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## ARTICLES

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### ALL COPYING IS NOT CREATED EQUAL: BORROWED LANGUAGE IN SUPREME COURT OPINIONS

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#### A. INTRODUCTION

Imitation may be the most sincere form of flattery,<sup>1</sup> but in the language of the law, the demarcation between imitation and wholesale borrowing remains opaque. This is especially true in the Supreme Court’s opinion-construction process. This article examines the implications of the Court’s use of substantive language directly from merits briefs. To do this, the article critically analyzes the relationship between merits briefs and opinions, focusing on instances in which there is strong evidence that briefs played a substantial role in the Court’s choice of majority-opinion language. The analysis compares phrasing from briefs and opinions and locates a case type in which briefs have played an especially influential role.

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1. *See, e.g.*, CHARLES CALEB COLTON, LACON: OR, MANY THINGS IN FEW WORDS; ADDRESSED TO THOSE WHO THINK § CCXVII, 114 (1824) (asserting that “[i]mitation is the sincerest of flattery”). The sentiment has been expressed elsewhere, of course, but Colton’s is a relatively early formulation.

While there is an expectation among those experienced in Supreme Court practice that language from briefs will seep into the Court's opinions,<sup>2</sup> there is considerable variation in the extent and types of overlapping language. Maybe due to this expectation, there is minimal scholarship dedicated to examining instances of high levels of language sharing between Supreme Court opinions and the sources of opinion language such as merits briefs, as well the normative consequences of this language-sharing practice.<sup>3</sup> To help explain the variation in shared language from case to case, this article contains a typology of relationships between briefs and opinions and presents examples of the different types before focusing on the brief-opinion relationship in which briefs play the greatest role: what I characterize as cases having "Lifted" opinions.

The manner in which Justices and their clerks utilize language from merits briefs in Supreme Court opinions shows distinct practices across Justices' chambers and across time. By inquiring into the inputs for the information and wording in Supreme Court opinions, we may begin to better understand the opinion-construction process in a fashion that interviews with clerks and Justices alone cannot convey.<sup>4</sup>

Recent evidence shows that from 1946 through 2013, Supreme Court opinions shared 9.55 percent of their language, on average, with individual merits briefs.<sup>5</sup> That analysis of

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2. See, e.g., TODD C. PEPPERS & ARTEMUS WARD, *IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* (2012); DAVID L. WEIDEN & ARTEMUS WARD, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 206 (2006) (indicating that Justice Stewart might ask a clerk to "[w]rite an opinion along the lines of the United States brief" or "the petitioner's brief"); Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 638 (1962) (declaring that "your brief ought to . . . offer the court something that it can lift, verbatim, into the opinion taking care of all prior authority, phrasing the whole satisfactorily, and applying it to the case in hand").

3. See e.g. Adam Liptak, *Clarence Thomas, A Supreme Court Justice of Few Words, Some of Them Others'*, N.Y. TIMES, August 28, 2015, at A11 (questioning whether language overlap between merits briefs and Justice Thomas's opinions rises to a level of "cribbing").

4. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 34–35 (1979) (discussing the secrecy involved in the interactions between Supreme Court Justices and clerks in the decisionmaking process).

5. Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language*, 86 MISS. L.J. \_\_\_\_ (2017) (forthcoming). An unedited version of this article is available at <http://ssrn.com/abstract=2574451>.

almost 10,000 briefs elucidates several patterns in the ways that merits-brief language makes its way into Supreme Court opinions. The main foci of this article are cases in which the briefs have the greatest impact on the Court's opinions or, put another way, cases in which the language from a merits brief is most fundamental to the language of the opinion.<sup>6</sup>

In many of these instances, the Court uses language from the briefs as its own without attribution. With these examples, this article confronts the normative question about when the Court should note that the opinion language does not originate with the Justices and their clerks.<sup>7</sup>

In addition to examining specific brief-opinion relationships, this article also looks at the factors that tie the set of cases together. In this sample of cases there are common threads in terms of the attributes of the cases, Justices, and litigants. These shared features show that cases with high levels of language overlap are not entirely random.

The underlying premise of this article is that the language in Supreme Court opinions matters. The article begins by looking at why opinion language matters and by developing a hypothesis for why we might expect the language in briefs to filter into Supreme Court opinions, sometimes in especially high doses. After this introduction and a short discussion of how the article tracks the linguistic similarities between briefs and opinions, the article compares the cases of interest with their respective briefs. To conclude, this article examines the normative implications of this language-sharing practice by focusing on the ways in which bringing it to light may affect the perception of the way the Court conducts its business.

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6. Surprisingly, even these opinions including large sections of uncited language that overlaps with the merits briefs are not wholly devoid of citations to the briefs, which I elaborate on in the conclusion.

7. For instance, some might view overlapping language in the Court's statements of facts as inconsequential, but view overlapping language in the Court's assessment of the law as more worthy of attribution if unoriginal. Even with cited source material, there is often strong evidence of the impact of briefs on opinions through the sharing of citations to less-common references such as treatises and law reviews, as well as sharing of multiple citations appearing in briefs as parts of string citations.

## II. WHY FOCUS ON LANGUAGE

The strength of the Supreme Court's precedents is only as iron-clad as opinion language permits. Time and again, issues left unsettled by the Supreme Court lead to new test cases that percolate back up to the Supreme Court. This can be illustrated by the Court's sinuous precedent in Fourth Amendment cases that define the exclusionary rule.<sup>8</sup> As language from past cases is repeated in subsequent cases, the specific wording of the opinions affects future decisions of the Supreme Court and lower courts. Indeed, when interviewed on the subject of Supreme Court opinions, Justice Scalia underscored the importance of opinion language:

[T]he only important part about an appellate case is not who wins or loses; it's not . . . affirmed or reversed. The important part is the opinion. And if you affirm or reverse for the wrong reason, you've done everything wrong. . . . [I]f you haven't made clear what your holding is, instead of reducing litigation, instead of making life simpler for courts and lawyers below you, you've complicated it.<sup>9</sup>

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8. Although in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court broadly held that evidence obtained in violation of the Fourth Amendment should be excluded from evidence at trial, subsequent cases either chipped away at this holding or added teeth to it. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (creating a "good faith" exception to the exclusionary rule); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that subject's identity and body are not suppressible evidence under the exclusionary rule); *Camera v. Mun. Ct.*, 387 U.S. 523 (1967) (holding that housing inspectors need a warrant to enter and search an apartment building); *Schmerber v. Cal.*, 384 U.S. 757 (1966) (allowing physical evidence derived from a blood sample taken without the subject's consent into evidence at trial). The various trajectories of the exclusionary rule are the focus of much scholarly debate and analysis. *See, e.g.*, Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 *MISS. L.J.* 483 (2006) (analyzing the lack of clarity surrounding the good-faith exception to the exclusionary rule); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005 *CATO S. CT. REV.* 283 (discussing the ways in which the Court's 2005 Fourth Amendment cases chip away at the exclusionary rule); Stephen E. Hessler, Note, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 *MICH. L. REV.* 238 (2000) (examining the lack of clarity surrounding the reach of the exclusionary rule); James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 *STANFORD L. REV.* 1301 (1992) (looking at use of illegally obtained evidence to impeach a witness at trial).

9. Bryan A. Garner, *Justice Antonin Scalia*, 13 *SCRIBES J. LEGAL WRITING* 51, 54 (2010).

Similarly, Justice Kennedy noted that “the law lives through language and we must be very careful about the language that we use.”<sup>10</sup> With this understanding, many scholars take seriously the downstream effects of the Court’s opinion language in guiding and constraining future decisions in the Supreme Court and other courts.<sup>11</sup>

The source of Supreme Court opinion language is relevant to its institutional standing.<sup>12</sup> There is an expectation for the Court to use language that comes from the machinations of the Justices based on their understandings of the Constitution as well as from citations to existing law and secondary sources.<sup>13</sup> One of the main sources that provides potential language for Supreme Court opinions is parties’ merits briefs.<sup>14</sup>

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10. Bryan A. Garner, *Justice Anthony M. Kennedy*, 13 SCRIBES J. LEGAL WRITING 79, 97 (2010).

11. See, e.g., Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 80 (Cornell W. Clayton & Howard Gillman eds. 1999) (“There is evidence that most justices act in accordance with the Court’s formal responsibility to decide actual legal disputes based on their best understanding of the law.”); GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009) (noting that the way in which judges reason through their decisions in prior cases constrains judges’ later decisions); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POLITICAL SCI. REV. 305 (2002) (looking at law’s influence—in contrast to personal political ideologies’ influence—on Supreme Court Justices because it operates as a means of establishing specific case factors as relevant or setting levels of scrutiny); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (articulating a theory of the historic course of decisions as a shaper of subsequent outcomes).

12. See LIEF H. CARTER & THOMAS FREDERICK BURKE, *REASON IN LAW* (2005) (utilizing “logic of the triad” framing to explain judicial legitimacy). For background on the framework of the “logic of the triad” and its application to legal institutions see generally Martin M. Shapiro, *COURTS, A COMPARATIVE AND POLITICAL ANALYSIS* (1981), and Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMPARATIVE POLITICAL STUDIES 147 (1999).

13. See Hathaway, *supra* note 11.

14. Of course, the Court uses lower court opinions, amicus curiae briefs, and original research in the preparation of its opinions as well. See, e.g., Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC’Y REV. 917 (2015); Pamela C. Corley, Paul M. Collins & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POLITICS 31 (2011); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51 (2008). While I do not exclude the possibility that the merits brief and the opinion both derived language from one of these common sources, the extent of the relationships

Briefs organize and synthesize cases for the Justices and clerks, minimizing their need to turn to other sources.<sup>15</sup> They also distill the information so the Justices and clerks can focus on other case attributes.<sup>16</sup> Chief Justice Rehnquist underscored this point when he wrote, “The brief writer must . . . bring order to [the case materials] by organizing—and I cannot stress that term enough—by organizing, organizing, and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer’s client.”<sup>17</sup>

Given that the Justices’ own statements describe the brief’s importance in organizing all of the case material for their digestion, it may not be surprising that there is directly overlapping language in some cases between the opinion and a brief. The extent of this relationship, however, varies immensely and studies have up to this point been generally devoid of such analysis because qualitative assessments—like the one that I discuss here—of the language shared between Supreme Court briefs and opinions are sparse.<sup>18</sup>

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between individual merits briefs and the Court’s opinions that will be shown below corroborates the direct influence of the briefs.

15. E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 290–91 (1953) (describing utility of briefs for judges).

16. Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 261–62 (2009) (characterizing the brief as “a superior and more efficient method of conveying detailed information to a judge,” and noting that “it is always handy for the judge to have the written submission, and all of its points and authorities, at hand . . . because the judge need not expend great effort in capturing and storing an argument to memory,” which allows the judge to “expend more energy on understanding it and assessing its persuasiveness”).

17. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 4 (1999); see also Richard A. Posner, *Convincing a Federal Court of Appeals*, 25 LITIG. 3, 3 (1999) (explaining that an effective brief is self-contained, so that the judge does not need to consult other sources in order to understand what is at issue); Albert Tate, *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIG. 11, 13 (1978) (discussing the brief as an organization tool or “judge’s companion” useful “from before the oral argument until the rehearing is denied”).

18. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 111 (1990) (explaining that “[j]udges’ opinions do not acknowledge the borrowing of ideas, even language, from the parties’ briefs, so the evaluation of a judge’s creativity requires comparison between the opinion and the briefs in each case”); see also LEE EPSTEIN & JOSEPH FISKE KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 113 (1992) (stating that in the opinion for *Gregg v. Ga.*, 428 U.S. 153 (1976), the Justices “borrowed heavily” from Robert Bork’s amicus brief).

This article relies on mixed methods, cutting between quantitative and qualitative ends of the spectrum. As I explain in the following section, I use quantitative methods to locate the specific cases and briefs of interest. I then analyze the content of the shared language to generate inferences surrounding these relationships in cases with the greatest percentage of shared language.<sup>19</sup>

### III. MEASURING LANGUAGE OVERLAP

Text-analysis software allows for precise measurements of shared language. A drawback, however, is that the language from the two sources must be a near match, and as a consequence, the software does not pick up on shared meaning when the words differ.<sup>20</sup> I use WCopyfind software for the analyses on which this article is based.<sup>21</sup> This program compares two documents and reports the similarities in their words, both in terms of percentage of overlapping language and number of shared words. The user chooses and inputs certain settings to calibrate the requirements of language similarity necessary for the program to note an instance of overlap.

#### *A. Program Settings and Examples*

Understanding the WCopyfind settings is essential to contextualizing what a high percentage of overlap in a Supreme Court case means. I use the default settings as others have done in studies looking at similar relationships of language in legal

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19. The percentage is based on the amount of shared language relative to the total opinion, not to the total brief.

20. For example, it would not pick up on the instances in which Justice Cardozo used briefs' language as a starting point, but changed the actual words for his opinions. POSNER *supra* note 18, at 111–12 (comparing Justice Cardozo's graceful language in one opinion with the stilted language in an amicus brief that appears to have been its inspiration, but noting that Cardozo opinions actually "owe little even those briefs that are excellent"). In this sense software that measures language similarity is generally under-inclusive of the actual relationship between the language in briefs and opinions. The software I use—WCopyfind, *see infra* note 21 and accompanying text—has a parameter setting for the percentage of phrases that must match, however, allowing for some flexibility in locating overlapping language.

21. Lou Bloomfield, *Software, WCopyfind*, THE PLAGIARISM RESOURCE SITE (n.d.), <http://plagiarism.bloomfieldmedia.com/wordpress/software/wcopyfind>.

and political texts.<sup>22</sup> The first setting deals with the number of words in a phrase that must be similar for the program to mark it as an instance of overlap. I set the minimum phrase length at six words. This means that phrases under five words will not be indicated, while phrases of six words or more will be processed. The second significant setting deals with the percent of language commonality that phrases must share for the program to recognize a phrase as relevant. I set this to eighty percent, which allows for slight differences between phrases in which the majority of the content is the same. Finally, the program is set to allow at most two imperfections in the shared language, so it will not pick up phrases that overlap at eighty percent or more if there are more than two differences between them.

These settings may be easier to visualize through a straightforward example. In *Lawson v. FMR*,<sup>23</sup> the program recorded this sentence in the opinion as overlapping with the petitioner's brief: "[The Report concludes]: 'Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent.'" The bracketed words were not shared with the brief (the brief and the opinion referring to the same document using different phrasing for its title), but due to the more than eighty-percent similarity, the program marked the entire passage as overlapping, and highlighted the words that did not overlap. *Lawson* also contains this language: "[the provisions require] accountants and lawyers for public companies to investigate and report misconduct, or risk being banned from further practice before the SEC."<sup>24</sup> The respondent's brief has similar—but not exactly the same—wording: "[u]nder these provisions, a law firm or public

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22. See, e.g., Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POLITICAL RESEARCH Q. 468 (2008); see also RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT (2012); Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228 (Mar./Apr. 2014); Matthew Eshbaugh-Soha, *Presidential Influence of the News Media: The Case of the Press Conference*, 30 POLITICAL COMM. 548 (2013); Justin Grimmer, *A Bayesian Hierarchical Topic Model for Political Texts: Measuring Expressed Agendas in Senate Press Releases*, 18 POLITICAL ANALYSIS 1 (2010).

23. \_\_\_ U.S. \_\_\_, 134 S. Ct. 1158, 1170 (2014).

24. *Id.* at 1171.



accounting firm that engages in retaliation against such whistleblowing can be banned from further practice before the SEC.”<sup>25</sup> The program highlighted only “banned from further practice before the SEC.” From this result, it is apparent that the program misses some matches in meaning (in this instance references to the types of firms banned and the types of actions that warrant this ban) unless the wording is approximately identical.

Another important setting is that WCopyfind ignores punctuation in matching, so that, for instance, the difference of a comma between phrases will not change the program’s results. In *Lawson*, for example, the phrase in the opinion citing the statutory language of “discriminate against an employee in the terms and conditions of employment because”<sup>26</sup> comes up as an exact match with the same phrase in the petitioner’s brief, notwithstanding quotation marks around the phrase in the petitioner’s version and not in the opinion.<sup>27</sup> WCopyfind also ignores letter case, so a phrase that is the same in both instances except for an upper-case letter in one would come up as a complete match.

### *B. Types of Language Shared Generally*

WCopyfind does not discriminate between types of overlap, so the matches found in my analysis contain language that is likely meaningful in the brief-opinion relationship as well as language that is most likely in the brief and opinion either by pure chance or because of its importance to the case. As above, this process may be easier to visualize through a straightforward example. I use the opinion and the Solicitor General’s (SG’s) brief from *FERC v. Mississippi*<sup>28</sup> to illustrate the spectrum of language overlap from presumably inconsequential to likely meaningful.

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25. Brief for Respondent at 41, *Lawson v. FMR*, 2013 WL 5441390 (U.S. Sept. 30, 2013) (No. 12-3).

26. *Lawson*, 134 S. Ct. at 1161.

27. See Brief for Petitioner at 8, *Lawson v. FMR*, 2013 WL 3972434 (U.S. July 31, 2013) (No. 12-3).

28. 456 U.S. 742 (1982).

I focus on two main facets in each phrase. First, whether the language is original or quoted, including whether the opinion cites to the brief or whether either cites to an extrinsic source. The second is the type of phrase, focusing on whether it is facts, argument, a citation from a statute or case, and so on. To describe the Public Utility Regulatory Policies Act, Justice Blackmun writes for the Court that it “was part of a package of legislation approved the same day, designed to combat the nationwide energy crisis at the time.”<sup>29</sup> The SG’s brief contains this language: “The Public Utility Regulatory Policies Act of 1978 . . . was enacted by Congress as part of a package of legislation designed to combat the nationwide energy crisis.”<sup>30</sup> Here, the shared language consists of “part of a package of legislation designed to combat the nationwide energy crisis.” This descriptive, factual language is not treated as a quotation in either place, and so it may be assumed as original in both the brief and opinion. The shared description makes it clear, however, that the Court agrees with the SG’s characterization of the legislation, but does not attribute it to the SG.

*FERC* contains many instances in which the language is similar to that used in the SG’s brief, but the opinion does not mention the SG’s brief as a source. An example of a statement from the recitation of facts in the opinion that overlaps with the SG’s brief includes this shared phrasing:<sup>31</sup>

[E]lectric utilities were plagued with skyrocketing fuel costs and decreasing efficiency in the use of their generating capacity; both of these factors had an adverse effect on rates to consumers and on the economy.<sup>32</sup>

[E]lectricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities; each of these factors had an adverse effect on rates to consumers and on the economy as a whole.<sup>33</sup>

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29. *Id.* at 745.

30. Brief for Appellants at 2, *FERC v. Mississippi*, 1981 WL 390123 (U.S. Aug. 27, 1981) (No. 80-1749) [hereinafter *FERC* Brief].

31. In this and all two-column comparisons in this article, the brief is on the left and the opinion is on the right.

32. *FERC* Brief, *supra* note 30, at 2–3.

33. *FERC*, 456 U.S. at 745–46.

Similar to the phrase previously mentioned, this portion of the opinion does not cite to the SG's brief or to an extrinsic source, yet the language is an almost exact match. Importantly, in this example the different word choices do not change the meaning of the text.

Another type of shared language occurs when the brief and the opinion share a citation. An example in *FERC* is “[the statutory section] *directs FERC*, in consultation with state regulatory authorities, to promulgate ‘such rules as it determines necessary to encourage cogeneration and small power production.’”<sup>34</sup> In such instances the shared language provides evidence of a shared understanding of the importance of the statutory language. In isolation, one cannot infer that the brief writer's choice of language led to the adoption of the same language in the opinion. Considered cumulatively with other instances of shared language, though, this overlap underscores the possibility of, at a minimum, coinciding views between the brief writer and the opinion writer.

