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Reconsidering Substantive Canons

Anita S. Krishnakumar[†]

This Article provides the first empirical study of the Roberts Court's use of substantive canons in statutory interpretation cases. Based on data from 296 cases, the Article argues that much of the conventional wisdom about substantive canons of statutory construction is wrong, or at least overstated with respect to the modern Supreme Court. Substantive canons—for example, the rule of lenity, the avoidance canon, and the presumption against extraterritorial application of domestic laws—have long been criticized as undemocratic judge-made rules that defeat congressional intent, enable interpreters to massage different meanings out of the same text, and make statutory interpretation unpredictable. Scholars have bemoaned the amount of work that substantive canons perform in statutory interpretation cases, and several have charged that textualist judges in particular overuse such canons. But virtually all of these critiques have occurred in the absence of empirical evidence about how judges invoke substantive canons in practice.

This Article reconsiders the substantive canons in light of new data collected from the Roberts Court. The data show that, contrary to the conventional wisdom, substantive canons are infrequently invoked on the modern Court—and even when invoked, they rarely play an outcome-determinative role in the Court's statutory constructions. Perhaps most surprisingly, textualist justices—including Justice Antonin Scalia—rarely invoke substantive canons in the opinions they author, and do so less often than most of their purposivist counterparts. Moreover, contrary to the conventional view that substantive canons empower judges to read their personal policy preferences into statutes, the Court's conservative justices have employed substantive canons to support liberal case outcomes as often, or nearly as often, as they have employed such canons to support conservative outcomes. Further, doctrinal analysis shows that the Roberts Court repeatedly has used substantive canons to honor, rather than frustrate, congressional intent.

The Article also challenges scholars' gloomy warnings that justices in the modern, textualism-influenced era have replaced legislative history with

[†] Professor of Law, St. John's University School of Law. I owe deep thanks for valuable insights and conversations to Aaron-Andrew Bruhl, William N. Eskridge, Abbe R. Gluck, Rebecca M. Kysar, Margaret H. Lemos, Katherine Shaw, Lawrence Solan, Nelson Tebbe, and Adam Zimmerman. I am especially indebted to my husband, Ron Tucker, for his patience with this project. Special thanks to Dean Michael A. Simons and St. John's University School of Law for generous research assistance and to participants at workshops and colloquia at Yale Law School and the Benjamin N. Cardozo School of Law for their comments on earlier drafts of this Article. Christina Corcoran, Sade Forte, Ilya Mordukhaev, Jennifer Roseman, Samuel Sroka, Rita Wang, Kim Friedman, Lissa Yang, Peter Ryan, Vince Nibali, Christine Sammarco, and Thomas Combs provided terrific research assistance. Thanks also to the editors at *The University of Chicago Law Review* for their excellent work. All errors are my own.

substantive canons as the go-to resource for deciphering ambiguous statutory text. Rather, the data from the Roberts Court show that most of the justices referenced legislative history at higher rates than they referenced substantive canons. Moreover, the Court’s own precedents—rather than substantive canons or legislative history—seem to be the unsung gap-filling mechanism that the justices turn to when confronted with unclear statutory text. After reporting the data, the Article discusses the implications of its findings for current debates in statutory interpretation, arguing that statutory interpretation theory needs to pay less attention to substantive canons and more attention to how the Court employs precedents when construing statutes.

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INTRODUCTION

There is a popular belief among statutory interpretation scholars that substantive canons of statutory construction—that is, policy-based background norms or presumptions such as the rule of lenity and the canon of constitutional avoidance—act as an “escape valve” that helps textualist judges eschew, or “mitigate,”

the rigors of textualism.¹ As Professor William Eskridge has noted, “[T]he textualist who refuses to consider legislative history will be sorely tempted to rely on [substantive canons] to provide necessary context and analysis for deciding issues of interpretation.”² The conventional wisdom is that substantive canons operate as an interpretive trump card, allowing judges to reject statutory readings dictated by other tools of construction in favor of readings based on external policy considerations.³ In the conventional telling, substantive canons are thought to wield significant power—indeed, *too much* power—over interpretive outcomes.

Scholars on both sides of the textualist-purposivist divide have criticized substantive canons, although textualists also have defended some substantive canons as entrenched background conventions that Congress is aware of when it legislates.⁴ Justice Antonin Scalia, notably, decried substantive canons as “dice-loading” devices;⁵ but he, in turn, has been accused of employing such canons generously when it suited his ends.⁶ Scholars have pointed out that substantive canons are counter-majoritarian, subject to judicial invention and reinvention, and

¹ John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 125 (2001). See also William N. Eskridge Jr, et al, *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy* 743 (West Academic 5th ed 2014) (“Critics could suggest that . . . every human interpretive technique, including textualism, needs a ‘safety valve’ of some sort.”).

² William N. Eskridge Jr, Book Review, *Textualism, the Unknown Ideal?*, 96 Mich L Rev 1509, 1542 (1998), reviewing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997) (Amy Gutmann, ed).

³ See, for example, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 BU L Rev 109, 109–10 (2010); Eskridge, Book Review, 96 Mich L Rev at 1545–46 (cited in note 2).

⁴ See Manning, 101 Colum L Rev at 125 (cited in note 1); Scalia, *A Matter of Interpretation* at 29 (cited in note 2) (defending the rule of lenity and rules requiring a clear statement to eliminate state sovereignty or to waive the federal government’s sovereign immunity).

⁵ Scalia, *A Matter of Interpretation* at 28 (cited in note 2).

⁶ See, for example, Eskridge, Book Review, 96 Mich L Rev at 1512 n 9 (cited in note 2) (“Scalia warns that ‘to the honest textualist, all of these preferential rules and presumptions are a lot of trouble,’ and criticizes the substantive canons. Yet Scalia himself not only cites but heavily relies on these ‘substantive’ canons.”) (brackets and citations omitted); id at 1543–46 (discussing Scalia’s use of a substantive canon in *BFP v Resolution Trust Corp*, 511 US 531 (1994)); Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky L J 527, 551 (1997–98) (“Justice Scalia and other modern textualists often use ‘clear-statement canons’ that require express congressional authorization for a particular type of government regulatory action.”).

difficult for Congress to overcome.⁷ Recent work has characterized substantive canons as the equivalent of federal common law, explored the theoretical tension between textualism and the substantive canons, and concluded that the constitutionally based canons, at least, are defensible on a “faithful agent” theory of statutory interpretation.⁸

Virtually all of this theorizing has occurred in the absence of empirical evidence about how often judges invoke substantive canons or how much work such canons perform in statutory cases when invoked. There is a general consensus that the avoidance canon has been much abused⁹ and that the rule of lenity has fallen into disuse,¹⁰ but no one has examined the federal courts’

⁷ See, for example, Neal Kumar Katyal and Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 Harv L Rev 2109, 2119 (2015); William N. Eskridge Jr and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand L Rev 593, 636–40 (1992); Eskridge, Book Review, 96 Mich L Rev at 1542–43 (cited in note 2); William N. Eskridge Jr, *The New Textualism*, 37 UCLA L Rev 621, 683–84 (1990).

⁸ See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm & Mary L Rev 753, 778–79 (2013) (theorizing that at least some of the canons might be viewed as a kind of federal common law); Barrett, 90 BU L Rev at 169 (cited in note 3) (suggesting that judges act as “faithful agents of the Constitution” when they apply constitutionally based substantive canons).

⁹ See, for example, Katyal and Schmidt, 128 Harv L Rev at 2129–53 (cited in note 7) (discussing and critiquing the use of the avoidance canon in several recent Supreme Court cases); Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* 105 (Yale 1997) (describing the avoidance canon as suboptimal given game theory analysis); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L Rev 831, 834–35 (2001) (calling for the abandonment of the avoidance canon on separation-of-powers grounds); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 S Ct Rev 223, 228 (criticizing the enforcement of the nondelegation doctrine through the use of the avoidance canon); Frederick Schauer, *Ashwander Revisited*, 1995 S Ct Rev 71, 94–95 (criticizing the avoidance canon as being disguised judicial activism); Harry H. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 S Ct Rev 49, 49–50, 73 (criticizing a specific application of the avoidance canon); *Clay v Sun Insurance Office Ltd*, 363 US 207, 213–14 (1960) (Black dissenting) (accusing the Court of “carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme,” and arguing that “there are times when a constitutional question is so important that it should be decided even though judicial ingenuity would find a way to escape it”); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Wallace Mendelson, ed, *Felix Frankfurter: The Judge* 30, 45 (Reynal 1964) (warning that the avoidance canon risks judicial rewriting of statutes); Richard A. Posner, *The Federal Courts: Crisis and Reform* 284–86 (Harvard 1985) (similar); *Reno v Flores*, 507 US 292, 314 n 9 (1993) (calling the avoidance canon “the last refuge of many an interpretive lost cause”).

¹⁰ See, for example, Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L Rev 885, 885 (2004) (arguing that the rule “has lately fallen out of favor with both courts and commentators”); *The Supreme Court 2007 Term: Leading Cases*, 122

use of substantive canons systematically. Instead, based on anecdote and speculation, much of it fueled by the Rehnquist Court's creation of several federalism clear statement rules in the 1980s and 1990s or the Roberts Court's use of the avoidance canon in recent high-profile cases,¹¹ scholars have taken for granted that substantive canons play a regular, decisive role in the judicial interpretation of statutes—and that textualism needs to articulate a justification for its subscribers' frequent use of such canons. But what if it turns out that these scholarly assumptions are wrong—or at least overstated—in several important respects?

This Article provides the first empirical study of the Roberts Court's use of substantive canons in its statutory interpretation cases. Based on data from 296 statutory interpretation cases decided by the Roberts Court during its first six and a half terms, the Article reports several surprising findings that call into doubt the conventional account of substantive canons and, particularly, their relationship to textualism. Five points stand out: (1) contrary to popular claims that textualist judges rely on substantive canons frequently, the Court's textualist justices rarely invoked substantive canons in the opinions they authored (11.0 percent and 11.7 percent for Scalia and Justice Clarence Thomas, respectively), and did so no more often than their nontextualist counterparts;¹² (2) despite the ubiquity of substantive canons and charges that judges regularly invent new ones, only a handful of

Harv L Rev 276, 475 (2008) (“Though lenity was a robust doctrine for much of this country’s legal development, in recent decades lenity has been disfavored, a deciding factor in only a limited subset of cases if at all.”). See also Note, *The New Rule of Lenity*, 119 Harv L Rev 2420, 2420 (2006).

¹¹ See, for example, *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 205 (2009); *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2594 (2012).

¹² See Table 1. Note also that two of the Court's textualist-leaning justices, Justices Samuel Alito and Anthony Kennedy, likewise referenced substantive canons at decidedly low rates (< 20.0 percent), as did most of the nontextualist justices. See *id.* For characterizations of Alito and Kennedy as textualist judges, see Peter J. Smith, *Textualism and Jurisdiction*, 108 Colum L Rev 1883, 1887 & n 14 (2008) (“[I]t appears that several Justices—clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy—on the Supreme Court now consider themselves textualists.”); John F. Duffy, *In re Nuijten: Patentable Subject Matter, Textualism and the Supreme Court* (Patently-O, Feb 5, 2007), archived at <http://perma.cc/J86F-NXGF> (“[T]here is now likely a majority of current Justices (including the Chief Justice and Justices Scalia, Kennedy, Thomas and Alito) who adhere to some form of fairly rigorous textualism in statutory interpretation.”); Manning, 101 Colum L Rev at 125 & n 505 (cited in note 1) (calling Kennedy a textualist’s “fellow traveler[]”).

substantive canons appear to be doing meaningful work on the modern Court;¹³ (3) a majority of the Roberts Court's references to substantive canons have been in passing, as makeweight or secondary arguments, with only a small number of cases relying significantly on such canons; (4) when the Court did rely significantly on substantive canons, it often exhibited more attentiveness to Congress's intent than the conventional view of substantive canons accounts for; and (5) contrary to the popular belief that substantive canons empower judges to decide cases based on their personal policy preferences, the Court's conservative justices invoked substantive canons to support liberal outcomes nearly as often, and in some cases more often, than they invoked such canons to support conservative outcomes.

These findings have important theoretical implications. For example, they raise the question: If textualist judges are not relying on substantive canons to mitigate the rigors of textualism, then what interpretive tools *are* they using to serve that function? Data from textualist-authored opinions in which substantive canons were *not* used suggest that the answer to this question is Supreme Court precedent and, to some extent, practical-consequences-based reasoning.¹⁴ The findings also suggest that some of the criticisms leveled against substantive canons may be overstated—for example, substantive canons may be *less* prone to invention and reinvention than previously thought. Indeed, in six and a half terms, I counted only four instances in which the members of the Roberts Court invoked an arguably “new” substantive canon—and over half of the Court's substantive canon references involved one of just six well-established canons.¹⁵ This means that despite the wide array of substantive canons created over the past two centuries, the Roberts Court was remarkably constrained, and somewhat predictable, in the canons it tended to invoke. The data also suggest that substantive canons may be applied in a manner that is *more* supportive of congressional intent than the conventional account recognizes.¹⁶ Doctrinal analysis of the handful of cases in the data set in which the Court *did* rely significantly on substantive canons reveals that, in several instances, the Court used the avoidance canon to read a statute

¹³ See Appendix (listing cases and substantive canons invoked).

¹⁴ See Part III.B.

¹⁵ See Appendix; text accompanying notes 140–41.

