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Decline and Fall of Legislative History - Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras, The

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The decline and fall of legislative history?

Patterns of Supreme Court reliance in the Burger and Rehnquist eras

Reliance on legislative history in the Court's majority opinions has fallen from nearly 50 percent during the Burger era to less than 30 percent since 1985.

by JAMES J. BRUDNEY AND COREY DITSLEAR

The United States Supreme Court's reliance on legislative history to help explain and justify its decisions has declined sharply over the past two decades. Both federal judges and academics regularly disagree on whether courts should consult the record of legislative hearings, committee reports, and floor exchanges that accompanies a congressional enactment. In the midst of this spirited debate, the Rehnquist Court embarked on a substantial departure from past practice. An examination of some 650 majority opinions in the area of workplace law reveals that reliance on legislative history has fallen from nearly 50 percent during the Burger era to less than 30 percent since 1985.

The Court's receding faith in legislative history is often attributed to the influence of Justice Antonin Scalia, who has consistently criticized use of this resource as an aid to...
interpretation. Although Justice Scalia's role has surely been important, what about the contribution of other justices, who author some eight-ninths of the Court's decisions? Does the Court's diminished appetite for legislative history extend equally to all subject matter areas within a given field of law? Further, in a doctrinal field where federal statutes are consistently liberal or redistributive in orientation, does the Court rely on legislative history more often to support liberal results than conservative outcomes? Finally, is there an ideological "tilt" associated with legislative history reliance by liberal or conservative justices?

Focus on these questions helps explain why the Rehnquist Court curtailed the use of legislative history as part of its reasoning process. There has been a recent upsurge of interest among legal and social science scholars in analyzing judicial reasoning from an empirical perspective. Examining how the justices use legislative history to support their decisions offers insights for lower courts and attorneys as they consider legislative history arguments in future cases. In addition, assessing the Court's principled justifications for its holdings sheds light on the persuasiveness of judicial decision making; this in turn influences perceptions about the legitimacy of courts in general.

The dataset for this study consists of every United States Supreme Court decision involving the law of the workplace from the start of the Burger Court in 1969 through the end of the Rehnquist Court in 2005. This broad category encompasses 649 decisions—primarily statutory but also constitutional—that address union-management relations, employment discrimination, safety and health, minimum wage and overtime standards, retirement benefits, employee privacy and freedom of expression, and even the immigration or tax consequences of individuals' status and conditions while on the job. Within the workplace law field we have identified eight distinct subject matter categories: seven covering claims that relate to different statutory schemes, and the eighth covering decisions that apply provisions of the Constitution. Measured in three-year intervals, workplace law cases have formed a remarkably stable portion of the Court's docket since the mid 1970s, about one-sixth of all merits decisions.

**Methods**

The purpose of the research reported here is to explore the Court's reasoning techniques, specifically reliance on various interpretive resources to help the majority reach its result. Legislative history is one such resource for the Court. The Court makes use of committee reports, floor debates, hearings, or other legislative record evidence that it finds indicative of the legislative intent underlying the text that is subject to dispute. For instance, the Court may refer explicitly to a committee report discussion to clarify the meaning of inconclusive statutory language, or to reinforce that such language was intended to apply in a certain way.

Apart from legislative history, we have coded for nine other interpretive resources on which the justices rely with some frequency. These are: (1) the plain or ordinary meaning of textual language; (2) dictionaries; (3) language canons; (4) legislative purpose; (5) legislative inaction; (6) Supreme Court precedent; (7) common law precedent; (8) substantive canons; and (9) agency deference. The Court's opinions almost always rely at least two interpretive resources as probative of its decision, and the vast majority recognize three or more. Identifying a resource's probative role in the majority's affirmative reasoning process casts a sharper light on the Court's justifications for its decisions.

The relationship between the Court's use of interpretive resources
and the ideological direction of its opinions is also explored. Accordingly, all 649 workplace cases are classified according to whether the Court’s legal outcome favored employees (liberal) or employers (conservative). In addition, each of the 19 justices who served during this time is identified as either liberal or conservative, relying on voting scores derived from the Spaeth Supreme Court database.3

Declining reliance
As noted at the outset and in Figure 1, the Court’s interest in legislative history has declined sharply over time. Court reliance for the entire 36 year period stands at 38 percent, but the level of reliance has fallen between the Burger and Rehnquist eras from 47 percent to 29 percent, a statistically significant decrease.4 This downward trend becomes even sharper when constitutional decisions, which do not surprisingly feature very little reliance on legislative history, are excluded. Omitting decisions on constitutional matters, the Court’s reliance on legislative history declined from 51 percent during the Burger years to 29 percent in the Rehnquist era.

As Figure 1 indicates, the turning point in the Court’s appetite for legislative history as a reasoning asset came in the late 1980s and early 1990s. Reliance declined from 50 percent in the 1986 term to 33 percent during the following three terms (1987-89) and to 17 percent for the 1990-92 terms. Legislative history usage then leveled off at 23 percent for almost a decade before rebounding in the last three terms to 37 percent. While the 2002 and 2003 terms featured Court reliance at 43 percent, the 2004 term level was only 17 percent; more time is needed to determine if the two preceding terms were anomalies rather than the start of a long-term resurgence.

Individual justices
Authoring an opinion for the Court is hardly an exercise in judicial independence. Justices face a number of constraints when writing for four or more colleagues. Opinion assignments may reflect case-specific considerations, including the need to solidify a fragile majority or the desire to utilize an individual justice’s expertise on a particular issue, as well as broader institutional factors such as a preference for equalizing workload. In addition, the contours of a Court opinion will likely be shaped to some extent by the contentions of the litigants. Still, the justices retain ample discretion when explaining and defending the results reached, provided they are able to retain at least four other votes.

Table 1 reports justices’ reliance on legislative history in their majority opinions, listing total number of majority opinions in parenthesis for each of the 16 justices who served between 1969 and 2005 and who authored at least 10 majority opinions. For justices whose tenure spans both the Burger and Rehnquist Courts, reliance is reported separately for each period, again listing the number of majority opinions in parenthesis.

