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## Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis

Anita S. Krishnakumar

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## Articles

# Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis

ANITA S. KRISHNAKUMAR\*

*This Article examines the Roberts Court's statutory cases from its 2005–2008 Terms, beginning with cases decided after January 31, 2006, when Justice Alito joined the Court, and concluding with cases decided on June 29, 2009, when Justice Souter retired. The Article's approach is both empirical and doctrinal, in that it (1) presents descriptive statistics illustrating the Court's and individual Justices' rates of reliance on fourteen different tools of statutory construction, and (2) engages in doctrinal analysis of the Court's statutory cases, highlighting discernable patterns in the individual Justices' interpretive approaches. The Article makes two significant contributions to the field of statutory interpretation. First, it identifies an interpretive divide that seems to be doing significant work in the Roberts Court's statutory cases—a divide that perhaps best can be described as one between “legal-landscape coherence” on the one hand, and “statute-specific coherence” on the other. “Legal-landscape coherence” refers to an interpretive approach that focuses on the legal framework surrounding the statute at issue and seeks the statutory construction that fits most coherently into the existing legal structure; while “statute-specific coherence” refers to an interpretive approach that focuses on the individual statute at issue and preferences the statutory construction that creates an internally consistent and coherent policy across like situations and across time. The Article maps out the Justices' theoretical divide in detail and shows how the divide translates into stark empirical differences in the Justices' individual rates of reliance on particular interpretive canons and tools.*

*This Article breaks new ground by uncovering an important difference in the form of practical considerations that different Justices tend to reference. Specifically, the Article demonstrates that the landscape-coherence Justices tend to focus on the administrability of an interpretation—that is, its effect on judicial resources, the difficulty of implementing it, and the clarity and predictability of the rule created; while the statute-specific Justices tend to focus on the constancy of the policy effected by an interpretation—for instance, whether it fosters a consistent application of the statute over time, the arbitrariness of the policy created, and the justness of the interpretation. The Article concludes with two case studies illustrating how the Roberts Court's interpretive divide operates in practice and with a discussion about the theoretical implications of the divide.*

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## INTRODUCTION

Scholarly literature in the field of statutory interpretation long has tended towards the theoretical. The academic annals are rife with forceful, often heated, debate about the most legitimate approach to interpreting statutes, as well as bald assertions about the value or indeterminacy of particular interpretive canons and methodologies.<sup>1</sup> In

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1. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16–37 (1997) (advocating a textualist approach and denouncing the resort to legislative history or substantive policy norms in interpreting statutes); see also J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 772–73 (1987) (describing originalism as the preferred method of statutory interpretation for most judges and lawyers); Stephen Breyer, *On The Uses of Legislative History in Interpreting Statutes*, 65 *S. CAL. L. REV.* 845, 847 (1992) (defending legislative history use as legitimate); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *HARV. J.L. & PUB. POL'Y* 59, 62 (1988) (“[O]riginal intent

the early years following Justice Scalia's ascension to the Supreme Court, it was particularly in vogue to argue the merits of "textualism"<sup>2</sup> versus "intentionalism"<sup>3</sup> and to observe that the Court had become more text-focused and correspondingly less inclined to rely on legislative history in interpreting statutes.<sup>4</sup> Until recently, almost no empirical measurements had been conducted to test such assertions.

In the last decade-and-a-half, a few empirical studies of the Supreme Court's statutory interpretation cases have emerged. These studies have ranged in scope, measuring various aspects of the Court's interpretive methodology—from the use of canons of construction in workplace law cases,<sup>5</sup> to the rise and fall of the Court's reliance on legislative history,<sup>6</sup> to

rather than an objective inquiry . . . increases the discretion, and therefore the power, of the court."); William D. Popkin, *An 'Internal' Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1138 (1992) (offering a critical look at "Justice Scalia's text- and rule-based approach" to interpreting statutes); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 383–84 (1992) ("I construct a second theory, 'law as a statute.' . . . [This will] provide a principled and effective constraint on the use of legislative history."); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (criticizing legislative history use).

2. Textualism is an interpretive philosophy that prioritizes the statute's text above all else. Proponents of this approach urge courts to resolve statutory cases solely with reference to the written text and discourage consultation of non-textual sources such as legislative history. *See, e.g.*, Scalia, *supra* note 1, at 16–37; *see also* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 89–94 (1984); John F. Manning, *Competing Presumption About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2027 (2006).

3. Intentionalism instructs courts to resolve interpretive questions in statutory cases by asking how the enacting Congress would have decided the question. Intentionalism invites substantial reliance on legislative history and other interpretive tools indicative of the enacting Congress's desires. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM 286–87* (1985) ("[T]he judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) ("The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed.");

4. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–25 (1990) ("[N]ew textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant."); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355–57 (1994) (finding an increase in "textualism" and a corresponding decline in the Court's use of legislative history between 1981 and 1992); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750–52 (1995) (criticizing the Court's overuse of textualism); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246 ("[P]lain language discourse dominates the Court's statutory interpretation cases.");

5. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 15 (2005).

6. *See, e.g.*, James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (finding a higher rate of legislative history use, between 40% and 50%, in the period from 1969 to 1986, with a drop off to 25% from 1986 to 2002); Merrill, *supra* note 4, at 355 (finding that use of legislative history had fallen to 18% by the 1992 Term); Patricia M. Wald, *The Sizzling Sleeper: The*

the Court's patterns of deference to administrative agencies,<sup>7</sup> to the frequency of the Court's references to all interpretive tools in all statutory cases decided in one Term,<sup>8</sup> to the alignment between the Court's use of interpretive tools and the most prominent theoretical approaches—textualism, intentionalism, dynamic updating, or pragmatism.<sup>9</sup>

This Article takes a slightly different approach, examining the Roberts Court's reliance on the canons and other interpretive tools in all of its statutory cases from January 31, 2006, when Justice Alito joined the Court, to June 29, 2009, Justice Souter's last day on the bench. My study differs from earlier empirical studies in a few significant respects. First, its data is culled from all of the cases decided by one particular Court—the Roberts Court—rather than from a sampling of cases from various Terms and Courts. Second, it focuses not on measuring changes in the Court's use of particular canons or interpretive tools over time, but on patterns and groupings of different Justices' preferences for particular interpretive tools, and what these patterns reveal about the Justices' goals in interpreting statutes. The Article, therefore, takes a combined empirical and doctrinal approach, relying on both descriptive statistics and doctrinal analysis of the Court's opinions to paint a nuanced portrait of the Justices' methodological points of departure in statutory cases.

In the end, this Article reaches three conclusions. First, the data from the Roberts Court's first era of statutory interpretation cases is consistent with Jane Schacter's theory that the Supreme Court interprets statutes in a manner she dubbed "common law originalism."<sup>10</sup> Based on empirical observations of forty-eight statutory cases decided during the Court's 1996 Term, Schacter has argued that the Court's interpretive methodology is part "originalist," in that it involves significant reliance on statutory language as an "interpretive anchor," and part "common law," in that the Court draws from a number of judicially created

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*Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 280, 287–88 (1990) (finding that the Court used legislative history in almost every statutory interpretation case in the 1981 Term, with the rate declining to 75% for the 1988–1989 Term); see also David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1683–84 (2010) (tracking, inter alia, the Court's rate of legislative history use from 1953 to 2006).

7. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

8. See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 4 (1998).

9. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 136–37, 143–48 (2009); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1074–76 (1992).

10. See Schacter, *supra* note 8, at 5.

resources to choose between plausible statutory constructions.<sup>11</sup> Data from the Roberts Court's first three-and-a-half Terms<sup>12</sup> supports this characterization, demonstrating substantial judicial reliance on originalist sources, such as statutory language and structure, as well as on common law sources, such as prior judicial interpretations and judicial observations about the practical consequences<sup>13</sup> likely to result from certain interpretations.

Second, the data also suggest that Schacter's common law originalism theory paints an incomplete picture of the Supreme Court's interpretive methodology in statutory cases. Something more nuanced than simple, across-the-board common law judging, tempered by attention to the text appears to be taking place beneath the surface in several of the cases. My analysis of canon and interpretive tool reliance in majority versus dissenting opinions and of the individual Justices' rates of reliance on particular canons and interpretive tools suggests that, while all of the Justices seek to make sense of statutes they interpret, the individual members of the Court possess different points of departure for what the relevant "sense" is.

In my observation, there are two principle camps, or schools of thought, reflected in the Roberts Court's opinions with respect to what kind of "sense" a judicial interpreter should strive to make of the statute before her. The first camp seems to regard the relevant "sense" with reference to the larger legal landscape. Doctrinally, members of this camp tend to justify their interpretations as necessary to make a statutory provision fit coherently into the existing legal framework, like a piece in a puzzle. These Justices focus not only on the statute at issue, but also, and sometimes more so, on the puzzle pieces (related legal rules) already in place, such as the entire United States Code (all federal statutes), prior judicial interpretations of similar statutes, the Constitution and background norms derived from it, and the common law rule in the relevant field. Empirically and methodologically, the Justices in this camp exhibit a measurable preference for interpretive tools that foster consistency with the overarching legal landscape, including other statutes with similar language, Supreme Court precedents interpreting similar statutory provisions, substantive canons of construction<sup>14</sup> reflecting

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11. *Id.*

12. The study includes cases from the second half of the Court's 2005 Term (following Justice Alito's ascension to the bench at the end of January, 2006) and from the full 2006, 2007, and 2008 Terms.

13. Schacter calls this latter interpretive resource "judicially-selected policy norms." Schacter, *supra* note 8, at 5, 12.

14. Substantive canons reflect a judicially preferred policy position. They are not predicated on presumptions about what the words of a statute should mean, but instead reflect judicial rules of thumb about how to treat statutory text in light of constitutional priorities, pre-enactment common law practices, or specific statutorily-based policies. See *infra* pages 243-44 for a detailed explanation

background constitutional or policy norms, generally applicable dictionary definitions and meanings of words, and common law precedents in the relevant field.<sup>15</sup> The Justices in this camp also pay significant attention to the practical consequences likely to result from a particular interpretation, to ensure that the rule announced in the instant case does not create an unworkable rupture in the overarching legal landscape.

The second camp, which finds itself in dissent more often than the first, is less focused on the legal landscape and more focused on the policy embodied in the particular statute before the Court. Its members seem to consider it their primary interpretive goal to “make sense” of Congress’s handiwork in the individual statute at issue. This camp, while not inattentive to legal landscape concerns, places greater interpretive weight on canons and interpretive tools that focus on the statute at hand and that foster consistent and coherent fulfillment of the individual statute’s provisions. Empirically, Justices in this camp exhibit a higher degree of reliance on statutory purpose, inferences regarding congressional intent, and legislative history<sup>16</sup> than do the Justices who fall into Camp One. Like the Camp One Justices, they also pay attention to the practical consequences likely to result from a particular interpretation, but with an eye towards ensuring an internally consistent and coherent statutory policy. This is not to say that Camp Two Justices do not rely on Supreme Court precedent, other statutes, or the other preferred tools of Camp One Justices—but merely that they rely less frequently on such landscape-oriented tools than they do on the statute-specific coherence-promoting tools described above. Doctrinally, Camp Two Justices tend to lead with the statute-specific oriented canons and interpretive tools and to emphasize the importance of maintaining a consistent statutory policy over time.

Third, while it is no longer novel to observe that Supreme Court Justices frequently reference the practical consequences of particular statutory constructions,<sup>17</sup> this Article’s empirically-informed doctrinal analysis suggests that the two camps vary markedly in the *form* of practical consequences to which they tend to give weight when construing statutes. That is, the Camp One Justices tend to focus on administrability concerns, such as the effect on judicial resources, clarity, and predictability created by an interpretation; whereas, the Camp Two Justices tend to focus on concerns about policy constancy, including whether the interpretation maintains a consistent statutory policy over

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and examples of different kinds of substantive canons.

15. Each of these interpretive tools is explained in detail *infra* page 241–45.

16. Each of these interpretive resources is examined in detail *infra* pages 245–46.

17. See discussion *infra* Part I and accompanying notes (discussing Zeppos’s and Schacter’s findings in previous studies).

time, the arbitrariness or incoherence of the policy created by the interpretation, and the fairness of the interpretation.

Part I of this Article briefly reviews four of the most recent empirical studies of the Supreme Court's statutory interpretation cases. Part II presents data about the individual Justices' relative rates of reliance on different interpretive tools in the opinions they authored, mapping out in detail the Justices' interpretive and methodological divide over legal-landscape versus statute-specific coherence. Part III examines case studies from the Roberts Court's last three-and-a-half Terms that doctrinally illustrate how the coherence divide operates in practice. Part IV concludes with a discussion of the differences between statute-specific coherence, purposivism, and intentionalism and with observations about the ideological implications of the coherence divide.

#### I. WHAT WE KNOW SO FAR: PREVIOUS EMPIRICAL STUDIES OF STATUTORY INTERPRETATION

A handful of empirical studies of Supreme Court statutory interpretation cases have been conducted to date. These studies variously have concluded that the Court's rate of reliance on canons of construction has increased over time, while its use of legislative history has declined;<sup>18</sup> the Court's use of legislative history is experiencing a "resurgence"<sup>19</sup>; the Court has become more textualist and less willing to rely on legislative history;<sup>20</sup> the Court rarely references the *Chevron* test and uses ad hoc judicial reasoning when deciding whether to defer to agency interpretations;<sup>21</sup> and the Court's approach to statutory interpretation does not match up neatly with any of the prevailing theories of statutory interpretation.<sup>22</sup> Some of the studies have noted the Court's open reliance on pragmatic considerations in construing statutes.<sup>23</sup> A few have characterized the Court's approach to statutory interpretation as "eclectic" or "pluralis[t],"<sup>24</sup> concluding that the Justices seem willing to use whatever interpretive tool they deem best suited to the case at hand—relying on legislative history in one case, statutory text and the dictionary in the next, and pragmatic policy concerns in a third. This Part briefly reviews the major findings of four recent empirical studies of relatively broad scope, that is, studies that measured the Court's reliance on a variety of interpretive tools, rather than focusing on

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18. See Brudney & Ditslear, *supra* note 5, at 35.

19. See Schacter, *supra* note 8, at 5.

20. See Merrill, *supra* note 4, at 355.

21. See Eskridge & Baer, *supra* note 7, at 1090.

22. See Cross, *supra* note 9, at 144–46; Zeppos, *supra* note 9, at 1106.

23. See, e.g., Cross, *supra* note 9, at 147–48; Schacter, *supra* note 8, at 21; Zeppos, *supra* note 9, at 1107–08.

24. See, e.g., Cross, *supra* note 9, at 157; Zeppos, *supra* note 9, at 1119 ("eclectic").



just one tool, such as legislative history or deference to agency interpretations.

In one of the first empirical studies of the Supreme Court's statutory interpretation cases, Nicholas Zeppos sought to measure the Court's existing practice against several prevailing theories about how statutes should be construed.<sup>25</sup> After measuring the Court's citations to a wide range of authorities in a random sample of 413 cases decided between 1890 and 1990, Zeppos concluded that although the Court made frequent references to legislative sources,<sup>26</sup> including text<sup>27</sup> and legislative history,<sup>28</sup> the Court's methodology could not be described as either predominantly "originalist"<sup>29</sup> or "textualist," because it relied on neither textual nor originalist sources in a significant percentage of cases and, conversely, often relied on both textual and nontextual sources in the same case.<sup>30</sup> Zeppos further observed that the Court referenced "consequentialist or practical considerations" in 28% of the cases studied<sup>31</sup> and argued that this suggested the Court was far more "dynamic" in its interpretive approach than scholars had realized.<sup>32</sup>

Schacter's empirical study of the Court's 1996 Term has been discussed in some detail above. Like Zeppos, Schacter found striking the Court's reliance on what she termed "judicially-selected policy norms," reflecting pragmatic and consequentialist concerns about the likely results of a particular interpretation.<sup>33</sup> Schacter's "judicially-selected policy norms" seem to measure the same types of references as Zeppos's "consequentialist or practical considerations"—that is, references to desirable or adverse policy consequences likely to flow from a particular interpretation, or arguments that a particular interpretation will produce results that undermine important public values. But Schacter found a remarkably high rate of reference to such policy norms—73%—in her

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25. Zeppos, *supra* note 9, at 1076–88.

26. Zeppos grouped all of the sources of authority cited by the Court into six larger categories: (1) legislative, (2) executive, (3) judicial, (4) constitutional, (5) canons of interpretation, and (6) other. *Id.* at 1089.

27. *Id.* at 1093 (reporting that 84% of cases studied referenced the statute's text).

28. *Id.* (reporting that congressional reports are cited in 32% of the cases studied, debates in 16.9% of cases studied, and hearing material in 12.6% of the cases studied).

29. Zeppos used the term "originalism" rather than "intentionalism" to describe the interpretive philosophy that focuses on fulfilling the enacting of Congress's intent. *See id.* at 1078.

30. *See id.* at 1118–20.

31. *Id.* at 1097.

32. *See id.* at 1107–08. Dynamic theories of statutory interpretation focus on the public values or practical consequences of an interpretation, urging courts to construe statutes in a manner that is responsive to current, real-world societal needs. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) ("Statutes . . . should . . . be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context.").

33. *See* Schacter, *supra* note 8, at 5, 12, 18, 21.

dataset.<sup>34</sup> It is difficult to determine whether the difference between the studies results from different coding criteria, from the larger sample size of Zeppos's study, or from differences in Court composition during the time frame of the two studies. All three factors are likely at play, but the important point is that both studies found a significant rate of reliance on consequentialist<sup>35</sup> considerations in the Court's interpretive methodology. As discussed in greater detail in Part II.B, my study of the Roberts Court's statutory cases similarly found references to practical consequences in a significant percentage of the cases.<sup>36</sup> Schacter also found significant judicial reliance on legislative history<sup>37</sup> and congressional intent, and comparatively little reliance on dictionaries.<sup>38</sup>

More recently, Frank Cross examined a sample of 120 cases from the Court's 1994 through 2002 Terms.<sup>39</sup> Cross's aim was to measure the Court's and individual Justices' patterns of canon usage for consistency with the different theoretical approaches, as well as to test the various interpretive methodologies' ability to constrain ideological decisionmaking.<sup>40</sup> He coded for judicial reliance on several specific canons and interpretive tools and then grouped these canons and tools into four categories corresponding to the predominant interpretive theories: Intentionalism, Textualism, Canons, and Pragmatism.<sup>41</sup> Cross's study, like Zeppos's, found significant reliance on both textual and intent-focused sources, reporting that a majority of cases made some positive use of at least one tool of legislative intent, as well as some reference to statutory text.<sup>42</sup> His study found "much less" reliance on pragmatic or practical considerations,<sup>43</sup> and still less reliance on the canons of construction (10% of cases studied).<sup>44</sup> Finally, with respect to ideology, Cross's study found that the use of textualist tools showed no constraining effect on the liberal or conservative outcome of a ruling, but

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34. *See id.* at 18 tbl.I.

35. *See, e.g.*, RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 465 (1990) ("Law as currently conceived . . . [places] too much emphasis on authority, certitude, rhetoric, and tradition, [and] too little on consequences and on social-scientific techniques for measuring consequences.").

36. *See infra* Table 1 (in half of the cases studied, the majority, concurring, and/or dissenting opinions referenced the practical consequences of an interpretation).

37. Schacter, *supra* note 8, at 16, 18 tbl.I (showing legislative history referenced in 49% of cases studied).

38. *Id.* at 14 (showing congressional intent referenced in 53% of cases studied, and dictionaries referenced in only 18% of cases studied).

39. *See* CROSS, *supra* note 9, at 142–43; Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1981 (2007).

40. CROSS, *supra* note 9, at 143, 164.

41. *Id.* at 143–44.

42. *Id.* at 144, 146.

43. *Id.* at 147.