¹⁶ See Part II.C.

in a manner that *honored* a recent congressional override, or to preserve a long-standing statute against constitutional challenge.¹⁷ In other cases, the Court employed substantive canons in tandem with, or as an approximation of, congressional intent.¹⁸ These cases stand in marked contrast to the conventional wisdom—including recent commentary about the Roberts Court¹⁹—arguing that the Court uses substantive canons to displace legislative preferences with judicial ones.

Further, the data from this study suggest that, in practice, there may not be the stark textualist-purposivist divide that scholars have described regarding whether to consult substantive canons or legislative history to provide contextual clues about statutory meaning.²⁰ As Part II describes in detail, eight of the eleven justices who have served on the Roberts Court for a significant amount of time have referenced legislative history at higher rates—sometimes *much* higher rates—than they have referenced substantive canons. Even archtextualist Scalia invoked substantive canons *at almost the same rate* as he invoked legislative history—an interpretive resource he considered illegitimate—and Thomas referenced both of these tools at quite low rates, suggesting a miserly view of both.²¹ In addition, the data on levels of reliance provide some support for pragmatists' contentions that the canons of construction do not play much of a role in the judicial interpretation of statutes, and that judges

¹⁷ See Parts II.C.1–2.

¹⁸ See Part II.C.3.

¹⁹ See Katyal and Schmidt, 128 Harv L Rev at 2112 (cited in note 7) (arguing that the Roberts Court employs “[a]ctive avoidance” that emboldens judicial activism and “leads to tortured constructions of statutes that bear little resemblance to laws actually passed by the elected branches”); Richard M. Re, *The Doctrine of One Last Chance*, 17 Green Bag 2d 173, 182–84 (2014).

²⁰ See, for example, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750, 1842 (2010) (asserting that the Supreme Court currently is grappling with the question of “how ambiguity is discerned and, once found, whether legislative history or canons come next,” and that “at least part of what divides textualists from purposivists on the modern U.S. Supreme Court seems to be that textualists put canons second, whereas purposivists choose legislative history most of the time”).

²¹ See Table 1 (reporting that Scalia referenced substantive canons in 11.0 percent (nine of eighty-two) of the cases he authored and legislative history in 9.8 percent (eight of eighty-two), and that Thomas invoked substantive canons in 11.7 percent (nine of seventy-seven) of the cases he authored and legislative history in 7.8 percent (six of seventy-seven)).

use them as mere “window-dressing” to shore up interpretations reached primarily through other tools.²²

Finally, taken as a whole, the data suggest that the Roberts Court’s treatment of substantive canons correlates surprisingly well with the methodological *stare decisis* employed by several state courts—which place substantive canons last in the hierarchy of statutory construction tools²³—and with the rules of statutory construction codified by many state legislatures, which list only a handful of substantive canons among the rules they instruct state courts to follow.²⁴ The Roberts Court’s limited use of substantive canons also seems to accord with the preferences of congressional staffers in charge of drafting legislation, who rank substantive canons behind legislative history and rules on agency deference when asked about the usefulness of particular interpretive aids.²⁵

This Article proceeds in three parts. Part I describes the conventional understanding of substantive canons. Part II reports the findings from my study of the Roberts Court’s substantive canon use from January 2006, when Justice Samuel Alito joined the Court, to the end of the Court’s 2011 term. It also provides doctrinal analysis of several cases in which the Court relied significantly on substantive canons, and examines the tools the Court invoked when it *did not* reference substantive canons. Part III explores the theoretical implications of the data and doctrinal observations.

I. THE CONVENTIONAL ACCOUNT

Before exploring the conventional wisdom surrounding substantive canons in detail, it is worth pausing for a moment to

²² William N. Eskridge Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U Chi L Rev 671, 679 (1999). See also 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 (1950) (“[T]o make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon.”).

²³ See Gluck, 119 Yale L J at 1778, 1805–06 (cited in note 20) (describing approaches adopted by several state supreme courts).

²⁴ See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Georgetown L J 341, 382–401 (2010).

²⁵ See Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan L Rev 901, 966 (2013) (showing legislative drafters’ perceptions of which interpretive tools are most useful to courts in determining congressional intent).

define some terms. First, what are “substantive canons”? “The phrase ‘canons of construction’ is understood to encompass a set of background norms and conventions that are used by courts when interpreting statutes.”²⁶ Many scholars further divide the “canons of construction” into two categories: language canons and substantive canons.²⁷ Language canons, as their name suggests, focus on the text of the statute and encompass rules of syntax and grammar, “whole act” rules about how different provisions of the same statute should be read in connection with each other (for example, to minimize internal inconsistency or to avoid superfluity), and Latin maxims such as *expressio unius est exclusio alterius* and *noscitur a sociis*.²⁸ Substantive canons, by contrast, are principles and presumptions that judges have created to protect important background norms derived from the Constitution, common-law practices, or policies related to particular subject areas.²⁹ Substantive canons sometimes operate as tiebreakers, or thumbs on the scale, but in recent years they

²⁶ James J. Brudney and Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand L Rev 1, 7 (2005), citing Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 147 (Harvard 1990).

²⁷ For detailed explanations of this dichotomy, see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921, 927–41 (1992); Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 643, 657–59, 690–93 (cited in note 1); Brudney and Ditslear, 58 Vand L Rev at 12–14 (cited in note 26). Language canons and substantive canons are also sometimes referred to as descriptive and normative canons. See Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 Vand L Rev 561, 563 (1992) (summarizing the distinction between descriptive canons, which are based on particular uses of language, grammar, or syntax, and normative canons, which dictate that ambiguous text be construed in favor of certain judicially crafted policy objectives).

²⁸ For examples of all of these types of language canons, see Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 657–90 (cited in note 1). The maxim *expressio unius est exclusio alterius* means “expression . . . of one thing indicates exclusion of the other.” Id. at 668. The rule rests on a logical assumption of negative implication; if the legislature specifically enumerates certain items in a statute, this is taken to imply a deliberate exclusion of all other items. Id. See also Norman J. Singer and Shambie Singer, 2A *Statutes and Statutory Construction* § 47:23 at 406–13 (Thomson Reuters rev 7th ed 2014). *Noscitur a sociis* means “[i]t is known from its associates.” Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 658 (cited in note 1) (brackets in original). Thus, when a statute contains a list of two or more words, courts are to give each word in the list a meaning that is consistent with the meaning of other words in the list. See Singer and Singer, 2A *Statutes and Statutory Construction* § 47:16 at 353–59 (cited in note 28); Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 658–59 (cited in note 1).

²⁹ See Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 643 (cited in note 1).

have been accused of playing a much more determinative role in the Court's statutory cases.³⁰

Perhaps the most famous substantive canon is the rule of lenity, which holds that ambiguities in criminal statutes must be resolved in favor of the defendant.³¹ A close second is the canon of constitutional avoidance, which holds that if there are two or more plausible readings of a statute, and one of these raises serious constitutional concerns, the Court should adopt the reading that avoids the constitutional problem.³² Other well-known substantive canons include: the rule that waivers of sovereign immunity should be narrowly construed,³³ a rule requiring a "clear statement" before a federal statute may be read to intrude in areas traditionally regulated by states,³⁴ a rule that ambiguities in statutes dealing with Indian tribes are to be resolved in favor of the tribes,³⁵ a rule that statutes in derogation of the common law are to be narrowly construed,³⁶ a rule that remedial

³⁰ See Brudney and Ditslear, 58 Vand L Rev at 13 & n 53 (cited in note 26).

³¹ See Norman J. Singer and J.D. Shambie Singer, 3 *Statutes and Statutory Construction* § 59:3 at 167–75 (Thomson Reuters/West 7th ed 2008); *United States v Wiltberger*, 18 US (5 Wheat) 76, 95 (1820) (describing the rule as "perhaps not much less old than construction itself"); Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 693–96 (cited in note 1).

³² See, for example, *Rapanos v United States*, 547 US 715, 737–38 & n 9 (2006) (Scalia) (plurality); *Edward J. DeBartolo Corp v Florida Gulf Coast Building & Construction Trades Council*, 485 US 568, 575 (1988); *United States v Delaware and Hudson Co*, 213 US 366, 407–08 (1909). See also Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Cal L Rev 397, 399–401 (2005); Schauer, 1995 S Ct Rev at 83 (cited in note 9); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 UC Davis L Rev 1, 88–90 (1996); Friendly, *Mr. Justice Frankfurter* at 45 (cited in note 9); Posner, *The Federal Courts* at 285 (cited in note 9); Wellington, 1961 S Ct Rev at 67–71 (cited in note 9).

³³ See, for example, *Federal Aviation Administration v Cooper*, 132 S Ct 1441, 1453 (2012); *United States v White Mountain Apache Tribe*, 537 US 465, 472 (2003); *United States v Nordic Village, Inc*, 503 US 30, 33–34 (1992).

³⁴ See, for example, *Rapanos*, 547 US at 737–38 (Scalia) (plurality); *BFP v Resolution Trust Corp*, 511 US 531, 544 (1994); *Gregory v Ashcroft*, 501 US 452, 460–61 (1991).

³⁵ See, for example, *Carcieri v Salazar*, 555 US 379, 413–14 (2009) (Stevens dissenting); *Montana v Blackfeet Tribe of Indians*, 471 US 759, 766–68 (1985).

³⁶ See, for example, *Norfolk Redevelopment and Housing Authority v Chesapeake & Potomac Telephone Co of Virginia*, 464 US 30, 35–36 (1983); *Robert C. Herd & Co, Inc v Krawill Machinery Corp*, 359 US 297, 304–05 (1959).

statutes are to be construed liberally,³⁷ and a rule that interpretive doubts should be resolved in favor of veterans.³⁸

As the above list illustrates, substantive canons come in many varieties. Most take one of three forms: (1) “presumptions,” or “rules of thumb that cut across different types of statutes” and “that the Court will ‘presume’ Congress intends to incorporate into statutes”;³⁹ (2) “liberal” or “strict” construction canons, which direct courts to read statutes dealing with certain subject areas either expansively or narrowly;⁴⁰ and (3) “clear statement rules,” which require a clear statement on the face of the statute in order to rebut a policy presumption the Court has created.⁴¹ The next Section discusses prevailing scholarly assumptions about how these policy-based canons operate.

A. The Prevailing Wisdom

Statutory interpretation scholars of widely divergent philosophies tend to converge in several respects in their views about substantive canons. They agree, for example, that textualist judges employ substantive canons regularly⁴² and, at the same time, that there is significant theoretical tension between substantive canons and textualism.⁴³ Implicit in these two points of convergence are two additional assumptions—that substantive canons play a significant role in the interpretation of statutes

³⁷ See, for example, *Atchison, Topeka & Santa Fe Railway Co v Buell*, 480 US 557, 562 (1987); *Tcherepnin v Knight*, 389 US 332, 336 (1967).

³⁸ See, for example, *King v St. Vincent's Hospital*, 502 US 215, 220 n 9 (1991).

³⁹ Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 691 (cited in note 1).

⁴⁰ See id at 690–91.

⁴¹ Id at 692 (emphasis omitted).

⁴² See, for example, Eskridge, Book Review, 96 Mich L Rev at 1542–43 (cited in note 2); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum L Rev 1648, 1655 (2001) (describing textualists' use of “constitutionally inspired clear statement rules”); Gluck, 119 Yale L J at 1758 (cited in note 20) (contending that textualist judges “widely employ the substantive canons”); Mank, 86 Ky L J at 552 (cited in note 6) (arguing that textualists “frequently” employ federalism clear statement rules); Amanda Frost, *Congress in Court*, 59 UCLA L Rev 914, 929 (2012) (noting that “textualist judges are particularly fond of clear statement rules”).

⁴³ See, for example, Barrett, 90 BU L Rev at 121–25 (cited in note 3); Jim Chen, *Law as a Species of Language Acquisition*, 73 Wash U L Q 1263, 1303 (1995) (“[T]he new textualism consistently undermines its stated right-branching approach by its increasing reliance on clear statement rules and other constitutionally informed substantive canons.”); Scalia, *A Matter of Interpretation* at 28 (cited in note 2) (“To the honest textualist, all of these preferential rules and presumptions are a lot of trouble.”); Manning, 101 Colum L Rev at 125–26 (cited in note 1).

and that their effect is to displace legislative policy preferences with judicial ones.⁴⁴

On one side of the statutory interpretation divide, pragmatist Professor Eskridge has posited that “a textualism refusing to consider the legislative context of statutes is going to be tempted not only to rely on substantive canons, but also to develop them, common law style.”⁴⁵ He and others have observed that, despite criticizing substantive canons in theory, leading textualist Justice Scalia “not only cites but heavily relies on these ‘substantive’ canons” when deciding cases.⁴⁶ Eskridge argued that this textualist reliance on substantive canons is problematic, because it allows judges to elide statutory language and to invent or adjust the rules that govern statutory construction as they go along.⁴⁷

On the opposite side of the interpretive divide, textualist scholar Professor John Manning has made similar observations. Manning has noted, for example, that devices like the avoidance canon and clear statement rules “mitigate the textualists’ strict focus on the conventional meaning of the enacted text.”⁴⁸ Further, he has acknowledged that these canons are in tension with “the most basic textualist assumptions” and that some textualists or textualist-sympathetic judges “have recognized the necessity

⁴⁴ Scholarly views regarding language canons have been more mixed. Some scholars have argued that, like substantive canons, language canons are used to frustrate or undermine legislative intent. See James J. Brudney, *Faithful Agency versus Ordinary Meaning Advocacy*, 57 SLU L J 975, 983 (2013), citing generally Brudney and Ditslear, 58 Vand L Rev 1 (cited in note 26). Others have argued that language canons approximate the way Congress drafts and, therefore, that their use *fulfills* legislative intent. See, for example, Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 383–84 (2005) (arguing that canons like *noscitur a sociis* and *expressio unius est exclusio alterius* reflect the “likely intent of the enacting legislature”). See also Scalia, *A Matter of Interpretation* at 25–26 (cited in note 2) (describing language canons such as *noscitur a sociis* and *expressio unius est exclusio alterius* as “commonsensical”); Gluck and Bressman, 65 Stan L Rev at 932–33 (cited in note 25) (reporting that a study of congressional staffers revealed that the majority of them believed that the assumptions underlying the *noscitur a sociis* and *eiusdem generis* canons “always or often” apply).