The most striking feature of the variations among individual justices is the record of Justices Scalia and Clarence Thomas. Justice Scalia has long proclaimed his distrust of legislative history as a resource,5 and Justice Thomas has followed his lead.6 Scalia’s appointment to Chief Justice Warren Burger’s seat in 1986, and Thomas’s arrival as a replacement for Justice Thurgood Marshall in 1992, together account for a large part of the Court’s diminished willingness to rely on legislative history. Nearly one-half of the Court’s decline in legislative history reliance since 1986 is attributable to the opinion-writing performances of Justices Scalia and Thomas.7 Justice Anthony

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6. We designate results as significant at the .05 level (t ≤.05). All statistical analyses in this article are run using Stata version 7.
7. Justice Douglas authored nine majority opinions during this period; Justices Black and Harlan authored four each. Douglas relied on legislative history in 44% of his Court opinions (four of nine); Harlan in 50% (two of four), and Black in 75% (three of four). We omit them from this table based on their minimal levels of participation, which in turn reflect brief periods of service on the Burger Court. In 22 of the 649 cases in our dataset, the Court delivered its holding and principal reasoning in a plurality opinion. We treat these plurality opinions as majorities for purposes of our analyses.
Kennedy, another Rehnquist era appointee, also has been a notably infrequent user of legislative history in his majority opinions, and he too has expressed skepticism regarding its reliability in general.10

In addition, Table 1 reveals interesting differences in legislative history reliance among the six justices who contributed at least 10 majority opinions during both the Burger and Rehnquist Courts. Justice Byron White relied far less frequently on legislative history in his Rehnquist era majority opinions than he had during the Burger years; Justice John Paul Stevens' and Justice Marshall's reliance on legislative history also declined noticeably during their years on the Rehnquist Court. Taking these three justices together, reliance on legislative history declined from 56 percent (64 of 115 majority opinions) to 33 percent (22 of 67 majority opinions), a significant decrease.11

Justice Scalia’s commitment to avoiding reliance on legislative history may have exerted an important ripple effect. During Scalia’s early years on the Court, several justices took issue with his openly expressed hostility toward legislative history.12 Two of those colleagues, however—Justices White and Stevens—made considerably less use of such history in opinions they authored after 1985. Further, Justice Stephen Breyer, who vigorously defended the uses of legislative history while an appellate court judge, has relied on that resource less often than Justice Harry Blackmun, whom he replaced, although Breyer’s volume of work-

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Table 1: Legislative history reliance by justices authoring 10 or more majority opinions

<table>
<thead>
<tr>
<th>Justice</th>
<th>Legislative history %</th>
<th>Legislative history %</th>
<th>Legislative history %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All years</td>
<td>Burger years</td>
<td>Rehnquist years</td>
</tr>
<tr>
<td>Marshall</td>
<td>60* (53)</td>
<td>65 (37)</td>
<td>50 (16)</td>
</tr>
<tr>
<td>Burger</td>
<td>59 (17)</td>
<td>59 (17)</td>
<td>N/A</td>
</tr>
<tr>
<td>Brennan</td>
<td>55* (69)</td>
<td>54 (54)</td>
<td>60 (15)</td>
</tr>
<tr>
<td>Stewart</td>
<td>52 (33)</td>
<td>52 (33)</td>
<td>N/A</td>
</tr>
<tr>
<td>Blackmun</td>
<td>46 (48)</td>
<td>46 (28)</td>
<td>45 (20)</td>
</tr>
<tr>
<td>White</td>
<td>44 (66)</td>
<td>53 (49)</td>
<td>18 (17)</td>
</tr>
<tr>
<td>Souter</td>
<td>44 (23)</td>
<td>N/A</td>
<td>44 (23)</td>
</tr>
<tr>
<td>Stevens</td>
<td>40 (63)</td>
<td>48 (29)</td>
<td>32 (34)</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>36 (14)</td>
<td>N/A</td>
<td>36 (14)</td>
</tr>
<tr>
<td>O'Connor</td>
<td>31 (48)</td>
<td>40 (5)</td>
<td>30 (43)</td>
</tr>
<tr>
<td>Breyer</td>
<td>29 (14)</td>
<td>N/A</td>
<td>29 (14)</td>
</tr>
<tr>
<td>Powell</td>
<td>28 (36)</td>
<td>24 (33)</td>
<td>67 (3)</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>28* (47)</td>
<td>22 (32)</td>
<td>33 (15)</td>
</tr>
<tr>
<td>Kennedy</td>
<td>23* (26)</td>
<td>N/A</td>
<td>23 (26)</td>
</tr>
<tr>
<td>Scalia</td>
<td>4* (28)</td>
<td>N/A</td>
<td>4 (28)</td>
</tr>
<tr>
<td>Thomas</td>
<td>0* (24)</td>
<td>N/A</td>
<td>0 (24)</td>
</tr>
</tbody>
</table>

* t-test reveals significant difference between that justice's reliance and reliance in decisions authored by all other justices. Overall mean for legislative history reliance is 38%.

Number of majority opinions for each justice in parenthesis.

10. We determined that there has been a decline of 17.36% in legislative history reliance (from 46.12 to 28.76) when comparing majority opinions by Justice Burger (who served until the start of the Rehnquist era) plus the Burger era majorities authored by the eight "continuing Justices" (who served for part or all of the Rehnquist years) as against all majorities written during the Rehnquist era. Majorities written by Justices Scalia and Thomas (when appropriately weighted based on their proportional contribution to the Rehnquist era total of 299 decisions) constitute 7.99% out of 17.36%, or 46.0% of the decline.


12. Of the three other justices who made substantial workplace law contributions in both eras, Justice Blackmun's use of legislative history remained constant while Justices Brennan and Rehnquist actually increased their reliance on legislative history after 1985. Justice Rehnquist, however, was an infrequent user of legislative history overall, even with the heightened reliance that followed his elevation to chief justice.

place law decisions is not yet very large.

These three justices, and perhaps others as well, may have come to regard analysis based on legislative history as less important in explaining or justifying a result.14 The Rehnquist Court as a whole relied more often than its Burger era counterpart on a linguistic approach to judicial reasoning, focused on text, dictionaries, and language canons, and less often on the primary intentionalist resources of legislative history and purpose. Faced with the outspoken position adopted by Justice Scalia and later Justice Thomas, other justices may have concluded, even if subconsciously, that relying regularly on legislative history risked diminishing the prospects of attracting or retaining the allegiance of their colleagues. In this regard, roughly one-third of the Court’s reduced reliance on legislative history appears to be attributable to changes in the opinion-writing of the eight “continuing justices”—those who served in both the Burger and Rehnquist eras.15

**Subject matter areas**

The decline in legislative history usage may be linked not only to changes in the Court’s membership but also to the varied subject matter composition of workplace law. Congress’s regulatory initiatives in some areas are more recently promulgated than in others; there also may be differences in the volume or detail of legislative history materials that accompany a given statutory scheme.

