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Dueling Canons

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ABSTRACT

This Article offers the first targeted study of the Supreme Court's use of canons and other tools of statutory interpretation in a "dueling" manner—that is, in both the majority and dissenting opinions in the same case, to support opposing outcomes. Taking its inspiration from Karl Llewellyn's celebrated list of canons and countercanons, this Article examines how often and in what ways the members of the Roberts Court counter each other's references to particular interpretive tools when disagreeing about the proper reading of a statute. Many of the Article's findings are unexpected and undermine the assumptions made by some of the most prominent theories of statutory interpretation. Most notably, the data reveal that several of textualism's most-favored interpretive tools are at least as susceptible to dueling use as the purposivist tools that textualists have long denigrated as indeterminate and readily subject to judicial manipulation. For example, the study shows that the Justices dueled extensively over the meaning of statutory text. By contrast, they dueled at far lower rates over legislative history, purpose, and intent. Moreover, the Justices dueled over dictionary references, the whole act rule, and language canons at rates that were virtually identical to the rates at which they dueled over the purposivist-preferred tools. The study also reveals that the canons do not seem capable of constraining the Justices to vote against ideology and that noncanon tools of analysis, including precedent and practical-consequences-

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based reasoning, lead to higher rates of dueling than do most traditional canons or tools of statutory interpretation. After reporting the data, the Article examines doctrinal patterns in how the Justices duel over individual canons and explores the theoretical implications of the Justices' dueling canon use.

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INTRODUCTION

> Judge A is an appellate-court judge tasked with interpreting a criminal sentencing-enhancement statute. She believes that there is a strong argument based on the *expressio unius* canon[1] that the enhancement provision does not apply to the defendant in the case.
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> Judge B, who is sitting on the panel with Judge A, believes that the purpose of the sentencing statute covers conduct like the defendant's and that the enhancement therefore should apply.
>
> Will Judge B write an opinion that relies on statutory purpose alone, or will he search for an opposing language canon to counter Judge A's expressio unius argument? Will Judge A's opinion confine itself to discussing the expressio unius canon, or will it also seek to demonstrate that her interpretation is consistent with the statute's purpose—perhaps framing that purpose in different terms than Judge B's opinion? How easy will it be for Judge A and Judge B to find countervailing purpose or language canon arguments, if they seek to counteract each other in this manner?

If we extrapolate from the above hypothetical, two larger questions emerge: To what extent do judges tailor the interpretive tools they discuss in statutory opinions to counter the tools referenced by opposing opinions in those same cases? Or, put somewhat differently, to what extent do various canons or tools of statutory interpretation lend themselves to "dueling" use, such that they can be employed to support competing statutory constructions? These are two important, yet rarely asked, questions in statutory interpretation. Both questions implicate some of the key theoretical debates in the field—such as whether certain interpretive tools constrain judges more than others—and both are deeply tied to underlying views about the proper role of judges.

In 1950, Columbia Law Professor Karl Llewellyn offered a memorable answer to the second question, in what has been called "one of the most celebrated law review articles of all time."[2] The article famously challenged the view that the canons of statutory

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1. The *expressio unius* canon is based on a Latin maxim, "*expressio unius est exclusio alterius*," which dictates that the express inclusion of one item implies the exclusion of other items not listed. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 852–54 (4th ed. 2007).

2. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 593 (1992).

construction provide neutral, predictable legal rules that lead courts to one "correct" reading of a statute.[3] Its most feted feature is a list of twenty-eight pairs of canons and countercanons, which Llewellyn labeled "thrusts" and "parries." The article's demonstration that the canons readily can be used to cancel each other out has been taken to demonstrate the canons' illegitimacy and has served as a catalyst for discussions about the ability of interpretive tools to constrain judges.[4]

But to show that the canons (or other tools of construction) are *capable* of being used by judges in a discretionary, canceling-out manner is not to say that they *will* be used in such a manner. Theoretical possibility is not the same as actual judicial practice.

This Article takes Llewellyn's famous juxtaposition of canons and countercanons as its inspiration and examines the extent to which the modern Supreme Court actually duels over the most common statutory interpretation canons and tools in opposing opinions in the same case. That is, the Article identifies the extent to which a majority (or occasionally, concurring) opinion's reference to a particular canon or tool is countered by a dissenting opinion's offsetting reference to the *same* canon or tool, in the same case. Notably, the Article measures a different kind of judicial dueling over interpretive canons and tools than that suggested by Llewellyn's "thrusts" and "parries": the Article counts as dueling those instances in which a majority and dissenting opinion in a case invoke the *same* interpretive tool to reach different readings of the statute. It does not measure instances in which a majority opinion invokes one tool (e.g., purpose) and the dissenting opinion counters by relying on another tool (e.g., text or a language canon). The reasons for this methodological choice are elaborated in Part II.A.

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3. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

4. *See, e.g.*, William N. Eskridge, Jr., *Norms, Empiricism, And Canons In Statutory Interpretation*, 66 U. CHI. L. REV. 671, 679–80 (1999); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547–48 (1992); John F. Manning, *Continuity and Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1863–64 (2004); John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2d 283, 283 (2001) ("Llewellyn largely persuaded two generations of academics that the canons of construction were not to be taken seriously."); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–14 (1983); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 923 (1992) (noting that the canons have been "interred" by Llewellyn's essay); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989). *But see* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1190 ("Llewellyn's critique of the maxims appears overstated.").

Despite the Llewellyn article's tremendous influence on statutory interpretation scholars, only two empirical studies to date have considered, even in passing, the extent to which majority and dissenting opinions rely on the same interpretive canons to counter each other's constructions of the same statute.[5] One of the studies was limited to employment law and only briefly discussed dueling references to language and substantive canons.[6] The other focused exclusively on the Supreme Court's use of legislative history and paid only passing attention to judicial dueling over this tool.[7] No study has examined whether, or to what extent, the Court uses the canons in a dueling manner when construing statutes dealing with subjects other than employment law. And, importantly, no study to date has compared the extent to which the Court uses other traditional statutory interpretation tools such as purpose, dictionaries, the common law, and the like in a dueling fashion, *period*. This Article offers the first empirical evidence of this kind, going beyond the linguistic and referential canons contained in Llewellyn's list,[8] and also exploring the extent to which majority and dissenting opinions duel over the full array of other statutory interpretation tools.[9]

Thus far, statutory interpretation theory has operated with a blind spot regarding the extent to which particular interpretive tools and canons are used to support competing statutory constructions in the same case. Scholars and jurists have made assumptions about how manipulable they *think* certain interpretive tools are, but no one has tested those assumptions systematically or examined how judges use

5. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 4 (2005) [hereinafter Brudney & Ditslear, *Canons of Construction*]; David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1654 (2010). Both of these studies measured judicial dueling by counting instances in which a majority opinion's reference to a particular interpretive resource (e.g., a language canon or legislative history) was countered by a dissenting opinion's reference to the same interpretive resource. That is, both of these studies defined "dueling" the same way that this Article does—rather than counting how often the majority opinion in a case invoked one interpretive tool (a "thrust") while the dissenting opinion countered with a different canon or tool (the "parry"), as suggested by Llewellyn's famous list.

6. Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 65 tbl.XII, 68 & n.222, 96–102.

7. Law & Zaring, *supra* note 5, at 1736–38, 1739 tbl.9.

8. *See, e.g.*, Eskridge & Frickey, *supra* note 2, at 595 & nn.2–3 (characterizing "Thrust But Parry" numbers 2–6, 8–10, and 13–14 as referential canons and numbers 11–12 and 15–28 as linguistic canons).

9. For a detailed explanation of this Article's methodology, see *infra* Part II.A.

interpretive tools to counter each other in practice. This Article begins to address that lacuna.

The Article's findings are surprising, and intriguing, for statutory interpretation theory. Five points stand out: (1) the overall rate of dueling canon or interpretive tool use in the Roberts Court's first five terms was low—at or below 25.0 percent for most tools;[10] (2) the rates of dueling for text/plain meaning and precedent were much higher than for other tools, at 42.7 percent and 63.3 percent, respectively;[11] (3) the rate of judicial dueling over most textualist-preferred interpretive tools was roughly the same (about 25.0 percent) as the rate of judicial dueling over purposivist-preferred interpretive tools;[12] (4) statutes dealing with certain subject areas—criminal law, environmental law, and antidiscrimination law—showed particularly high rates of dueling;[13] and (5) none of the canons or tools seemed capable of constraining the Justices' tendency to vote consistently with their ideological preferences, at least in divided-vote cases.[14]

These empirical findings have important implications for some of the key debates in statutory interpretation. They are particularly relevant to theoretical approaches that emphasize predictability or seek to constrain judicial discretion. For example, the findings call into question some of textualism's (and in particular Justice Scalia's) claims about the unique manipulability of interpretive tools like purpose, intent, and legislative history as compared to text, language canons, dictionary references, and "other statutes."[15] The findings also cast some doubt on purposivism's claims that reliance on legislative history, relative to other interpretive resources, helps courts act as faithful agents of the legislature.[16] The findings even have implications

10. *See infra* Table 1; discussion *infra* Part II.B.1.

11. *Id.*

12. *Id.*

13. *See infra* Table 3a; discussion *infra* Part II.B.2. Of the eighty-eight cases in the dataset that contained judicial dueling over one or more statutory interpretation-specific tools, 26.1 percent involved a criminal statute, 13.6 percent involved an antidiscrimination statute, and 6.8 percent involved an environmental statute.

14. *See infra* Part II.B.3; Tables 6a–6g, 8. In the subset of cases decided unanimously, by contrast, some of the interpretive tools consistently correlated with votes against individual Justices' ideology. *See infra* notes 127–36; Table 7.

15. "Other statutes" is an interpretive tool that directs interpreters to compare how courts in previous cases have interpreted identical or similar language in other statutes addressing issues similar to the statute at issue. *See, e.g.*, Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 871 (2012).

16. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548–49 (1998); John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 1–2 (2005).

for pragmatism—a theoretical approach that does not claim to promote predictability or constrain judges—because the data confirm that practical consequences play a significant role in the judicial interpretation of statutes, and because they show that judges duel along predictable lines with respect to this interpretive tool. Specifically, the data reveal that most of the Court's dueling over practical consequences involves one opinion that emphasizes administrability-type practical concerns and an opposing opinion that emphasizes policy-constancy concerns.[17]

The Article also engages in doctrinal analysis of *how* precisely majority and dissenting opinions invoke the same interpretive resource to reach different readings of a statute. This analysis reveals some noteworthy patterns in the Court's dueling over particular canons. For example, in applying the plain meaning rule, the Justices often divide over the prototypical, core meaning versus the legalist meaning of key statutory text.[18] Similarly, when dueling over a statute's purpose, the Justices who favor one reading of the statute sometimes focus on a generalized purpose, while those who favor an opposing reading focus on a narrower, more specific purpose. These patterns provide valuable insights and add texture to our understanding of how the Court applies the tools of statutory construction. The patterns also suggest that it may be possible to eliminate some of the dueling that occurs over certain interpretive tools—through clearer meta-rules about how those tools should be applied.[19]

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17. *See infra* Part III.A.4. This administrability versus policy-constancy divide is one that I describe in earlier empirical work regarding the Roberts Court. *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 244–45 (2010). Briefly, administrability concerns focus on an interpretation's effect on judicial resources, the difficulty of implementing the interpretation, or the clarity and predictability of the rule the interpretation creates. Policy-constancy concerns focus on whether an interpretation ensures consistent application of the statute over time, any arbitrariness created by the interpretation, or the justness of the interpretation.

18. *See* Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 997, 1002 (2011); Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2027–28, 2060–61 (2005). The prototypical meaning of a statute focuses on the "core example" that the statute was designed to reach, whereas the legalist meaning looks broadly to the conceptual extension of the word at issue, often incorporating the specialized connotations and conventions the legal world has attached to the word. *See* Nourse, *supra*, at 1000–03. The differences between prototypical and legalist meaning are discussed in greater detail *infra* Part III.A.1.

19. *Cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1822–23 (2010) (describing state courts' adoption of a binding statutory interpretation methodology and

The Article proceeds in three parts. Part I examines the theoretical and empirical background for this study. Part II reports the study's findings on the Roberts Court's dueling use of interpretive canons and other tools from the middle of the 2005 term, when Justice Alito joined the Court, to the end of the Court's 2010 term. It also provides doctrinal analysis of the Court's dueling over several individual interpretive tools. Part III explores the theoretical implications of the data and doctrinal observations.

I. BACKGROUND

A. Llewellyn's "Thrusts" and "Parries"

Ironically, Llewellyn's "fiendishly deconstructive"[20] attack on the canons—the famous list of "Thrust But Parries"—was not the focus of his article. Indeed, Llewellyn included the list only at the end of the article, as an illustrative exercise.[21] His focus, instead, was on the broader legal-realist claim that judges do not decide cases based on neutral legal rules, and that neutral legal rules capable of producing a single correct answer do not in fact exist. Llewellyn had made this point earlier in the common-law context, arguing that case law precedents are highly malleable and subject to multiple, conflicting applications.[22] His article was designed to show that the same is true in the statutory interpretation context, despite the existence of numerous seemingly definitive "canons of construction."[23]

One reason why Llewellyn's list of "thrusts" and "parries" has endured, and proved so influential among academics, is because the list seems to demonstrate *concretely* that the canons are easily manipulated and, therefore, incapable of constraining judges. Llewellyn did not actually argue that courts would use his canon–countercanon pairs to reach opposing statutory constructions in the same case, but the strong implication was that judges looking to

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suggesting that federal courts might benefit from adopting some form of methodological *stare decisis* as well).

20. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983).

21. *See* Llewellyn, *supra* note 3, at 401.

22. *See, e.g.*, KARL LLEWELLYN, THE BRAMBLE BUSH 74 (1930); Karl Llewellyn, *A Realist Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 443–44 (1930); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1241–42 (1931).

23. *See* Llewellyn, *supra* note 3, at 399 ("What we need to see now is that all of this is paralleled, in regard to statutes.").

counter a statutory reading based on one canon could readily find an opposing canon to support their preferred outcome. Indeed, Llewellyn called it a "foolish pretense" for courts to justify their statutory constructions based on "a set of mutually contradictory . . . rules on How to Construe a Statute."[24]

If Llewellyn was correct that judges can readily find countercanons for every canon and that judges use the canons as after-the-fact justifications for their decisions, then we might expect, in practice, to see judicial opinions pitting canon against canon to neutralize the tools that supposedly support an opposing reading—at least in cases where judges disagree about the best reading of the statute. For example, we might expect to see dictionary definitions in a majority opinion countered by opposing dictionary definitions in the dissenting opinion, references to statutory purpose in a majority opinion (e.g., "the Civil Rights Act was enacted in order to remedy the nation's long history of discrimination against racial minorities") countered by an opposing statutory purpose in the dissenting opinion (e.g., "the Civil Rights Act's primary goal was to create a color-blind society"), and a majority opinion's reliance on the whole act rule met by reliance on a contradictory subset of the whole act rule in the dissenting opinion.[25] Although this Article does not measure the Court's use of Llewellyn's precise form of canon-for-countercanon pairings, it takes his canons-can-point-in-different-directions heuristic as inspiration for examining how often majority and dissenting opinions in the same case use the *same* canon to support different statutory constructions.

In a less-celebrated passage of his article, Llewellyn also embraced a purposivist approach to statutory interpretation. He argued that "if a statute is to make sense, it must be read in the light of some assumed purpose."[26] Llewellyn did not claim that judicial reliance on statutory purpose would be more determinate than reliance on the canons, but his simultaneous rejection of the canons and endorsement of statutory purpose raises the comparison. This is particularly so given that the New Textualism popularized by Justice Scalia takes precisely the opposite view—hailing the canons as

24. *Id.*

25. *See id.* at 404 (describing "Thrust But Parry" number 17, which says "The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute" versus "This presumption will be disregarded where it is necessary to assign different meanings to make the statute consistent").

26. *Id.* at 400.

neutral rules that enhance predictability, while arguing that statutory purpose is malleable and easily shaped to justify an individual judge's policy preferences.[27] Indeed, both Llewellyn's list and New Textualism's claims about the relative merits of different interpretive tools invite empirical analysis of the extent to which statutory purpose—as well as other noncanon tools, like legislative history—are susceptible to Llewellyn's "thrust and parry" criticism.

Part II of this Article answers these questions with data from the Roberts Court's first five terms. Before turning to the data, however, the next Section reviews the two empirical studies that have addressed judicial dueling over the canons of construction and legislative history, respectively.

B. Prior Empirical Work

As noted above, only two studies to date have attempted to measure the extent to which judges use the canons of construction against each other to support opposing readings of the same statute in the same case. The first study, conducted by James Brudney and Corey Ditslear, reviewed the Supreme Court's use of interpretive canons in every workplace-law case decided between 1969 and 2003.[28] The study focused on the extent to which the canons of construction operate as neutral legal rules, constraining the Justices' ability to interpret statutes according to their ideological preferences. Brudney and Ditslear treated "dueling canons" in passing, as a way to test claims that the canons enhance consistency and predictability and perform an important "gap-filling" function.[29] They made two findings that seem to support Llewellyn's skeptical view of the canons: (1) dissenting Justices were significantly more likely to rely on language and substantive canons when language canons were part

27. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25–27 (1997); sources cited *infra* note 186.

28. *See* Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 15–69. The Brudney–Ditslear study coded for judicial reliance on two categories of interpretive tools: language canons, which the study defined to include grammar rules, Latin maxims, the whole act rule, and the *in pari materia* rule, and substantive canons, defined as judicial presumptions based on constitutional and common-law norms about how statutes should be interpreted. *Id.* at 12–13.

29. *See* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 147, 151–53 (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994) ("One goal . . . of the canons, is to lower the costs of drafting statutes. . . . The Court can perform a valuable coordinating function by generating 'off-the-rack,' gap-filling rules that are accessible ex ante to the drafters."); Shapiro, *supra* note 4, at 943.

of the majority's reasoning than when they were not; and (2) the canons failed to constrain the Justices' ideological preferences, as conservative Justices tended to use the canons to reach conservative results, while liberal Justices tended to use the canons to reach liberal outcomes.[30] Based on these findings, the authors concluded that, "in divided decisions, the Justices themselves are more prone to view the canons as reasonably amenable to supporting either side."[31]

In a subsequent article expanding on their original study, Brudney and Ditslear found some evidence that judicial reliance on legislative history does have a constraining effect on judicial ideology. Specifically, they reported that liberal Justices were more likely to vote in favor of employer interests when they invoked legislative history,[32] and that, during the Burger Court, conservative Justices were more likely to vote in favor of worker interests when they relied on legislative history.[33] However, Brudney and Ditslear found that after 1986, conservative Justices ruled increasingly in favor of employers (consistent with their ideological preferences), relying on canons and even legislative history to do so.[34] Brudney and Ditslear also reported what they called a "Scalia Effect," finding that liberal Justices opted not to rely on legislative history in a series of proemployer majority opinions that Justice Scalia joined, and that when liberal Justices did rely on legislative history, Justice Scalia was significantly less likely to join their majority opinions, even when he voted for the same result.[35] Conversely, the authors found that Justice Scalia's resistance to legislative history did not extend to majority opinions authored by his conservative colleagues; that is, he was just as likely to join his conservative colleagues' majority opinions when they relied on legislative history as when they did not.[36]

These findings are significant, particularly given the large sample size of workplace-law cases examined by Brudney and Ditslear. But the findings also are limited in their generalizability because, as Brudney and Ditslear acknowledged, their study examined cases in

30. Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 57–60.

31. *Id.* at 98.

32. *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 143–44 & tbl.6 (2008) [hereinafter Brudney & Ditslear, *Legislative History*].

33. *Id.* at 144 tbl.6.

34. *Id.* at 142–44; Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 6.

35. Brudney & Ditslear, *Legislative History*, *supra* note 32, at 160–69.

36. *Id.* at 169–70.

only one subject area—workplace law.[37] It is thus unclear whether the significant level of dueling that Brudney and Ditslear found over language and substantive canons is representative of how the Justices use the canons in all statutory interpretation cases. Moreover, Brudney and Ditslear, like Llewellyn, focused exclusively on language and substantive canons. But there are many other interpretive tools that courts regularly use to construe statutes—including the plain meaning rule, purpose, legislative history, dictionary definitions, and congressional intent. And there are non-statute-specific tools of legal analysis, such as precedent and practical consequences, which recent empirical work has shown to play a significant role in the judicial interpretation of statutes.[38] The Brudney–Ditslear study thus provides an incomplete picture of how the Court duels over statutory interpretation tools other than language and substantive canons, leaving open the questions of how susceptible other tools are to competing inferences and whether such tools provide any constraining effect on judges' ability to vote according to their ideological preferences.

The second empirical study to date on judicial dueling is David Law and David Zaring's comprehensive study of the Supreme Court's use of legislative history.[39] Law and Zaring studied every Supreme Court statutory interpretation case decided from 1953 to 2006. Their focus was on identifying legal factors that might influence the Court to rely on legislative history, such as the age or length of a statute.[40] Like Brudney and Ditslear, they examined judicial dueling over legislative history only in passing, as a small part of their larger project about legislative history use.[41] And, like Brudney and Ditslear, Law and Zaring found that dissenting Justices were significantly more

37. Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 26–27.

38. *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, 5, 12, 18, 21 (1998); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1107–08 (1992); *see also* Krishnakumar, *supra* note 17, at 236–37 & tbl.1 (reporting that practical consequences were the third most frequently cited interpretive resource cited by the Roberts Court during its first three-and-a-half terms, showing up in 51.8 percent of all statutory cases decided during that time period).

39. Law & Zaring, *supra* note 5.

40. Additional variables for which Law and Zaring coded were the complexity and obscurity of the statute, as well as the number of times the statute was amended. *See id.* at 1689–98.

41. *See id.* at 1738.

likely to cite legislative history when a majority or concurring opinion also cited legislative history than when no other opinion cited this interpretive resource.[42] Law and Zaring hypothesized that these data "suggest that Justices are sensitive to the types of arguments made by their colleagues and feel an obligation or desire to respond in kind, especially when they disagree with one another on the merits."[43]

Law and Zaring's findings, like Brudney and Ditslear's, are important, especially given the depth and breadth of their sample size—all cases before the Court that involved statutes over a fifty-year period. Their study was not limited by subject area, so their findings are less likely to be distorted by partisanship, judicial impressions of congressional expertise, age of a statute, obscurity, or other concerns that might be particular to one area of the law. But Law and Zaring examined judicial dueling over only one interpretive tool—legislative history—shedding no light on competing judicial invocations of the numerous other canons and tools of statutory construction. Thus their study, too, only scratches the surface in exploring how Justices authoring an opinion respond to interpretive canons and tools used by an opposing opinion.

The next Part seeks to provide a more complete picture of the Justices' dueling over multiple interpretive tools as well as to explore doctrinally how the Justices engage each other's use of particular interpretive tools.

II. FINDINGS

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)[44] through 2010 terms that confronted a question of statutory interpretation. Every case decided during that period was examined through the Supreme Court's online database to determine whether it dealt with a statutory issue.[45] Any case in which

42. *Id.*

43. *Id.*

44. This is the date that Justice Alito joined the Court. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/about/biographies.aspx [http://perma.cc/8HLT-QVKN].

45. *See Opinions*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/opinions/opinions.aspx [http://perma.cc/P5SJ-ENZP]. The Court's online database currently only goes

the Court's opinion contained a discussion about statutory meaning was included in the study. Cases interpreting the Federal Rules of Civil Procedure were not included,[46] but a handful of constitutional cases in which the Court construed the meaning of a federal statute before deciding the constitutional question were included.[47] This selection methodology yielded 255 statutory cases over five-and-a-half terms, with 255 majority or plurality opinions, 103 concurring opinions, 156 dissenting opinions, 12 part-concurring/part-dissenting opinions, and 2 part-majority/part-concurring opinions, for a total of 528 opinions.[48] Of these, 115 cases were decided unanimously, and 140 were decided by a divided vote.

In coding and analyzing these cases, 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) statutory text, including appeals to plain meaning; (2) dictionary definitions; (3) grammar rules; (4) the whole act rule; (5) other federal and state statutes; (6) common-law precedent; (7) substantive canons; (8) Supreme Court precedent; (9) statutory purpose; (10) practical consequences; (11) legislative intent; (12) legislative history; and (13) language canons such as *noscitur a sociis* and *expressio unius*.[49]

These interpretive sources are consistent with those examined in other empirical studies of the Court's statutory interpretation

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back to the 2009 Term, *id.*, but when I began coding cases in 2007, it went back to the 2005 Term.