⁴⁵ Eskridge, Book Review, 96 Mich L Rev at 1545 (cited in note 2).

⁴⁶ *Id.* at 1512 n 9. See also, for example, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 S Ct Rev 181, 186.

⁴⁷ See Eskridge, Book Review, 96 Mich L Rev at 1545–46 (cited in note 2) (“[A]s new canons are created or strengthened and old ones narrowed as Supreme Court composition changes, the honest textualist becomes just as unpredictable as, and may even come to resemble, her doppelgänger the willful judge.”).

⁴⁸ Manning, 101 Colum L Rev at 125 (cited in note 1). See also Manning, 101 Colum L Rev at 1655 (cited in note 42).

for restrained application of such tools of construction.”⁴⁹ In addition, although Manning has defended certain substantive canons as reflecting “established background conventions,” he has conceded that when textualists create new substantive canons, they should be forced to justify their reliance on such interpretive tools.⁵⁰

Other scholars with less clearly staked-out jurisprudential philosophies have echoed these assumptions as well. Professor Amanda Frost has noted that “textualist judges are particularly fond of clear statement rules, which aid them in interpreting ambiguous statutes without the need to resort to legislative history.”⁵¹ And Professor Amy Coney Barrett has argued that textualists “embrace” many substantive canons, including the canon of constitutional avoidance, the rule of lenity, and several clear statement rules.⁵²

In addition, numerous commentators writing over a wide time span have maintained that judges use substantive canons strategically, to effect judicial policy preferences at the expense of legislative intent.⁵³ Speaking broadly about both substantive and language canons, British jurist Sir Frederick Pollock complained more than a century ago that canons “cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.”⁵⁴ More recently, Eskridge has argued that Scalia used substantive canons selectively and arbitrarily, and in a manner that was *less constraining* than interpretive approaches that consider legislative history and intent.⁵⁵

Scalia himself characterized at least some substantive canons as “a sheer judicial power-grab”⁵⁶ and called all substantive

⁴⁹ Manning, 101 Colum L Rev at 125 (cited in note 1).

⁵⁰ Id at 125–26.

⁵¹ Frost, 59 UCLA L Rev at 929 (cited in note 42).

⁵² Barrett, 90 BU L Rev at 121–23 (cited in note 3).

⁵³ See, for example, Ross, 45 Vand L Rev at 563 (cited in note 27) (arguing that substantive canons “clearly reflect *judicial*, not congressional, policy concerns”); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 Vand L Rev 579, 590 (1992).

⁵⁴ Frederick Pollock, *Essays in Jurisprudence and Ethics* 85 (Macmillan 1882). See also James M. Landis, *A Note on “Statutory Interpretation”*, 43 Harv L Rev 886, 890–91 (1930) (criticizing the use of the canons of interpretation over legislative history).

⁵⁵ See Eskridge, 37 UCLA L Rev at 676 (cited in note 7).

⁵⁶ Scalia, *A Matter of Interpretation* at 29 (cited in note 2).

canons “a lot of trouble” to “the honest textualist.”⁵⁷ He described substantive canons as “indeterminate,” leading to the “unpredictability, if not the arbitrariness, of judicial decisions.”⁵⁸ He also questioned “where the courts get the authority to impose them,” doubting whether courts can “really just decree that [they] will interpret the laws that Congress passes to mean less or more than what they fairly say.”⁵⁹

Commentators also seem to agree that there is tension between substantive canons and legislative history, and that as conservative justices have come to dominate the Supreme Court, there has been a trend toward increasing reliance on substantive canons and diminishing reliance on legislative history. Judge Patricia Wald, for example, has observed that “*legislative history is often rejected in favor of, or at least filtered through, canons, presumptions, or principles* considered overriding by a majority of the Court.”⁶⁰ Professor Charles Tiefer similarly has argued that textualists have “strengthen[ed] [] substantive canons *along grounds of dispensing with legislative history.*”⁶¹ More recently, Professors James Brudney and Corey Ditslear’s study of Supreme Court canon use in employment law cases found that, in closely decided cases, there was a “distinctly conservative influence associated with substantive canon reliance.”⁶² Brudney and Ditslear identified a subset of cases in which the majority opinion relied on canons (language or substantive), while the dissenting opinion relied on legislative history.⁶³ In short, the picture painted by statutory interpretation scholars has been of a Court dominated by conservative justices who regularly employ substantive canons and rarely consult legislative history, and of a liberal minority who infrequently invoke substantive canons but continue to consult legislative history regularly.

At first blush, the prevailing scholarly wisdom seems unimpeachable. Some prominent substantive canons blatantly are designed to contravene congressional intent, or at least to

⁵⁷ Id at 28.

⁵⁸ Id (“[I]t is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight.”).

⁵⁹ Id at 28–29.

⁶⁰ Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L Rev 195, 207 (1983) (emphasis added).

⁶¹ Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wis L Rev 205, 220 (emphasis added).

⁶² Brudney and Ditslear, 58 Vand L Rev at 6 (cited in note 26).

⁶³ See id at 77–79. For a fuller discussion of their findings, see Part I.B.

impose default rules that penalize Congress for imprecise drafting. The rule of lenity, for example, dictates that doubts about whether particular conduct is covered by a criminal statute should be resolved in favor of criminal defendants, even though members of Congress tend to take a “tough on crime” stance and likely would prefer to resolve such close calls in favor of the government.⁶⁴ Similarly, federalism clear statement rules impose a default rule that preserves state power at the expense of federal power, deliberately setting a high bar for congressional efforts to intrude on state rights—even though members of Congress would likely prefer that such doubts be resolved in favor of the federal rule.⁶⁵ But despite the intent-defeating design of some substantive canons, doctrinal analysis of the cases studied in this Article suggests that substantive canons often are used in tandem with, or to further, legislative intent, rather than to frustrate it.⁶⁶

B. Prior Studies

There is only one study to date that has examined the substantive canons as a set, rather than focusing on one or a handful of specific such canons. That study, published in 1992 by Eskridge and Professor Philip Frickey, reviewed the Supreme Court’s substantive canon use during the last eleven years of the Burger Court and the first five years of the Rehnquist Court.⁶⁷ Eskridge and Frickey posited that, rather than deciding cases based on what a substantive canon dictates, the Court shapes and even invents canons to fit the results it reaches in individual cases.⁶⁸ That is, substantive canons play an important role in the way the Court expresses or justifies the “value choices” it is employing when it construes a statute, but they do not dictate or produce outcomes; rather, outcomes produce canons.⁶⁹ As evidence in support of their view, Eskridge and Frickey reported that a comparison of the Court’s behavior during the Burger and Rehnquist Courts, and even during different periods within the

⁶⁴ Gluck and Bressman, 65 *Stan L Rev* at 957 (cited in note 25).

⁶⁵ See *id.* at 944 (reporting the results of a survey showing that congressional staffers predicted that courts interpreting ambiguities in federal statutes relating to preemption would favor the reach of federal law).

⁶⁶ See Part II.C.

⁶⁷ See Eskridge and Frickey, 45 *Vand L Rev* at 596 (cited in note 7).

⁶⁸ See *id.*

⁶⁹ *Id.*

Burger Court, revealed “striking differences both in the canons the Court invokes and in the way in which the canons are invoked.”⁷⁰ They argued that this makes sense because, if outcomes produce canons, we can expect that “different Courts will express their different ideologies by emphasizing, or even creating, different substantive canons in the complex work of statutory interpretation.”⁷¹ Indeed, Eskridge and Frickey’s article focused on the Court’s creation of several new federalism-protecting clear statement rules during the 1980s.⁷² Specifically, they observed that “[t]he Court not only created new canons reflecting federalism-based values, but also transformed some of the existing clear statement rules into super-strong clear statement rules.”⁷³ And they took this invention and reinvention of substantive canons to be par for the course, rather than a development unique to the federalism clear statement rules or to the particular period they studied.⁷⁴

In a later article, Eskridge further observed that during the period between 1987 and 1994, the Rehnquist Court employed “no fewer than seventy-nine different” substantive canons in statutory cases.⁷⁵ He also pointed out that “Scalia joined or wrote the Court’s opinion in *almost all of the cases* where the Court invoked or revised these substantive canons.”⁷⁶ As Part II elaborates, I found considerably less variety in the number of substantive canons employed by the Roberts Court between 2006 and 2012 and low rates of substantive canon reliance in the opinions authored by Scalia.⁷⁷

Although not focused on substantive canons, Brudney and Ditslear’s study of the Supreme Court’s workplace law cases also provides some important background for this Article. In particular,

⁷⁰ Id.

⁷¹ Eskridge and Frickey, 45 Vand L Rev at 596 (cited in note 7).

⁷² The article is best known for its elaboration of the quasi-constitutional nature of these federalism clear statement rules and for the authors’ normative critique of such rules. See id at 619–29, 640–45.

⁷³ Id at 619.

⁷⁴ See id at 596 (asserting that the substantive canons are “constructed, and reconstructed, over time”).

⁷⁵ Eskridge, Book Review, 96 Mich L Rev at 1543 (cited in note 2), citing William N. Eskridge Jr and Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 Harv L Rev 26, 101–08 (1994).

⁷⁶ Eskridge, Book Review, 96 Mich L Rev at 1543 (cited in note 2) (emphasis added).

⁷⁷ See Parts II.B.1–2. Similarly, Scalia joined a majority (fifty of eighty-seven), but nowhere near *all*, of the opinions in which the Court invoked a substantive canon. See Table 4.

the Brudney-Ditslear study reinforces several prevailing assumptions about the relationship among substantive canons, ideology, and congressional intent. As noted above, Brudney and Ditslear identified a subset of 10 closely divided cases (out of 148 total closely divided cases) in which the majority opinion relied on substantive canons but not legislative history, while the dissent invoked legislative history to support its position.⁷⁸ In nine of these cases, the majority opinion applied a substantive canon to reach a conservative result, while the dissenting opinion relied on legislative history to reach a liberal result.⁷⁹ Based on these and related findings, Brudney and Ditslear concluded that “this polarized pattern suggests that for an identifiable subset of divisive cases, the canons are being used by the Rehnquist Court to help produce a judicially desired set of policies, ignoring or sacrificing legislatively expressed preferences in the process.”⁸⁰ Although Brudney and Ditslear’s study involved a relatively small number of cases, the conclusions Brudney and Ditslear drew are consistent with prevailing views that substantive canons operate to undermine congressional intent. As discussed in Part II, my study of the Roberts Court suggests that these conclusions may be overstated and that, at least in some cases, the Court seeks to use substantive canons to *honor* congressional intent.

Both the Eskridge-Frickey and the Brudney-Ditslear studies appear to have assumed that when substantive canons were invoked, they played a meaningful role in the Court’s statutory constructions. The evidence reported in the next Part provides some reason to question that assumption and affords a more complete picture of how individual justices compare in their use of substantive canons.

II. THE DATA

A. Methodology

The findings and conclusions presented below are based on quantitative and qualitative analysis of all decisions in the Roberts Court’s 2005 (post–January 31, 2006⁸¹) through 2011

⁷⁸ Brudney and Ditslear, 58 Vand L Rev at 53, 78–79 (cited in note 26).

⁷⁹ See *id.* at 78–79.

⁸⁰ *Id.* at 79.

⁸¹ This is the date that Justice Alito joined the Court.

terms that confronted a question of statutory interpretation.⁸² Every case decided during that period was examined through the Supreme Court's online database to determine whether it dealt with a statutory issue.⁸³ Any case in which the Court's opinion contained a substantial discussion about statutory meaning was included in the study. Cases interpreting the Federal Rules of Civil Procedure (FRCP), the Federal Rules of Evidence (FRE), or the Federal Rules of Criminal Procedure (FRCrP) were not included,⁸⁴ but a handful of constitutional cases in which the Court construed the meaning of a federal statute before deciding the constitutional question were included.⁸⁵ This selection methodology yielded 296 statutory cases over six and a half terms, with 296 majority or plurality opinions, 115 concurring opinions, 172 dissenting opinions, 18 part-concurring/part-dissenting opinions, and 2 part-majority/part-concurring opinions, for a total of 603 opinions. Of these 296 cases, 138 cases were decided unanimously, and 158 were decided by a divided vote.⁸⁶

⁸² This time period was not chosen for any particular reason; the time-intensive nature of data collection led to a decision to end with the 2011 term.

⁸³ For most cases, this process consisted of examining the syllabus for the case; in a few cases, the entire case was read.