Table 2 identifies two subject matter categories that are associated with unusually high Court reliance on legislative history. Majority opinions interpreting race or sex discrimination statutes and opinions applying minimum standards laws made significantly more use of legislative history compared with the baseline rate of reliance. In addition, two subject matter areas—general negligence statutes and constitutional decisions—are associated with unusually low Court reliance on legislative history.

### Table 2: Legislative history reliance by subject matter category

<table>
<thead>
<tr>
<th>Issue</th>
<th>Legislative</th>
<th>Legislative</th>
<th>Legislative</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>history %</td>
<td>history %</td>
<td>history %</td>
</tr>
<tr>
<td></td>
<td>All years</td>
<td>Burger years</td>
<td>Rehnquist years</td>
</tr>
<tr>
<td>Labor relations (192)</td>
<td>33</td>
<td>39</td>
<td>19 #</td>
</tr>
<tr>
<td>Race or sex discr. (138)</td>
<td>47*</td>
<td>56</td>
<td>33 #</td>
</tr>
<tr>
<td>General discr. (54)</td>
<td>41</td>
<td>67</td>
<td>23 #</td>
</tr>
<tr>
<td>Min. standards (71)</td>
<td>54*</td>
<td>70</td>
<td>40 #</td>
</tr>
<tr>
<td>Retirement (62)</td>
<td>45</td>
<td>60</td>
<td>40</td>
</tr>
<tr>
<td>General negligence (23)</td>
<td>9*</td>
<td>25</td>
<td>5</td>
</tr>
<tr>
<td>Misc. (46)</td>
<td>44</td>
<td>50</td>
<td>39</td>
</tr>
<tr>
<td>Constitutional (134)</td>
<td>10*</td>
<td>9</td>
<td>11</td>
</tr>
</tbody>
</table>

* t-test reveals significant difference in reliance for all years between that issue area and all other issue areas.

14. There is another possible explanation for this downturn: strategic choices made by Supreme Court advocates may be influencing the justices’ willingness to rely on legislative history. Given the steadfast hostility expressed by two justices, litigants before the Court may have concluded they should reduce reliance on the legislative history resource when presenting their legal positions. We explored this hypothesis on a preliminary basis by reviewing the parties’ merits briefs for all workplace law cases decided in two terms at the end of the Burger era (1984 and 1985) when the Court’s legislative history reliance was quite high, and two terms in the middle of the Rehnquist era (1992 and 1997) when the Court’s legislative history reliance was extraordinarily low. We found no evidence that the litigants in these four terms became more reluctant to advance legislative history as a resource that might justify a Court decision, even in cases where the Court’s opinion reflects no reliance on legislative history. We also reviewed the tables of contents for these merits briefs to see whether the parties used the words “legislative history” as part of a separate argument heading or subheading. Here too, we found the parties appear at least as willing to feature legislative history as a distinct argument in the 1990s as they had been in the mid 1980s. Whether Supreme Court litigants have gradually come to rely less prominently or less often on legislative history arguments in recent years would require more in-depth study, especially given the Court’s own increased reliance in two of the past three terms.

15. The exact figures are 5.62 out of 17.36, or 32.4% of the decline; see note 10, supra, for related discussion. The remaining one-fifth of the Court’s diminished reliance (5.75 out of 17.36, or 32.6% of the decline) is associated with the opinion writing of newcomer justices other than Scalia and Thomas. Justice Kennedy (who replaced Powell), Justice Breyer (who replaced Blackmun), Justice Souter (who replaced Brennan), and Justice Ginsburg (who replaced White).

16. Over three-fourths of all race and sex discrimination decisions involve interpretation of Title VII of the 1964 Civil Rights Act. With respect to general discrimination, the Age Discrimination in Employment Act of 1967 accounts for more than two-fifths of all decisions—more than twice the number arising under any other statutory scheme that addresses discrimination beyond race or sex. In the minimum standards area, over three-fourths of the Court’s decisions concern one of four statutory schemes initially enacted or substantially amended between 1966 and 1977, and dealing with worker safety and health or basic compensation and overtime standards.
As a statute's original legislative history fades into the past, the Court may come to view the detailed pre-enactment record as less relevant.

delineate further the lawful contours of affirmative action. Similarly, the Court has relied on precedent in the area of sexual harassment law to refine the scope of employer liability for discriminatory harassment by supervisors. Another source that history when interpreting labor relations statutes during the Burger era was below the baseline level of reliance for that 17-year period. Importantly, the Burger Court's reliance on legislative history when interpreting the NLRA was significantly lower than its reliance on this resource when constraining three major statutes from other subject matter areas, all initially enacted between 1964 and 1974. The three major statutory schemes include Title VII (1964), the Age Discrimination in Employment Act (ADEA) (1967), and the Employee Retirement Income Security Act (ERISA) (1974). Legislative history reliance during the Burger years was 52 percent for 65 Title VII decisions, 100 percent for eight ADEA decisions, 60 percent for 10 ERISA decisions, and 33 percent for 83 NLRA decisions.

Further, while the principal laws in the labor relations category were more than two decades old at the start of the Burger Court era, they were at least half a century old by the late 1990s. The justices evidently found legislative history even less useful as guidance when resolving labor relations controversies several generations removed from Congress's pre-enactment deliberative processes rather than merely one or two. The significant decline in reliance within this category from the Burger to the Rehnquist years may again reflect the influence of intervening authority—both Supreme Court precedent and deference to agency determinations.

Interestingly, the Court's declining reliance on legislative history seems to be more a matter of attrition than substitution. The Rehnquist Court uses a slightly higher number of interpretive resources per decision than did the Burger Court. The difference reflects a significant increase in Rehnquist era reliance on textual meaning, dictionaries, canons of construction, and common law precedent that more than offsets the Court's diminished use of legislative history. Yet when legislative history is not used, the number of resources per decision actually declines by more than one in both Burger and Rehnquist Court majority opinions. The justices apparently have concluded that while legislative history can help to explain and justify a result, its absence does not leave a gap that needs to be filled.