44. *Id.* at 146.

that reliance on legislative intent and pragmatism pushed outcomes in a liberal direction.<sup>45</sup>

In a slightly different vein, James Brudney and Corey Ditslear studied the Supreme Court's use of the canons of construction in every workplace law case decided from 1969 to 2003.<sup>46</sup> Brudney and Ditslear's focus was on measuring the extent to which the canons operate as neutral rules constraining the Justices' ability to interpret statutes based on ideological preferences.<sup>47</sup> Brudney and Ditslear coded for judicial reliance on a number of interpretive sources, including language canons, which they defined to include grammar and linguistic canons, as well as the whole act rule,<sup>48</sup> and substantive canons, defined as presumptions based on constitutional and common law norms about how statutes should be interpreted,<sup>49</sup> and found, *inter alia*, that the Justices tend to use the canons to reinforce their ideological predispositions, with liberal Justices referencing the canons to reach liberal outcomes and conservative Justices referencing the canons to reach conservative outcomes.<sup>50</sup> Brudney and Ditslear also found that the Court's use of legislative history as an interpretive tool declined significantly from the Burger Court to the Rehnquist Court, falling from an average rate of reference of 42.1% between 1984 and 1988, to somewhere between 22 and 25% from 1989 to 2003.<sup>51</sup>

In sum, previous empirical studies have taught that the Court relies significantly on statutory text, as well as legislative intent and legislative history in interpreting statutes, although its rate of reliance on legislative history seems to have fluctuated over time. The studies also indicate that the Court references practical considerations, focusing on the consequences that an interpretation will produce, in a substantial percentage of statutory cases.

## II. THE ROBERTS COURT, 2005–2008 TERMS: EMPIRICAL FINDINGS

This Part presents the data found in my examination of the Roberts Court's first era statutory interpretation cases. Part II.A explains the methodology used to gather and evaluate the Court's statutory cases. Part II.B provides an overview of the data on the Justices' interpretive

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45. *Id.* at 176.

46. See Brudney & Ditslear, *Canons*, *supra* note 5, at 5.

47. *Id.* at 4.

48. See E-mail from James J. Brudney, Newton D. Baker-Baker & Hostetler Professor of Law, Ohio State Univ. Moritz Coll. of Law (Feb. 27, 2008, 10:46 EST) (on file with author). Language canons are based on grammar rules and the arrangement of words or phrases within a statute, while the whole act rule is based on how the different sections of a statute fit together. ESKRIDGE ET AL., *infra* note 102, at 862; Brudney & Ditslear, *supra* note 5, at 12.

49. See Brudney & Ditslear, *supra* note 5, at 5 & n.16.

50. See *id.* at 6.

51. See *id.* at 35.

practices. And Part II.C presents both detailed data and doctrinal analysis demonstrating the Court's coherence divide.

#### A. METHODOLOGY

The findings and conclusions presented below are based on empirical and doctrinal analysis of all decisions in the Roberts Court's 2005 (post-January 31, 2006) through 2008 Terms that confronted a question of statutory interpretation. Every case decided during that time frame was examined through the Supreme Court's online database to determine whether it dealt with a statutory issue. Any case in which the Court's opinion contained a substantial discussion about statutory meaning was included in the study. Cases interpreting the Federal Rules of Civil Procedure (FRCP) were not included,<sup>52</sup> but a handful of constitutional cases in which the Court was required to construe a federal statute before deciding the constitutional question were included. This selection methodology yielded 166 statutory cases over three and a half Terms, with 166 majority or plurality opinions, 65 concurring opinions, 110 dissenting opinions, 9 part concurring/part dissenting opinions, and 2 part majority/part concurring opinions, for a total of 352 opinions.<sup>53</sup>

In analyzing these cases and opinions, my primary goal was to determine the frequency with which the Court referenced a range of interpretive sources when giving meaning to federal statutes. The cases in the study were examined for references to the following interpretive tools: (1) the statutory language of the provision at issue, including appeals to plain or ordinary meaning; (2) dictionary definitions; (3) a grammar-based canon or rule; (4) the whole act rule (inferences based on other sections of the same statute); (5) other statutes, including federal and sometimes state; (6) common law precedent; (7) substantive canons (for example, the rule of lenity and the canon of constitutional avoidance); (8) deference to agency interpretations; (9) Supreme Court precedent interpreting the same or related statutes; (10) statutory

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52. I made this judgment call because the Federal Rules of Civil Procedure are created in a manner that differs significantly from federal statutes. Whereas federal statutes are enacted into law by both houses of Congress and the President pursuant to Article I, Section 7 of the Constitution; the FRCP are promulgated by the judicial branch, with minimal review by Congress, and do not require the President's approval. Thus, several of the interpretive tools available when construing statutes either are not available with respect to the FRCP or provide a very different kind of context, from a very different perspective, when used to construe the FRCP—including legislative history, intent, other statutes, and text. See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 618 (2009); Natasha Dasani, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23(B)(2)*, 75 FORDHAM L. REV. 165, 194–95 (2006); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1100–02 (2002).

53. For a list of the cases examined in the study—and the statutes they interpreted—see Appendix A, on file with the *Hastings Law Journal*.

purpose; (11) practical consequences; (12) legislative intent; (13) legislative history (including references to committee reports, floor debates, hearings, and a statute's evolution); and (14) language canons such as *noscitur a sociis* and *expressio unius*.<sup>54</sup>

These fourteen interpretive sources are consistent with those examined in previous empirical studies. A few differences in definitions used for the different sources were inevitable and will be pointed out where notable. First, unlike the Brudney and Ditslear study, which grouped together several interpretive tools under the heading "language canons," I counted separately any references to grammar canons, linguistic canons, and the whole act rule. Second, I recorded as a reference to "practical consequences" any reliance on the absurdity of a result, the administrative or other burdens caused by an interpretation, the justness or fairness of an interpretation, the interpretation's consistency with the policy of the statute, or other practical consequences expected to be produced by an interpretation.

In recording the Court's reliance on these interpretive tools, I counted only references that reflected substantive judicial reliance on the tool in reaching an interpretation. Instances in which the Court considered an interpretive tool but rejected it as unconvincing were not counted, nor were instances in which the Court merely acknowledged, but did not accept, a litigant's argument that a particular canon or tool dictated a particular result. An example may help illustrate. In *Watson v. United States*, Justice Souter's majority opinion relied on the plain meaning of the word "use" in the firearms enhancement statute, along with several corroborative dictionary definitions<sup>55</sup> to hold that a person who trades his drugs in exchange for a gun does not "use" a firearm "during and in relation to . . . [a] drug trafficking crime."<sup>56</sup> Justice Souter's opinion also rejected the government's practical consequences argument that it would be asymmetrical for the criminal law to penalize a person who trades his gun for drugs, which was previously ruled to constitute "use" under the same statutory provision, but not to penalize the person on the other end of the exchange who receives the gun.<sup>57</sup> The opinion was coded for reliance on text/plain meaning and the dictionary rule, but not for reliance on practical consequences.

Secondary or corroborative references to an interpretive tool, on the other hand, were counted; thus, where the Court reached an

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54. In order to reduce the risk of inconsistency, I, along with at least one research assistant, separately read and analyzed each opinion, and separately recorded the use of each interpretive resource. In the event of a disagreement, I reviewed and reconsidered the case and made the final determination as to how a particular interpretive resource should be coded.

55. 552 U.S. 74, 79–80 & n.7 (2007).

56. *Id.* at 76 (alteration in original) (internal quotation marks omitted).

57. *Id.* at 81–82.

interpretation based primarily on one interpretive source but then went on to note that *x*, *y*, and *z* interpretive tools further supported that interpretation, the references to *x*, *y*, and *z* were coded along with the other sources. Again, an example may prove helpful. In *Dean v. United States*,<sup>58</sup> Justice Stevens' dissenting opinion argued that a sentencing enhancement triggered when a "firearm is discharged"<sup>59</sup> should be read to apply only when the defendant intended to discharge the gun, and not in cases where the gun accidentally discharged during commission of the crime.<sup>60</sup> In reaching this conclusion, Justice Stevens relied principally on whole-act-rule-based arguments about the structure of the sentencing enhancement provision,<sup>61</sup> combined with legislative history and intent arguments<sup>62</sup> which emphasized that Congress had amended the enhancement provision in response to the Court's previous interpretation of the statute in *Bailey v. United States*.<sup>63</sup> Justice Stevens went on to argue that even if the enhancement provision's structure and history had not clearly pointed to the conclusion that it applies only to intentional discharges, common law presumptions about mens rea, Supreme Court precedent, presumptions of an intent requirement in other criminal statutes, the rule of lenity, and practical concerns about inequitable application of the enhancement provision<sup>64</sup> all dictated the same interpretive outcome.<sup>65</sup> The opinion was coded for references to the whole act rule, legislative history, legislative intent, common law precedent, Supreme Court precedent, other statutes, substantive canons such as the rule of lenity, and practical consequences.

In addition, the vote margin in each case was recorded, and each case and opinion was recorded as unanimous, close margin (5-4, 5-3, 4-1-4, or 5-2 where two Justices were non-participating), or wide margin (cases with six or more Justices in the majority). Each Justice's vote in each case also was recorded, as were the authors of each opinion.

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58. 129 S. Ct. 1849 (2009).

59. 18 U.S.C. § 924(c)(1)(A)(iii) (2006).

60. *Dean*, 129 S. Ct. at 1856 (Stevens, J., dissenting).

61. *Id.* at 1857.

62. *Id.*

63. 516 U. S. 137, 148 (1995).

64. Specifically, Justice Stevens's dissent argued that the majority's interpretation of the enhancement provision would impose a harsher penalty for an act caused not by an "evil-meaning mind," but by a clumsy hand (that is, accidental discharge of a gun) than it would for an act caused by both an "evil-meaning mind" and an "evil-doing hand" (that is, brandishing a gun with an intent to intimidate). 129 S. Ct. at 1859 (quoting *Morrisette v. United States*, 342 U.S. 246, 251-52 (1952)).

65. *Id.* at 1857-59 (citing *Staples v. United States*, 511 U. S. 600, 605-06 (1994); *United States v. U.S. Gypsum Co.*, 438 U. S. 422 (1978); *Morrisette*, 342 U.S. at 251-52).

## B. OVERVIEW

Before presenting the data, a few caveats are in order. First, my study covers only three and a half Supreme Court Terms and only 166 statutory interpretation cases, decided by one set of the same nine Justices. Given the size of the dataset, great significance should not be placed on the precise percentages reported for the frequency with which the members of the Court relied on particular interpretive tools during this era. The number of cases reviewed in this study is large enough to provide some valuable broad-brushstroke insights, but the focus should be on the patterns that emerge, rather than on minute differences in the percentages reported. Second, although I suggest that the Justices fall into two basic interpretive camps, with some overlap, I make no claims to have discovered the Justices' underlying, or "true," motivations for deciding statutory cases; my empirical and doctrinal claims are confined to describing how the Justices publicly justify their statutory interpretations and to theorizing about discernable patterns in the kinds of public justifications they regularly provide. Third, I have not attempted to prioritize or empirically account for the weight that the Court gives to different interpretive tools in each case. Although the Court sometimes places great weight on certain interpretive tools and references others only for corroboration, ranking its relative reliance on such tools requires subjective judgments and is likely to produce unreliable empirical results, so I avoided it.<sup>66</sup>

Fourth, while most of the coding performed in this study involved simple binary observations of whether a particular interpretive source was referenced or not, some of the coding required nuanced classifications of legal arguments—most notably, the coding identifying which form of practical consequences the Court was referencing. The use of such nuanced classifications may pose replicability issues, but it added a valuable dimension that was largely lacking in previous studies of the Supreme Court's statutory interpretation methodology.<sup>67</sup> In any event,

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66. The exception is for legislative history. In addition to a variable that coded "yes" or "no" for legislative history usage, I also created a separate variable that coded for use of legislative history to "corroborate" an interpretation arrived at through other tools versus substantial "reliance" on legislative history to construe a statute. *See infra* Codebook.

67. *See, e.g.*, Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POL. 261, 266–67 (2006) (criticizing much of the political science literature for, inter alia, focusing on the analysis of bare outcomes in lieu of the content of opinions); Kirk A. Randazzo et al., *Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior*, 68 J. POL. 1006, 1008 (2006) (noting the lack of empirical studies that attempt to examine the impact of "traditional legal concepts" on judicial behavior); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 884–86 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)) ("[T]he law necessitates [empirical studies] . . . examining and classifying the content of judicial opinions rather than merely counting outcomes in cases.").

the practical-consequences data and classifications are available for others to review and to agree or disagree with.

Table 1 lists the frequency with which the Roberts Court relied on various interpretive tools in its majority, dissenting, and concurring opinions, as well as the Court's overall rates of reliance on these sources in the 166 cases decided and the 352 opinions issued between the date Justice Alito joined the Court and the date Justice Souter retired. For each interpretive resource, Table 1 reports reliance as a percentage of the total number of cases, majority opinions, dissenting opinions, concurring opinions, and total opinions. The data demonstrate some unsurprising results, as well as some less expected ones. Unsurprisingly, the text/plain meaning of the statute and Supreme Court precedent were the most frequently relied upon interpretive resources, irrespective of opinion type. The Court's significant reliance on its own interpretive precedents hardly is unexpected, as it reflects the application of traditional decisionmaking tools to the statutory context and may be driven at least in part by a need to legitimate the Court's interpretation.<sup>68</sup> Further, a high rate of reliance on the Court's own precedents is entirely consistent with the empirical findings in the studies discussed in Part I.<sup>69</sup> The frequency of the Court's references to statutory text, likewise, is consistent with findings in prior empirical studies and suggests judicial sensitivity to the legal legitimacy interests achieved by grounding its construction in the language of the statute at issue.<sup>70</sup>

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68. See, e.g., Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 509 (finding that the need to legitimate the Court's rulings is a significant factor contributing to its citation of precedent); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 16 (2008) (arguing that given the judiciary's political weakness and inability to implement its rulings, judicial power is limited by its perceived authority in our governmental system—a fact which puts pressure on the Court to justify its decisions with reference to stable legal standards, such as stare decisis).

69. See, e.g., Brudney & Ditslear, *supra* note 5, at 30 (finding reliance on Supreme Court precedent in 82.8% of cases studied); Schacter, *supra* note 8, at 18 (finding reliance on Supreme Court or other precedent in 100% of majority opinions of cases studied).

70. See, e.g., Cross, *supra* note 9, at 146; Brudney & Ditslear, *supra* note 5, at 30; Schacter, *supra* note 8, at 18; Zeppos, *supra* note 9, at 1092–93.



TABLE I: OVERALL ROBERTS COURT RATES OF RELIANCE ON INTERPRETIVE CANONS AND TOOLS<sup>71</sup>

Canons/ Interpretive Tools	All Cases <sup>†</sup> (n = 166)	Majority Opinions (n = 166)	Dissenting Opinions (n = 110)	Concurring Opinions (n = 65)	All Opinions <sup>‡</sup> (n = 352)
Text/Plain Meaning* (p = .015)	67.5%	55.4%	40.9%	33.8%	46.3%
Dictionary Rule** (p = .003)	29.5%	27.1%	11.8%	7.7%	18.5%
Grammar Canons	10.2%	7.8%	3.8%	1.6%	5.1%
Linguistic Canons	11.4%	7.8%	4.5%	1.6%	5.4%
Language Canons (Grammar + Linguistic)	19.9%	15.1%	7.3%	3.1%	9.9%
Other Statutes* (p = .024)	39.2%	33.7%	21.8%	7.7%	24.4%
Common Law Precedent* (p = .018)	17.3%	13.3%	4.8%	7.7%	9.4%
Substantive Canons	28.9%	18.7%	18.2%	4.6%	15.3%
Whole Act Rule* (p = .016)	45.2%	36.8%	22.7%	7.7%	26.7%
Agency Deference	14.5%	9.0%	7.3%	3.1%	8.2%
Supreme Court Precedent	65.0%	57.2%	46.4%	29.2%	47.7%
Practical Consequences	51.8%	36.1%	38.2%	20.0%	33.2%
Purpose	41.0%	29.5%	27.3%	10.8%	25.0%
Intent** (p = .005)	33.1%	16.9%	30.9%	9.2%	19.3%
Legislative History	37.9%	26.5%	28.2%	6.2%	23.0%

71. \* Indicates chi-squared test reveals a significant difference between rates of reliance in Majority and Dissenting Opinions at  $p < .05$ . (For Text/Plain Meaning  $p = .015$ ; for Other Statutes  $p = .024$ ; for Common Law Precedent  $p = .018$ ; and for Whole Act Rule  $p = .016$ ).

\*\* Indicates chi-squared test reveals a significant difference between rates of reliance in Majority and Dissenting Opinions at  $p < .01$ . (For Dictionary Rule  $p = .003$  and for Intent  $p = .005$ ).

† Percentages reported in this column for Practical Consequences, Legislative History, and Whole Act Rule include 2–3 part concurring/dissenting or part majority/concurring opinions not listed separately in the Table. The effect of these additional opinions on the percentages reported is minimal, at 1%.

‡ Percentages reported in this column for Text or Plain Meaning, Dictionary Rule, Agency Deference, Supreme Court Precedent, Practical Consequences, Legislative History, and Whole Act Rule include 2–3 part concurring/dissenting or part majority/concurring opinions not listed separately in the Table. The effect of these additional opinions on the percentages reported is minimal (less than 1%).

The next most-frequently referenced interpretive tools in cases in which *at least one opinion* references the interpretive resource are practical consequences and the whole act rule, followed by other statutes, purpose, and legislative history. Legislative intent also is referenced in a substantial percentage of the Court's statutory cases, though at a somewhat lower rate than the other most-frequently referenced interpretive sources. Of the cases in which at least one opinion references legislative history, 60.9% of the references are to committee reports, 31.3% are to the statute's evolution over time, 15.6% are to floor statements or debates, 9.4% are to hearings, 7.8% are to the absence of legislative history and the "dog that did not bark canon,"<sup>72</sup> and 9.4% are to other types of legislative history, such as rejected legislative proposals or the identity of the statute's drafter or the drafter's non-legislative statements.<sup>73</sup> This hierarchy of legislative history sources, from most-frequently to least-frequently referenced, is roughly consistent with prior empirical studies.<sup>74</sup>

When references to different interpretive tools in majority versus dissenting opinions are compared, however, a striking pattern emerges. Some interpretive tools were referenced with significantly greater frequency in dissenting opinions, while others were referenced far more frequently in majority opinions. For example, legislative intent was referenced in only 16.9% of the majority opinions studied, but was referenced at almost twice that rate in dissenting opinions (31%).

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72. The canon is named after a famous Sherlock Holmes story, *Silver Blaze*, in which the fact that the dog did not bark while a racehorse was being stolen led the detective to deduce that the thief was someone the dog knew. See ARTHUR CONAN DOYLE, *Silver Blaze*, in 1 SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 455, 475 (Bantam Books 1986) (1892). The canon holds that where the legislative history is silent, courts should not presume that Congress intended to work drastic changes in a law—on the theory that if drastic changes were intended, some legislator would have "barked" and highlighted the change somewhere in the legislative history. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment."); *id.* 396 n.23 ("Congress' silence in this regard can be likened to the dog that did not bark." (citing DOYLE, *supra*)).

73. There were 64 cases and 81 opinions that referenced one or more kinds of legislative history. A number of these cases and opinions cited more than one kind of legislative history. The percentages provided above reflect the proportion of cases (out of 64) in which the different kinds of legislative history were cited. The percentage of opinions (out of 81) in which these legislative history types were cited is as follows: 48.1% (39 of 81) of the opinions in which legislative history is cited refer to committee reports, 24.7% (20 of 81) refer to the statute's evolution over time, 12.3% (10 of 81) refer to floor statements or debates, 7.4% (6 of 81) refer to hearings, 6.2% (5 of 81) refer to the absence of legislative history and invoke the "dog that did not bark canon," and 7.4% (6 of 81) reference other types.

74. See Zeppos, *supra* note 9, at 1093 (reporting that congressional committee reports are cited in 32% of the cases studied, debates in 16.9% of cases studied, and hearing material in 12.6% of the cases studied).

Further, purpose, practical consequences, legislative history, and substantive canons were referenced at nearly equal rates in both majority and dissenting opinions, whereas dictionaries, other statutes, common law precedents, text/plain meaning, and Supreme Court precedent were referenced at statistically significantly higher rates in majority opinions.<sup>75</sup> This dichotomy suggests that the majority, or winning coalition, approach to interpreting statutes may not be the Court's exclusive interpretive method or the approach of choice for all members of the Court. Moreover, it hints at a methodological divide in the Court's jurisprudence—between landscape-coherence oriented interpretive tools (higher rates of reference in majority opinions) and statute-specific coherence-oriented interpretive tools (higher or equal rates of reference in dissenting opinions).