Opinions may also share language with the brief's argument. This is perhaps the best evidence of the persuasive power of the brief, especially when the phrasing is not attributed to the brief's author. An example of shared argument language from the opinion in *FERC* appears in this sentence: “It is *sufficient* that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential.”<sup>35</sup> In the brief the word “sufficient” is replaced with “clear enough”<sup>36</sup> which does little to alter the meaning of the phrase, providing the Court with some background for treating the “clear enough” evidence of Congressional intent as legally “sufficient.” The opinion uses this sentence to support its subsequent declaration that this “is enough to place the challenged portions of PURPA within

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34. *Id.* at 751 (emphasis added to highlight language not shared between brief and opinion).

35. *Id.* at 758 (emphasis added to highlight language not shared between brief and opinion).

36. *FERC* Brief, *supra* note 30, at 24.

Congress' power under the Commerce Clause."<sup>37</sup> While it does not provide conclusive evidence that the wording in the brief led to the phrasing in the opinion, this overlap, along with other phrases in the opinion that articulate viewpoints congruent with the SG's position, lends support to the proposition that the Justices (or their clerks<sup>38</sup>) read and analyzed the brief and found it persuasive, and it potentially also indicates that they adopted the brief's language for the opinion itself.

### *C. Exploring the Cases*

Some shared features of the cases in this study, which covers the 1946 through 2013 Supreme Court Terms,<sup>39</sup> are worthy of note. These similarities provide insight into the factors or mechanisms that play a role in extremely high levels of language overlap between opinions and merits briefs.<sup>40</sup> Previous works show that the Court tends to share more or less language with briefs based on specific factors such as the presence of the SG as counsel of record.<sup>41</sup>

Along with the percentage of overlapping language for each case, I also aggregated the number of overlapping words in each brief-opinion pair. Upon analysis I found one subset of cases in which there is an especially high probability that merits briefs will strongly impact Supreme Court opinion content.

Table 1 presents the typical impact of merits briefs on opinions, which depends on the combination of the percentage of the opinion that shares language with the brief and the number of words in the opinion that overlap with words from

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37. *FERC*, 456 U.S. at 751.

38. See generally David J. Garrow, *The Lowest Form of Animal Life?* 84 CORNELL L. REV. 855 (1999) (reviewing books that look at clerks' lead roles in drafting opinions).

39. I use Washington University's well-known Supreme Court Database. Spaeth et. al., *Supreme Court Database*, WASH. UNIV. L. (2014), <http://www.supremecourtdatabase.org>.

40. This article does not delve into causal mechanisms. The factors linking cases merely show correlations that may help generate a deeper causal understanding of the role that briefs play in influencing opinion language.

41. For empirical results supporting this correlate, see Feldman, *supra* note 5. For empirical support of the SG's success before the Supreme Court from multiple dimensions including shared language with the Court's opinions, see generally Black and Owens, *supra* note 22, and see Corley, *supra* note 22, at 476 (showing that the Court shared more language with the Solicitor General's briefs than with those of other experienced members of the Supreme Court bar for the 2002–2004 terms).

the brief. (Both calculations are from the same overlapping language.) The distinction between these subsets is based on an extensive qualitative analysis of the brief-opinion relationships in the dataset. In certain cases, as will become evident below, the relationship between brief and opinion will not neatly fit into the relationship type described in the typology. The typology is not meant to encompass every brief-opinion relationship, but rather to work as a heuristic to approximately group these linguistic relationships.<sup>42</sup> The thresholds for overlapping words and percentages are guidelines that lead to a reasonable separation of groups, and most importantly, they separate out the highest-impact group: the Lifted relationship.<sup>43</sup>

Later in the article I present examples from all four types of relationships, but the Lifted group presents some of the strongest examples indicating that specific briefs made meaningful contributions to the language in the opinions and that the opinions used substantive language from the briefs. To bracket the cases, I set a threshold of thirty-three percent overlap between opinion and brief as the demarcation between high and low percentage overlap and 1,000 shared words as the demarcation between high and low word overlap.

		<b>High</b>	<b>Low</b>
<b>Overlapping of Words and/or Total of Shared Words</b>	<b>High</b>	<b>Lifted Language</b> Greatest impact throughout opinion; brief used as template; shared legal reasoning and salient language; brief clear source	<b>Shared Understanding</b> Shared language generally interspersed throughout opinion; includes facts, law, secondary authority—often with significant impact on opinion
	<b>Low</b>	<b>Common Source</b> Generally shared source described in lower-court record is shared source	<b>Traditional Impact</b> From marginal to interspersed law and facts—most common form

42. See e.g. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, LAW & SOC’Y REV. 95, 99 n.9 (1974) (referring, in the course of creating a typology to estimate and explain the advantage of “repeat players” in litigation, to SG’s establishment of trusting relationship at Supreme Court).

43. I used a multi-methods approach to help locate these cases. See NICHOLAS WELLER & JEB BARNES, FINDING PATHWAYS: MIXED-METHOD RESEARCH FOR STUDYING CAUSAL MECHANISMS (2014).

There are twenty-two Lifted opinions in the dataset. Although there are a few exceptions, most use language from merits briefs as templates for the wording in the opinions. This often includes the Court's adopting the argument from the brief. In Lifted opinions in particular the percentage overlap and overlapping word metrics do not provide the entire picture. As the examples below show, instances of language overlap in these cases also point to sections in the opinion that almost assuredly derive from language in the brief, but due to the software's capabilities and limitations, do not come up as overlapping matches.

The last case that fits the Lifted criteria is from 1993. This implies that the relationship between specific merits briefs and the Court's opinions has evolved away from Lifted opinions in the last several decades.<sup>44</sup> That last Lifted opinion—from 1993—was, like the majority of Lifted opinions, authored by Justice Blackmun. As I show below, Justice Blackmun was the majority opinion writer for twelve of the twenty-two Lifted opinions, and each of these Blackmun opinions shares a substantial amount of language with a brief from the SG.

Finally, there is a strong distinction in the cases between the amount of language each Lifted opinion shares with the non-highly similar merits brief and the amount each shares with the highly similar merits brief. This is evident from the fact that no Lifted opinion shares the threshold number of words and percentage overlap with both merits briefs filed in that case. The high level of difference between the amounts of language the opinions share with one merits brief relative to the other is telling in that it is not merely uncontested statements and quotations that form the basis of the shared language. Although it is beyond the scope of this article to dissect the psychology of the Justices in an attempt to uncover whether the briefs cause the Justices to utilize the same language, or if the Justices simply share the opinions of the brief writer, the examples of relationships predicated on lifted language show the extent of the role briefs can play in opinion construction.

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44. This is underscored by the fact that the length of opinions has generally grown in recent years. See, e.g., Ryan C. Black & James F. Spriggs, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621 (2008).

First I examine Common Source, Shared Understanding, and Traditional Impact brief-to-opinion relationships. Then I juxtapose these with the relationship of most interest: the Lifted brief-to-opinion relationship.

*D. Common Source Relationships*  
(*High Percentage Overlap, Low Word Overlap*)

The case in the dataset with the highest percentage overlap between a brief and opinion is *Ashton v. Kentucky*,<sup>45</sup> an opinion for the Court authored by Justice Douglas that shares fifty-nine percent of its language and 850 of its 1430 words with the brief for the petitioner.<sup>46</sup> The opinion in this case is typical of the Common Source type, as the overlapping language is primarily based on shared citations. At one point in this opinion, for example, 434 continuously shared words—more than fifty percent of the shared language—derive from the pamphlet that led to the libel claim at the heart of the case, which is lengthily quoted in both brief and opinion.

Aside from this long shared citation, the Court and the petitioner’s brief also rely on many of the same cases. The Court analogizes to *Cantwell v. Connecticut*,<sup>47</sup> in which interpretation of a related statute was required. The *Ashton* opinion and the petitioner’s brief both note that the *Cantwell* Court stated that “[the] offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.”<sup>48</sup> Both quote *Cantwell* for what was problematic in the law: “Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial

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45. 384 U.S. 195 (1966).

46. This is a Common Source opinion because, although the percentage overlap is high, the number of overlapping words is below the 1,000 word threshold. See Table 1, *supra* page 33, and accompanying text.

47. 310 U.S. 296 (1940).

48. *Ashton*, 384 U.S. at 199 (quoting *Cantwell*, 310 U.S. at 308); Brief for Petitioner at 24, *Ashton v. Kentucky*, 1966 WL 115462 (U.S. Mar 14, 1966) (No. 619) (same [hereinafter *Ashton* Brief]).

branches too wide a discretion.”<sup>49</sup> Comparisons in such cases may suggest that a party thought along the same lines as the Justices and clerks, although it sheds little light on whether the brief made a significant impact on the opinion writer or writers.

Common Source opinions can mirror Lifted opinions more closely, although they generally do not display the same overall similitude between brief and opinion as found in Lifted instances. An example of this sort of relationship can be found in *Bulova Watch Company v. United States*.<sup>50</sup> Justice Whittaker’s opinion for the Court in *Bulova* shares forty-eight percent of its language (861 words) with the SG’s brief. The brief in this instance was written by the Office of the Solicitor General (OSG) under the direction of SG Archibald Cox, and the SG’s presence is often an indicator that the Court will rely on the brief’s language, especially when the views expressed in it accord with the Justices’ positions on the issues. The *Bulova* opinion relies on the SG’s brief for its depiction of the petitioner’s argument:

Even if petitioner were correct in stating that Section 2411(a) is to be regarded as the later enactment, it would not follow that it would take precedence, for it has been frequently held that a specific statute over-rides a general statute “without regard to priority of enactment.” *Townsend v. Little*, 109 U.S. 504, 512. More than that, however, the premise of the argument is erroneous. At the time Section 3771(e) was enacted (in 1942), a predecessor provision of Section 2411(a) had long been on the books. Save for one word of no possible significance, this predecessor provision (Section

Petitioner further contends that §2411(a) is a later enactment than §3771(e) and, for that reason, should take precedence over it. We do not believe that §2411(a) can fairly be regarded as a later enactment than § 3771(e), for at the time § 3771(e) was enacted, in 1942, a predecessor provision of § 2411(a) had long been on the books. Save for the word “hereby”—of no possible significance—that predecessor provision (§177(b) of the Judicial Code, 28 U.S.C. (1940 ed.) §284(b) was identical with the present §2411(a). But even if petitioner were correct in

49. *Ashton*, 384 at 199 (quoting *Cantwell*); *Ashton* Brief, *supra* note 48, at 24 (same). As this analogy is not in the State’s favor, it does not appear in Kentucky’s brief.

50. 365 U.S. 753 (1961).



177(b) of the Judicial Code, 28 U.S.C., 1940 ed., Section 284(b)) was identical in terms with the present Section 2411(a).<sup>51</sup>

concluding that § 2411(a) is to be regarded as the later enactment, it would not necessarily take precedence over § 3711(e), for it is familiar law that a specific statute controls over a general one “without regard to priority of enactment.” *Townsend v. Little*, 109 U.S. 504, 512.<sup>52</sup>

In the above example, the Court uses the same reasoning as the SG to explain both why the petitioner was incorrect in that instance as well as why § 2411(a) is not necessarily a later enactment than § 3771(e).

Elsewhere, the opinion shares language with the SG’s brief in interpreting the Congressional intent behind § 3771(e). Both rely on the same report from the Senate Finance Committee:

From this statement, it is apparent that Congress proposed (1) to deny interest up to the date that a carry-back could be determined and (2) to prevent, through delay in the presentation of claims, the accumulation of interest after that date.<sup>53</sup>

This surely shows Congress’ purpose to deny interest on carry-back refunds for any period prior to the time they could be determined, and also to prevent, through delay in the presentation of claims, the accumulation of interest after that date and prior to the filing of the claim.<sup>54</sup>

There are several other instances of extensive language sharing between the SG’s brief and the Court’s opinion in *Bulova*, mainly dealing with the interpretation of relevant precedent. With its instances of shared substantive language between brief and opinion, *Bulova* presents an example of how Common Source opinions may share Lifted opinion characteristics on a smaller scale.

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51. Brief for the United States at 10, *Bulova Watch Co. v. United States*, 1961 WL 101948 (U.S. Mar. 3, 1961) (No. 241) [hereinafter *Bulova* Brief].

52. *Bulova*, 365 U.S. at 758.

53. *Bulova* Brief, *supra* note 51, at 16.

54. *Bulova*, 365 U.S. at 760.

*E. Shared Understanding (Low Percentage Overlap, High Words Overlap) and Traditional Impact (Low Percentage Overlap, Low Words Overlap) Examples*

Shared Understanding opinions are more frequent of late, as lengthier opinions allow for relationships in which the overall number of shared words is on the higher end of the spectrum, although nowhere near the thirty-three percent overlapping-language threshold. Four have the highest level of word overlap during the early Roberts period, and two are on the high end of percentage language overlap as well. The first is *Graham v. Florida*,<sup>55</sup> in which Justice Kennedy wrote the opinion for the Court analyzing the constitutionality of imposing a life sentence on a juvenile. Twelve percent of the opinion—1,327 words—overlaps with the petitioner’s brief. But the shared language, often salient to the Court’s analysis, does not originate with the petitioner’s brief. It comes from common sources:

First, juveniles possess less maturity and an underdeveloped sense of responsibility, which often results in impetuous and ill-considered actions and decisions. Second, juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure.<sup>56</sup>

As compared to adults, juveniles have a “‘lack of maturity and an underdeveloped sense of responsibility’”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.”<sup>57</sup>

In fact, even expert psychologists cannot reliably “differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose

These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the

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55. 560 U.S. 48 (2010).

56. Brief for Petitioner at 26, *Graham v. Florida*, 2009 WL 2159655 (U.S. July 16, 2009) (No. 08-7412) (discussing conclusions reached in *Roper v. Simmons*, 543 U.S. 551 (2005)) [hereinafter *Graham* Brief].

57. *Graham*, 560 U.S. at 68 (same).

crime reflects irreparable corruption.” <i>Id.</i> at 573. <sup>58</sup>	rare juvenile offender whose crime reflects irreparable corruption.” <i>Id.</i> , at 573. <sup>59</sup>
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Thus, the shared language in *Graham* is integral to the Court’s decision. It supports the notion that the imposition of a life sentence violates the Eighth Amendment prohibition against cruel and unusual punishment, which was the Court’s ultimate conclusion. Still, the overlapping language primarily stems from a common source, so it cannot be determined if Justice Kennedy and his clerks utilized the language due to the brief’s persuasive powers or due to a common acknowledgement of the importance of the wording from the precedent that they both cited.

Similarly, Chief Justice Roberts’s opinion for the Court in *Holder v. Humanitarian Law Project*,<sup>60</sup> shares twelve percent of its language—1,359 words—with the SG’s brief. As in *Graham*, however, there are several instances of meaningful shared language from shared sources, all of which relate in this case to whether a federal statute is unconstitutionally vague. Examples of such shared language include:

This Court has repeatedly observed that “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” <i>Ward v. Rock Against Racism</i> , 491 U.S. 781, 794 (1989). <sup>61</sup>	“But ‘perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.’” <i>Williams</i> , <i>supra</i> , at 304, . . . (quoting <i>Ward v. Rock Against Racism</i> , 491 U.S. 781 . . . (1989)). <sup>62</sup>
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The statute does not prohibit independent advocacy or expression of any kind. <sup>63</sup>	“The statute does not prohibit independent advocacy or expression of any kind.” <sup>64</sup>
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58. *Graham* Brief, *supra* note 56, at 49.

59. *Graham*, 560 U.S. at 68.

60. 561 U.S. 1 (2010).

61. Brief for Respondents at 18, *Holder v. Humanitarian Law Project*, 2009 WL 4951303 (U.S. Dec. 22, 2009) (No. 08-1498) [hereinafter *Humanitarian Law* Brief].

62. *Humanitarian Law Project*, 561 U.S. at 19.

63. *Humanitarian Law* Brief, *supra* note 61, at 13.

64. *Humanitarian Law Project*, 561 U.S. at 26 (citing “Brief for Government” as source).

In both *Graham* and *Humanitarian Law Project*, there is no question of the source of the language. Even with the same propositions supporting the arguments in the opinions and the briefs, there is attribution to the proper sources. But the role of the briefs in fashioning the language for the opinions is not entirely clear outside of the instances in which the opinions cite the briefs.

Next is *Pepper v. United States*,<sup>65</sup> in which Justice Sotomayor's opinion for the Court deals with resentencing. With 1,784 overlapping words and twenty-two percent overlap between the opinion and the respondent's brief, this case ranks high on the list of overall word overlap. As is typical for Shared Understanding cases, the shared language in this case primarily revolves around shared citations to precedent. Even with the high level of overlapping words in *Pepper*, the overlapping language is dispersed about the opinion and the sections of overlapping language are not as dense as is typical in Lifted scenarios. Some examples of shared language in *Pepper* meaningful to the Court's conclusion include:

It has been a “uniform and constant” principle of the federal sentencing tradition that the sentencing court will “consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”<sup>66</sup>

“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113.<sup>67</sup>

Section 3577 permitted a sentencing judge in determining the appropriate punishment to

Both Congress and the Sentencing Commission thus expressly preserved the

65. 562 U.S. 476 (2011).

66. Brief for the United States at 30, *Pepper v. United States*, 2010 WL 3426283 (U.S. Aug. 31, 2010) (No. 09-6822) (citing *Koon v. United States*, 518 U.S. 81, 113 (1996)) [hereinafter *Pepper* Brief].

67. *Pepper*, 562 U.S. at 487.

“conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.” *United States v. Tucker*, 404 U.S. 443, 446 (1972).<sup>68</sup>

traditional discretion of sentencing courts to “conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.” *United States v. Tucker*, 404 U.S. 443, 446.<sup>69</sup>

One recent Shared Understanding case shows how the delineation between the relationships in these cases and Lifted relationships is not always clear. Justice Thomas’s opinion for the Court in *Marx v. General Revenue Corporation*<sup>70</sup> includes 1198 overlapping words, or a twenty-five percent overall overlap between the opinion and the respondent’s brief. Although the majority of the shared language tracks typical Shared Understanding examples, two instances of shared language in *Marx* are quite similar to the type of overlap typically particular to Lifted opinions.

In the first example from *Marx*, the opinion shares language from the respondent’s brief to strengthen a legal argument:

By adding “and costs” to the second sentence, Congress foreclosed the argument that, under *expressio unius est exclusio alterius*, the expression of costs in the first sentence and exclusion of the same term in the second meant that defendants could recover only attorney’s fees, and not costs.<sup>71</sup>

If Congress had excluded “and costs” in the second sentence, plaintiffs might have argued that the expression of costs in the first sentence and the exclusion of costs in the second meant that defendants could only recover attorney’s fees when plaintiffs bring an action in bad faith.<sup>72</sup>

68. *Pepper* Brief, *supra* note 66, at 32.

69. *Pepper*, 562 U.S. at 489.

70. \_\_\_ U.S. \_\_\_, 133 S. Ct. 1166 (2013).

71. Brief for Respondent at 15–16, *Marx v. General Revenue Corp.*, 2012 WL 3945843 (U.S. Sept. 10, 2012) (No. 11-1175) [hereinafter *Marx* Brief].

72. *Marx*, 133 S. Ct. at 1176.

In this instance the opinion and brief use the same tools of statutory interpretation to gain leverage on Congressional intent for recovering costs and attorney fees. The matching language likely presents a situation in which the argument from the brief was used as a template for the analysis in the opinion, something that is prevalent in Lifted opinions. Comparing the brief and the opinion suggests the brief as the likely source of the language in the opinion.