⁸⁴ I made this judgment call because the FRCP, FRE, and FRCrP 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. See 28 USC § 2072(a) (granting the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases" in federal courts); *How the Rulemaking Process Works: Overview for the Bench, Bar, and Public* (Administrative Office of the US Courts), archived at <http://perma.cc/DEB3-7QT6> (explaining the current process for amending the federal rules). Accordingly, several of the interpretive tools available when construing statutes—for example, legislative history, intent, the whole-act rule, and other statutes—are not available with respect to the federal rules or provide a very different kind of context, from a very different perspective, when used to construe the federal rules.

⁸⁵ 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 5–4 regarding the constitutional validity of the statute, the opinion was coded as unanimous. See generally, for example, *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193 (2009) (holding unanimously, on statutory grounds, that all political subdivisions are entitled to seek relief from their preclearance obligations under the Voting Rights Act, while also deciding, by a vote of 8–1, to employ the canon of constitutional avoidance to refrain from determining the constitutionality of a section of that act).

⁸⁶ This figure counts as unanimous all decisions in which there was no dissenting opinion, even if concurring opinions offering different rationales were issued. By comparison, for the 2006 through 2011 terms, the overall number of unanimously decided cases (including both statutory and constitutional cases) was 186, and the number of

In coding and analyzing these cases, my primary goal was to determine the frequency with which the Court referenced different 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; (7) substantive canons; (8) Supreme Court precedent; (9) statutory purpose; (10) practical consequences; (11) legislative intent; (12) legislative history; (13) language canons such as *expressio unius*; and (14) references to some form of agency deference.⁸⁷

For purposes of this study, “substantive canons” were defined as background constitutional or policy norms, rules, or presumptions about how statutes should be interpreted, including rules about how statutes in a particular subject area should be construed. Coders were instructed to identify the specific substantive canon being invoked.⁸⁸

The interpretive resources coded for in this study are consistent with those that have been examined in other empirical studies of the Court’s statutory interpretation practices.⁸⁹ A few differences in definitions used for the different sources were inevitable and are pointed out when notable. For example, some early empirical studies of the Supreme Court’s statutory cases lumped language and substantive canons together under the

divided-vote cases was 278. For access to the data, see *Stat Pack Archive* (SCOTUSblog), available at <http://perma.cc/4T5G-8L3L>.

⁸⁷ 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 disagreement, I reviewed the case and made the final determination as to how a particular interpretive resource should be coded. For a detailed explanation of my coding methodology, see Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 *Hastings L J* 221, 291–96 (2010).

⁸⁸ For a list of all cases in the data set that were identified as invoking a substantive canon and the substantive canon(s) invoked, see Appendix. For additional discussion of the methodology and what constitutes a substantive canon, see note 148 and accompanying text.

⁸⁹ See, for example, 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, 11–12 (1998); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 *Tex L Rev* 1073, 1088–90 (1992); Frank B. Cross, *The Theory and Practice of Statutory Interpretation* 142–48 (Stanford 2009).

heading “canons of construction,” rather than measuring references to these different forms of canons separately, as I did.⁹⁰

In recording the Court’s reliance on particular interpretive tools, I counted only references that reflected substantive judicial reliance on the tool in reaching an interpretation. When an opinion mentioned a substantive canon but rejected it as inapplicable or not controlling,⁹¹ I did not count that as a substantive canon reference. 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.⁹²

Secondary or corroborative references to an interpretive tool, on the other hand, were counted; thus, when the Court reached an interpretation based primarily on one interpretive source but went on to note that x, y, and z interpretive tools further supported that interpretation, the references to x, y, and z were coded along with the primarily-relied-upon source.⁹³

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). Each justice’s vote in each case also was recorded, as was the author of each opinion. This methodology was the same as that followed in my previous empirical studies.⁹⁴

The ideological direction of each opinion also was recorded. It is difficult to code case outcomes for ideology because it is not

⁹⁰ See, for example, Schacter, 51 *Stan L Rev* at 11–12 (cited in note 89).

⁹¹ See, for example, *United States v Stevens*, 559 US 460, 481 (2010) (declining to apply the canon of constitutional avoidance).

⁹² An example may help illustrate. In *Barber v Thomas*, 560 US 474 (2010), the majority opinion considered whether 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, or the time the prisoner was *sentenced* to serve. *Id.* at 483–84. The majority held that the phrase referred to the time actually served; in so ruling, it rejected a rule of lenity argument invoked by the petitioner and the dissent, concluding that the rule was inapplicable because the statute was unambiguous. *Id.* at 488. See also *id.* at 500–01 (Kennedy dissenting). The opinion was *not* coded for reliance on a substantive canon.

⁹³ For example, in *Reynolds v United States*, 132 S Ct 975 (2012), the Court held that the Sex Offender Registration and Notification Act does not require pre-Act offenders (convicted before the Act took effect) to register or update their registrations before the attorney general specifies that the Act’s registration requirements apply to them. *Id.* at 984. The majority opinion relied primarily on the “natural” meaning of the Act’s text, and also mentioned the rule of lenity in a passing parenthetical. *Id.* at 980, 982. The opinion was coded for references to text / plain meaning and substantive canons.

⁹⁴ See Krishnakumar, 62 *Hastings L J* at 231–33 (cited in note 87); Anita S. Krishnakumar, *Dueling Canons*, 65 *Duke L J* 909, 921–26 (2016).

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 Professor Harold Spaeth's Supreme Court Database for the cases in my data set.⁹⁵

Finally, every opinion in which a substantive canon was invoked was coded as containing "passing reliance," "some reliance," or "primary reliance" on the substantive canon. While this coding necessarily involved some judgment calls, I believe that it adds valuable texture to our understanding of *how* the Court uses substantive canons when it chooses to invoke them. In any event, my data are available for others to review and agree or disagree with.⁹⁶ The coding parameters for reliance were as follows: An opinion was coded as containing "passing reliance" on a substantive canon if it made minimal reference to the canon, or mentioned it as a fallback or add-on argument supporting a reading already arrived at through other interpretive tools. An opinion was coded as involving "some reliance" on a substantive canon if it made more than minimal reference to the canon, but did not rely on the substantive canon as the main justification for the construction it adopted. Finally, an opinion was coded as containing "primary reliance" if it relied primarily on a substantive canon to justify the result reached.

A few examples should help illustrate how these judgment calls were made. In *Exxon Shipping Co v Baker*,⁹⁷ for instance, the Court considered whether the Clean Water Act's⁹⁸ water pollution penalties preempt punitive damages awards in maritime spill cases.⁹⁹ The Court concluded that the Act does not preempt punitive damages awards, based primarily on the statute's text.¹⁰⁰ The Court also commented that it saw no clear indication of congressional intent to preempt such awards and made a passing reference—in a parenthetical—to the rule that a statute must clearly state its intent to abrogate a common-law

⁹⁵ See *The Supreme Court Database* (Washington University Law), archived at <http://perma.cc/3DL8-4K2W>.

⁹⁶ See Appendix.

⁹⁷ 554 US 471 (2008).

⁹⁸ Federal Water Pollution Acts Amendments of 1972, Pub L No 92-500, 86 Stat 816, codified as amended at 33 USC § 1251 et seq.

⁹⁹ *Exxon*, 554 US at 481.

¹⁰⁰ See *id* at 488–89.

principle.¹⁰¹ This case was coded as containing “passing” reliance on a substantive canon. By contrast, in *Northwest Austin Municipal Utility District Number One v Holder*¹⁰² (“NAMUDNO”), the Supreme Court employed the avoidance canon to adopt a strained reading of the Voting Rights Act of 1965¹⁰³ (VRA)—concluding that a Texas utility district counted as a “political subdivision” eligible for bailout from the preclearance requirement of VRA § 5—in order to avoid thorny questions about the constitutionality of § 5’s preclearance formula.¹⁰⁴ *NAMUDNO* was coded as involving “primary reliance” on a substantive canon.¹⁰⁵ Finally, in *Begay v United States*,¹⁰⁶ the Court held that the offense of driving under the influence (DUI) does not count as a “violent felony” under the Armed Career Criminal Act of 1984.¹⁰⁷ Justice Scalia agreed and authored a concurring opinion that relied on the statutory text, the whole-act rule, and a dictionary definition to conclude that the proper test for determining whether an offense is a “violent felony” is whether the offense “pose[s] at least as serious a risk of physical injury to another as burglary.”¹⁰⁸ His concurring opinion then stated that drunk driving could not clearly be said to pose “at least as serious a risk of physical injury to another as burglary” and that the rule of lenity therefore required him to find in favor of the defendant.¹⁰⁹ Scalia’s concurrence in *Begay* was coded as containing “some reliance”—that is, more than “passing reliance” but less than “primary reliance”—on a substantive canon.

¹⁰¹ See *id.* at 489.

¹⁰² 557 US 193 (2009).

¹⁰³ Pub L No 89-110, 79 Stat 437, codified as amended at 52 USC § 10301 et seq.

¹⁰⁴ *NAMUDNO*, 557 US at 196–97.

¹⁰⁵ For additional examples of “primary reliance” cases, see generally *Arlington Central School District Board of Education v Murphy*, 548 US 291 (2006) (using a federalism clear statement canon to hold that the Individuals with Disabilities Education Act (IDEA) does not allow recovery of expert fees from states); *Gonzales v Carhart*, 550 US 124 (2007) (using the avoidance canon to find that the Partial-Birth Abortion Ban Act does not prohibit standard “dilation and evacuation” procedures); *Florida Department of Revenue v Piccadilly Cafeterias, Inc.*, 554 US 33 (2008) (using a federalism clear statement canon to construe the Bankruptcy Code’s stamp tax exemption to not apply to transactions before a plan is confirmed under Chapter 11).

¹⁰⁶ 553 US 137 (2008).

¹⁰⁷ Pub L No 98-473, 98 Stat 2185, codified as amended at 18 USC § 924(e). For the Court’s holding, see *Begay*, 553 US at 139.

¹⁰⁸ *Begay*, 553 US at 148–53 (Scalia concurring in the judgment).

¹⁰⁹ *Id.* at 153 (Scalia concurring in the judgment).

B. Substantive Canon Statistics

Before reporting the data, it is important to note some limitations of this study. First, the study covers only six and a half Supreme Court terms and only 296 statutory interpretation cases, decided by some combination of the same eleven justices. While this data set is large enough to reveal some things about the Supreme Court's use of substantive canons, the data reported may reflect trends specific to the Roberts Court. Second, great significance should not be placed on the precise percentages reported; the number of cases reviewed is large enough to provide some valuable insights, but the focus should be on the patterns that emerge rather than on specific percentages. Third, in noting the weight, or intensity, of an opinion's reliance on a substantive canon, I make no claims to have discovered the justices' underlying, or "true," motivations for deciding a statutory case; the data do not reveal whether a particular opinion relied heavily on a substantive canon because the opinion's author was persuaded by the canon, or merely because the author thought the canon was a convincing interpretive tool. The study's empirical and doctrinal claims are confined to describing how the justices publicly engage the substantive canons as justifications for their statutory constructions and to theorizing about discernable patterns in their public engagement of such canons.

1. Frequency and weight.

Table 1 reports the frequency with which the members of the Roberts Court referenced substantive canons—and other interpretive canons or tools of construction—in the opinions they authored during the Court's 2005 through 2011 terms.¹¹⁰ For seven of the eleven justices, the rates of reference to substantive canons are low, roughly at or below 15.0 percent.¹¹¹ As Table 1 shows, this compares to much higher rates of reference, across justices, for almost every other interpretive tool.¹¹² Even the three most frequent users of substantive canons, Justices John Paul Stevens, John Roberts, and Sonia Sotomayor, employed such canons in no more than 25.0 percent of the opinions they

¹¹⁰ See Table 1.

¹¹¹ See *id.*

¹¹² See *id.*

authored.¹¹³ Indeed, out of the eleven interpretive tools listed in Table 1, substantive canons were among the least frequently invoked. Only common law exhibited similarly low rates of reference across the board.¹¹⁴ While some of the justices referenced legislative intent at low rates as well, several others invoked intent at much higher rates (above 20.0 percent).¹¹⁵

¹¹³ See *id.*

¹¹⁴ See Table 1 (reporting rates of reference for “Common Law” precedent ranging from 0 percent to 17.6 percent). One important caveat: my study did not count references to agency deference, such as the *Chevron* doctrine, as substantive canon references—such references instead were coded as reliance on an independent interpretive resource (agency deference). See *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842–43 (1984). This is consistent with how most other empirical studies of the US Supreme Court’s statutory interpretation practices have treated references to agency deference. See, for example, Schacter, 51 *Stan L Rev* at 33–34 (cited in note 89) (coding judicial invocations of “*Chevron*-style deference” as references to “administrative materials”); Cross, *The Theory and Practice of Statutory Interpretation* at 144 (cited in note 89) (coding reliance on *Chevron* doctrine as a form of “deference to the executive branch”); Brudney and Ditslear, 58 *Vand L Rev* at 23–24 (cited in note 26) (coding “agency deference” separately from “substantive canons”). But see Connor N. Raso and William N. Eskridge Jr, *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 *Colum L Rev* 1727, 1734–35 (2010) (calling agency deference doctrines a form of substantive canon); Gluck and Bressman, 65 *Stan L Rev* at 940 (cited in note 25). My study also did not count citations to the canon against implied repeals or the rule that specific provisions trump general ones as substantive canons because legislation scholars consider these to be textual integrity or whole-code canons. See, for example, William N. Eskridge Jr, John A. Garver Professor of Jurisprudence, Yale Law School, E-mail to Anita S. Krishnakumar (Oct 30, 2015) (“Eskridge E-mail”) (on file with author).