### C. THE COHERENCE DIVIDE

Recent empirical work has shown that traditional distinctions pitting textualism against intentionalism are artificial, at least when it comes to describing actual Supreme Court practice.<sup>76</sup> All of the studies discussed in Part I found significant Supreme Court reliance on both text and legislative history, and the two most comprehensive studies found that the Justices often rely on both textual and legislative history sources in the same case.<sup>77</sup> Based on their observations, the authors of these prior studies labeled the Court's interpretive approach "eclectic,"<sup>78</sup> "pluralis[t],"<sup>79</sup> "common law originalist,"<sup>80</sup> and "dynamic-pragmatic,"<sup>81</sup> concluding that the Justices mix and match interpretive rules indeterminately. As explained in the Introduction, my empirical and doctrinal analysis of the Roberts Court's 2005–2008 Terms' statutory opinions suggests that there is more coherence and method to the interpretive madness than these prior studies acknowledge.

Doctrinally, I argue that there are two basic interpretive camps on the Roberts Court: those Justices whose goal in construing statutes is to harmonize the individual statute with the rest of the legal landscape, and those Justices whose goal is to ensure that the specific policy embodied in the individual statute is sensibly and consistently applied, both internally and over time. I noted in the Introduction that the two camps exhibit different rates of reliance on particular interpretive tools, based on which interpretive goal the tools promote. Before turning to the data in Table

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75. See *supra* Table 1.

76. See, e.g., Schacter, *supra* note 8, at 5; Zeppos, *supra* note 9, at 1117–18.

77. See *supra* notes 26–30 and accompanying text (referencing the Cross and Zeppos studies).

78. Zeppos, *supra* note 9, at 1119.

79. Cross, *supra* note 9, at 158.

80. Schacter, *supra* note 8, at 54.

81. See Zeppos, *supra* note 9, at 1091, 1107–13.

2, a few further words are in order to explain why certain interpretive tools should be considered landscape-coherence fostering, and others statute-specific coherence fostering. I begin with the interpretive aids that foster landscape coherence.

*I. Camp One: Legal-Landscape Coherence Tools*

*Other Statutes.* References to other statutes reflect a sort of “whole code” approach to statutory interpretation, in which the statute at issue is viewed as one component of a larger whole—that is, the United States Code. When the Justices rely on the meaning given to similar words and phrases in the rest of the United States Code to interpret the individual statute before the Court, they are ensuring that the individual statute “fits” or coheres with the existing statutory backdrop. The Justices often explain their reliance on other statutes by noting that Congress is “presumed” to be aware of the existing statutory landscape when it drafts new statutes, and to incorporate interpretations given to relevant preexisting statutes into the new statutes it enacts;<sup>82</sup> however, such “presumptions” are little more than a legal fiction<sup>83</sup> devised to legitimate judicial common law-style synthesis and harmonizing of multiple federal statutes.

*The Dictionary Rule.* When a Justice references the dictionary to give meaning to the words or phrases in a statute, he or she is promoting a coherent legal landscape in two ways. First, when the dictionary referenced is *Black’s Law Dictionary*, the Justice is giving the individual statute a meaning that is based upon longstanding legal customs or conventions. Nearly 60% of the Roberts Court cases that reference the dictionary use a definition from *Black’s Law Dictionary*;<sup>84</sup> thus, this form of landscape harmonization is at work in the majority of dictionary rule cases. Second, even when the Justices reference a dictionary other than *Black’s Law*, they are interpreting the individual statute based on a conventional meaning contained in an external, convention-reflecting source. This convention-reflecting source, moreover, can be consulted in

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82. See, e.g., *Atl. Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2577 (2009) (Alito, J., dissenting) (“When Congress incorporated FELA unaltered into the Jones Act, Congress must have intended to incorporate FELA’s limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation.”); *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 370 (2008) (“[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.” (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006))).

83. See, e.g., Scalia, *supra* note 1, at 16 (“[Courts] simply assume . . . that the enacting legislature was aware of all those other laws. Well of course that is a fiction . . .”).

84. Nearly 58% (26 of 45) of the majority opinions that referenced the dictionary cited *Black’s Law Dictionary*; 57.1% (28 of 49) of the cases that referenced the dictionary in at least one opinion cited *Black’s Law Dictionary*; and 47.7% (31 of 65) of all opinions that referenced the dictionary cited *Black’s Law Dictionary*. See Appendix B on file with the *Hastings Law Journal*.

subsequent cases to give the same meaning to the same words in other statutes or to other legal materials, continuing the landscape cohesion down the line. Indeed, to the extent that reliance on dictionary definitions—particularly from the same one or two dictionaries<sup>85</sup>—becomes a staple of statutory interpretation, the dictionary itself acts as a harmonizing device, rather like a “Federal Code of Definitions” applicable to all statutes.

*Common Law Precedent.* As with references to other statutes, when a Justice uses common law precedent as an interpretive aid, he or she is harmonizing the individual statute at issue with the existing legal backdrop. Statutory construction in light of common law rules promotes continuity and consistency throughout the legal system by forging a connecting thread between old laws and new laws, judge-made law and legislatively enacted law.<sup>86</sup>

*Substantive Canons.* Substantive canons are interpretive presumptions and rules based on background legal norms, policies, and conventions.<sup>87</sup> They derive primarily from the common law, the Constitution, and legal tradition.<sup>88</sup> Perhaps the most famous substantive canon is the rule of lenity, which is based on an accused’s due process right to fair notice of the conduct prohibited by a criminal statute.<sup>89</sup> The canon dictates that when a criminal statute is ambiguous and allows for more than one interpretation, courts should choose the interpretation that favors the defendant.<sup>90</sup> Other prominent substantive canons include

85. The Court relied on one of two dictionaries (or both) in the overwhelming majority of its cases. The first was *Black’s Law Dictionary*, which was referenced in 57.7% of the cases. The second was *Webster’s*, either in the Third New International or New International edition or, on occasion, one of the Collegiate editions. A full 49% (24 of 49) of the cases citing a dictionary referenced *Webster’s*; 42.2% (19 of 45) of the majority opinions citing the dictionary referenced *Webster’s*; and 53.8% (35 of 65) of the opinions that cited a dictionary referenced *Webster’s*. A few of the cases and opinions referenced both *Black’s Law Dictionary* and *Webster’s New International Dictionary*; only 4 of 49 cases and 6 of 65 opinions referencing the dictionary failed to cite either *Black’s Law Dictionary* or *Webster’s*. The *American Heritage Dictionary* was referenced in 7 cases and opinions; *Random House* was referenced in 8 cases and 9 opinions; and the *Oxford English Dictionary* was referenced in 8 cases and opinions. See Appendix B on file with the *Hastings Law Journal*.

86. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 275–76 (1994).

87. See, e.g., Brudney & Ditslear, *supra* note 5, at 13.

88. See, e.g., ESKRIDGE, *supra* note 86, at 276; Brudney & Ditslear, *Canons*, *supra* note 5, at 13 (“[S]ubstantive canons reflect judicially-based concerns, grounded in the courts’ understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.”).

89. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 397 (2005) (Thomas, J., dissenting); *United States v. Lanier*, 520 U.S. 259, 266 (1997).

90. See, e.g., *Evans v. United States*, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting); *McNally v. United States*, 483 U.S. 350 (1987); *Scarborough v. United States*, 431 U.S. 563, 579–80 (1977) (Stewart, J., dissenting). The rule of lenity was relied upon in 12.5% (6 of 48) of the Roberts Court 2005–2008 Term cases that referenced a substantive canon. See *Dean v. United States*, 129 S. Ct. 1849, 1859 (2009); *United States v. Hayes*, 129 S. Ct. 1079, 1088–89 (2009); *United States v. Santos*, 128 S. Ct. 2020, 2024–26 (2008); *United States v. Rodriguez*, 553 U.S. 377, 404–05 (2008) (Souter, J., dissenting);

the avoidance canon, which directs the courts to avoid interpreting a statute in a manner that would render it unconstitutional or would raise serious constitutional concerns,<sup>91</sup> and federalism clear-statement rules, which impose a strong interpretive presumption that unless Congress clearly expresses its intent to infringe on state rights in the text of a statute, the statute must not be interpreted to interfere with state functions,<sup>92</sup> laws,<sup>93</sup> or processes.<sup>94</sup> Subject-matter-specific substantive canons include rules calling for deference for the practice and precedent of the Patent Office,<sup>95</sup> narrow construction of tax exemptions,<sup>96</sup> and a strong presumption in favor of enforcing labor arbitration agreements.<sup>97</sup> The substantive canons are, by nature non-statute-specific external rules, designed to navigate the boundaries between individual statutes and the rest of the puzzle pieces in the legal landscape. The avoidance canon, for example, seeks to side-step potential friction between the statute and constitutional principles, while federalism clear-statement rules attempt to fit federal statutes in and around existing state laws. Thus, when a Justice relies on a substantive canon to interpret a statute, he or she ensures that the individual statute is given a meaning that coheres with the background legal landscape.

James v. United States, 550 U.S. 192, 219 (2007); Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 17–18 (2006).

91. See, e.g., Cherokee Nation v. Leavitt, 543 U.S. 631, 646 (2005); Zadvydas v. Davis, 533 U.S. 678, 696–99 (2001); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465–66 (1989). The avoidance canon was relied on in 18.8% (9 of 48) of the Roberts Court cases that referenced a substantive canon. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009); *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1247 (2009); *Boumediene v. Bush*, 553 U.S. 723, 787 (2008); *Gonzalez v. United States*, 553 U.S. 242, 251 (2008); *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 514 (2007); *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007); *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006).

92. See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

93. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

94. *McCormick v. United States*, 500 U.S. 257, 268 n.6 (1991); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991). Federalism clear-statement rules, including the presumption against preemption of state laws, were referenced in 16.7% (8 of 48) of the Roberts Court cases that employed a substantive canon. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (Stevens, J., dissenting); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2337 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (Ginsburg, J., dissenting); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 31 (2007); *Rapanos*, 547 U.S. at 738; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006).

95. See, e.g., *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 738 (2002).

96. See, e.g., *United States v. Burke*, 504 U.S. 229, 248 (1992) (Souter, J., concurring in the judgment); *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988).

97. See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 498 U.S. 168, 173 (1990).

## 2. *Camp Two: Statute-Specific Coherence Tools*

*Purpose.* When the Court relies on a statute's purpose, objective, or underlying goals to give meaning to the words in the statute, it promotes continuity and coherence within the individual statute. Statutory purpose is a statute-specific interpretive resource; it comes from the four corners of the statute itself—usually the preamble—or from external sources specific to the statute at issue, such as the legislative history created during the statute's drafting process. In this sense, purpose is a markedly different interpretive resource from the legal-landscape coherence tools, which employ sources external to the statute at issue—such as the dictionary, common law, or other statutes—to harmonize the specific statute's meaning with the broader legal framework.

*Legislative History.* Legislative history, like statutory purpose, is a statute-specific interpretive device that has almost nothing to do with the external legal landscape. It is a source external to the statute's four corners, but one that is deeply related to those four corners; indeed, it includes materials that are the precursor to the statutory text at issue. Thus, when the Justices reference a statute's evolution from bill to law, or statements made by those who drafted the statute as interpretive aids, they are using the statute's past to provide context for its application to the present situation. Whether they reference legislative history to corroborate an interpretation arrived at through other tools, to clarify the scope of a particular word, or to understand how different statutory sections fit together, their focus is on all of the background information available for the individual statute at issue and on connecting the dots to ensure a consistent and coherent statutory policy. In contrast to the landscape-coherence approach, which harmonizes the individual statute's meaning with the external legal background, interpretive references to legislative history seek to discover the individual statute's meaning from *its own* internal background.

*Intent.* References to legislative intent as an interpretive aid or justification for a particular statutory construction also focus on the background of the individual statute at issue, rather than on the surrounding legal landscape. Indeed, many of the Roberts Court's references to legislative intent take the form of inferences based on the statute's design, structure, or previous versions.<sup>98</sup> When the Justices

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98. See, e.g., *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 (2009) (“[The] history [of the Controlled Substances Act] drives home what is already clear in the current statutory text: Congress meant to treat purchasing drugs for personal use more leniently than the felony of distributing drugs, and to narrow the scope of the communications provision to cover only those who facilitate a drug felony. . . . [I]t is impossible to believe that Congress intended ‘facilitating’ to cause that twelve-fold quantum leap in punishment for simple drug possessors [who use a telephone to facilitate a drug purchase.]”); *Boumediene v. Bush*, 553 U.S. 723, 735–36 (2008) (holding that the Detainee Treatment Act's grant of “exclusive” jurisdiction to the courts of appeals shows Congress's intent that the courts

emphasize the intent reflected in a statutory provision, they are focusing on the particular statute's policy and on keeping that policy both internally coherent and consistent over time.

### 3. *Camp-Transcendent Interpretive Tools*

*Supreme Court Precedent.* Prior judicial interpretations, like practical consequences, can foster both legal-landscape coherence and statute-specific coherence. Precedents in the relevant area of law, particularly interpretations given by the Supreme Court to the same words or phrases in similar statutes, are part of the legal landscape against which the statute at issue is being construed. Thus, efforts to reconcile or give meaning to an individual statute in light of the Court's prior interpretations promote consistency and continuity in the legal system writ large. But this is not the only kind of consistency that reliance on Supreme Court precedent can promote. References to prior interpretations of the statutory provision at issue, other sections of the statute at issue, or related statutes on which the statute at issue was modeled can also foster statute-specific coherence by ensuring that the meaning given to the individual statute remains consistent across time and across similar situations.<sup>99</sup>

*Whole Act Rule.* The whole act rule has many subparts, all of which focus in some way on the structure of the statute at issue and how its different sections fit together. One frequently referenced subpart is the rule against superfluities, which instructs courts to interpret a statute in a manner that gives effect to all of its provisions, such that no one part is rendered superfluous by another.<sup>100</sup> Another regularly referenced subpart of the whole act rule is the presumption of statutory consistency, which directs courts to interpret the same or similar terms in a statute the same way.<sup>101</sup> The whole act rule is at once focused on both the individual

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of appeals have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 17–20 (2006) (stating that Congress did not intend for the Hobbs Act to create a freestanding physical violence offense, as evidenced by the fact that the Hobbs Act's predecessor statute explicitly linked the physical violence it prohibited to a plan or purpose to injure commerce through coercion or extortion).

99. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009) (holding that Title IX does not preclude § 1983 actions alleging unconstitutional gender discrimination in schools based, in part, on precedents interpreting Title VI and the fact that Title IX was modeled on Title VI); *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (holding that the Sherman Antitrust Act does not apply to baseball, because the Court had previously so held (citing *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922))).

100. *See, e.g.*, *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001); *United States v. Alaska*, 521 U.S. 1, 59 (1997); 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46.06, at 181–86 (rev. 6th ed. 2000) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”).

101. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005); *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 249–50 (1996);



statute and the entire United States Code. It promotes policy coherence within the individual statute by ensuring that the statute's various parts make sense when read together; but it also promotes consistency and coherence in the United States Code by ensuring that certain parts of the Code—of which individual statutes are of course included—are not rendered extraneous or meaningless, and by harmonizing the meaning given to the same or similar words throughout all sections and subsections of the Code.<sup>102</sup> In other words, the whole act rule fosters landscape coherence between the statutory provision at issue and the immediately adjacent puzzle piece in the legal landscape—that is, other provisions of the same statute.

#### 4. *The Practical Consequences Divide*

Perhaps the most intriguing aspect of the coherence divide identified in this study is the following doctrinal dichotomy. There appear to be two different categories of practical consequences—tracking the two interpretive camps—that the Justices reference when construing statutes. The first category, which might aptly be labeled “administrability concerns,” encompasses discussions about the practical difficulty of administering a particular interpretation,<sup>103</sup> the likely effect on judicial or other public resources of a particular interpretation,<sup>104</sup> the

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Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995).

102. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1066 (4th ed. 2007) (likening the whole act rule's presumption that a word used multiple times in a statute has the same meaning throughout the statute to whole code/other statutes rules dictating that the statute at issue should be construed in light of interpretations already given to other federal statutes using the same language or dealing with the same subject matter—more specifically known as the *in pari materia*—and modeled or borrowed statutes' rules).

103. See, e.g., Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2352 (2009) (“*Price Waterhouse*[’s] burden-shifting framework is difficult to apply. . . . [so] even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.”); Bartlett v. Strickland, 129 S. Ct. 1231, 1244–45 (2009) (“Determining whether a [VRA] § 2 claim would lie . . . would place courts in the untenable position of predicting many political variables . . . that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term.”); Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 169 (2007) (“Departing from the common-law practice of applying a single causation for negligence and contributory negligence would have been a peculiar approach for Congress to take . . . [because as] a practical matter, it is difficult to reduce damages ‘in proportion’ to the employee’s negligence if the relevance of each party’s negligence to the injury is measured by a different standard of causation. . . . [I]t is far simpler for a jury to conduct the apportionment FELA mandates if the jury compares like with like—apples to apples.”).

104. Gonzalez v. United States, 553 U.S. 242, 249–50 (2008) (“Giving the attorney control of trial management matters is a practical necessity. ‘The adversary process could not function effectively if every tactical decision required client approval.’ . . . For these reasons we conclude that [the statute must be read so] that express consent by counsel suffices to permit magistrate judge to preside over jury selection . . . .” (quoting Taylor v. Illinois, 484 U.S. 400 (1988))); Panetti v. Quarterman, 551 U.S. 930, 943 (2007) (“As a result [of an alternative construction], conscientious defense attorneys would be obligated to file unripe (and, in many cases, meritless) . . . claims . . . . This counterintuitive approach

consistency or lack thereof between federal and state laws created by the interpretation,<sup>105</sup> and the clarity or predictability of the legal rule or landscape going forward, in light of the interpretation.<sup>106</sup> The second category, which I have dubbed “policy constancy concerns,” includes discussions about the inconsistencies in statutory policy likely to result from an interpretation,<sup>107</sup> the fairness of an interpretation,<sup>108</sup> the likelihood that the interpretation will render the statutory provision “meaningless” or ineffective,<sup>109</sup> and the possibility that logical absurdities

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would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.”).

105. See, e.g., *Cuomo v. Clearing House Ass’n, L.L.C.*, 129 S. Ct. 2710, 2717–18 (2009) (finding that everyone acknowledges that the National Bank Act leaves in place some state substantive laws affecting banks, but the Office of the Comptroller of the Currency’s regulation says that the State may not enforce its valid non-preempted laws against national banks, and that this is a “bizarre” result); *Wyeth v. Levine*, 129 S. Ct. 1187, 1230–31 (2009) (Alito, J., dissenting) (criticizing majority’s interpretation for creating an incoherent regulatory scheme by allowing state tort law claims based on a hospital’s use of a risky IV-injection practice approved by the FDA for drug *A*, when the FDA continues to allow the practice for more dangerous cancer medications with a greater risk of causing death—thus, rendering the federal regulations inconsistent with state tort law); *United States v. Rodriguez*, 553 U.S. 377, 383 (2008) (finding that an alternative interpretation would result in the possibility that defendants offending for a second, third, or more times could be sentenced in state court to more than five years for a crime that federal courts had deemed, for purposes of the Armed Career Criminal Act, to have a maximum term of five years).

106. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 419–20 (2008) (Thomas, J., dissenting) (“Today’s decision does nothing—absolutely nothing—to solve the problem that under the EEOC’s current processes no one can tell, *ex ante*, whether a particular filing is or is not a charge.”); *James v. United States*, 550 U.S. 192, 215 (2007) (Scalia, J., dissenting) (criticizing the majority’s interpretation as “ad hoc” and for failing to provide concrete guidance to lower courts going forward).

107. *Kimbrough v. United States*, 552 U.S. 85, 94–95 (2007) (finding the disparity between recommended sentences for crack cocaine and powder cocaine means that a major supplier of powder cocaine could receive a shorter sentence than a low-level dealer who buys powder from the supplier and converts it to crack); *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring) (finding it “makes scant sense” to distinguish between trading a gun for drugs, which counts as “use” of a firearm, and trading drugs for a gun, which doesn’t count as “use” according to majority’s opinion).