46. I made this judgment call because the Federal Rules of Civil Procedure (FRCP) are created in a manner that differs significantly from federal statutes—they are drafted by judges rather than Congress and do not require the President's approval. Accordingly, 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—e.g., legislative history, intent, the whole act rule, and other statutes.

47. In such cases, the opinion was coded as unanimous, close margin, or wide margin based on the Justices' votes regarding the statutory interpretation question only; thus, if the Justices agreed unanimously that the statute should be read to mean X, but then split regarding the constitutional validity of the statute, the opinion was coded as unanimous. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 211 (2009).

48. For a list of the cases examined in the study, see *infra* Appendix.

49. In order to reduce the risk of inconsistency, I and 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. For a detailed explanation of how the cases were coded, see Krishnakumar, *supra* note 17, Codebook at 291–96.

practices.[50] A few differences in definitions used for the different sources were inevitable and will be pointed out where notable. For example, unlike the Brudney and Ditslear study, which grouped together several interpretive tools under the heading "language canons," I counted separately references to grammar canons, language canons, and the whole act rule.[51] However, in order to allow comparison with Brudney and Ditslear's data, I also created a combined variable that coded for reliance on any one of these interpretive resources (so that if an opinion referenced at least one of these interpretive sources, it was coded as a "yes"). Further, unlike some previous studies,[52] 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 fairness of an interpretation, an interpretation's coherence or incoherence, the workability of an interpretation for lower courts, or other effects that an interpretation could be expected to produce. I also further disaggregated this interpretive tool, coding for administrability-type practical consequences concerns versus policy-constancy-type practical consequences concerns.[53]

In recording the Court's reliance on the above interpretive tools, I counted only references that reflected substantive reliance on the tool in reaching an interpretation. Opinions that mentioned a particular interpretive tool but rejected the tool as unconvincing were

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50. *See, e.g.*, Schacter, *supra* note 38, at 11–12; Zeppos, *supra* note 38, at 1089; *see generally* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009) (surveying the tools of statutory interpretation and presenting empirical findings on the Rehnquist Court's use of interpretive tools).

51. The term "grammar canons" refers to interpretive maxims that are based on basic conventions of grammar and syntax, such as "'[o]r' means in the alternative" or "[s]hall' is mandatory, while 'may' is precatory." *See* ESKRIDGE ET AL., *supra* note 1, at 856–60. The term "language canons" refers to canons that are based on Latin maxims, such as "*expressio unius est exclusio alterius*" (the inclusion of one item implies the exclusion of others not listed) or "*noscitur a sociis*" (terms in a statutory list should be interpreted in light of the other items in the list). *See id.* at 852–54. The whole act rule refers to a series of inferences that courts may draw about the meaning of one section of a statute based on how other sections of the statute are structured; it includes the rule that differences in similar or parallel statutory provisions should be deemed deliberate and intentional (the meaningful variation rule), rules dictating that the title and preamble of a statute are relevant but not dispositive in determining statutory meaning, and the rule that one section of a statute should not be construed in a manner that renders another section superfluous (the rule against superfluity). *See id.* at 862–65.

52. *See infra* Part III.A.4.

53. *See id.*; *see also* Krishnakumar, *supra* note 17, Codebook at 294 (explaining parameters for coding for references to administrability-type practical consequences versus policy-constancy-type practical consequences).

not counted. Similarly, I did not count 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.[54]

Secondary or corroborative references to an interpretive tool were counted. That is, when the Court relied primarily on one interpretive tool but went on to note that x, y, and z tools further supported that interpretation, the references to x, y, and z were coded along with the primarily relied-upon source(s).[55]

In addition, the vote margin in each case was recorded, and each case and opinion was recorded as unanimous, close margin, or wide margin (cases with six or more Justices in the majority).[56] Each Justice's vote in each case also was recorded, as was the author of each opinion. This methodology comports with my previous empirical study.[57]

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54. An example may help illustrate. In *Barber v. Thomas*, 560 U.S. 474 (2010), the majority opinion relied on the plain meaning rule, statutory purpose, and practical consequences to conclude that the phrase "term of imprisonment" in a statute allowing good time credit for good behavior by prisoners applies to the time actually served by the prisoner, rather than the time the prisoner was *sentenced* to serve. *Id.* at 479–84. In so ruling, the majority rejected a legislative history argument advanced by petitioner, finding that the cited portions of the legislative record did not address the precise interpretive question at issue. *See id.* at 485. It also rejected rule of lenity and whole act rule arguments relied on by petitioner and the dissent, stating that the rule of lenity was inapplicable because the statute was not ambiguous and that interpreting "term of imprisonment" consistently throughout the statute would contradict the statute's text (a text-trumps-whole-act-rule argument). *Id.* at 486–89. The opinion was coded for reliance on text/plain meaning, purpose, and practical consequences, but not legislative history, substantive canons, or the whole act rule.

55. For example, in *Schwab v. Reilly*, 560 U.S. 770 (2010), the Court held that when a bankruptcy debtor underestimates the value of "property claimed as exempt" on her Schedule C filing, the bankruptcy trustee is entitled to retain in the estate any actual value above that listed, even if he did not initially object to the "property claimed as exempt." *Id.* at 774. The majority opinion relied primarily on the "clear" meaning of the Bankruptcy Code's text, combined with a whole act argument. *Id.* at 782. The opinion also noted that this interpretation was consistent with the historical treatment of bankruptcy exemptions (common-law precedent), disagreed with the majority's reading of Supreme Court precedent, and cited other Supreme Court precedent supporting its interpretation. *Id.* at 786–91. The opinion was coded for references to text/plain meaning, the whole act rule, common law, and Supreme Court precedent.

56. Cases decided by a vote margin of 5–4, 5–3 (with only eight justices participating), 5–2 (with only seven justices participating), and 4–1–4 (by a plurality) were coded as "close margin" cases. If the vote margin was 6–3, either with six justices in the majority or with only five justices in the majority and one concurring and three dissenting, the case was coded as a wide margin case. A quick perusal of the full dataset (not just dueling canon cases) reveals only six cases like this (6–3 with five in the majority plus one concurring).

57. *See* Krishnakumar, *supra* note 17, at 231–33.

To measure the Court's use of interpretive canons and tools in a dueling fashion, I sorted the cases in the dataset by docket number and identified those that showed a majority *and* dissenting opinion (or a concurring *and* dissenting opinion) referencing the same canon or tool. For these purposes, I defined "same canon or tool" to mean that both the majority and dissent argued that a specific interpretive resource—purpose, dictionary definition, substantive canon—supported their respective readings of the statute. I did not count as "dueling canon" cases those in which the dissenting opinion mentioned, or even criticized, the majority's application of a particular canon or tool, unless the dissenting opinion also argued that the interpretive tool supported its reading of the statute.[58] I made this methodological choice because in my view, judicial rejections or disagreements over whether an interpretive canon applies in a particular case do not constitute disagreements over the meaning dictated by the canon. Rather, such disagreements show merely that the canon has limitations or exceptions and that the opposing opinion author found the argument from the canon powerful enough to require criticism. Further, while battles over applicability do provide some evidence that a canon does not constrain judges—who retain the discretion to refuse to apply the canon in a particular case—they do not show that the canon itself is malleable or indeterminate. That is, disagreements over applicability do not necessarily reflect an underlying looseness as to what construction the canon, if applicable, directs the Court to adopt or the canon's ready susceptibility to judicial massaging to support a judge's chosen construction. Thus, counting such disagreements as instances of "dueling canon" use would be misleading, measuring something other than how often the

58. For example, in *Dolan v. United States*, 560 U.S. 605 (2010), the Court held that a district court retained the power to order restitution to crime victims—even though the court missed the Mandatory Victims Restitution Act's 90-day deadline for establishing the amount of the victim's losses—because the court had made clear, prior to the deadline, that it would order restitution in some amount. *Id.* at 608. The majority opinion referenced several interpretive tools, including the statute's purpose of helping victims by imposing restitution on convicts. *Id.* at 613–14. The dissenting opinion argued that the statute's text did not permit such a reading, particularly given other criminal statutes that "only make[] sense against a background rule that trial courts cannot change sentences at will." *Id.* at 625–28 (Roberts, C.J., dissenting). The dissent rejected the majority's purpose argument, reasoning that the statute's broad purpose did not justify a reading that contradicts the statutory text. *See id.* at 625. The dissenting opinion was coded for references to text/plain meaning and other statutes, but not statutory purpose.

Justices used particular interpretive tools to support opposing statutory readings.[59]

I also did not count as "dueling canon" cases those in which a majority opinion relied on one interpretive canon, such as the whole act rule, while the dissenting opinion relied on another interpretive canon or tool, such as statutory purpose or a dictionary definition.[60] On the one hand, a high rate of this kind of interpretive resource dueling would provide some evidence that the interpretive canons and tools do not constrain judges by showing that judges retain significant discretion about *which* canons to apply, and which ones to privilege when different canons point in different directions. But measuring this type of dueling would not reveal very much about the indeterminacy of *individual* interpretive tools or show how often the Justices counter each other's references to specific interpretive resources. Instead, it would demonstrate only, or at least primarily, that there is no settled methodology dictating which interpretive canons and tools judges should use to construe statutes, and no hierarchy indicating the order in which they should prioritize particular tools when different tools point toward different constructions. The whole act rule is not necessarily indeterminate simply because statutory purpose points toward a different interpretation; and the entire practice of consulting canons and tools of statutory construction is not meaningless simply because judges faced with different tools pointing in different directions disagree about which tools to privilege.[61] Accordingly, in order to provide a better picture of individual canons' malleability, this study counted as dueling only those cases in which a majority opinion's reliance on purpose was countered with a dissenting opinion's reliance on purpose, or a majority opinion's reference to a dictionary definition was countered with a dissenting opinion's reference to a dictionary definition, or a substantive canon reference in a majority opinion was countered with a substantive canon reference in a dissenting opinion, and so on.

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59. *See* SCALIA, *supra* note 27, at 27 (arguing that Llewellyn's "parries" do not contradict the corresponding canon but merely show that it is not absolute).

60. In this sense, my definition of "dueling" interpretive tool use departs from Llewellyn's, as Llewellyn's thrusts and parries certainly include opposing pairs of this kind.

61. *See, e.g.*, SCALIA, *supra* note 27, at 27 ("Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud . . . .").

B. Dueling Statistics

Before reporting the data, it is important to note some limitations of this study. First, the study covers only five-and-a-half Supreme Court terms and only 255 statutory interpretation cases, decided by some combination of the same eleven Justices. While this dataset is large enough to teach us some things about the Court's use of canons and interpretive tools in a dueling manner, the data reported may reflect trends specific to the Roberts Court. Second, although the number of cases reviewed is large enough to provide some valuable insights, the focus should be on the patterns that emerge rather than on precise differences in the percentages reported. Third, in noting the canons and other interpretive tools referenced in majority and dissenting opinions, I make no claims to have discovered the Justices' underlying or "true" motivations for deciding statutory cases; the data do not reveal whether a particular opinion relied on a tool because the opinion's author was persuaded by that interpretive tool, or merely because the author felt it necessary to counter an opposing opinion's reliance on that tool. The study's empirical and doctrinal claims are confined to describing how the Justices publicly justify their statutory constructions, and to theorizing about discernable patterns in the kinds of public justifications the Justices regularly provide.

1. *Frequency of Dueling*. At the outset of this study, I expected to find higher rates of judicial dueling over dictionary definitions, legislative history, and statutory purpose and lower, but still high, rates of dueling over language canons and substantive canons. Specifically, because dictionaries contain multiple definitions for each word—and because the Justices have multiple dictionaries to choose from—I expected to find the Justices countering each other's dictionary references in the vast majority of cases—i.e., in the vicinity of 60 percent to 70 percent of the cases. I expected to find similarly high rates of judicial dueling over legislative history because resourceful lawyers can be expected to dig through the (often copious) legislative history of a statute and find some snippet to support their clients' preferred statutory construction. Further, because both proponents and opponents of a proposed law often make competing statements on the House and Senate floor about the likely effects or scope of the bill, there is a wealth of material for the Justices to invoke in support of opposing readings of a statute. With respect to statutory purpose, I expected to find high rates of judicial

dueling because statutes often have multiple purposes, again providing the Justices with ample fodder for fashioning an argument that their chosen statutory construction is more consistent with a statute's purpose than is the opposing opinion's.

For substantive canons, I expected to find lower, but still meaningful rates of judicial dueling (perhaps in the range of 30 percent to 40 percent). This expectation stemmed from the fact that substantive canons are judicially created policy norms, so they should prove relatively easy for the Justices to craft anew, or to tweak and invoke in order to lend an aura of inevitability and consistency with larger legal norms to their chosen interpretation. I similarly expected to find noteworthy rates of judicial dueling (perhaps in the 30 percent range) over language canons. This expectation was based on the fact that it is often possible to characterize the common denominator connecting statutory terms in different and competing ways, so as to support competing *noscitur a sociis* or *ejusdem generis* arguments about what a term in a list means. I also expected the rates of dueling over text/plain meaning to be lower than the rates of dueling over legislative history, purpose, and dictionary definitions. For the other canons and interpretive tools, I did not have specific expectations about how often the Justices would employ them in a dueling manner.

Table 1 lists the frequency with which the Justices on the Roberts Court employed the various canons and tools of statutory construction in a dueling fashion—that is, in both the majority and dissenting opinions in the same case—in the 255 cases decided and the 528 opinions issued from the time Justice Alito joined the Court in 2006 through the end of the Court's 2010 term.[62] For each interpretive tool, the Table first reports the number of unanimous opinions, majority opinions, and dissenting opinions that referenced the tool. It then reports the percentage of cases in which a majority and dissenting opinion in the same case both referenced the interpretive tool. This figure is calculated using as a denominator the total number of divided-vote cases in which the interpretive tool was invoked by at least one opinion (second-to-last-column) and, separately, using as a denominator the number of *all* cases—including unanimous cases—in which at least one opinion referenced the tool (last column).[63]

62. *See infra* Table 1.

63. Table 1 uses the number of cases in which at least one opinion relied on an interpretive tool, rather than the total number of cases reviewed in the study (255) as a denominator because

Table 1: Dueling Canon Use 2005–2010 Terms

	Unanimous Cases (n=115)*	**Majority Opinions (n=255)**	**Dissenting Opinions (n=155)**	**Dueling Opinions (Majority or Concurrence + Dissent)†**	**Percent Dueling In Divided-Vote Cases‡**	**Percent Dueling In All Cases°**
Supreme Court Precedent	69	157	75	58	63.7% (n=91)	32.6% (n=178)
Text or Plain Meaning	68	145	64	44	42.7% (n=103)	25.3% (n=174)
Dictionary Rule	28	75	25	16	28.6% (n=56)	18.2% (n=88)
Other Statutes	80	44	33	20	34.5% (n=58)	21.1% (n=95)
Language Canons + Whole Act Rule	54	117	40	21	24.7% (n=85)	14.1% (n=149)
Whole Act Rule	56	103	35	17	21.8% (n=78)	12.7% (n=134)
Grammar or Linguistic Canons	19	38	14	4	13.3% (n=30)	8.2% (n=49)
Substantive Canons	17	37	26	3	6.8% (n=44)	4.9% (n=61)
Common Law	25	40	12	6	22.2% (n=27)	11.5% (n=52)
Purpose	30	75	47	20	24.7% (n=77)	19.6% (n=107)

I believe the former is a better measure of the rate at which the Court "dueled" over the canons and other interpretive tools. If Table 1 used the total number of cases in the dataset as the denominator for calculating the rate of dueling, that would count as potential dueling canon cases those cases in which no member of the Court referenced a particular canon or tool. But cases in which no opinion referenced a particular interpretive tool might be cases in which no on-point legislative history existed, or in which no other statutes were analogous to the one at issue, and so on. In any event, it would not provide a good measure of how frequently the Justices found it necessary to counter each others' claims that a particular interpretive resource supported a particular statutory construction. For the sake of thoroughness, I note that if Table 1 were to use the total number of cases in the dataset (255) as the denominator for its calculations, the rates of dueling would be significantly lower for every interpretive canon and tool (e.g., SCP – 22.7%, Plain Meaning – 17.3%, Dictionary – 6.3%, Other Statutes – 7.8%, Language/Whole Act – 8.2%, Purpose – 7.8%, Practical Consequences – 11.4%, Intent – 5.1%, Legislative History – 7.5%).

	Unanimous Cases (n=115)*	**Majority Opinions (n=255)**	**Dissenting Opinions (n=155)**	**Dueling Opinions (Majority or Concurrence + Dissent)†**	**Percent Dueling In Divided-Vote Cases‡**	**Percent Dueling In All Cases°**
Practical Consequences	45	93	69	29	30.9% (n=94)	20.9% (n=139)
Intent	22	40	39	13	26.5% (n=49)	18.3% (n=71)
Legislative History	32	74	47	19	25.3% (n=75)	17.6% (n=108)

* This column reports the number unanimous cases in which the majority opinion invoked an interpretive tool to support its chosen construction.

** This column includes a small number of double-counts for cases in which more than one dissenting opinion referenced the interpretive tool.

† This column counts the number of cases in which both the majority and one or more dissenting opinions relied on the interpretive tool to support its construction and a few cases in which a concurring opinion and at least one dissenting opinion relied on the interpretive tool. As explained in the article's methodology section, the figures reported in this column do not include cases in which one opinion relied on the interpretive tool and an opposing opinion rejected the tool as inapplicable or criticized the opposing opinion's reliance on the tool.

‡ Percentages in this column were calculated by dividing the number of cases that dueled over this interpretive tool (reported in previous column) by the number of divided-vote cases in the dataset in which at least one opinion relied on the tool to support its statutory construction (reflected in the figure n=90 for Supreme Court precedent, n=104 for Text/Plain meaning, and so on).

° Percentages in this column were calculated by dividing the number of cases that dueled over this interpretive tool (reported in the fourth column) by the total number of cases in the dataset in which at least one opinion relied on the tool to support its statutory construction, including unanimous cases (reflected in the figure n=177 for Supreme Court precedent, n=175 for Text/Plain meaning, and so on).

The data reveal several surprising results. First, prior Supreme Court precedent and text/plain meaning show very high rates of dueling during the Roberts Court's first five-and-a-half terms—the Justices dueled over the application of Supreme Court precedent in 63.7 percent of the divided-vote cases in which at least one opinion cited precedent, and they dueled over text/plain meaning in 42.7 percent of the divided-vote cases in which at least one opinion found a clear statutory meaning.[64] (The percentages are significantly lower when unanimous cases are included in the count, but still higher than for other interpretive resources). Practical consequences and other statutes exhibited the next-highest rates of dueling, generating

64. *See supra* Table 1.

competing judicial references in 30.9 percent and 34.5 percent of the divided-vote cases that referenced either resource, respectively. By contrast, the Justices dueled over purpose, legislative history, and intent in roughly 25.0 percent of the cases in which they invoked these tools. The rates for these interpretive tools are almost identical to the rates at which the Justices dueled over textualist-preferred tools, such as dictionary definitions (28.6 percent), the whole act rule (21.8 percent) and the combined grammar/language canons/whole act rule (24.7 percent), and the common law (22.2 percent). Finally, the data revealed that the Justices rarely dueled over substantive canons, at a rate of just 10.4 percent.[65]

In short, the Court engaged in the highest rates of dueling canon or interpretive tool use when invoking traditional tools of legal analysis—i.e., precedent, text, and to a lesser extent, practical consequences—not when invoking statutory-interpretation-specific tools such as the language or substantive canons, statutory purpose, legislative history, the whole act rule, or dictionary definitions. The only statutory-interpretation-specific tool for which the Justices exhibited rates of dueling comparable to those exhibited for traditional legal tools was other statutes—an interpretive tool which requires traditional legal analysis of prior Supreme Court precedents interpreting analogous statutory provisions, in addition to the statutory-interpretation-specific task of making analogies across statutes.[66]

The data are intriguing on many levels. First, the relatively low rate of dueling over dictionary definitions is noteworthy and unexpected. Dictionary definitions are bountiful; there are numerous dictionaries in print and each dictionary typically contains several definitions for the same word. Moreover, a recent study of the Supreme Court's dictionary usage from 1986–2010 found that the Justices' choices regarding which dictionary to cite to be "largely ad hoc, based on the appeal of particular dictionaries in particular

65. I counted as substantive canon "duels" those cases in which a majority opinion cited one substantive canon (e.g., the rule of lenity) and an opposing opinion cited another substantive canon (e.g., the constitutional avoidance canon). I did not count as "dueling" cases in which a majority opinion invoked the rule of lenity and the dissenting opinion argued that the rule was not applicable. *See supra* Part II.A.

66. Specifically, for statutes deemed *in pari materia* (in the same matter), "courts will apply prior judicial interpretations" of a particular term both "to subsequent cases that arise under the statute *actually* interpreted [and] also to identical or similar language in other statutes addressing similar issues." *See* Widiss, *supra* note 15, at 871.

cases."[67] That study also found that in the vast majority of cases, judicial opinions that referenced dictionary definitions used them as "ornament[s]"—meaning that the dictionary played a minimal substantive role in the opinion's reasoning, but nevertheless was used to "lend[] a patina of objectivity and legitimacy" to the chosen construction.[68] Given the abundance of dictionary definitions and empirical evidence indicating that the Justices use them in an ad hoc manner, one would expect that jurists seeking to use this interpretive tool readily could find *some definition* to support almost any construction of a statute—and that majority and dissenting opinions in the same case frequently would employ competing dictionary definitions, however marginally helpful, to cancel out any aura of objectivity that an opposing opinion might gain from using such definitions.

Thus, the low rate of dueling dictionary use—28.6 percent—is puzzling.[69] One explanation could be that the Justices tend to prefer a handful of dictionaries, so that despite the abundance of dictionaries and definitions in publication, competing definitions may not be readily available within their preferred lexical universe.[70] But upon closer examination, this explanation seems insufficient for at least two reasons. First, the Court's opinions in recent cases like *Taniguchi v. Kan Pacific Saipan, Ltd.*[71] demonstrate that despite the Justices' individual preferences for certain dictionaries, they are perfectly willing to reference other dictionaries (as many as fourteen in *Taniguchi*!).[72] Second, empirical research shows that even those Justices with the most pronounced dictionary preferences deviate from their preferred dictionary in a substantial number of cases.[73]

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67. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 537 (2013).

68. *Id.* at 548.

69. This finding is consistent with the 28.8 percent rate of dueling dictionary use found in Brudney and Baum's study of employment law, business and commercial law, and criminal-law cases from 1986 to 2010. *See id.* at 526.

70. My earlier empirical study of the Roberts Court and Brudney & Baum's recent study of the Rehnquist and Roberts Courts found that the Justices cited the following five dictionaries most frequently: Webster's Third New International Dictionary, the Oxford English Dictionary, Webster's Second New International Dictionary, the American Heritage Dictionary, and Black's Law Dictionary. *See* Brudney & Baum, *supra* note 67, at 529; Krishnakumar, *supra* note 17, at 240 n.85.

71. Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).

72. *See id.* at 2002–03, 2003 n.2.

73. *See* Brudney & Baum, *supra* note 67, at 530–31; Krishnakumar, *supra* note 17, at 240 n.85.

Another possible explanation for the relatively low rate of judicial dueling over dictionary references is that, despite the availability of numerous dictionaries, there may have been no competing definition available in the forty cases in the dataset in which majority or dissenting opinions declined to counter an opposing opinion's dictionary reference(s). In order to test this possibility, I (or a research assistant) examined the briefs in thirty-eight of the forty cases in which a majority or dissenting opinion referenced a dictionary definition, but the opposing opinion(s) did not counter that reference.[74] In the vast majority of the cases (67.5 percent), both the petitioner and the respondent (or, in some cases, amici) had provided dictionary definitions supporting their respective statutory constructions. Moreover, in another handful of cases, the party whose interpretation was favored by the opinion that did *not* invoke a dictionary definition *did provide* a supporting dictionary definition in its brief.[75] Ultimately, in 75.0 percent (thirty out of forty) of the cases in which a majority or dissenting opinion declined to counter a dictionary reference in an opposing opinion, at least one brief supporting the opposing opinion provided a helpful dictionary definition. Thus, the lack of availability of opposing definitions does not seem to explain the low level of dueling—nor does a lack of framing by litigants and attorneys.