¹¹⁵ See Table 1.

TABLE 1. RATES OF RELIANCE ON INTERPRETIVE CANONS AND TOOLS BY OPINION AUTHOR^λ
(N=584)^ρ

Canons / Interpretive Tools	Thomas (n=77)	Scalia (n=82)	Alito (n=58)	Roberts (n=41)	Kennedy (n=46)	Breyer (n=80)	Kagan (n=14)	Souter (n=35)	Ginsburg (n=57)	Sotomayor (n=34)	Stevens (n=60)
Supreme Court Precedent	54.5%	40.2%	43.1%	58.5%	60.9%	50.0%	42.9%	54.3%	47.4%	70.6%	55.0%
Text / Plain Meaning*	62.3%	56.1%	48.3%	48.8%	47.8%	26.3%	57.1%	45.7%	28.1%	47.1%	43.3%
Dictionary Rule	24.7%	19.5%	29.3%	14.6%	26.1%	15.0%	35.7%	17.1%	14.0%	26.5%	16.7%
Combined Language Canons / Whole-Act Rule	42.9%	28.0%	36.2%	51.2%	30.4%	18.8%	50.0%	31.4%	29.8%	52.9%	25.0%
Other Statutes	16.9%	23.2%	31.0%	26.8%	21.7%	18.8%	7.1%	22.9%	22.8%	26.5%	16.7%
Common Law	9.0%	14.6%	17.2%	17.1%	4.3%	8.8%	0.0%	14.3%	5.3%	17.6%	16.7%
Substantive Canons	11.7%	11.0%	13.8%	22.0%	15.2%	11.3%	14.3%	14.3%	15.8%	17.6%	25.0%
Practical Consequences*	16.9%	30.5%	37.9%	31.7%	45.7%	43.8%	21.4%	31.4%	42.1%	44.1%	30.0%
Purpose*	14.3%	11.0%	22.4%	12.2%	45.7%	41.3%	50.0%	17.1%	33.3%	38.2%	30.0%
Intent*	5.2%	4.9%	17.2%	7.3%	6.5%	21.3%	14.3%	22.9%	21.1%	26.5%	41.7%
Legislative History*	7.8%	9.8%	20.7%	12.2%	26.1%	43.8%	28.6%	28.6%	29.8%	52.9%	38.3%

^λ Percentages reported in each row represent the number of opinions authored by each justice that invoked the listed interpretive canon, divided by the total number of statutory interpretation opinions each justice authored (that total number is reported below each justice's name, as n=X).

^ρ The total number of opinions reflected in the Table is 584, rather than 603, because the Table omits 19 per curiam opinions issued during the period studied.

* Indicates that a one-way analysis of variance (ANOVA) test, using the Bonferroni multiple comparison method, reveals a significant difference between rates of reliance by different justices in the opinions they authored at $p < 0.05$. (For Text / Plain Meaning $p=0.000$; for Practical Consequences $p=0.0091$; for Purpose $p=0.000$; for Intent $p=0.000$; and for Legislative History $p=0.0001$.) In other words, for these particular interpretive tools, the patterns or differences in rates of reference across justices were less than 5.0 percent likely to have occurred merely by chance.

Table 2 provides a slightly different comparison of the rates at which the members of the Roberts Court referenced substantive canons, relative to other interpretive tools, as a percentage of all opinions issued during the period studied.

TABLE 2. OVERALL ROBERTS COURT RATES OF RELIANCE ON INTERPRETIVE CANONS AND TOOLS: 2005–2011 TERMS

Canons / Interpretive Tools	All Opinions† (n=603)	Majority Opinions (n=296)	Dissenting Opinions (n=172)	Concurring Opinions (n=115)	Partial Opinions (n=20)
Supreme Court Precedent	52.6%	62.5%	48.3%	36.5%	35.0%
Text / Plain Meaning	44.8%	54.1%	39.0%	33.0%	25.0%
Dictionary Rule	19.9%	27.7%	14.5%	8.7%	15.0%
Combined Language Canons / Whole-Act Rule	32.3%	67.9%	25.0%	12.2%	25.0%
Other Statutes	21.2%	33.4%	20.3%	5.2%	5.0%
Common Law	11.4%	15.2%	6.4%	8.7%	15.0%
Substantive Canons	14.4%	15.5%	18.0%	5.2%	5.0%
Practical Consequences	33.7%	34.5%	44.2%	19.1%	15.0%
Purpose	26.0%	28.0%	32.0%	12.2%	25.0%
Intent	16.1%	15.2%	24.4%	7.8%	5.0%
Legislative History	25.0%	27.0%	30.8%	10.4%	30.0%

Like the data in Table 1, the data in Table 2 reveal that substantive canons were infrequently invoked in the Court's statutory cases (14.4 percent of all opinions). Also as in Table 1, substantive canons were the Court's second-least-frequently-used interpretive resource overall, behind only the common law.¹¹⁶ This raw rate is not shocking in itself; Professors Brudney and Ditslear's study of workplace law cases found similarly low

† The percentages reported in each column represent the number of cases that referenced an interpretive tool divided by the total number of opinions of that type (majority, dissenting, etc.) authored in cases presenting a statutory interpretation question. Per curiam opinions, which were excluded from Table 1, are counted as majority opinions for the purposes of this Table.

¹¹⁶ See Table 2. Common-law precedent was referenced in 11.4 percent of all opinions.

overall rates of reference to substantive canons (15.6 percent of Rehnquist Court cases).¹¹⁷ What is new is the finding that such low rates of reference hold true across *all statutory subject areas*—not just in cases involving employment law statutes—and the comparative data indicating that the Court invoked substantive canons far less often than it invoked *almost all other* interpretive canons and tools.

More striking, however, is what the data show about how infrequently *textualist* justices employed substantive canons in the statutory opinions they authored. Contrary to popular belief, the Court's most prominent textualist, Scalia, referenced substantive canons in only 11.0 percent (nine of eighty-two) of the opinions he authored, and fellow textualist Justice Thomas did so in just 11.7 percent (nine of seventy-seven) of the opinions that he authored.¹¹⁸ Textualist-leaning Justice Alito¹¹⁹ exhibited similarly low rates of reference.¹²⁰ Equally surprising is that the three most frequent users of substantive canons turned out to be Stevens, Roberts, and Sotomayor.¹²¹ This is unexpected, and turns the conventional wisdom about substantive canons on its head, because Stevens and Sotomayor are intentionalists, who regularly use legislative history to inform their statutory constructions—not textualist judges forced to turn to substantive canons to provide the context they lack because they refuse to consult legislative history.¹²² Part III discusses the implications of these findings in detail.

The data also reveal some surprising information about the weight that the justices placed on substantive canons when they did invoke them. Table 3 reports how often the members of the Roberts Court placed “passing,” “some,” or “primary” reliance on substantive canons in the opinions in which they employed such canons.

¹¹⁷ See Brudney and Ditslear, 58 Vand L Rev at 30 (cited in note 26).

¹¹⁸ See Table 1.

¹¹⁹ See Smith, 108 Colum L Rev at 1887 & n 14 (cited in note 12).

¹²⁰ See Table 1 (reporting a rate of 13.8 percent).

¹²¹ See *id* (reporting rates of reference of 25.0 percent, 22.0 percent, and 17.6 percent, respectively).

¹²² See Eskridge, Book Review, 96 Mich L Rev at 1545 (cited in note 2) (“[A] textualism refusing to consider the legislative context of statutes is going to be tempted . . . to rely on substantive canons.”); Frost, 59 UCLA L Rev at 929 (cited in note 42) (“[T]extualist judges are particularly fond of clear statement rules, which aid them in interpreting ambiguous statutes without the need to resort to legislative history.”).

TABLE 3. RELATIVE WEIGHT PLACED ON SUBSTANTIVE CANONS

	Passing Reliance (n=34)	Some Reliance (n=28)	Primary Reliance (n=25)
All Opinions That Reference Substantive Canons (n=87)	39.1% (34)	32.2% (28)	28.7% (25)
Majority Opinions (n=49)	30.6% (15)	32.7% (16)	36.7% (18)
Concurring Opinions (n=6)	50.0% (3)	16.7% (1)	33.3% (2)
Dissenting Opinions (n=31)	51.6% (16)	35.5% (11)	12.9% (4)
Partial Opinions (n=1)	0.0% (0)	0.0% (0)	100.0% (1)

Notably, the data show that the justices placed only “passing” or “some” reliance on substantive canons in 71.3 percent of the opinions that invoked such canons.¹²³ Many of these opinions mentioned substantive canons only at the tail end, in a fleeting, throwaway fashion or as an alternative, “even if,” argument.¹²⁴ Others employed substantive canons as a secondary resource or

¹²³ See Table 3 (demonstrating that sixty-two of the eighty-seven opinions that invoked a substantive canon did so in a passing or secondary manner).

¹²⁴ See, for example, *United States v Santos*, 553 US 507, 528 (2008) (Stevens concurring in the judgment) (noting, in the last few sentences of the opinion, that “[t]his conclusion dovetails with what common sense and the rule of lenity would require”). For similar usages, see *Federal Communications Commission v Fox Television Stations, Inc.*, 556 US 502, 565–67 (2009) (Breyer dissenting); *CBOCS West, Inc v Humphries*, 553 US 442, 463 (2008) (Thomas dissenting); *Hall Street Associates, LLC v Mattel, Inc.*, 552 US 576, 595 (2008) (Stevens dissenting); *Dean v United States*, 556 US 568, 581 (2009) (Stevens dissenting); *Carachuri-Rosendo v Holder*, 560 US 563, 581 (2010); *Bilski v Kappos*, 561 US 593, 645 (2010) (Stevens concurring in the judgment); *Carr v United States*, 560 US 438, 450 n 6 (2010); *Fowler v United States*, 563 US 668, 675–76 (2011); *Kucana v Holder*, 558 US 233, 251 (2010); *Exxon*, 554 US at 489; *Ali v Federal Bureau of Prisons*, 552 US 214, 247 (2008) (Breyer dissenting); *BP America Production Co v Burton*, 549 US 84, 95–96 (2006); *Bruesewitz v Wyeth LLC*, 562 US 223, 267 n 15 (2011) (Sotomayor dissenting); *James v United States*, 550 US 192, 219 (2007) (Scalia dissenting). The substantive canons used in each of these cases are listed in the Appendix.

interpretive aid.¹²⁵ Ultimately, less than 30.0 percent of the substantive canon-invoking opinions in the data set relied “primarily,” or in a dispositive manner, on such canons.¹²⁶ Thus,

¹²⁵ See Table 3 (middle column). See also, for example, *Knight v Commissioner of Internal Revenue*, 552 US 181, 192–95 (2008) (invoking, inter alia, a canon that the trustee has the burden of establishing a trust’s entitlement to a tax deduction and holding that the trustee had not met that burden). For similar usages, see *Altria Group, Inc v Good*, 555 US 70, 77–80 (2008); *Bartlett v Strickland*, 556 US 1, 21–23 (2009) (Kennedy) (plurality); *Hawaii v Office of Hawaiian Affairs*, 556 US 163, 176 (2009); *Chamber of Commerce of the United States of America v Whiting*, 563 US 582, 594–600 (2011); *Hamilton v Lanning*, 560 US 505, 517 (2010); *Hardt v Reliance Standard Life Insurance Co*, 560 US 242, 252–56 (2010); *Office of Senator Mark Dayton v Hanson*, 550 US 511, 514 (2007); *Gonzalez v Thaler*, 132 S Ct 641, 648–50 (2012); *Howard Delivery Service, Inc v Zurich American Insurance Co*, 547 US 651, 667–68 (2006); id at 669–70 (Kennedy dissenting); *Microsoft Corp v AT&T Corp*, 550 US 437, 454–56 (2007); *PLIVA, Inc v Mensing*, 564 US 604, 621–23 (2011) (Thomas) (plurality); id at 634–38 (Sotomayor dissenting); *Smith v Bayer Corp*, 564 US 299, 306 (2011); *Travelers Casualty & Surety Co of America v Pacific Gas & Electric Co*, 549 US 443, 452–55 (2007); *Wyeth v Levine*, 555 US 555, 565 (2009); *Begay*, 553 US at 153–54 (Scalia concurring in the judgment); *Barber*, 560 US at 500–01 (Kennedy dissenting); *Dean*, 556 US at 584–86 (Breyer dissenting); *Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 US 573, 623 (2010) (Kennedy dissenting); *Kawashima v Holder*, 132 S Ct 1166, 1177 (2012) (Ginsburg dissenting); *Riegel v Medtronic, Inc*, 552 US 312, 334–35 (2008) (Ginsburg dissenting); *Riley v Kennedy*, 553 US 406, 430 (2008) (Stevens dissenting); *United States v Rodriguez*, 553 US 377, 404–05 (2008) (Souter dissenting); *Vartelas v Holder*, 132 S Ct 1479, 1494–96 (2012) (Scalia dissenting); *Watters v Wachovia Bank, NA*, 550 US 1, 32 (2007) (Stevens dissenting); *Brown v Plata*, 563 US 493, 531–33 (2011). The substantive canons used in each of these cases are listed in the Appendix.