108. *Gross*, 129 S. Ct. at 2358–59 (Breyer, J., dissenting) (finding that plaintiffs cannot prove employer’s but-for reliance on age in age-discrimination cases, since the employer is in best position to know what he or she was thinking at the time, so the fair and appropriate test is whether plaintiff can show that the forbidden motive played some role in the employer’s decision); *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1977–78 (2009) (Ginsburg, J., dissenting) (noting that the plaintiffs, comprised of female retirees seeking to have their pregnancy leave included in their pension calculations, made “modest claims,” which could be satisfied without interrupting the “settled expectations of other workers”).

109. *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009) (“[Alternative construction] would [render the statute] ‘a dead letter’ in some two-thirds of the States from the very moment of its enactment.”); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649–50 (2007) (Ginsburg, J., dissenting) (arguing that because salaries often are kept confidential, a victim of Title VII discrimination may not know immediately that she has been discriminated against, and that it is meaningless to give victims the right to sue but then bar recovery if they do not sue immediately, even if they are not initially aware of the discrimination), *overruled by statute*, *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. 111–2, 123 Stat. 5 (2009).

or statutory incoherence are likely to result from the interpretation.<sup>110</sup>

These two categories of practical consequences give precedence to different aspects of the interpretive task and seem to reflect the interpretive priorities at work in the landscape- versus statute-specific coherence divide. Like the landscape-coherence approach, administrability concerns focus on how a particular interpretation will affect the legal system—that is, whether it will waste judicial resources, whether it will prove impossible or burdensome to administer, whether it will result in unclear or unpredictable rules, and whether it will cause a conflict between rules set by different institutions, such as legislative versus executive, federal versus state, and administrative versus judicial entities. Conversely, policy constancy concerns track the statute-specific coherence approach in that they focus on ensuring that the statute at issue is applied consistently over time and across like situations, that it is applied in a just manner, and that it is not given an interpretation that renders it meaningless or nonsensical. A few examples should help illustrate these differences.

In *Arlington Central School District Board of Education v. Murphy*, the statutory issue was whether the parents of a disabled student who had won an Individuals with Disabilities Education Act (IDEA)<sup>111</sup> lawsuit against their child's school district could recover expert consultant's fees from the district.<sup>112</sup> The relevant statutory text enables parents who bring successful IDEA lawsuits to recover "reasonable attorneys' fees," but says nothing about expert's fees.<sup>113</sup> The Court ruled, 6–3, that absent express statutory authority indicating that school districts would be liable for expert's fees, successful IDEA litigants could not recover such fees.<sup>114</sup> Justice Breyer, writing in dissent, made a typical "policy constancy" practical consequences argument. Experts, he noted, are necessary for most IDEA cases but are very expensive.<sup>115</sup> Absent the possibility of ultimately recovering an expert's fees from the school district, many disabled litigants and their parents might be unwilling to

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110. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2495 (2009) (finding the school district's interpretation "would produce a rule bordering on the irrational" whereby IDEA would provide a remedy when the school district offers child an inadequate individualized education program, but not in the "more egregious situation" where the school district unreasonably denies a child access to such services altogether); *Dean v. United States*, 129 S. Ct. 1849, 1859 (2009) (Stevens, J., dissenting) (finding that the majority's construction produces the "strange result" of imposing a substantially harsher penalty for an accidental act caused not by an "evil-meaning mind," but by a clumsy hand, than would be imposed for the intentional act of brandishing a firearm).

111. 20 U.S.C. § 1415(i)(3)(B) (2006).

112. 548 U.S. 291, 293–94 (2006).

113. *Id.*

114. *Id.* at 296–97.

115. *Id.* at 314 (Breyer, J., dissenting).

hire experts in the first place.<sup>116</sup> As a result, he worried that disabled litigants would have a harder time proving an IDEA violation, and that the majority's interpretation would lead to underenforcement of the rights protected by the IDEA, as well as render the IDEA provision allowing lawsuits and attorney's fees against non-complying school districts meaningless.<sup>117</sup> In other words, Justice Breyer expressed concern that *the statute's individual policy* (as opposed to the legal landscape) *would be rendered incoherent* by the majority's interpretation.

Justice Stevens's dissenting opinion in *FCC v. Fox Television Stations, Inc.*<sup>118</sup> similarly invoked policy constancy arguments about the practical consequences that would result from the majority's interpretation of the Federal Communications Act.<sup>119</sup> The statutory provision at issue prohibits the broadcasting of "any obscene, indecent, or profane language."<sup>120</sup> The FCC had, for years, interpreted this provision in a manner that counted as indecent only "deliberate and repetitive use [of expletives] in a patently offensive manner."<sup>121</sup> In 2006, however, the FCC changed its interpretation, deeming "actionably indecent" two live broadcasts in which celebrities fleetingly uttered two expletives, one as a slap-in-the-face to her critics, and another as a joke.<sup>122</sup> In upholding the FCC's reversal, the majority construed the word "indecent" to include any expletive that has a "sexual or excretory origin" (and argued that its prior case law had endorsed this definition as well).<sup>123</sup> Justice Stevens criticized the FCC's interpretation on two policy constancy fronts. First, he argued that the majority's interpretation

116. *Id.*

117. *Id.* at 315–16 ("In a word, the Act's statutory right to a 'free' and 'appropriate' education may mean little to those who must pay hundreds of dollars to obtain it. . . . Today's result will leave many parents and guardians 'without an expert with the firepower to match the opposition,' a far cry from the level playing field that Congress envisioned." (citation omitted) (quoting *Shaffer v. Weast*, 546 U.S. 46, 61 (2005))).

118. 129 S. Ct. 1800 (2009).

119. 47 U.S.C. §§ 151–614 (2000).

120. 18 U.S.C. § 1464 (2006); Public Telecommunications Act of 1992, Pub. L. No. 102–356, 16a, 106 Stat. 949, 954 (codified at 47 U.S.C. § 303 note (2000)).

121. *Fox Television*, 129 S. Ct. at 1806–07, 1827 (quoting *Pacifica Found.*, 2 FCC Rcd. 2698, 2699, ¶13 (1987)).

122. *Id.* at 1808.

The first [incident] occurred during the 2002 Billboard Music Awards, when the singer Cher exclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f\*\*\* 'em." The second involved a segment of the 2003 Billboard Music Awards, during the presentation of an award by Nicole Richie and Paris Hilton, principals in a Fox television series called "The Simple Life." Ms. Hilton began their interchange by reminding Ms. Richie to "watch the bad language," but Ms. Richie proceeded to ask the audience, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow s\*\*\* out of a Prada purse? It's not so f\*\*\*ing simple."

*Id.*

123. *Id.* at 1805–06.

would lead to absurd results—for example, a golfer who shanks a shot and swears would now be considered to be describing sex or excrement.<sup>124</sup> Second, he emphasized that the FCC was making a big policy shift without acknowledging it and without giving reasons for the shift, and he maintained that it was arbitrary and capricious—or, incoherent—for the agency to reverse its longstanding policy without providing some justification for the change.<sup>125</sup>

In the opposite vein, Justice Alito’s opinion for the Court in *Richlin Security Service Co. v. Chertoff*<sup>126</sup> advanced classic administrability arguments in favor of its interpretation of the Equal Access to Justice Act (EAJA).<sup>127</sup> After prevailing against the Government on a claim originating in the Department of Transportation’s Board of Contract Appeals, Richlin filed an application with the Board seeking reimbursement of its attorney’s fees, expenses, and costs, pursuant to the EAJA.<sup>128</sup> The issue in the case was whether Richlin was entitled to recover its paralegal fees from the Government at prevailing market rates, or at the cost to the law firm of the paralegal’s time.<sup>129</sup> The Court concluded that the EAJA authorized Richlin to recover the fees at prevailing market rates noting the practical infeasibility of the Government’s proffered interpretation.<sup>130</sup> Justice Alito argued that a rule requiring parties and courts to calculate the cost to the firm of the paralegal’s services would be extremely difficult to administer—requiring complex accounting judgments about how to factor in the benefits and other perks that form a significant part of a law firm’s compensation to its paralegals and other staff.<sup>131</sup> The Court noted that market rates, by contrast, provide a “transparent” and comparatively simple basis for calculating the amount to which a prevailing party is entitled.<sup>132</sup> Thus, in the Court’s view: “It strains credulity that Congress would have abandoned this predictable, workable framework for the uncertain and complex accounting requirements that a cost-based rule would inflict on litigants, their attorneys, administrative agencies, and the courts.”<sup>133</sup>

Justice Thomas’s dissenting opinion in *Altria Group, Inc. v. Good*<sup>134</sup> provides a more extreme example of an administrability-focused practical consequences argument. The issue in *Altria* was whether the

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124. *Id.* at 1827 (Stevens, J., dissenting).

125. *Id.* at 1826–28.

126. 128 S. Ct. 2007 (2008).

127. 5 U.S.C. § 504(a)(1) (2006); 28 U.S.C. § 2412(d)(1)(A) (2006).

128. *Richlin Sec. Serv. Co.*, 128 S. Ct. at 2010.

129. *Id.* at 2010–11.

130. *Id.* at 2018.

131. *Id.* at 2018–19.

132. *Id.* at 2019.

133. *Id.*

134. 129 S. Ct. 538 (2008).

Federal Cigarette Labeling and Advertising Act (FCLAA),<sup>135</sup> which preempts state laws “based on smoking and health,” barred respondents’ lawsuit claiming that Altria violated the Maine Unfair Trade Practices Act (MUTPA) by fraudulently advertising that its “light” cigarettes delivered less tar and nicotine than regular brands.<sup>136</sup> The majority ruled that the MUTPA claims were not preempted because they were based on the cigarette manufacturer’s duty not to deceive—a duty which itself is not based on smoking and health.<sup>137</sup> The Court’s interpretation relied heavily on the reasoning of a prior case, *Cipollone v. Liggett Group, Inc.*, which had established the relevant preemption inquiry to be “whether the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement or prohibition based on smoking and health.’”<sup>138</sup> Justice Thomas’s dissenting opinion in *Altria*, joined by Justices Roberts, Alito, and Scalia, argued, in classic administrability-concern mode, that the *Cipollone* rule should be abandoned, because it had proved unduly confusing and unworkable over the years.<sup>139</sup> Justice Thomas agreed with the district court that lower courts “remain divided about what the decision means and how to apply it.”<sup>140</sup> Noting that “*stare decisis* considerations carry little weight” when a governing decision has created “an unworkable legal regime,” the dissenters maintained that it was high time for the Court to replace its current interpretation of the FCLAA’s preemption provision with a practicably feasible one.<sup>141</sup>

##### 5. *Individual Justices and the Coherence Divide*

This subpart examines the Justices’ individual rates of reliance for the various interpretive tools in the statutory opinions he or she authored during the 2005–2008 Terms—including all majority, concurring, dissenting, and splintered partial opinions. I focus on opinions authored, rather than merely joined, by each Justice on the theory that the Justices have greater control over which interpretive resources to reference when they author opinions than they do when they only sign on to one.

Table 2 lists the individual Justices’ rates of reliance for each interpretive tool measured in the study. The total number of opinions authored by each Justice also is listed. Table 3 ranks the interpretive tools used most frequently by each Justice. Table 4 lists each Justice’s rates of reference, in the opinions he or she authored, for particular forms of practical consequences. The references are subdivided into

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135. 15 U.S.C. § 1334(b) (2006).

136. *Altria Grp.*, 129 S. Ct. at 541 (citing ME. REV. STAT. ANN. tit. 5, § 207 (2008)).

137. *Id.* at 546.

138. 505 U.S. 504, 524 (1992).

139. *Altria Grp.*, 129 S. Ct. at 551, 554–55.

140. *Id.* at 555 (quoting *Good v. Altria Grp., Inc.*, 436 F. Supp. 2d 132, 142 (Me. 2006)).

141. *Id.* (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment)) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

administrability versus policy constancy-type concerns and the rates are expressed as a percentage of the total number of opinions in which each Justice used practical consequences as an interpretive tool. Table 5 reports the landscape-coherence Justices' overall rates of reference, as a group, to administrability versus policy constancy concerns, as well as the statute-specific coherence Justices' overall rates of reference, as a group, to each category of practical consequence concerns. Again, the numbers are low, so it is important to focus on large-scale trends rather than precise percentages.

TABLE 2: RATES OF RELIANCE ON INTERPRETIVE CANONS AND TOOLS BY OPINION AUTHOR<sup>142</sup>

Canons/ Interpretive Tools	Scalia ( <i>n</i> = 41)	Thomas ( <i>n</i> = 47)	Alito ( <i>n</i> = 32)	Roberts ( <i>n</i> = 26)	Kennedy ( <i>n</i> = 30)
Text/Plain Meaning*	61.0%	66.0%	62.5%	50.0%	43.3%
Dictionary Rule	22.0%	29.8%	28.1%	11.5%	23.3%
Language Canons (Grammar & Linguistic)	7.3%	14.9%	15.6%	19.2%	13.3%
Other Statutes	26.8%	19.1%	43.8%	30.8%	23.3%
Common Law	17.1%	10.6%	6.3%	11.5%	3.3%
Substantive Canons	9.7%	14.9%	15.6%	30.8%	13.3%
Whole Act Rule	24.4%	34.0%	28.1%	46.1%	23.3%
Agency Deference	14.6%	2.1%	6.3%	0.0%	10.0%
Supreme Court Precedent	34.1%	44.7%	34.4%	53.9%	56.7%
Practical Consequences	29.2%	14.9%	31.3%	38.5%	43.3%
Purpose*	7.3%	14.0%	31.3%	11.5%	43.3%
Intent*	2.4%	6.4%	25.0%	7.7%	10.0%
Legislative History*	9.8%	8.5%	15.6%	18.2%	20.0%

142. \* Indicates that one-way ANOVA test, using Bonferroni multiple comparison test, reveals a significant difference between rates of reliance by different Justices in the opinions they authored at  $p < .001$ . (For Purpose,  $p = .0004$ ; for Intent,  $p < .0001$ ; and for Legislative History,  $p = .0001$ ).

<b>Canons/ Interpretive Tools</b>	<b>Souter (n = 34)</b>	<b>Ginsburg (n = 33)</b>	<b>Breyer (n = 48)</b>	<b>Stevens (n = 47)</b>
Text/Plain Meaning*	47.1%	33.3%	20.8%	46.8%
Dictionary Rule	17.7%	15.2%	14.3%	11.9%
Language Canons (Grammar & Linguistic)	5.9%	6.1%	8.3%	6.4%
Other Statutes	23.5%	27.3%	20.8%	19.1%
Common Law	14.7%	0.0%	4.2%	17.0%
Substantive Canons	14.7%	12.1%	8.3%	27.7%
Whole Act Rule	32.4%	30.3%	18.8%	21.3%
Agency Deference	11.8%	9.1%	12.5%	8.5%
Supreme Court Precedent	55.9%	48.5%	41.7%	51.1%
Practical Consequences	32.4%	51.5%	39.6%	31.9%
Purpose*	17.7%	39.4%	37.5%	29.8%
Intent*	23.5%	24.2%	27.1%	46.8%
Legislative History*	29.4%	36.4%	37.5%	38.3%

Despite this limitation, the data reveal a striking divide between the members of the Roberts Court over the interpretive sources they most often choose to reference when authoring a statutory opinion. All of the Justices except Justices Alito, Ginsburg and Breyer referenced text/plain meaning and Supreme Court precedent more frequently than any of the other interpretive tools.<sup>143</sup> This hardly is shocking, as text and precedent are the two most conventional legal resources, and the Justices may regularly refer to them to legitimate the Court's statutory decisions and to create a public perception of neutral decisionmaking.<sup>144</sup> Once we look beyond these two conventional legal resources, the Justices' patterns of reliance fall rather neatly into the two interpretive camps described in this Article: legal-landscape versus statute-specific coherence. Specifically, the opinions authored by Justices Scalia, Thomas, Roberts, Kennedy, and Alito exhibited the highest rates of reliance for interpretive tools that promote legal-landscape coherence—that is, other statutes, the dictionary rule, and practical consequences emphasizing administrability-based concerns.<sup>145</sup> At the same time, the opinions authored by Justices Souter, Ginsburg, Breyer, and Stevens exhibited the highest rates of reliance on interpretive tools that promote statute-specific coherence—

143. See *infra* Table 3.

144. See, e.g., sources cited *supra* note 68.

145. See *supra* Table 2; *infra* Table 3.



that is, legislative history, purpose, intent, and practical consequences focused on policy constancy concerns.<sup>146</sup>

TABLE 3: RANKINGS OF INTERPRETIVE TOOLS USED MOST OFTEN IN AUTHORED OPINIONS

Scalia		Thomas		Roberts	
1	Text/Plain Meaning (61%)	1	Text/Plain Meaning (66%)	1	Supreme Ct. Precedent (53.9%)
2	Supreme Ct. Precedent (34.1%)	2	Supreme Ct. Precedent (44.7%)	2	Text/Plain Meaning (50%)
3	Practical Consequences (29.2%)	3	Whole Act Rule (34%)	3	Whole Act Rule (46%)
	Other Statutes (26.8%)		Dictionary Rule (29.8%)	4	Practical Consequences (38.5%)
	Whole Act Rule (24.4%)	4	Other Statutes (19.1%)		Other Statutes (30.8%)
	Dictionary Rule (22%)		Substantive Canons (30.8%)		
4	Common Law Precedent (17.1%)				

  

Alito		Kennedy		Souter	
1	Text/Plain Meaning (62.5%)	1	Supreme Ct. Precedent (44.7%)	1	Supreme Ct. Precedent (55.9%)
2	Other Statutes (43.8%)	2	Text/Plain Meaning (43.3%)	2	Text/Plain Meaning (47.1%)
3	Supreme Ct. Precedent (34.4%)		Practical Consequences (43.3%)	3	Practical Consequences (32.4%)
	Practical Consequences (31.3%)		<i>Purpose</i> (43.3%)		Whole Act Rule (32.4%)
	<i>Purpose</i> (31.3%)	3	Whole Act Rule (23.3%)		Legislative History (29.4%)
	Dictionary Rule (28.1%)		Dictionary Rule (23.3%)	4	Intent (23.5%)
	Whole Act Rule (28.1%)		Other Statutes (23.3%)		<i>Other Statutes</i> (23.5%)
	<i>Intent</i> (25%)				

146. See *supra* Table 2; *infra* Table 3.

Ginsburg		Breyer		Stevens	
1	Practical Consequences (51.5%)	1	Supreme Ct. Precedent (41.7%)	1	Supreme Ct. Precedent (51.1%)
2	Supreme Ct. Precedent (48.5%)	2	Practical Consequences (39.6%)	2	Text/Plain Meaning (46.8%)
3	Purpose (39.4%)		Purpose (37.5%)		Intent (46.8%)
	Legislative History (36.4%)	Legislative History (37.5%)	3	Legislative History (38.3%)	
	Text/Plain Meaning (33.3%)	3	Intent (27.1%)	4	Practical Consequences (31.9%)
	Whole Act Rule (30.3%)				Purpose (29.8%)
4	<i>Other Statutes</i> (27.3%)	4	Intent (27.7%)	4	<i>Substantive Canons</i> (27.7%)
	Intent (24.2%)				

As Tables 2 and 3 illustrate, the lines dividing the two camps, while stark, are not absolute. Two Justices in each camp showed noteworthy crossover reliance on interpretive tools that promote the opposite camp's approach. Justices Kennedy and Alito exhibited relatively high rates of reliance on statutory purpose, and Justice Alito also relied with notable frequency on legislative intent, while Justices Souter and Ginsburg exhibited noteworthy rates of reliance on other statutes and Justice Stevens exhibited a noteworthy rate of reliance on substantive canons.

Significantly, the landscape-coherence Justices were far less inclined to reference interpretive tools that promote statute-specific coherence than the statute-specific coherence Justices were to employ landscape-coherence promoting interpretive tools. Justice Scalia, for example, exhibited remarkably low rates of reliance—less than 10%—for the three most distinctly statute-specific coherence-promoting interpretive tools: purpose, intent, and legislative history.<sup>147</sup> Justice Thomas exhibited similarly low rates of reliance on intent and legislative history, and only a slightly higher rate of reliance on purpose.<sup>148</sup> Justice Roberts's rates of reliance on the statute-specific coherence-promoting interpretive tools

147. See *supra* Table 2 (reporting that Justice Scalia referenced legislative history in 9.8% of the opinions he authored; statutory purpose in 7.3% of the opinions he authored; and legislative intent in 2.4% of the opinions he authored).