A third possibility is that the Justices are motivated to counter an opposing opinion's dictionary references only, or primarily, in those cases in which the opposing opinion relies significantly on dictionary definitions to *reach* its statutory construction—and tend to leave unanswered those dictionary references that are used merely as "ornaments." I explore this possibility further in the doctrinal analysis conducted in Section III.B.[76]

Second, the Roberts Court's relatively low rate of dueling over legislative history is quite surprising. The legislative history of most federal statutes is extensive, and debate on the House and Senate floor often produces competing statements about a statute's

74. Briefs were not available online for the other two cases.

75. *See, e.g.*, Brief for the State of Cal. at 44–46, Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009) (Nos. 07-1601 & 07-1607); Brief for the United States as Amicus Curiae Supporting Respondents at 7, 15, Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008) (No. 06-1322); Brief for the Petitioners at 16–17, Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 550 U.S. 81 (2007) (No. 05-1508).

76. *See infra* Part III.B.1.

meaning.[77] Accordingly, as with dictionary definitions, one would expect there to be "something for everyone" in the legislative history—and for this to translate into frequent dueling over this interpretive resource. Yet the data from this study reveal judicial dueling over legislative history in only 25.3 percent of the divided-vote cases. Part III will explore the theoretical implications of this finding in detail, but for now it bears noting two possible explanations for the data: On the one hand, the conventional wisdom could simply be wrong, and the legislative history of many statutes may not in fact contain support for competing characterizations of the statute's meaning. Alternatively, the Justices who make legislative history references may not be citing directly on-point "smoking gun" statements, and those authoring opposing opinions accordingly may not consider it crucial to counter such legislative history citations.

Third, the low rate of judicial dueling over substantive canons also is unexpected. Substantive canons are judicially created interpretive presumptions and rules based on background legal norms, policies and conventions.[78] They reflect judicially preferred policy positions, expressed as rules of thumb about how to treat statutory text in light of constitutional priorities, common-law practices, or specific statute-based policies. Because substantive canons are policy-based, there often are two or more that point in opposite directions. Indeed, Llewellyn lists in his "thrust" column the substantive canon that "[s]tatutes in derogation of the common law will not be extended by construction" and, as its "parry," the countercanon that "[s]uch acts will be liberally construed if their nature is remedial."[79] Accordingly, it seems surprising that the members of the Roberts Court dueled over substantive canons at a rate of only 10.9 percent.[80]

Last, the high rates of judicial dueling over precedent and practical reasoning, as compared to the low rates of dueling over purpose, legislative history, the whole act rule, and the like suggest

77. *See, e.g.*, SCALIA, *supra* note 27, at 36 ("Legislative history provides, moreover, a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody."); *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) ("Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize . . . .").

78. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 276 (1994); Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 13.

79. Llewellyn, *supra* note 3, at 401.

80. *See supra* Table 1.

that the canons and tools of statutory construction may not be as readily manipulable as the traditional tools of legal analysis that Llewellyn sought to compare them to in his article. Or, at the least, the Justices on the Roberts Court do not seem as inclined to use the tools of statutory construction to counter each other as they do to use the common-law tools of analysis in a dueling manner.

Before we rush to conclude that the Court rarely duels over statutory-interpretation-specific tools, however, it is worth looking at the rate of dueling by case type rather than by individual interpretive tool. As Table 2a shows, only 88 of 255 statutory cases decided during the period studied (34.5 percent) involved competing references to the same interpretive tool in both a majority and a dissenting opinion, excluding cases in which the Justices dueled only over Supreme Court precedent or practical consequences.[81] This is not a trivial number, but neither does it constitute a terribly high rate of dueling. If we separate out unanimous cases and focus on the 140 cases in which the Justices divided over a statute's construction, the rate climbs significantly, indicating that the Roberts Court engaged in dueling canon use in 62.9 percent of such cases. Put differently, a large majority of the cases in which the Justices disagreed over the construction of the statute involved majority–dissent dueling over the same interpretive canon or tool.

81. One-hundred and thirteen of the cases involved some kind of dueling, but in nineteen of these the Court dueled only over the application of its own precedent, and in another six it dueled only over the application of practical consequences reasoning (three) or over precedent and practical reasoning (three). In my view, cases in which the Court dueled only over precedent and/or practical consequences should not count as "dueling canon" cases because precedent and practical consequences are general tools of legal analysis, not canons or tools specific to statutory construction. If we count these precedent-only or practical-only cases, then 44.3 percent of the cases involved "dueling."

*Table 2a: Dueling Canon Use by Vote Margin**

	Percent Dueling Over Statutory Interpretation-Specific Tools (n)	**Percent Dueling Over All Legal Analysis Tools (Including Precedent-Only and Practical-Only Dueling) (n)**
All Cases (Including Unanimous Cases) (n=255)	34.5% (88)	44.3% (113)
Divided-Vote Cases (n=140)	62.9% (88)	80.7% (113)
Close-Margin Cases (5–4 / 5–3) (n=53)	64.2% (34)	84.9% (45)
Wide-Margin Cases (n=87)	62.1% (54)	78.2% (68)

* A chi-squared test revealed no statistical difference between rates of dueling for close-margin versus wide-margin cases.

In addition, when the Justices used the interpretive tools in a dueling fashion, they tended to do so on multiple levels, dueling over numerous resources. Indeed, the members of the Roberts Court dueled over two or more interpretive tools in 83.0 percent of the eighty-eight dueling canon cases. Only fifteen of the eighty-eight dueling canon cases (17.0 percent) involved majority and dissenting opinions that dueled over only one interpretive tool.[82] Further, as Table 2b below shows, the data from the Roberts Court's first five terms are consistent with the Brudney–Ditslear and Law–Zaring findings that dissenting opinions were significantly more likely to invoke a canon or legislative history when the majority opinion relied on that interpretive resource than when the majority opinion did not. On the one hand, this finding could be taken to demonstrate that the Justices are strategic in their interpretive tool use—tailoring their references to counter the specific tools relied on by an opposing opinion rather than referencing only those tools they independently find compelling. This is the conclusion that Brudney–Ditslear and Law–Zaring reached based on similar data.[83] On the other hand, the

82. *See infra* Appendix (listing each "dueling canon" case and all tools over which majority and dissenting opinions dueled by case). If we include cases that involve dueling only over precedent or practical consequences, then thirty-seven of one-hundred and thirteen or 32.7 percent of the dueling cases involved dueling over only one interpretive tool.

83. *See* Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 96; Law & Zaring, *supra* note 5, at 1738.

cases in which a majority opinion references a particular interpretive tool may also be cases in which citation to that tool is more appropriate than in the average case. In many cases, for example, the legislative history may not contain on-point discussion of the relevant statutory issue; in those cases where it does, and the majority references that discussion, a competing comment about the statutory provision may also be available. Thus we should be cautious before ascribing too much meaning to this statistic.[84]

Table 2b: Dissenting Opinion Reliance on Canons and Other Interpretative Tools

	Dissenting Opinion Reliance Absent Majority Opinion References	**Dissenting Opinion Reliance When Majority Opinion Invokes the Canon/Tool**
Text / Plain Meaning	32.3% (20 out of 62)	56.4% (44 out of 78)
Dictionary	10.6% (10 out of 94)	34.8% (16 out of 46)
Other Statutes	13.5% (13 out of 96)	45.5% (20 out of 44)
Language Canons / Grammar / Whole Act Rule	24.7% (19 out of 77)	33.3% (21 out of 63)
Substantive Canons	19.5% (23 out of 118)	13.6% (3 out of 22)
Common Law	5.0% (6 out of 121)	31.6% (6 out of 19)
Purpose	30.8% (28 out of 91)	38.8% (19 out of 49)
Intent	22.0% (26 out of 118)	59.1% (13 out of 22)
Legislative History	28.9% (28 out of 97)	44.2% (19 out of 43)
Practical Consequences	49.4% (40 out of 81)	49.2% (29 out of 59)
Supreme Court Precedent	32.7% (17 out of 52)	65.9% (58 out of 88)

Overall, the data regarding the frequency of dueling canons provide a mixed picture. The rates of judicial dueling for most individual tools of construction are low—certainly lower than I expected to find for legislative history, dictionary references,

84. This is also why I believe that Table 1—which measures not only the extent to which dissenting opinions respond to a majority or concurring opinion's reliance on a particular interpretive tool, but also the extent to which majority or concurring opinions respond to a dissenting opinion's reliance on the tool—provides a better gauge of judicial dueling than does either the Brudney–Ditslear or the Law–Zaring study.

language/whole act, and substantive canons. At the same time, a large percentage of the Court's divided-vote cases involved *some* level of majority–dissent dueling over the same interpretive tool. Indeed, in 52.1 percent of the cases in which the Justices disagreed (73 of 140), majority and dissenting opinions dueled over multiple canons or tools. Thus, on the one hand, the worst implications of Llewellyn's "thrusts" and "parries" do not appear to be borne out, in that most individual tools of construction are not being pitted against themselves in the vast majority of cases. On the other hand, however, the tools of statutory construction hardly seem to constrain the Justices or point neatly to one correct interpretation, as nearly two-thirds of the Court's divided-vote cases (88 of 140) contained competing applications of the same interpretive tool.

2. *Statutory Subject Matter.* If we break the cases down by statutory subject matter, the data become still more interesting. As Table 3a illustrates, subject matter seems to have a notable correlation to the rate at which the Roberts Court dueled over one or more interpretive canons when interpreting the statute. Table 3a reports the percentage of all dueling canon cases that involve statutes in a particular subject area.[85] Caution should be used in interpreting these figures because once the data are disaggregated by statutory subject matter, the number of case observations dips significantly. Accordingly, this Article focuses on only the most striking data from Table 3a: criminal and antidiscrimination statutes each made up a substantial proportion of the Roberts Court's dueling canon cases; nearly 40 percent of the cases in which the Court dueled involved a statute that fell within one of these two subject areas.[86] If we add in cases construing environmental statutes, nearly half (46.5 percent) of the Court's dueling canon cases are accounted for.[87]

85. *See infra* Table 3a.

86. *See id.*

87. Of the 255 statutory cases decided during the period studied, 32.9 percent involved criminal (21.1 percent) or antidiscrimination (11.8 percent) statutes. If we add in environmental law cases, the percentage of the Court's docket that involved these types of statutes was 37.3 percent. So the proportion of dueling cases accounted for by these statutory subject areas (46.5 percent) was a bit higher than the proportion of overall statutory cases that involved these subject areas.

Table 3a: Dueling Canon Use by Subject Area

	Percentage of All Dueling Cases That Involve Statutes in this Subject Area (n=88)
Criminal (incl. AEDPA)	26.1% (23)
Discrimination (incl. IDEA)	13.6% (12)
Environmental	6.8% (6)
Jurisdictional (not incl. criminal)	4.5% (4)
Preemption	5.7% (5)
FAA	3.4% (3)
Securities	3.4% (3)
Bankruptcy	5.7% (5)
Immigration	2.3% (2)
Communications Act	2.3% (2)
False Claims Act	2.3% (2)
NLRA / Employment	2.3% (2)
Other[&]	21.6% (19)

[&] Fourteen statutes/subject areas generated only one dueling canon case: Terrorism Risk Insurance Act; Civil Racketeer Influenced and Corrupt Organizations Act; Employee Retirement Income Security Act; Railroads; Fair Debt Collection Act; Religion; Federal Tort Claims Act; Freedom of Information Act; Tax; Indian law; Attorneys' Fees; Federal Power Act; National Banking Act; Jones Act. Three others generated two dueling canon cases each: the Prison Litigation Reform Act, statutes dealing with Procedure, and Intellectual Property.

This subject-matter sensitivity could be one reason why the Brudney–Ditslear study reported greater overall dueling canon use than Table 1 suggests. Because Brudney–Ditslear reviewed only employment cases, including many antidiscrimination cases based on statutes such as Title VII, the Fair Labor Standards Act (FLSA), and the Age Discrimination in Employment Act (AEDA), their study may unwittingly have selected a subset of statutory cases that are particularly susceptible to judicial dueling.

The subject-matter data naturally raise the question: Why? What is it about criminal, antidiscrimination, and environmental statutes that makes the Roberts Court particularly likely to duel over canons and interpretive tools? One possibility is that there is something about statutes in these subject areas that gives rise to greater

indeterminacy or to competing applications of interpretive tools than is the case for statutes in other subject areas. For example, Congress often borrows language from existing criminal statutes when it writes new ones, particularly when a new statute deals with the same type of underlying conduct as older statutes.[88] Similarly, Congress often uses Title VII or the Fair Labor Standards Act as the template for other, newer antidiscrimination statutes.[89] As a result, there may be multiple analogous statutes available for the Justices to choose from when applying the other statutes tool to help decipher the meaning of a criminal or antidiscrimination statute.[90] Alternately, statutes in these subject areas may reflect more ideologically charged legislative battles than do other statutes, giving rise to cross cutting statements in the legislative record, including competing claims about statutory purpose. Thus, there might be a large quantity of contradictory legislative history or statutory purposes available to the Justices when construing statutes in these subject areas.

As Table 3b shows, the data contain some evidence that is consistent with these explanations. But the evidence is modest and does not hold for all three subject areas. For example, nearly one-fourth of the dueling canon criminal cases contained dueling references to the other statutes and legislative history tools, as did one-fourth of the dueling canon antidiscrimination cases—but none of the environmental cases dueled over either of these tools.[91] Conversely, one-third of the dueling canon environmental cases contained dueling references to statutory purpose, but the figures were much lower for dueling criminal and antidiscrimination cases.[92]

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88. *See, e.g.*, Jones v. United States, 526 U.S. 227, 234 (1999) (referencing a robbery statute that served as a model for the statute at issue).

89. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 578–79 (1978) (noting that the ADEA was modeled on both the FLSA and Title VII); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 696–97 ("A number of other laws banning discrimination, including [the ADEA] are modeled after, and have been interpreted in a manner consistent with, Title VII.").

90. *See, e.g.*, *Jones*, 526 U.S. at 234–36, 259–61 (discussing which of three model robbery statutes was most analogous to statute at issue). *Compare* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (citing numerous state statutes and federal regulations that permit complaints to be filed orally), *with* Brief in Opposition at 6–8, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (No. 09-834) (citing numerous different analogous statutes to argue that complaints must be filed in writing).

91. *See infra* Table 3b.

92. *See infra* Table 3b.

Table 3b: Subject Area Dueling

	Criminal	Antidiscrimination	Environmental
Plain Meaning	43.5% (10)	41.7% (5)	33.3% (2)
Dictionary	13.0% (3)	8.3% (1)	33.3% (2)
Language/Whole Act Rule	26.1% (6)	16.7% (2)	33.3% (2)
Other Statutes	21.7% (5)	25.0% (3)	0.0% (0)
Purpose	4.3% (1)	16.7% (2)	33.3% (2)
Legislative History	21.7% (5)	25.0% (3)	0.0% (0)
Substantive Canons	0.0% (0)	0.0% (0)	0.0% (0)

Another possibility is that statutes in the criminal, antidiscrimination, and environmental law areas reflect clearer ideological dividing lines than do statutes dealing with other subjects.[93] With respect to the environmental law and antidiscrimination law cases, the statutes being interpreted typically are sweeping progressive or social-justice statutes enacted during the 1960s by liberal Congresses—in a political climate very different from the one that has existed during the Roberts Court's tenure.[94] Thus, the clash between majority and dissenting opinions may be political, with the liberal Justices seeking to preserve the original, broad goals of a statute enacted in a more liberal era and the conservative Justices seeking to curtail the modern application of the statute. As a result, when construing statutes in these subject areas, the Justices' ideological preferences may predominate and they may be more inclined to use the canons to justify their preferred statutory constructions than is the case with other, less controversial subject areas. That is, the members of the Roberts Court (1) may be more inclined in criminal, antidiscrimination, and environmental law cases to start with their preferred outcomes and then look for ways to shape the canons and interpretive tools to justify those outcomes; or (2) may

93. That is, government v. criminal defendant, employer v. employee, disability claimant v. state, minority voters v. local authorities, or environmental interests v. private-property interests.

94. *Cf.* Law & Zaring, *supra* note 5, at 1740 (concluding that the level of ideological alignment between authoring justice and enacting Congress is a statistically significant predictor of probability that a statutory interpretation opinion will reference legislative history).

regard the stakes as higher for these cases and, accordingly, consider it more necessary to neutralize the interpretive tools used by opposing opinions.

There is some anecdotal evidence for this explanation: a number of the U.S. Supreme Court's most memorable statutory interpretation cases have involved significant judicial dueling over statutes in the antidiscrimination and environmental law areas. Consider, for example, the Rehnquist Court case, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[95] *Babbitt* involved a section of the Endangered Species Act (ESA) that makes it unlawful for any person to "take" an endangered species within the United States.[96] The ESA defines the term "take" to mean, in part, "to harm."[97] In 1975, the Department of the Interior issued a regulation defining "'[h]arm' in the definition of 'take'" to include any activity that results in "significant habitat modification . . . [that] significantly impair[s] essential behavioral patterns, including breeding, feeding or sheltering."[98] *Babbitt* raised the question whether the Department had the authority, under the ESA, to prevent landowners from harming endangered species by destroying their essential habitats.[99]

The majority and dissenting opinions in *Babbitt* dueled over a dizzying array of canons and interpretive tools, including dictionary definitions, the plain meaning rule, *noscitur a sociis*, the whole act rule, and legislative history.[100] Despite their impressive repartee over the canons, however, both opinions give the distinct impression of being about much more than the neutral application of statutory interpretation rules. The strong undercurrent of the conservative dissenting opinion is that environmental statutes should be construed

95. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

96. *See id.* at 690; 16 U.S.C. § 1538(a)(1)(B) (2012).

97. 16 U.S.C. § 1532(19).

98. 50 C.F.R. § 17.3 (1994).

99. *Babbitt*, 515 U.S. at 692.

100. For example, Justice Scalia's dissenting opinion argued that the plain meaning of "take" encompasses only deliberate, intentional action directed toward individual animals, not incidental injuries to habitat. Justice Stevens' majority opinion countered that the ordinary meaning of "harm" in the definition of "take" covers incidental injury of the kind caused by habitat destruction. *Compare Babbitt*, 515 U.S. at 687, 697, 709 (stating that the dictionary definition of "harm" includes "injure" and habitat modification which kills individual animals of an endangered species causes "injury"), *with id.* at 717–18 (Scalia, J., dissenting) ("It is obvious that 'take' in this sense . . . describes a class of acts (not omissions) done directly and intentionally . . . .").

to interfere as little as possible with private-property rights;[101] while the underlying theme of the liberal majority opinion is that species extinction poses grave threats to the environment and that the ESA's broad purpose of species preservation must trump private-property interests.[102] A recent case, *Rapanos v. United States*,[103] which involved a landowner's right to backfill wetlands under the Clean Water Act, reflects similar majority–dissent dueling on the surface, and a similar underlying ideological battle over private-property rights versus effective environmental preservation. The conservative plurality opinion, for example, began by bemoaning the costly "burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States,'" calling the agency responsible for regulating wetlands "an enlightened despot," and complaining that "for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines."[104] The liberal dissenting opinion, by contrast, emphasized the Clean Water Act's "Herculean goal of ending water pollution" and the importance of wetlands for the preservation of water quality.[105]

In a similar vein is the Burger Court case *United Steelworkers v. Weber*.[106] *Weber* involved an early application of Title VII, raising the question whether that statute should be read to bar private employers from adopting voluntary affirmative action plans designed to remedy the present effects of past discrimination against black employees.[107] The majority and dissenting opinions in *Weber* dueled over multiple interpretive tools, including legislative history, purpose, and statutory language.[108] Most notably, the opinions engaged in an exhaustive back-and-forth about various statements in the legislative history,

101. *See id.* at 714 (Scalia, J., dissenting) ("The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.").

102. *See id.* at 698 (majority opinion) ("[T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.").

103. Rapanos v. United States, 547 U.S. 715 (2006).

104. *Id.* at 721.

105. *Id.* at 787, 798–99 (Stevens, J., dissenting).

106. United Steelworkers v. Weber, 443 U.S. 193 (1979).

107. *Id.* at 197.

108. *Id.* at 206, 220, 230.

often refuting each other's claims point-for-point.[109] Underlying this extensive dueling, however, was a fundamental ideological battle over affirmative action. The liberal majority opinion found it unimaginable to read a statute designed to address centuries of discrimination against black Americans in a manner that would prohibit voluntary efforts by private employers to abolish the present-day effects of that historical discrimination.[110] The conservative dissenting opinion, by contrast, found it equally odious to read the statute to allow discrimination against white employees as the means for improving black employees' opportunities.[111] Several of the Roberts Court's antidiscrimination cases reflect similar underlying judicial divides over the appropriate reach of statutes designed to protect minorities and women from employment or voting discrimination, even as the majority and dissenting opinions duel over the application of specific interpretive canons.[112]

What, then, about the Court's high rates of dueling canon use in cases involving *criminal* statutes? After all, the statutes at issue in the Court's criminal-law cases generally are *not* the product of sweeping social-justice movements. Despite this difference, criminal statutes nevertheless may reflect clear ideological dividing lines, or disagreement, over how the State should treat those accused of crimes. Again, the Justices' clear policy preferences may color the way they apply the canons and interpretive tools and make them more inclined to counter an opposing opinion's use of such tools—not

109. *See id*. at 207, 207 n.7, 229, 230 n.11, 232, 232 n.12 (Rehnquist, J., dissenting).

110. *Id.* at 202–04 (majority opinion).

111. *See id*. at 254 (Rehnquist, J., dissenting) ("There is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota."). A recent Roberts Court case, *Ricci v. DeStefano*, 557 U.S. 557 (2009), involved a similar ideological clash over Title VII. *See id.* at 563 (discussing the legality under Title VII of a municipality's race-based promotion practices). The majority and dissenting opinions in *Ricci* dueled over the whole act rule, statutory purpose, and practical consequences, *see id.* at 583–84, 579–80, but again, the underlying division was over the fairness of abandoning the results of a firefighter promotion examination on which white firefighters significantly outperformed black firefighters, *compare id.* at 593 ("Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe."), *with id.* at 608–11 (Ginsburg, J., dissenting) (noting that though "[t]he white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy . . . they had no vested right to promotion" and that "[f]irefighting is a profession in which the legacy of racial discrimination casts an especially long shadow").

112. *See, e.g.*, *Ricci*, 557 U.S. at 583–84, 579–80, 608–11; Bartlett v. Strickland, 556 U.S. 1, 6, 14–16, 27–29 (2009); AT&T Corp. v. Hulteen, 556 U.S. 701, 704, 709 n.3, 720–721 (2008); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621, 628, 646–47 (2006).

as a result of longstanding ideological divisions over sweeping statutes enacted in a previous era, but because the Justices have strong views about the moral culpability of certain behavior and about how the government should punish those accused of such behavior.

Many of the Court's criminal cases, for example, involve sentencing statutes, and seem to reflect an underlying disagreement about the harshness of applying a mandatory enhancement to particular conduct. Consider *Dean v. United States*,[113] in which the Justices employed the whole act rule, other statutes, and common-law rules in a dueling manner in determining whether a ten-year sentencing enhancement applied to a defendant whose gun accidentally discharged while he was robbing a bank.[114] Although the majority and principal dissenting opinions dueled over the structure of the statute, the appropriate inferences to be drawn from the felony murder statute (parallel v. meaningful variation), and common-law rules about *mens rea* versus unintended consequences of unlawful conduct,[115] a strong policy disagreement about fairness seems to underlie these more technical disagreements. Specifically, the opinions seem to be motivated by a fundamental concern about whether it is fair (majority) or unfair (dissent) to subject a criminal defendant to an extra ten years in prison because his gun accidentally discharged while he was committing a violent crime.[116] Several of the Court's other criminal cases involve the Antiterrorism and Effective Death Penalty Act and reflect ideological divisions about the equity of cutting off death-penalty appeals. In such cases, the majority and dissenting opinions often seem, at bottom, to be clashing over different normative visions about access to the courts for death-penalty appeals.[117]

Overall, then, ideological divisions may explain the high representation of environmental, antidiscrimination, and criminal statutes among the dueling canon cases. Each of these subject areas

113. Dean v. United States, 556 U.S. 568 (2009).

114. *See id.* at 570.

115. *Compare id.* at 572–73, 578, *with id.* at 575, 579 (Stevens, J., dissenting) (disagreeing over comparisons to common-law crimes).

116. *Compare id.* at 576 (defendant was "guilty of unlawful conduct twice over"), *with id.* at 585 (Breyer, J., dissenting) ("Congress would not have intended to punish so harshly.").