¹²⁶ See Table 3 (right column). See also, for example, *Arlington Central*, 548 US at 296–300 (beginning the analysis by invoking the rule that “when Congress attaches conditions to a State’s acceptance of federal funds, the conditions must be set out ‘unambiguously,’” and finding that expert fees are not covered by the IDEA because the statute does not put the states on clear notice that they might be liable for such fees). For similar usages, see *Mims v Arrow Financial Services, LLC*, 132 S Ct 740, 748–49 (2012); *Federal Aviation Administration v Cooper*, 132 S Ct 1441, 1453 (2012); *Arizona v United States*, 132 S Ct 2492, 2524–25 (2012) (Alito concurring in part and dissenting in part); *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2594, 2607 (2012) (“NFIB”); *Sackett v Environmental Protection Agency*, 132 S Ct 1367, 1373 (2012); *Vartelas*, 132 S Ct at 1484; *CompuCredit Corp v Greenwood*, 132 S Ct 665, 675 (2012) (Sotomayor concurring in the judgment); *Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc*, 563 US 776, 785–86 (2011); id at 802–03 (Breyer dissenting); *Holland v Florida*, 560 US 631, 645–46 (2010); *Skilling v United States*, 561 US 358, 403, 410 (2010); *Citizens United v Federal Election Commission*, 558 US 310, 405–08 (2010) (Stevens concurring in part and dissenting in part); *Holder v Humanitarian Law Project*, 561 US 1, 56 (2010) (Breyer dissenting); *Felkner v Jackson*, 562 US 594, 598 (2011) (per curiam); *Fernandez-Vargas v Gonzales*, 548 US 30, 37 (2006); *Morrison v National Australia Bank Ltd*, 561 US 247, 255 (2010); *NAMUDNO*, 557 US at 203–05; *Santos*, 553 US at 514; *Boumediene v Bush*, 553 US 723, 806 (2008) (Roberts dissenting); *Piccadilly Cafeterias*, 554 US at 50; *Permanent Mission of India to the United Nations v City of New York*, 551 US 193, 202–03 (2007) (Stevens dissenting); *eBay Inc v MercExchange, LLC*, 547 US 388, 391 (2006); id at 395 (Roberts concurring); *Carhart*, 550 US at 153–54. The substantive canons used in each of these cases are listed in the Appendix.

it seems that not only are substantive canons infrequently invoked, but even when invoked, they are used only to reinforce other considerations in the vast majority of cases.¹²⁷

Finally, the data show that the modern Court is not invoking substantive canons at dramatically higher rates than legislative history, as some scholars have speculated. On the contrary, eight of the eleven justices who served on the Roberts Court during the period studied—including conservative, textualist-leaning Alito and Justice Anthony Kennedy—invoked legislative history more frequently than they invoked substantive canons, *and Scalia invoked these two interpretive resources at almost equal rates*.¹²⁸

Moreover, if we compare my data to Brudney and Ditslear's data from the Burger and Rehnquist Courts, we see that although legislative history use declined significantly from the Burger Court (46.6 percent) to the Rehnquist (27.7 percent) and Roberts (25.0 percent) Courts—as the conventional account holds—*legislative history use has not been replaced by substantive canon use*.¹²⁹ Substantive canon use is slightly higher on the Roberts Court (14.4 percent) than on the Burger Court (8.3 percent)—but has declined slightly since the Rehnquist Court (15.6 percent).¹³⁰ Further, legislative history use on the Roberts Court (25.0 percent) remains substantially higher, overall, than does substantive canon use (14.4 percent).¹³¹

Overall, these data call into question scholarly assumptions that, as the Court has grown more conservative in recent years, it has moved toward frequent reliance on substantive canons at the expense of legislative history.¹³² Indeed, I found only 4 conservative-outcome divided-vote cases (out of 158 divided-vote cases and 60 closely divided cases in the data set) in which the majority opinion invoked a substantive canon but not legislative history, while the dissenting opinion referenced legislative history.¹³³ Recall that Brudney and Ditslear found 9 cases fitting

¹²⁷ See Table 3.

¹²⁸ See Table 1. In the eighty-two opinions Scalia authored, he employed substantive canons nine times and legislative history eight times.

¹²⁹ Compare Table 2 with Brudney and Ditslear, 58 Vand L Rev at 30 (cited in note 26).

¹³⁰ Compare Table 2 with Brudney and Ditslear, 58 Vand L Rev at 30 (cited in note 26).

¹³¹ See Table 2.

¹³² See text accompanying notes 60–63.

¹³³ See generally *Arlington Central*, 548 US 291 (5–1–3); *Rapanos v United States*, 547 US 715 (2006) (4–1–4); *Chamber of Commerce*, 563 US 582 (5–3); *Sossamon v Texas*, 563 US 277 (2011) (6–2).

this pattern, out of 148 closely divided cases total.¹³⁴ Brudney and Ditslear interpreted this subset of cases to represent a disturbing snapshot of how the Court uses substantive canons to effect judicially desired policies at the expense of clearly expressed legislative preferences.¹³⁵ I view the (smaller) subset of similar cases in my data set differently—that is, as evidence that substantive canons rarely are employed *instead of*, or to contradict, legislative history. In other words, while it may be true that the Court’s use of legislative history has declined since the Burger Court era,¹³⁶ its reliance on legislative history as an interpretive resource has not been replaced, in most cases, with reliance on substantive canons.

2. A handful of canons.

As discussed earlier, Professors Eskridge and Frickey’s prior study of substantive canon use by the Burger and early Rehnquist Courts posited that we should expect to see wide differences in the specific substantive canons employed by different Courts, or even different iterations of the same Court—and that the cases they studied revealed such differences.¹³⁷ Eskridge also suggested that the universe of substantive canons is vast and evolving, noting that, in the period from 1987 to 1994, the Court invoked “no fewer than seventy-nine” different substantive canons, many of them new or substantially modified canons.¹³⁸ Other scholars have argued that there are “too many” of certain types of substantive canons, and that the variety of such canons makes it “difficult . . . to predict the courts’ interpretive path.”¹³⁹

But the data from the Roberts Court’s first six and a half terms call into doubt this conventional account. Out of 296 statutory cases, and 87 opinions that invoked a substantive canon, I found only 4 instances in which the justices arguably could be

¹³⁴ See Brudney and Ditslear, 58 Vand L Rev at 53, 68, 78–79 (cited in note 26).

¹³⁵ See *id.* at 79.

¹³⁶ See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash U L Q 351, 355–57 (1994) (describing the decline in the Supreme Court’s use of legislative history between 1981 and 1992); Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 Harv J Legis 369, 384–87 (1999) (reporting a decline in the Court’s citations of legislative history during the period from 1980 to 1998).

¹³⁷ Eskridge and Frickey, 45 Vand L Rev at 596 (cited in note 7).

¹³⁸ Eskridge, Book Review, 96 Mich L Rev at 1543 (cited in note 2).

¹³⁹ See, for example, Gluck and Bressman, 65 Stan L Rev at 945–46 (cited in note 25).

said to have created a “new” substantive canon or to have modified an existing one.¹⁴⁰ Nor was there significant variety in the canons the justices invoked; most opinions referenced one of just six well-established canons—the avoidance canon (sixteen), the rule of lenity (eleven), the presumption against preemption (eight), a federalism clear statement rule (six), the presumption against retroactivity (five), or the narrow construction of waivers of sovereign immunity (four).¹⁴¹ Overall, forty-eight of the eighty-seven (55.2 percent) Roberts Court opinions that invoked a substantive canon employed one of just a handful of canons.¹⁴² The remaining opinions referenced thirty-three other canons—meaning that in the period between 2006 and 2012, the Court employed only thirty-nine different substantive canons, total.¹⁴³ Even if we disaggregate the federalism clear statement rules and count each one separately, the total number would come to only forty-four different canons.¹⁴⁴ This is a far cry from the seventy-nine substantive canons that Eskridge and Frickey recorded during the Court’s 1987 through 1994 terms.¹⁴⁵

There could be many reasons for these stark differences in the variety of canons invoked over different time periods. Notably, the Court’s docket has shrunk over the years, so the number of statutory cases decided likely was larger during the period of Eskridge and Frickey’s study.¹⁴⁶ In addition, the

¹⁴⁰ These cases are *Hamdan v Rumsfeld*, 548 US 557, 602 (2006) (Stevens) (plurality) (establishing a new rule requiring a clear statement before the common law of war can make offenses not defined by statute triable by military commission); *Gonzalez*, 132 S Ct at 648–49 (Sotomayor) (articulating the canon that “[a] rule is jurisdictional ‘if the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional,’” and citing only a previous Roberts Court case, *Arbaugh v Y & H Corp*, 546 US 500 (2006), for support) (brackets omitted); *NAMUDNO*, 557 US at 203 (Roberts) (holding that the equal state sovereignty principle requires a showing that any “disparate geographic coverage” in a statute “is sufficiently related to the problem that [the statute] targets”); and *Stanford*, 563 US at 795 (Breyer dissenting) (articulating “a background norm that . . . denies [] inventors patent rights growing out of research for which the public has already paid”). Notably, three of these four “new canon” inventions came from intentionalist, rather than textualist, justices.

¹⁴¹ See Appendix.

¹⁴² These numbers reflect one overlap; the majority opinion in *Skilling* invoked both the avoidance canon and the rule of lenity. See *Skilling*, 561 US at 403, 410.

¹⁴³ See Appendix. Two avoidance canon opinions also invoked other canons; these were included in the thirty-three-figure total.

¹⁴⁴ See *id.*

¹⁴⁵ See Eskridge, Book Review, 96 Mich L Rev at 1543 (cited in note 2), citing Eskridge and Frickey, 108 Harv L Rev at 101–08 (cited in note 75).

¹⁴⁶ The Roberts Court has heard roughly eighty cases per term since 2006. See *Stat Pack Archive* (cited in note 86). By contrast, the Burger and Rehnquist Courts heard

Court's composition stayed conservative over the entire period from 1994 to 2012, so the Roberts Court may have been closer, ideologically, to the Rehnquist Court than the Rehnquist Court was to the Burger Court. As a result, the Roberts Court may have found less need to create new canons or to reinvent canons created by the Rehnquist Court in order to reach its preferred results. Alternately, perhaps the Roberts Court is inherently more cautious than was the Rehnquist Court.¹⁴⁷

Another possibility is that Eskridge and Frickey may have defined what constitutes a substantive canon more broadly than I did. At a theoretical level, there does not seem to be much difference between Eskridge and Frickey's conception of what constitutes a substantive canon and mine—we agree that such canons establish rules or presumptions of statutory construction that are based on substantive policy norms derived from the Constitution, common law, or general Anglo-American legal traditions.¹⁴⁸ In practice, however, they may have been more capacious in what they counted as a substantive canon. One crude way to test this possibility is to compare the list of substantive

roughly 150 cases per term. See Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093, 1100 (1987); Thomas E. Baker and Douglas D. McFarland, *The Need for a New National Court*, 100 Harv L Rev 1400, 1400–01 (1987).

¹⁴⁷ During his confirmation hearings, Roberts famously likened the role of a Supreme Court justice to that of a baseball umpire, whose job is “to call balls and strikes, and not to pitch or bat.” *Chief Justice Roberts Statement - Nomination Process* (Administrative Office of the US Courts), archived at <http://perma.cc/FZH3-7AVK>. He is rumored, moreover, to have voted with the liberal members of the Court to uphold the Affordable Care Act in *NFIB* in order to preserve the institutional legitimacy of the Court. See, for example, Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 Tenn L Rev 763, 769 (2013) (arguing that Roberts's “driving concern” in *NFIB* “was credibility—the institutional legitimacy of the Court, and his own reputation and legacy”); David L. Franklin, *Why Did Roberts Do It? To Save the Court*. (Slate, June 28, 2012), archived at <http://perma.cc/76LR-CNQ6> (suggesting that “the court's very legitimacy” was at stake and that Roberts ruled the way he did “to save the court”). Thus, his jurisprudential philosophy may be one that lends itself more to the use of existing interpretive resources than to the creation of new canons.

¹⁴⁸ Compare Eskridge and Frickey, 45 Vand L Rev at 595 (cited in note 7) (describing substantive canons as “the clear statement rules or presumptions of statutory interpretation that reflect substantive values drawn from the common law, federal statutes, or the United States Constitution”) (citation omitted), with Krishnakumar, 62 Hastings L J at 240 (cited in note 87) (defining substantive canons as “interpretive presumptions and rules based on background legal norms, policies, and conventions,” and noting that “[t]hey derive primarily from the common law, the Constitution, and legal tradition”). See also *Eskridge E-mail* (cited in note 114) (explaining that the Eskridge and Frickey study defined substantive canons as “explicitly substantive norm based default rule[s]”).

canons provided in the appendix to Eskridge and Frickey's statutory interpretation casebook with the list of substantive canons identified in this study.¹⁴⁹ Such a comparison reveals that Eskridge and Frickey identified eight substantive canons from the 2005–2011 terms that my study did not count as substantive canons.¹⁵⁰ This crude comparison suggests that Eskridge and Frickey were, indeed, somewhat more generous in their determinations of what counts as a substantive canon. But it is uncertain whether such definitional or coding differences account for the entire gap between Eskridge and Frickey's findings of extensive substantive canon use and my more modest findings. Indeed, even if we add these eight canons to the list compiled in my Appendix, the total number of different canons invoked during the 2005 through 2011 terms would come to fifty-two—still a long way from the seventy-nine different canons identified by Eskridge in his earlier study.¹⁵¹

Ultimately, it is unclear which of the two studies captures the norm regarding the Court's use of substantive canons across time, or if either one does—it is possible that both studies are anomalies or *sui generis*. Either way, the differences in the variety of substantive canons invoked by the Roberts versus Rehnquist and Burger Courts—and especially the Roberts Court's lack of new substantive canon creation—are intriguing. Moreover, whatever the reason for the differences between the two periods studied, it is undeniable that the Roberts Court has been surprisingly predictable, as well as somewhat restrained,

¹⁴⁹ Compare Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 1203–15 (cited in note 1), with Appendix.