18. See Johnson v. Transp. Agency, 480 U.S. 616, 627-40 (1987). As was true for race or sex discrimination cases in general, the Court's use of legislative history in Title VII decisions declined significantly between the Burger and Rehnquist years, from 52% to 31%.
21. Our dataset does not extend back to the 1950s and 1960s, when key provisions of the NLRA had just been enacted, but a previous study suggests that the Court found NLRA legislative history more reliable as a resource during those earlier decades. See Beth Henschen, Judicial Use of Legislative History and Intent in Statutory Interpretation, 10 LEGIS. STUDIES Q. 333, 364-65 (1980). Using a different methodology, Henschen analyzed all 124 NLRA cases decided by the Court between 1950 and 1972.
23. In the Burger era, there were 3.94 resources per decision when legislative history is relied on and 2.5 resources per decision when legislative history is not a factor. The corresponding figures for Rehnquist era decisions are 4.50 and 2.88. Given that our coding approach allows for up to ten resources per majority opinion (nine in opinions without legislative history), one also could describe the reduction in resources used as roughly 12% when comparing majorities relying on legislative history with majorities having no such reliance: 39% vs. 26% in the Burger era, and 40% vs. 32% in the Rehnquist years.
Whether subject matter variations are as influential as the justices' individual roles authoring majority opinions is an area that warrants more nuanced examination. The record regarding the 1990 Americans with Disabilities Act—construed by the Court in 12 majority opinions, only two of which rely on its extensive legislative history—suggests that the “statutory aging” hypothesis advanced for some federal laws is not applicable across the board. Nonetheless, it does seem that the relative maturity of a statutory scheme influences the Court's changing patterns of legislative history reliance.

**Ideological direction**

Table 1 discloses that four of the five most conservative members of the Rehnquist Court are at best reluctant users of legislative history, while two of the most liberal justices who served during the combined period—Justices William Brennan and Marshall—regard legislative history with special favor. This raises the possibility that legislative history reliance during our 36-year time span has a distinctly liberal or pro-employee tilt. Such an inference is at least plausible given that Congress in the workplace law area has consistently acted to further a broad pro-employee intent. Statutes approved from the 1930s to the early 1990s have had as their basic purpose to augment the legal protections available to employees and thereby promote economic security and individual dignity in the American workplace.

In fact, however, legislative history findings for the Court as a whole do not support a liberal or pro-employee tilt. Sorting the Court's entire body of decisions according to ideological direction reveals that legislative history reliance is fairly evenly distributed. It is used to help explain 40 percent of the 310 decisions that reach a liberal or pro-employee result, 37 percent of the 291 decisions that arrive at a conservative or pro-employer outcome, and 35 percent of the 48 indeterminate ideology decisions (favoring neither employees nor employers in clear terms). The difference between legislative history's contribution to outcomes that favor employees as opposed to employers is not significant.

With respect to the 249 decisions out of 649 that rely on legislative history, 50 percent reach liberal results, 43 percent have conservative outcomes, and 7 percent are indeterminate. The distribution is slightly more favorable to employees than the ratios for the 400 decisions that do not rely on legislative history, but again the difference is not significant. Looking at all 649 decisions, 48 percent reach liberal results, 45 percent have conservative outcomes, and 7 percent are indeterminate.

**Ideology of the justices**

Even though legislative history reliance by the Court as a whole is not associated with a distinctly liberal or conservative direction, it remains possible that the use of this resource is ideologically linked in the hands of certain conservative or liberal justices. To consider that possibility, the study assessed legislative history usage for two ideologically identifiable subgroups: the five most conservative members of the Rehnquist Court (Justices William Rehnquist, Scalia, Thomas, Kennedy, and Sandra Day O'Connor) and the eight most liberal justices who served for at least 10 years on the Rehnquist or Burger Courts (Justices Marshall, Brennan, Stevens, David Souter, Ruth Bader Ginsburg, Breyer, Blackmun, and White).

Table 3 shows that liberal justices generally have a distinctly liberal history reliance percentage. Eight of the nine most liberal justices have liberal history reliance (60%) as compared to conservative reliance (28%). The exceptions are Justice O'Connor, whose liberal reliance is down to 48%, the most conservative number among the justices.

**Table 3: Outcomes associated with legislative history reliance by selected justices**

<table>
<thead>
<tr>
<th></th>
<th>Liberal justices</th>
<th>Conservative justices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leg. history</td>
<td></td>
<td></td>
</tr>
<tr>
<td>reliance %</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liberal</td>
<td>46 (205)</td>
<td>50 (117)</td>
</tr>
<tr>
<td>Conservative</td>
<td>15 (53)</td>
<td>22 (112)</td>
</tr>
</tbody>
</table>

Total number of majority opinions for each outcome in parenthesis.
majority opinions reaching pro-employee results (205 versus 117) while conservative justices write more majority opinions favoring employers (112 to 53). Further, when authoring majority opinions that reach either pro-employee or pro-employer results, the eight liberals use legislative history more than twice as often as the Rehnquist Court conservatives (46-50 percent versus 15-22 percent). This too is understandable, given that four Rehnquist Court conservatives are the four lowest users of legislative history among all the justices, and two of the liberals—Justices Brennan and Marshall—are at the very high end relative to their colleagues.

More surprising, however, is that for both wings of the Court legislative history usage points in the same ideological direction—away from the pro-employee purposes of the statutes themselves. For liberal justices, legislative history reliance is associated with a slight moderating tendency: liberals use legislative history to support pro-employer results somewhat more often than pro-employee outcomes. Conservative justices also rely on legislative history to justify pro-employer results more often than pro-employee outcomes; that tendency is more predictable, given conservatives’ ideological orientation on workplace law issues. These differences are not significant for either subgroup of justices. Still, the fact that legislative history reliance for basically liberal workplace statutes even tilts in such a pro-employer direction is intriguing.

The pro-employer tendency is more pronounced when comparing outcomes for the two sets of justices in decisions that rely on legislative history versus decisions that do not. As Table 4 indicates, decisions authored by the eight liberal justices that rely on legislative history reach liberal outcomes 22 percent more often than they produce conservative results. By contrast, the liberal justices reach liberal outcomes 28 percent more often than conservative results in decisions without legislative history. The results for our five conservative justices point distinctly in a pro-employer direction; although the number of decisions is smaller, the results are significant. The conservative justices reach conservative results 50 percent more often than liberal results when relying on legislative history, but only 31 percent more often when not relying on legislative history.