The next example from *Marx* is something atypical in non-Lifted cases: an extensive passage for which a brief was almost assuredly used as a basis for the language in the opinion. Not only is there considerable overlapping language throughout the passage, but even the non-overlapping language expresses the same points in the same sequence:

<p>The canon against superfluity should particularly give way when “excess language” is “hardly unusual.” <i>Microsoft</i>, 131 S. Ct. at 2249. A myriad of statutes overlap with Rule 54(d). E.g., 12 U.S.C. § 2607(d)(5) (Real Estate Settlement Procedures Act of 1974) (“the court may award to the prevailing party the court costs of the action”); 12 U.S.C. § 5565(b) (Consumer Financial Protection Act of 2010) (“the [Consumer Financial Protection] Bureau . . . may recover its costs in connection with prosecuting such action if [it] is the prevailing party in the action”); 15 U.S.C. § 6104(d) (Telemarketing and Consumer Fraud and Abuse Prevention Act) (“[t]he court . . . may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party”); 15 U.S.C. § 7706(f)(4)</p>	<p>Second, redundancy is “hardly unusual” in statutes addressing costs. See <i>id.</i>, at. . . . 131 S. Ct. 2238, 180 L. Ed. 2d 131. Numerous statutes overlap with Rule 54(d)(1). See, e.g., 12 U.S.C §2607(d)(5) (“[T]he court may award to the prevailing party the court costs of the action”); §5565(b) (2006 ed., Supp. V) (“the [Consumer Financial Protection]Bureau . . . may recover its costs in connection with prosecuting such action if [it] . . . is the prevailing party in the action”); 15 U.S.C §6104(d) (2006 ed.) (“The court . . . may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party”); §7706(f)(4) (“In the case of any successful action . . . the court, in its discretion, may award the costs of the action”); §7805(b)(3) (“[T]he court may</p>
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(Controlling the Assault of Non-Solicited Pornography and Marketing Act) (“[i]n the case of any successful action . . . the court, in its discretion, may award the costs of the action”); 15 U.S.C. § 7805(b)(3) (Sports Agent Responsibility and Trust Act) (“the court may award to the prevailing party costs”); 15 U.S.C. § 8131(2) (Anti-Cybersquatting Consumer Protection Act) (“[t]he court may also, in its discretion, award costs and attorneys’ fees to the prevailing party”); 29 U.S.C. § 431(c) (Labor-Management Reporting and Disclosure Act) (“[t]he court . . . may, in its discretion . . . allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action”); 42 U.S.C. § 3612(p) (Fair Housing Act) (“the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs”); 42 U.S.C. § 3613(c)(2) (Fair Housing Act) (“the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs”); 47 U.S.C. § 551(f)(2) (Communications Act) (“[t]he court may award . . . other litigation costs reasonably incurred”).<sup>73</sup>

award to the prevailing party costs”); §8131(2) (2006 ed., Supp. V) (“The court may also, in its discretion, award costs and attorneys’ fees to the prevailing party”); 29 U.S.C §431(c) (2006 ed.) (“The court . . . may, in its discretion . . . allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action”); 42 U.S.C §3612(p) (“[T]he court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs”); § 3613(c)(2) (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs”); 47 U.S.C. § 551(f)(2) (“[T]he court may award . . . other litigation costs reasonably incurred”). . . . a reasonable attorney’s fee and costs”); §3613(c)(2) (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs”); 47 U.S.C §551(f)(2) (“[T]he court may award . . . other litigation costs reasonably incurred”).<sup>74</sup>

73. *Marx* Brief, *supra* note 71, at 24–25.

74. *Marx*, 133 S. Ct. at 1177–78.

*Marx* thus presents an instance in which the brief provided a template for the Court opinion. The opinion tracks the brief's lengthy phrases in meaning and uses the same references. Much of the overlap is through shared citations, but the similarity between passages makes it unlikely that the brief's wording did not play a large role in shaping the language in the opinion.

Traditional Impact opinions, the most common in the dataset, can look like Shared Understanding opinions, but with less shared language. Although they also may occasionally share characteristics of Lifted opinions, the shared language tends to be sparse, so it is more difficult to decipher the extent of the impact (if any) that the brief made on the opinion's content. Scrutiny of *Kloeckner v. Solis*,<sup>75</sup> for example, shows that the brief in that case affected the opinion's content here:

Section 7702(a)(3) defines for the most part which MSPB decisions qualify as “judicially reviewable action[s],” providing that “[a]ny decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of” the date of the decision.”<sup>76</sup>

That provision, the Government states, “defines for the most part which MSPB decisions qualify as ‘judicially reviewable actions[s]’” by “providing that ‘[a]ny decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of’ the date of the decision.”<sup>77</sup>

And here:

The purpose of the provision is to save employees from being held in perpetual uncertainty by Board inaction.<sup>78</sup>

That provision, as the Government notes, is designed “to save employees from being held in perpetual uncertainty by Board inaction.”<sup>79</sup>

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75. \_\_\_ U.S. \_\_\_, 133 S. Ct. 596 (2012).

76. Brief for Respondent at 21, *Kloeckner v. Solis*, 2012 WL 2883261 (U. S. July 13, 2012) (No. 11-184) [hereinafter *Kloeckner* Brief].

77. *Kloeckner*, 133 S. Ct. at 605 (citing *Kloeckner* Brief).

78. *Kloeckner* Brief, *supra* note 76, at 28.

79. *Kloeckner*, 133 S. Ct. at 606 (citing *Kloeckner* Brief).



In the more recent cases, we tend to see the largest impact of a brief when it is cited in the opinion. Although shared citations to precedent are common, instances of shared language similar to the lengthy passage in *Marx*<sup>80</sup> are not due to the lower percentage of overlapping language and fewer overlapping words in relationships of Traditional Impact like those found in *Kloeckner*. In *Kloeckner*, as in many other cases from the last several decades, opinions tend to attribute unoriginal language to a source internal or external to the case itself. With Lifted opinions, such attribution typically is not present.

*F. Lifted Relationships*  
(*High Percentage Overlap and High Word Overlap*)

The briefs in Lifted relationships play a greater role than merely persuading Justices to vote a certain way. These are cases in which the briefs ultimately affect the Court's assertions, its assessments of the facts, and the outcome of the law to be applied in future cases. Table 2 below breaks each opinion down into its composite sections dealing with facts and law, and measures the percentage of opinion language from each section that overlaps with the relevant merits brief. This dichotomy points to opinions in which the briefs impact the recitation of facts versus those for which the briefs are an aid in the construction of law and in the Court's legal reasoning.

It should not be surprising that one of the most trusted litigants before the Court, the SG, was the author of all but two of the briefs in cases with Lifted opinions. The examples below that include the SG's brief not only show high levels of similarity due to shared citations, but also due to large quantities of text shared between the briefs and opinions, and yet the opinions lack any form of attribution to the briefs.

The chronological chain of Supreme Court decisionmaking strengthens the probability that the briefs played a decisive role in the opinion language. The briefs predate the opinions and are circulated among the Justices. The Justices and clerks gain valuable information about the case through the briefs. As the cases show, the voice and rhetorical devices in the opinion

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80. See *supra* text accompanying notes 73 and 74.

language are sufficiently similar to those in the briefs to suggest a decisive role for the briefs. It is difficult to conceive of another source that could provide both the opinion writer and the brief writer with the same material at this frequency. The constructions of the facts and arguments in these opinions share the tone of the briefs, with the highly overlapping language leading the opinions to echo arguments made by the brief writers. This goes beyond the neutral language we might expect to find from a shared source and is often instead pointed language that parallels the arguments made in the briefs. There tends to be little in the way of attribution in these opinions to any source, although the similarity between the language in the briefs and opinions makes it nearly impossible to conclude that the language in the opinions did not derive from the briefs.

As Table 2 (which appears on the next page) shows, there is generally a large portion of both facts and law shared between the opinions and briefs. The briefs in these cases impact the Court's reasoning as do the recitations of facts likely derived from the case records. Only two cases fall below twenty percent overlap in the area of the opinions' legal reasoning, suggesting that the Court typically tends to rely on the briefs' presentations of both law and facts.<sup>81</sup>

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81. Because a detailed examination of each case in this list would require hundreds of pages, I attempt in the following discussion to distill the most salient and relevant shared passages between the briefs and opinions. And because the extent of the similarity between Lifted opinions and briefs is helpful in understanding the impact of the briefs on the opinions, and appreciating how in many instances the briefs are templates for many parts of the opinions, I provide an online appendix that includes each opinion in full, highlighted to show the language shared with the lifted brief. See Adam Feldman, *All Copying Is Not Created Equal: Appendix* (2016), <https://sites.google.com/a/usc.edu/afresearch/home/papers/allcopyingappendix>.

**Table 2**  
**Impact of Brief on Opinion Language**

Justice	Term	Case	Party	Facts/Law	Words	Total
Warren	1955	<i>Steiner</i> (SG brief)	Resp	71/14%	1,015	53%
Goldberg	1963	<i>Tilton</i> (SG brief)	Pet	43/44%	1,187	44%
Warren	1963	<i>Foti</i> (SG brief)	Resp	43/30%	1,119	34%
Marshall	1975	<i>Train</i> (SG brief)	Pet	29/33%	1,466	32%
Blackmun	1977	<i>MacDonald</i> (SG brief)	Pet	30/46%	1,395	42%
Blackmun	1979	<i>Lewis</i> (SG brief)	Resp	35/38%	1,036	40%
Blackmun	1980	<i>DiFrancesco</i> (SG brief)	Pet	41/28%	1,921	33%
Marshall	1980	<i>Hodel</i> (SG brief)	Pet	56/37%	1,675	43%
Stewart	1980	<i>Lehman</i> (SG brief)	Pet	22/50%	1,141	43%
Stewart	1980	<i>Carter</i>	Pet	48/32%	1,427	41%
White	1980	<i>Valencia</i>	Pet	50/30%	1,153	35%
Blackmun	1982	<i>New Banner</i> (SG brief)	Pet	55/38%	1,975	43%
Blackmun	1983	<i>Russello</i> (SG brief)	Resp	33/55%	1821	51%
Burger	1983	<i>89 Firearms</i> (SG brief)	Pet	28/38%	1,178	38%
Blackmun	1984	<i>Nat'l Bank</i> (SG brief)	Pet	43/51%	2,216	50%
Blackmun	1985	<i>Hughes</i> (SG brief)	Pet	37/28%	1,108	33%
Powell	1986	<i>Yuckert</i> (SG brief)	Pet	39/49%	1,446	43%
Blackmun	1987	<i>Egan</i> (SG brief)	Pet	60/47%	1,955	52%
Blackmun	1989	<i>Doe Agency</i> (SG brief)	Pet	44/38%	1,097	42%
Blackmun	1989	<i>U. Penn</i> (SG brief)	Resp	53/25%	1,555	33%
Blackmun	1992	<i>Keystone</i> (SG brief)	Pet	39/37%	1,010	39%
Blackmun	1993	<i>Posters N' Things</i> (SG brief)	Resp	54/38%	1,178	41%

Often even the non-overlapping language in the opinions is so closely related to the language in the briefs that it would be difficult to make a compelling argument that the author of the opinion did not lift the language and argument from the brief, simply exchanging a few words for their synonyms in the process.

### *1. Blackmun Cases*

Justice Blackmun, more than any other member of the Court, showed a high level of willingness to engage the SG's arguments and to parallel the SG's reasoning and language throughout his opinions for the Court. This relationship is underscored by its continuity throughout his career on the Court. While no other justice authored more than two Lifted opinions during the period covered by the dataset, Justice Blackmun

authored twelve from 1977 through 1993. Due to the high percentage of Lifted opinions Justice Blackmun authored, I discuss his Lifted opinions first, and then those authored by other Justices.

The first Lifted opinion authored by Justice Blackmun for the Court is *United States v. MacDonald*.<sup>82</sup> As Table 2 shows, almost fifty percent of the opinion's discussion of the law overlaps with the brief filed in that case by the SG. The opinion clearly follows the brief for the assessment of the applicable caselaw, as can be seen here:

This Court has twice departed in criminal cases from the general prohibition against piecemeal appellate review, invoking on both occasions the so-called "collateral order" exception to the final judgment rule, first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–547.<sup>83</sup>

This Court in criminal cases has twice departed from the general prohibition against piecemeal appellate review. *Abney v. United States, supra*; *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951). In each instance, the Court relied on the final-judgment rule's "collateral order" exception articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–547, 69 S. Ct. 1221, 1225–1226, 93 L. Ed. 1528 (1949).<sup>84</sup>

Here:

Like the denial of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review" (*Abney v. United States, supra*,

Like the denial of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review," *Abney v. United States,*

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82. 435 U.S. 850 (1978).

83. Brief for the United States at \*27, *United States v. MacDonald*, 1977 WL 189842 (U.S. Sept. 7, 1977) (No. 75-1892) [hereinafter *MacDonald* Brief].

84. *MacDonald*, 435 U.S. at 854.

slip op. 7). Hence, if such orders may be appealed prior to trial, it must be because they satisfy the restrictive qualifications identified in *Cohen* and *Abney* as sufficient to justify dispensing with the normal rules against piecemeal review before final judgment. . . . [T]he same cannot be said of the denial of a pretrial motion to dismiss an indictment on speedy trial grounds.<sup>85</sup>

431 U.S., at 659, 97 S. Ct., at 2040, that is, such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court. Thus, if such an order may be appealed before trial, it is because it satisfies the criteria identified in *Cohen* and *Abney* as sufficient to warrant suspension of the established rules against piecemeal review before final judgment. . . . We believe it clear that an order denying a motion to dismiss an indictment on speedy trial grounds does not satisfy those criteria.<sup>86</sup>

And here:

We are aware of only two other federal cases in which a defendant has sought pretrial appellate review of an order denying his motion to dismiss the indictment because of an alleged violation of the Sixth Amendment right to a speedy trial, and in both instances the court of appeals held that it lacked jurisdiction to consider the claim prior to conviction. See *United States v. Bailey*, 512 F. 2d 833 (C.A. 5), certiorari dismissed, 423 U.S. 1039; *Kyle v. United States*, 211 F. 2d 912 (C.A. 9).<sup>87</sup>

In keeping with what appear to be the only two other federal cases in which a defendant has sought pretrial review of an order denying his motion to dismiss an indictment on speedy trial grounds, we hold that the Court of Appeals lacked jurisdiction to entertain respondent's speedy trial appeal. *United States v. Bailey*, 512 F.2d 833 (CA5), cert. dismissed, 423 U.S. 1039, 96 S. Ct. 578, 46 L.Ed.2d 415 (1975); *Kyle v. United States*, 211 F.2d 912 (CA9 1954).<sup>88</sup>

85. *MacDonald* Brief, *supra* note 83, at \*30–\*31.

86. *MacDonald*, 435 U.S. at 857.

87. *MacDonald* Brief, *supra* note 83, at \*23–\*24.

88. *MacDonald*, 435 U.S. at 857.

The opinion's conclusion also parallels the petitioner's brief:

[T]he important policy considerations that underlie both the Speedy Trial Clause and the statutory bar to piecemeal appeals in criminal cases strongly suggest that speedy trial motions are the least appropriate subject for interlocutory appellate review.

.....

This Court has recognized that one of the principal reasons for its strict adherence to the doctrine of finality in criminal cases is that "[t]he Sixth Amendment guarantees a speedy trial." *DiBella v. United States, supra*, 369 U.S. at 126. The . . . compelling societal interest in the swift punishment of the guilty and the prompt exoneration of the innocent . . . would be severely compromised if every contested legal question arising in the course of a criminal proceeding could be resolved in a separate appeal before trial of the general issue.<sup>89</sup>

Our conclusion, however, is reinforced by the important policy considerations that underlie both the Speedy Trial Clause and 28 U.S.C. § 1291.

.....

Significantly, this Court has emphasized that one of the principal reasons for its strict adherence to the doctrine of finality in criminal cases is that "[t]he Sixth Amendment guarantees a speedy trial." *Di Bella v. United States*, 369 U.S., at 126, 82 S. Ct., at 658. Fulfillment of this guarantee would be impossible if every pretrial order were appealable.<sup>90</sup>

*Lewis v. United States*,<sup>91</sup> Justice Blackmun's second Lifted opinion for the Court, uses the SG's construction of the statute in question as the basis for the resolution of the case and for the

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89. *MacDonald* Brief, *supra* note 83, at \*43-\*44.

90. *MacDonald*, 435 U.S. at 861.

91. 445 U.S. 55 (1980).

reasoning to support it. The following passages present some examples:

In our view, this particular omission is especially indicative of congressional intent, since other federal statutes involving prior convictions explicitly permit the accused to challenge the validity or constitutionality of the predicate felony as a defense. See Section 411(c)(2) of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>92</sup>

It thus stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. See, *e. g.*, 18 U. S. C. § 3575(e) (dangerous special offender) and 21 U. S. C. § 851(c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970).<sup>93</sup>

The structure of Title IV of the Omnibus Act, which was enacted simultaneously with Title VII, reinforces that conclusion. Like Title VII, Title IV prohibits various categories of presumptively dangerous persons from transporting and receiving firearms. 18 U.S.C. 922 (g) and 922(h). . . . Thus, with regard to the statutory question at issue here, there is no significant difference between title IV and Title VII. Both statutes seek to keep firearms away from “any person . . . who has been convicted . . .” of a felony.<sup>94</sup>

The very structure of the Omnibus Act’s Title IV, enacted simultaneously with Title VII, reinforces this conclusion. Each Title prohibits categories of presumptively dangerous persons from transporting or receiving firearms. See 18 U. S. C. §§ 922 (g) and (h). Actually, with regard to the statutory question at issue here, we detect little significant difference between Title IV and Title VII. Each seeks to keep a firearm away from “any person . . . who has been convicted” of a felony.<sup>95</sup>

92. Brief for United States at \*17–\*18, *Lewis v. United States*, 1979 WL 213815 (Nov. 3, 1979) (No. 78-1595) [hereinafter *Lewis* Brief].

93. *Lewis*, 445 U.S. at 62.

94. *Lewis* Brief, *supra* note 92, at \*24–\*25.

95. *Lewis*, 445 U.S. at 63–64.

Congress rationally concluded that any felony conviction—even an allegedly invalid one—is a sufficient basis on which to prohibit the possession of firearms. See, e.g., *United States v. Samson*, *supra*, 533 F.2d at 722; *United States v. Ransom*, 515 F.2d 885, 891–892 (5th Cir. 1975). . . .<sup>96</sup>

Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm. See, e. g., *United States v. Ransom*, 515 F.2d 885, 891–892.<sup>97</sup>

The express congressional purpose in enacting Title VII is set forth in the statute itself. [T]he receipt, possession, or transportation of a firearm by felons constitutes . . . a threat to the continued and effective operation of the Government of the United States. . . . 18 U.S.C. App. 1201. . . . [T]he legislative history of the gun control laws “evidences Congress’ deep concern about the easy availability of firearms, especially to those who . . . pose a greater threat to community peace. . . .” And . . . Congress focused on the substantial nexus between violent crimes and the possession of firearms by “any person who has a criminal record.” 114 Cong. Rec. 13220 (1968) (remarks of Sen. Tydings); . . . 16298 (remarks of Rep. Pollock).<sup>98</sup>

Congress, as its expressed purpose in enacting Title VII reveals, 18 U. S. C. App. §1201, was concerned that the receipt and possession of a firearm by a felon constitutes a threat, among other things, to the continued and effective operation of the Government of the United States. The legislative history of the gun control laws discloses Congress’ worry about the easy availability of firearms, especially to those persons who pose a threat to community peace. And Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record. 114 Cong. Rec. 13220 (1968) (remarks of Sen. Tydings); . . . 16298 (remarks of Rep. Pollock)<sup>99</sup>

96. *Lewis* Brief, *supra* note 92, at \*41.

97. *Lewis*, 445 U.S. at 66.

98. *Lewis* Brief, *supra* note 92, at \*40–\*41.

99. *Lewis*, 445 U.S. at 66.