117. *Compare, e.g.*, Lawrence v. Florida, 549 U.S. 327, 336 (2007) (worrying about providing "incentives for state prisoners to file certiorari petitions as a delay tactic"), *with id.* at 345 (Ginsburg, J., dissenting) (emphasizing that the majority's reading "deprive[s] unwitting litigants of the opportunity to pursue their constitutional claims").

involves a hot-button issue that tends to divide the major political parties and their supporters. As a result, statutes dealing with these subject areas may be the product of extensive compromise between legislators on opposite sides of the political divide. This in turn may give rise to (1) an abundance of legislative history reflecting competing visions of the statute's reach, (2) statutory text that is intentionally vague or susceptible to competing readings, or (3) a heightened likelihood that the Justices charged with interpreting these statutes will have individual policy preferences regarding how such statutes should be implemented. Consequently, it may be the case that statutes in these subject areas give rise to competing applications of the same interpretive tool more frequently than do statutes in other subject areas. Moreover, when construing statutes in these subject areas, the Justices may be more likely to use the canons and tools of statutory construction to justify a reading arrived at through other means, rather than as a starting point. In contrast, when construing statutes in other, less ideologically charged subject areas, the Justices may be less inclined to use the canons to counteract each other.

Another possibility raised by the subject-matter data is that the Justices tend to duel at higher rates in cases involving a statute not administered by an agency or a statute that is administered by a weak agency. This hypothesis does not perfectly explain the data reported in Table 3a, as environmental statutes are administered by the EPA, a powerful agency.[118] But lack of deference to an agency interpretation could be part of the reason why so many of the dueling canon cases

118. Agencies are not all created equal. Congress grants some agencies expansive powers and authority, while limiting the authority granted to others. The EPA is widely considered a powerful agency because Congress has granted it broad powers under several statutes, including the Clean Water Act, the Clean Air Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 87 (1998) ("The [EPA] has the most powerful enforcement arsenal: it may seek criminal, civil, or administrative penalties."); Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2191 ("Government again expanded the scope of regulation significantly in the 1970s with the creation of powerful but not necessarily organizationally 'independent' regulatory authorities, such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration."); Louis Jaffe, *The Disorder of Politics: Lowi Takes the High Road (Book Review)*, 24 STAN. L. REV. 587, 590 (1972) (book review) ("[EPA] by a continuing series of statutes has been given very powerful anti-pollution tools allowing it to formulate and enforce air and water quality standards.").

involve criminal and antidiscrimination[119] statutes (and why the next largest category of dueling canon cases involves preemption and bankruptcy statutes).[120] Perhaps the Court engages in more extensive statutory interpretation in cases that do not involve a respected agency interpretation because in such cases it does not begin with a presumption of deference to the agency's construction. And perhaps when the Court engages in more extensive statutory interpretation, without the benefit of agency guidance (or with guidance from an agency to which Congress has given limited power, like the EEOC), the Justices are more inclined to duel over individual interpretive tools.

3. *Dueling Canons and Ideology*. While evaluating the data, it became clear that it would be useful to examine the relationship between ideology and judicial dueling, both for purposes of comparison to the Brudney–Ditslear study and because the subject-matter data suggested the possibility that judicial dueling might be more prevalent in cases with strong ideological dividing lines. Before reporting the ideology data, however, a caveat is in order: It is difficult to code case outcomes for ideology because it is not always clear whether an outcome favoring a particular litigant is liberal or conservative and coders necessarily must make judgment calls. In order to minimize errors and to make this study as replicable as possible, I coded for ideology by importing the ideological direction coding from the Spaeth Supreme Court database for the cases in my dataset.[121]

Three results stand out. First, the "dueling canon" cases (i.e., cases in which the Court invoked the same interpretive tools to support competing interpretations) skewed significantly conservative compared to all statutory cases, and somewhat more conservative than all divided-vote cases.[122] Further, the more closely divided cases were significantly more likely to inspire judicial dueling than were cases decided by a wide margin. Second, when the Justices in majority

119. The Equal Employment Opportunity Commission is a notoriously weak agency, to which Congress has delegated limited power, and traditionally receives little deference from courts. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 76 n.11 (1977); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

120. *See supra* Table 3a.

121. *Legacy Datasets: 2014 Release 01*, THE SUPREME COURT DATABASE, http://supremecourtdatabase.org/data.php?s=2 [http://perma.cc/RG9G-HM78].

122. *See infra* Table 4.

and dissenting opinions invoked the interpretive canons in a competing or dueling fashion, they tended to do so consistently with their ideological preferences. Third, and by contrast, in the unanimously decided cases the Justices tended to employ the interpretive canons to support both liberal and conservative outcomes at much more even rates. (That is, the conservative–liberal differential for most canons was much closer).

Table 4: Ideology by Case Type

	Conservative (n)	**Liberal (n)**	**Neither (n)**
All Statutory Cases (n=255)	49.8% (127)	46.7% (119)	3.5% (9)
Dueling Cases (n=88)	62.5% (55)	37.1% (33)	0.0% (0)
Unanimous Cases (n=115)	40.0%	53.0%	7.0%
Divided-Vote Cases (n=140)	57.9% (81)	41.4% (58)	0.7% (1)

Table 4 reports the ideological direction of the majority opinion in all statutory cases, unanimous cases, divided-vote cases, and dueling canon cases in the dataset. As the Table shows, the conservative–liberal split for all statutory cases decided during the time frame of the study was almost even, while the split for unanimous cases skewed liberal by several percentage points (thirteen percentage points). By contrast, the split for cases decided by a divided vote skewed conservative by a decisive margin (over sixteen percentage points). The largest conservative–liberal differential occurred in the dueling canon cases, which skewed conservative by a whopping thirty-two percentage points.

Table 5: Dueling by Vote Margin

	Percent of Cases Within Vote Margin Involving Dueling Canons[&]	**Percent of Dueling Canon Cases Decided By This Vote Margin**	**Percent of Cases Within Vote Margin Involving Any Dueling (Including Precedent-Only and Practical-Only Dueling)**
5 or 4 Justice Majority (5–4 / 5–3 / 4–1–4) (n=53)	64.2%	38.6%	84.9%
5, 4, or 6 Justice Majority Cases (n=95)	68.4%[*]	72.7%	84.2%
7 or More Justice Majority Cases (n=45)	51.1%	27.3%	73.3%

[&] For purposes of this Table, "dueling canon use" refers to cases in which majority and dissenting opinions (or, in a few cases, a concurrence and at least one dissenting opinion) both employed the same statutory-interpretation-specific interpretive tools to reach different statutory readings and case outcomes. This column does not include cases in which majority and dissenting opinions dueled solely over the application of Supreme Court precedent, practical reasoning, or both precedent and practical reasoning.

[*] A chi-squared test showed that the difference between rates of dueling for opinions with six or fewer Justices in the majority versus opinions with seven or more Justices in the majority approached significance, at p=.084.

Table 5 reports the Roberts Court's rate of dueling canon use in divided-vote cases by vote margin. As the Table shows, the overwhelming majority of the dueling canon cases were decided with six or fewer Justices joining the majority opinion (72.7 percent), and more than half of those cases were decided by extremely close vote margins, usually 5–4 or 5–3. Cases in which seven or more Justices agreed on a statute's construction represented a much smaller percentage of the dueling canon cases (27.3 percent). Moreover, a large majority of all cases decided by close vote margins contained judicial dueling over the canons and other interpretive tools. In other words, the Justices were most likely to engage the interpretive canons and tools in a dueling manner when their levels of consensus were low.

It is difficult to draw any definitive conclusions from these numbers, as they show only correlation, not causation. But a number of possible explanations are worth exploring. On the one hand, close vote margins could reflect statutory ambiguity. That is, the Justices could be dividing closely because the statutes at issue lend themselves to multiple plausible readings. In cases involving such ambiguous

statutes, individual interpretive canons and tools may be particularly likely to point in multiple directions. Thus, the Justices could be dividing closely *because* individual canons and tools are pointing in competing directions, and they could be dueling over the canons' application *because* the canons point in multiple directions. Alternately, the close margin cases may involve issues that are particularly ideologically charged. The Justices could be deciding these cases based on their ideological preferences—choosing their preferred readings first, and then employing the canons in a dueling fashion in order to justify their constructions and neutralize opposing arguments.

Statistical observations cannot reveal the Justices' internal motivations for voting a particular way in a particular case—and in this context cannot tell us whether the Justices duel at higher rates in close-vote-margin cases because of statutory ambiguity, ideological preferences, or some other factor. Nevertheless, it is worth trying to understand as much as we can about how the Justices duel over individual interpretive canons when they choose to do so. In an effort to gain a more granular understanding of the Justices' dueling practices, Tables 6a–6g report the ideological direction of each individual Justice's vote in cases in which the justice authored or joined an opinion that employed a particular interpretive tool in a dueling manner.[123]

123. Figures are not reported for dueling over substantive canons or the common-law precedent interpretive tool because there were only 5–6 cases involving dueling over each of these interpretive tools.

Table 6a: Judicial Ideology in Dueling Legislative History Cases (n=19)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϑ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	68.4% (13)	10.5% (2)	21.1% (4)	58.1%
Thomas	Conservative	63.2% (12)	15.8% (3)	21.1% (4)	47.4%
Roberts	Conservative	52.6% (10)	21.1% (4)	26.3% (5)	31.5%
Alito	Conservative	73.7% (14)	15.8% (3)	10.5% (2)	57.9%
Kennedy	Conservative	42.1% (8)	42.1% (8)	15.8% (3)	0.0%
Souter	Liberal	21.1% (4)	36.8% (7)	42.1% (8)	-15.7%
Ginsburg	Liberal	31.6% (6)	57.9% (11)	10.5% (2)	-26.3%
Breyer	Liberal	15.8% (3)	68.4% (13)	15.8% (3)	-52.6%
Stevens	Liberal	15.8% (3)	63.2% (12)	21.1% (4)	-47.4%
Sotomayor	Liberal	10.5% (2)	21.1% (4)	68.4% (13)	--
Kagan	Liberal	5.2% (1)	10.5% (2)	84.2% (16)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϑ] Percentage of cases involving majority–dissenting dueling over text or plain meaning in which the Justice authored or joined an opinion that referenced text or plain meaning to reach a liberal outcome.

Table 6b: Judicial Ideology in Dueling Purpose Cases (n=19)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϑ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	63.2% (12)	26.3% (5)	10.5% (2)	36.9%
Thomas	Conservative	68.4% (13)	26.3% (5)	5.26% (1)	42.1%
Roberts	Conservative	68.4% (13)	26.3% (5)	5.26% (1)	42.1%
Alito	Conservative	78.9% (15)	15.8% (3)	5.26% (1)	63.1%
Kennedy	Conservative	73.7% (14)	26.3% (5)	0.0% (0)	47.4%
Souter	Liberal	26.3% (5)	31.6% (6)	42.1% (8)	-5.3%
Ginsburg	Liberal	21.1% (4)	78.9% (15)	0.0% (0)	-57.8%
Breyer	Liberal	36.8% (7)	63.2% (12)	0.0.% (0)	-26.5%
Stevens	Liberal	15.8% (3)	68.4% (13)	15.8% (3)	-52.6%
Sotomayor	Liberal	10.5% (2)	26.3% (5)	63.2% (12)	--
Kagan	Liberal	5.26% (1)	5.26% (1)	89.4% (17)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϑ] Percentage of cases involving majority–dissenting dueling over text or plain meaning in which the Justice authored or joined an opinion that referenced text or plain meaning to reach a liberal outcome.

Table 6c: Judicial Ideology in Dueling Dictionary Cases (n=16)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϑ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	50.0% (8)	50.0% (8)	0.0% (0)	0.0%
Thomas	Conservative	62.5% (10)	37.5% (6)	0.0% (0)	25.0%
Roberts	Conservative	50.0% (8)	43.75% (7)	6.25% (1)	6.25%
Alito	Conservative	75.0% (12)	25.0% (4)	0.0% (0)	50.0%
Kennedy	Conservative	56.25% (9)	43.75% (7)	0.0% (0)	12.5%
Souter	Liberal	18.75% (3)	43.75% (7)	37.5% (6)	-25.0%
Ginsburg	Liberal	37.5% (6)	62.5% (10)	0.0% (0)	-25.0%
Breyer	Liberal	25.0% (4)	75.0% (12)	0.0% (0)	-50.0%
Stevens	Liberal	18.75% (3)	62.5% (10)	18.75% (3)	-50.0%
Sotomayor	Liberal	12.5% (2)	37.5% (4)	62.5% (10)	--
Kagan	Liberal	0.0% (0)	0.0% (0)	100.0% (16)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϑ] Percentage of cases involving majority–dissenting dueling over text or plain meaning in which the Justice authored or joined an opinion that referenced text or plain meaning to reach a liberal outcome.

Table 6d: Judicial Ideology in Dueling Language/Grammar/Whole Act Cases (n=21)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϑ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	71.4% (15)	28.6% (6)	0.0% (0)	42.8%
Thomas	Conservative	85.7% (18)	14.3% (3)	0.0% (0)	71.4%
Roberts	Conservative	57.1% (12)	38.1% (8)	4.8% (1)	19.0%
Alito	Conservative	71.4% (15)	28.6% (6)	0.0% (0)	42.8%
Kennedy	Conservative	57.1% (12)	38.1% (8)	4.8% (1)	19.0%
Souter	Liberal	28.6% (6)	57.1% (12)	14.3% (3)	-28.5%
Ginsburg	Liberal	28.6% (6)	61.9% (13)	9.5% (2)	-33.3%
Breyer	Liberal	9.5% (2)	66.7% (14)	23.8% (5)	-57.2%
Stevens	Liberal	0.0% (0)	76.2% (16)	23.8% (5)	-76.2%
Sotomayor	Liberal	0.0% (0)	9.5% (2)	90.5% (19)	--
Kagan	Liberal	0.0% (0)	0.0(0)	100.0% (21)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϑ] Percentage of cases involving majority–dissenting dueling over text or plain meaning in which the Justice authored or joined an opinion that referenced text or plain meaning to reach a liberal outcome.

Table 6e: Judicial Ideology in Dueling Other Statutes Cases (n=20)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϑ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	65.0% (13)	30.0% (6)	5.0% (1)	35.0%
Thomas	Conservative	65.0% (13)	35.0% (7)	0.0% (0)	30.0%
Roberts	Conservative	55.0% (11)	40.0% (8)	5.0% (1)	15.0%
Alito	Conservative	55.0% (11)	40.0% (8)	5.0% (1)	15.0%
Kennedy	Conservative	55.0% (11)	40.0% (8)	5.0% (1)	15.0%
Souter	Liberal	30.0% (6)	45.0% (9)	25.0% (5)	-5.0%
Ginsburg	Liberal	30.0% (6)	65.0% (13)	5.0% (1)	-35.0%
Breyer	Liberal	15.0% (3)	85.0% (17)	0.0% (0)	-70.0%
Stevens	Liberal	15.0% (3)	75.0% (15)	10.0% (2)	-60.0%
Sotomayor	Liberal	0.0% (0)	20.0% (4)	80.0% (16)	--
Kagan	Liberal	0.0% (0)	0.0% (0)	100.0% (20)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϑ] Percentage of cases involving majority–dissenting dueling over text or plain meaning in which the Justice authored or joined an opinion that referenced text or plain meaning to reach a liberal outcome.

Table 6f: Judicial Ideology in Dueling Plain Meaning Cases (n=43)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϑ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	61.4% (27)	34.1% (15)	4.5% (2)	27.3%
Thomas	Conservative	72.7% (32)	22.7% (10)	4.5% (2)	50.0%
Roberts	Conservative	50.0% (22)	45.5% (20)	4.5% (2)	4.5%
Alito	Conservative	63.6% (28)	31.8% (14)	4.5% (2)	31.8%
Kennedy	Conservative	50.0% (22)	50.0% (22)	0.0% (0)	0.0%
Souter	Liberal	15.9% (7)	43.2% (19)	40.9% (18)	-27.3%
Ginsburg	Liberal	36.3% (16)	56.8% (25)	6.8% (3)	-20.5%
Breyer	Liberal	29.5% (13)	61.4% (27)	9.1% (4)	-31.9%
Stevens	Liberal	13.6% (6)	65.9% (29)	20.5% (9)	-52.3%
Sotomayor	Liberal	11.4% (5)	15.9% (7)	72.7% (32)	--
Kagan	Liberal	4.5% (2)	11.4% (5)	84.1% (37)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϑ] Percentage of cases involving majority–dissenting dueling over text or plain meaning in which the Justice authored or joined an opinion that referenced text or plain meaning to reach a liberal outcome.

Table 6g: Judicial Ideology in Dueling Legislative Intent Cases (n=13)

Justice	Justice Ideology	Percent Conservative[τ]	Percent Liberal[ϕ]	Percent Not Participating / Neither	Conservative –Liberal Differential
Scalia	Conservative	76.9% (10)	23.1% (3)	0.0% (0)	53.8%
Thomas	Conservative	76.9% (10)	23.1% (3)	0.0% (0)	53.8%
Roberts	Conservative	76.9% (10)	15.4% (2)	7.7% (1)	62.5%
Alito	Conservative	61.5% (8)	30.8% (4)	7.7% (1)	30.7%
Kennedy	Conservative	69.2% (9)	30.8% (4)	0.0% (0)	38.4%
Souter	Liberal	30.8% (4)	69.2% (8)	7.7% (1)	-38.4%
Ginsburg	Liberal	46.2% (6)	53.8% (7)	0.0% (0)	-7.6%
Breyer	Liberal	46.2% (6)	46.2% (6)	7.7% (1)	0.0%
Stevens	Liberal	0.0%	92.3% (12)	7.7% (1)	92.3%
Sotomayor	Liberal	0.0% (0)	7.7% (1)	92.3% (12)	--
Kagan	Liberal	0.0% (0)	7.7% (1)	92.3% (12)	--

[τ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a conservative outcome.

[ϕ] Percentage of cases involving majority–dissenting dueling over legislative intent in which the Justice authored or joined an opinion that referenced intent to reach a liberal outcome.

The results are striking. They reveal that when the members of the Roberts Court duel over interpretive canons or tools, they do so in a manner that strongly correlates with their ideological preferences. Many of the conservative Justices used particular canons or tools to reach conservative outcomes in over 60 percent, and even over 70 percent of the cases, while the liberal Justices used those same canons or tools to reach liberal outcomes at similarly high rates *in those same cases*. Strikingly, in the nineteen cases in which the Court dueled over legislative history, Justice Scalia authored or joined an opinion that used legislative history to reach conservative results 68.4 percent of the time, and liberal results 10.5 percent of the time.[124] The figures for Justice Thomas were similar, as were those for Justices Alito and Roberts. In contrast, the liberal Justices referenced legislative history to reach liberal results in the overwhelming majority (57.9 percent to 68.4 percent) of these same cases, and to reach conservative results in only 15.8–31.6 percent of the cases.[125]

124. In the remaining cases, Justice Scalia failed to join an opinion that referenced legislative history.

125. This calculation does not include Justice Souter, who retired from the Court in 2009, and did not participate in cases decided during two out of the five terms studied in the dataset (including nearly half of the dueling legislative history cases). It also does not include Justices

The Justices' dueling over other canons and interpretive tools shows similarly stark ideological-slanting.[126]

These findings are consistent with Brudney and Ditslear's findings that conservative Justices tend to invoke the canons to reach conservative outcomes, while liberal Justices tend to invoke the canons to support liberal outcomes.[127] But these findings also deepen, or expand, on the Brudney–Ditslear study by demonstrating that the ideological slanting applies to interpretive tools other than the language and substantive canons, and by revealing that the ideological slanting is particularly forceful in the dueling canon cases. Further, the data in Tables 6a–6g suggests that the canons do not constrain the Justices on the Roberts Court to vote against their policy preferences, providing some support for Llewellyn's legal realist view that judges do not decide cases based on neutral legal rules.

The data in Table 6a also seem to contradict Brudney and Ditslear's findings on the ideologically constraining effects of legislative history. Brudney and Ditslear found that liberal Justices were more likely to vote in favor of employer interests (that is, against their ideological preferences) when they invoked legislative history,[128] and that during the Burger Court, conservative Justices were more likely to vote in favor of employee interests when they relied on legislative history.[129] After 1986, the Brudney–Ditslear study reported that conservative Justices ruled increasingly in favor of employers, even when relying on legislative history.[130] Table 6a shows, by contrast, that when the Justices dueled over legislative history, conservative Justices were highly likely to vote in favor of conservative outcomes and liberal Justices were highly likely to vote in favor of liberal outcomes. Even if we set aside the data regarding the conservative Justices' voting patterns on the theory that they are consistent with Brudney and Ditslear's findings for post-1986 cases, the data regarding the ideological direction of the liberal Justices'

Sotomayor or Kagan, who joined the Court in the last two years of the period studied, and did not participate in the overwhelming majority of the cases in the dataset.

126. *See supra* Tables 6b–6g. The one noteworthy exception was the conservative Justices' dueling uses of dictionary definitions; Justices Scalia, Roberts, and Kennedy employed this interpretive tool very even-handedly, showing almost no ideological slanting.

127. Brudney & Ditslear, *Cannons of Construction*, *supra* note 5, at 57–60.

128. Brudney & Ditslear, *Legislative History*, *supra* note 32, at 144 tbl.6.

129. *Id.*

130. *Id.* at 142–44; Brudney & Ditslear, *Cannons of Construction*, *supra* note 5, at 6.

dueling canon use run exactly opposite to Brudney and Ditslear's findings.

But there is an interesting counterpoint to these data. Table 7 reports the correlation between canon and interpretive tool use and ideology in the Roberts Court's unanimous statutory cases. The Table does not contain entries for the individual Justices' ideological slanting because, in the unanimous cases, all of the Justices voted the same way. Thus, the ideological breakdown for each interpretive tool tells us the rate at which individual Justices invoked that tool to reach conservative versus liberal outcomes. Interestingly, the Table shows that for this subset of cases, the Justices tended to use most of the canons and interpretive tools to support both liberal and conservative outcomes *at generally comparable rates*. There were some exceptions—for example, dictionary definitions and legislative history tended to be used to support liberal outcomes at much higher rates than conservative outcomes, and the common law tended to be used to reach conservative outcomes much more often than liberal ones. But overall, most canons and tools were used to support conservative outcomes in roughly 40 percent to 50 percent of the cases and liberal outcomes in roughly 40 percent to 50 percent of the cases.

Table 7: Ideology by Canon/Tool in Unanimous Cases

	Percent Conservative	**Percent Liberal**	**Percent Neither**	**Conservative –Liberal Differential**
Ideology in Unanimous Cases (n=115)	40%	53%	7.0%	-13.0%
Text/Plain Meaning† (n=68)	51.47%	41.17%	7.35%	10.3%
Dictionaries[131] (n=28)	28.57%	60.7%	10.71%	-32.13%
Language / Grammar / Whole Act Rule (n=54)	38.89%	53.7%	74.07%	-14.81%
Other Statutes (n=36)	44.4%	50.0%	5.55%	-5.6%
Legislative History[132] (n=30)	30.0%	56.7%	13.33%	-26.7%
Purpose† (n=26)	50.0%	38.46%	11.54%	11.54%
Intent (n=22)	40.9%	50.0%	9.1%	-9.1%
Practical Consequences† (n=34)	52.94%	38.24%	8.82%	14.7%
Common Law*† (n=21)	57.14%	28.57%	14.29%	28.57%
Substantive*† Canons (n=17)	41.2%	47.05%	11.8%	-5.85%

† Denotes that this canon or tool skewed in the opposite ideological direction from the overall ideological breakdown for unanimous cases (canon/tool tended to lead to conservative case outcomes, while a majority of unanimous cases had liberal case outcomes).

*Indicates chi-squared test reveals a significant difference between the rates at which this tool was used to support liberal and conservative outcomes at $p<.05$. (Except that for substantive canons, the difference approaches significance at $p=.057$).

The data reveal that the Justices tended to use at least some of the canons and tools in a manner that was *inconsistent* with their ideological preferences in cases with the highest degree of consensus. For example, conservative Justices, who used legislative history to support a conservative outcome in 52.6 percent to 68.4 percent of the

131. Nine of twenty-one liberal dictionary referencing unanimous opinions were authored by conservative Justices; four of the eight conservative ones were – so not just explained by liberal Justices authoring the unanimous opinions that used dictionary to reach liberal results.