For Justices Brennan and Marshall, the same moderating association is present that was observed for the liberal justices as a group: their majority opinions using legislative history were more supportive of employers than their majority opinions that did not rely on this resource. In Justice Brennan’s case, majority opinions relying on legislative history were 16 percent conservative and 71 percent liberal; those not relying on legislative history were 13 percent conservative and 81 percent liberal. For Justice Marshall, the ratios were 25 percent conservative and 66 percent liberal in majority opinions relying on legislative history, but 19 percent conservative and 71 percent liberal in majority opinions not relying on legislative history.

Why is legislative history reliance associated with a slight moderating trend for the liberal wing of the Court? More broadly, how does legislative history accompanying liberal pro-employee statutes end up being relied on to support conservative pro-employer outcomes almost half the time?

Exploring answers

There are several observations worth making when exploring possible answers to these questions. Initially, the fact that workplace law statutes enacted by Congress favor legal interests of employees does not mean the enacted provisions or accompanying legislative records are monolithic. Complex and comprehensive legislative schemes such as Title VII, ERISA, and the NLRA inevitably involve compromises among competing interests. Negotiation of various tradeoffs and adjustments is reflected in the work product of authorizing committees and the floor debates in both houses of Congress. Legislators understand they are voting for employee rights and protections in some overarching sense, but they also know those rights and protections are being reconciled with the need to maintain business operations in an efficient and not unduly burdensome manner.

Congress regularly accommodates such major and minor legislative objectives in order to further its pol-

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Table 4: Comparing outcomes: decisions relying on legislative history versus decisions not relying on legislative history*

<table>
<thead>
<tr>
<th></th>
<th>Liberal</th>
<th>Conservative</th>
<th>Total # decisions</th>
<th>Liberal</th>
<th>Conservative</th>
<th>Total # decisions</th>
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</thead>
<tbody>
<tr>
<td>% decisions relying on LH</td>
<td>60</td>
<td>33</td>
<td>(165)</td>
<td>32</td>
<td>63</td>
<td>(139)</td>
</tr>
<tr>
<td>% decisions not relying on LH</td>
<td>57</td>
<td>35</td>
<td></td>
<td>24</td>
<td>74</td>
<td></td>
</tr>
</tbody>
</table>

* Percentages do not add up to 100 because the total number of decisions for both liberal and conservative justices includes cases with indeterminate ideology that are not reported here.
policy-making agenda. In this context, there are several principled or coherent ways that legislative history may be used to defend conservative or pro-employer results even as the Court applies the terms of a liberal or pro-employee statute. Three such classifications occur with some frequency in the workplace law area; they are relied on by liberal justices, not just conservative ones.

First, there is legislative history that explains employer defenses or exemptions included in the statutory language. In a considerable number of cases, the Court has used legislative history to confirm or establish that Congress intended employers to be immune from liability for certain business judgments, even if those judgments in some sense aggravate the discriminatory conditions at which the law is aimed.21

Second, the Court has looked to legislative history that establishes a compromise occurred between supporters and opponents on the issue in question. The existence of this compromise is manifested in the legislative record, either through evidence of a concrete give and take between members from both sides or through evidence that Congress simply “agreed to disagree” on the issue, inviting the courts to make the call.22

Finally, the Court has invoked legislative history to demonstrate that employees and their supporters have overreached in their claims. Typically, the Court analyzes this legislative history to establish that the asserted right, protection, or remedy simply was not envisioned by the Congress that enacted the language under dispute.23

Apart from these three doctrinal factors, the justices may have strategic reasons for using a liberal statute’s legislative history to support conservative results. Justices authoring majority opinions may turn to legislative history primarily to counteract legislative history arguments offered in dissent. Over 40 percent of the Court’s decisions relying on this resource also feature a dissenting opinion urging that legislative history justifies the opposite conclusion. More than half of these “dueling legislative history” cases (53 out of 101) involve conservative results: the majority uses legislative history to help defend its pro-employer outcome while the dissent contends that the legislative record supports the employee’s position. In some cases, the majority author may have added legislative history discussion in response to—or in anticipation of—the dissent’s argument based on evidence of Congress’s intent.

To be sure, the presence of competing legislative history arguments may reflect a dissent’s response to the majority’s initiative rather than a majority author’s strategic afterthought or preemptive strike. Moreover, even when the justices invoke legislative history in a majority opinion to further such strategic ends, the majority author presumably has some principled or coherent grounds for maintaining that the history invoked actually supports the Court’s legal conclusion. If this were not true, the majority would likely ignore the legislative history resource altogether, or else maintain that it is not relevant to resolving the controversy at hand.24

It is important to examine further this provisional determination that deliberative materials accompanying a statute aimed broadly in one ideological direction are being used in coherent ways to defend specific results pointing in the opposite direction. Legislative history has been criticized as too easily manipulated based on its subjective and political character. The findings here indicate, however, that the relatively neutral aspects of legislative history reliance, especially by liberal justices, may be explained at least in part based on certain recurrent and principled judicial approaches to the record.25

**Ideology or interpretive philosophy?**

As previously noted, Table 3 shows that even absent a pronounced ideological tilt, the eight liberal justices are more likely to rely on legislative history than the five Rehnquist Court conservatives. The liberals’ more favorable view toward this history is distinctive in both eras: liberal justices made use of legislative history 21 percent more often than conservative justices during the Rehnquist years and 30 percent more often during the Burger era.26 Much of the difference for the Rehnquist era reflects the arrival of two conservative justices who are implacably opposed to legislative history reliance. Still, it remains true as a general matter that liberal justices are more inclined to value legislative history than are their conservative colleagues.

The difference in interpretive attitudes with regard to legislative history such reliance did have an ideological dimension in limited circumstances. For close cases (decisions involving a vote margin of one or two between majority and dissent), majority reliance on legislative history was significantly more likely to be associated with a liberal or pro-employee result than for close decisions in which legislative history was not part of the majority’s explanation. This finding may be primarily attributable to the conduct of our eight liberal justices: they were more likely to rely on legislative history in authoring close majorities with pro-employee results than when authoring pro-employee decisions that commanded wider vote margins. When the Court is closely divided and issues a liberal decision, it is perhaps not surprising that justices in the majority tend to be both liberal (favoring pro-employee results generally) and heavier users of legislative history (see Table 3 and accompanying discussion).