The *Lewis* Court also follows the SG’s rationale for the rejection of petitioner’s construction of the relevant statute:

“[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is ‘fairly possible’ or when the statute provides a ‘fair alternative’ construction.” *Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977).<sup>100</sup>

With the face of the statute and the legislative history so clear, petitioner’s argument that the statute nevertheless should be construed so as to avoid a constitutional issue is inapposite. That course is appropriate only when the statute provides a fair alternative construction. This statute could not be more plain. *Swain v. Pressley*, 430 U.S. 373, 378, and n. 11.<sup>101</sup>

And finally the opinion adopts, nearly verbatim, the SG’s assessment of the Court’s own precedent:

And this Court has repeatedly recognized that a legislature may constitutionally prohibit convicted felons from engaging in activities far more fundamental than the right to possess firearms at issue here. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (disenfranchisement of felons); *DeVeau v. Braisted*, 363 U.S. 144, 157-160 (1960) (felons barred from waterfront employment); *Hawker v. New York*, 170 U.S. 189 (1898) [58] (prohibition on medical practice by a felon).<sup>102</sup>

This Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (disenfranchisement); *DeVeau v. Braisted*, 363 U.S. 144 (1960) (proscription against holding office in a waterfront labor organization); *Hawker v. New York*, 170 U.S. 189 (1898) (prohibition against the practice of medicine).<sup>103</sup>

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100. *Lewis* Brief, *supra* note 92, at \*36.

101. *Lewis*, 445 U.S. at 65.

102. *Lewis* Brief, *supra* note 92, at \*42.

103. *Lewis*, 445 U.S. at 66.

To be sure, the Court has made clear that an outstanding uncounselled felony conviction cannot reliably be used for certain purposes. See *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972); *Loper v. Beto*, 405 U.S. 473 (1972). But the Court has never suggested that an uncounselled conviction is invalid for all purposes (see, e.g., *Scott v. Illinois*, *supra*).<sup>104</sup>

We recognize, of course, that under the Sixth Amendment an uncounseled felony conviction cannot be used for certain purposes. See *Burgett*, *Tucker*, and *Loper*, all *supra*. The Court, however, has never suggested that an uncounseled conviction is invalid for all purposes. See *Scott v. Illinois*.<sup>105</sup>

In each of those cases this Court found that the conviction or sentence in question violated the Sixth Amendment because it depended upon the reliability of a particular uncounselled conviction in the past. The federal gun laws, however, focus on the mere fact of conviction, regardless of its reliability, in order to keep firearms away from potentially dangerous people.<sup>106</sup>

In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons.<sup>107</sup>

The high level of similarity between the SG's brief and the opinion in *Lewis* reinforces the conclusion that the trust and faith that Justice Blackmun and his clerks placed in the SG makes Lifted opinions more likely in cases involving the SG. This pattern continues through the remainder of Justice Blackmun's Lifted opinions for the Court, which all rely heavily on the language from the SG's briefs.

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104. *Lewis* Brief, *supra* note 92, at \*45.

105. *Lewis*, 445 U.S. at 66–67.

106. *Lewis* Brief, *supra* note 92, at \*48.

107. *Lewis*, 445 U.S. at 67.

*DiFrancesco v. United States*,<sup>108</sup> is yet another Blackmun opinion for the Court in which the opinion language parallels that in the SG’s brief, utilizing the same linguistic framework as the SG’s brief to interpret the Court’s precedent:

This rule has been characterized as attaching “particular significance to an acquittal” (*United States v. Scott, supra*, 437 U.S. at 91), and it has been justified on the basis that “[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent he may be found guilty.’” *Ibid.*<sup>109</sup>

This is justified on the ground that, however mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby “enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S., at 188.<sup>110</sup>

The decisions of this Court in the sentencing area have also established that a sentence does not have qualities of constitutional finality comparable to an acquittal.<sup>111</sup>

This Court’s decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal.<sup>112</sup>

The multiple punishment guarantee that has evolved in the holdings of this Court, apart from the *Benz* dictum, clearly is not involved in this case. . . . As in *Ex*

The guarantee against multiple punishment that has evolved in the holdings of this Court plainly is not involved in this case. As *Ex parte Lange* demonstrates, a

108. 449 U.S. 117 (1980).

109. Brief for the United States at \*21, *DiFrancesco v. United States*, 1980 WL 339988 (U.S. May 28, 1980) (No. 79-567) [hereinafter *DiFrancesco* Brief].

110. *DiFrancesco*, 449 U.S. at 130.

111. *DiFrancesco* Brief, *supra* note 109, at \*28 (discussing *Bozza v. United States*, 330 U.S. 160 (1947)).

112. *DiFrancesco*, 449 U.S. at 134 (discussing *Bozza v. United States*, 330 U.S. 160 (1947)).

*parte Lange*, a defendant may not receive a higher sentence than that authorized by the legislature. . . . Clearly, no double jeopardy problem would have been presented in *Ex parte Lange* if Congress had established that the offense was punishable by fine and imprisonment, even though those are multiple punishments. See *Whalen v. United States*, *supra*, slip op. 4. There is no question what punishment was authorized by Congress under 18 U.S.C. 3575 and 18 U.S.C. 3576 . . . . Accordingly, 18 U.S.C. 3576 does not violate the guarantee against multiple punishment that is enunciated in *Ex parte Lange*.<sup>113</sup>

defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment. See *Whalen v. United States*, 445 U.S., at 688–689; . . . *id.*, at 697–698 (concurring opinion). The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and, accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange*.<sup>114</sup>

*DiFrancesco* also tracks the reasoning and language in the SG’s brief to explain the Court’s decision that the Double Jeopardy Clause is not violated by allowing the government to appeal:

Since it is not a prosecution appeal itself that can fall afoul of the Double Jeopardy Clause, but rather the relief requested by the appeal, it must next be considered whether a criminal sentence, once pronounced, must be accorded constitutional finality similar to that attaching to a jury’s verdict of not guilty. Neither the history

The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury’s verdict of acquittal. We conclude that

113. *DiFrancesco* Brief, *supra* note 109, at \*46–\*47 (emphasis in original).

114. *DiFrancesco*, 449 U.S. at 139.

of sentencing practices, the pertinent holdings of this Court, nor considerations of double jeopardy policy supports such an equation.<sup>115</sup>

neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.<sup>116</sup>

Thus, appeal of a sentence would seem to be a violation of double jeopardy only if the original pronouncement of sentence is to be treated in the same way as an acquittal and the appeal is to be treated as a retrial. . . . Essentially, the court of appeals' theory is that the imposition of a sentence should be treated, for double jeopardy finality purposes, as an "implied acquittal" of a greater sentence. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 634-635 (1965).<sup>117</sup>

Appeal of a sentence, therefore, would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated and the appeal is to be treated in the same way as a retrial. Put another way, the argument would be that, for double jeopardy finality purposes, the imposition of the sentence is an "implied acquittal" of any greater sentence. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 634-635 (1965).<sup>118</sup>

In a later section, the opinion language mirrors the certainty in the SG's brief regarding the common law tradition of allowing such an appeal:

While there is little American experience with appellate review of sentences, this history demonstrates that the common law has never ascribed such finality to a sentence as would

Thus it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the

115. *DiFrancesco* Brief, *supra* note 109, at \*20.

116. *DiFrancesco*, 449 U.S. 132.

117. *DiFrancesco* Brief, *supra* note 109, at \*21, \*23.

118. *DiFrancesco*, 449 U.S. at 133.

prevent a legislature from authorizing its appeal by the prosecution. Indeed, several countries that trace their legal systems to the English common law permit such appeals. See Canada: Can. Rev. Stat. §§ 605(1)(b) and 748(b)(ii) (*Martin's Annual Criminal Code* (1979)); Australia (New South Wales): Criminal Appeal Act of 1912, as amended in 1924, 3 Pub. Acts N.S.W. § 5D (1959); New Zealand: Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N.Z. § 383 (a) (1979).<sup>119</sup>

prosecution. Indeed, countries that trace their legal systems to the English common law permit such appeals. See Can. Rev. Stat. §§ 605(1)(b) and 748(b)(ii) (1970), *Martin's Annual Criminal Code* 523, 636 (E. Greenspan ed. 1979); New Zealand Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N. Z. § 383(2) (1979).<sup>120</sup>

Like the opinion in *Lewis*, Justice Blackmun's opinion for the Court in *Dickerson v. New Banner Institute*<sup>121</sup> deals with sentencing. As happens often in a Lifted case involving the SG, the *Dickerson* Court actually adopts both the SG's interpretation of *Lewis* as a precedent and the SG's explanation of why the Court should differentiate its reasoning in this case:

In *Lewis*, this Court recognized an obvious, "commonsense" exception to the statutory language for persons whose convictions have been reversed or vacated on appeal or on collateral attack (445 U.S. at 60–61 & n.5), but that exception is not applicable to persons whose convictions have been expunged. . . . A conviction that has been expunged, however, stands on an

In *Lewis*, it is true, we recognized an obvious exception to the literal language of the statute for one whose predicate conviction had been vacated or reversed on direct appeal. 445 U.S., at 61, n. 5; see Note, Prior Convictions and the Gun Control Act of 1968, 76 Colum. L. Rev. 326, 334, n. 42 (1976). But, in contrast, expunction does not alter the legality of the previous

119. *DiFrancesco* Brief, *supra* note 109, at \*27.

120. *DiFrancesco*, 449 U.S. at 134.

121. 460 U.S. 103 (1983).

entirely different footing. Expunction does not call into question the legality of the previous conviction, and it does not signify that the defendant was innocent of the crime for which he was convicted. As explained below (pages 30–35, *infra*), expunction merely means that the responsible jurisdiction has decided not to accord the conviction certain continuing effects.<sup>122</sup>

conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law.<sup>123</sup>

There seems little doubt that firearms disabilities may constitutionally be attached to an expunged conviction (see *Lewis v. United States*, *supra*, 445 U.S. at 65–68), and an exception for such convictions, unlike convictions reversed or vacated due to legal error, is far from obvious.<sup>124</sup>

Clearly, firearms disabilities may be attached constitutionally to an expunged conviction, see *Lewis v. United States*, 445 U.S., at 65–68 . . . , and an exception for such a conviction, unlike one reversed or vacated due to trial error, is far from obvious.<sup>125</sup>

Much of the shared reasoning in *Dickerson* involves parallel interpretations of the statute, so the majority of the overlapping language focuses on Congressional intent. The following is a sampling of the extensive instances in which the *Dickerson* Court adopts the SG’s interpretation of Congressional purpose and also adopts much of the SG brief’s language:

We have found nothing in the legislative history of the Gun Control Act or related federal

Although we have searched diligently, we have found nothing in the legislative history of Title

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122. Brief for Petitioner at 8, 13–28, *Dickerson v. New Banner Inst.*, 460 U.S. 103 (U.S. June 1982) (No. 81-1180) [hereinafter *Dickerson* Brief].

123. *Dickerson*, 460 U.S. at 115.

124. *Dickerson* Brief, *supra* note 122, at 13.

125. *Dickerson*, 460 U.S. at 115.

firearms laws that even faintly suggests that state expunctions were intended automatically to remove the disabilities imposed by 18 U.S.C. 922(g)(1) and (h)(1), and neither the court below nor respondent has cited any such proof. This lack of evidence is highly significant for several reasons. First, the purpose of the Gun Control Act will be frustrated by the decision of the court of appeals. That decision would require the Secretary to grant dealer and manufacturer licenses to organizations directed by individuals convicted of serious criminal offenses (or to such individuals themselves) whenever the conviction in question has been expunged under state law. This would result even though state expunctions typically do not focus upon the question with which the Gun Control Act is concerned, *i.e.*, whether the convicted person is fit to engage in the firearms business or to possess, ship, transport, or receive firearms.<sup>126</sup>

Second, . . . “[i]n the absence of a plain indication to the contrary it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state

IV or related federal firearms statutes that suggests, even remotely, that a state expunction was intended automatically to remove the disabilities imposed by §§ 922(g)(1) and (h)(1). *See, e.g.*, S. Rep. No. 1501, 90th Cong., 2d Sess. (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 1577, 90th Cong., 2d Sess. (1968); H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 488, 90th Cong., 2d Sess. (1968). This lack of evidence is significant for several reasons. First, the purpose of the statute would be frustrated by a ruling that gave effect to state expunctions; a state expunction typically does not focus upon the question with which Title IV is concerned, namely, whether the convicted person is fit to engage in the firearms business or to possess a firearm.<sup>127</sup>

Second, “in the absence of a plain indication to the contrary. . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state

126. *Dickerson* Brief, *supra* note 122, at 25–27 (footnote omitted).

127. *Dickerson*, 460 U.S. at 119.



law.” *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 603 (1971), quoting *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60 (4th Cir. 1965). . . . In *Jerome v. United States*, 318 U.S. 101, 104 (1943) the Court explained. . . : “That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control” . . . . [T]he legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms. See S. Rep. No. 1097, 90th Cong., 2d Sess. 28, 76–77 (1968). . . . Title IV “is a carefully constructed package of gun control legislation. . . . ‘Congress knew the significance and meaning of the language it employed.’” *Scarborough v. United States*, *supra*, 431 U.S. at 570. As noted, Congress carefully crafted a procedure for removing those disabilities in appropriate cases (see 18 U.S.C. 925(c)).<sup>128</sup>

As noted above, the Gun Control Act “is a carefully constructed package of gun control legislation,” (*Scarborough v. United States*, *supra*, 431 U.S. at

law.” *NLRB v. Natural Gas Utility Dist.*, 402 U.S. 600, 603 (1971), quoting *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62–63 (CA4 1965). This is because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control. *Jerome v. United States*, 318 U.S. 101, 104 (1943). . . . The legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms. See S. Rep. No. 1097, 90th Cong., 2d Sess., 28, 76–77 (1968). Third, Title IV “is a carefully constructed package of gun control legislation. . . . ‘Congress knew the significance and meaning of the language it employed.’” *Scarborough v. United States*, 431 U.S., at 570, quoting *Barrett v. United States*, 423 U.S., at 217. And Congress carefully crafted a procedure for removing those disabilities in appropriate cases. § 925(c).<sup>129</sup>

Congress, in framing it, took pains to avoid the very problems that the Court of Appeals’ decision inevitably would create, such as individualized federal

128. *Dickerson* Brief, *supra* note 122, at 27 (brackets in original).

129. *Dickerson*, 460 U.S. at 119–20.

570) and in framing its terms Congress took pains to avoid the very sort of problems that the decision below will inevitably create. The provisions of the Act demonstrate that Congress endeavored to prevent any uncertainty concerning those persons subject to disabilities by virtue of prior convictions. Congress used unambiguous language in attaching gun control disabilities to “any person . . . who has been convicted” of a qualifying offense (18 U.S.C. 922(g)(1) and (h)(1)).<sup>130</sup>

treatment of every expunction law. Congress used unambiguous language in attaching gun control disabilities to any person “who has been convicted” of a qualifying offense.<sup>131</sup>

The Court also tracks the SG’s reasoning almost identically in its discussion of similar state statutes:

More than half the states have enacted one or more laws that may be broadly classified as expunction statutes. . . . The various statutes differ, however, in almost every particular. While some are applicable only to young offenders, others may be invoked by adults. Some are available only to persons convicted of certain offenses, but others permit the expunction of a conviction for any crime, including murder. Some are confined to first offenders, but others permit relief to recidivists. Some apply only to persons given

Over half the States have enacted one or more statutes that may be classified as expunction provisions. . . . These statutes differ, however, in almost every particular. Some are applicable only to young offenders, *e. g.*, Mich. Comp. Laws §§ 780.621 and .622 (1982). Some are available only to persons convicted of certain offenses, *e. g.*, N. J. Stat. Ann. § 2C:52-2(b) (West 1982); others, however, permit expunction of a conviction for any crime including murder, *e. g.*, Mass. Gen. Laws Ann., ch. 276, § 100A (West Supp. 1982–

130. *Dickerson* Brief, *supra* note 122, at 41.

131. *Dickerson*, 460 U.S. at 122.

certain sentences or sentenced under certain laws, while others contain no such restriction. Some but not all require a waiting period following conviction. Some are discretionary, while others provide for automatic expunction under certain circumstances.<sup>132</sup>

1983). Some are confined to first offenders, *e. g.*, Okla. Stat., Tit. 22, § 991c (Supp. 1982). Some are discretionary, *e. g.*, Minn. Stat. § 638.02(2) (Supp. 1982), while others provide for automatic expunction under certain circumstances, *e. g.*, Ariz. Rev. Stat. Ann. § 13-912 (1978).<sup>133</sup>

The statutes also vary widely in the language employed to describe what they are supposed to do. Various statutes are said to “expunge” the conviction, guilty verdict, or guilty plea; “seal” the file or record; “limit access” to the convicted person’s “criminal history.” . . . [O]nly a minority . . . address . . . whether the expunged conviction may be considered in sentencing for a subsequent offense, in setting bail on subsequent charges, or . . . whether the expunged conviction may be used to impeach testimony . . . and whether . . . the convicted person may deny the fact of conviction.<sup>134</sup>

The statutes vary in the language employed to describe what they do. Some speak of expunging the conviction, others of “sealing” the file or of causing the dismissal of the charge. The statutes also differ in their actual effect. Some are absolute; others are limited. Only a minority address questions such as whether the expunged conviction may be considered in sentencing for a subsequent offense or in setting bail on a later charge, or whether the expunged conviction may be used for impeachment purposes, or whether the convict may deny the fact of his conviction.<sup>135</sup>

By sharing the SG’s reasoning in *Dickerson*, the Court buttresses its decision from multiple angles. Its doing so combined with the high level of language overlap between the opinion and the SG’s brief suggests that the respondent’s

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132. *Dickerson* Brief, *supra* note 122, at 31–33 (footnotes omitted).

133. *Dickerson*, 460 U.S. at 121.

134. *Dickerson* Brief, *supra* note 122, at 34, 35 (footnotes omitted).

135. *Dickerson*, 460 U.S. at 121.

arguments had very little influence on the Court's opinion language in *Dickerson*.

This pattern continues in *Russello v. United States*,<sup>136</sup> another federal-crime-bill case with a Blackmun opinion for the Court that frames the facts as laid out by the SG—and, consequently, in a way unfavorable to the defendant. The Court, for example, adopts the SG's strong language to define the ambiguous term “interest,” which is consequential in the case:

[T]he term “interest” . . . undoubtedly comprehends all forms of real and personal property, including profits and proceeds. This Court has repeatedly relied upon the term “interest” in defining the meaning of “property” in the Due Process Clause. . . . *Perry v. Sinderman*, 408 U.S. 593, 601 (1972).<sup>137</sup>

[T]he term “interest” comprehends all forms of real and personal property, including profits and proceeds. This Court repeatedly has relied upon the term “interest” in defining the meaning of “property” in the Due Process Clause. . . . See *Perry v. Sindermann*, 408 U.S. 593, 601 . . . (1972).<sup>138</sup>

It was undoubtedly because Congress did not want the RICO forfeiture provision to be limited by “rigid, technical” (*Perry v. Sindermann*, *supra*, 408 U.S. at 601) definitions drawn from other areas of law that it selected the broad term “interest” to describe those things subject to forfeiture under Section 1963(a)(1). Congress therefore selected the term “interest.” . . . This choice of language was fully consistent with the pattern of the RICO statute.<sup>139</sup>

It undoubtedly was because Congress did not wish the forfeiture provision of § 1963(a) to be limited by rigid and technical definitions drawn from other areas of the law that it selected the broad term “interest” to describe those things that are subject to forfeiture under the statute. Congress selected this general term apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. . . .<sup>140</sup>

136. 464 U.S. 16 (1983).