132. Seven of the seventeen liberal legislative history unanimous opinions were authored by conservative Justices; two of the nine conservative ones were – so not just explained by liberal Justices authoring the unanimous opinions that used legislative history to reach liberal results.

dueling canon cases,[133] authored or joined an opinion using legislative history to support a *liberal* outcome in 56.7 percent of the unanimously decided cases. Conversely, liberal Justices, who invoked statutory purpose to support a liberal outcome in 57.9 percent to 68.4 percent of the dueling canon cases,[134] authored or joined an opinion that employed purpose to reach a *conservative* outcome in half of the unanimous cases. For comparison purposes, Table 8 reports the correlation between opinion author and ideology for all cases.

Table 8: Ideology by Opinion Author

	Conservative	**Liberal**	**Indeterminate**
Per Curiam (n=15)	26.7%	73.3%	0.0%
Scalia (n=68)	63.2%	35.3%	1.5%
Thomas (n=68)	58.8%	38.2%	3.0%
Roberts (n=38)	52.6%	44.7%	2.6%
Alito (n=52)	50.0%	46.2%	3.8%
Kennedy (n=44)	43.2%	52.3%	4.5%
Souter (n=34)	35.3%	64.7%	0.0%
Ginsburg (n=46)	37.0%	63.0%	0.0%
Breyer (n=73)	31.5%	63.0%	5.5%
Stevens (n=60)	25.0%	70.0%	5.0%
Sotomayor (n=23)	52.2%	43.5%	4.35%
Kagan (n=7)	42.85%	42.85%	14.29%

133. As noted earlier, Justice Kennedy's rate of invoking legislative history to support conservative outcomes was lower, at 42.1 percent. *See supra* Table 6a.

134. These figures do not include Justices Souter, Sotomayor, or Kagan, who did not participate in a substantial number of the cases, and whose rates of reference therefore are not comparable to those of the other Justices.

Why the significant difference? Again, causation is difficult to determine, but there seem to be at least three possible explanations. On the one hand, perhaps when confronted with a statutory case, the Justices are looking to the interpretive canons and tools for guidance in the first instance. When the canons and tools point clearly to a particular interpretation, perhaps the Justices are reaching high degrees of consensus and engaging in very little dueling canon use *because* the interpretive tools are pointing in a clear direction. Conversely, when the interpretive tools are indeterminate, that could be driving the Justices to divide over the correct statutory construction—and to engage the canons in a dueling manner.

On the other hand, it could be the case that the Justices are starting with a preferred statutory construction—perhaps based on ideology, or considerations of practical consequences or equitable concerns, or some other intuition—and are invoking the interpretive tools to justify that construction. In other words, the Justices could be using the canons as "just window-dressing for results reached for other reasons."[135] If so, the Justices could be dueling more in the divided-vote cases (when they disagree over the correct statutory construction) because they are using the canons strategically, with the distinct purpose of neutralizing an opposing opinion's arguments.

A third possibility is that the Justices may be doing different things in different cases. That is, the close-vote-margin cases may be ones in which the Justices generally are starting with a preferred construction, perhaps based on ideology, and working backward to the interpretive tools—making them more prone to find competing applications for the same tool and to duel in such cases. In the unanimous cases, by contrast, the order of decisionmaking might be reversed; that is, these might be cases in which the Justices do not have strong ideological preferences and might be looking to the interpretive canons in the first instance for guidance.

Bottom line: the canons and interpretive tools do not seem to be constraining the Justices to vote against their ideological preferences. But it also does not seem to be the case that the interpretive canons and tools are being readily manipulated to support competing outcomes in the same case, in the manner suggested by Llewellyn's famous critique. That is, for most individual interpretive canons and tools, reliance by a majority opinion is not resulting in a dissenting

135. Eskridge, *supra* note 4, at 679.

opinion countering that *same* canon or tool most of the time (in roughly 75 percent of the cases). Only the plain meaning rule and Supreme Court precedent are being used in a dueling manner in a large percentage of the cases. And, surprisingly, many interpretive tools that seem highly susceptible to competing invocation—including legislative history, dictionary definitions, substantive canons, and statutory purpose—are generating only low levels of dueling (in roughly 25 percent of the relevant cases).[136] The practical consequences and other statutes tools exhibit slightly higher rates of dueling, at 30.9–34.5 percent, but these tools, like Supreme Court precedent, are traditional tools of legal analysis rather than statutory interpretation-specific maxims; indeed, the other statutes tool has a significant precedent component, as it involves analogies to words in other statutes that have been given a particular construction by courts in prior cases. Also, importantly for the foundational theories of statutory interpretation, no individual statutory interpretation-specific tool of interpretation—other than the plain meaning rule—seems more prone than others to trigger counter-references in the opposite direction. Some implications of these findings are discussed below in Part III.

III. DOCTRINAL FINDINGS

A. Inside Story: Patterns of Dueling Canon Use

Llewellyn observed that a court must "take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play . . . ."[137] This Section examines the many ways in which majority and dissenting opinions play the same interpretive resource to reach different readings of the same statute. The Section explores the dueling canon cases by individual canon or interpretive tool, uncovering some noteworthy patterns in how the Justices duel. The analysis in this Section is doctrinal rather than empirical, focusing on understanding *how* the Justices employ the same tools to reach opposing statutory constructions rather than on how *frequently* they duel over particular tools.

136. *See supra* Table 1.

137. Llewellyn, *supra* note 3, at 399.

1. *Text / Plain Meaning Rule*. My analysis identified three primary ways that opposing opinions in the same case tend to duel over application of the plain meaning rule. The majority and dissenting opinions in the case might:

> 1. Focus on different words or phrases in the text of the same statute.
>
> 2. Focus on the text of different statutes, where more than one statute is implicated in the parties' dispute.
>
> 3. Focus on the same word or phrase in a statute, but ascribe different meaning to that text.

Further, when dueling in the third manner, one opinion might adopt the prototypical, or core meaning of the term at issue, while the opposing opinion adopts a more expansive reading of the same term.

Let us consider in turn each form of judicial dueling over the plain meaning rule.

a. Focus on different words or phrases in the text of the same statute. When one party alleges that particular conduct gives rise to a claim under a statutory provision, judges may disagree about which precise words or phrases in the statute govern the statute's reach. For example, in *Holder v. Humanitarian Law Project*,[138] the Court construed a provision of the Patriot Act that makes it a federal crime to "knowingly provide[] material support or resources to a foreign terrorist organization . . . ."[139] Pursuant to the statute, the Secretary of State designated the Kurdistan Workers' Party in Turkey and the Liberation Tigers of Tamil Eelam in Sri Lanka as "foreign terrorist organizations."[140] Some U.S. citizens and domestic organizations who wished to provide support for the lawful, nonterrorist activities of these organizations argued that the statute should be read to require proof that a defendant intended to further a foreign terrorist organization's illegal activities.[141] A majority of the Court disagreed, focusing on the word "knowingly" and arguing that the statute requires only knowledge about the organization's connection to terrorism, not a specific intent to further the organization's terrorist activities.[142] The dissenting opinion, by contrast, focused on the words

138. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

139. 18 U.S.C. § 2339B(a)(1) (2012).

140. *Humanitarian Law Project*, 561 U.S. at 9.

141. *Id.* at 16.

142. *Id.* at 16–17.

"material support" and argued that the statute required the government to show that the defendant knew his acts were likely to further the organization's terrorist aims, not just its lawful ones.[143]

b. Focus on the text of two different statutes, where more than one statute is implicated in the parties' dispute. This form of dueling over application of the plain meaning rule does not seem to be very common, but it did occur in a few Roberts Court cases. In *AT&T Corp. v. Hulteen*,[144] for example, the majority opinion emphasized the text of Title VII, while the dissenting opinion focused on the text of the Pregnancy Discrimination Act.[145]

c. Focus on the same word or phrase in a statute, but ascribe different meaning to that text. This is the most common, and perhaps most interesting, form of judicial dueling over plain meaning. Roughly three-fourths of the cases in which the Justices dueled over the plain meaning rule involved a disagreement over the meaning of the same word or phrase in the statutory text.[146] In almost half of those cases, however, something more than simple disagreement was

143. *See id.* at 57–58 (Breyer, J., dissenting). Additional examples from outside the dataset include *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 691–95, 727–30 (1995) (focusing on the statutory term "harm," while the dissent focuses on the term "taking"), and *Muscarello v. United States*, 524 U.S. 125, 128–132,143–48 (1998) (focusing on the plain meaning of statutory term "carried," while the dissent focuses on the phrase "carried a firearm").

144. AT&T Corp. v. Hulteen, 556 U.S. 701 (2009).

145. *Hulteen* concerned whether an employer violated the Pregnancy Discrimination Act (PDA) by calculating pension benefits using an accrual rule that gave less retirement credit for pregnancy leave than for other kinds of medical leave. *Id.* at 704. The PDA was enacted in 1978 to override a 1976 Supreme Court decision, *General Electric Co. v. Gilbert*, which held that discrimination on the basis of pregnancy is not sex discrimination. *Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1982). The *Hulteen* majority concluded that the employer's pension policy did not violate the PDA, relying on a Title VII provision that defines "unlawful employment practice" with respect to seniority systems. *Hulteen*, 556 U.S. at 707. The majority held that a seniority system violates Title VII only if it was "adopted for an intentionally discriminatory purpose" and found that there could be no "intentional" discrimination in a policy adopted before the PDA was enacted, while *Gilbert* supplied the governing legal rule. *Id*. at 711–14. Justices Ginsburg and Breyer dissented, arguing that the PDA's plain text unambiguously expressed Congress's disapproval of both the holding and reasoning of *Gilbert*—and made clear that pregnancy-based discrimination always has constituted sex discrimination. *Id*. at 720–21 (Ginsburg, J., dissenting).

146. There were forty-three cases in the dataset in which the Court dueled over plain meaning; thirty-four involved majority and dissenting opinions that ascribed different meaning to the same statutory word or phrase.

at work.[147] Specifically, the Justices seemed to divide over whether to adopt the "core" or "prototypical" meaning of the word at issue versus the "legalist" meaning.

The distinction between "prototypical" and "legalist" meaning is not new. Linguist Larry Solan brought the concept of "prototypical meaning" to the attention of statutory interpretation scholars at least a decade ago, defining it as the meaning that focuses on the "core example" that the statute was designed to reach, rather than a meaning that stretches to the conceptual or logical extension of the word at issue.[148] More recent work by Victoria Nourse has highlighted the distinction between "prototypical meaning" and the latter, logical extension kind of meaning, which she calls "legalist meaning."[149] Nourse's work also demonstrates the significance of the distinction, observing that "legalist meaning" is the meaning that New Textualists like Justice Scalia tend to employ, abstracting from the core meaning and considering all logical possibilities that fit within a statutory term.[150] Both Solan and Nourse urge judges to follow "prototypical" rather than "legalist" meaning when construing statutes.[151]

As noted, the Roberts Court's first five-plus terms contained a significant number of cases in which the majority and dissent reached opposing statutory constructions based on the statute's prototypical versus legalist meaning. Consider, for example, the dueling opinions in *Ali v. Federal Bureau of Prisons*.[152] *Ali* involved the Federal Tort Claims Act (FTCA), which waives the United States' sovereign immunity for claims based on torts committed by federal employees.[153] The FTCA contains several exceptions, including one for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any . . . property by any officer of customs or excise or any other law enforcement officer . . . ."[154] Ali, a prisoner who was transferred between prisons,

147. Of the thirty-four cases that dueled over the meaning of the same statutory term, fourteen (41.2 percent) pitted prototypical meaning against legalist meaning.

148. Solan, *supra* note 18, at 2061.

149. Nourse, *supra* note 18, at 1000.

150. *See id.*; *see also* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 124–25 (2012) (discussing prototypical vs. legalist meaning in the context of Professors Vermeule and Chomsky's debate over legislative history in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)).

151. Nourse, *supra* note 18, at 1001–04; Solan, *supra* note 18, at 2060–62.

152. Ali v. Fed. Bureau of Prisons, 552 U.S. 214 (2008).

153. 28 U.S.C. § 1346 (2012).

154. *Id.* § 2680(c).

noticed that several items of his personal property were missing when he arrived at his new facility.[155] Ali brought an FTCA claim alleging that Federal Bureau of Prisons (BOP) officials lost his property in transit. The BOP argued that Ali's claim was barred under the above exemption.

A majority of the Roberts Court agreed with the BOP, relying heavily on the plain meaning of the phrase "any other law enforcement officer," which it read to confer immunity on *all* law enforcement officers.[156] The majority argued that "[t]he phrase 'any other law enforcement officer' suggests a broad meaning" and observed that "[w]e have previously noted that read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[157] To support its construction, the majority cited both a dictionary definition and prior cases that gave expansive meaning to phrases such as "any other term of imprisonment" and "any other final action."[158] The majority opinion acknowledged that the statute's use of the terms "tax or customs duty" and "officer[s] of customs or excise" demonstrated Congress's focus on preserving immunity for claims arising from an officer's enforcement of tax and customs laws. But it emphasized that the text also explicitly mentions claims arising from the "detention of property" and insisted that there was no indication that Congress intended immunity to turn on the type of law being enforced.[159] This is a legalist approach to plain meaning—abstracting out from the statute's core application to customs officers, and relying on broadening interpretive resources such as the dictionary, which provides definitions detached from statutory context, to aid in this conceptual expansion. By contrast, Justice Kennedy's dissenting opinion found that "the plain words of the statute indicate that the exception is concerned only with customs and taxes" and protects only law enforcement officers who deal with customs and taxes.[160] Justice Kennedy's dissent emphasized that property damage resulting from customs and tax-related forfeitures was the core situation that the exemption was designed to reach, and faulted the majority for

155. *Ali*, 552 U.S. at 216.

156. *Id.* at 218–21.

157. *Id.* at 218–19 (emphasis omitted) (alterations in original) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

158. *Id.* at 219.

159. *Id.* at 220–21.

160. *Id.* at 230 (Kennedy, J., dissenting).

reading the phrase "detention of property" too broadly[161] and for focusing on the meaning of the word "any" in isolation, rather than in light of the statutory context.[162]

What is especially interesting about the core-versus-legalist-meaning divide is that it does not necessarily play out along predictable ideological or jurisprudential lines across cases. For example, at least in the cases decided during the Roberts Court's first five-and-a-half terms, arch-textualist Justice Scalia voted to follow the statute's prototypical meaning nearly as often as he did to follow its legalist meaning.[163] Similarly, purposivist jurist Justice Ginsburg voted nearly as often to adopt a statute's legalist meaning as she did to adopt its prototypical, or core, meaning.[164] Purposivist Justice Breyer

161. *See id.* at 235–36 ("[T]he majority of the nine federal statutes other than § 2680(c) containing a reference to the detention of goods, merchandise, or other property are specific to customs and excise.").

162. *Id.* at 233–35.

163. There were fourteen dueling plain meaning rule cases that divided over prototypical-versus-legalist meaning; in six of these, Justice Scalia voted to adopt the prototypical, core meaning rather than the legalist meaning. *See, e.g.*, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2304 (2011) (Thomas, J.) (finding that the prototypical conduct covered by SEC's Rule 10b-5 prohibition against false statements in prospectus is statements made by entities who have final authority over statements); United States v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1728 (2011) (Kennedy, J.) (finding that the core conduct covered by statute's jurisdictional bar is Civil War-era cotton claimants who sued the United States in the Court of Claims, while concurrently suing federal officials in other courts under state tort law); Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 102–03, 111 (2010) (Kennedy, J.) (finding that the core meaning of the Carmack Amendment subjects only "receiving rail carrier[s]" and "delivering rail carrier[s]" to liability and, therefore, property received overseas and later transported to inland location by rail carriers was not covered); Hamilton v. Lanning, 560 U.S. 505, 524 (2010) (Scalia, J., dissenting) (finding that the core method of projecting debtor's income for Bankruptcy Code purposes is to follow Code's formula defining "current monthly income" as "the average monthly income from all sources that the debtor receives" during the past six months); Cuomo v. Clearing House Ass'n, 557 U.S. 519, 525 (2009) (Scalia, J.) (finding that the core meaning of National Bank Act is that "visitorial powers" protect national banks against *supervisory powers* and actions by states, not against all ordinary enforcement by states); Begay v. United States, 553 U.S. 137, 142 (2008) (Scalia, J., concurring) (finding that a DUI offense is not a "violent felony" because the residual clause of the Armed Career Criminal Act covers only offenses similar to the core offenses enumerated in the statute).

164. There were fourteen dueling plain meaning rule cases that divided over prototypical-versus-legalist meaning; in six of these, Justice Ginsburg voted to adopt the legalist meaning rather than the prototypical meaning. *See Janus Capital Grp.*, 131 S. Ct. at 2307 (Breyer, J., dissenting) (reasoning that the "English language" does not impose boundaries on the word 'make' and relying on examples external to the securities context); *Tohono O'Odham*, 131 S. Ct. at 1739 (Ginsburg, J., dissenting) (identifying legalist focus on the general, detached meaning of the terms "claim" and "cause of action," and citing generalist treatise to conclude that entitlement to relief is an essential component of both terms); *Kawasaki*, 561 U.S. at 114–15 (Sotomayor, J., dissenting) (employing a legalist reading of the Carmack Amendment as

and intentionalist Justice Stevens were more predictable, voting to adopt a statute's prototypical meaning in most, though not all, cases. Justice Thomas was similarly predictable, voting to adopt a statute's legalist meaning in most cases, while Justices Roberts, Alito, and Kennedy were more evenly divided in their use of legalist versus prototypical meaning.[165]

The above doctrinal patterns provide important insight into why the plain meaning rule does not seem to constrain jurists in the manner that textualists predict. Justices interpreting statutory text may find different words, phrases, or provisions within the same statute to be controlling or, more cynically, may emphasize different words, phrases, or provisions in order to justify their preferred statutory constructions. Even when the Justices agree on the precise text at issue, some may focus on the core situations that text was designed to cover, while others may seek the general, broad meaning of the word. None of this tells us directly whether the Justices are being disingenuous in their use of text/plain meaning in pursuit of predetermined outcomes, or are simply disagreeing honestly about the rule's application. They could be doing either, or both. Regardless, this doctrinal information teaches that there is ample room for judicial discretion in identifying the so-called "plain" import of statutory terms.

At the same time, however, the doctrinal insight about "prototypical" versus "legalist" meaning suggests a path by which at least some of the indeterminacy involved in application of the plain meaning rule might be eliminated, and judicial dueling over this interpretive canon reduced. Specifically, if jurists were to select either "legalist" or "core" meaning as the appropriate measuring device for a statute's plain meaning, and all Justices sought to identify only that form of plain meaning in all cases, then at least some uncertainties about a statute's meaning could be diminished and judicial dueling

providing liability regime for all rail carriage of property within United States, and citing generalist maritime treatises); *Hamilton*, 130 S. Ct. 2464, 2472 (Alito, J.) (referencing broad, general meaning that "projections" are based on likely future events, not an assumption that the past will repeat itself); Boyle v. United States, 556 U.S. 938, 944 (2009) (Alito, J.) (relying on a legalist reading of the term "any" to construe the RICO term "enterprise" to cover any group of individuals associated in fact); *Ali*, 552 U.S. at 220 (Thomas, J.) (voting with the majority and finding that the statutory mention of "any" law enforcement covers all law enforcement).

165. Justices Roberts, Kennedy, and Alito voted to adopt the prototypical meaning over the legalist meaning in five to six cases each, while Justice Thomas did so in only four of fourteen cases.

over this interpretive canon could be reduced appreciably—perhaps by as much as one-third.

2. *Whole Act Rule*. As with the plain meaning rule, there are a number of ways in which the members of the Roberts Court tend to duel over application of the whole act rule:

> 1. In some cases, the majority and dissenting opinions apply different subparts of the whole act rule to the same statutory provision.
>
> 2. In others, the majority and dissenting opinions focus on different subparts of the statute at issue.
>
> 3. In still other cases, opposing opinions focus on the same subpart of the whole act rule, but reach different end results.

a. Apply different subparts of the whole act rule to the same statutory provision. This form of dueling whole act rule use is perhaps most akin to the "thrusts and parries" in Llewellyn's famous list, as it involves one canonical maxim canceling out another. A majority opinion, for example, might invoke the "meaningful variation" subpart of the whole act rule, which holds that when Congress includes particular language in one section of a statute but omits it in another section of the same statute, courts should presume that Congress acts intentionally and purposefully in the disparate inclusion or exclusion; while the dissenting opinion might invoke the "consistent usage" rule, which presumes that statutory terms mean the same thing throughout all provisions of a statute. Consider the 2009 case, *Carcieri v. Salazar*.[166] *Carcieri* involved construction of the Indian Reorganization Act of 1934 (IRA), which authorizes the Secretary of Interior to acquire land and hold it in trust "for the purpose of providing land for Indians."[167] The Act defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[168] At the time the IRA was enacted, federal authorities considered a tribe called the Narragansett to be under state, rather than federal, jurisdiction and refused to provide it with federal assistance. The Narragansett Tribe did not gain formal recognition from the federal

166. Carcieri v. Salazar, 555 U.S. 379 (2009).

167. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 985 (1934) (codified at 25 U.S.C. § 465 (2012)).

168. 25 U.S.C. § 479 (2012).

government until 1983.[169] Several years later, a dispute arose regarding land that the Tribe had purchased. While litigation was pending, the Secretary notified the State of Rhode Island that he intended to accept the disputed land into trust.[170] Rhode Island challenged the Secretary's authority to accept the land into trust, arguing that the statutory term "now" refers to the time of the IRA's enactment, and permits the Secretary to take land into trust only for recognized tribes that were "under Federal jurisdiction" in 1934.[171]

A majority of the Court agreed with the State's construction. Among other canons, the majority opinion invoked the whole act rule "meaningful variation" principle, noting that other sections of the IRA refer to "now or hereafter," and arguing that this shows that Congress knows how to draw both contemporaneous *and* future events into a statute when it wants to, and that its failure to include "or hereafter" in the provision at issue means that only tribes recognized at the time of the IRA's enactment come under the provision.[172] The dissenting opinion, by contrast, invoked a different whole act rule subpart, the "consistent usage" rule, and different statutory text. It observed that the majority's construction works only if one reads the term "Indians" to refer to individuals, not an Indian tribe.[173] And it noted that Congress has used "Indians" and "Indian tribe" interchangeably in other parts of the IRA, and that the consistent usage rule dictates that Congress should be understood to have done the same in this provision of the IRA as well.[174]

b. The majority and dissenting opinions focus on different subparts of the statute at issue. This form of dueling over application of the whole act rule can involve application of the same whole act rule subpart to different statutory provisions, or can involve two different subparts of the whole act rule applied to two different statutory provisions. *Begay v. United States*[175] provides a good example of the first form of whole act rule dueling. *Begay* raised the question whether driving under the influence of alcohol is a "violent felony" under the Armed Career Criminal Act. The majority held

169. *Carcieri*, 555 U.S. at 384.
170. *Id.* at 382.
171. *Id.*
172. *Id.* at 389–90 (construing 25 U.S.C. § 472).
173. *Id.* at 409–10 (Stevens, J., dissenting).
174. *Id.*
175. Begay v. United States, 553 U.S. 137 (2008).

that a DUI does not constitute a "violent felony," relying significantly on a whole act "rule against superfluity" argument that compared the first and second clauses of § 924(e)(2)(B) and noted that if "violent felony" meant all risky crimes, there would be no need for Congress to include specific examples of crimes such as burglary and arson in the second clause—the examples would be superfluous and would render the first clause, which covers the use of physical force, superfluous.[176] The dissent also made a whole act rule superfluity argument, but based on a different statutory provision—§ 924(e)(2)(A), which includes offenses that "have as an element the use or threatened use of violence."[177] The dissent maintained that this subparagraph shows that § 924(e)(2)(B)(ii) is not limited to "violent" crimes because, if it were, it would be redundant, covering the exact same ground as § 924(e)(2)(A).[178]

c. Opposing opinions apply the same subpart of the whole act rule, but reach different end results. This form of dueling over application of the whole act rule is similar to the third form of plain meaning dueling, in which the majority and dissenting opinions take different views about what constitutes the "plain" meaning of the same statutory text. It suggests that judicial application of the canons suffers not merely from a "cherry-picking" problem, whereby judges have substantial discretion to decide which canons or tools to apply and which precise statutory terms and provisions to focus on, but that even when judges agree on the precise tool to apply and the precise terms or provisions of the statute at issue, there is substantial room for disagreement about the interpretive conclusion to be drawn. In other words, this form of dueling canon use suggests that it is not just the exceptions and countercanons that can render the tools of statutory interpretation indeterminate; but, rather, that the canons and interpretive tools themselves are fairly open to interpretive license.