148. See *supra* Table 2 (reporting that Justice Thomas referenced legislative history in 8.5% of the opinions he authored; statutory purpose in 14.9% of the opinions he authored; and legislative intent in 6.4% of the opinions he authored).

were marginally higher than Justice Scalia's and Justice Thomas's, but still were extremely low.<sup>149</sup>

By contrast, each of the statute-specific coherence Justices exhibited non-marginal rates of reliance on at least one landscape-coherence promoting tool. Justices Souter and Stevens, for example, relied somewhat frequently—and at rates comparable to the landscape-coherence Justices—on substantive canons and common law precedent.<sup>150</sup> Further, each Justice in the statute-specific coherence camp referenced other statutes in roughly 20% of the opinions he or she authored.<sup>151</sup> As Table 3 shows, the statute-specific coherence Justices relied with less frequency on landscape-coherence tools than they did on the statute-specific coherence tools, but they did not reject the landscape coherence tools the way that the landscape-coherence Justices rejected most of the statute-specific coherence tools. Indeed, for the top two landscape-coherence promoting interpretive tools—other statutes and the dictionary—the statute-specific coherence Justices' rates of reliance, while lower than the landscape-coherence Justices' rates, did not fall below 10%, or even below 15% in most cases, unlike Justices Scalia's, Thomas's, and Roberts's rates of reliance on the top two or three statute-specific coherence-promoting interpretive tools.<sup>152</sup> The reasons for this difference in the two camps' willingness to rely on canons and tools promoting the other camp's preferred interpretive approach are unclear. It could be that Justice Scalia's rants against the use of legislative history, intent, or purpose in interpreting statutes have influenced Justices Thomas and Roberts and, to a lesser extent, Justices Alito and Kennedy, to diminish or eliminate their reliance on these interpretive tools.<sup>153</sup> Another possibility is that the Justices who prioritize statute-specific coherence also are concerned with ensuring a coherent legal landscape, as long as the two kinds of coherence are not in conflict. Alternatively, the statute-specific coherence-leaning Justices may find it necessary to use some landscape-coherence oriented tools in their opinions in order to win or retain the votes of their landscape-oriented colleagues—particularly those landscape-coherence Justices who exhibit little affinity

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149. See *supra* Table 2 (reporting that Justice Roberts referenced legislative history in 18.2% of the opinions he authored; statutory purpose in 11.5% of the opinions he authored; and legislative intent in 7.7% of the opinions he authored).

150. See *supra* Table 2 (reporting that Justice Souter referenced both substantive canons and common law precedent in 14.7% of the opinions he authored, and that Justice Stevens referenced substantive canons in 27.7% of the opinions he authored and common law precedent in 17% of the opinions he authored).

151. See *supra* Table 2.

152. See *supra* Table 3.

153. *But see* Law & Zaring, *supra* note 6, at 1728–29 (finding no evidence to support a “Scalia effect” diminishing other Justices’ use of legislative history).

for the statute-specific coherence canons (such as Roberts, Scalia, and Thomas).

In a related vein, the data suggest something of an inverse relationship between judicial references to dictionary definitions on the one hand, and legislative history on the other. Those Justices who exhibited the *highest* rates of reference to dictionary definitions—Justices Thomas, Alito, and Scalia—also exhibited the *lowest* rates of reliance on legislative history.<sup>154</sup> Similarly, those Justices who exhibited the highest rates of reliance on legislative history—Justices Stevens, Breyer, Ginsburg, and Souter—exhibited the lowest rates of reference to dictionary definitions.<sup>155</sup> The exceptions, again, are crossover Justice Roberts, who exhibited a low rate of reliance on the dictionary and also a medium-low rate of reliance on legislative history,<sup>156</sup> and Justice Kennedy, who exhibited comparable rates of reliance on both interpretive tools.<sup>157</sup> These differences in rates of reliance highlight the fact that resort to dictionary definitions and resort to legislative history reflect two very different philosophical approaches to statutory construction. To date, scholars have viewed the battle between dictionary and legislative history use as part of the mythical divide between textualist and intentionalist judges.<sup>158</sup> But the empirical and doctrinal analysis presented in this Article suggests an alternative explanation for the split. Perhaps the judicial divide is not so much over text versus intent but, rather, over the relevant context for ensuring statutory coherence. For those Justices who define coherence as

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154. Justice Thomas referenced dictionary definitions in 29.8% of the opinions he authored but referenced legislative history in only 8.5% of those opinions; Justice Alito referenced the dictionary in 28.1% of the cases he authored and legislative history in only 15.6% of the cases; Justice Scalia referenced the dictionary in 22% of the cases he authored and legislative history in only 9.8% of his opinions. *See supra* Table 2.

155. Justice Stevens invoked legislative history in 38.3% of the opinions he authored but relied on the dictionary in only 11.9% of his opinions; Justice Breyer referenced legislative history in 37.5% of the opinions he authored and the dictionary in only 14.3% of those opinions; Justice Ginsburg referenced legislative history in 36.4% of her opinions and the dictionary in 15.2% of those same opinions; and Justice Souter invoked legislative history in 29.4% of his opinions, while citing the dictionary in 17.7%. *See supra* Table 2.

156. Justice Roberts referenced the dictionary in only 11.5% of the opinions he authored—the lowest rate of reliance for any Justice, though essentially equal to Justice Stevens's rate of reliance—and invoked legislative history in 18.2% of the opinions he authored—more than all of the other landscape-coherence Justices, save Justice Kennedy, but only half as often as most of the statute-specific Justices. *See supra* Table 2.

157. Justice Kennedy invoked the dictionary in 23.3% of the cases he authored and legislative history in 20%. *See supra* Table 2.

158. *See, e.g.,* Scalia, *supra* note 1, at 32; *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1762–64 (2010); Merrill, *supra* note 4, at 355–61; Schacter, *supra* note 8, at 5 (calling dictionary references the “benchmark of the new textualism” and contrasting an apparent decline in dictionary citations with an apparent “resurgence” in legislative history use).

consistency across the legal landscape, the dictionary, as a surrogate Code of Federal Definitions (or Code of Legal Custom, in the case of *Black's Law Dictionary*), is an ideal gap-filler; while for those Justices who define coherence as consistency in the specific statute's application to like situations and across time, legislative history illuminating the statute's path of evolution is the better gap-filling interpretive aid.

TABLE 4: INDIVIDUAL JUSTICES' RATES OF RELIANCE ON DIFFERENT PRACTICAL CONSEQUENCES TYPES<sup>159</sup>

<b>Justices*</b> ( <i>n</i> = number of practical consequences-referencing opinions authored by each Justice)	<b>Administrability Concerns</b>	<b>Policy Constancy Concerns</b>	<b>Both Types of Concerns</b>
Scalia ( <i>n</i> = 12)	75.0%	16.7%	8.3%
Thomas ( <i>n</i> = 7)	71.4%	28.6%	0.0%
Alito ( <i>n</i> = 10)	70.0%	30.0%	0.0%
Roberts ( <i>n</i> = 10)	50.0%	50.0%	0.0%
Kennedy ( <i>n</i> = 13)	53.8%	46.2%	0.0%
Souter ( <i>n</i> = 11)	9.1%	81.8%	9.1%
Ginsburg ( <i>n</i> = 17)	5.9%	88.2%	5.9%
Breyer ( <i>n</i> = 19)	26.3%	68.4%	5.3%
Stevens ( <i>n</i> = 15)	6.7%	93.3%	0.0%

Tables 4 and 5 are particularly telling, revealing a sharp contrast between the kinds of practical consequences that the landscape- versus statute-specific coherence Justices tended to reference. When they invoked practical consequences to interpret a statute, Justices Scalia, Thomas, and Alito employed administrability type arguments over 70% of the time and policy constancy arguments less than one-third of the

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159. \* Indicates chi-squared test reveals a significant difference between the rates at which the different Justices referenced administrability versus policy constancy practical consequences concerns at  $p = .001$ . Not including per curiam opinions, the Justices referenced some sort of practical consequence in 114 of their opinions in statutory cases.

time.<sup>160</sup> Justices Roberts and Kennedy were less sharp in their preferences for administrability-type concerns, referencing the two categories of practical consequences at roughly equal rates. Statute-specific coherence Justices Souter, Ginsburg, and Stevens, by contrast, referenced policy constancy type concerns in *over 80%* of the cases in which they invoked practical considerations to interpret a statute and referenced administrability concerns in *less than 20%* of those cases.<sup>161</sup> Justice Breyer's numbers were only slightly less stark. He referenced policy constancy arguments in nearly 70% of the cases and administrability concerns in less than one-third of the cases.<sup>162</sup> Interestingly, it appears from this data that the statute-specific coherence Justices are more averse to administrability arguments than are the landscape-coherence Justices to policy constancy arguments.

TABLE 5: ROBERTS COURT'S RATES OF RELIANCE ON DIFFERENT PRACTICAL CONSEQUENCES TYPES BY COHERENCE GROUPING ( $n = 117$ )<sup>163</sup>

Justices By Camp*	Administrability Concerns	Policy Constancy Concerns	Both Types of Concerns
Landscape Coherence Justices ( $n = 52$ )	63.5%	34.6%	1.9%
Statute-Specific Policy Coherence Justices ( $n = 62$ )	12.9%	82.3%	4.8%
Per Curiam ( $n = 3$ )	33.3%	66.7%	0.0%

Table 5 shows similar figures when all practical consequences-referencing opinions authored by the landscape-coherence Justices are grouped together (of 52 such opinions, 63.5% reference administrability concerns and 34.6% reference policy constancy concerns), and when all practical consequences-referencing opinions authored by the statute-specific coherence Justices are grouped together (of 62 such opinions,

160. See *supra* Table 4.

161. See *supra* Table 4.

162. See *supra* Table 4.

163. \* Indicates chi-squared test reveals a significant difference between the rates at which the two camps/groups of Justices referenced administrability versus policy constancy practical consequences concerns at  $p < .0001$ . Including per curiam opinions, the Justices referenced some sort of practical consequence in 117 of their opinions in statutory cases.

82.3% reference policy constancy concerns, while only 12.9% reference administrability concerns).<sup>164</sup>

#### 6. *Statutory Subject Matter and the Interpretive Tools*

In addition to the individual Justices' rates of reliance on landscape-versus statute-specific coherence tools, I also sought to measure the correlation, if any, between statutory subject matter and the Roberts Court's reliance on particular interpretive sources. Each opinion in the dataset was coded for its subject matter according to the following categories: (1) criminal statutes; (2) environmental statutes; (3) jurisdictional statutes; (4) the Internal Revenue Code; (5) the Federal Arbitration Act; (6) discrimination-related statutes; (7) the IDEA; (8) civil RICO; (9) securities statutes; (10) antitrust statutes; (11) preemption statutes; (12) the Federal Tort Claims Act (FTCA); (13) the Bankruptcy Code; (14) immigration statutes; (15) ERISA; (16) the Federal Communications Act; (17) the Prison Litigation Reform Act; (18) the Patent Act; (19) the False Claims Act; (20) the Anti-Terrorism and Effective Death Penalty Act (AEDPA); (21) the Federal Employers Liability Act (FELA); and (22) other statutes. It turned out that several of these statutes/subject areas were interpreted in only a few of the opinions in the dataset.<sup>165</sup> In order to avoid generalizing from very small numbers, only those statutory subject areas that were interpreted in at least nine opinions in the dataset were included in the tables and analysis below.<sup>166</sup>

The results are reported in Tables 6a to 6d, 7a to 7d, and 8a to 8c. As the tables indicate, the data suggest that the camp-transcendent interpretive tools are also subject-matter transcendent: practical consequences, Supreme Court precedent, the whole act rule, and text/plain meaning all were referenced frequently across statute types.<sup>167</sup> "Other statutes" also was referenced frequently across statute types, with

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164. See *supra* Table 5.

165. The dataset contained only 7 cases and 8 opinions interpreting the Internal Revenue Code; 3 cases and 8 opinions interpreting the IDEA; 6 cases and 8 opinions interpreting antitrust statutes; 2 cases and 5 opinions interpreting the FTCA; 4 cases and 3 opinions interpreting the Bankruptcy Code; 2 cases and 7 opinions interpreting the Federal Communications Act; 2 cases and 4 opinions interpreting the Prison Litigation Reform Act; 3 cases and 7 opinions interpreting the Patent Act; 3 cases and 4 opinions interpreting the False Claims Act; 4 cases and 6 opinions interpreting the AEDPA; and 2 cases and 6 opinions interpreting the FELA.

166. As Tables 6a–d, 7a–d, and 8a–c indicate, the subject areas for which correlation was assessed were: criminal statutes (53 opinions), environmental statutes (24 opinions), jurisdictional statutes (50 opinions), the Federal Arbitration Act (11 opinions), discrimination-related statutes (49 opinions), the civil RICO statute (9 opinions), securities statutes (9 opinions), preemption statutes (22 opinions), immigration statutes (13 opinions), and ERISA (10 opinions).

167. See *infra* Tables 6a, 6b, 6c, and 6d.

the exception of opinions interpreting environmental statutes and ERISA.<sup>168</sup>

The statutes that provoked the most frequent references to landscape coherence interpretive tools were criminal statutes,<sup>169</sup> civil RICO,<sup>170</sup> and immigration statutes.<sup>171</sup> Preemption and securities statutes also provoked notable rates of reference to two of the four landscape-coherence tools,<sup>172</sup> although the total number of opinions available for analysis in the securities area makes it difficult to place much weight on these figures. As for the statute-specific interpretive tools, the statutory subject matters that provoked the most frequent rates of reference were criminal statutes,<sup>173</sup> environmental statutes,<sup>174</sup> discrimination-related statutes,<sup>175</sup> securities statutes,<sup>176</sup> and, to a lesser extent, jurisdictional statutes,<sup>177</sup> civil RICO,<sup>178</sup> and preemption statutes.<sup>179</sup>

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168. *See infra* Table 7a.

169. Of the 53 Roberts Court opinions in the dataset involving the interpretation of a criminal statute, 39.6% referenced other statutes, 26.4% referenced the dictionary, and 17% referenced substantive canons. *See infra* Tables 7a, 7b, and 7d.

170. Of the 9 Roberts Court opinions in the dataset that involved the interpretation of the civil RICO statute, 33.3% referenced other statutes, 22.2% referenced the dictionary, and 22.2% referenced common law precedent. *See infra* Tables 7a, 7b, and 7c.

171. Of the 13 Roberts Court opinions in the dataset that involved the interpretation of an immigration statute, 30.8% referenced other statutes, 23.1% referenced the dictionary, and 23.1% referenced common law precedent. *See infra* Tables 7a, 7b, and 7c.

172. Twenty-two Roberts Court opinions in the dataset involved the interpretation of a preemption statute; of these, 22.7% referenced other statutes and 22.7% referenced substantive canons. 9 opinions from the dataset involved the interpretation of a securities statute; of these, 22.2% referenced other statutes and 22.2% referenced common law precedent. *See infra* Tables 7a, 7c, and 7d.

173. The Roberts Court's opinions interpreting criminal statutes referenced legislative history at a rate of 30.2%, referenced intent at a rate of 24.5%, and referenced statutory purpose at a rate of 17%. *See infra* Tables 8a, 8b, and 8c.

174. Of the 24 Roberts Court opinions in the dataset that involved the interpretation of an environmental statute, 20.8% referenced legislative history, 20.8% referenced intent, and 37.5% referenced statutory purpose. *See infra* Tables 8a, 8b, and 8c.

175. Of the 49 Roberts Court opinions in the dataset that involved the interpretation of a discrimination-related statute, 30.6% referenced legislative history, 22.4% referenced intent, and 20.4% referenced statutory purpose. *See infra* Tables 8a, 8b, and 8c.

176. Of the 9 Roberts Court opinions in the dataset that involved the interpretation of a securities statute, 33.3% referenced legislative history, 33.3% referenced intent, and 44.4% referenced purpose. *See infra* Tables 8a, 8b, and 8c.

177. Of the 50 Roberts Court opinions in the dataset that involved the interpretation of a jurisdictional statute, 20% referenced legislative history and 24% referenced statutory purpose. *See infra* Tables 8a and 8c.

178. Of the 9 Roberts Court opinions in the dataset that involved the interpretation of the civil RICO statute, 22.2% referenced legislative history and 22.2% referenced statutory purpose. *See infra* Tables 8a and 8c.

179. Of the 22 Roberts Court opinions in the dataset that involved the interpretation of a preemption statute, 31.8% referenced intent and 40.9% referenced statutory purpose. *See infra* Tables 8b and 8c.



It is difficult to generalize from these figures, but a few trends are apparent. First, the data and tables indicate that, on the whole, the Roberts Court tends to employ statute-specific coherence tools more frequently than it does landscape-coherence tools when construing environmental and discrimination-related statutes, although the Court references one landscape-coherence tool—dictionary definitions—frequently when construing environmental statutes.<sup>180</sup> The same is true to a lesser extent for jurisdictional statutes.<sup>181</sup> Conversely, landscape-coherence tools tend to be the Court's preferred interpretive aids when it construes immigration statutes, although references to statutory purpose also are common in the Court's immigration opinions.<sup>182</sup> Second, the Court tends to call upon the full gamut of interpretive tools, both landscape and statute-specific, when interpreting criminal statutes,<sup>183</sup> preemption statutes,<sup>184</sup> securities statutes,<sup>185</sup> and the civil RICO statute.<sup>186</sup>

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180. Compare Tables 8a–c (opinions interpreting environmental statutes referenced legislative history at a rate of 20.8%, intent at a rate of 20.8%, and statutory purpose at a rate of 37.5%; opinions interpreting discrimination-related statutes referenced legislative history at a rate of 30.6%, intent at a rate of 22.4%, and statutory purpose at a rate of 20.4%) with Tables 7a–d (opinions interpreting environmental statutes referenced other statutes at a rate of 4.2%, dictionary definitions at a rate of 41.7%, common law precedent at a rate of 4.2%, and substantive canons at a rate of 8.3%; opinions interpreting discrimination-related statutes referenced other statutes at a rate of 20.4%, dictionary definitions at a rate of 10.2%, common law precedent at a rate of 6.1%, and substantive canons at a rate of 14.3%).

181. Compare Tables 8a–c (opinions interpreting jurisdictional statutes referenced legislative history at a rate of 20%, intent at a rate of 14%, and statutory purpose at a rate of 24%), with Tables 7a–d (opinions interpreting jurisdictional statutes referenced other statutes at a rate of 22%, dictionary definitions at a rate of 12%, common law precedent at a rate of 6%, and substantive canons at a rate of 8%).

182. Compare Tables 8a–c (opinions interpreting immigration statutes referenced legislative history at a rate of 7.7%, intent at a rate of 7.7%, and statutory purpose at a rate of 30.8%), with Tables 7a–d (opinions interpreting immigration statutes referenced other statutes at a rate of 30.8%, dictionary definitions at a rate of 23.1%, common law precedent at a rate of 23.1%, and substantive canons at a rate of 7.7%).

183. See Tables 8a–c and Tables 7a–d (opinions interpreting criminal statutes referenced legislative history at a rate of 30.2%, intent at a rate of 24.5%, and statutory purpose at a rate of 17%; other statutes were referenced at a rate of 39.6%, dictionary definitions at a rate of 26.4%, common law precedent at a rate of 7.5%, and substantive canons at a rate of 17%).

184. See Tables 8a–c and Tables 7a–d (opinions interpreting preemption statutes referenced legislative history at a rate of 18.2%, intent at a rate of 31.8%, and statutory purpose at a rate of 40.9%; other statutes were referenced at a rate of 22.7%, dictionary definitions at a rate of 9.1%, common law precedent at a rate of 9.1%, and substantive canons at a rate of 22.7%).

185. See Tables 8a–c and Tables 7a–d (opinions interpreting securities statutes referenced legislative history at a rate of 33.3%, intent at a rate of 33.3%, and statutory purpose at a rate of 44.4%; other statutes were referenced at a rate of 22.2%, dictionary definitions at a rate of 11.1%, common law precedent at a rate of 22.2%, and substantive canons at a rate of 11.1%).