137. Brief for the United States at 14, *Russello v. United States*, 464 U.S. 16 (May 1983) (No. 82-472) [hereinafter *Russello* Brief].

138. *Russello*, 464 U.S. at 21.

139. *Russello* Brief, *supra* note 137, at 15, 16.

If Congress had intended to restrict subsection (a)(1) to interests in an enterprise, as petitioner argues, it presumably would have done so expressly, as it did in subsection (a)(2).<sup>141</sup>

Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).<sup>142</sup>

As is the case with many Lifted opinions, the *Russello* Court uses reasoning similar to that of the SG’s brief for rejecting the opposing party’s contentions. But this feature pervades the *Russello* opinion to a much greater extent than in some Lifted opinions, as is evident in the following passages:

[P]etitioner has not attempted to define the term “interest.” Petitioner insists . . ., however, that the term does not reach profits and proceeds because “[i]nterest’, by definition, includes of necessity an interest in something.” . . . This argument is plainly invalid. Every property interest, including the ownership of or right to receive profits or proceeds, may be described as an interest in something. Before the profits of an illegal enterprise are divided, each participant may be said to own an “interest” in the ill-gotten gain. After distribution, each participant will have a possessory or ownership interest in currency, valuables, a bank account, stocks, bonds, or the like.<sup>143</sup>

Petitioner himself has not attempted to define the term “interest” as used in § 1963(a)(1). He insists, however, that the term does not reach money or profits because, he says: “‘interest,’ by definition, includes of necessity an interest in something.” Brief for Petitioner 9. . . . We do not agree. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an “interest” in the ill-gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed.<sup>144</sup>

140. *Russello*, 464 U.S. at 21–22.

141. *Russello* Brief, *supra* note 137, at 21.

142. *Russello*, 464 U.S. at 23.

143. *Russello* Brief, *supra* note 137, at 17 (footnote omitted).

Petitioner argues (Br. 17–18) that if the term “‘interest’ were as all encompassing as suggested by the *en banc* decision below, 18 U.S.C. Sec. 1963(a)(2) would have no meaning independent of 18 U.S.C. Sec. 1963(a)(1).” This argument is plainly incorrect. Section 1963(a)(1) reaches “any interest,” whether or not in an enterprise, provided that the interest was “acquired or maintained in violation of section 1962.” Section 1963(a)(2), on the other hand, is restricted to interests in an enterprise, but the interest itself need not have been illegally acquired or maintained.<sup>145</sup>

It is no answer to say, as petitioner does, Brief for Petitioner 17-18, that if the term “interest” were as all-encompassing as suggested by the majority opinion of the Court of Appeals, § 1963(a)(2) would have no meaning independent of § 1963(a)(1), and would be mere surplusage. This argument is plainly incorrect. Subsection (a)(1) reaches “any interest,” whether or not in an enterprise, provided it was “acquired . . . in violation of section 1962.” Subsection (a)(2), on the other hand, is restricted to an interest in an enterprise, but that interest itself need not have been illegally acquired.<sup>146</sup>

Petitioner also suggests (Br. 29–33) that subsequent proposed legislation demonstrates that the 1970 RICO forfeiture statute excludes profits. This conclusion is wholly unjustified. The bills in question were introduced to rectify *Marubeni* and similar district court cases. Their introduction hardly suggests that their sponsors viewed those decisions as correct interpretations of 18 U.S.C. 1963(a)(1) as it currently stands. See *United States v. Gordon*, 638 F.2d 886,

The bills to which petitioner refers, however, were introduced in order to overcome the decisions in *Marubeni*, *Meyers*, and *Thevis*. See, e. g., S. 2320, 97th Cong., 2d Sess. (1982). The introduction of these bills hardly suggests that their sponsors viewed those decisions as correct interpretations of § 1963(a)(1). See *United States v. Gordon*, 638 F.2d 886, 888, n. 5 (CA5), cert. denied, 452 U.S. 909 (1981). In any event, it is well settled that “‘the views of a subsequent

144. *Russello*, 464 U.S. at 22.

145. *Russello* Brief, *supra* note 137, at 22–23.

146. *Russello*, 464 U.S. at 24.

888 n.5 (5th Cir. 1981). And, in any event, it is settled that ““the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”” *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 15 n.27, quoting *United States v. Price*, 361 U.S. 304, 313 (1960). See also *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980).<sup>147</sup>

Congress form a hazardous basis for inferring the intent of an earlier one.”” *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U.S. 150, 165, n. 27 (1983), quoting from *United States v. Price*, [361 U.S. 304, 313] . . . (1960). See, also, *United States v. Clark*, 445 U.S. 23, 33, n. 9 . . . (1980).<sup>148</sup>

For the same reasons, petitioner’s argument draws no support from the fact that certain state racketeering laws provide expressly for the forfeiture of “profits,” “money,” or “all property, real or personal,” acquired from racketeering (see Pet. Br. 8–9). With one exception, all of the state provisions upon which petitioner relies postdate federal court decisions barring the forfeiture of racketeering profits under the federal law. See *United States v. Meyers*, 432 F. Supp. 456 (W.D. Pa. 1977); *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979). Undoubtedly aware of the problems created by such decisions, the legislatures of these states presumably employed language different from that in 18

Neither are we persuaded by petitioner’s argument that his position is supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of “profits,” “money,” “interest or property,” or “all property, real or personal,” acquired from racketeering. Brief for Petitioner 8-9. Nearly all of the state statutes postdate the *Meyers* and *Thevis* district court decisions. See, e. g., Colo. Rev. Stat. Sec. 18-17-106 (Supp. 1982) (enacted in 1981); R.I. Gen. Laws § 7-15-3 (Supp. 1982) (enacted in 1981). The legislatures of those States presumably employed language different from that of Sec. 1963(a)(1) so as to avoid narrow interpretations of their laws along the lines of the narrow interpretations given the federal

147. *Russello* Brief, *supra* note 137, at 31–32 (footnote omitted).

148. *Russello*, 464 U.S. at 25–26.

U.S.C. 1963(a)(1) in order to avoid similar interpretations of their new racketeering laws.<sup>149</sup>

statute by the courts in *Meyers* and *Thevis*.<sup>150</sup>

As evidence that Congress did not intend to reach racketeering profits, petitioner points (Br. 14–15) to a 1969 letter from then Deputy Attorney General Kleindienst to Senator McClellan . . . concerning an earlier version of Section 1963(a)(1) (*Senate Hearings, supra*, at 407). . . . The court below correctly concluded that this letter did not indicate a congressional intent to preclude forfeiture of racketeering profits. The sentence at issue did not refer to Section 1963(a) as finally enacted but to an earlier version in which forfeiture was expressly limited to interests in an enterprise. Thus, by stating that forfeiture under Section 1963(a) was “limited . . . to one’s interest in the enterprise,” the letter was merely following the language of the bill then pending. Moreover, the purpose of this sentence was not to explain what the statutory provision meant but to explain why the Department of Justice believed it was constitutional.<sup>151</sup>

We are not persuaded otherwise by the presence of a 1969 letter from the then Deputy Attorney General to Senator McClellan. See Measures Relating to Organized Crime: Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 407 (1969). That letter, with its reference to “one’s interest in the enterprise” does not indicate, for us, any congressional intent to preclude forfeiture of racketeering profits. The reference, indeed, is not to § 1963(a) as finally enacted but to an earlier version in which forfeiture was to be expressly limited to an interest in an enterprise. The letter was merely following the language of the then pending bill. Furthermore, the real purpose of the sentence was not to explain what the statutory provision meant, but to explain why the Department of Justice believed it was constitutional.<sup>152</sup>

149. *Russello* Brief, *supra* note 137, at 32–33 (footnote omitted).

150. *Russello*, 464 U.S. at 26.

151. *Russello* Brief, *supra* note 137, at 45–46.

152. *Russello*, 464 U.S. at 28–29.



Without delving into the psychology of the Justices and their clerks, it is impossible to determine if they used independent reasoning to reject the petitioner's points in *Russello*. But the high similarity between the language in the opinion and the SG's brief suggests that, at very least, the Court found the SG's arguments far more compelling than those made by the respondent.

As in *Russello*, Justice Blackmun's opinion for the Court in *United States v. National Bank of Commerce*<sup>153</sup> almost entirely follows the linguistic template set forth in the SG's brief. The examples below show that the Court's opinion uses language about Congressional intent that is highly similar to that in the SG's brief:

In holding that Roy did not possess "property [or] rights to property" on which the IRS could levy, the court of appeals relied heavily on Arkansas creditors' rights law. . . . This reasoning seriously misconceives the role properly played by state law in federal tax collection matters.<sup>154</sup>

The Court of Appeals' conclusion that Roy did not possess "property [or] rights to property" on which the IRS could levy rested heavily on its understanding of the Arkansas law of creditors' rights, particularly those in garnishment. . . . As we have suggested, this misconceives the role properly played by state law in federal tax-collection matters.<sup>155</sup>

[T]he facts that under Arkansas law Roy's creditors (unlike Roy himself) could not exercise his right of withdrawal in their favor . . . and would have to join his co-depositors in a garnishment proceeding . . . are irrelevant in answering the question presented here. The federal statute . . . refers

Thus, the facts that under Arkansas law Roy's creditors, unlike Roy himself, could not exercise his right of withdrawal in their favor and in a garnishment proceeding would have to join his codepositors are irrelevant. The federal statute relates to the taxpayer's rights to

153. 472 U.S. 713 (1985).

154. Brief for the United States at \*28–\*29, *United States v. National Bank of Commerce*, 1985 WL 669719 (U.S. Feb. 21, 1985) (No. 84-498) [hereinafter *Nat'l Bank of Commerce* Brief].

155. *Nat'l Bank of Commerce*, 472 U.S. at 727.

to the taxpayer's property and rights to property, not to his creditor's rights. Yet the court of appeals has . . . deprived the . . . statute of all independent force, by remitting the IRS to only the rights that an ordinary creditor . . . would have under state law. That result . . . is to "compare the government to a class of creditors to which it is superior" (*Randall*, 542 F.2d at 274 n.8).<sup>156</sup>

property and not to his creditors' rights. The Court of Appeals would remit the IRS to the rights only an ordinary creditor would have under state law. That result "[compares] the government to a class of creditors to which it is superior." *Randall v. H. Nakashima & Co.*, 542 F.2d 270, 274, n.8 (CA5 1976).<sup>157</sup>

In its solicitude for the potential claims of Roy's co-depositors, the court of appeals has ignored the statutory scheme that Congress established.<sup>158</sup>

In its understandable concern for Ruby's and Neva's property interests, the Court of Appeals has ignored the statutory scheme established by Congress to protect those rights.<sup>159</sup>

As a final justification for refusing to impose personal liability on the bank, the court of appeals theorized that an IRS levy "is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties." (Pet. App. 17a). The court appeared to recognize that Congress's enactment of Section 7426—which permits wrongful-levy actions by "any person who claims an interest in" seized property—tended to undermine

The Court of Appeals' final justification for its holding was its belief that an IRS levy "is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties, and in which those third parties likely have a property interest." 726 F.2d, at 1300. The court acknowledged the existence of § 7426 but felt that that statute was designed to protect only those third parties "whose property has been seized

156. *Nat'l Bank of Commerce* Brief, *supra* note 154, at \*30 (emphasis in original).

157. *Nat'l Bank of Commerce*, 472 U.S. at 727.

158. *Nat'l Bank of Commerce* Brief, *supra* note 154, at \*33.

159. *Nat'l Bank of Commerce*, 472 U.S. at 728.

this theory. But the court suggested that the Section 7426 remedy is designed to protect only those third parties “whose property has been seized ‘inadvertently’” (Pet. App. 17a).<sup>160</sup>

‘inadvertently.’” 726 F.2d, at 1300.<sup>161</sup>

While the opinion in *National Bank of Commerce* utilizes the SG brief throughout, relying especially on its legal reasoning, the opinion in *United States v. Hughes Properties*<sup>162</sup> utilizes language and reasoning from the SG’s brief to interpret and apply the Court’s precedent. Some examples include:

This Court has consistently held that a liability does not accrue for purposes of the “all events” test as long as it remains contingent. *Brown v. Helvering*, 291 U.S. 193, 200 (1934). To be deductible for tax purposes, “the obligation to pay [must] ha[ve] become final and definite.” *Security Flour Mills Co. v. Commissioner*, 321 U.S. 281, 287 (1944). It must be “unconditional.” *Lucas v. North Texas Lumber Co.*, 281 U.S. 11, 13 (1930).<sup>163</sup>

The Court’s cases have emphasized that “a liability does not accrue as long as it remains contingent.” *Brown v. Helvering*, 291 U.S. 193, 200 . . . (1934); accord, *Dixie Pine Products Co. v. Commissioner*, 320 U.S. 516, 519 . . . (1944). Thus, to satisfy the all-events test, a liability must be “final and definite in amount,” *Security Flour Mills Co. v. Commissioner*, 321 U.S. 281, 287 . . . (1944), must be “fixed and absolute,” *Brown v. Helvering*, 291 U.S., at 201 . . . , and must be “unconditional,” *Lucas v. North Texas Lumber Co.*, 281 U.S. 11, 13 . . . (1930).<sup>164</sup>

160. *Nat’l Bank of Commerce* Brief, *supra* note 154, at \*36–\*37.

161. *Nat’l Bank of Commerce*, 472 U.S. at 729–30.

162. 476 U.S. 593 (1986).

163. Brief for the United States at 8, *United States v. Hughes Properties*, 476 U.S. 593 (Feb. 1986) (No. 85-554) [hereinafter *Hughes Properties* Brief] (brackets in original).

164. *Hughes Properties*, 476 U.S. at 600.

Rather, “the tax law requires that a deduction be deferred until ‘all the events’ have occurred that will make it fixed and certain” (Thor Power Tool Co., 439 U.S. at 543).<sup>165</sup>

And one may say that “the tax law requires that a deduction be deferred until ‘all the events’ have occurred that will make it fixed and certain.” *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 543 . . . (1979).<sup>166</sup>

Congress’s decision to grant the Commissioner “broad powers” to depart from the taxpayer’s usual accounting practice in computing taxable income owes in part to “the vastly different objectives that financial and tax accounting have.” *Thor Power Tool Co.*, 439 U.S. at 542. “The primary goal of financial accounting is to provide useful information to management, shareholders, [and] creditors” and “to protect these parties from being misled” (*ibid.*). . . . “[T]he major responsibility of the Internal Revenue Service,” by contrast, “is to protect the public fisc.”<sup>167</sup>

The Court has long recognized “the vastly different objectives that financial and tax accounting have.” *Thor Power Tool Co. v. Commissioner*, 439 U.S., at 542. . . . The goal of financial accounting is to provide useful and pertinent information to management, shareholders, and creditors. On the other hand, the major responsibility of the Internal Revenue Service is to protect the public fisc. *Ibid.*<sup>168</sup>

In *Department of the Navy v. Egan*,<sup>169</sup> in which Justice Blackmun again wrote for the Court, the opinion adopts the caselaw and statutory analysis provided in the SG’s brief as the basis for its interpretation and application of precedent:

This Court has . . . recognized the government’s “compelling interest” in withholding national

This Court has recognized the Government’s “compelling interest” in withholding national

165. *Hughes Properties* Brief, *supra* note 163, at 10.

166. *Hughes Properties*, 476 U.S. at 600–01.

167. *Hughes Properties* Brief, *supra* note 163, at 24 (brackets in original).

168. *Hughes Properties*, 476 U.S. at 603.

169. 484 U.S. 518 (1988).

security information from unauthorized persons in the course of executive business (*Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) . . .). See, e.g., *United States v. Robel*, 389 U.S. 258, 267 (1967); *United States v. Reynolds*, 345 U.S. 1, 10 (1953). . . . The authority and the solemn obligation to protect such information fall on the President as head of the Executive Branch and Commander in Chief.<sup>170</sup>

security information from unauthorized persons in the course of executive business. *Snepp v. United States*, 444 U.S. 507, 509, n. 3 . . . (1980). See also *United States v. Robel*, 389 U.S. 258, 267 . . . (1967); *United States v. Reynolds*, 345 U.S. 1, 10 . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.<sup>171</sup>

National security matters, as this Court has recognized, are “the province and responsibility of the executive.” *Haig v. Agee*, 453 U.S. 280, 293–294, 304 (1981). “As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.” *United States v. Nixon*, 418 U.S. 683, 710 (1974). Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Schlesinger v. Councilman*, 420 U.S. 738, 757–

The Court also has recognized “the generally accepted view that foreign policy was the province and responsibility of the Executive.” *Haig v. Agee*, 453 U.S. 280, 293–294 . . . (1981). “As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.” *United States v. Nixon*, 418 U.S. 683, 710 . . . (1974). Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 93–94 . . . (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 . . . (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 . . . (1973),

170. Brief for Petitioner at \*15–\*16, *Department of the Navy v. Egan*, 1987 WL 880362 (U.S. Aug. 10, 1987) (No. 86-1552) [hereinafter *Egan* Brief].

171. *Egan*, 484 U.S. at 527.

758 (1975); *Chappell v. Wallace*, 462 U.S. 296 (1983). The court of appeals' contrary holding . . . puts the matter backwards.<sup>172</sup>

*Schlesinger v. Councilman*, 420 U.S. 738, 757–758 . . . (1975); *Chappell v. Wallace*, 462 U.S. 296 . . . (1983). We feel that the contrary conclusion of the Court of Appeals' majority is not in line with this authority.<sup>173</sup>

The *Egan* Court's language also tracks that from the brief regarding the policy rationale of the case and its implications:

No individual has a "right" to a security clearance. Under long established principles, the grant of a security clearance requires an affirmative act of discretion on the part of the granting official based on a high degree of confidence in the grantee. . . . The general standard therefore is that a clearance may be granted only when "clearly consistent with the interests of the national security." See, *e.g.*, Exec. Order No. 10,450, Sec. Sec. 2, 7, 3 C.F.R. 936, 938 (1949–1953 Comp.); OPNAV INST 5510.1F, para. 16-100(1); 10 C.F.R. 710.10(a) (Department of Energy regulation); 32 C.F.R. 156.3(a) (Department of Defense regulation); Department of Defense Regulation 5200.2-R, para. 6-100(a) (Dec. 1979).<sup>174</sup>

It should be obvious that no one has a "right" to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with the interests of the national security." See, *e.g.*, Exec. Order No. 10450, Sec. Sec. 2 and 7, 3 CFR 936, 938 (1949–1953 Comp.); 10 CFR Sec. 710.10(a) (1987) (Department of Energy); 32 CFR Sec. 156.3(a) (1987) (Department of Defense).<sup>175</sup>

A clearance determination . . . is not a judgment of an individual or

A clearance does not equate with passing judgment upon an

172. *Egan* Brief, *supra* note 170, at \*20–\*21.

173. *Egan*, 484 U.S. at 529–30.

174. *Egan* Brief, *supra* note 170, at \*17–\*18.

175. *Egan*, 484 U.S. at 528.

his past conduct. It is an attempt to predict his future behavior, to assess whether he might . . . under the compulsion of circumstances beyond his control, compromise sensitive information. The prediction may be based upon the individual's past or present conduct; but it may also be based upon concerns unrelated to an individual's conduct, such as whether he has close relatives residing in a country that is hostile to the United States.<sup>176</sup>

individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States.<sup>177</sup>

Such predictive judgments must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion" (*CIA v. Sims*, 471 U.S. 159, 170 (1985)), the protection of classified information must be committed to the broad discretion of the agencies responsible . . . , and this must include broad discretion to judge who may have access to it. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment and decide whether, under the "clearly consistent" standard, the agency should have been able to make the necessary affirmative prediction with the necessary confidence.<sup>178</sup>

Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," *CIA v. Sims*, 471 U.S. 159, 170 . . . (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence.<sup>179</sup>

176. *Egan* Brief, *supra* note 170, at \*18.