176. *Id.* at 147–48; *see* 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (defining violent felony to mean "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another").

177. *Begay*, 553 U.S. at 160 (Alito, J., dissenting) (discussing 18 U.S.C. § 924(e)(2)(A)).

178. *Id.* at 159–60.

The Court's dueling statutory-structure inferences in *Dean v. United States*[179] provide a good example. *Dean* involved a sentencing-enhancement statute that contained three subparts: the first imposes a five-year mandatory-minimum enhancement if a firearm is used or carried during and in relation to a violent crime, the second increases the enhancement to seven years "if the firearm is brandished," and the third increases the enhancement to ten years "if the firearm is discharged."[180] At issue was whether the ten-year mandatory enhancement applies if the gun was discharged accidentally, or whether there is an intent requirement for the ten-year enhancement. A majority of the Court interpreted the statute not to contain an intent requirement, relying significantly on the whole act rule "meaningful variation" and "holistic endeavor" subparts. The majority opinion pointed to the "is brandished" provision immediately preceding the "is discharged" provision and noted that it expressly includes an intent requirement, because the brandishing must be done "in order to intimidate."[181] It concluded that Congress's failure to include a similar intent requirement in the "is discharged" provision should be viewed as intentional and deliberate.[182] Justice Stevens' dissenting opinion also relied heavily on the whole act rule "holistic endeavor" subpart; but in contrast to the majority, it read the three enhancements clauses, taken as a whole, to provide escalating mandatory sentences for increasingly culpable conduct.[183] Based on this statutory structure, it drew a different conclusion from the intent requirement in the "is brandished" provision—reading it to mean that the "is discharged" clause also must contain an intent requirement because unintentional discharges are less culpable than intentional brandishing, and it would be nonsensical for clause (iii) to impose a higher sentence for conduct less culpable than that described in clause (ii).[184]

The multiple ways in which the Justices duel over application of the whole act rule are instructive. They reveal that majority–dissenting dueling is not necessarily a simple canon-for-countercanon affair. The Justices disagree not just over the applicable legal rule, but

179. Dean v. United States, 556 U.S. 568 (2009).

180. *See id.* at 570 (discussing 18 U.S.C. § 924(c)(1)(A)).

181. *Id.* at 572–73 (emphasis omitted) (discussing 18 U.S.C. § 924(c)(4)).

182. *Id.* at 573.

183. *Id.* at 578–79 (Stevens, J., dissenting).

184. *Id.* at 579.

also over which parts of the statute are relevant to the interpretive question at issue. These doctrinal observations show that Justices seeking to counteract an opposing opinion's whole act rule argument will have many avenues available for crafting a dueling "parry." Indeed, given the evidence that federal statutes increasingly are drafted by multiple committees, with different sections pieced together in a hurried fashion—rather than carefully planned out by one drafter attentive to how different subparts interact—it is almost surprising that we do not see *more* judicial dueling over this interpretive tool.

3. *Statutory Purpose*. Again, there were a number of ways in which the members of the Roberts Court dueled over the proper application of statutory purpose in the majority and dissenting opinions in the same case. The primary patterns I observed were:

> 1. Majority and dissenting opinions focus on *different, sometimes competing, statutory purposes*.
>
> 2. Majority and dissenting opinions invoke the *same statutory purpose,* but draw *different conclusions* about how that purpose should impact their construction of the statute.
>
> 3. Related to the first, majority or dissenting opinion focuses on a *broad, general statutory purpose*, while the opposing opinion focuses on a *narrow or specific purpose* of the statute.

a. Majority and dissenting opinions focus on different, sometimes competing, statutory purposes. This form of dueling over statutory purpose is, I think, what Justice Scalia has in mind when he argues that interpreting statutes based on purpose leaves too much discretion to individual judges. Justice Scalia has, for example, noted that every statute has multiple purposes and that "[n]o legislation pursues its purposes at all costs"[185]—meaning that the limitations and compromises enacted into a statute are as much a part of its purpose as are its broad goals.[186]

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185. Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 2044 (2012) (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam)).

186. *See, e.g.*, Barnhart v. Peabody Coal Co., 537 U.S. 149, 183–84 (2003) (Scalia, J., dissenting) (noting that "[i]t is naïve for the Court to rely on guesses as to what Congress would have wanted in legislation as complicated as this, the culmination of a long, drawn-out legislative battle in which" interested parties attempted to pull the provisions in different directions); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose.");

The competing-purposes form of dueling occurred in fourteen of nineteen dueling purpose cases.[187] A good example is *Conkright v. Frommert*,[188] an ERISA case that raised the question whether courts must defer to subsequent interpretations made by a plan administrator whose initial interpretation of a benefits plan was deemed "unreasonable" by a court.[189] The majority opinion held that deference remained appropriate, relying in part on ERISA's statutory purpose of balancing the need to "ensur[e] fair and prompt enforcement of rights" with the need to "encourag[e] the creation of such plans" by employers.[190] The dissenting opinion, by contrast, construed the statute to allow more searching judicial review where a plan administrator's first interpretation was unfair to employees, arguing that this construction is most consistent with ERISA's "core purpose of promot[ing] the interests of employees and their beneficiaries in employee benefit plans."[191]

b. Majority and dissenting opinions invoke the same statutory purpose, but draw different conclusions about how that purpose should impact their construction of the statute. As with the "plain meaning" rule and the whole act rule, this form of dueling over the same, agreed-upon statutory purpose suggests an inherent looseness in translating statutory purpose into statutory construction, as opposed to mere judicial discretion in choosing among different versions of a canon or tool. That is, it suggests an "inherent indeterminacy," rather than merely a "cherry-picking" problem in the use of interpretive tools.

Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("The number of possible motivations, to begin with, is not binary, or indeed even finite."); *see also* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002) (Thomas, J.) ("[The statute's] delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions."); City of Joliet v. New West, L.P., 562 F.3d 830, 836–37 (7th Cir. 2009) (Easterbrook, C.J.) (stating that when courts look to purpose, "judges become effective lawmakers, bypassing the give-and-take of the legislative process").

187. *See infra* Appendix for dueling purpose cases. The five cases in which the Court dueled *without* invoking different statutory purposes were: AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Jerman v. Carlisle, 559 U.S. 573 (2010); Altria Grp., Inc. v. Good, 555 U.S. 70 (2008); Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576 (2008); Howard Delivery Serv., Inc. v. Zurich Am. Ins., 547 U.S. 651 (2006).

188. Conkright v. Frommert, 559 U.S. 506 (2010).

189. *Id.* at 509–11.

190. *Id.* at 517 (citations omitted). The majority noted several ways in which deference would benefit employers. *Id.*

191. *Id*. at 535–36 (Breyer, J., dissenting) (citations omitted).

The Court's opinions in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*[192] provide a good illustration. *Jerman* involved construction of the Fair Debt Collection Practices Act, which prohibits debt collectors from making false representations to debtors about a debt's character, amount, or legal status.[193] The Act contains an exception if a debt collector can show that its violation "was not intentional and resulted from a bona fide error."[194] At issue was whether a law firm that filed a lawsuit on behalf of a mortgage company mistakenly seeking to foreclose on property owned by Jerman qualified for the bona fide error exception.[195] A majority of the Court concluded that the bona fide error defense does not apply to violations that result from a debt collector's mistaken interpretation of the legal requirements of the FDCPA.[196] In so ruling, the Court cited the statute's purpose of "eliminat[ing] abusive debt collection practices by debt collectors [and] insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged" and argued "that immunizing debt collectors who adopt aggressive but mistaken interpretations of the law would be inconsistent with the statute's broadly worded prohibitions on debt collector misconduct."[197] The dissenting opinion quoted the same statutory purpose, but concluded that when referring to "abusive debt collection practices" Congress "surely did not contemplate attorneys who act based on reasonable, albeit ultimately mistaken legal interpretations" and noted that debt collectors do not gain a competitive advantage by making good-faith legal errors.[198]

c. Majority or dissenting opinion focuses on a broad, general statutory purpose, while the opposing opinion focuses on a narrow, or specific purpose of the statute. This form of dueling over statutory purpose also may be one that Justice Scalia has in mind when he criticizes purpose-based statutory interpretation. It is a standard textualist complaint that by framing the statutory purpose at whatever

192. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573 (2010).

193. *Id.* at 576; *see* Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (codified as amended at 15 U.S.C. § 1692 *et seq.* (2012)).

194. 15 U.S.C. § 1692k(c) (2012).

195. *Jerman*, 559 U.S. at 579. The debt had already been paid, but the complaint contained a notice stating that the debt would be assumed valid unless Jerman disputed it in writing. *Id.*

196. *Id*. at 581–82.

197. *Id*. at 602.

198. *Id.* at 619 (Kennedy, J., dissenting).

level of abstraction she wishes, a judge can reach the interpretive outcome that she prefers.[199]

Ledbetter v. Goodyear Tire & Rubber Co.[200] provides a good example of this form of dueling over statutory purpose. In *Ledbetter*, a female retiree sued her former employer under Title VII and the Equal Pay Act, alleging that poor performance evaluations she received as a result of sex-based discrimination early in her tenure resulted in her receiving lower pay than her male colleagues from the time of the evaluations through the end of her career.[201] Goodyear argued that Ledbetter's claims were time-barred under a Title VII provision requiring that individuals who wish to bring a discriminatory pay lawsuit must file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred."[202] Ledbetter countered that her claims were timely because each unequal paycheck she received constituted a new Title VII violation and gave her an additional 180 days to file an EEOC charge.[203] A majority of the Court disagreed, concluding that the later effects of past discrimination do not restart the clock for filing an EEOC charge.[204] The majority opinion relied in part on the narrow, specific purpose of the time limitation, noting that statutes of limitations serve a "policy of repose."[205] The dissenting opinion, by contrast, focused on Title VII's broad, general purpose of "assur[ing] equality of employment opportunities" and "mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination."[206] The dissent also criticized the majority's

199. *See, e.g.*, John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2010–11 (2006) (arguing that "legislators . . . rely on semantic detail to express the level of generality at which a proposed legislative policy is acceptable to them" and that judges ignore the "untidy compromise[s]" designed to check a statute's reach when they engage in purposivist analysis); Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1196–97 (2011) (noting that Justice Scalia has made this point).

200. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

201. *Id.* at 621–22.

202. *Id.* at 623–624 (discussing Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-5(f)(1) (2012))).

203. *Id.* at 624.

204. *Id.* at 628–29.

205. *Id.* at 630.

206. *Id.* at 660–61 (Ginsburg, J., dissenting) (quoting Teamsters v. United States, 431 U.S. 324, 328 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

construction as "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."[207]

4. *Practical Consequences*. Finally, many of the Roberts Court's statutory cases contain dueling assessments of the practical consequences that are likely to flow from adopting a particular interpretation. Within this subset of dueling opinions, one pattern or divide is prominent: in 61.3 percent of the cases, one opinion makes an "administrability" argument, while the opposing opinion makes a "policy constancy" argument.[208] In an earlier empirical study of the

207. *Ledbetter*, 550 U.S. at 661. Another good example of majority–dissent dueling over general versus specific purpose can be found in *CSX Transportation, Inc. v. Alabama Department of Revenue*, 131 S. Ct. 1101 (2011), where the majority opinion relied on a tax statute's broad purpose of restoring financial stability to railroads, *id.* at 280, while the dissent referenced the more specific statutory purpose of preventing states from discriminating against railroads, *id.* at 298 (Thomas, J., dissenting).

208. This was true in nineteen of thirty-one cases. *See* Fowler v. United States, 131 S. Ct. 2045, 2049, 2053 (2011) (majority argues that rejected interpretation would undermine another section of the statute [policy constancy] while dissent argues that majority's reading adopts a standard that will confuse judges and juries [administrability]); Magwood v. Patterson, 561 U.S. 320, 332–33, 355 (2010) (majority makes an absurd results argument [policy constancy], while dissent argues waste of prosecutorial resources [administrability]); Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 109–10, 137 (2010) (majority argues that rejected interpretation would be unworkable, leading to two different sets of rules depending on where shipping damage occurred [administrability], while dissent emphasizes unfair advantage to some carriers created by majority's reading [policy constancy]); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179, 191–92 (2009) (majority argues that rejected burden-shifting framework has proved difficult to apply in practice [administrability], while Justice Breyer's dissent argues that burden-shifting framework makes more sense because it would otherwise be practically impossible for plaintiffs to prove statutory violations [policy constancy]); Harbison v. Bell, 556 U.S. 180, 193–94, 204 (2009) (majority argues that rejected interpretation would lead to unworkable waste of resources, forcing defendants to get both state and federal counsel [administrability], while dissent argues that majority's interpretation will lead to absurd results and gamesmanship [policy constancy]); Vaden v. Discover Bank, 556 U.S. 49, 65, 76 (2009) (majority argues that rejected reading would create procedural mess [administrability], while dissent argues that majority's reading unjustly produces different results for parties with identical claims [policy constancy]); Bartlett v. Strickland, 556 U.S. 1, 17, 40 (2009) (plurality argues unworkability [administrability], while dissent argues consistency with statute's goals and avoidance of absurd results [policy constancy]); United States v. Hayes, 555 U.S. 415, 425–26, 436 (2009) (majority argues that rejected interpretation would make provision at issue inapplicable in most cases [policy constancy], while dissent argues that majority's reading makes statute difficult to administer, requiring elaborate fact-finding [administrability]); Greenlaw v. United States, 554 U.S. 237, 251–52, 256 (2008) (majority makes an absurd results argument [policy constancy], while dissent makes a judicial resources argument [administrability]); United States v. Santos, 553 U.S. 507, 528, 530 (2008) (concurrence argues that rejected interpretation would lead to perverse, unthinkable results [policy constancy], while dissent argues that proof problems will plague implementation of concurrence / majority reading [administrability]); United States v. Rodriquez, 553 U.S. 377, 383, 398–99 (2008) (majority claims rejected interpretation could lead to defendants receiving more than the maximum federal sentence

Roberts Court's statutory interpretation practices, I described the "administrability" form of practical consequences as encompassing discussions about the practical difficulty of implementing the particular interpretation, the likely effect the interpretation will have on judicial or other public resources, the consistency or lack of consistency between federal and state laws created by the interpretation, and the clarity or predictability of the legal rule or landscape going forward in light of the interpretation.[209] The "policy constancy" form of practical consequences, by contrast, includes discussions about inconsistencies in statutory policy likely to result from a particular interpretation, the equity or justness of the interpretation, the likelihood that the interpretation will render the statutory provision "meaningless" or ineffective, and assertions that logical absurdities or statutory incoherence will result from the interpretation.[210]

There are many examples of majority–dissent division over administrability versus policy-constancy concerns. In *Gonzalez v. United States*,[211] the Court considered whether the Federal Magistrate

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[policy constancy], while dissent argues that majority's construction leads to lack of uniformity across states [administrability]); Gonzalez v. United States, 553 U.S. 242, 249–50, 265 (2008) (majority argues that adversary process could not function effectively under rejected construction [administrability], while dissent makes an absurd results argument [policy constancy]); Fed. Express Corp. v. Holowecki, 552 U.S. 389, 404, 420 (2008) (majority argues that rejected interpretation is "illogical and impractical" [policy constancy], while dissent argues that majority's reading leaves legal rule vague and unsettled [administrability]); Bowles v. Russell, 551 U.S. 205, 211–12, 216–17 (2007) (majority references Congress's institutional competence to decide statute of limitations parameters [administrability], while dissent references harshness of majority's result [policy constancy]); Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531, 542–43 (2007) (majority argues unfairness of treating procedural and substantive claims differently [policy constancy], while dissent argues that its construction conserves judicial resources and limits frivolous claims [administrability]); Watters v. Wachovia Bank, 550 U.S. 1, 11, 31–32 (2007) (majority emphasizes structural concerns – history of national bank immunity to state regulation [administrability], while dissent argues fairness [policy constancy]); Lawrence v. Florida, 549 U.S. 327, 336, 342–43 (2007) (majority cautions against interpretation that would encourage certiorari filings as a delay tactic [administrability], while dissent counters that majority's reading will produce absurd results [policy constancy]); Woodford v. Ngo, 548 U.S. 81, 89, 115–16 (2006) (majority emphasizes burden that prisoner suits place on judicial system [administrability], while dissent criticizes majority's reading as too absolute [policy constancy]); Rapanos v. United States, 547 U.S. 715, 721–22, 772, 806 (2006) (plurality emphasizes administrative costs and delays associated with permit process [administrability], while concurrence and dissent argue that plurality's reading produces inconsistent consequences [policy constancy]).

209. Krishnakumar, *supra* note 17, at 244–45.

210. *Id.* at 245–46.

211. Gonzalez v. United States, 553 U.S. 242 (2008).

Act empowers magistrate judges to preside over the *voir dire* and selection of prospective jurors in a felony criminal trial based on the consent of defense counsel, or whether the Act requires the personal consent of the defendant for magistrate supervision.[212] A majority of the Court read the FMA to allow magistrate supervision based on defense counsel consent alone.[213] In so ruling, the majority emphasized the practical necessity of giving defense counsel control over trial-management matters—an "administrability" argument.[214] "The adversary process could not function effectively if every tactical decision required client approval."[215] The dissenting opinion countered with a "policy constancy" absurd results argument, noting that the statute requires defendant's express, informed consent in order for a magistrate judge to conduct a misdemeanor trial and calling it a "glaring" inconsistency to read the statute to require greater consent for defendant's waiver of rights in a misdemeanor case than in a felony case.[216]

In earlier work, I described how the "administrability" versus "policy constancy" divide reflects a deeper jurisprudential divide between the Justices over the kind of coherence that jurists should prioritize when construing statutes;[217] the fact that this divide shows up prominently in the dueling practical consequences cases is intriguing, and its implications are explored further in Part III of this Article.

B. Other Observations

Last, let us turn to judicial dueling over dictionary definitions and legislative history. No noteworthy patterns were found regarding how the Justices dueled over either of these interpretive tools. Nevertheless, it is worth discussing doctrinal trends in the cases involving dueling over these tools because, as noted earlier, the low level of dueling for these tools was so surprising.

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212. *Id.* at 243.

213. *Id.* at 245.

214. *Id.* at 249.

215. *Id.* (quoting Taylor v. Illinois, 484 U.S. 400, 418 (1988)).

216. *Id.* at 262–63 (Thomas, J., dissenting); *see also Winkelman*, 550 U.S. at 531, 542–43 (majority making policy-constancy injustice argument about allowing parents to sue pro se to enforce IDEA; part-concurring, part-dissenting opinion counters with administrability argument that pro se cases impose unique burdens on lower courts, schools, and school districts).

217. *See* Krishnakumar, *supra* note 17, at 244–45.

1. *Dictionary Definitions*. Two things stand out when one examines the dueling dictionary cases. First, in most of the cases, majority and dissenting opinions dueled over different definitions of the same word, as one would expect.[218] However, in a nontrivial minority of the cases, opposing opinions dueled over the dictionary definitions for *different words*.[219] This parallels the manner in which the Justices sometimes dueled over the plain meaning of different statutory words and phrases.[220]

Second, when the Justices did duel over dictionary definitions, they rarely placed significant weight on such definitions as an interpretive aid. Of the more than thirty-two opinions in the sixteen cases that involved dueling dictionary definitions, the vast majority referenced such definitions in a corroborative manner, to note that they pointed in the same direction as other interpretive tools. Some opinions even referenced dictionary definitions only to note that they were not particularly helpful in construing the statute. Only six opinions seemed to use the dictionary in a manner that was dispositive, or that significantly directed the interpretive outcome—all but one of these was authored by Justice Scalia or Justice Alito.[221] These findings are consistent with a recent empirical study about the Supreme Court's dictionary use, which found that the bulk of the Court's dictionary references employed the dictionary in an "ornamental role"—rather than as a primary aid in identifying the

218. This was true in eleven of the sixteen cases in which the Justices dueled over dictionary definitions. *See* Sossamon v. Texas, 131 S. Ct. 1651, 1659–60, 1668 (2011); New Process Steel, L.P. v. NLRB, 560 U.S. 674, 683, 692 (2010); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 587, 613 (2010); Graham Cty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 559 U.S. 280, 287, 304 (2010); Cuomo v. Clearing House Assoc., 557 U.S. 519, 526, 539–40 (2009); Boyle v. United States, 556 U.S. 938, 946, 952–53 (2009); Nken v. Holder, 556 U.S. 418, 428, 441 (2009) (counting "injunction" and "enjoin" as the same word); United States v. Santos, 553 U.S. 507, 511, 531–32 (2008); Begay v. United States, 553 U.S. 137, 144, 151, 156 (2008); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 667–68, 692 n.12 (2007); Rapanos v. United States, 547 U.S. 715, 732–33, 769–70, 801 (2006).

219. *See* Kasten v. Saint-Gobain Performance Plastics, 131 S. Ct. 1325, 1331–32, 1337 (2011) (dueling over "filed" v. "complaint"); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 231–32, 251 (2011) ("even though" v. "unavoidable"); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 228, 237 (2008) ("any" v. "detention" and "bailment"); James v. United States, 550 U.S. 192, 207, 213–14 (2007) ("potential" v. "otherwise"); Hamdan v. Rumsfeld, 548 U.S. 557, 632, 639, 711 (2006) ("constituted" v. "special").

220. *See supra* Part III.A.1 (noting a pattern that majority and dissenting opinions sometimes "[f]ocus on *different words or phrases* in the text of the same statute").

221. *See Boyle*, 556 U.S. at 946 (Alito, J.); *Nken*, 556 U.S. at 441, 444 (Alito., J., dissenting); *Begay*, 553 U.S. at 156 (Alito, J., dissenting); *James*, 550 U.S. at 218 (Scalia, J., dissenting); *Nat'l Ass'n of Home Builders*, 551 U.S. at 667–68 (Alito, J.); *Rapanos*, 547 U.S. at 732–33 (Scalia, J.).

best interpretation—and that when the Court did use dictionary definitions in a dispositive manner, it was almost exclusively in an opinion authored by one of the conservative Justices.[222]

These findings also suggest an explanation for the Court's low overall rate of dueling over dictionary definitions, despite the abundance of dictionaries and definitions within those dictionaries. Perhaps, when confronted with an opinion that employs a dictionary definition in an "ornamental" or corroborative fashion, the Justices writing in opposition do not feel compelled to invoke a countervailing dictionary definition to undermine the first opinion's reasoning. That is, perhaps dueling over dictionary definitions does not seem worth the effort to the Justices because the dictionary definition does not seem to add much to their opponent's statutory construction—so that providing a dueling definition conversely would not subtract much from the opposing construction.

2. *Legislative History*. With respect to legislative history, I examined the dueling cases for patterns such as one opinion that relied on legislative history countered by another that used legislative history merely to corroborate, or one opinion that focused on the evolution of the statute countered by another that invoked statements from the legislative record. But no such patterns emerged. Instead, most of the dueling legislative history cases involved majority and dissenting opinions that relied on *different pieces* of legislative history, such as a conference report versus a rejected proposal, or floor statements versus committee reports, and so on.[223] Only a handful of the cases even arguably involved majority and dissent dueling over the meaning of the same form of legislative history.[224] Thus, when the Justices dueled over legislative history, they typically did so in the "cocktail party" or "something for everyone" manner that textualists decry.

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222. *See* Brudney & Baum, *supra* note 67, at 493, 540, 548 n.229, 554 n.273, 569–73.

223. Thirteen of nineteen cases containing dueling references to legislative history involved majority and dissenting references to different forms of legislative history.

224. Only six of nineteen cases could be said to fall into this category. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749, 1757 (2011) (H. Rep. v. H. Rep., floor and hearing statements); *Bruesewitz*, 562 U.S. at 240–42, 254–55 (H. Rep. v. H. Rep.); Carr v. U.S., 130 S. Ct. 2229, 2241, 2249 (2010) (H. Rep and evolution v. H. Rep.); Graham Cty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 559 U.S. 280, 296, 308 (2010) (evolution and H. Rep., S. Rep. v. evolution); AT&T Corp. v. Hulteen, 556 U.S. 701, 713, 718 (2008) (H. Rep v. H. Rep. and statutory evolution); *Hamdan*, 548 U.S. at 578–80, 665 (evolution, rejected proposal, floor statements v. floor statements).