¹⁵⁰ The cases these canons were employed in are *National Meat Association v Harris*, 132 S Ct 965 (2012) (holding that the presumption against preemption does *not* apply if clear language or purpose allows preemption); *Sanchez-Llamas v Oregon*, 548 US 331 (2006) (construing the Vienna Convention, not a statute); *Wallace v Kato*, 549 US 384 (2007) (implying that Congress borrows state statutes of limitations for federal statutory schemes; coded in my study as a rule about when other statutes should be invoked); *Safeco Insurance Co of America v Burr*, 551 US 47 (2007) (holding that the willfulness requirement in civil sanction cases typically includes reckless conduct; coded in my study as invoking the common law and Supreme Court precedent); *Samantar v Yousuf*, 560 US 305 (2010) (assuming that Congress considers the legitimate sovereign interests of other nations when writing American laws); *Richlin Security Service Co v Chertoff*, 553 US 571 (2008) (refusing to apply a presumption against waivers of US sovereign immunity); *Hardy v Cross*, 132 S Ct 490 (2011) (per curiam) (“[I]f the state-court decision was reasonable, it cannot be disturbed.”); *Rehberg v Paulk*, 132 S Ct 1497 (2012) (indicating that, in evaluating official immunity, courts look to the immunities that officials historically received at common law; coded in my study as reliance on common law).

¹⁵¹ See text accompanying notes 137–38.

with respect to the universe of substantive canons it has invoked: again, just six well-established canons account for more than half of the Court's total substantive canon references.¹⁵² These data contradict the conventional view that there are "too many" substantive canons and that their ubiquity makes it difficult to predict the courts' interpretive path.¹⁵³

3. Ideology.

As noted in Part I, many commentators have argued that judges use substantive canons strategically, to achieve outcomes that accord with their policy preferences. Brudney and Ditslear's study of workplace law cases reinforced this view, finding that liberal justices tend to use canons (both language and substantive) to reach liberal outcomes, while conservative justices use canons to reach conservative outcomes.¹⁵⁴ The data from the Roberts Court's first six and a half terms are only partly consistent with these findings. Table 4 reports the ideological direction for each justice for every opinion he or she authored or joined that referenced a substantive canon.¹⁵⁵ As Table 4 shows, all of the liberal justices employed substantive canons to support liberal outcomes at far higher rates than they employed such canons to support conservative outcomes.¹⁵⁶ However, four of the five conservative justices—Scalia, Thomas, Roberts, and Kennedy—employed substantive canons to reach liberal results in almost the same number of cases as they used substantive canons to reach conservative results.¹⁵⁷

¹⁵² See text accompanying notes 141–42.

¹⁵³ See, for example, Gluck and Bressman, 65 *Stan L Rev* at 945–46 (cited in note 25) (suggesting that there are "too many" clear statement rules).

¹⁵⁴ See Brudney and Ditslear, 58 *Vand L Rev* at 57–60 (cited in note 26).

¹⁵⁵ See Table 4. Dissenting opinions are coded for their ideology, just as majority opinions are. So, for example, if a majority opinion reaches a liberal outcome, the dissenting opinion will be coded as reaching a conservative outcome, and any substantive canons used in the dissenting opinion will be coded as supporting a conservative outcome.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

TABLE 4. IDEOLOGY BY JUSTICE IN OPINIONS AUTHORED OR
JOINED INVOKING SUBSTANTIVE CANONS
(N=87)

Justice	Justice Ideology	% Conservative	% Liberal	% Neither	Cons-Lib Difference
Thomas (n=46)	Conservative	50.0% (23)	47.8% (22)	2.2% (1)	2.2%
Scalia (n=50)	Conservative	50.0% (25)	46.0% (23)	4.0% (2)	4.0%
Alito (n=41)	Conservative	63.4% (26)	34.1% (14)	2.4% (1)	29.3%
Roberts (n=44)	Conservative	43.2% (19)	54.5% (24)	2.3% (1)	-11.3%
Kennedy (n=51)	Conservative	45.1% (23)	52.9% (27)	2.0% (1)	-7.8%
Breyer (n=45)	Liberal	28.9% (13)	66.7% (30)	4.4% (2)	-37.8%
Kagan (n=14)	Liberal	35.7% (5)	64.3% (9)	0.0% (0)	-28.6%
Souter (n=28)	Liberal	32.1% (9)	64.3% (18)	3.6% (1)	-32.2%
Ginsburg (n=53)	Liberal	30.2% (16)	66.0% (35)	3.8% (2)	-35.8%
Sotomayor (n=23)	Liberal	26.1% (6)	73.9% (17)	0.0% (0)	-47.8%
Stevens (n=41)	Liberal	26.8% (11)	68.3% (28)	4.9% (2)	-41.5%

n = the number of cases in which the justice authored or joined an opinion that referenced a substantive canon. For example, cases in which a majority opinion invoked a substantive canon, but in which the justice authored or joined a dissenting opinion that did not invoke a substantive canon, are *not* counted in the denominator.

Table 5 similarly reports the ideological direction of the opinions *authored* by each justice that invoked a substantive canon.

TABLE 5. IDEOLOGY BY JUSTICE IN AUTHORED OPINIONS
INVOKING SUBSTANTIVE CANONS
(N=87)

Justice	Justice Ideology	% Conservative	% Liberal	% Neither*	Cons-Lib Difference
Thomas (n=9)	Conservative	44.4% (4)	55.6% (5)	0.0% (0)	-11.2%
Scalia (n=9)	Conservative	44.4% (4)	55.6% (5)	0.0% (0)	-11.2%
Alito (n=8)	Conservative	37.5% (3)	50.0% (4)	12.5% (1)	-12.5%
Roberts (n=9)	Conservative	33.3% (3)	66.7% (6)	0.0% (0)	-33.4%
Kennedy (n=7)	Conservative	71.4% (5)	28.6% (2)	0.0% (0)	42.8%
Breyer (n=9)	Liberal	0.0% (0)	100.0% (9)	0.0% (0)	-100.0%
Kagan (n=1)	Liberal	100.0% (1)	0.0% (0)	0.0% (0)	100.0%
Souter (n=5)	Liberal	60.0% (3)	40.0% (2)	0.0% (0)	20.0%
Ginsburg (n=9)	Liberal	11.1% (1)	88.9% (8)	0.0% (0)	-77.8%
Sotomayor (n=6)	Liberal	66.7% (4)	33.3% (2)	0.0% (0)	33.4%
Stevens (n=15)	Liberal	40.0% (6)	53.3% (8)	6.7% (1)	-13.3%

* The Conservative and Liberal columns do not reflect opinions authored by justices that were coded as “unspecified” in ideological direction using the Spaeth Supreme Court Database’s coding designation.

Caution should be used in interpreting the precise percentages reported, because the raw number of cases is quite low for each justice. However, the pattern demonstrated is clear. The Table shows that four of the justices employed substantive canons to reach outcomes consistent with their ideological preferences in the majority of opinions they authored.¹⁵⁸ Four justices—Scalia, Thomas, Alito, and Justice David Souter—wrote opinions that used substantive canons to support liberal and conservative outcomes at equal or nearly equal rates.¹⁵⁹ Roberts and Sotomayor were the only justices who employed substantive canons inconsistently with their ideological preferences in *a substantial majority* of the cases in which they authored an opinion that used substantive canons.¹⁶⁰ The next Section discusses Roberts's use of substantive canons in greater detail, arguing that he often invoked such canons because of institutional concerns, including a desire to avoid upsetting congressional intent.

¹⁵⁸ See Table 5.

¹⁵⁹ See *id.* (reporting a one-case differential between liberal and conservative outcomes for Scalia, Thomas, Alito, and Souter).

¹⁶⁰ See *id.* (reporting that Roberts used substantive canons to reach liberal outcomes in 66.7 percent of the opinions he authored that invoked substantive canons, and to reach conservative outcomes in only 33.3 percent of these opinions, and that Sotomayor similarly used substantive canons to reach conservative outcomes in 66.7 percent of the opinions she authored that invoked substantive canons, and to reach liberal outcomes in only 33.3 percent of these opinions). Justice Elena Kagan was not included in this count because she authored only one opinion in the data set that invoked a substantive canon. See *id.*

TABLE 5A. SUBSTANTIVE CANONS INVOKED BY CONSERVATIVE JUSTICES IN OPINIONS WITH LIBERAL OUTCOMES

Substantive Canon	Thomas (n=5)	Scalia (n=7)	Alito (n=4)	Roberts (n=8)	Kennedy (n=2)
Avoidance canon	(1)			(2) ^Σ	(1)
Rule of lenity		(4)*		(1)	(1)
Federalism clear statement rule		(1)*			
Burden on the taxpayer seeking a deduction				(1)	
<i>Non obstante</i> (allowing implied repeal)	(1)				
APA presumption of judicial review of all final agency actions		(1)			
Presumption against retroactivity		(1)			
Narrow construction against the government			(1)		
Presumption against a major departure from the “long tradition” of equity practice	(1)			(1)	
Clear statement rule for attorney’s fee awards	(1)				
Ambiguity resolved in favor of veterans			(1)		
Clear statement rule for disallowing state law claims			(1)		
Presumption that the Bankruptcy Code does not erode past practice absent clear intent			(1)		
Presumption favoring the retention of “long-established and familiar principles”				(1)	
Equal sovereignty principle				(1) ^Σ	
Presumption favoring severability				(1) ^Σ	
Presumption that waivers of sovereign immunity must be clearly stated	(1)				

As Table 5a shows, there was no clear pattern in the specific substantive canons that the conservative justices invoked in

^Σ In one case, Roberts authored a majority opinion that referenced both the avoidance canon and an equal sovereignty principle. See generally *NAMUDNO*, 557 US 193. In another, he authored a majority opinion that referenced both the avoidance canon and a presumption favoring severability. See generally *NFIB*, 132 S Ct 2566.

* In one case, Scalia authored a concurring opinion that referenced both the rule of lenity and a federalism clear statement rule. See *Fowler*, 563 US at 682–85 (Scalia concurring in the judgment).

support of liberal outcomes. While Scalia did invoke the rule of lenity often—in four of nine opinions he authored (representing four of ten substantive canons referenced in those opinions)—both he and the other conservative justices invoked an array of other substantive canons as well when authoring opinions that reached liberal results.

The data regarding the justices' ideological use of substantive canons—or, perhaps more accurately, demonstrating that substantive canons do not seem to be constraining the justices to vote against their ideological preferences in most cases—are not surprising. Several earlier studies have found that the members of the Court tend to vote consistently with their ideological preferences in statutory cases.¹⁶¹ But the data showing that Roberts and Scalia used substantive canons to support liberal outcomes more often than conservative outcomes in the opinions they authored, and that several of the other conservative justices, including Thomas, authored or joined opinions that invoked substantive canons to reach liberal outcomes in as many (or nearly as many) cases as they did to reach conservative outcomes, are unexpected and noteworthy. This is especially so in light of the widespread scholarly assumption, detailed in Part I, that judges—particularly textualist judges—use substantive canons manipulatively, to subvert legislative intent and to justify outcomes that accord with their policy preferences.

C. Doctrinal Analysis: Attentiveness to Congressional Intent

As discussed in Part I.A, the conventional consensus among legal scholars has been that judges employ substantive canons in a manner that usurps or frustrates legislative policy preferences. But doctrinal analysis of the Roberts Court's substantive canon cases—and particularly of the opinions that rely primarily on a substantive canon—reveals a substantial number of cases in which the justices used substantive canons to *preserve* congressional intent.¹⁶² This Section describes how the Roberts

¹⁶¹ See, for example, Cross, *The Theory and Practice of Statutory Interpretation* at 176 (cited in note 89); Brudney and Ditslear, 58 Vand L Rev at 57–60 (cited in note 26).

¹⁶² “Congressional intent” is a notoriously amorphous term—one that eludes simple definition and has generated much controversy in the statutory interpretation literature. See, for example, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”); Max Radin, *Statutory Interpretation*, 43 Harv L Rev 863, 870 (1930) (“A legislature certainly has no intention whatever in connection with words

Court, many times in opinions authored by Roberts, has used substantive canons to honor congressional overrides of prior Supreme Court decisions, to preserve long-standing statutes from judicial invalidation, and to approximate congressional intent.