177. *Egan*, 484 U.S. at 528–29.

178. *Egan* Brief, *supra* note 170, at \*19.

Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk that confidential information will be compromised. Accordingly, this Court has acknowledged that with respect to employees in sensitive positions “there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the *final* say in deciding whether to repose his trust in an employee who has access to such information.” *Cole v. Young*, 351 U.S. 536, 546 (1956).<sup>180</sup>

Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions “there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.” *Cole v. Young*, 351 U.S. 536, 546 . . . (1956).<sup>181</sup>

In *John Doe Agency v. John Doe Corp.*,<sup>182</sup> the Court examined an exemption under the federal Freedom of Information Act (FOIA). Justice Blackmun’s opinion for the Court relies on the SG’s brief primarily for the interpretation of the relevant statutory provisions:

The Legislative History Of Exemption 7, As Enacted And As Amended In 1974, Confirms The Plain Meaning Of Exemption 7. . . . This Court thoroughly discussed the legislative history of Exemption 7 in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224–236 (1978). As originally enacted, Exemption 7

If, despite what we regard as the plain meaning of the statutory language, it were necessary or advisable to examine the legislative history of Exemption 7, as originally enacted and as amended in 1974, we would reach the same conclusion. Justice Marshall, writing for the Court in *Robbins Tire*, 437 U.S.,

179. *Egan*, 484 U.S. at 529.

180. *Egan* Brief, *supra* note 170, at \*20 (emphasis in original).

181. *Egan*, 484 U.S. at 529.

182. 493 U.S. 146 (1989).



permitted nondisclosure of “investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.” 80 Stat. 251. By that exemption, “Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases.” *Robbins Tire*, 437 U.S. at 224.<sup>183</sup>

at 224–236, . . . discussed this legislative history in detail. In its original 1966 form, Exemption 7 permitted nondisclosure of “investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.” Pub. L. 89-487, §3(e)(7), 80 Stat. 251. But the Court in *Robbins Tire* observed: “Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases.” 437 U.S., at 224.<sup>184</sup>

The legislative history of the 1974 amendments says nothing about limiting Exemption 7 to those documents *originating* as law enforcement records.<sup>185</sup>

The legislative history of the 1974 amendments says nothing about limiting Exemption 7 to those documents originating as law-enforcement records.<sup>186</sup>

This Court has consistently taken a practical approach to interpreting FOIA in an effort to apply a workable statutory balance between the interests of the public in greater access to information and the needs of the government in protecting certain

This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the

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183. Brief for Petitioner at \*24, *John Doe Agency v. John Doe Corp.*, 1988 WL 1025573 (U.S. n.d.) (No. 88-1083) (beginning quoted matter with a section heading) [hereinafter *Doe Agency Brief*].

184. *Doe Agency*, 493 U.S. at 155–56.

185. *Doe Agency Brief*, *supra* note 183, at \*28 (emphasis in original).

186. *Doe Agency*, 493 U.S. at 157.

kinds of information from disclosure. See, e.g., *EPA v. Mink*, 410 U.S. 73, 80 (1973); *Department of the Air Force v. Rose*, 425 U.S. 352, 361–362 (1976); *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). In accord with that approach, the Court looks to the reasons for exemption from FOIA’s mandatory disclosure requirements in determining whether the government has properly invoked a particular exemption. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148–154 (1975); *FBI v. Abramson*, 456 U.S. at 630. In applying Exemption 7, this Court has looked carefully at the effect that disclosure would have on the interests that exemption seeks to protect. In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242–243. . . .<sup>187</sup>

Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption. See e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148–154 . . . (1975). In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect. *Robbins Tire*, 437 U.S., at 242–243. . . .<sup>188</sup>

The *Doe Agency* opinion also relies on the SG’s interpretation of the lower court opinion and the SG’s interpretation of the opposing parties’ arguments:

The plain meaning of the word “compile” does not permit such a distinction [as made by the Court of Appeals]. It is the pulling together of materials that constitutes the compiling. It does not matter whence the documents were obtained. . . . This Court

We disagree with that interpretation for, in our view, the plain meaning of the word “compile,” or, for that matter, of its adjectival form “compiled,” does not permit such refinement. This Court itself has used the word “compile” naturally to refer

187. *Doe Agency* Brief, *supra* note 183, at \*33.

188. *Doe Agency*, 493 U.S. at 157.

itself has used the word “compiled,” quite naturally, to refer to the process of pulling together at one time records and information that were generated (or even compiled) at an earlier time and for different purposes. In *FBI v. Abramson*, 456 U.S. at 622 n.5. . . .<sup>189</sup>

even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. See *FBI v. Abramson*, 456 U.S., at 622, n. 5. . . .<sup>190</sup>

Even respondent has used the noun form of the word “compiled” in its ordinary sense to refer to the gathering together of documents, whether or not they were generated or compiled at an earlier time for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent “ask[ed] that copies of the requested materials be furnished to us as soon as individual items are available, and that your response to this request not await a *compilation* of all the materials requested.” J.A. 21, 47–48. Thus respondent, unlike the court of appeals, obviously and quite properly recognized that the documents’ having been “compiled” once for the purpose of routine audits would in no way prevent their being compiled again later for a different purpose.<sup>191</sup>

Respondent, too, has used the word “compile” in its ordinary sense to refer to the assembling of documents, even though those documents were put together at an earlier time for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent asked that the requested materials be furnished as soon as they were available, and that the response to the request “not await a compilation of all the materials requested.” App. 21, 47-48. This was a recognition, twice repeated, that the documents having been compiled once for the purpose of routine audits were not disqualified from being “compiled” again later for a different purpose.<sup>192</sup>

189. *Doe Agency Brief*, *supra* note 183, at \*19.

190. *Doe Agency*, 493 U.S. at 154.

191. *Doe Agency Brief*, *supra* note 183, at \*21 (brackets and emphasis in original).

[T]he ruling . . . is at odds with the plain meaning of the exemption. The . . . distinction . . . drawn between documents that were originally obtained for law enforcement purposes and those . . . not so originally obtained, but later gathered . . . for law enforcement purposes, finds no support in the plain language.<sup>193</sup>

We thus do not accept the distinction the Court of Appeals drew between documents that originally were assembled for law enforcement purposes and those that were not so originally assembled but were gathered later for such purposes. The plain language of Exemption 7 does not permit such a distinction.<sup>194</sup>

By adopting the SG's positions regarding both the lower court decision and the opposing parties' contentions, the *Doe Agency* Court aligns itself with the government's perspective. Reading linearly through an opinion with this extent of shared reasoning leaves little room for one to speculate on the Court's conclusions: The Court's ultimate decision seems a foregone conclusion.

In the constitutional case of *University of Pennsylvania v. EEOC*,<sup>195</sup> the Court's opinion parallels the SG's analysis of Title VII provisions and the SG's explanation for why the petitioner interpreted these provisions incorrectly:

The effect of the elimination of Title VII's exemption for educational institutions was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions. As this Court has noted, Title VII creates "'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S.

The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions. This Court previously has observed that Title VII "sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 . . .

192. *Doe Agency*, 493 U.S. at 154–55.

193. *Doe Agency* Brief, *supra* note 183, at \*22.

194. *Doe Agency*, 493 U.S. at 155.

195. 493 U.S. 182 (1990).

54, 62 (1984) (citation omitted). The efficacy of each step of that procedure depends directly on the Commission's unencumbered access to information relevant to alleged discrimination. The Commission's enforcement responsibilities are triggered by the filing of a specific, sworn charge of discrimination. The Act obligates the Commission to investigate charges of discrimination to determine whether "there is reasonable cause to believe that the charge is true." Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b).<sup>196</sup>

(1984), quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 . . . (1977). The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination. The Act obligates the Commission to investigate a charge of discrimination to determine whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. §2000e-5(b) (1982 ed.).<sup>197</sup>

If it finds no reasonable cause, the Commission is obligated to dismiss the charge. *Ibid.* If it does find reasonable cause, the Commission "endeavor[s] to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* This requirement reflects Congress's wish "that violations of the statute could be remedied without resort to the courts." . . . If attempts at voluntary resolution fail, the Commission may bring an action against the employer.<sup>198</sup>

If it finds no such reasonable cause, the Commission is directed to dismiss the charge. If it does find reasonable cause, the Commission shall "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* If attempts at voluntary resolution fail, the Commission may bring an action against the employer.<sup>199</sup>

196. Brief for Respondent at \*14, *University of Pennsylvania v. EEOC*, 1989 WL 1126944 (U.S. Aug. 15, 1989) (No. 88-493) (footnotes omitted) [hereinafter *Penn Brief*].

197. *U. Penn.*, 493 U.S. at 190.

198. *Penn Brief*, *supra* note 196, at \*14–\*15.

199. *U. Penn.*, 493 U.S. at 190–91 (brackets in original).

To enable the Commission to make informed decisions at each stage of the enforcement process, Section 709(a) of Title VII, 42 U.S.C. 2000e-8(a), confers a broad right of access to relevant evidence: [T]he Commission or its designated representative shall . . . have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation. If employers refuse to provide information voluntarily, the Act authorizes the Commission to issue subpoenas and to seek orders enforcing them. Section 710 of Title VII, 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161).<sup>200</sup>

Petitioner argues, nevertheless, that Title VII leaves courts with discretion to provide additional protection for tenure review documents. Although petitioner recognizes that Title VII gives the Commission broad “power to seek access to all evidence that may be ‘relevant to the charge under investigation’” (Pet. Br. 38), it nevertheless contends that Title VII’s subpoena enforcement provisions do not give the

To enable the Commission to make informed decisions at each stage of the enforcement process, § 2000e-8(a) confers a broad right of access to relevant evidence: “[T]he Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation.” If an employer refuses to provide this information voluntarily, the Act authorizes the Commission to issue a subpoena and to seek an order enforcing it. §2000e-9 (incorporating 29 U.S.C. §161).<sup>201</sup>

Petitioner argues, nevertheless, that Title VII affirmatively grants courts the discretion to require more than relevance in order to protect tenure-review documents. Although petitioner recognizes that Title VII gives the Commission broad “power to *seek* access to all evidence that may be ‘relevant to the charge under investigation,’” Brief for Petitioner 38 (emphasis added), it contends that Title VII’s

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200. *Penn* Brief, *supra* note 196, at \*15.

201. *U. Penn.* 493 U.S. at 191 (brackets in original).

Commission an unqualified right to *acquire* such evidence. See Pet. Br. 38–41. That interpretation is untenable. First, the plain language of Section 709(a) of Title VII, 42 U.S.C.2000e-8(a), states that the Commission “shall . . . have access” to relevant evidence; this can only be read as giving the Commission a right to that evidence, not a mere “power to seek” it.<sup>202</sup>

subpoena enforcement provisions do not give the Commission an unqualified right to *acquire* such evidence. *Id.*, at 38–41. This interpretation simply cannot be reconciled with the plain language of the text of § 2000e-8(a), which states that the Commission “*shall . . . have access*” to “relevant” evidence (emphasis added). The provision can be read only as giving the Commission a right to obtain that evidence, not a mere license to seek it.<sup>203</sup>

Title VII anticipates and addresses situations in which an employer may have an interest in the confidentiality of its records. The same Section that gives the Commission access to any evidence relevant to its investigations also makes it “unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding” under the Act. . . . Any violation of this provision subjects the Commission’s employees to criminal penalties. *Ibid.*<sup>204</sup>

Congress did address situations in which an employer may have an interest in the confidentiality of its records. The same § 2000e-8 which gives the Commission access to any evidence relevant to its investigation also makes it “unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding” under the Act. A violation of this provision subjects the employee to criminal penalties. *Ibid.*<sup>205</sup>

202. *Penn* Brief, *supra* note 196, at \*22 (emphasis in original).

203. *U. Penn.*, 493 U.S. at 192 (emphasis in original).

204. *Penn* Brief, *supra* note 196, at \*21.

205. *U. Penn.*, 493 U.S. at 192.

This deference to the SG's interpretation of the statutory scheme is also evident in *C.I.R. v. Keystone Consolidated Industries, Inc.*<sup>206</sup> The *Keystone* opinion uses some of the SG's language, and some similar to it, in interpreting the tax code, and uses the same canons of interpretation. A few examples include:

But even if “sale or exchange” had not had a settled meaning under the . . . Code, it would be clear that Section 4975(c)(1)(A) prohibits the transfer of property in satisfaction of a debt. Congress did not merely prohibit a “sale or exchange,” it barred “any direct or indirect . . . sale or exchange” between employers and the pension plans they sponsor. At the least, the contribution of property in satisfaction of a funding obligation is a type of sale of the property. It is equally surely a form of exchange, since the property is exchanged for diminution of the employer's funding obligation.<sup>207</sup>

Even if this phrase had not possessed a settled meaning, it still would be clear that § 4975(c)(1)(A) prohibits the transfer of property in satisfaction of a debt. Congress barred not merely a “sale or exchange.” It prohibited something more, namely, “any direct or indirect . . . sale or exchange.” The contribution of property in satisfaction of a funding obligation is at least both an indirect type of sale and a form of exchange, since the property is exchanged for diminution of the employer's funding obligation.<sup>208</sup>

Congress's goal . . . was to bar categorically transactions . . . likely to injure pension plans. . . . The transfer of property to a pension plan in satisfaction of a funding obligation can jeopardize the ability of the plan to pay promised benefits.<sup>209</sup>

Congress' goal was to bar categorically a transaction that was likely to injure the pension plan. . . . . The transfer of encumbered property may jeopardize the ability of the plan to pay promised benefits.<sup>210</sup>

206. 508 U.S. 152 (1993).

207. Brief for Petitioner at \*17, *C.I.R. v. Keystone Consolidated Industries*, 1992 WL 547216 (U.S. Nov. 19, 1992) (No. 91-1677) [hereinafter *Keystone* Brief].

208. *Keystone*, 508 U.S. at 159.

209. *Keystone* Brief, *supra* note 207, at \*18.

210. *Keystone*, 508 U.S. at 160.



The statutory text at issue—providing that a transfer of encumbered property “shall be treated as” a sale or exchange—supports the . . . view that Congress intended Section 4975(f)(3) to expand the scope of the prohibited transaction provision. . . . Thus, Section 4975(f)(3) amplifies and extends the reach of “sale or exchange” in Section 4975(c)(1)(A) to include contributions of encumbered property that do not satisfy funding obligations. The legislative history confirms that Congress understood Section 4975(f)(3) to enlarge, rather than restrict, the reach of the prohibited transaction provision . . . thus, Congress intended Section 4975(f)(3) to provide additional protection, not to limit the protection provided by Section 4975(c)(1)(A).<sup>211</sup>

We feel that by this language Congress intended § 4975(f)(3) to expand, not limit, the scope of the prohibited-transaction provision. It extends the reach of “sale or exchange” in § 4975(c)(1)(A) to include contributions of encumbered property that do not satisfy funding obligations. See H.R. Conf. Rep. No. 93-1280, p. 307 (1974). Congress intended by § 4975(f)(3) to provide additional protection, not to limit the protection already provided by § 4975(c)(1)(A).<sup>212</sup>

Also as in *Doe Agency*, the *Keystone* Court adopts the SG’s language to reject the rationale for the lower court’s decision:

The court of appeals interpreted “sale or exchange” in Section 4975(c)(1)(A) contrary to its ordinary, settled meaning . . . as a result of its erroneous construction of Section 4975(f)(3). That provision states . . . that “[a] transfer [of] real or personal property by a disqualified person

We do not agree with the Court of Appeals’ conclusion that §4975(f)(3) limits the meaning of “sale or exchange,” as that phrase appears in §4975(c)(1)(A). Section 4975(f)(3) states that a transfer of property “by a disqualified person to a plan shall be treated as a sale or exchange if

211. *Keystone* Brief, *supra* note 207, at \*23–\*24.

212. *Keystone*, 508 U.S. at 161.

to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien.” The court of appeals . . . read it as “implying that unless [property] is encumbered by a mortgage or lien, a transfer of property is not to be treated as if it were a sale or exchange.”<sup>213</sup>

the property is subject to a mortgage or similar lien.” The Court of Appeals read this language as implying that unless property “is encumbered by a mortgage or lien, a transfer of property is not to be treated as if it were a sale or exchange.” 951 F.2d at 78.<sup>214</sup>

Justice Blackmun’s opinion for the Court in *Posters N’ Things v. United States*<sup>215</sup> follows a similar form. The opinion adopts an abundance of language from the SG’s brief regarding Congressional intent, the Court’s precedent, and the opposing parties’ arguments. The SG’s brief and the Court’s opinion look at Congressional intent similarly:

Congress omitted a factor that would have borne . . . directly on the question of subjective intent—the defendant’s own statements about his intent. That omission is particularly striking when Section 857 is compared to the Model Drug Paraphernalia Act. The Model Act includes among the relevant factors “[s]tatements by an owner . . . concerning [the] use” of the object and “direct or circumstantial evidence of the intent of an owner . . . to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act.” 8 App., *infra*, 6a-7a. Congress’s omission of both factors in Section 857

Congress did not include among the listed factors a defendant’s statements about his intent or other factors directly establishing subjective intent. This omission is significant in light of the fact that the parallel list contained in the . . . Model Drug Paraphernalia Act, on which §857 was based, includes among the relevant factors “statements by an owner . . . concerning [the object’s] use” and “direct or circumstantial evidence of the intent of an owner . . . to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act.” An objective construction of the definitional

213. *Keystone* Brief, *supra* note 207, at \*21–\*22 (brackets in original).

214. *Keystone*, 508 U.S. at 161.

215. 511 U.S. 513 (1994).

indicates that it did not intend to define drug paraphernalia in terms of the subjective intent of the defendant.<sup>216</sup>

provision also finds support in §857(f), which establishes an exemption for items “traditionally intended for use with tobacco products.” An item’s “traditional” use is not based on the subjective intent of a particular defendant.<sup>217</sup>

In 1988, Congress replaced “primarily” with “traditionally” in order to “clarif[y]” the meaning of the exemption. See Pub. L. No. 100-690, Tit. IV, § 6485, 102 Stat. 4384. If Congress had meant to shift from a subjective to an objective concept of intent, it is unlikely that it would have characterized the amendment as merely “clarifying” the law.<sup>218</sup>

In 1988, Congress added the word “traditionally” in place of “primarily” . . . in order to “clarif[y]” the meaning of the exemption. Pub. L. 100-690, Tit. VI, § 6485, 102 Stat. 4384. Congress’ . . . merely “clarifying” the law suggests that the original phrase . . . was not a reference to the fundamentally different concept of a defendant’s subjective intent.<sup>219</sup>

“[T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.” *Liparota*, 471 U.S. at 426. Instead, “far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.” *United States*

Neither our conclusion that Congress intended an objective construction of the “primarily intended” language in §857(d), nor the fact that Congress did not include the word “knowingly” in the text of §857, justifies the conclusion that Congress intended to dispense entirely with a scienter requirement. This Court stated in *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 . . . (1978):

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216. Brief for the United States at \*17–\*18, *Posters N’ Things v. United States*, 1993 WL 358181 (U.S. June 7, 1993) (No. 92-903) (brackets in original) [hereinafter *Posters Brief*].

217. *Posters*, 511 U.S. at 520–21 (footnotes omitted).

218. *Posters Brief*, *supra* note 216, at \*18–\*19 (brackets in original).

219. *Posters*, 511 U.S. at 521 (brackets in original).