Further, in contrast to the Justices' largely "ornamental" use of dictionary definitions, the overwhelming majority of the dueling legislative history cases involved at least one opinion that *relied* on legislative history to reach its chosen construction, rather than merely to corroborate a construction arrived at through other interpretive tools. Half of the cases involved *both* majority and dissenting opinions that relied on legislative history. These data might lead one to hypothesize that the low overall rate of judicial dueling results from judicial disinclination to duel in cases where legislative history is used only to corroborate a statute's meaning; that is, perhaps most of the Roberts Court opinions that employ legislative history do so in a corroborative manner—and perhaps the Justices who author opposing opinions in those cases do not consider it necessary to counteract such secondary interpretive references. I explored this possibility, but the data were not consistent with such an explanation—most of the opinions in the study that referenced legislative history relied on such history, rather than used it in a corroborative manner, yet in the vast majority of those cases opposing opinions did not make competing legislative history references.[225]

I also reviewed the dueling legislative history cases to determine whether they involved "smoking-gun" pieces of legislative history that seemed to address the precise interpretive question at issue—perhaps explaining why these particular cases triggered a response of some kind in the opposing opinion. I found, however, that "smoking-gun" pieces of legislative history were rare and referenced in only a few of the dueling cases.[226]

Finally, in order to test the possibility that competing legislative history arguments may not have been available in many of the cases in which one opinion referenced legislative history, but the opposing opinion(s) did not, I examined the briefs in fifty-four of the fifty-six cases in the dataset in which only one opinion cited legislative

225. Of the 528 opinions in the dataset, 137 referenced legislative history. Eighty-four of these relied on that legislative history, while fifty-three used legislative history to corroborate an interpretation reached primarily through other tools. Only nineteen of the eighty-four reliance cases, however, involved judicial dueling over this interpretive tool. *See supra* Table 1; *infra* Appendix.

226. In my view, the following are the only cases in the dataset in which the legislative history referenced by the Court could be considered of the "smoking-gun" variety: Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–75 (2009); Corley v. United States, 556 U.S. 303, 318 (2009); *Hamdan*, 548 U.S. at 578–80.

history.[227] I found that in forty-eight of these cases (88.9 percent), at least one brief supporting the reading opposed by the legislative-history-citing opinion contained competing legislative history references.[228] So the textualist claim that some argument from legislative history can be manufactured to support almost any reading does seem to hold true, although this does not seem to be translating into *judicial* manipulation of the legislative history in the manner that textualists predict.

* * *

Overall, the above patterns of dueling interpretive tool use show that there are numerous ways in which judges may disagree over the application of a particular interpretive resource or canon. There are not simply canons and countercanons, as Llewellyn pointed out, and there is not only a cherry-picking problem as Bill Eskridge has pointed out.[229] Rather, even when judges use the same interpretive tool, they may disagree about the statutory word, phrase, provision, or subpart to which that tool should be applied; they might draw competing inferences using the same canon or interpretive rule, or they might bring different focuses (general versus specific) when applying an interpretive tool. All of this amounts to significant judicial discretion in the application of particular interpretive tools and canons. Indeed, when viewed in light of all the possible ways the canons could be used in a dueling manner, it is surprising that the Court does not show higher rates of dueling use for most statutory-interpretation-specific tools.

IV. THEORETICAL IMPLICATIONS

The data reported in Part II have important implications for several prominent theories of statutory interpretation. The implications are greatest for interpretive theories that emphasize predictability or that seek to constrain judicial discretion, but theories that rely on other justifications also can benefit from—or be undermined by—this study's findings. This Part explores the theoretical upshot of the Roberts Court's dueling canon practices. It argues that the dueling canon data undermine several normative

227. Briefs were not available online for two of these cases.

228. Most of these references were contained in the main or reply brief for the party; some were contained in an amicus brief.

229. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 534–35 (2013) (book review).

claims made by textualists,[230] calling into question key justifications that theory offers for privileging certain interpretive tools over others. At the same time, however, the data do not provide any particular support for textualism's chief competitor theory, purposivism. The data do lend some support, at least descriptively, to pragmatic theories of statutory interpretation—highlighting the significant role that practical reasoning plays in the Court's decisions and divisions. The Part concludes by discussing what the dueling canon data might instruct about the viability of methodological stare decisis—the suggestion that federal courts should adopt a binding statutory interpretation methodology.

A. Textualism

Textualism is a formalist method of statutory interpretation that seeks answers primarily from the official language of the statute. It directs judges to identify the ordinary meaning, at the time of enactment, of the statutory term in question.[231] It prioritizes clarity and predictability[232] and is founded on a belief that there is one correct, definitive answer to every interpretive question. Textualism treats the interpretive process like a puzzle;[233] if the correct answer cannot be found through a plain reading of the text, then the

230. *See, e.g.*, SCALIA, *supra* note 27, at 17–22, 132; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii–xxix, 18–19 (2012) (arguing that the textualist approach will produce greater certainty and less variation in the law—"The most destructive (and most alluring) feature of purposivism is its manipulability"—as well as that purposivism is unpredictable and five different judges are likely to have five different ideas about a particular statute's purpose); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (arguing that intent obfuscates the law and is less clear than textual meaning); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that textualism leads to predictability and clarity of statutory meaning).

231. *See, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 548 (1992) (Scalia, J., concurring in part and dissenting in part); SCALIA, *supra* note 27, at 17; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2397–98 (2003); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 416 (1992); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997).

232. SCALIA & GARNER, *supra* note 230, at xxix, xxii–xxvi.

233. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354, 372 (1994) (describing textualists' puzzle-solving approach); 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, 779 (1995) (observing that a textualist judge's interpretive process is analogous to solving a puzzle); *see also* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1257 (1996) (noting textualists' conviction and certainty about their method).

dictionary, the statute's structure, and the Court's prior interpretations of the same word or phrase in other statutes should be consulted to decipher the statute's meaning. Textualists trust such bounded interpretive aids to lead courts to the proper statutory construction—and to restrict the opportunity for "strong-willed judges to substitute their own personal political views for those of the legislature."[234]

Related to its emphasis on predictability and judicial constraint, textualism fervently rejects judicial inquiry into legislative history, intent, and statutory purpose.[235] Textualists have articulated numerous objections to these interpretive sources, particularly legislative history. Formally, they point out that only the statutory text is law and that statements in the legislative record about statutory purpose or the meaning of particular words have not been enacted following the bicameralism and presentment requirements articulated in Article I, Section 7.[236] Textualists also challenge the concept of collective intent, noting that legislative history usually is created by congressional staffers or, at best, a few legislators—so it does not represent the views of the legislature as a whole.[237] Most relevantly for a study of dueling canons, textualists argue that judges use legislative history and statutory purpose selectively, picking and choosing statements or statutory objectives that support constructions that align with their personal policy preferences.[238] As Justice Scalia has commented, "In any major piece of legislation, the legislative history is extensive, and there is something for everybody."[239] In this vein, textualists are fond of invoking Judge Harold Leventhal's famous quip that using legislative history is like going to a cocktail party, and "look[ing] over the heads of the crowd to pick out your friends."[240]

The dueling canon data pose some serious problems for the textualist account. First, the data undermine textualism's central

234. Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1320 (1991) (book review).

235. *See, e.g.*, SCALIA, *supra* note 27, at 16–18, 23, 25 ("[O]f course it's formalistic! The rule of law is about form."(emphases omitted)).

236. *See* U.S. CONST. art. I, § 7; SCALIA, *supra* note 27, at 35.

237. *See, e.g.*, Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring); SCALIA, *supra* note 27, at 16–23.

238. *See* Pierce, *supra* note 233, at 751; *see also* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 205–06 (1983).

239. *See* SCALIA, *supra* note 27, at 36.

240. *See, e.g., id.*; Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 18 (2004).

claim that text-based analysis constrains judicial decision-making and leads jurists to one correct result.[241] Most notably, the high rate of majority–dissent dueling over the plain meaning of statutory text—over 40 percent—indicates that the Justices are not finding textual analysis particularly clarifying or determinative of one correct answer. Further, the data in Table 6f, reporting the ideological direction of the Justices' votes in the text/plain meaning dueling cases, suggest that the plain meaning rule is not constraining the Justices ideologically either.[242] Second, the data also undermine textualism's claim that interpretive tools such as legislative history, purpose, and intent are inherently more indeterminate or manipulable than textualism's favored tools.[243] There is no evidence, for example, that statutory purpose, legislative history, or intent is particularly susceptible to dueling use. Table 1 reports low overall levels of dueling for each of these interpretive tools—at or near 25 percent.[244] More importantly, these purposivist tools exhibited rates of dueling that were roughly equal to some of textualism's most favored tools—e.g., language canons/whole act rule and dictionary references—and exhibited lower rates of dueling than other textualism-favored tools, such as the plain meaning rule and other statutes.[245]

Textualists might counter that the low rates of dueling over purpose, legislative history, and intent reflect the fact that some Justices—particularly those who follow a textualist methodology—refuse to reference these interpretive tools as a matter of principle. Thus, even where competing applications of these three interpretive tools exist, they may not be invoked in a dueling manner in cases authored by these Justices. If this is true, the argument might continue, then the dueling rates for these tools could be dampened—and therefore should be taken not as evidence that the purposivist tools are *not* manipulable or indeterminate, but merely as evidence

241. Textualists may argue that the "dueling text" cases in the dataset contain one opinion that correctly construes the statute paired with an opposing opinion that incorrectly construes the statute—that is, the "dueling text" cases reveal corrupt applications of the textualist approach, rather than two correct, competing textualist constructions. Even if we accept this argument at face value, however, it means that the textualist-preferred interpretive tools are highly susceptible to judicial manipulation and can be made to appear to support the construction favored by the judge in a large percentage of the cases, precisely the charge textualists have leveled at the purposivist interpretive tools.

242. *See supra* Table 6f.

243. *See supra* Table 6f.

244. *See supra* Table 1.

245. *See supra* Table 1.

that these tools are not popular, or widely accepted interpretive resources.

There is some surface appeal to this critique, as the overall reference rates for individual Justices show that Justices Scalia, Thomas, and Roberts rarely invoked purpose, legislative history, or intent in the statutory opinions they authored.[246] For a number of reasons, however, I do not believe that this factor can sufficiently explain the low rate of judicial dueling over the purposivist tools or reconcile the lack of more significant dueling with the traditional textualist critique of these interpretive tools. First, Justice Roberts has not expressed a philosophical opposition to citing legislative history, statutory purpose, or intent—in fact, he has expressly endorsed legislative history use when the statutory text is ambiguous;[247] so his low rates of legislative history citation could have many causes, including a failure to locate on-point legislative history, purpose, or intent in the cases he authored.

Second, although Justices Scalia, Thomas, and Roberts rarely invoked the purposivist interpretive tools in the opinions they *authored*, all of these Justices proved quite willing to *join* opinions that dueled with opposing opinions over statutory purpose or legislative history.[248] This is consistent with Brudney and Ditslear's pointed finding that there was no "Scalia Effect" for opinions authored by other conservative Justices.[249] Thus, it is difficult to tell whether Justices Scalia, Thomas, and Roberts's low rates of legislative history and purpose reliance are caused by philosophical objections—or by a lack of available legislative history, purpose, or intent arguments in the cases in which they authored opinions, or by some other factor.

Third, there is a difference between statements about statutory meaning made by legislators in the legislative record, on the one hand, and the objective statutory history that shows how a statute

246. *See infra* Table 9.

247. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–20 (2005).

248. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011); CSX Transp., Inc., v. Ala. Dep't of Revenue, 562 U.S. 277, 301 (2011) (Thomas, J., dissenting); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 225, 240–42 (2011); Bloate v. United States, 562 U.S. 223, 234–35 (2010); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–75 (2009); FCC v. Fox, 556 U.S. 502, 525 n.5 (2009); Harbison v. Bell, 556 U.S. 180, 198 (2009); Powerex v. Reliant Energy Servs., Inc., 551 U.S. 224, 231 (2007); Hamdan v. Rumsfeld, 548 U.S. 557, 680 (2006).

249. Brudney & Ditslear, *Legislative History*, *supra* note 32, at 169–70.

evolved over time, through multiple drafts and amendments, on the other. Although textualists object to the use of statements in the legislative record, even the most ardent among them is willing to consult evidence of how a particular statutory phrase or provision evolved over time.[250] The cases in my dataset were coded both for references to statements in the legislative record and for references to the evolution of the statute form of legislative history that textualists favor. Thus, philosophical objections to legislative history use cannot entirely explain textualist Justices' low rates of reference, or dueling over, this interpretive tool. Further, all of the Justices other than Justices Scalia, Thomas, and Roberts—including conservative Justices Alito and Kennedy—were willing to invoke statutory purpose and legislative history in a sizeable number of the cases they authored, which means that legislative history dueling was possible in all of the opposing opinions authored by six of the nine Justices on the Court at any given time.[251]

Finally, it is possible to take a crude measure of what the Justices' dueling over legislative history, purpose, and intent might look like without the skewing effect potentially created by Justices Scalia, Thomas, and Roberts—by examining the subset of cases in which none of these Justices authored an opinion on either side.[252] When we adjust the dataset in this manner, the results are surprising, and provide only mixed support for the "refusal to cite" hypothesis. Most surprisingly, the rate of judicial dueling for legislative history actually *decreases*, from 25.3 percent to 16.7 percent, when opinions authored by these three Justices are removed![253] This means that the

250. *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 702–03 (1995) ("[T]he historical evolution of a statute—based on decisions by the entire Congress—should not be discounted for the reasons that may undermine confidence in the significance of excerpts from congressional debates and committee reports."); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 n.2 (1992) (Scalia, J.) (comparing the enacted language of the Airline Deregulation Act with an earlier version that passed the Senate); Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) ("[L]egislative history of a bill is valuable only to the extent it shows genesis and evolution . . . .").

251. *See infra* Table 9.

252. Such a measure is overinclusive, excluding cases in which dueling may have occurred between a majority and dissenting opinion authored by other Justices, but it provides at least a crude control set of opinions for examining whether judicial dueling over purpose, legislative history, and intent looks substantially different when the authors of both opposing opinions are regular users of these interpretive tools.

253. There were only twenty-four cases in this reduced dataset in which at least one opinion referenced legislative history (compared to seventy-six such cases when cases containing

Court was actually *more likely* to duel over legislative history as an interpretive resource in cases where Justices Scalia, Thomas, or Roberts authored an opinion than in cases where they did not. Indeed, of the nineteen dueling legislative history cases in the full dataset, Justice Scalia authored one of the dueling opinions in five cases, and Justice Thomas did so in another four.[254] In other words, although Justices Scalia and Thomas may not prefer to reference legislative history of their own accord in the vast majority of opinions they author, these Justices seem willing to counter an opposing opinion's legislative history references with competing references of their own.

For purpose and intent, by contrast, when we eliminate opinions authored by Justices Scalia, Thomas, and Roberts from the dataset, the rates of judicial dueling increase, from 24.7 percent to 32.0 percent, and from 26.5 percent to 35.8 percent, respectively.[255] These latter rates do provide some crude evidence of a dampening effect on dueling in opinions authored by these three Justices. However, even with this adjustment, the rates of judicial dueling over purpose and intent remain comparable to the rates of dueling over many textualist-preferred tools—slightly higher than dictionary references (28.6 percent), at roughly the same level as the other statutes tool (34.5 percent), and *below* the rate for text/plain meaning rule (42.7 percent).

At bottom, the problem for textualism is that its claims about the ubiquity and malleability of legislative history, statutory purpose, and congressional intent have been so vigorous. In arguing that "there is something for everyone" and invoking Judge Leventhal's cocktail party quip, textualists have implied that competing purposes, congressional intent, and legislative history should be available—or manufacturable—in *most* cases. Against that rubric, a dueling rate of 25 percent seems quite low, even if one accepts some dampening effect based on Justices Scalia's and Thomas's disinclination to reference statutory purpose, intent, or the legislative record form of legislative history in the opinions that they author. Relatedly, textualists have made such strong claims about the ability of text-

opinions authored by Justices Scalia, Thomas, and Roberts are included). Of these, only four involved dueling over legislative history, compared to nineteen dueling legislative history cases in the full dataset.

254. *See* sources cited *supra* note 248.

255. For purpose, the no-Scalia-Thomas-Roberts dueling figure was seven of twenty-four cases; for intent, it was five of fourteen cases.

based interpretive tools to lead judges to one correct result that the rough equivalency between the rates of dueling exhibited for these interpretive tools and the purposivist tools is glaring.[256]

In short, the dueling canon data suggest that textualism's underlying assumptions about different interpretive tools' ability to constrain judges may be incorrect. If textualism wants to push interpreters to privilege text-based interpretive tools over tools such as purpose and legislative history, then, it may need a different theoretical rationale for this methodological prioritization. Perhaps that rationale is the formalist Article I, Section 7 argument that only the statutory text is law. Perhaps it is the landscape coherence idea that individual statutes should be interpreted in a manner that is consistent with the rest of the *corpus juris*.[257] Textualism already relies significantly on both of these justifications, so the lesson from the dueling canons study may simply be that the judicial restraint component of the textualist argument against legislative history and related purposivist tools of construction has been called into doubt.[258]

At the same time, the dueling canon data suggest that textualism may be able to find a way to render its preferred interpretive tool—the plain meaning rule—more constraining, or predictable. The doctrinal analysis in Section II.C showed that much of the dueling that occurs over the plain meaning rule involves one opinion that follows the "prototypical meaning" of a statute, pitted against an opposing opinion that employs a "legalist meaning" of the statute. This observation raises the possibility that courts could eliminate at least some judicial dueling that occurs over this interpretive tool by choosing decisively between prototypical and legalist meaning—that is, by declaring that plain meaning means the prototypical meaning, not the legalist meaning, or vice-versa—and by dictating the kinds of measures that jurists should look for when applying the plain meaning rule going forward (for example, the core example the legislature was

256. Moreover, the dampening argument made regarding purposivist tools is matched on the other end by dictionary definitions: Justices Souter, Ginsburg, Breyer, and Stevens—who are philosophically disinclined, though not opposed, to relying on dictionary definitions—all exhibited very low overall reference rates for dictionary reliance. *See infra* Table 9. If one accepts the argument that legislative history dueling would be higher if all Justices on the Court were willing to use this interpretive tool, then one also must accept that dictionary dueling would be higher if the liberal Justices were more willing to use this interpretive tool.

257. *See* SCALIA, *supra* note 27, at 17; Krishnakumar, *supra* note 17, at 270–71.

258. Or further into doubt, as other empirical studies have shown that the plain meaning rule does not constrain the Justices ideologically. *See* CROSS, *supra* note 50, at 176; Brudney & Ditslear, *Canons of Construction*, *supra* note 5, at 57–60.

seeking to cover or, conversely, the meaning given to a word or phrase in other parts of the *corpus juris*).[259] In other words, courts could adopt a sort of binding, mini-methodological stare decisis dictating how the plain meaning rule should be applied going forward. The data from the Roberts Court's first five-and-a-half terms suggest that such a rule could reduce the frequency of plain meaning dueling at least a little, and perhaps by as much as one-third.

B. Purposivism

Purposivism is an interpretive approach associated with the Legal Process movement.[260] In contrast to textualism, it advocates that jurists interpret the words of a statute by identifying the statute's purpose and selecting the meaning that best effectuates that purpose.[261] Purposive statutory interpretation typically involves inquiries into legislative history, the societal problem that prompted the legislature to enact the statute, legislative intent, and other sources that might illuminate a statute's objectives. It can entail guesswork and judicial discretion, but is often defended on the ground that reliance on legislative history and purpose helps restrict judicial discretion and fulfill congressional intent.[262]

Purposivism once was the dominant approach to statutory interpretation, but over the past few decades it has come under significant attack.[263] The criticism has come from both the New Textualism, which arose largely as a reaction to purposivism, and

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259. Victoria Nourse, who along with Larry Solan, popularized the prototypical-legalist meaning distinction, argues that statutory interpreters should seek a statute's prototypical meaning. *See* Nourse, *supra* note 18, at 1000–04. For our purposes, it matters not which form of plain meaning rule courts choose, so long as they choose one and stick with it.

260. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, lii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting the centrality of The Legal Process materials to purpose-based views of statutory interpretation).

261. *Id*. at xcii.

262. *See* Eskridge, *supra* note 16, at 1548–49; Stevens, *supra* note 16, at 1–2.

263. *See* Roger Colinvaux, *What Is Law? A Search For Legal Meaning And Good Judging Under A Textualist Lens*, 72 IND. L.J. 1133, 1139 (1997); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 334–35 (1990); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 574 (2005); Manning, *supra* note 231, at 2416–17; *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 103 (2006) (questioning "whether the construct of imputed semantic meaning reflects a more defensible conception of legislative supremacy than does the construct of imputed policy coherence").

from public choice theorists, who have criticized purposivism as providing a rose-colored glasses view of the legislative process. Both sets of critics have emphasized the open-endedness of the search for statutory purpose and have argued that purpose-based interpretation enables judges to import their personal policy preferences into the statute.[264]

This study's dueling canon findings provide mostly good news for purposivism. First and foremost, purposivism can celebrate that the data show no evidence supporting textualism's attack on purposivist-preferred tools of interpretation. Indeed, for purposivists, the headline from the study should be that as interpretive tools, purpose, legislative history, and intent appear no more susceptible to judicial shaping to support competing interpretations than do textualist-favored tools such as the whole act rule, dictionary definitions, and the plain meaning rule. Moreover, during the period studied, the purposivist-interpretive tools were used to support competing readings of the same statute in only one-fourth of the cases in which they were invoked.[265] These data came as quite a surprise because most statutes have more than one motivating purpose and because legislative history (particularly statements made on the House and Senate floor) can cut in multiple directions—rendering these two purposivist interpretive tools ripe for dueling use in opposing opinions.

On the other hand, the data do not show any evidence supporting purposivism's affirmative claims that statutory purpose and legislative history constrain judges or ensure that jurists give statutes a meaning that is faithful to Congress's intent. In fact, the doctrinal analysis in the next section illuminates several ways in which judges can disagree over how to characterize a statute's purpose or over what the legislative history means. Moreover, Tables 6a and 6b demonstrate that when the Justices duel over statutory purpose and legislative history, they do so in a manner that is highly ideological. (The data for legislative intent are better, suggesting some

264. *See, e.g.*, ESKRIDGE, *supra* note 78, at 26–29 (commenting that the application of statutory purpose is dependent on the perspective of the interpreter); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 251 (1992); Adrien Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1885 (1998) (criticizing the "malleability of purposive interpretation").

265. *See supra* Table 1.

constraining effect for Justices Ginsburg and Breyer).[266] Thus, while the frequency of judicial dueling over purpose, intent, and legislative history might be relatively low, the manner in which the Justices duel over these interpretive tools shows that there is substantial room for disagreement in application—and that these tools seem incapable of constraining judges to vote against their ideological preferences.

As with the plain meaning rule, however, the inside legislative history doctrinal analysis suggests a way that this purposivist tool might be made more determinate or predictable in application. Specifically, most of the Roberts Court's dueling over legislative history involved a majority opinion that cited one form of legislative history (e.g., a conference report) and a dissenting opinion that referenced a different form of legislative history (e.g., a rejected proposal). Thus, if courts were to adopt a binding hierarchy of legislative history, dictating a precise order in which judges should rely on specific forms of legislative history, at least some of the dueling over this interpretive tool potentially could be diminished. For example, the Supreme Court could adopt a rule that, say, conference reports trump all other forms of legislative history, followed by regular committee reports, statements by sponsors, rejected proposals, and so on down the line. If the Court enforced such a rule strictly, then the only forms of dueling over legislative history that should occur are disagreements about which interpretation a particular piece of legislative history favors and/or competing inferences drawn from inconsistent statements in the same piece of legislative history. This latter form of dueling was rare—occurring in only six cases in the dataset.[267] This suggests that a binding hierarchy of legislative history sources could provide clarity about which interpretation the legislative history points toward in a particular case, enabling litigants and their attorneys to know where to concentrate their resources when researching legislative history and perhaps making legislative history use more predictable.

Significantly, an *informal* hierarchy of legislative history sources does already exist.[268] Committee reports, for example, are widely

266. *See supra* Table 6g.

267. *See* cases cited *supra* note 219.

