Ethical & Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992); CARLOS F. GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS (1991)).
144. *Glucksberg*, 521 U.S. at 748–49 (Stevens, J., concurring) (citing Block & Billings, *Patient Request to Hasten Death*, 154 ARCHIVES INTERNAL MED. 2039, 2045 (1994); Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691–94 (1991); WHEN DEATH IS SOUGHT, *supra* note 143, at 20; Jerald G. Bachman et al., *Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia*, 334 NEW ENG. J. MED. 303–09 (1996); Melinda A. Lee et al., *Legalizing Assisted Suicide—Views of Physicians in Oregon*, 335 NEW ENG. J. MED. 310–15 (1996), Back et al., *supra* note 143, at 919–25; David J. Doukas et al., *Attitudes and Behaviors on Physician-Assisted Death: A Study of Michigan Oncologists*, 13 J. CLINICAL ONCOLOGY 1055 (1995); Lee Slome et al., *Physicians' Attitudes Toward Assisted Suicide in AIDS*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 712 (1992)).
145. *Glucksberg*, 521 U.S. at 755, 757, 777, 779–80, 786 (Souter, J., concurring) (citing Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?* HASTINGS CTR. REP., May–June 1993, at 32, 36–37; EDWARD SAMUEL CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 58–115 (1948); Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES 225, 229 (John Keown ed., 1995); Richard C. Cabot, *Ether Day Address*, BOSTON MED. & SURGICAL J. 287, 288 (1920); Paul Rousseau, *Terminal Sedation in the Case of Dying Patients*, 156 ARCHIVES OF INTERNAL MED. 1785 (1996); Robert D. Truog et al., *Barbiturates in the Case of the Terminally Ill*, 327 NEW ENG. J. MED. 1678 (1992); CARLOS F. GOMEZ, REGULATING DEATH 40–43 (1991); John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?* in EUTHANASIA EXAMINED, *supra*, at 261, 289; RICHARD A. EPSTEIN, MORTAL PERIL 322 (1997); RICHARD A. POSNER, AGING AND OLD AGE 242 & n.23 (1995); Gerrit Van der Wal et al., *Euthanasia and Assisted Suicide. II. Do Dutch Family Doctors Act Prudently?* 9 FAM. PRACTICE 135 (1992)).
146. *Glucksberg*, 521 U.S. at 791–92 (Breyer, J., concurring) (citing WHEN DEATH IS SOUGHT, *supra* note 143, at 163, n.29; Ira Byock, *Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia*, 9 J. PALLIATIVE CARE 135 (1992)).
147. 523 U.S. 303, 324, 335–36 (Stevens, J., dissenting) (citing Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal Year 1996, at 14–15; William J. Yankee, *The Current State of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception*, 40 J. FORENSIC SCI. 63 (1995); J. Wydacki & F. Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 J. FORENSIC SCI. 596, 596–600 (1978); VLAD KALASHNIKOV, BEAT THE BOX: THE INSIDER'S GUIDE TO OUTWITTING THE LIE DETECTOR (1983); Charles R. Honts et al., *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 J. APPLIED PSYCHOL. 252 (1994); Charles R. Honts et al., *Effects of Physical Countermeasures on the Physiological Detection of Deception*, 70 J. APPLIED PSYCHOL. 177, 185 (1985); Charles R. Honts et al., *Effects of Spontaneous Countermeasures on the Physiological Detection of Deception*, 16 J. POLICE SCI. & ADMIN. 91, 93 (1988); Stan Abrams & Michael Davidson, *Counter-Countermeasures in Polygraph Testing*, 17 POLYGRAPH 16, 17–19 (1988)).
148. *Scheffer*, 523 U.S. at 310, 312. Justice Thomas, in his majority opinion, cited to general studies of the technology: STANLEY ABRAMS, THE COMPLETE POLYGRAPH HANDBOOK 190–91 (1989); JAMES ALLAN MATTE, FORENSIC PSYCHOPHYSIOLOGY USING THE POLYGRAPH 121–29 (1996); THE POLYGRAPH TEST: LIES, TRUTH, AND SCIENCE (Anthony Gale ed., 1988).

Summing Up

¶61 When one considers the nonlegal materials the Supreme Court used in the period of time covered by this study, one is struck by the range of disciplines involved. It is also evident that all the Justices used these resources to firm up their arguments. While majority opinions employed the highest percentage of these sources, nearly 49%, dissenting opinions (more than 37%) also used these materials to a significant degree. (See table 3.)

Table 3
Number of Nonlegal Citations by Type of Opinion, 1989–1998

Term	Majority	Concurring	Dissenting	Total
1989	90	34	100	224
1990	51	7	56	114
1991	68	22	25	115
1992	96	8	39	143
1993	70	24	34	128
1994	112	77	140	329
1995	113	12	83	208
1996	118	34	85	237
1997	108	12	68	188
1998	83	29	63	175
Total	909 (48.9%)	259 (13.9%)	693 (37.2%)	1,861

¶62 As mentioned earlier, the persuasive nature of nonlegal materials is marked by their employment in clusters. Even dictionary definitions find strength in numbers; it is not unusual to find the definition of a single term by three different dictionaries offered as proof of the accepted meaning of a word. A measure of the concentration of nonlegal resources in the U.S. Supreme Court opinions of this period is provided by dividing the number of citations of nonlegal materials per term by the number of opinions making use of those materials. (See table 4.) When looked at from this perspective, the highest ratio of nonlegal citations per type of opinion is found in dissenting opinions (3.6), followed very closely by concurring opinions (3.5). A trend that may be worth watching in the future is that the clustering occurred at a much higher rate in the years constituting the second half of the study.