*Gypsum Co.*, 438 U.S. at 438. Despite this presumption, “courts obviously must follow Congress’ intent as to the required level of mental culpability for any particular offense.” *United States v. Bailey*, 444 U.S. 394, 406 (1980). In this instance, however, we do not believe that the language or legislative history of Section 857 demonstrates that Congress intended to dispense with a mens rea requirement.<sup>220</sup>

“Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”<sup>221</sup>

The SG’s brief and the *Posters* opinion respond to the arguments raised by petitioner in this way:

Petitioners contend . . . that Section 857 is unconstitutionally vague as applied in this case. . . . Whatever its standing in the abstract, Section 857 is not unconstitutionally vague as applied to petitioners. The void-for-vagueness doctrine “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461. . . . Many of the items at issue in this case—including bongos, roach clips, and pipes designed for use with illegal drugs—are listed in

Petitioners argue that § 857 is unconstitutionally vague as applied to them in this case. . . . Whatever its status as a general matter, we cannot say that § 857 is unconstitutionally vague as applied in this case. First, the list of items in §857(d) constituting *per se* drug paraphernalia provides individuals and law enforcement officers with relatively clear guidelines as to prohibited conduct. With respect to the listed items, there can be little doubt that the statute is sufficiently determinate to meet constitutional requirements. Many items involved in this case—including bongos, roach clips, and pipes designed for use

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220. *Posters* Brief, *supra* note 216, at \*20–\*21.

221. *Posters*, 511 U.S. at 522.

Section 857(d). There is no plausible basis for arguing that the statute is unconstitutionally vague concerning those items.<sup>222</sup>

with illegal drugs—are among the items specifically listed in § 857(d).<sup>223</sup>

Petitioner Acty contends . . . that she was improperly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). . . . She asserts . . . that . . . under the district court’s instructions the jury was “required . . . to find that the substances were intended for manufacturing with a controlled substance.” Petitioner argues that the district court’s instructions . . . “create[d] ‘a presumption that relieve[d] the [government] of its burden of persuasion on an element of the offense,’” in violation of the Due Process Clause of the Fifth Amendment. . . . Petitioner did not raise that argument in the court of appeals, and that court did not address it.<sup>224</sup>

Petitioner Acty’s other contentions are not properly before the Court. First, she argues that she was improperly convicted of aiding and abetting the manufacture and distribution of cocaine because the jury instructions created a “presumption” that certain items of drug paraphernalia “were intended for manufacturing with a controlled substance.” . . . This argument was neither raised in nor addressed by the Court of Appeals.<sup>225</sup>

In another section of the *Posters* opinion, the Court establishes the SG’s interpretation of “primarily intended” as the governing definition of that statutory phrase:

Finally, our objective construction of the “primarily intended for use” language avoids

Finally, an objective construction of the phrase “primarily intended” is consistent with the

222. *Posters* Brief, *supra* note 216, at \*30–\*32.

223. *Posters*, 511 U.S. at 525–26.

224. *Posters* Brief, *supra* note 216, at \*34.

225. *Posters*, 511 U.S. at 527.

the creation of an unusual mens rea standard and is consistent with the meaning of similar language in other federal criminal statutes. See 18 U.S.C. 921(a)(17)(B) (“armor piercing ammunition” excludes any projectile that the Secretary of the Treasury finds is “primarily intended” to be used for sporting purposes); 21 U.S.C. 860(d)(2) (“youth center” means a recreational facility “intended primarily for use by persons under 18 years of age”).<sup>226</sup>

natural reading of similar language in definitional provisions of other federal criminal statutes. See 18 U.S.C. § 921(a)(17)(B) (“armor piercing ammunition” excludes any projectile that is “primarily intended” to be used for sporting purposes, as found by the Secretary of the Treasury); 21 U.S.C. §860(d)(2) (1988 ed., Supp. V) (“youth center” means a recreational facility “intended primarily for use by persons under 18 years of age”).<sup>227</sup>

## 2. *Non-Blackmun Cases*

Justice Blackmun’s Lifted opinions for the Court present some of the most elaborate examples of opinions that adopt language from the briefs in all their facets, including legal reasoning. They also represent the majority of Lifted opinions. Other Lifted opinions show greater variation in the material they include from the briefs, but they all tend to take the focal brief as the template for the language in the opinion. Many of these, like the Blackmun opinions, rely on the SG’s briefs from beginning to end.

The earliest Lifted relationship in the dataset comes from the 1955 opinion in *Steiner v. Mitchell*,<sup>228</sup> authored by Chief Justice Warren. This case is atypical both because the legal-reasoning section of the opinion is quite small compared to the discussion of facts and because the amount of overlapping language in the facts section is higher than in any other Lifted opinion and source brief at seventy-one percent. The Court’s reliance on the SG’s brief is apparent at the outset when the

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226. *Posters* Brief, *supra* note 216, at \*19.

227. *Posters*, 511 U.S. at 521.

228. 350 U.S. 247 (1956).

question posed in the opinion is compared to the question in each brief.<sup>229</sup>

Under the provisions of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, does time spent by petitioner's employees at its battery manufacturing plant in changing from street clothes into work clothes prior to punching the time clock at the beginning of the work day, and in taking shower baths and changing from work clothes to street clothes after punching out the time clock at the end of the work day, constitute compensable "time worked" under the amended Act?<sup>230</sup>

Where workers in a battery plant must make extensive use of dangerously caustic and toxic materials and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and . . . to shower in facilities which State law requires their employer to provide, are these "principal," rather than "preliminary" or "postliminary," activities within the meaning of the Portal-to-Portal Act.<sup>231</sup>

The precise question is whether workers in a battery plant must be paid as a part of their "principal" activities for the time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employer to provide, or whether these activities are "preliminary" or "postliminary" within the meaning of the Portal-to-Portal Act.<sup>232</sup>

The opinion in *Steiner* follows the facts as described in the SG's brief and deviates considerably from the facts as conveyed

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229. In all three-column *Steiner* quotations, the petitioner's brief, which is not highly similar to the opinion, is in the left column. The highly similar SG's brief is in the center column, and the opinion is in the right column.

230. Brief for Petitioners at \*2–\*3 *Steiner v. Mitchell*, 1955 WL 72535 (U.S. Aug. 12, 1955) (No. 22) [hereinafter *Steiner* Petitioners' Brief].

231. Brief for Respondent at \*2 *Steiner v. Mitchell*, 1955 WL 72536 (U.S. Sept. 26, 1955) (No. 22) [hereinafter *Steiner* Respondent's Brief.].

232. *Steiner*, 350 U.S. at 248.

by the petitioner.<sup>233</sup> The facts are often also drawn from the record, but as part of the opinion, they are damaging to the petitioner's contention that the working conditions in the battery plant are not hazardous and do not require the workers to take additional precautions to maintain their safety. The following examples exemplify how the pictures painted by the SG and the Court are quite different from that drawn by the petitioner.

The manufacturing process for storage batteries involves the handling of toxic matter, such as sulphuric acid and lead oxide. This matter damages clothes if it is spilled on them.<sup>234</sup>

All of the . . . production employees customarily work with or near the various chemicals used in the plant . . . . These include lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid . . . . Some of these are in liquid form, some are in powder form, and some are solid . . . . In the manufacturing process some of the materials go through various changes . . . . and give off dangerous fumes . . . . Some are spilled or dropped and thus become a part of the dust in the air . . . . In general, the chemicals permeate the entire plant and everything and everyone in it. . . . Moreover, "abnormal concentrations of lead have been discovered in

All of the production employees, such as those with whom we are here concerned, customarily work with or near the various chemicals used in the plant. These include lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid. Some of these are in liquid form; some are in powder form, and some are solid. In the manufacturing process, some of the materials go through various changes and give off dangerous fumes. Some are spilled or dropped, and thus become a part of the dust in the air. In general, the chemicals permeate the entire plant and everything and everyone in it. . . . Abnormal concentrations of lead were discovered in the

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233. It is worth noting that the opinion also derives from the lower court opinion, but the shared language is mainly between the opinion and the SG's brief, and not between the lower court's opinion and the Supreme Court's opinion.

234. *Steiner* Petitioners' Brief, *supra* note 230, at \*4.



<p>the bodies of some of [petitioners'] employees and [petitioners'] insurance doctor has recommended that such employees be segregated from their customary duties". . . .<sup>235</sup></p>	<p>bodies of some of petitioners' employees, and petitioners' insurance doctor recommended that such employees be segregated from their customary duties.<sup>236</sup></p>
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In another instance the *Steiner* opinion directly adopts the SG's reasoning concerning the petitioner's treatment of its workers:

<p>Petitioners concededly do not record or pay for the time which their employees spend in clothes changing and showering, which was found to amount to thirty minutes a day (ten minutes in the morning and twenty minutes in the afternoon) for each employee (R. 221). . . . Petitioners do not challenge the concurrent finding of the courts below that the clothes-changing and showering activities of the battery plant employees (men who work with or near dangerously toxic materials) are indispensable to the performance of productive work and integrally related thereto. See Pet. Br., p. 33.<sup>237</sup></p>	<p>Petitioners do not record or pay for the time which their employees spend in these activities, which was found to amount to thirty minutes a day, ten minutes in the morning and twenty minutes in the afternoon, for each employee. They do not challenge the concurrent findings of the courts below that the clothes-changing and showering activities of the employees are indispensable to the performance of their productive work and integrally related thereto.<sup>238</sup></p>
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While the opinion in *Steiner* is unusually fact-intensive, most Lifted opinions, as is suggested by the Blackmun

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235. *Steiner* Respondent's Brief, *supra* note 231, at \*3, \*4 (citations omitted).

236. *Steiner*, 350 U.S. at 249–50.

237. *Steiner* Respondent's Brief, *supra* note 231, at \*7, \*8.

238. *Steiner*, 350 U.S. at 251.

examples,<sup>239</sup> include an even mix of lifted facts and lifted reasoning. Justice Goldberg's opinion for the Court in *Tilton v. Missouri Pacific Railroad*<sup>240</sup> is more typical of the Lifted type. Its language parallels the reasoning found in the SG's brief as well as the SG's construction of the facts. The certainty present in the petitioner's argument makes its way into the Court's opinion, as is apparent in the following:

There is no room for doubt then, that, had Tilton, Beck and McClearn remained continuously on the job, they would have been able to complete the work period and qualify as journeymen in advance of those who "jumped" them in seniority during their absence. Each was entitled, under the agreement, to do carman's work ahead of any man upgraded after him. It was only because of petitioners' military service that men upgraded after them were able to work more days as carmen and to qualify as journeymen before them (Tilt. R. Stip. 29). But for their absence, petitioners would have qualified as journeymen carmen and achieved the seniority dates they now claim.<sup>241</sup>

There is no room for doubt in this case that . . . had petitioners remained continuously on the job during the period of their military service, they would have completed the work period and qualified as journeymen in advance of those who passed them in seniority during their absence. Each petitioner was entitled, under the labor agreement, to do carman's work ahead of any upgraded after him. It was only because of petitioners' military service that men upgraded after them were able to work more days as provisional carmen and to qualify as journeymen before them. But for their absence, petitioners would have qualified as journeymen carmen and achieved the seniority dates they now claim.<sup>242</sup>

Shared phrases such as "there is no room for doubt" indicate the parallel strength and confidence of the arguments in

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239. See Section III(F)(1), *supra*.

240. 376 U.S. 169 (1964).

241. Brief for Petitioners at \*25-\*26 *Tilton v. Missouri Pacific Railroad*, 1963 WL 105912 (U.S. Aug. 21, 1963) (No. 49) (footnote omitted) [hereinafter *Tilton* Brief].

242. *Tilton*, 376 U.S. at 177.

the SG's brief and the statements in the Court's opinion. In other examples, the opinion continues to validate the SG's reasoning as it takes contentions made in the brief as its own wording. As in *Steiner*, these statements in the opinion make the *Tilton* Court's position on the issues, and in particular its agreement with the SG's logic, abundantly clear:

For it was apparent that McKinney could never have predicted "with any degree of certainty," when he left for service, that (1) a group 1 position would fall vacant in his absence; (2) that he would elect to bid for it; (3) that he would be in adequate health to bid for it; and (4) that he would not have already lost his lower position because of unsatisfactory performance. . . . A returning veteran cannot claim a promotion that depends solely upon completing a prerequisite period of employment training unless he first works that period but, upon completion of that period of training, he can insist upon a seniority date in the higher position which reflects the delay in completing the requisite period of training caused by military service.<sup>243</sup>

It was apparent that McKinney, when he left for service, could not have predicted with absolute certainty that a group position would fall vacant in his absence; that he would be in adequate health to bid for it; that he would elect to bid for it; and that he would not have lost his lower position because of unsatisfactory performance. . . . [A] returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service.<sup>244</sup>

These samples of parallel construction in the SG's brief and in the opinion in *Tilton* are similar to those in *Steiner*, depicting language that leaves little doubt regarding the position of the

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243. *Tilton* Brief, *supra* note 241, at \*22 (discussing *McKinney v. Mo.-Kan.-Tex. R. Co.*, 357 U.S. 265 (1958)), \*34.

244. *Tilton*, 376 U.S. at 177 (discussing *McKinney v. Mo.-Kan.-Tex. R. Co.*, 357 U.S. 265 (1958)), 181.

litigant or of the Court. They also show that the *Tilton* Court adopted the SG's reasoning when ruling in the government's favor.

Chief Justice Warren's second Lifted opinion for the Court, *Foti v. INS*,<sup>245</sup> adopts more reasoning similar to that in the SG's brief even than appeared in *Steiner*. In particular, the *Foti* Court's reasoning is similar in construing the relevant legislative language and the practice of how to enforce it.

From the beginning, by regulations having the force and effect of law, it has been exercised as an integral part of the administrative proceedings which have led to the issuance of a final deportation order.<sup>246</sup>

Thus, the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order.<sup>247</sup>

The fundamental purpose of Section 106(a), its legislative history discloses, was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices, which had come to Congress's attention, whereby persons subject to deportation were forestalling enforcement by dilatory tactics in the courts.<sup>248</sup>

The fundamental purpose behind § 106(a) was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.<sup>249</sup>

The last-mentioned consideration also refutes the majority's suggestion that it is "incredible" that Congress meant to burden courts of appeals with review of

And the suggestion of the court below that it is "incredible" that Congress meant to burden the Courts of Appeals with review of all orders denying discretionary

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245. 375 U.S. 217 (1963).

246. Brief for Respondent at \*19, *Foti v. INS*, 1963 WL 105680 (U.S. July 31, 1963) (No. 28) (footnote omitted) [hereinafter *Foti* Brief].

247. *Foti*, 375 U.S. at 223.

248. *Foti* Brief, *supra* note 246, at \*24.

249. *Foti*, 375 U.S. at 224.

orders denying voluntary departure. <sup>250</sup>	relief in deportation cases is unconvincing. <sup>251</sup>
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Like the *Foti* and *Tilton* opinions, Justice Marshall's opinion for the Court in *Hodel v. Indiana*<sup>252</sup> follows the language and reasoning of the SG's brief. Significant to this case are the instances in which the opinion and the brief both discuss the importance of giving deference to Congressional choices:

A court may not substitute its judgment for that of Congress merely because it believes that Congress was "unwise in not choosing a means more precisely related to its primary purpose." <sup>253</sup>	"This court will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." <sup>254</sup>
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All of the provisions invalidated by the district court are reasonably calculated to further the legitimate congressional goals of preserving the productive capacity of mined lands, minimizing the adverse environmental consequences that can result from surface mining or inadequate reclamation of mined lands, and protecting the public from health and safety hazards that may be created by surface mining. <sup>255</sup>	All the provisions invalidated by the court below are reasonably calculated to further these legitimate goals. For example, the approximate-original-contour requirement in §515(b)(5) is designed to avoid the environmental and other harm that may result from unreclaimed or improperly restored mining cuts. <sup>256</sup>
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250. *Foti* Brief, *supra* note 246, at \*12.

251. *Foti*, 375 U.S. at 230.

252. 452 U.S. 314 (1981).

253. Brief for Appellant at \*26, *Hodel v. Indiana*, 1980 WL 339846 (U.S. Nov. 29, 1980) (No. 80-231) [hereinafter *Hodel* Brief].

254. *Hodel*, 452 U.S. at 326 (quoting *Stafford v. Wallace*, 258 U.S. 495, 521 (1922)).

255. *Hodel* Brief, *supra* note 253, at \*17.

256. *Hodel*, 452 U.S. at 327 (footnotes omitted).

That is surely a rational distinction for Congress to draw, and the fact that a particular state has more of one kind of mining operation than another does not establish discrimination in violation of the Due Process Clause of the Fifth Amendment.<sup>257</sup>

Congress acted rationally in drawing these distinctions, and the fact that a particular State has more of one kind of mining operation than another does not establish impermissible discrimination under the Fifth Amendment's Due Process Clause.<sup>258</sup>

Moreover, Congress' determination that federal intervention is necessary in this area was based in part on a desire to ensure that mine operators in states adhering to high performance and reclamation standards would not be disadvantaged in competition with their counterparts in states with less rigorous regulatory programs. See 30 U.S.C. (Supp. I) 1201(g). The statutory provisions overturned by the district court advance these legitimate goals of Congress and thus are rationally related to the protection of commerce from the adverse impact of surface mining operations.<sup>259</sup>

[T]he Act reflects the congressional goal of protecting mine operators in States adhering to high performance and reclamation standards from disadvantageous competition with operators in States with less rigorous regulatory programs. See 30 U. S. C. §1201 (g) (1976 ed., Supp. III). The statutory provisions invalidated by the District Court advance these legitimate goals, and we conclude that Congress acted reasonably in adopting the regulatory scheme contained in the Act.<sup>260</sup>

As is the case with several other Lifted opinions, the opinion in *Hodel* uses the SG's reasoning for rejecting the opposing parties' arguments:

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257. *Hodel* Brief, *supra* note 253, at \*28 (footnote omitted).

258. *Hodel*, 452 U.S. at 333.

259. *Hodel* Brief, *supra* note 253, at \*20.

260. *Hodel*, 452 U.S. at 329 (footnote omitted).

Moreover, even assuming *arguendo* that the provisions in question impose a greater burden on mine operators in midwestern states, that is no basis for striking them down as unconstitutional. A claim of arbitrariness or irrationality cannot be founded merely upon a statute's lack of uniform geographic impact.<sup>261</sup>

More important, even were appellees correct that the challenged provisions impose a greater burden on mine operators in the Midwest, that is no basis for finding the provisions unconstitutional. A claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616-619 . . . (1950).<sup>262</sup>

As in *Virginia Surface Mining*, plaintiffs' taking claims did not focus on any particular properties to which the challenged provisions have been applied, and the district court did not base its ruling on the denial of a surface mining permit for specific prime farmland operations proposed by plaintiffs.<sup>263</sup>

In this case as in *Virginia Surface Mining*, appellees' takings claims do not focus on any particular properties to which the challenged provisions have been applied. Similarly, the District Court's ruling did not pertain to the taking of a particular piece of property or the denial of a mining permit for specific prime farmland operations proposed by appellees.<sup>264</sup>

[P]laintiffs here, like their counterparts in *Virginia Surface Mining*, have made no showing that they were ever assessed civil penalties . . . , much less that the statutory prepayment requirement was ever applied to them or that it caused them injury.<sup>265</sup>

[L]ike their counterparts in *Virginia Surface Mining*, appellees have made no showing that they were ever assessed civil penalties . . . , much less that the statutory prepayment requirement was ever applied to them or caused them any injury.<sup>266</sup>

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261. *Hodel* Brief, *supra* note 253, at \*27.

262. *Hodel*, 452 U.S. at 332.

263. *Hodel* Brief, *supra* note 253, at \*30.

264. *Hodel*, 452 U.S. at 334 (footnote omitted).

265. *Hodel* Brief, *supra* note 253, at\* 36.