28. There are 57 decisions in which the dissent relies on legislative history and the majority does not. Some of these decisions that reach conservative results appear to reflect an ideologically-linked determination to reject legislative history evidence as irrelevant. See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Sutton v. United Airlines, 527 U.S. 471 (1999); EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

29. Although we found that legislative history reliance was basically neutral in outcome terms, some reliance did have an ideological dimension in limited circumstances. For close cases (decisions involving a vote margin of one or two between majority and dissent), majority reliance on legislative history was significantly more likely to be associated with a liberal or pro-employee result than for close decisions in which legislative history was not part of the majority’s explanation. This finding may be primarily attributable to the conduct of our eight liberal justices: they were more likely to rely on legislative history in authoring close majorities with pro-employee results than when authoring pro-employee decisions that commanded wider vote margins. When the Court is closely divided and issues a liberal decision, it is perhaps not surprising that justices in the majority tend to be both liberal (favoring pro-employee results generally) and heavier users of legislative history (see Table 3 and accompanying discussion).

30. The Rehnquist Court differential is 39% reliance for liberals and 18% for conservatives; the Burger Court differential is 54% for liberals and 24% for conservatives. The Burger Court numbers for our group of conservative justices include only 37 majority opinions: those authored by Justices Rehnquist and O’Connor.
tory may well reflect a deeper fault line involving judicial understandings about how best to acknowledge the lawmaking supremacy of Congress. Although this separation of powers debate is more complex than can be adequately addressed here, a few observations are in order.

Conservative federal judges in recent decades have often been skeptical whether legislative history can be helpful in achieving fidelity to congressionally enacted text. They maintain that to be properly respectful of Congress's constitutional role as a unified lawmaking body, judges should avoid or minimize reliance on the unenacted intentions expressed by various congressional subgroups. Liberal judges, on the other hand, have tended to view evidence is inevitably influenced by her reaction to the ideological thrust of the statutes themselves. This study's findings on the ideologically neutral aspects of legislative history reliance by liberal justices suggest that the divergence in approach between these two groups may warrant additional explanation. While further study should continue to address the possible ideological dimensions of legislative history reliance, the differences observed between the Court's two wings over a 36-year period may reflect interpretive philosophy as well as ideological strategy.

Concluding thoughts
This analysis of legislative history reliance in Burger and Rehnquist

effects to discern and apply the intent of key legislative subgroups as furthering their constitutional role of junior partner in the lawmaking enterprise. They assume that the record of such intent can be evaluated in a suitably cautious manner, and therefore that legislative history constitutes relevant and probative evidence of what Congress was seeking to accomplish.

Scholars in both law and social science have suggested that this difference in attitudes must be ideologically driven. Mindful of the fact that most federal laws enacted since the 1930s point in a liberal or pro-regulatory direction, these scholars contend that a judge's willingness to draw on legislative background


This study does, however, shed light on the relevance and magnitude of several different factors that help explain the Court's patterns of reliance on legislative history. It is evident that Justice Scalia has played an important role in the Court's declining use of this resource—both through high profile resistance and criticism expressed in his own opinions, and through the influence he seems to have had on the writings of his colleagues.

Subject matter considerations also have contributed to the Court's growing reluctance to rely on the legislative history resource. Sharp declines in reliance have occurred for statutes that aged notably during the 36 years covered by the study. As a regulatory scheme advances to middle age or beyond, the Court may well conclude that other interpretive resources are more trustworthy or malleable in clarifying and developing the meaning of inconclusive text.

Finally, the Court's reliance on legislative history turns out to be intriguingly non-ideological in direction. With respect to the Court as a whole and distinctly ideological subgroups of justices, legislative history reliance for liberal workplace law statutes is associated with pro-employer results more often than one might expect. Several principled explanations for these findings suggest that the Court's use of legislative history may be deliberative and coherent in ways that legislative history skeptics have not imagined.

The Court's reliance on legislative history turns out to be intriguingly non-ideological in direction.

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Law versus science and the problem of eyewitness identification
By Timothy S. Eckley


The haunting nature of Franz Kafka's The Trial lies in its everyman aspect: the main character "K." inexplicably finds himself mired in the vagaries of an unfathomable legal system from which he cannot escape. Imagine, however, if it were not fiction. Imagine you were one of the thousands of innocent people imprisoned in the United States for a crime you did not commit.

In March, 1985, ex-marine Kirk Noble Bloodsworth was tried and convicted for the brutal murder and sexual assault of a nine-year-old girl and sentenced to death by a jury of his peers. He was law enforcement's prime suspect; the prosecution had its man. Five eyewitnesses testified at trial that they had seen Bloodsworth with the victim. After serving two years on death row, his conviction was overturned and he was retried, convicted a second time, and sentenced to two consecutive life terms. It was a crime he did not commit. It's a crime that remains unsolved.

After serving nearly nine years in prison as an innocent man, Bloodsworth was exonerated through DNA testing in 1993 and was released from prison five months after his mother passed away. He was the first person exonerated from death row by post conviction testing utilizing DNA scientific advances. The details of Bloodsworth's story are far from unique.

According to the Northwestern Journal of Criminal Law and Criminology from 1989-2003 340 people were exonerated in the United States. The advent of DNA technology and improved forensic techniques has accelerated the rate of exonerations beyond everyone's expectations, concomitantly exposing alarming weaknesses in the American criminal justice system.

Documented exonerations in America date at least as far back as 1820. What may be surprising, however, is that the oldest, most reliable, most relied upon form of identifying a criminal suspect—eyewitness identification—has been shown to account for more wrongful convictions than all other factors combined. Frailties of human memory and perception have been at the heart of debates about the criminal justice system in this country for nearly 100 years. Only recently, however, in conjunction with the development of peer-reviewed, verifiable psychological science, has the legal system truly begun to acknowledge the prevalence of inaccurate eyewitness identifications and to take steps to prevent the inevitably tragic consequences.

In True Witness, James Doyle presents fascinating insights into the world of high-stakes academia fighting to make a difference in mainstream America. More precisely, Doyle traces the history of the struggle of social scientists attempting to effect fundamental changes in the American criminal justice system by laying bare the too-often catastrophic results of blind adherence to and faith in fickle aspects of human nature.