186. See Tables 8a–c and Tables 7a–d (opinions interpreting the civil RICO statute referenced legislative history at a rate of 22.2%, intent at a rate of 11.1%, and statutory purpose at a rate of 22.2%; other statutes were referenced at a rate of 33.3%, dictionary definitions at a rate of 22.2%, common law precedent at a rate of 22.2%, and substantive canons at a rate of 11.1%).

Again, given the size of the dataset, it is important to focus on overall trends rather than precise percentages. But even staying at the big-picture level, the data about statutory subject matter is intriguing. Why does the Roberts Court tend to employ statute-specific rather than landscape coherence tools when interpreting environmental, discrimination-related and, to some extent, jurisdictional statutes? It is possible that these statutes are more complicated or are viewed as greater breaks from the preexisting legal regime than is the average statute; or perhaps environmental, discrimination-related, and jurisdictional statutes have more developed legislative records and purposes than do other statutes. Perhaps they were, on the whole, enacted by very liberal Congresses. Future work examining the Court's interpretive tool reliance by statutory subject matter can and should explore such possibilities.

### III. ILLUSTRATIVE CASE STUDIES

The reader might be left wondering what all of these statistics mean on the level of the individual case. Specifically, she may question whether the Roberts Court's statutory cases are characterized by clean face-offs between landscape-coherence canons in the majority opinions and statute-specific coherence canons in the dissenting opinions, and whether the subject matter of a statute is a definitive predictor of which interpretive tools the Court will employ in construing the statute. The short answer to such questions is that the statistical evidence is not nearly so black-and-white. For one thing, the two interpretive approaches are not always in tension—indeed, landscape- and statute-specific coherence often both point towards and can be achieved by the same construction of a statute.<sup>187</sup> Further, some of the Justices exhibit crossover tendencies to reference one or more of the opposing camp's preferred interpretive tools.<sup>188</sup> And while statutory subject matter may play some role in the Court's choice of which interpretive aids to consult, the data reported above hardly indicate that this role is a definitive one.

In highlighting the Justices' interpretive divide, I do not mean to suggest that every statutory case neatly and exclusively relies on either legal-landscape coherence-fostering interpretive tools or statute-specific coherence-fostering tools. My intention in this Article is merely to point out that: (1) different interpretive canons and tools push towards different kinds of coherence; (2) the Justices, in their common law approach to construing statutes, very much evince an interpretive goal of

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187. See, e.g., *Dean v. United States*, 129 S. Ct. 1849, 1856–60 (2009) (Stevens, J., dissenting) (making both statute-specific legislative history and design arguments and landscape-focused common law and substantive canon arguments).

188. See Tables 2 and 3 and discussion *supra* Part II.C.5.

creating coherence in the law, whether in the legal landscape writ large or in the specific policy of the individual statute; and (3) when landscape-coherence oriented interpretive tools point to a different interpretation than do the interpretive tools that focus on the specific statute at issue, the Justices are likely to split along fairly identifiable lines in their statutory constructions. This Part examines a few non-unanimous cases from the dataset to illustrate how the Court's interpretive divide works in practice.

A. *LIMTIACO V. CAMACHO*

The first example, *Limtiaco v. Camacho*,<sup>189</sup> is a 2006 Term case in which the Court divided 5-4 over the proper interpretation of the debt-limitation provision of the Organic Act of Guam.<sup>190</sup> The Guam legislature had authorized Guam's governor to issue bonds to fund the territory's continuing debt obligations.<sup>191</sup> Guam's attorney general refused to sign off on the bond contracts, arguing that the bond issuance would violate the debt-limitation provision of the Act, which limits the territory's public indebtedness to 10% of the "aggregate tax valuation of the property in Guam."<sup>192</sup> The statutory question before the Supreme Court was whether Guam's debt limitation must be calculated according to the *assessed* or to the *appraised* valuation of property in Guam.<sup>193</sup> A divided Court ruled that the debt-limitation must be calculated based on the assessed valuation.<sup>194</sup>

Justice Thomas's opinion, joined by Justices Roberts, Scalia, Kennedy, and Breyer, relied heavily on landscape-coherence oriented interpretive tools to reach and justify its construction of the statute. First, he referenced *Black's Law Dictionary*—an external, non-statute-specific source of legal definitions and custom—to determine that "'tax valuation' most naturally means the value to which the tax rate is applied[.]"<sup>195</sup> which in turn translates to the "'assessed valuation,' a term consistently defined as a valuation of property for purposes of taxation."<sup>196</sup> The Court also tied a plain-meaning argument to its dictionary references, holding that the term tax valuation "most naturally means the value to which the tax rate is applied."<sup>197</sup>

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189. 549 U.S. 483 (2007).

190. 48 U.S.C. § 1423a (2006); 11 GUAM CODE ANN. § 24102 (1998).

191. *Limtiaco*, 549 U.S. at 485.

192. 48 U.S.C. § 1423a; *Limtiaco*, 549 U.S. at 485.

193. *Limtiaco*, 549 U.S. at 485.

194. *Id.*

195. *Id.* at 489.

196. *Id.* (quoting BLACK'S LAW DICTIONARY 1721, 149 (4th ed. 1951)).

197. *Id.*

The Court then made a second classic legal-landscape oriented interpretive move, arguing that “[o]ur interpretation comports with *most States’* practice of tying the debt limitations of municipalities to assessed valuation,” and that “[s]tates that depart from the majority approach use clear language to do so.”<sup>198</sup> In other words, the Court chose to interpret the statute in the manner most consistent with existing legal practice, emphasizing that its chosen construction fit snugly alongside the other pieces of the legal landscape puzzle (or, most states’ practices).

In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Alito, took a classically statute-specific interpretive approach. The dissent disagreed with the majority’s argument that the term “tax valuation” unambiguously referred to the assessed value and contended that it, therefore, was proper to consult the statute’s purpose.<sup>199</sup> Congress’s purpose in enacting the debt limitation, the dissent argued, was to restrict the Guam government’s ability to incur “crushing” amounts of debt that would be shouldered by future generations and ultimately, could require a bailout from the United States government.<sup>200</sup> Combining purpose with practical consequence considerations, the dissent concluded that the only construction that could fulfill the statute’s policy objectives was one that tied the debt limitation to Guam’s capacity to tax property—that is, appraised or market value.<sup>201</sup> The dissent made the practical observation that “[t]he actual, market value of property is the only economic index of Guam’s ability to collect property taxes to pay its bills, the only figure under consideration that is fixed in the real world, and the only figure that provides a genuine limitation.”<sup>202</sup> Further, the dissent hypothesized that because assessed value is determined based on the tax rate set by the Guam legislature, an interpretation that tied the debt-limitation to the assessed value would enable the Guam legislature to manipulate the tax rate in order to affect the assessed valuation and hence, to manipulate the debt limit.<sup>203</sup> In other words, the practical consequences of the majority’s interpretation would be to render the debt limitation provision meaningless—a classic policy constancy-type practical consequences argument. Thus, while the majority opinion looked outward to common state practice and conventional legal definitions to give meaning to the statute at issue, the dissent looked inward to the purpose of the individual statute and to

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198. *Id.* at 491 (emphasis added) (citing 15 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 41:7, at 422, 424–25 (3d ed. rev. 2005)).

199. *Id.* at 492 (Souter, J., dissenting).

200. *Id.* at 495.

201. *See id.* at 495–96.

202. *Id.* at 496.

203. *Id.* at 495.

practical realities, suggesting that the majority's interpretation was likely to render the statute's policy hollow.

Given the trajectories taken by the majority and dissenting opinions and the individual Justices' preferences for particular interpretive tools, Justice Alito's crossover to join the policy-coherence-focused dissenting opinion is not surprising. At least based on his rates of reliance in the opinions he authored, Justice Alito seems to consider statutory purpose an important interpretive resource.<sup>204</sup> Justice Breyer's crossover vote to join the landscape-coherence focused majority opinion is a little more surprising, though not incomprehensible, as the data in Table 2 indicate some inclination on his part to reference dictionary definitions in the opinions he authors.<sup>205</sup>

#### B. *RAPANOS V. UNITED STATES*

The second case study is *Rapanos v. United States*,<sup>206</sup> a 2006 case in which the Court splintered by a 4-1-4 margin in construing the Clean Water Act (CWA).<sup>207</sup> Michigan landowner John Rapanos backfilled wetlands on a parcel of land that he owned.<sup>208</sup> The Army Corps of Engineers, which administers much of the CWA, informed Mr. Rapanos that his wetlands were "waters of the United States" and could not be backfilled without a permit.<sup>209</sup> The CWA makes it unlawful to discharge certain material into "navigable waters" without a permit<sup>210</sup> and defines "navigable waters" as "the waters of the United States, including the territorial seas."<sup>211</sup> The Army Corps had, for years, interpreted "waters of the United States" expansively to include not only traditional navigable waters, but also "tributaries" and wetlands "adjacent" to navigable waters and tributaries.<sup>212</sup> The Supreme Court had to decide whether Mr. Rapanos's wetlands, which lay near ditches or man-made drains that eventually emptied into traditional navigable waters, constituted "waters of the United States" within the meaning of the CWA.<sup>213</sup> The members of the Roberts Court split three ways, with a plurality concluding that the statute did not cover Mr. Rapanos's wetlands.<sup>214</sup>

Writing for four members of the Court, Justice Scalia placed significant emphasis on giving the CWA an interpretation that fit

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204. See *supra* Table 2.

205. *Id.*

206. 547 U.S. 715 (2006) (plurality opinion).

207. 33 U.S.C. §§ 1251-1444 (2006).

208. *Rapanos*, 547 U.S. at 719-20.

209. *Id.* at 720-21 (citing 33 U.S.C. § 1362(7)).

210. See 33 U.S.C. § 1344(a).

211. *Id.* § 1362(7).

212. *Rapanos*, 547 U.S. at 727-28.

213. *Id.* at 729.

214. *Id.* at 731-32.

coherently into the existing legal landscape and almost no emphasis on the specific statutory policy internal to the CWA.<sup>215</sup> His plurality opinion referred extensively to dictionary definitions indicating that the statutory term “the waters” means “water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’”<sup>216</sup> All of these dictionary terms, he observed, “connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”<sup>217</sup> Justice Scalia reinforced his reliance on the conventional meaning provided in dictionaries with a reference to how the term “navigable waters” had been interpreted in other statutes: He noted that the CWA adopted the “traditional phrase ‘navigable waters’” from its predecessor statutes<sup>218</sup> and that the traditional understanding of “navigable waters” in those statutes included only discrete bodies of water.<sup>219</sup> Justice Scalia supported this latter point by citing Supreme Court precedents that used the terms “waters” and “rivers” interchangeably and used “navigable waters” to mean “waterways,” arguing that “because such ‘waters’ had to be navigable in fact or susceptible of being rendered so, the term [could] not include ephemeral flows.”<sup>220</sup> He also made a whole-act-rule argument emphasizing that the CWA itself characterizes the channels and conduits that typically carry intermittent flows of water—like the tributaries and wetlands at issue—as “point sources” separate and distinct from “navigable waters.”<sup>221</sup> This separate internal classification, he argued, further showed that the watercourses through which intermittent waters typically flow are not “waters of the United States.”<sup>222</sup>

Having covered the immediately adjacent legal landscape (dictionary conventions, past precedent, other statutes, other sections of the same statute), Justice Scalia next looked to ensure that the Court’s interpretation remained consistent with the overarching legal framework.

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215. *See id.*

216. *Id.* at 732 (alteration in original) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

217. *Id.* at 733 & n.6.

The principal definition of ‘stream’ likewise includes reference to such permanent, geographically fixed bodies of water: ‘[a] current or course of water or other fluid, flowing on the earth, as a *river, brook, etc.*’ The other definitions of ‘stream’ repeatedly emphasize the requirement of *continuous* flow: ‘[a] *steady flow*, as of water, air, gas, or the like’; ‘[a]nything issuing or moving with *continued succession* of parts’; ‘[a] *continued current* or course; current; drift.’

*Id.* (internal citations omitted).

218. *Id.* at 734.

219. *Id.*

220. *Id.*

221. *Id.* at 735 (citing 33 U.S.C. § 1362(14) (2006)).

222. *Id.* at 735–36.

He noted that serious constitutional issues involving the Commerce Clause and federalism would arise if the CWA were interpreted to give the Army Corps' authority over intermittent water flows.<sup>223</sup> The Court's precedents established that the "[r]egulation of land use" is a "quintessential state and local power,"<sup>224</sup> and that states possess "traditional and primary power over land and water use."<sup>225</sup> Only a narrow reading of the Army Corps' regulatory authority would be consistent with the states' primacy in this area; the Corps' expansive definition would make it "a de facto regulator of immense stretches of intrastate land"<sup>226</sup> and eliminate "virtually all" state and local planning, intruding impermissibly on state governments' authority.<sup>227</sup> Thus, both the avoidance canon and federalism clear-statement rules dictated that the Court should interpret the regulatory power conferred by the statute narrowly, so as not to disrupt the existing constitutional balance between federal and state power.<sup>228</sup>

Justice Scalia's opinion also contained a passing reference to the practical consequences worked by the Corps' expansive interpretation. The opinion began by detailing the burden placed on landowners under existing regulations, implying that the current system is prohibitively expensive and time-consuming.<sup>229</sup> "The average applicant for an individual permit," Justice Scalia noted, "spends 788 days and \$271,596 in completing the process," and "[o]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits."<sup>230</sup> These are administrability-based practical concerns, suggesting that the statutory question at issue was part of a larger problem with a regulatory landscape that was unduly burdensome and inefficient. Although this data about the costs landowners face in applying for a permit appears in the background facts section of the plurality opinion, rather than its statutory analysis section,<sup>231</sup> the fact that the opinion mentions these costs at all—even providing hard numbers—indicates that they formed at least part of the plurality's interpretive calculus.

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223. *See id.* at 738.

224. *Id.* (citing *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

225. *Id.* (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001)).

226. *Id.* (emphasis omitted).

227. *Id.* at 737–38.

228. *Id.* at 738 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

229. *See id.* at 721.

230. *Id.* (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74–76, 81 (2002)).

231. *Id.* at 719–22.

Justice Scalia's plurality opinion was landscape-oriented in three important ways. First, it looked to external sources, including conventional dictionary meanings, other statutes, and Supreme Court precedents, to give meaning to the statutory term "navigable waters."<sup>232</sup> Second, it relied on background rules directing that the CWA should be read narrowly in order to avoid bumping up incongruously against the constitutional structure.<sup>233</sup> Third, it pointed to evidence suggesting that the regulatory landscape was unduly burdensome and unworkable.<sup>234</sup> For Justice Scalia and the other members of the plurality, the policy underlying the individual statute took a backseat to concerns about how the interpretation chosen by the Court would square with the meaning given to other statutes containing the term "navigable waters," the constitutional backdrop, and the permitting and regulatory system.

Justice Kennedy provided the fifth vote in the case but refused to join Justice Scalia's heavily landscape-oriented opinion.<sup>235</sup> Instead, he authored a concurring opinion that exhibited significant crossover reliance on statute-specific coherence-focused interpretive tools. Rather than look to external dictionary definitions to provide a universal meaning for "waters," Justice Kennedy argued that the appropriate test for whether a wetland constitutes "navigable waters" was the one established in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, a prior Supreme Court case interpreting the same statutory language.<sup>236</sup> In *Solid Waste*, the Court held that in order to fall within the Corps' regulatory authority, ponds and mudflats must possess a "significant nexus" to waters that are navigable in fact or that could reasonably be made navigable.<sup>237</sup> In Justice Kennedy's view, this "significant nexus" test was the established rule and should be applied to wetlands as well.<sup>238</sup>

Justice Kennedy also referenced the CWA's statutory purpose, observing that "Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" and that the rationale for including wetlands is that wetlands "can perform critical functions related to the integrity of other waters."<sup>239</sup> He contended that wetlands should be deemed to possess the requisite "nexus" and thus, to come within the statutory phrase "navigable waters" if they "significantly affect the chemical, physical, and biological

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232. See *supra* notes 216, 218, 219 and accompanying text.

233. See *supra* note 228 and accompanying text.

234. See *supra* note 230 and accompanying text.

235. *Id.* at 759 (Kennedy, J., concurring in judgment).

236. *Rapanos*, 547 U.S. at 759 (citing 531 U.S. 159, 167 (2001)).

237. 531 U.S. at 167.

238. *Rapanos*, 547 U.S. at 759, 767.

239. *Id.* at 779 (quoting 33 U.S.C. § 1251(a) (2006)).



integrity of other covered waters... understood as ‘navigable.’”<sup>240</sup> Because the lower courts failed to apply the “significant nexus” test to determine whether Mr. Rapanos’s wetlands fell within the CWA’s coverage, Justice Kennedy argued that the case should be remanded.<sup>241</sup> For Justice Kennedy, maintaining a consistent policy across time with respect to the test for “navigable waters” and ensuring that the term was applied in a manner consistent with the CWA’s purpose were more important considerations than ensuring that the term “navigable waters” be construed consistently across the United States Code or with minimal constitutional side effects.

Justice Kennedy’s concurring opinion also criticized the plurality opinion for producing an absurd result.<sup>242</sup> He argued that the “permanent” or “continuous flow” reading of “navigable waters” made “little practical sense,” because it meant that “[t]he merest trickle, if continuous, would count as a ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.”<sup>243</sup> Justice Kennedy went on to give real-world examples of rivers that might not be counted as “navigable waters” under the plurality’s reasoning.<sup>244</sup> This is a classic policy constancy practical consequences argument, faulting the plurality’s interpretation for producing a nonsensical statutory policy.

Justice Kennedy’s concurring opinion shows that there was more than mere results-focused decisionmaking at work in *Rapanos*. He reached the same outcome as the plurality opinion—no Army Corps jurisdiction over the wetlands at issue<sup>245</sup>—but based on very different interpretive tools and a very different interpretive focus. Moreover, he did so in a manner quite consistent with the interpretive tool preferences reflected in Table 2. He references statutory purpose and Supreme Court precedent, interpreting the same statutory provision in a slightly different context.

In dissent, Justice Stevens, joined by Justices Breyer, Souter, and Ginsburg, focused on the consistency of the CWA’s specific policy over time, invoking four statute-specific coherence-fostering interpretive tools. First, the dissent argued that the Supreme Court’s decision in a prior case, *United States v. Riverside Bayview Homes, Inc.*,<sup>246</sup> had decided the precise question at issue, dictating that the CWA “authorizes the Corps to require landowners to obtain permits from the Corps before

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240. *Id.* at 780.

241. *Id.* at 786.

242. *Id.* at 769.

243. *Id.*

244. *Id.* at 769–70.

245. *Id.* at 734 (plurality opinion).

246. 474 U.S. 121 (1985).

discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.”<sup>247</sup> That opinion, the dissent insisted, nowhere limited the covered wetlands to those containing a continuous connection to permanent bodies of water.<sup>248</sup> Second, the dissent referenced the CWA’s legislative history to argue that the Army Corps’ expansive interpretation of “navigable waters” had been ratified by Congress decades ago.<sup>249</sup> The legislative history showed that Congress, in 1977, considered and rejected an amendment that would have narrowed the scope of the Army Corps’ asserted jurisdiction;<sup>250</sup> in the dissent’s view, this was powerful evidence that Congress deliberately acquiesced in the Army Corps’ interpretation of “navigable waters” to include wetlands.<sup>251</sup> Third, the dissent criticized the plurality for casting aside the Army Corps’ longstanding regulatory policy, noting that the rejected interpretation reflected “30 years of practice by the Army Corps.”<sup>252</sup> Fourth, the dissent listed some of the practical ways in which wetlands can improve water quality and argued that the plurality opinion would result in arbitrary practical distinctions.<sup>253</sup> For example, Justice Stevens noted,

Under the plurality’s view, then, the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days of the year—even if the dredge in this second stream would have the same effect on downstream waters as the dredge in the year-round one.<sup>254</sup>

This last argument expresses a policy constancy-type practical consequences concern that the plurality’s interpretation will result in an incoherent statutory policy.