The links between the opinion and the SG's brief in *Hodel*—from the interpretation of Congressional purpose in enacting a particular statute through the rejection of the opposing parties' arguments—are also present in Justice Stewart's opinion for the Court in *Lehman v. Nakshian*.<sup>267</sup> In reviewing the purpose behind the Age Discrimination in Employment Act, the *Lehman* Court shares the SG's views:

The general experience has been that when Congress waives the sovereign immunity of the United States, it does *not* provide for trial by jury. . . . [J]ury trials historically have not been available in the Court of Claims in the broad range of cases within its jurisdiction under 28 U.S.C. § 1491—*i.e.*, all claims against the United States “founded either upon the Constitution, or *any* Act of Congress.”<sup>268</sup>

When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial.<sup>269</sup>

In any event, Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to trial by jury “as declared by the Seventh Amendment to the Constitution or as *given by a statute of the United States* shall be preserved to the parties inviolate” (emphasis added). This language certainly does not state a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in the district

Moreover, Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to a jury trial “as declared by the Seventh Amendment to the Constitution or as *given by a statute of the United States* shall be preserved to the parties inviolate” (emphasis added). This language hardly states a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in federal

266. *Hodel*, 452 U.S. at 335–36.

267. 453 U.S. 156 (1981).

268. Brief for Petitioner at 11, *Lehman v. Nakshian*, 453 U.S. 156 (Jan. 1981) (No. 80-242) (emphasis in original) [hereinafter *Lehman* Brief].

269. *Lehman*, 453 U.S. at 161.



court. To the contrary, Rule 38(a) renders it necessary to look elsewhere for a specific, affirmative grant of the right where, as here, the Seventh Amendment does not apply.<sup>270</sup>

district courts. Indeed, Rule 38(a) requires an affirmative statutory grant of the right where, as in this case, the Seventh Amendment does not apply.<sup>271</sup>

As is evident, neither the provision for cases under Section 15(c) to be brought in district court nor the use of the word “legal” in that section can be thought to manifest a congressional intent that the plaintiff in an ADEA action against the federal government have a right to trial by jury.<sup>272</sup>

Neither the provision for federal employer cases to be brought in district courts rather than the Court of Claims, nor the use of the word “legal” in that section, evinces a congressional intent that ADEA plaintiffs who proceed to trial against the Federal Government may do so before a jury.<sup>273</sup>

In its analysis of whether jury trials should be allowed in cases like *Lehman*, the Court follows the SG’s reasoning regarding the dearth of evidence presented by the respondent:

There is nothing in the legislative history to indicate that Congress did not mean what it said in providing for jury trials in cases under Section 7(c) but not in cases against the federal government under Section 15(c). Indeed, the legislative history contains not a single reference to the issue of jury trials in federal sector cases, and any inferences that may be drawn from the legislative history on this question cut against the

The respondent cannot point to a single reference in the legislative history to the subject of jury trials in cases brought against the Federal Government. There is none. And there is nothing to indicate that Congress did not mean what it plainly indicated when it expressly provided for jury trials in § 7(c) cases but not in § 15(c) cases. In fact, the few inferences that may be drawn from the legislative history are inconsistent with the respondent’s

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270. *Lehman* Brief, *supra* note 268, at 31.

271. *Lehman*, 453 U.S. at 164–65 (footnote omitted).

272. *Lehman* Brief, *supra* note 268, at 40–41.

273. *Lehman*, 453 U.S. at 168.

availability of jury trials. . . . position.<sup>275</sup>  
 [A]ny inferences that may be  
 drawn from the legislative history  
 cut strongly against respondent's  
 position.<sup>274</sup>

Writing for the Court in *Carter v. Kentucky*,<sup>276</sup> another case dealing with defendants' rights, Justice Stewart utilized the petitioner's constitutional analysis—advanced by a team of public advocates employed by the Commonwealth of Kentucky—for requiring specific jury instructions under the Fifth Amendment:

There is no doubt that the Fifth Amendment privilege, the presumption of innocence, and the burden of proof are closely aligned. . . . However, to say that these principles are closely aligned is not to say that they do not serve distinctive functions. Petitioner's jury would have certainly derived "significant additional guidance" from an instruction that "no inference" should be drawn from his failure to testify. *Taylor v. Kentucky*, 436 U.S. at 484.<sup>277</sup>

Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned. But these principles serve different functions, and we cannot say that the jury would not have derived "significant additional guidance," *Taylor v. Kentucky*, 436 U.S. 478, 484 . . . , from the instruction requested.<sup>278</sup>

This passage demonstrates that the *Carter* opinion shares the strength of the argument made by petitioner's counsel with phrases like "no doubt" in the petitioner's brief and "[w]ithout question" in the opinion that leave little room for alternative interpretations of the Constitution's language.

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274. *Lehman* Brief, *supra* note 268, at 5–6, 17.

275. *Lehman*, 453 U.S. at 166.

276. 450 U.S. 288 (1981).

277. Brief for Petitioner at \*39–\*40, *Carter v. Kentucky*, 1980 WL 339742 (1981) (No. 80-5060).

278. *Carter*, 450 U.S. at 304.

Chief Justice Burger's opinion for the Court in *United States v. One Assortment of 89 Firearms*<sup>279</sup> has a similar tone of certainty in its adoption of language from the SG's brief, especially in the Court's statutory analysis regarding whether Congress intended for the possibility of forfeiture proceedings after a gun owner is acquitted of criminal charges:

Congress' intent that Section 924(d) be regarded as a civil rather than a criminal penalty is most clearly evidenced, however, by the procedural mechanisms it established for enforcing forfeitures under the statute. Section 924(d) does not prescribe the steps to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code of 1954. The Internal Revenue Code provides that proceedings to enforce forfeitures "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made" (26 U.S.C. 7323). As outlined above, in rem actions are, by their very nature, civil proceedings, with jurisdiction dependent upon seizure of a physical object, in contrast with the in personam nature of criminal actions. See *Calero-Toledo*, 416 U.S. at 684.<sup>280</sup>

Applying the first prong of the *Ward* test to the facts of the instant case, we conclude that Congress designed forfeiture under § 924(d) as a remedial civil sanction. Congress' intent in this regard is most clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute. Section 924(d) does not prescribe the steps to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code of 1954 (Code), 26 U. S. C. § 7321–7328. The Code in turn provides that an action to enforce a forfeiture "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made." 26 U. S. C. §7323. In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object. See

279. 465 U.S. 354 (1984).

280. Brief for Petitioner at 21, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (June 1983) (No. 82-1047) (footnote omitted) [hereinafter *89 Firearms Brief*].

*Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 . . . (1974).<sup>281</sup>

In addition to the *in rem* nature of the action, the Internal Revenue Code provides a summary, administrative proceeding for forfeiture of seized goods valued at \$2,500 or less. See 26 U.S.C. 7325. . . . That Congress provided a distinctly civil procedure for [forfeitures under 18 U.S.C. 924 [36] (d)] indicates clearly that it intended a civil, not a criminal, sanction.” *Helvering*, 303 U.S. at 402.<sup>282</sup>

In addition to establishing the *in rem* nature of the action, the Code authorizes a summary administrative proceeding for forfeiture of items valued at \$2,500 or less. . . . See 26 U.S.C. §7325. By creating such distinctly civil procedures for forfeitures under §924(d), Congress has “indicate[d] clearly that it intended a civil, not a criminal, sanction.” *Helvering v. Mitchell*, *supra*, 303 U.S., at 402.<sup>283</sup>

When Congress enacted the 1968 gun control legislation, “it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.” *Huddleston v. United States*, 415 U.S. 814, 824 (1974). . . . The Gun Control Act of 1968, in particular, was designed to “control the indiscriminate flow” of firearms across state borders and to “assist and encourage States and local communities to adopt and enforce stricter gun control laws.” H.R. Rep. No. 1577, 90th Cong., 2d Sess. 8

In enacting the 1968 gun control legislation, Congress “was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.” *Huddleston v. United States*, 415 U.S. 814, 824 . . . (1974). Accordingly, Congress sought to “control the indiscriminate flow” of firearms and to “assist and encourage States and local communities to adopt and enforce stricter gun control laws.” H. R. Rep. No. 1577, 90th Cong., 2d Sess., 8 (1968). Section 924(d) plays an important role in

281. *89 Firearms*, 465 U.S. at 363.

282. *89 Firearms* Brief, *supra* note 280, at 21–22.

283. *89 Firearms*, 465 U.S. at 363.

(1968). . . . Section 924(d) plays an important role in furthering the “broad prophylactic purpose” of the 1968 gun control legislation (*Dickerson v. New Banner Institute, supra*, slip op. 15) by eliminating stocks of firearms that have been used or intended for use outside regulated channels of commerce.<sup>284</sup>

furthering the prophylactic purposes of the 1968 gun control legislation by discouraging unregulated commerce in firearms and by removing from circulation firearms that have been used or intended for use outside regulated channels of commerce.<sup>285</sup>

By sharing the SG’s reasoning in *89 Firearms*, the Court shows its regard for the SG’s interpretation of Congressional intent and purpose to such a degree that it is willing to incorporate many aspects of the SG’s argument wholesale into the opinion. This, however, is not an anomaly in this sort of case. Lifted opinions, almost without exception, convey the strength of the Court’s faith in the SG’s approach.<sup>286</sup> On a separate level, though, it also shows great deference on the part of the Court to the SG’s contentions. The SG has insight into the inner workings of the government not available to other parties, but even an insider with special knowledge can be fallible. Unfortunately, comparisons of briefs and opinions cannot provide evidence of the Court’s level of scrutiny into the SG’s contentions.

#### IV. CONCLUSION: MAKING SENSE OF THE RELATIONSHIP BETWEEN MERITS BRIEFS AND SUPREME COURT OPINIONS

These examples present a slice of the relationship between Supreme Court briefs and opinions. They highlight cases in which the Court has borrowed a large amount of substantive language from merits briefs. While there has been prior scholarship demonstrating that Supreme Court opinions borrow

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284. *89 Firearms* Brief, *supra* note 280, at 24–25.

285. *89 Firearms*, 465 U.S. at 364.

286. One exception would be *Carter*. See text accompanying note 276, *supra* (noting that lifted language in *Carter* came from a brief filed by a team of lawyers working for Kentucky’s Department of Public Advocacy).

language from briefs,<sup>287</sup> the extent of this borrowing at the individual-case level is uncharted territory. The cases discussed here illuminate important factors regarding the relationship between briefs and opinions in cases that include high levels of overlapping language. Yet these comparisons between briefs and opinions leave us with unanswered questions.

The comparisons drawn from these cases provide further confirmation that repeat players—the OSG in particular—have strong relationships with the Court that makes this extent of language sharing possible.<sup>288</sup> They also help differentiate the types of impact a brief can have on an opinion. There are clear differences between cases in which the opinions share citations and quoted language with the briefs, and cases in which opinions share language that was original with the briefs. The former cases present examples of briefs that were likely influential to the extent that they focused the Court’s attention on particular precedent, on specific places in the record, and on relevant statutes, all intended to assist the Court in its decision making. But the latter—the Lifted relationships that are the focus of this article—present puzzles due not only to the extent of the language shared, but also due to the content of the shared language.

How deeply should we read into the borrowed language in Lifted opinions? If we dig into other cases and probe the relationships between briefs and opinions, there are almost assuredly more examples of this type of language sharing, potentially at levels that approximate those in the cases covered

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287. See, e.g., Corley, *supra* note 22 (discussing the influence of merits briefs on the language of Supreme Court opinions).

288. For discussion of repeat players’ success in the Supreme Court see, for example, Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175 (2007); Kevin T. McGuire, *Explaining Executive Success in the U. S. Supreme Court*, 51 POLITICAL RESEARCH Q. 505 (1998), and Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POLITICS 187 (1995). For a more detailed look at the Solicitor General’s unique impact on Supreme Court opinion language, see Black and Owens, *supra* note 22, and Patricia A. Millett, “*We’re Your Government and We’re Here to Help*”: *Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209 (2009), the latter noting that, “once requested by the Supreme Court, the Solicitor General’s analysis of the importance of a question presented and the necessity and appropriateness of certiorari review carry significant weight with the Court.” Millett, *supra* this note, at 215–16 (footnote omitted).

in this article. There are likely even more cases in which minor editing changed the phrasing so that language does not align perfectly between brief and opinion, but in which high levels of shared language predominate.

A few of the implications from relationships predicated on language lifting bear consideration. That Supreme Court opinions share language with briefs itself is not an original concept. There are also many sources that the Justices or their clerks would have located without the assistance of briefs, so in some cases it is mere happenstance that the language is shared. Judges also often want briefs to organize and synthesize the information in case records and information relevant to judicial decision of the issues raised in them,<sup>289</sup> so they may actively seek specific language in the briefs before them.

The unattributed shared language, however, is not so readily explained by well-organized and persuasive briefs. Opinions can and do cite to briefs, just as they cite other sources of law, analysis, and information. In *Russello* for instance, the opinion cites to the petitioner's brief when it says that

Petitioner himself has not attempted to define the term "interest" as used in § 1963(a)(1). He insists, however, that the term does not reach money or profits because, he says: 'Interest,' by definition, includes of necessity an interest in something.' Brief for Petitioner 9."<sup>290</sup>

Similarly in *National Bank of Commerce*, the Court cites to the respondent's brief, stating that

[c]ommon sense dictates that a right to withdraw qualifies as a right to property for purposes of §§ 6331 and 6332. In a levy proceeding, the IRS "steps into the taxpayer's shoes," *United States v. Rodgers*, 461 U. S., at 691, n. 16, . . . quoting 4 Bittker, ¶ 111.5.4, at 111-102; M. Saltzman, IRS Practice and Procedure ¶ 14.08, p. 14-32 (1981); Brief for Respondent 8."<sup>291</sup>

These examples show that even in Lifted opinions, the Court is willing to cite to the briefs in circumstances in which the brief informs the opinion writer's choice of language.

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289. See Rehnquist, *supra* note 17; Tate, *supra* note 17.

290. *Russello*, 464 U.S. at 22 (1983).

291. *Nat'l Bank of Commerce*, 472 U.S. at 725.

In the bulk of the Lifted relationships identified in this article, however, the Court does not cite sources for its choices of language. Yet the extent of shared language in these cases, and the Justices' and clerks' access to the briefs, make the likely source of the language clear.<sup>292</sup> This lack of attribution raises two concerns. The first has to do with the trustworthiness or credibility of the source: How are we to know that the shared language in the opinion was lifted from a brief written by a reputable source? The second has to do with the normative value that we place on courts' citing to the sources they use: When there is a clear indication that the language lifted into the opinion did not originate with either the Justice writing for the Court or an obvious third-party source (a constitutional provision, a statute, a regulation, or an official comment, for instance, or perhaps a law-review article known in the relevant field), shouldn't we expect the Justice writing for the Court to make that clear?

The trustworthiness quandary may be diminished because of the source of language in these cases. The relationship between the SG and the Court is predicated on trust.<sup>293</sup> This is evident from the numerous times the Court has invited the SG to file amicus briefs in cases in which the government is not a party.<sup>294</sup> This trust and the reasons behind it might allay

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292. Since clerks are involved in the process of drafting opinions it is plausible that these choices of shared language stem from clerks' decisions. To this point, in an interview Justice Ginsburg related the clerks' role in opinion drafting when she said, "I would like to do all of my own work so I could write all my opinions myself, but there is just not enough time to do that." Todd C. Peppers, *Ruth Bader Ginsburg and Her Law Clerks*, in Peppers & Ward, *supra* note 2, at 397. It is also the case that even if the shared language in some of these instances stems from a source that both the brief and the opinion share, the lack of attribution does not change.

293. See, e.g., REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 161 (1992) (noting in discussion of a related topic that "solicitors general must consider the trust they enjoy with the Court"); cf. Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POLITICAL SCI. 72, 83 (2005) (noting, after examining relationship between SG and Court, SG's "direct impact" on "decisions reached by the Court" and "influence" on "all justices," and acknowledging SG's "success rates").

294. See, e.g., Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 717 (1963) (describing the Court's seeking the expertise of the SG and others by inviting them to file amicus briefs); see also Millett, *supra* note 288, at 225 (noting that the SG filed more amicus briefs—thirty—than merits briefs—twenty-seven—in the 2007 term).



concerns about the source of the shared language. If there is a repeat litigator in the Court who is expected to present accurate information and who is held to a lofty standard, that litigator is the government's attorney—the SG. Nonetheless, the SG is also an advocate who makes arguments to win cases. Furthermore, the government may have an agenda in a case that does not coincide with the best interest of justice or of the rule of law. If the SG frames arguments to win cases, then the language used may be stronger or more argumentative than we would expect from an agnostic party or from the Court itself.

Although the SG's argument and statements of fact, or those of any other similarly situated litigator, may be accurate, the level of accuracy expected from these parties does not parallel that expected from the Court. Thus, there may be certain professional and societal expectations of due diligence in checking the law and the facts on the part of the Justices and the clerks that is not equally expected from others. This is not to say that such due diligence does not occur in circumstances with unattributed language sharing; it is only to say that the lack of attribution raises questions about the level of due diligence performed.<sup>295</sup>

The normative question of when a citation in a Supreme Court opinion is proper or expected is primarily untapped.<sup>296</sup> Yet because it sits at the apex of the judicial hierarchy, the Supreme Court and its opinions are not reviewed by other judicial bodies that could fashion norms and expectations for this practice. We should in consequence examine the practice more closely. Further research might demonstrate that there are reasons why the Justices may want to provide citations when there are clear

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295. The question of the source of lifted language may be further complicated in situations in which briefs look to resources like the opinions below for their language, simply re-framing it in a most favorable light. *See, e.g.*, Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POLITICAL SCI. 617 (2010).

296. There is a small body of scholarship looking specifically at judicial plagiarism, but it is primarily focused on the copyright implications of the practice and its use by the lower courts. *See, e.g.*, Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism*, 45 ARIZ. ST. L.J. 1077 (2013); Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777 (2008); Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008); Jaime S. Dursht, *Judicial Plagiarism: It May Be Fair Use but Is It Ethical?* 18 CARDOZO L. REV. 1253 (1996).

sources—reasons including the potential positive effect that those citations could have on perceptions of the Court’s institutional legitimacy.<sup>297</sup>

Further research into the possibility that large-scale language borrowing is idiosyncratic to particular Justices might also be productive. Justice Blackmun authored more than half of the Lifted opinions revealed by my research.<sup>298</sup> This may indicate that he, more than other Justices, was willing to directly adopt the language of the briefs.<sup>299</sup> Still, many other Justices in the time period of the study authored Lifted opinions, and if the word-number threshold for Lifted opinions was loosened, this number would grow considerably.

As one team of commentators aptly wrote, “There is much to be learned from studies that compare a judicial opinion with the briefs and trial transcripts and other materials on which the judge based—or purported or was expected to base—his opinion.”<sup>300</sup> Awareness of the practice of large-scale language borrowing may help bring clarity to this part of the process of opinion construction. Still, the rules for drafting opinions when they are primarily based on contentions made in merits briefs are unscripted. Supreme Court opinion writing is a unique enterprise that may deserve deference not afforded to other types of writing. By removing the mystery that obscures this part of the opinion-construction process, however, we may begin to develop expectations for the role that briefs should play in it. And we may also begin to assess the significance, if any, that we

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297. See generally, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006) (describing the many audiences that may affect Supreme Court Justices’ behavior and why the Justices likely care about the opinions of these audiences).

298. Cf. Tony Mauro, *Lifting the Veil: Justice Blackmun’s Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037 (2005) (describing Justice Blackmun’s other uncommon behaviors as a Justice).

299. Although this might be accurate at the level of particular cases, the average percentage of overlapping language between briefs and Justice Blackmun’s opinions is not high compared to the other Justices. See Feldman, *supra* note 5 (showing that the mean overlap value across the 1946 through 2013 terms is 9.54 percent, and that Justice Blackmun’s mean overlap value is just above average at 9.90 percent).

300. LEE EPSTEIN, WILLIAM W. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 52 (2013).

place on attribution to briefs when opinions adopt their substantive language.