Doyle launches frequent broadsides at the justice system, and frankly universally indicts everyone involved in the administration of justice—law enforcement, lawyers, judges—as being "derisive" towards, "patronizing" of, "hostile" to, and "reflexively" dismissive of psychology specifically, and all of science generally. The oft-repeated criticism of the court system as harboring an ongoing "hostility" and "contempt" towards science is overstated, but that tone is consistent with the balance of this fascinating nonfiction work on the history of psychology and the law, which reads like a novel.

Doyle begins with an entertaining redux of the turn of the 19th century heavyweight bout over the role of psychology in the courtroom fought by Hugo Munsterberg, the "father of applied psychology," and Dean John Henry Wigmore, a towering legal scholar of the age. The story concludes with Attorney General Janet Reno, an unsung but crucial hero in the "law-versus-psychology battle," and Iowa State psychology professor Gary Wells and his vision of how "psychology could play a role in improving the world," by improving the accuracy and reliability of eyewitness identifications and procedures. Doyle reports that "each year an estimated 75,000 American prosecutions turn on eyewitness evidence." Doyle weaves throughout a massive
amount of research the compelling stories of death row exonerences and the tribulations of heroic figures committed to preventing such catastrophes in the future.

Challenging reliability
Hugo Munsterberg, Doyle notes, was "alert enough to notice" that moral issues in America "inexorably gravitate toward the courts." (p.15) Munsterberg published a series of essays, ultimately collected in On the Witness Stand, including a discourse titled "The Memory of the Witness," wherein he challenged the reliability of eyewitness accounts by relating his own failed recollections in testimony he gave during the trial of a suspected burglar of his own home. Alarmed and intrigued by the contamination of his own prodigious memory, Munsterberg set out to demonstrate his self-revelations of memory mistakes.

Munsterberg illustrated the relative lack of correlation between a witness' certainty in testifying to an event and the accuracy of the testimony. He demonstrated the phenomenon that is becoming commonly known today as "confirmatory bias," which includes the theory that perception, memory, and recall—the fundamental bases of eyewitness testimony—are subject to "suggestion, distortion, and omission, [which] was very bad news for legal procedure," according to Doyle. (p. 21) Doyle presents a fascinating rendition of a "mock trial" between Wigmore and Munsterberg on the law vs. psychology debate and highlights the crux of the matter: "The cross-examination of 'Munsterberg' revealed in humbling fashion that when it came to understanding which particular witness produced a good, and which a bad, verdict psychologists were, just like lawyers, groping in the dark." (p. 30)

Some 70 years later psychologist Robert Buckhout noted the failure of psychology to contribute significantly to understanding which particular witness produced a good, and which a bad, verdict psychologists were, just like lawyers, groping in the dark. Buckhout, taking the fight into the courtroom by way of expert testimony, "attacked the videotape version of eyewitness memory at length, explaining that memory was actually a delicate three-stage process of perception, storage, and recall, which was vulnerable at every stage...including the social pressures inherent in the environment of a lineup...to identify a suspect in order to please authority figures." (p. 56) Despite the misgivings of many that the work of Buckhout and his colleagues was creating a dangerous weapon for the benefit of all criminal defendants, most of whom are truly guilty, "by increasing juror skepticism about all eyewitnesses," the eyewitness identification reform movement had at least gained a foothold in the legal system.

Preventing misidentification
While the psychological experts were indeed making inroads into the courtroom the progress was slow and the practical effect of their efforts regarding eyewitness identification was limited. Then along came Professor Gary Wells. If the legal system was unable sufficiently to identify or rectify errors in eyewitness testimony after they had been made, Gary Wells has been instrumental in developing methods of preventing mistaken identities from occurring in the first place. His formula of "estimator variables" denominated factors the criminal justice system cannot control, such as the race of the perpetrator, circumstances under which the event occurred, the length of the criminal event, and the like, and "system variables," which are factors under the direct control of the justice system, such as the form and method of witness interviews, suspect interrogations, and identification procedures. This methodology enabled Wells to champion sequential, rather than simultaneous, line-ups and photo arrays.

By focusing on system variables, Wells and his colleagues have been able to posit additional practical reforms in law enforcement's interrogation and investigation procedures that garner significantly fewer misidentifications with only a marginal drop in positive identifications. In 1997, a working group assembled by Wells recommended to the criminal justice system four peer-reviewed, "best practices:"

1. Double-blind testing. The person supervising the identification procedure should be unaware of who the suspected perpetrator is in order to avoid contaminating the witness' independent and objective memory.

2. Improving instructions to witnesses. Witnesses should be instructed that the suspected criminal perpetrator "may, or may not, be" in the line-up to reduce the number of "false hits."

3. Selecting better "fillers," by matching the witness' description of the criminal, not law enforcement's early suspect.

4. Gauging eyewitness confidence immediately before the influence of post-identification feedback. (pp. 164-65)

Advancing deliberately
The United States justice system suffers a beating at the hands of James Doyle. Introspective systems of justice, such as ours, do tend to move more slowly than one might wish, especially in an era of rapid scientific advancement. Often, however, it advances quite deliberately with good reason. The courts have readily embraced DNA technology, as they have many, many other revolutionary scientific advancements.

When confronted with novel scientific evidence or theories, the judge's role of gatekeeper of the courtroom and guardian of the jury must be played deliberately. As the then Court of Appeals for the District of Columbia noted in 1923 "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized . . . ." Frye v. United States, 293 F. 1013, 1014 (1923). Writ-
ing more recently for the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Justice Harry Blackmun observed the "important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly." The struggle is great for many reasons, including that it threatens the traditional province of the jury of determining matters of credibility and the weight of evidence, of which it is the role of the presiding judge to protect. Even Doyle acknowledges that "The science will not stay frozen forever. Will further research prove that sequential lineups are really no better than simultaneous ones?" (p. 205)

As Doyle iterates, some reluctance to accepting new scientific eyewitness identification techniques stems from the fear that guilty defendants, and defense lawyers charged with representing them, would use the mountains of information and scientific studies to cast skepticism on all eyewitness testimony no matter how irrefutable it might otherwise be. If the standard of proof is beyond a reasonable doubt, and the crucial evidence is eyewitness identification, and any particular eyewitness identification is shown to be the product of procedure inconsistent with cutting edge standards and is thus inherently unreliable—the result is a dangerous indictment of the entire criminal justice system. “The prosecutors thought [Wells] was handing defense lawyers a new weapon with which to beat the cops over the head.” (p. 173)

High stakes
The stakes involved with wrongful convictions could not be higher. And perhaps the justice system has blindly or stubbornly held too long to the notion of eyewitness infallibility. In this light, Doyle, the psychological researchers, and others are justly impatient and frustrated with the pace of reform. While Munsterberg may have begun this struggle nearly 100 years ago, it is really relatively recently that the pioneering work of Gary Wells and others has been done. And even so, if not for the advent of DNA technology, psychology and overdue reform in eyewitness identification procedures would still be relegated to and subject to the vagaries of trench warfare in the courtroom governed by a legal system of rules and procedures that by design is anathema to affirmatively imposing wholesale reform beyond its own hallowed halls.