268. *See, e.g.*, OTTO J. HETZEL, MICHAEL E. LIBONATI & ROBERT F. WILLIAMS, LEGISLATIVE LAW AND PROCESS 589 (3d ed. 2001); ESKRIDGE ET AL., *supra* note 1, at 972 n.d (providing an ordered list of legislative history materials from OTTO HETZEL, MICHAEL LIBONATI & ROBERT WILLIAMS, LEGISLATIVE LAW AND PROCESS 589 (3d ed. 2001)). For a

considered to be the most authoritative form of legislative history, falling second only to conference reports.[269] And empirical studies have found that the majority of legislative history references made in Supreme Court opinions are to committee reports.[270] So adopting a formal hierarchy of legislative history sources would not require a sea change in the Court's interpretive practices or even great debate about the appropriate order of sources. What it would require is a judicial precommitment to employ the most authoritative forms of legislative history when they are available, and judicial discipline to avoid invoking less authoritative forms when the latter contradict the most authoritative forms. Of course, one cannot expect such a hierarchy to eliminate all judicial dueling over legislative history—the battleground could simply shift from competing forms of legislative history to arguments over the relevance that a particular piece of the legislative record bears for a particular interpretive question.[271] But a hierarchy could help to reduce the already low overall rate of dueling over legislative history by creating greater consistency in at least some cases. For example, where a conference committee report and a floor statement directly conflict on the same question, a hierarchy of sources would tell us which one ranks as more authoritative.

C. Pragmatism

Pragmatism is not a jurisprudential approach that claims to ensure judicial constraint or to improve the predictability of statutory interpretation. Rather, it posits only that judges should construe statutes by focusing on the practical consequences that will result from an interpretation and seeking the best result. There is no single or uniform theory of pragmatism, but its various strands are united—

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persuasive argument that the most relevant legislative history is that which corresponds to the last decisionmaking point by Congress, see Nourse, *supra* note 149, at 98.

269. *See In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 977 (9th Cir. 1999); *accord* Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996) ("[A] congressional conference report is recognized as the most reliable evidence of congressional intent because it 'represents the final statement of the terms agreed to by both houses.'" (quoting Dep't of Health & Welfare v. Block, 784 F.2d 895, 901 (9th Cir. 1986))).

270. *See* Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 299 (1982); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 390 (1999); Krishnakumar, *supra* note 17, at 237.

271. For example, we often see different sources that address the interpretive question at issue with varying degrees of precision, such that an on-point line of questioning from a hearing arguably could trump, say, a vague or silent committee report.

and distinct from textualism and purposivism—in their open emphasis on outcomes and practical consequences and their frank recognition that statutory interpretation involves creative policymaking by judges. Judge Richard Posner, for example, has argued that the goal of statutory interpretation should be to produce the best results for society.[272] Judge Posner defines pragmatism, at its core, as "a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans."[273] Bill Eskridge similarly urges that statutory interpreters should take public values into account and construe statutes dynamically—to reflect current social, political, and legal contexts.[274]

Notably, pragmatism shares much in common with legal realism, which challenges the rule-bound formalist narrative and insists that judges decide cases based significantly on social or practical considerations.[275] In fact, Llewellyn himself was a pragmatist, albeit one who focused on disproving the formalist account as an impossible ideal and providing a more accurate description of how judges actually decide cases, rather than on articulating a normative theory for how judges *should* decide cases.

It is perhaps fitting, then, that the dueling canon data provide some descriptive support for pragmatism—and the legal realist account. As Table 1 shows, the Justices on the Roberts Court dueled over practical-consequences considerations slightly more often than they dueled over most traditional canons and tools of statutory construction—indeed, *more often* than they dueled over every other interpretive tool save the plain meaning rule and other statutes.[276] Moreover, all of the Justices other than Justice Thomas referenced practical consequences frequently in the statutory opinions they

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272. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL & LEGAL THEORY 227 (1999); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73–74 (1990).

273. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 3 (2003).

274. *See, e.g.*, Eskridge & Frickey, *supra* note 260, at 321; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46 (1988) ("[S]tatutes ought to be responsive to today's world. They ought to be made to fit, as best they can, into the current legal landscape.").

275. *See, e.g.*, E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES 4–6 (2005); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 193–94 (1988); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 470–71 (1987).

276. *See supra* Table 1.

authored, as Table 9 reports.[277] Only the plain meaning rule and Supreme Court precedent exhibited higher rates of dueling consistently, across all Justices. In this sense, the data vindicate the larger point made in Llewellyn's article, that statutory cases are not very different from common-law cases in their susceptibility to judicial policymaking, despite the existence of neutral canons of construction.

Table 9: Rates of Reliance on Interpretative Canons and Tools by Opinion Author

	Scalia (n=68)	**Thomas (n=67)**	**Alito (n=51)**	**Roberts (n=38)**
Supreme Court Precedent	36.8%	53.7%	41.2%	57.9%
Text or Plain Meaning Rule*	61.8%	64.2%	54.9%	50.0%
Dictionary Rule	22.1%	26.9%	29.4%	15.8%
Language Canons + Whole Act Rule (Combined)	27.9%	44.1%	37.3%	55.3%
Other Statutes	25.0%	17.9%	33.3%	28.9%
Common Law	16.2%	9.0%	13.7%	18.4%
Substantive Canons	8.8%	11.9%	9.6%	21.1%
Whole Act Rule	25.0%	37.3%	31.4%	47.4%
Practical Consequences*	30.9%	17.9%	41.2%	31.6%
Purpose*	8.8%	14.9%	25.5%	13.2%
Intent*	2.9%	6.0%	15.7%	7.9%
Legislative History*	10.3%	9.0%	23.1%	13.2%

277. This is true even for those Justices who openly subscribe to other interpretive approaches and even for textualists, who object in principle to pragmatic reasoning.

	Kennedy (n=44)	**Souter (n=35)**	**Ginsburg (n=46)**	**Breyer (n=73)**	**Stevens (n=60)**
Supreme Court Precedent	61.4%	54.3%	47.8%	49.3%	55.0%
Text or Plain Meaning Rule*	50.0%	45.7%	30.4%	27.4%	43.3%
Dictionary Rule	27.2%	17.1%	13.0%	15.1%	16.7%
Language Canons + Whole Act Rule (Combined)	29.5%	31.4%	30.4%	20.5%	25.0%
Other Statutes	22.7%	22.9%	23.9%	20.5%	16.7%
Common Law	4.5%	14.3%	6.5%	11.0%	16.7%
Substantive Canons	13.6%	11.4%	13.0%	8.2%	25.0%
Whole Act Rule	22.7%	31.4%	28.3%	19.2%	21.7%
Practical Consequences*	47.7%	31.4%	50.0%	42.5%	30.0%
Purpose*	47.7%	17.1%	34.8%	41.1%	30.0%
Intent*	6.8%	22.9%	21.7%	21.9%	41.7%
Legislative History*	22.7%	28.6%	32.6%	41.1%	38.3%

* 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<.05. (For Text / Plain Meaning p=.0016; Purpose p=.0001; for Intent p<.0001; and for Legislative History p=.0001). For Substantive Canons, the differences in rates of reliance approached significance at p=.0597.

What is perhaps most interesting about the Court's practical consequences dueling is that it occurs despite wide-spread concerns about judicial policymaking. Federal judges tend to resist the idea of making any kind of federal common law and their concerns are heightened in the statutory context, where legislative supremacy looms large.[278] Given this, the fact that the Roberts Court Justices openly dueled over practical consequences at a rate of 30.9 percent in their statutory cases suggests that the Justices believe that explaining an interpretation's practical effects will persuade readers of the interpretation's correctness or, at the least, that countering an opposing opinion's characterization of the consequences that would follow from an interpretation is necessary to persuade opinion readers. Otherwise, it would have been safer for the Justices to avoid

278. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 788 (2014).

mentioning that pragmatic considerations played any role in the Court's reasoning, for fear of being charged with judicial activism.

Finally, the doctrinal discovery of the Court's administrability-versus-policy-constancy dueling suggests that practical-consequences-based reasoning may be less ad hoc than the conventional wisdom suggests, and perhaps more predictable than pragmatists themselves realize. We now know that the Justices tend to focus their practical reasoning on concerns such as an interpretation's likely effect on judicial resources, the difficulty of implementing the interpretation, the clarity and predictability of the rule the interpretation creates or, conversely, on the fairness, arbitrariness, or consistency over time of an interpretation. Moreover, we know that these two sets of concerns sometimes point to different interpretations in the same case, and that different Justices prioritize these two sets of concerns differently. This understanding gives litigants a better sense of what to expect from judicial construction and scholars a better sense of what practical reasoning means in practice. It also opens the door to new debates within pragmatism, suggesting that it may no longer be enough for pragmatists to urge judges to choose the construction that achieves the "best results"—but may now also require pragmatists to provide more concrete accounts of what kinds of practical consequences judges should concern themselves with, and which consequences judges should seek to ensure or avoid when different consequences point in conflicting directions.

D. Methodological Stare Decisis

Recent scholarly work has illuminated efforts by state courts and state legislatures to dictate a binding hierarchy of interpretive tools that courts must follow, in a prescribed order—what Abbe Gluck has called "methodological stare decisis."[279] A good example is the Oregon Supreme Court's three-step interpretive framework, which the state court adopted on its own initiative and followed "religiously" for sixteen years.[280] Oregon's framework consisted of a three-tier hierarchy of interpretive resources that required courts to consult textual canons at step one, legislative history at step two if and only if the textual canons proved inconclusive, and substantive

279. Gluck, *supra* note 19, at 1754.

280. Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1145–47 (Or. 1993); Jack. L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 50 (1997).

canons at step three, only as a last resort if both textual tools and legislative history proved indeterminate.[281] Proponents of methodological stare decisis have argued that this kind of binding interpretive framework renders statutory interpretation more predictable, promotes consensus, conserves litigant and judicial resources, and make courts seem less results-oriented.[282] Critics have argued that federal courts cannot agree on an interpretive framework, that diversity in interpretive methods improves the quality of deliberation about statutory meaning, and that different interpretive techniques may be appropriate for different courts.[283] This Article need not take sides in the debate over the normative value of methodological stare decisis. Rather, it is possible to bracket the question of the desirability of methodological consistency and focus instead on what the dueling canon data might teach us about the workability of methodological stare decisis in federal courts.

On the one hand, the dueling canon data provide some reason for optimism regarding the feasibility of methodological stare decisis. One significant concern about methodological stare decisis is that it simply will not work in federal courts, particularly at the Supreme Court level, where most interpretive questions are close and individual canons hypothetically are more likely to point in multiple directions. The Roberts Court's low overall rates of judicial dueling for most interpretive tools, however, contradict that gloomy prediction, showing that even in cases involving close statutory questions, the Justices did not tend to find multiple applications for most interpretive tools most of the time.[284] In so doing, the data demonstrate that it is quite possible that if the Justices were able to agree on a binding hierarchy of interpretive tools to use in a

281. *Portland Gen. Elec. Co.*, 859 P.2d at 1146.

282. *See* Sydney Foster, *Should Courts Give* Stare Decisis *Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1885 (2008); Gluck, *supra* note 19, at 1767; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142 (2002).

283. *See* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 443–44 (2012); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010).

284. *See supra* Table 1. Recall that most interpretive tools coded for showed dueling rates in the range of 21.8–28.6 percent (whole act rule, dictionary definitions, common law, purpose, intent, legislative history) or lower, at 10.9–13.3 percent (substantive canons and grammar canons). Two other interpretive tools, practical consequences and other statutes showed rates of dueling in slightly more than three out of ten cases that invoked these tools (30.9 percent and 34.5 percent, respectively). Only one interpretive tool—text/plain meaning—gave rise to judicial dueling at even close to half of the cases that invoked the tool (42.7 percent).

prescribed order, they could apply those tools in a nondueling manner much of the time.

On the other hand, two aspects of the dueling canon data caution against too much optimism about the prospects for methodological stare decisis. First, despite the low rates of judicial dueling reported for most interpretive tools, the Justices' rates of dueling over the plain meaning rule were rather high. This is significant because, as Oregon's framework illustrates, the plain meaning rule tends to place high in the hierarchy of interpretive tools that courts prescribe when they adopt some form of methodological stare decisis.[285] Thus, the dueling canon data suggest that the first interpretive tool in a preordained interpretive regime might prove inconclusive and have to be bypassed in many cases. Second, this Article's doctrinal analysis demonstrates that there are countless ways for interpreters to divide over the application of a particular interpretive tool, and countless ways for judges to invoke the same interpretive tool to reach different results.[286] Majority and dissenting opinions might focus on different statutory words, invoke different subparts of the whole act rule, argue about which subsection of a statute is relevant, disagree over whether to follow a statute's general versus its specific purpose, and so on. These multiple avenues for conflicting application of the same interpretive tool raise the possibility that even if the Justices could agree on a binding hierarchy of interpretive tools—e.g., committing to employ textual tools of interpretation before considering others—the result might be much higher rates of dueling over textualist tools of interpretation such as the whole act rule, dictionary definitions, and other statutes, rather than more judicial consensus. The same danger of heightened dueling exists for legislative history and other tools that are included lower in the interpretive hierarchy, as these tools become relevant when the textualist tools do not produce a clear answer. That is, in the tough cases with significant stakes, the judicial battleground might simply shift from disagreement over which tools to privilege to whatever terrain the new methodological regime requires—e.g., what the "prototypical meaning" of a particular word is.

Conversely, we might see Justices in opposing opinions claiming less often that statutory text or the whole act rule dictates an opposing construction, and more likely to characterize these

285. *See* Gluck, *supra* note 19 at 1754.

286. For a doctrinal analysis and discussion, see *supra* Part III.

interpretive tools as creating ambiguity—so that they legitimately can bring in helpful legislative history or other interpretive tools authorized at later steps. If either of these results ensues, methodological stare decisis might not, in practice, work to ensure the consensus, predictability, conservation of resources and the like in the federal context that it seems to have achieved in state courts.

Nevertheless, this study's findings might provide at least a modest boost for methodological stare decisis. As noted earlier, many of the doctrinal patterns identified within the Justices' dueling over individual interpretive tools—e.g., prototypical versus legalist meaning, administrability versus policy-constancy-based practical reasoning, different forms of legislative history—suggest small-scale opportunities for courts to adopt binding methodological rules governing the application of particular interpretive tools, in the name of greater predictability and clarity. That is, courts need not adopt an Oregon-like rigid hierarchy of interpretive tools but could, instead, bind themselves to consult only certain forms of legislative history (and to reject others or use them only if more authoritative forms are not available) or to seek the prototypical rather than the legalist plain meaning, or to privilege administrability-type practical concerns over policy-constancy concerns. Even if such small-scale binding rules could not ensure greater predictability or judicial restraint in high-stakes cases, they might do so for more run-of-the-mill, low-stakes cases.

CONCLUSION

More than sixty years ago, Karl Llewellyn inflicted serious injury upon the canons of construction, providing what many have regarded as anecdotal "proof" that the canons are indeterminate, easily manipulated facades used to give judicial decisionmaking a false aura of objectivity. Textualists long have argued that Llewellyn's critique was grossly exaggerated and that, in fact, it is the purposivist tools of construction that are indeterminate and easily manipulated by judges. Purposivists have countered that their preferred interpretive tools ensure fidelity to legislative intent, taking for granted that such tools point toward only one statutory construction. No one has bothered to test these relative claims empirically. This Article begins the effort to do so, seeking to measure the extent to which jurists serving on the nation's high Court employ individual interpretive tools to reach competing outcomes in the same case. The measure is imperfect, but

it reveals a lot about how the Justices publicly defend their statutory constructions. Ultimately, the data suggest that some of the central claims made by textualism may be unfounded, and that pragmatism may benefit from more granular attention to the specific forms of practical reasoning the Court seems to employ, and to divide over. Throughout, this Article's aim has been to illuminate how the Court's actual practices align—or not—with the myths suggested both by Llewellyn's infamous list of canons and countercanons and by the most prominent theories of statutory interpretation.

APPENDIX: DUELING CANONS BY CASE

Legend: 1 = Text; 2 = Dictionary; 3 = Language/Grammar/Whole Act Rule; 4 = Other Statutes; 5 = Purpose; 6 = Legislative History; 7 = Substantive Canons; 8 = Common Law; 9 = Intent; 10 = Supreme Court Precedent; 11 = Practical Consequences.

Canons / Case	1	2	3	4	5	6	7	8	9	10	11
Rapanos v. United States (4–1–4)		Y			Y					Y	Y
Hamdan v. Rumsfeld (5–4)	Y	Y			Y	Y	Y	Y		Y	
AT&T Corp. v. Hulteen (7–2)	Y					Y				Y	Y
Ledbetter v. Goodyear Tire & Rubber Co. (5–4)					Y				Y	Y	
FCC v. Fox Television Stations, Inc. (5–4)	Y					Y				Y	
Boumediene v. Bush (5–4)	Y			Y							
Massachusetts v. EPA (5–4)	Y										
Altria Grp., Inc. v. Good (5–4)	Y				Y					Y	
Bartlett v. Strickland (5–4)	Y									Y	Y
Harbison v. Bell (5–2–2)	Y		Y			Y					Y
Zuni Public Sch. Dist. No. 89 v. U.S. Dep't of Educ. (5–4)				Y					Y		
Forest Grove Sch. Dist. v. T.A. (6–3)	Y		Y			Y					Y
Riley v. Kennedy (7–2)										Y	Y
Ricci v. DeStefano (5–4)			Y		Y					Y	Y
Kasten v. Saint-Gobain Performance Plastics Corp. (6–2)		Y		Y							
Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy (5–1–3)				Y							
Bloate v. United States (7–2)	Y					Y				Y	Y
Bruesewitz v. Wyeth LLC (6–1–2)	Y	Y	Y			Y					
Wyeth v. Levine (5–2–3)					Y					Y	

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Canons **Case**	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**
PLIVA, Inc. v. Mensing (5–4)							Y				
Marrama v. Citizens Bank of Mass. (5–4)	Y										
Morgan Stanley Capital Grp., Inc. v. Publ. Util. Dist. No. 1 (5–2)	Y								Y	Y	
Woodford v. Ngo (5–1–3)									Y		
United States v. Santos (4–1–4)		Y		Y					Y		Y
Gross v. FBL Fin. Servs., Inc. (5–4)	Y					Y				Y	Y
Brown v. Plata (5–4)	Y					Y					Y
Gomez-Perez v. Potter (6–3)				Y					Y	Y	
Lopez v. Gonzales (8–1)	Y		Y	Y							
United States v. Rodriquez (6–3)									Y		Y
Atl. Sounding Co. v. Townsend (5–4)				Y						Y	
Coeur Alaska, Inc. v. Se. Alaska Conservation Council (6–3)	Y		Y								
Riegel v. Medtronic, Inc. (8–1)				Y					Y	Y	Y
Nken v. Holder (7–2)	Y	Y	Y							Y	
Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp. (6–3)	Y				Y						Y
Sykes v. United States (5–1–3)			Y							Y	
Carcieri v. Salazar (6–3)	Y		Y			Y					
Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson (7–2)		Y	Y			Y					
Milner v. Dep't of Navy (8–1)						Y					

Legend: 1 = Text; 2 = Dictionary; 3 = Language/Grammar/Whole Act Rule; 4 = Other Statutes; 5 = Purpose; 6 = Legislative History; 7 = Substantive Canons; 8 = Common Law; 9 = Intent; 10 = Supreme Court Precedent; 11 = Practical Consequences.

Canons **Case**	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**
Nat'l Ass'n of Home Builders v. Defs. of Wildlife (5–4)		Y									
Winter v. Nat. Res. Def. Council (5–2–2)					Y						
Powerex Corp. v. Reliant Energy Servs., Inc. (7–2)						Y					
Tellabs, Inc. v. Makor Issues & Rights, Ltd. (6–2–1)					Y				Y		
Ali v. Fed. Bureau of Prisons (5–4)	Y	Y	Y							Y	
Begay v. United States (5–1–3)	Y	Y	Y								
Howard Delivery Serv., Inc. v. Zurich Am. Ins. (6–3)				Y	Y		Y				
Hall Street Assocs. v. Mattel, Inc. (6–3)					Y						Y
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A. (6–2–2)	Y	Y		Y	Y					Y	Y
Conkright v. Frommert (5–3)					Y			Y			Y
CSX Transp., Inc. v. Ala. Dep't of Revenue (7–2)					Y	Y				Y	
James v. United States (5–4)		Y									
Gonzalez v. United States (7–1–1)				Y							Y
Schindler Elevator Corp. v. United States *ex rel.* Kirk (5–3)			Y								
Sossamon v. Texas (6–3)		Y								Y	
Perdue v. Kenny (5–4)					Y					Y	
Chamber of Commerce v. Brown (7–2)									Y		
United States v. Ressam (6–2–1)				Y		Y			Y		

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Canons / Case	1	2	3	4	5	6	7	8	9	10	11
Stoneridge Inv. Partners, LLC v. Scientific-Atlanta (5–3)						Y				Y	
AT&T Mobility LLC v. Concepcion (5–4)	Y				Y	Y				Y	Y
Entergy Corp. v. Riverkeeper, Inc. (5–1–3)			Y								
Rockwell Int'l Corp. v. United States (6–2)	Y										
Vaden v. Discover Bank (5–4)	Y		Y							Y	Y
Negusie v. Holder (6–4–1)	Y		Y	Y							
Cullen v. Pinholster (5–4)									Y	Y	
Winkelman v. Parma City Sch. Dist. (7–2)	Y										Y
Chamber of Commerce v. Whiting (5–3)				Y	Y						
Dolan v. United States (5–4)	Y			Y							
Fowler v. United States (6–1–2)	Y										Y
Dillon v. United States (7–1)									Y	Y	
Hamilton v. Lanning (8–1)	Y										
Ransom v. FIA Card Servs., N.A. (8–1)	Y										
Osborn v. Haley (7–2)	Y		Y	Y						Y	
Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc. (7–2)	Y			Y						Y	
Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi (II) (6–3)	Y				Y						

Legend: 1 = Text; 2 = Dictionary; 3 = Language/Grammar/Whole Act Rule; 4 = Other Statutes; 5 = Purpose; 6 = Legislative History; 7 = Substantive Canons; 8 = Common Law; 9 = Intent; 10 = Supreme Court Precedent; 11 = Practical Consequences.

Canons / **Case**	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**
Schwab v. Reilly (6–3)	Y										
Holder v. Humanitarian Law Project (6–3)	Y										
New Process Steel, L.P. v. NLRB (5–4)	Y	Y									
Barber v. Thomas (6–3)	Y				Y						
United States v. Tohono O'odham Nation (5–2–1)	Y									Y	
Dean v. United States (7–2)			Y	Y				Y		Y	
Johnson v. United States (7–2)								Y			
Boyle v. United States (7–2)	Y	Y	Y							Y	
United States v. Hayes (7–2)				Y							Y
Janus Capital Grp., Inc. v. First Derivative Traders (5–4)	Y									Y	
Lawrence v. Florida (5–4)			Y								Y
Corley v. United States (5–4)						Y					
Cuomo v. Clearing House Ass'n (5–4)	Y	Y						Y		Y	
Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc. (7–2)								Y			
Bowles v. Russell (5–4)										Y	Y
Anza v. Ideal Steel Supply Corp. (7–2)										Y	Y
Magwood v. Patterson (5–4)										Y	Y
Greenlaw v. United States (6–1–2)											Y
Watters v. Wachovia Bank, N.A. (5–3)											Y

Legend: 1 = Text; 2 = Dictionary; 3 = Language/Grammar/Whole Act Rule; 4 = Other Statutes; 5 = Purpose; 6 = Legislative History; 7 = Substantive Canons; 8 = Common Law; 9 = Intent; 10 = Supreme Court Precedent; 11 = Practical Consequences.

Canons / Case	1	2	3	4	5	6	7	8	9	10	11
Fed. Express Corp. v. Holowecki (7–2)											Y
United States v. Denedo (5–4)										Y	
CSX Transp., Inc. v. McBride (5–4)										Y	
Global-Tech Appliances, Inc. v. SEB S.A. (8–1)										Y	
Rent-A-Center, W., Inc. v. Jackson (5–4)										Y	
Hemi Grp. v. City of New York (5–3)										Y	
14 Penn Plaza LLC v. Pyett (5–4)										Y	
CSX Transp., Inc. v. Hensley (7–2)										Y	
Metro. Life Ins. v. Glenn (6–2–2)										Y	
Preston v. Ferrer (8–1)										Y	
John R. Sand & Gravel Co. v. United States (7–2)										Y	
League of United Latin Am. Citizens v. Perry (5–4)										Y	
Spears v. United States (5–3)										Y	
CBOCS W., Inc. v. Humphries (7–2)										Y	
Lance v. Dennis (8–1)										Y	
Jefferson v. Upton (7–2)										Y	
Holland v. Florida (6–1–2)										Y	
Wood v. Allen (7–2)										Y	
Roper v. Weaver (5–1–3)										Y	
Panetti v. Quarterman (5–4)										Y	