Justice Stevens’s dissent also criticized the plurality opinion for ignoring the specific purpose and intent of the CWA and for misusing dictionary definitions.<sup>255</sup> He quoted Supreme Court precedent stating that the CWA was “not merely another law” and that “Congress’ intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation . . . .”<sup>256</sup> The plurality’s interpretation,

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247. *Rapanos*, 547 U.S. at 792 (Stevens, J., dissenting) (alteration in original) (quoting *Riverside Bayview*, 474 U.S. at 123 (1985)).

248. *Id.* at 806.

249. *Id.* at 797.

250. *Id.* at 794.

251. *Id.* at 797.

252. *Id.* at 788.

253. *Id.* at 800.

254. *Id.*

255. *Id.* at 804–05.

256. *Id.* at 804 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 317, 318 (1981)) (internal quotation marks omitted).

he lamented, undermined this fundamental statutory policy.<sup>257</sup> Finally, Justice Stevens's dissent, like Justice Kennedy's concurring opinion, argued that the plurality's reliance on dictionary definitions was spotty—ignoring, for example, the dictionary's treatment of “streams” as “waters,” and the fact that streams can be “intermittent” as well as “perennial.”<sup>258</sup> Significantly, Justice Stevens employed these landscape-oriented dictionary definitions only to rebut the plurality opinion's dictionary use, not as an interpretive aid in their own right.<sup>259</sup>

The various opinions in *Rapanos* provide a classic illustration of the Roberts Court's interpretive divide, with the Justices in either camp facing off squarely over legal-landscape versus individual statute-specific coherence concerns. Only Justice Kennedy was caught in the middle, joining the landscape-coherence Justices in outcome but writing an opinion that relied heavily on purpose—an interpretive tool for which he exhibits a relatively high rate of reliance in Table 2—and other statute-specific coherence-fostering interpretive resources.

#### IV. THEORETICAL IMPLICATIONS OF THE COHERENCE DIVIDE

The coherence divide identified in this Article raises several intriguing theoretical questions. Part IV.A compares landscape coherence and statute-specific coherence to theories of statutory interpretation espoused by some of the Justices in their opinions and extra-judicial writings. Part IV.B discusses the ideological implications of the coherence divide.

##### A. NOT JUST OLD WINE IN NEW BOTTLES

The interpretive divide described in this Article should not sound entirely foreign to those familiar with the Supreme Court's interpretive methodologies. Indeed, some hint of the divide is plainly discernable in at least two of the Justices' comments about the interpretive process. Justice Scalia has stated that when interpreting statutes, the members of the Court should “look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”<sup>260</sup> Justice Stevens, conversely, has expressed the view that the Court should interpret statutes in a manner that avoids statutory incoherence:

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257. *Id.*

258. *Id.* at 801. The dissent established this latter fact through references to topographical map symbols provided by the Department of the Interior. *Id.*

259. *Id.* at 801, 805 (rebutting the plurality's dictionary use regarding the word “stream,” and citing the dictionary definition of “adjacent” to rebut the plurality's definition of the word).

260. Scalia, *supra* note 1, at 17.

There are occasions when an exclusive focus on text seems to convey an incoherent message, but other reliable evidence clarifies the statute and avoids the apparent incoherence. In such a case . . . we should never permit a narrow focus on text to obscure a commonsense appraisal of that additional evidence.<sup>261</sup>

But despite some points of overlap, these two Justices' comments about how statutes should be interpreted do not square on all fours with either the landscape-coherence or the statute-specific coherence approaches to statutory interpretation. Justice Scalia's description focuses far more on what the reasonable person, or "objective" reader, would make of the statute's text than on the meaning dictated by the common law, substantive canons, or other federal statutes. Indeed, he criticizes reliance on substantive canons,<sup>262</sup> though such reliance is an important part of the landscape coherence approach. Moreover, he suggests that the corpus juris is secondary to the text in statutory construction; but in practice, many landscape-coherence Justices have proved willing to trim back a statute's apparent textual meaning to avoid constitutional problems or to maintain consistency with the interpretation given to other similar statutes.<sup>263</sup> In short, Justice Scalia's description of the ideal interpretive practice fails to acknowledge—or to justify—how much judicial puzzle-working and harmonization between various pieces of the existing legal backdrop is involved in the landscape-coherence approach.

Justice Stevens's proffered approach similarly fails to map precisely onto the actual practice of the statute-specific coherence camp. First, Justice Stevens aims all of his fire at textualism, arguing that rigid adherence to the statute's text is improper when it results in an incoherent message. In so defining the methodological battle, he completely ignores the role that landscape-coherence concerns—which emphasize avoiding incoherence in the legal system writ large—can play

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261. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 472 (2001) (Stevens, J., dissenting).

262. *See* Scalia, *supra* note 1, at 28–29 (“To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. . . . But . . . there is also the question of where the courts get the authority to impose them.”).

263. *See, e.g.,* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (explaining that construing the Voting Rights Act (VRA) to allow this utility district to bail out would raise serious constitutional concerns, and that the Court will not interpret a statute in a way that creates constitutional difficulties if there is some other ground upon which to dispose of the case); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1237 (2009) (explaining that reading § 2 of the VRA to require crossover districts would raise serious equal protection concerns by forcing courts to make inquiries based on racial classifications and race-based predictions, and that to the extent there is doubt about whether § 2 of the VRA requires crossover districts, the Court must resolve that doubt by avoiding the interpretation that raises serious constitutional concerns); *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (“The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to whether the Act covers the prototypical D&E procedure. ‘[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.’” (quoting *Edward J DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

in taking the interpreter's focus off of the individual statute and its specific message. Second, and relatedly, Justice Stevens justifies his preferred approach primarily through the argument that Congress should be presumed to act coherently when drafting and enacting statutes. Indeed, he considers it "disrespectful" to Congress *not* to make such an assumption.<sup>264</sup> But this focus on coherent congressional behavior ignores the fact that the Justices in the statute-specific coherence camp often rely on factors unconnected to Congress's actions when construing statutes—for example, the Court's own precedents interpreting the statute, the justness of a particular interpretation, or other practical consequences likely to result from the interpretation. Thus, while Justice Scalia's and Justice Stevens's remarks about the proper interpretive methodology touch on some of the important points of departure between the legal landscape and statute-specific coherence camps, they do not get to the bottom of what separates these two interpretive approaches: a focus on ensuring seamlessness with the rest of the legal landscape for landscape-coherence Justices versus a focus on the specific statute at issue and the consistency and coherence of its individual policy for statute-specific coherence Justices.

Hints of the statute-specific coherence approach also can be found in the longstanding interpretive methodologies referred to as purposivism and intentionalism. Purposivism instructs courts to choose the interpretation that best carries out a statute's purpose;<sup>265</sup> courts typically identify the statute's purpose from its text, legislative history, prior judicial interpretations, or other background information, such as the "mischief"<sup>266</sup> the statute was designed to correct.<sup>267</sup> Intentionalism directs the interpreter to identify and follow the original intent of the statute's drafters—to ask how the enacting Congress would have decided the question—and to construe the statute accordingly.<sup>268</sup> Both

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264. See *Barnhart*, 534 U.S. at 467, 469 ("If we assume that [the two sponsors] correctly understood their work product, the provision is coherent. . . . [T]he Court's cavalier treatment of the explanations of the statute provided . . . by [the sponsors] is disrespectful, not only to those Senators, but to the entire Senate as well. For . . . it apparently assumes that the Senators were either dissembling or unable to understand the meaning of the bill that they were sponsoring.")

265. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

266. See, e.g., *Heydon's Case*, (1584) 76 Engl. Rep. 637 (describing the "Mischief Rule").

267. See, e.g., *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 62 (2007) (gleaning the Fair Credit Reporting Act's "objective" from its statement of purpose); *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (identifying "streamlining federal habeas proceedings" as the AEDPA's "goal" based on prior judicial interpretation of the AEDPA (citing *Rhines v. Weber*, 544 U.S. 269, 277 (2005))); *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 380 (2006) (determining the purpose of § 401 of the CWA based on statements in the relevant senate committee report); see also Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269–70 (1947); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398–99 (1942).

268. See, e.g., *ESKRIDGE ET AL.*, *supra* note 102, at 690; *POSNER*, *supra* note 3, at 286–87; Pound,

interpretive theories proceed from the premise that Congress is the principal, or master, and that courts are its agents, or servants, charged with faithful execution of the enacting legislature's underlying policy objectives (purposivism) or specific intent (intentionalism).<sup>269</sup> Because both theories emphasize statutory purpose, legislative history, and legislative intent as interpretive guides, they may appear upon initial, superficial glance to equate with the approach taken by the statute-specific coherence Justices.

But there are important differences between the statute-specific coherence approach and the traditional purposive and intentionalist approaches. Purposivism and intentionalism place primary emphasis on the enacting Congress—either in terms of the policy objectives it established or in terms of its expectations regarding the application of the statute to the specific situation at issue.<sup>270</sup> The statute-specific coherence approach, by contrast, places primary emphasis on selecting an interpretation that: (1) maintains internal statutory consistency, in the sense of ensuring that the statute's various sections fit together sensibly, and that the meaning given to the provision at issue aligns with prior judicial interpretations of the statute; and (2) produces coherent policy consequences, in the sense that the interpretive rule established is fair, non-arbitrary, and not absurd.<sup>271</sup> These differences translate to the

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*supra* note 3, at 381 (“[The interpreter’s role is] to find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.”).

269. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 12–13 (2001).

270. See, e.g., Eskridge, Jr., *supra* note 32, at 1480; Eskridge Jr., *supra* note 4, at 626; Note, *Looking to Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation*, 115 HARV. L. REV. 1456, 1470–71 (2002).

271. An example may help make the differences between these approaches more concrete. In *Dada v. Mukasey*, the Court confronted an immigration statute that contained a provision granting every alien facing a court order for removal from the country the right to file one motion to reopen his or her removal proceedings. 128 S. Ct. 2307, 2310 (2008). A different provision of the same statute authorized aliens facing removal to request permission to depart the country voluntarily, in lieu of forcible removal, and if the voluntary departure request was granted, the statute required the alien to depart the country within sixty days. *Id.* The alien in the case requested and was granted voluntary departure. *Id.* at 2311. He also filed a motion to reopen his removal proceedings based on certain changed factual circumstances, including his marriage to an American citizen. *Id.* By the time his voluntary departure date arrived, the Board of Immigration Appeals (BIA) had not ruled on his motion to reopen. *Id.* The alien, accordingly, sought to withdraw his voluntary departure request and to remain in the country pending a decision on his motion to reopen. *Id.* at 2312. The statutory issue was whether an alien who has requested and received permission to depart voluntarily may withdraw his request and remain in the country in order to obtain a ruling on a motion to reopen his removal proceedings. *Id.*

A purposive interpretive approach would have dictated that the Court must identify the underlying objective of the immigration statute, or at least of the motion to reopen and/or voluntary

interpretive tool level: Purposivism focuses first and foremost on interpretive references to statutory purpose, while intentionalism focuses first and foremost on references to legislative intent.<sup>272</sup> Neither traditional approach contemplates significant reliance on Supreme Court precedent or the practical consequences of a particular interpretation, since neither of those interpretive tools sheds light on the enacting Congress's objectives or intent. The statute-specific coherence approach, by contrast, relies substantively on both Supreme Court precedent and practical consequences—and as the data in Table 2 shows, the Camp Two Justices exhibit high rates of reliance on both of these interpretive tools.<sup>273</sup>

#### B. IDEOLOGY AND THE COHERENCE DIVIDE

Interestingly, the dividing line between the two interpretive camps tracks rather neatly the liberal-conservative ideological divide, with the Court's conservative Justices tending towards landscape coherence and the Court's liberal Justices tending towards statute-specific coherence.<sup>274</sup> The reasons for this correlation are unclear, but several potential explanations come to mind. One possibility, as noted earlier,<sup>275</sup> is that Justice Scalia, who has been outspoken in his views about the illegitimacy of certain interpretative tools, namely, legislative history, purpose, and intent,<sup>276</sup> has influenced the other conservative Justices to adopt his interpretive approach. But if so, his influence has been incomplete—he

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departure provisions, and that the Court must decide the statutory question in the manner that best complied with the objective the statute was designed to achieve; an intentionalist approach would have directed the Court to attempt to divine how the enacting Congress would have resolved the issue. Yet the majority, composed of statute-specific coherence Justices plus crossover Justice Kennedy, made no mention whatsoever of the enacting Congress's intent and barely mentioned the statute's purpose. *See id.* at 2318 (including two sentences, in passing, about statute's purpose). Instead, it relied on the practical consequences that would arise from a decision not to permit the alien to withdraw his voluntary departure request. *See id.* at 2317–18 (calling it “untenable” to force aliens to make a “Scylla and Charibdys” choice between the right to file a motion to reopen and the provision requiring voluntary departure within sixty days, noting the practical reality that it often takes longer than the voluntary departure period for a motion to reopen to be decided, and decrying the unjustness of allowing a particular BIA member's backlog to determine whether an alien who has filed for both forms of relief gets to have his motion to reopen reviewed), and on inferences from the statute's structure (the whole act rule) to conclude that the most sensible construction was one that permitted the alien to withdraw his voluntary departure motion. *See id.* at 2317 (noting that the way to make sense of and give meaning to both the motion to reopen and the voluntary departure provision was to allow the alien to withdraw a request for voluntary departure if necessary to obtain a ruling on his motion to reopen).

272. *See* Eskridge, Jr. & Frickey, *supra* note 269, at 325–26, 332–33; Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 818–19 (2002); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1999).

273. *See supra* Table 2.

274. *See supra* Tables 2, 3.

275. *See supra* note 153 and accompanying text.

276. *See* Scalia, *supra* note 1, at 3–37.

has not, for example, convinced Justices Kennedy or Alito to avoid referencing statutory purpose or legislative intent.<sup>277</sup> Moreover, there are four Justices with crossover potential between the two statutory interpretation camps, but only one of these—Justice Kennedy—is considered a swing, or potential crossover, voter on ideology.<sup>278</sup> Indeed, the statutory interpretation methodology preferences of Justices Alito, Souter, and Ginsburg seem difficult to explain based purely on ideology.<sup>279</sup>

A second possibility is that the landscape versus statute-specific coherence divide reflects differences in conservative versus liberal views about the separation of powers and the proper role of the judiciary in reviewing legislative enactments. Our constitutional system is built on the premise that the best way to safeguard against tyranny is to separate the powers of government among three branches, so that each branch checks the other two.<sup>280</sup> The Founders believed that although this system of checks and balances might at times paralyze the processes of government and thwart the public will, such paralysis was a worthwhile price to pay to prevent legislative despotism.<sup>281</sup> Madison, Hamilton, and others even viewed the checks and balances as necessary brakes that would guard against impulsive legislation and ensure that only the best proposals would make it past the vetting process into law.<sup>282</sup>

277. See *supra* Tables 2, 3.

278. See, e.g., Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 41 (2009) (“The Court routinely splits five to four in cases of political import, with Justice Kennedy as the swing voter.”).

279. As explained above, I attempted in this study to assess the correlation between ideology and canon use, but the small sample size of 166 cases and 352 opinions generated numbers for the correlation between ideology and each interpretive tool that were too small from which to reach reliable observations. See *supra* Table 2. During the 2005–2008 Terms, each Justice authored somewhere between 30 and 48 opinions and most interpretive tools were referenced at a rate of somewhere between 20 and 40%; thus, the number of opinions available to be assessed for correlation between a particular interpretive tool and ideology often was at or below fifteen. *Id.*

280. See THE FEDERALIST NO. 51, at 347–49 (James Madison) (Jacob E. Cooke, ed., 1961).

281. See THE FEDERALIST NO. 73, at 496 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

It may perhaps be said, that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

*Id.*

282. See THE FEDERALIST NO. 73, at 495 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

The [secondary] inducement to conferring the [veto] power . . . upon the executive . . . is to increase the chances . . . against the passing of bad laws, through haste, inadvertence, or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.

*Id.*



In the post-New Deal era, however, the lines between the different branches of government have blurred somewhat, as party allegiances have replaced institutional ones<sup>283</sup> and administrative agencies with allegiances to both the executive and legislative branches<sup>284</sup> have come to play a significant role in implementing statutes.<sup>285</sup> Moreover, legislative and executive branch powers have expanded exponentially, as has the role of the federal government in regulating private and social spheres.<sup>286</sup> In the wake of these changes, it may be the case—as foreshadowed by FDR’s battle with the conservative members of the Supreme Court during the New Deal’s early years<sup>287</sup>—that conservative Justices, preferring limited government and limited federal regulation, have found it increasingly necessary to cabin the reach of ambitious legislation when interpreting statutes. That is, Justices with conservative political views may, as an ideological matter, be more wary than their liberal counterparts of congressional overreaching. Conservative Justices, therefore, consider it their role to check a statute’s meaning against established external sources such as the dictionary, the common law, prior judicial interpretations of related statutes, and other statutes enacted, in most cases, by earlier legislatures. Relatedly, they may be disinclined to interpret a statute’s text with reference to the

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283. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

284. See, e.g., Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1305 & nn.270–71 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2298 (2001); Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 850 (2004).

285. See, e.g., ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 4, 46 (1997); Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue With Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 903 (2007); see also *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (requiring courts to defer to reasonable agency interpretations of statutes).

286. See, e.g., RICHARD E. LEVY, THE POWER TO LEGISLATE 57 (2006); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727, 1819–20 (1996); Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 489 (2002); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 508 n.104 (2010).

287. During the early years of Franklin D. Roosevelt’s presidency, the Court struck down several of his most ambitious New Deal statutes on the grounds that they violated the Constitution’s separation of powers. See, e.g., *United States v. Butler*, 297 U.S. 1, 68 (1936) (“[O]ur Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act . . . is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government.”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (invalidating the National Industrial Recovery Act as an impermissible delegation of legislative power to the executive branch); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 368 (1935) (invalidating the Railroad Retirement Act as exceeding Congress’s power to regulate commerce). The rulings prompted FDR to retaliate with his infamous “court-packing” plan. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court Packing” Plan*, 1966 SUP. CT. REV. 347, 348.

untrustworthy, power-grabbing legislature's intent, purpose, or extraneous musings in the legislative history. Liberal Justices, by contrast, may be more trusting of legislatures and more sympathetic, ideologically, to legislative and executive attempts to accomplish social policy change through legislation. As a consequence, Justices with a liberal political ideology may be desirous, rather than wary, of implementing the legislature's underlying will when interpreting a statute and thus, inclined to seek out evidence of what the legislature intended for a statute to accomplish when determining the extent of that statute's reach.

Frank Easterbrook's old position in *Statutes' Domains* may also be relevant to the coherence divide. Easterbrook famously expressed a preference for cabining the reach of statutes and warned of the dangers produced when jurists interpret a statute to achieve more than the legislators who bargained and compromised over its provisions intended.<sup>288</sup> "If the court always responds to the invocation of [a] statute by attempting to read the minds of its framers and supply 'more in the same vein,' and makes its share of errors," Easterbrook argued, "every one of [those errors] will carry the statute to where costs exceed benefits."<sup>289</sup> In Easterbrook's view, fulfillment of a statute's policy to the utmost thus should not be the goal of the statutory interpreter.<sup>290</sup> Rather, "the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process."<sup>291</sup> Where no express legislative resolution has been made, Easterbrook advocated that the court should "hold the matter in question outside the statute's domain. The statute [sh]ould become irrelevant, [and] parties (and court) remitted to whatever other sources of law might be applicable."<sup>292</sup>

There are noteworthy parallels between Easterbrook's formulation and the landscape-coherence approach, which looks to sources of law external to the statute at issue to determine the statute's meaning and eschews interpretive tools that seek to "read the minds" of the statute's framers. Landscape-coherence Justices rely on common law precedent, other statutes, conventional word meanings supplied by dictionaries, and substantive canons based on constitutional or background legal norms, rather than on a statute's goals or internal history to give meaning to the statute's provisions. In this way, the landscape-coherence Justices are in a sense following Easterbrook's directive that, absent clear legislative resolution of the precise question at issue, "the statute [sh]ould become irrelevant, [and] parties (and court) remitted to whatever other sources

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288. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41 (1983).

289. *Id.* at 541.

290. *Id.* at 533-34.

291. *Id.* at 544.