¶63 Also noteworthy is the fact that all of the Justices used nonlegal materials in their opinions during the period of time of the study. Five of the Justices, Chief Justice Rehnquist, and Justices Stevens, O'Connor, Scalia, and Kennedy, were on the Court for the duration of the study. Three Justices, Marshall, White, and Blackmun, left early on during the time frame of the study, while Justices Souter,

Table 4
Ratio of Nonlegal Citations by Type of Opinion, 1989–1998

Term	Majority	Concurring	Dissenting	Total
1989	2.5	3.4	3.7	3.1
1990	1.9	3.5	2.9	2.6
1991	2.8	2.2	1.4	2.2
1992	2.6	2.0	2.3	2.5
1993	2.3	2.7	2.1	2.3
1994	3.2	6.4	5.8	4.6
1995	4.2	2.4	5.2	4.3
1996	3.9	3.8	4.5	4.1
1997	4.3	2.4	3.8	3.9
1998	3.5	3.2	3.9	3.6
Total	3.1	3.5	3.6	3.3

Thomas, Ginsburg, and Breyer were later additions. All the Justices, however, did cite to nonlegal materials in their opinions, and they used them in all types of opinions, majority, concurring, and dissenting. (See table 5.) While Chief Justice Rehnquist did not employ nonlegal materials in any concurring opinions, his application of those materials in majority and dissenting opinions was comparable to the use by the other Justices.

Table 5
Citation of Nonlegal Citations by Justice, 1989–1998

Justice (terms served)	Majority Opinions of Justice Containing Nonlegal Citations	Concurring Opinions of Justice Containing Nonlegal Citations	Dissenting Opinions of Justice Containing Nonlegal Citations
Rehnquist (1989–1998)	28%	0%	20%
Stevens (1989–1998)	38%	6%	19%
O'Connor (1989–1998)	37%	8%	16%
Scalia (1989–1998)	36%	7%	37%
Kennedy (1989–1998)	36%	13%	19%
Souter (1990–1998)	35%	12%	32%

(cont.)

Table 5 (cont.)
Citation of Nonlegal Citations by Justice, 1989–1998

Justice (terms served)	Majority Opinions of Justice Containing Nonlegal Citations	Concurring Opinions of Justice Containing Nonlegal Citations	Dissenting Opinions of Justice Containing Nonlegal Citations
Thomas (1991–1998)	23%	26%	34%
Ginsburg (1993–1998)	24%	5%	21%
Breyer (1994–1998)	36%	22%	23%
Blackmun (1989–1993)	37%	6%	24%
White (1989–1992)	17%	7%	23%
Marshall (1989–1990)	19%	20%	17%
Brennan (1989)	31%	7%	32%

¶64 The intersection of law with other disciplines was pointed out in the *Report of the Federal Courts Study Committee*. The survey described in this article attempted to determine the extent to which nonlegal materials are actually applied in U.S. Supreme Court opinions, the sorts of cases that appear most prone to apply them, and the range of nonlegal materials that are used.

¶65 The concern expressed in the *Report* regarding the increasing complexity of litigation and the growing tendency by courts to depend on scientific and technical information to make their decisions¹⁴⁹ is borne out by the findings of this study. Several opinions depended heavily on the hard sciences to support the Court's legal reasoning. The *Report's* recognition of such occurrences was accurate.

¶66 The *Report* voiced less concern, however, over the use of nonlegal materials that are not scientific or technical. But the results of this survey clearly indicate that the use of these materials is now just as high as that of scientific and technical sources. The gamut of the social sciences, dictionary applications, use of *The Federalist*, religious studies, and statistics were all heavily used in the opinions produced during the period of time covered by this study. One could easily argue that understanding these materials to render a judicial opinion is as challenging as understanding scientific and technical information. Indeed, the range of disciplines relied upon would suggest that successful members of the judiciary would best be Renaissance men and women; the variety is that broad. And this

149. See *supra* ¶¶ 2–3.

observation does not apply solely to the Supreme Court. Issues discussed in U.S. Supreme Court opinions are issues that were treated earlier in trial court and appellate opinions; judges at all levels are increasingly expected to be able to master the same range of disciplines.

¶67 What is evident from this study is that the U.S. Supreme Court has established a pattern of making use of nonlegal materials in its opinions. Depending on the subject matter of the litigation, the types of materials used are quite broad, ranging from the arts to the social sciences, the hard sciences to religion. There appears to be no limit as to the disciplines finding their way into the opinions; they are many, and they are sundry.

¶68 This study indicates that the practice of law has become quite complex, and that solving legal problems cannot be done by only the law. The resolution of many legal questions, as evidenced by the examples presented in this study, is greatly influenced and affected by developments outside the law. Law does not operate in a vacuum; this study indicates the truth of that seemingly trite cliché.