The courts, constrained by precedent, are charged with and accustomed to acting as referees, not players, in the game of law enforcement. Although they should not sit passively in light of the recent developments in forensic eyewitness identification, they are not well suited to effect systemic changes of this nature. *True Witness* should serve as a wake-up call for all stakeholders in the administration of justice to recognize that only through broad cooperation can meaningful system-wide change be accomplished.

Revolutionary changes
by Sally J. Kenney


For a system that revels in tradition, makes only the smallest incremental changes, and thinks modernizing is a dirty word, the changes in the judiciaries of the United Kingdom in the last 10 years have been nothing short of revolutionary. Devolving powers to Scotland, Northern Ireland (where the Assembly is currently suspended), and to a lesser extent, Wales, has made those jurisdictions the vanguard of electing women legislators, instituting judicial nominating commissions, and attempting to operationalize the concept of a representative judiciary.

Clearly on the agenda for a new supreme court in the United Kingdom is the constitutional issue of determining the relationship of the parts to the whole. How will Scotland’s independent civil law system fit into a system of appeals, formerly the purview of the Privy Council? Should a judge from Northern Ireland have a guaranteed seat on the House of Lords? Passage of the Human Rights Act of 1998 has brought into sharper focus the relationship with the U.K. as part of international and supranational institutions and the judicial systems they created, the Council of Europe (European Court of Human Rights) and European Union (European Court of Justice), respectively.

Many of us who advocate for reform, such as modernizing the arcane (and discriminatory) system of selecting judges, utilizing judicial staff more effectively, curtailing unlimited oral argument, and developing control over the appellate docket hope that the debate engendered by the passage of the Human Rights Act and more recently in 2003 the abolition of the office of the Lord Chancellor will place some of these other reform issues squarely on the public’s agenda.

Into this milieu steps Professor Andrew Le Sueur and his co-authors. *Building the UK's New Supreme Court: National and Comparative Perspectives* offers lesson-learning from the highest constitutional courts in the United States, Canada, Germany, and Spain as well as the European Court of Justice and European Court of Human Rights. The project on which this book is based (the Consti-
What are the lessons?
Who is the audience for this text, I wondered repeatedly as I read each chapter. High-level civil servants considering models of reform? The higher judiciary itself? Scholars such as myself specializing in judicial selection and the U.K.'s legal systems more generally? Or scholars and students of comparative law? Even the most devoted in each group will find it tough going reading from cover to cover. Do we really need to know the history of Scottish law from several centuries past to figure out the route of appeal of a new supreme court? I'm not sure Scottish highlanders are really comparable to native peoples of Canada, or those in Northern Ireland to the Quebecois, but I'm willing to be persuaded of the relevance of the comparative example. Alas, like too many volumes of so-called comparative work, comparison means considering a country other than the dominant, in this case, the United Kingdom. So we have interesting articles about Spain, Germany, Canada, and the United States, but the chapters leave all lesson drawing to the reader.

Several of the articles also have a second flaw of much comparative work: the authors are overly smitten by their own countries marvelous success in solving problems, in this volume, from federalism to managing their caseloads. Happily, we have a less sanguine view from Canada. If policy makers are going to borrow from one another, they need accurate, even critical, assessments of policy as implemented, not the propagandist's. Likewise, English judges and defenders of the English legal profession need to broaden their perspective from the untested and uncritical assumption of "the best in the world" to consider the lessons of other jurisdictions. Several of the fine essays in the volume, such as Le Sueur's ("Choosing Cases"), Kate Malleson's ("Judicial Appointments in the Era of Human Rights and Devolution"), and Richard Gordon's ("Relationships between Bench and Bar") encourage them to do just that. Judicature readers who are not academics might be interested in a chapter or two on a relevant topic. I learned something interesting and important from each chapter, although if I had not been a reviewer I probably would have skipped over more than half. Those who are teaching about the U.K.'s legal systems have a relevant (if somewhat dry, and descriptive rather than analytical) compilation that will serve them well. Other teachers of comparative law will simply have to compare the individual chapters to what they already have on the jurisdiction in question. The essays are relevant and competent, but I am not in a position to say that the chapter on Spain, for example, is the best overview in English.

Despite these criticisms, I look forward to further work by the team at the Constitution Unit. ☺

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What passes for justice
by Mary T. Skerrett


Forget everything you ever learned in school about the criminal justice system. Steve Bogira will tell you what really goes on in America's courtrooms and how little it has to do with justice. From his unique perspective as an observer in the Cook County (Illinois) Criminal Courthouse, he lets us in on the daily wheeling and dealing that passes for justice in Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse. From the moment of arrest until final determination, we follow the poor and powerless through a system that seeks not justice, but expediency. Courtroom 302 shows what has become typical in Chicago's courtrooms and is about "how justice miscarries every day, by doing precisely what we ask it to do."

Steve Bogira is a prize-winning writer for The Chicago Reader. This book is the result of a project fellowship the author was awarded in 1993 to report on urban criminal courts and the poor. Bogira spent the calendar year of 1998 in the courtroom of Judge Daniel Locallo observing criminal court procedure, poring over police reports and judicial decisions, and interviewing everyone involved in the process. He gives us insight into the decision-making processes of the power players—the judge, the prosecutors and public defenders; he also lets us in on discussions he had with those not in the limelight such as Chicago police officers, bailiffs, court clerks, and court reporters. However, the most interesting and enlightening stories come from his intimate conversations with defendants, defendants' families, witnesses, victims, and victims' families—the masses that converge on the courthouse every day with little voice or influence over the paths their lives will take after spending time in Courtroom 302.

The courtroom background is a noisy, chaotic, confused world in which alleged offenders are herded through the system as if cattle in a stockyard. The immediate goal is