292. *Id.*

of law might be applicable.”<sup>293</sup> This makes sense because the conservative Justices’ resistance to statute-specific coherence seems grounded in concerns similar to those expressed by Easterbrook. For example, reliance on “more in the same vein” interpretive sources such as statutory purpose and legislative intent will lead to extreme statutory applications that lack balance and that pursue the policy of one law to the exclusion of all others.<sup>294</sup> Moreover, the landscape-coherence Justices and Easterbrook seem to share an underlying view of the common law as superior to legislature-made statutes.<sup>295</sup>

Third, and related to the above, it is worth noting that for most of the past seventy years, the Democratic Party has controlled Congress, presumably leading to disproportionate enactment of statutes with liberal purposes and intents and to legislative history reflecting the views of liberal senators and representatives. It is possible that Congress’s political composition during this period has played some role in the conservative Justices’ aversion to statutory purpose, intent, and legislative history as interpretive tools and, conversely, has led these Justices to place greater emphasis on external legal norms, including the precedents of an increasingly conservative Court. In other words, if Congress had been controlled by the Republican Party for the past several decades, then perhaps the Roberts Court’s conservative Justices would be less dismissive of statutory purpose, intent, and legislative history, and more skeptical of the external legal landscape—as a crutch holding back desirable change—in their interpretive methodologies. This third possible explanation, at least, is somewhat measurable by comparing the conservative Justices’ rates of reference to purpose, intent, and legislative history when the statute at issue was enacted by a Republican-controlled, versus a Democratic-controlled Congress. Future work organized around the statutes at issue and the political make up of the Congresses that enacted them should seek to measure more deeply such correlations between ideology and the Court’s statutory interpretation methodology.<sup>296</sup>

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293. *Id.*

294. *See id.* at 543 (“The dominant purpose of some labor laws is to curb what is seen as the excessive power of employers over their workers; the dominant purpose of others is to curb what is seen as the excessive power of unions. What is a court to do when the union invokes one, the employer invokes another, and each asks the court to determine the case by construing the law—that is, by determining how the legislature that passed the law would have resolved this kind of case, had it been put?”).

295. *See id.* at 544 (“My suggestion is that unless the statute plainly hands courts the power to create and revise common law, the domain of the statute should be restricted to cases anticipated by its framers . . .”).

296. One recent empirical study measuring factors that contributed to the Supreme Court’s use of legislative history from 1953 to 2006 has begun down this path, finding that the level of ideological alignment between the authoring Justice and the Congress that enacted a statute is a statistically

## CONCLUSION

This Article's empirical and doctrinal analysis of the Roberts Court's 2005–2008 Terms' statutory cases confirms what prior studies of the Supreme Court's statutory interpretation methods have shown—that the Court's actual approach to construing statutes defies the traditional lines scholars have drawn between textualism and intentionalism. Contrary to the conclusions reached by prior empirical studies, however, the data and doctrinal analysis in this Article also suggest that there is something more than pure eclecticism at work in the Justices' reliance on particular interpretive tools. I have argued that that something more is a focus on ensuring coherence in the law, coupled with a philosophical dissonance over what form of coherence is most important: coherence in the external legal landscape or coherence in the internal, specific policy of the individual statute. The Justices' interpretive divide over landscape versus statute-specific coherence, I submit, gives theoretical context to much of what the Court is saying between the lines in its statutory cases and clarifies how both the majority and dissent in the same case can take a judge-as-guardian-of-coherence approach to interpreting a statute, while reaching opposing constructions. In pointing out the Justices' coherence divide, I do not mean to suggest that it is the only, or even the most important, factor at work in the Roberts Court's statutory cases. Rather, my aim in this Article has been to illuminate an overlooked, but significant, philosophical point of departure underlying the Justices' differing preferences for particular interpretive tools and, in so doing, perhaps to provide a theoretical alternative to the aging debate between textualism and intentionalism.

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significant predictor of the probability that a given statutory interpretation opinion will reference legislative history. See Law & Zaring, *supra* note 6.

## APPENDIX OF TABLES

TABLE 6A: PRACTICAL CONSEQUENCE REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Practical Consequences</b>	<b>Number of Opinions Referencing Practical Consequences</b>
Criminal statutes	45.3%	24/53
Environmental statutes	25%	6/24
Jurisdictional statutes	28%	14/50
Federal Arbitration Act	36.4%	4/11
Discrimination statutes	42.9%	21/49
Civil RICO	22.2%	2/9
Securities statutes	22.2%	2/9
Preemption statutes	36.4%	8/22
Immigration statutes	23.1%	3/13
ERISA	30%	3/10

TABLE 6B: SUPREME COURT PRECEDENT REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Supreme Court Precedent</b>	<b>Number of Opinions Referencing Supreme Court Precedent</b>
Criminal statutes	26.4%	14/53
Environmental statutes	25%	6/24
Jurisdictional statutes	66%	33/50
Federal Arbitration Act	63.6%	7/11
Discrimination statutes	61.2%	30/49
Civil RICO	66.7%	6/9
Securities statutes	33.3%	3/9
Preemption statutes	68.2%	15/22
Immigration statutes	38.5%	5/13
ERISA	40%	4/10
Discrimination statutes	61.2%	30/49

TABLE 6C: WHOLE ACT RULE REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing the Whole Act Rule</b>	<b>Number of Opinions Referencing the Whole Act Rule</b>
Criminal statutes	34%	18/53
Environmental statutes	29.2%	7/24
Jurisdictional statutes	24%	12/50
Federal Arbitration Act	45.5%	5/11
Discrimination statutes	24.5%	12/49
Civil RICO	11.1%	1/9
Securities statutes	11.1%	1/9
Preemption statutes	27.3%	6/22
Immigration statutes	38.5%	5/13
ERISA	20%	2/10

TABLE 6D: TEXT/PLAIN MEANING REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Text/Plain Meaning</b>	<b>Number of Opinions Referencing Text/Plain Meaning</b>
Criminal statutes	54.7%	29/53
Environmental statutes	58.3%	14/24
Jurisdictional statutes	36%	18/50
Federal Arbitration Act	36.4%	4/11
Discrimination statutes	38.8%	19/49
Civil RICO	66.7%	6/9
Securities statutes	33.3%	3/9
Preemption statutes	45.5%	10/22
Immigration statutes	46.2%	6/13
ERISA	20%	2/10



TABLE 7A: OTHER STATUTES REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Other Statutes</b>	<b>Number of Opinions Referencing Other Statutes</b>
Criminal statutes	39.6%	21/53
Environmental statutes	4.2%	1/24
Jurisdictional statutes	22%	11/50
Federal Arbitration Act	18.2%	2/11
Discrimination statutes	20.4%	10/49
Civil RICO	33.3%	3/9
Securities statutes	22.2%	2/9
Preemption statutes	22.7%	5/22
Immigration statutes	30.8%	4/13
ERISA	0%	0/10

TABLE 7B: DICTIONARY REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Dictionaries</b>	<b>Number of Opinions Referencing Dictionaries</b>
Criminal statutes	26.4%	14/53
Environmental statutes	41.7%	10/24
Jurisdictional statutes	12%	6/50
Federal Arbitration Act	0%	0/11
Discrimination statutes	10.2%	5/49
Civil RICO	22.2%	2/9
Securities statutes	11.1%	1/9
Preemption statutes	9.1%	2/22
Immigration statutes	23.1%	3/13
ERISA	20%	2/10

TABLE 7C: COMMON LAW PRECEDENT REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Common Law</b>	<b>Number of Opinions Referencing Common Law</b>
Criminal statutes	7.5%	4/53
Environmental statutes	4.2%	1/24
Jurisdictional statutes	6%	3/50
Federal Arbitration Act	0%	0/11
Discrimination statutes	6.1%	3/49
Civil RICO	22.2%	2/9
Securities statutes	22.2%	2/9
Preemption statutes	9.1%	2/22
Immigration statutes	23.1%	3/13
ERISA	30%	3/10

TABLE 7D: SUBSTANTIVE CANON REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Substantive Canons</b>	<b>Number of Opinions Referencing Substantive Canons</b>
Criminal statutes	17%	9/53
Environmental statutes	8.3%	2/24
Jurisdictional statutes	8%	4/50
Federal Arbitration Act	9.1%	1/11
Discrimination statutes	14.3%	7/49
Civil RICO	11.1%	1/9
Securities statutes	11.1%	1/9
Preemption statutes	22.7%	5/22
Immigration statutes	7.7%	1/13
ERISA	0%	0/10

TABLE 8A: LEGISLATIVE HISTORY REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Legislative History</b>	<b>Number of Opinions Referencing Legislative History</b>
Criminal statutes	30.2%	16/53
Environmental statutes	20.8%	5/24
Jurisdictional statutes	20%	10/50
Federal Arbitration Act	9.1%	1/11
Discrimination statutes	30.6%	15/49
Civil RICO	22.2%	2/9
Securities statutes	33.3%	3/9
Preemption statutes	18.2%	4/22
Immigration statutes	7.7%	1/13
ERISA	0%	0/10

TABLE 8B: INTENT REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Intent</b>	<b>Number of Opinions Referencing Intent</b>
Criminal statutes	24.5%	13/53
Environmental statutes	20.8%	5/24
Jurisdictional statutes	14%	7/50
Federal Arbitration Act	9.1%	1/11
Discrimination statutes	22.4%	11/49
Civil RICO	11.1%	1/9
Securities statutes	33.3%	3/9
Preemption statutes	31.8%	7/22
Immigration statutes	7.7%	1/13
ERISA	10%	1/10

TABLE 8C: PURPOSE REFERENCES BY STATUTE TYPE

<b>Subject Matter</b>	<b>Percentage of Opinions Referencing Purpose</b>	<b>Number of Opinions Referencing Purpose</b>
Criminal statutes	17%	9/53
Environmental statutes	37.5%	9/24
Jurisdictional statutes	24%	12/50
Federal Arbitration Act	18.2%	2/11
Discrimination statutes	20.4%	10/49
Civil RICO	22.2%	2/9
Securities statutes	44.4%	4/9
Preemption statutes	40.9%	9/22
Immigration statutes	30.8%	4/13
ERISA	10%	1/10

## CODEBOOK

Note: For all of these canons/tools of interpretation, opinions should NOT be marked as utilizing the canon/tool if it mentions the canon as an argument raised by a party but then rejects/declines to rely on that canon in the case. For example, coders should not count the case as one which utilizes the Dictionary Rule if the Court mentions a definition given by a dictionary but rejects it as inaccurate or not reflecting common usage; nor should they count the case as one in which the Court engages in Agency Deference if the Court discusses the agency's interpretation but rejects it and goes on to interpret the statute differently.

*AdditionalInfo* = A variable recording additional legislative history information. Code "1" if the opinion is one in which Justice Scalia refused to join because of its legislative history use. Code "2" if the opinion is one that relies on the evolution of the statute, rather than on committee reports, floor debates, or other internal legislative records about the process of statutory enactment. Code "3" if the opinion is one that references both the evolution of the statute and internal legislative records. Code "4" if the opinion is one that references or draws inferences based on legislative inaction. Code "o" if the opinion does not fit one of the above special cases.

*Agencysimp* = Code "1" if the opinion defers to the relevant agency's interpretation of the statute. Code "o" if the opinion does not mention or if it rejects/goes against the agency's interpretation of the statute.

*Author* = Name of the Justice who authored the opinion being coded. Code "o" for per curiam opinions; "1" for opinions authored by Justice Scalia; "2" for opinions authored by Justice Thomas; "3" for opinions authored by Chief Justice Roberts; "4" for opinions authored by Justice Alito; "5" for opinions authored by Justice Kennedy; "6" for opinions authored by Justice Souter; "7" for opinions authored by Justice Ginsburg; "8" for opinions authored by Justice Breyer; and "9" for opinions authored by Justice Stevens.

*Case Name* = Name of case.

*Case Term* = Supreme Court Term during which the case was argued.

*Common Law Precedent* = Code "1" if the opinion references common law precedent or analogizes to common practice in the same or another area of law (for example, "failure to exhaust is treated X way in the administrative law and criminal law contexts"). Code "o" if no reference



is made to common law precedents or practices, or if the opinion considers but rejects such precedents or practices.

*Dictionary Rule* = Code “1” if the opinion cites and references one or more dictionary definitions; note the dictionary(ies) cited. Code “0” if the opinion does not reference a dictionary or if it considers and rejects a dictionary definition.

*Docket Number* = The Supreme Court’s docket number for the case.

*Grammar Canons* = Code “1” if the opinion references one or more grammar rules. Code “0” if the opinion does not reference grammatical rules or rejects their use.

*Ideology* = Imported Spaeth database coding for ideological outcome of the opinion. “1” denotes a conservative opinion outcome, “2” denotes a liberal opinion outcome, “0” denotes an indeterminate ideological outcome.

*Intent* = Code “1” if the opinion references Congress’s intent or presumed intent. Code “0” if the opinion does not reference legislative intent or rejects reliance on legislative intent.

*Landscape v. Statute-Specific* = A group variable allowing for comparisons between the landscape- and statute-specific Justices taken together. Code “1” if the opinion was authored by Justices Scalia, Thomas, Roberts, Alito, or Kennedy. Code “2” if the opinion was authored by Justices Souter, Ginsburg, Breyer, or Stevens. Code “0” if the opinion was a per curiam one.

*Langgram* = Code “1” if the opinion references either grammar canons or linguistic canons, or both. Code “0” if it does not. (If the opinion was coded “1” for either grammar or linguistic canon use, then it should be coded “1” for this variable as well).

*LanGRWA* = Code “1” for opinions that reference any one or more of the following: language canons, grammar rules, and/or the whole act rule. Code “0” for opinions that do not reference any of these interpretive tools.

*Language Canon* = Code “1” if the opinion references linguistic canons such as *eiusdem generis*, *noscitur a sociis*, *expressio unius*, or other word association canons. Code “0” if it does not or if it rejects linguistic canon arguments.

*Leghistsimp* = Code “1” if the opinion references legislative history documents or references the evolution of the statutory provision at issue. Code “0” if the opinion does not reference legislative history.

*Legislative History* = Code “1” if the opinion uses legislative history to corroborate an interpretation dictated by other tools or canons or if the opinion actively references the legislative history to reach its result. Specify the kind and source(s) of legislative history cited. Code “0” if the opinion does not reference legislative history or rejects legislative history use.

*Legislative Purpose* = Code “1” if the opinion references the statute’s purpose or goals. Code “0” if the opinion does not reference the statute’s purpose or goals or if it rejects arguments based on the statute’s purpose or goals.

*Margin* = Code “0” for unanimous cases, “1” for 5-3 or 5-4 margin cases, “2” for wide margin cases with 6 or more justices voting in the majority, “3” for cases decided by a plurality of 4-1-4.

*Marginsh* = Stands for marginshare, a simplification of the “margin” variable. Code “0” for unanimous cases, “1” for close margin cases decided 5-3/5-4 or 4-1-4 (i.e., cases where there are fewer than 6 justices joining the majority), “3” for wide margin cases with 6 or more justices joining the majority.

*Martype* = A simplified variable that does not distinguish between close margin and wide margin cases. Code “0” for unanimous cases, “1” for divided vote cases.

*Opinion* = Code “1” for majority opinions, “2” for concurrences, “3” for dissenting opinions, “4” for partially concurring/partially dissenting opinions, “5” for part majority/part concurring opinions, “6” for plurality opinions.

*Other Statutes* = Code “1” if the opinion references other statutes (any reliance on other statutes, whether state or federal). Code “0” if the opinion does not reference other statutes or rejects analogies to other statutes.

*Practical Consequences* = Code “1” if the opinion references the practical consequences that would follow from a particular interpretation or outcome in reaching its construction of the statute, including references

to the absurdity doctrine, the practical difficulty of administering the rule created by the interpretation, the justness or fairness of an interpretation, the interpretation's predicted effect on judicial or other government institutions' resources, the interpretation's effect on the clarity or predictability of the legal rule in the relevant area of the law, and the interpretation's consistency with the policy of the statute. Code "0" if the opinion does not reference the practical consequences that would flow from a particular interpretation, or if the opinion rejects arguments based on practical consequences.

*Practical Type* = Code "1" for opinions that reference practical consequences that focus on the administrability of an interpretation—that is, opinions that discuss the practical difficulty of administering the rule created by the interpretation, the interpretation's predicted effect on judicial or other government institutions' resources, or the interpretation's effect on the clarity or predictability of the legal rule in the relevant area of the law. Code "2" for opinions that reference practical consequences that focus on the internal statutory consistency or the constancy of the policy created by the interpretation—that is, opinions that reference absurdities created by an interpretation, the justness or fairness of an interpretation, or the interpretation's consistency with the underlying policy of the statute. Code "3" for opinions that reference both administrability and consistency-type practical consequence concerns. Code "0" for opinions that make no reference to the practical consequences of an interpretation.

*Scalia, Thomas, Roberts, Alito, Kennedy, Souter, Ginsburg, Breyer, Stevens* = Each Justice's name is a separate variable coded for agreement in the case. Code "0" for Author Majority; "1" for Joined Majority/Plurality; "2" for Joined Concurrence; "3" for Joined Dissent; "4" for Joined Majority and Concurrence; "5" for Not Participating; "6" for Authored Concurrence; "7" for Authored Dissent; "8" for Authored Dissent & Joined a Dissent; "9" for Authored Concurrence + Joined Majority; "10" for Joined 2 Dissents; "11" for Authored a Concurrence/Dissent; "12" for Authored a Concurrence + Joined a Concurrence; "13" for Authored Concurrence + Partially Joined a Dissent; "14" for Concurrence + Partially joined Majority; "15" for Authored Concurrence/Dissent + Partially Joined Majority; "16" for Joined a Part Concurrence/Part Dissent; "17" for Authored Concurrence/Dissent + Joined Dissent; "18" for Partially Joined Majority + Joined a Concurrence/Dissent; "19" for Partially Joined Majority + Joined a Concurrence/Dissent + Authored a Concurrence/Dissent; "20" for Partially Joined Majority; "21" for voted to grant a writ.

*Subject Area* = Statute or field of law of statute being interpreted. Code “1” for criminal statutes; “2” for environmental statutes; “3” for jurisdictional statutes; “4” for the Internal Revenue Code; “5” for the Federal Arbitration Act; “6” for discrimination-related statutes; “7” for the Individuals with Disabilities Education Act (IDEA); “8” for civil RICO; “9” for securities statutes; “10” for antitrust statutes; “11” for preemption statutes; “12” for the Federal Tort Claims Act (FTCA); “13” for the Bankruptcy Code; “14” for immigration statutes; “15” for ERISA; “16” for the Federal Communications Act; “17” for the Prison Litigation Reform Act; “18” for the Patent Act; “19” for the False Claims Act; “20” for the Anti-Terrorism and Effective Death Penalty Act (AEDPA); “21” for the Federal Employers Liability Act (FELA); and “22” for other statutes.

*Substantive Canons* = Code “1” if the opinion references a substantive canon – i.e., a background constitutional or policy norm or a rule about how a particular kind of statute is to be construed. Specify which substantive canon is being used. Code “0” if no substantive canon is referenced or if the opinion rejects a substantive canon as inapplicable.

*Supreme Court Precedent* = Code “1” if the opinion references prior case law (Supreme Court opinions) interpreting the same statute or interpreting the same or similar words in a different statute. Code “0” if the opinion does not reference prior Supreme Court case law to interpret the statute.

*Text/Plain Meaning* = Code “1” if the opinion references the clear/plain/ordinary/natural meaning, usage of a word, or the text/language of a statute in construing a word or phrase in the statute. Does not count mere quotation of statutory language at issue without more, and does not count comments that the text is ambiguous. Code “0” if no mention is made of statutory text or plain meaning, or if the opinion merely comments that the text is ambiguous.

*Whole Act Rule* = Code “1” if the opinion references different parts of the statute at issue to determine the meaning of the provision/words at issue (common variants include the rule against derogation, meaning that different parts of a single statute must be consistent in their policy implications, and that one part of a statute should not be interpreted in a manner that derogates or undermines another part; the rule of meaningful variation, which dictates that if one part of the statute says *X*, and another similar part omits *X*, the difference is assumed to be intentional and to require a different interpretation; the rule against superfluity, which dictates that one part of a statute should not be

interpreted in a manner that renders another part of the same statute redundant or superfluous, and so on). Code "o" if the opinion does not reference the whole act rule or if it considers and rejects whole act rule arguments.