The cases are remarkable not just because they challenge the conventional account that substantive canons tend to be used to trump legislative intent, but also because several invoke substantive canons that are by nature designed to check Congress, or even to defeat congressional intent in the name of some larger—typically constitutional—concern. The avoidance canon, for example, deliberately seeks to curtail the reach of federal statutes in order to cure potential constitutional defects—even when Congress may have intended a much broader reach and wished to push the envelope as far as possible regarding what is constitutionally permissible. Similarly, federalism clear statement rules, such as the presumption against preemption, are designed to cut back the scope of congressional legislation in order to preserve state laws and power. Yet as the cases discussed in this Section demonstrate, the Roberts Court has used both of these canons to fulfill likely congressional intent, despite their intent-negating design. By contrast, other substantive canons seem designed to effectuate Congress’s larger policy goals regarding particular subject areas—for example, the maxim that preferences in the Bankruptcy Code are to be narrowly construed in order to fulfill the Code’s equal distribution goal—and the Roberts Court

which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: *Legislative Intent as Oxymoron*, 12 *Intl Rev L & Econ* 239, 254 (1992) (“Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful.”); William N. Eskridge Jr., *Dynamic Statutory Interpretation* 16–21 (Harvard 1994) (arguing that actual congressional intent is almost always unknowable and that conventional intent is equally unhelpful because of strategic behavior such as vote counting). In this Section, which highlights judicial efforts to honor congressional intent, I use the term to refer to any expression of legislative design that the Court takes to represent the enacting Congress’s intent—including the enacting Congress’s expressed goal of overriding a previous judicial interpretation, inferences drawn from legislative history, and the presumption that the enacting Congress would have wanted the statute it enacted to be upheld rather than invalidated. For purposes of this Section, what matters is not whether the Court got Congress’s intent right but, rather, whether the Court endeavored to discern or made an effort to determine what that intent was and to construe the statute in a manner that would effectuate, rather than undermine, what it perceived to be Congress’s intent.

has invoked such canons in a manner that furthers congressional intent as well.

In providing these case examples, I do not mean to suggest that cases do not exist in which the members of the Roberts Court invoked substantive canons without paying attention to congressional intent, or even used substantive canons to defeat congressional intent. Rather, my aim is to bring to light the fact that substantive canon use is not necessarily inconsistent with attentiveness to congressional intent, and that substantive canons were not used to defeat congressional intent *in most cases in which they were invoked*. Indeed, my doctrinal analysis of the cases in this study revealed only fifteen opinions (out of eighty-seven total) in which the members of the Roberts Court invoked substantive canons in a manner that arguably served to defeat Congress's intent.¹⁶³

¹⁶³ See generally *Arlington Central*, 548 US 291 (federalism clear statement) (holding that the IDEA does not authorize the recovery of expert fees by prevailing parties against states); *Rapanos*, 547 US 715 (federalism clear statement and avoidance) (limiting the Clean Water Act's reach to relatively stable bodies of water); *Piccadilly Cafeterias*, 554 US 33 (federalism clear statement) (limiting the stamp tax exemption in the Bankruptcy Code to plans already confirmed under Chapter 11); *Altria*, 555 US 70 (presumption against preemption) (holding that the Federal Cigarette Labeling and Advertising Act does not preempt a party's state law fraud claim); *Chamber of Commerce*, 563 US 582 (presumption against preemption) (holding that the Immigration Reform and Control Act did not preempt Arizona's sanctions on employing unauthorized aliens via a licensing program despite an explicit preemption clause); *Santos*, 553 US 507 (rule of lenity) (limiting a federal money laundering statute to apply to criminal profits but not receipts); *United States v Hayes*, 555 US 415 (2009) (Roberts dissenting) (rule of lenity) (arguing that a domestic relationship is a defining element of domestic violence under the Gun Control Act of 1968); *Rodriguez*, 553 US 377 (Souter dissenting) (rule of lenity) (arguing that a state's maximum prison term should not be applied to a federal conviction for possession of a firearm by a convicted felon); *Sossamon*, 563 US 277 (narrow construction for waivers of sovereign immunity) (holding that states do not waive sovereign immunity from private suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000 when they accept federal funding, despite the Act's express provision of a private cause of action against a government); *Microsoft*, 550 US 437 (presumption against extraterritorial application of domestic laws) (holding that Microsoft was not liable under the Patent Act for foreign installations of Windows that had the potential to infringe AT&T's patent); *Hamdan*, 548 US 557 (common law of war must clearly authorize trial by military commission) (holding that the military commission convened to try a Yemeni national was not authorized and lacked the power to proceed); *CBOCS*, 553 US 442 (Thomas dissenting) (affirmative evidence of congressional intent necessary for an implied remedy) (arguing that 42 USC § 1981 does not encompass retaliation claims); *AT&T Corp v Hulteen*, 556 US 701 (2009) (presumption against retroactivity) (holding that an employer does not violate the Pregnancy Discrimination Act by applying a rule that gives less retirement credit for pregnancy than for other medical leave when the rule is applied only to the period before the Act's passage); *Stoneridge Investment Partners, LLC v Scientific-Atlanta, Inc*, 552 US 148 (2008) (no expansion of private rights beyond

1. Honoring overrides.

The canon of constitutional avoidance has long been criticized as sanctioning the judicial revision of statutes in a manner that undercuts Congress's design.¹⁶⁴ The canon operates on the assumption that Congress would not want to press constitutional limits and would rather have its laws upheld in some form than invalidated as unconstitutional.¹⁶⁵ But as several scholars have pointed out, it might make more sense to presume that Congress prefers to legislate to the maximum extent of its power and to have its work product given full effect—and for the Court to openly say so when it believes that work product to be unconstitutional, rather than use the possibility of a constitutional violation as an excuse to rewrite the statute.¹⁶⁶

Given these prevailing assumptions, it was surprising to find a number of Roberts Court cases in which the justices seemed to be using the avoidance canon to honor congressional intent—not just paying lip service to what Congress presumably wanted, but engaging in a serious effort to give effect to Congress's overall aim in amending or enacting a statute. The cases took two forms. First, a number of cases involved opinions that invoked the avoidance canon to support a construction that honored a recent congressional override. Second, a handful of cases involved opinions that used the canon to preserve a long-standing statute from what the opinions explicitly found would

congressional intent) (holding that a private right of action under the Securities Exchange Act did not reach the respondents); *Gonzalez*, 132 S Ct 641 (clear statement rule for statutory limits on jurisdiction) (holding, among other things, that 28 USC § 2253(c)(3) does not set forth a jurisdictional rule).

¹⁶⁴ See, for example, Schauer, 1995 S Ct Rev at 74 (cited in note 9) (“[I]n interpreting statutes so as to avoid ‘unnecessary’ constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred.”) (citation omitted); Frickey, 93 Cal L Rev at 444 (cited in note 32) (“Many of the Court’s opinions used the avoidance canon to confine statutes to domains narrower than their enacting Congresses probably intended.”).

¹⁶⁵ See Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 726 (cited in note 1); Hasen, 2009 S Ct Rev at 186 (cited in note 46).

¹⁶⁶ See Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 726 (cited in note 1); Schauer, 1995 S Ct Rev at 74 (cited in note 9); Mashaw, *Greed, Chaos, and Governance* at 105 (cited in note 9) (arguing that a “truly restrained court . . . would do better to confront the constitutional question head on” because “even if [the court] invalidates the law, it at least returns the legislature to the status quo ante and gives the legislature a more realistic chance of concocting a constitutional policy that is close to its most-preferred position”); Friendly, *Mr. Justice Frankfurter* at 43–45 (cited in note 9).

be otherwise-certain constitutional invalidity—rather than to rewrite the statute based on speculated or possible invalidity, as the conventional critique predicts.

The first set of cases tended to follow this pattern: an earlier Supreme Court case invalidated a statute or limited its reach on constitutional grounds, Congress sought to override the decision by amending the statute to “fix” the constitutional problem, and then a new lawsuit arose in which the Court was required to interpret the amended statute—and to determine whether the amended statute contained the same deficiencies as the original version. In reviewing the congressional override, the Roberts Court invoked the avoidance canon and argued that the Court should read the amended statute in a way that recognized Congress’s clear intent to remedy the problems that led to invalidation of the original statute, rather than construe the new statute to repeat the deficiencies contained in the original.

A couple of examples should help illustrate. First, in *Skilling v United States*,¹⁶⁷ the Court considered whether a recently enacted criminal statute covered honest-services fraud, including investment fraud.¹⁶⁸ Like other cases involving overrides, *Skilling* had a backstory. For decades, the federal courts of appeals had construed the federal mail and wire fraud statutes to cover acts that deprive the public of the “intangible” right to receive “honest services,” such as bribery and kickback schemes.¹⁶⁹ In *McNally v United States*,¹⁷⁰ the Supreme Court put a stop to this construction, holding that the mail fraud statute does not cover honest-services fraud.¹⁷¹ Congress responded quickly, enacting a new statute that was designed “specifically to cover” the “intangible right of honest services” that lower courts had protected prior to *McNally*.¹⁷²

Jeffrey Skilling was an Enron executive charged with investment fraud under the new statute; he challenged the new

¹⁶⁷ 561 US 358 (2010).

¹⁶⁸ *Id.* at 367–68.

¹⁶⁹ *Id.* at 399–401.

¹⁷⁰ 483 US 350 (1987).

¹⁷¹ See *id.* at 360. The Court cited vagueness and federalism concerns, explaining that “[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials,” it would read the statute “as limited in scope to the protection of property rights.” *Id.*

¹⁷² *Skilling*, 561 US at 402. See also Anti-Drug Abuse Act of 1988 § 7603, Pub L No 100-690, 102 Stat 4181, 4508.

law as unconstitutionally vague.¹⁷³ The Roberts Court acknowledged that “Skilling’s vagueness challenge has force,” but invoked the avoidance canon, noting that “[i]t has long been our practice, [] before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.”¹⁷⁴ The Court observed that the history of Court-Congress interactions demonstrated that Congress intended for the new statute “to refer to and incorporate the honest-services doctrine recognized in Court of Appeals’ decisions before *McNally* derailed the intangible-rights theory of fraud.”¹⁷⁵ It then found that while the pre-*McNally* case law was inconsistent about the outer reaches of the honest-services doctrine, the “vast majority” of honest-services cases decided before *McNally* involved offenders who participated in bribery or kickback schemes, in violation of a fiduciary duty.¹⁷⁶ In order to “preserve the statute without transgressing constitutional limitations,” the Court thus read the new law to criminalize “only the bribe-and-kickback core of the pre-*McNally* case law” and *not* to apply to investment frauds such as that committed by Skilling.¹⁷⁷

Although the majority opinion in *Skilling* limited the reach of the new honest-services statute, it did so in a manner that very consciously sought to preserve coverage of the primary conduct associated with the doctrine—and the only conduct indisputably intended to be covered by Congress. Indeed, because pre-*McNally* case law was unclear about what behavior beyond bribes and kickbacks counted as honest-services fraud, it is uncertain whether the behavior left out by the Court’s construction fell within Congress’s consideration and whether legislators had any specific intent to include or not include it within the new statute’s reach.

Further, in applying the avoidance canon to limit the statute’s coverage, the Court made clear that the alternative was near-certain constitutional invalidation on vagueness grounds.¹⁷⁸ In other words, *the limiting construction was the only way to give effect to Congress’s clearly expressed intent to override McNally*. Thus, the Court was not using a merely possible or

¹⁷³ *Skilling*, 561 US at 402–03.

¹⁷⁴ *Id* at 405.

¹⁷⁵ *Id* at 404.

¹⁷⁶ *Id* at 405, 407.

¹⁷⁷ *Skilling*, 561 US at 408–09.

¹⁷⁸ See *id* at 405.

speculative constitutional concern as an excuse to rewrite the statute, as some scholars have argued that the avoidance canon encourages it to do.¹⁷⁹ In short, although the *Skilling* majority employed the avoidance canon in a manner that cut back the scope of the honest-services statute, it seemed highly attuned to congressional intent in so doing. For this reason, the case does not seem to fit within the conventional account of the relationship between the avoidance canon and congressional intent.

A second example of this form of substantive canon attentiveness to congressional intent occurred in *Gonzales v Carhart*,¹⁸⁰ in which the Court considered the validity of the federal Partial-Birth Abortion Ban Act of 2003.¹⁸¹ That statute was enacted following the Court's decision in *Stenberg v Carhart*,¹⁸² which held that a Nebraska "partial-birth abortion" statute violated the federal Constitution because its ban applied too broadly—covering the commonly used dilation and evacuation procedure ("D&E") as well as the dilation and extraction procedure known as "partial-birth" abortion ("D&X").¹⁸³ In enacting the statute, Congress was responding directly to the *Stenberg* ruling and sought to avoid the Nebraska statute's constitutional difficulties by being more precise about the procedures to which it applied.¹⁸⁴ The federal Act was very explicit about Congress's intent to remedy the deficiencies the Court had found in the Nebraska statute; in fact, its opening provisions expressly referenced the Court's opinion in *Stenberg*.¹⁸⁵ Several doctors and the pro-choice organization Planned Parenthood challenged the new federal Act,

¹⁷⁹ See, for example, Frickey, 93 Cal L Rev at 444, 447 (cited in note 32):

[T]he avoidance canon is one handy tool, a sort of Swiss army knife for trimming excesses from public law and readjusting what remains thereafter. . . .

. . . In effect, the canon creates a penumbra around the Constitution that dooms statutes raising serious constitutional questions to creative judicial rewriting, even though, if push came to shove, courts would presumably uphold the constitutionality of at least some of these laws.

See also Friendly, *Mr. Justice Frankfurter* at 45 (cited in note 9) (suggesting that the canon allows judicial rewriting of statutes); Posner, *The Federal Courts* at 285 (cited in note 9) (same).

¹⁸⁰ 550 US 124 (2007).

¹⁸¹ Pub L No 108-105, 117 Stat 1201, codified at 18 USC § 1531.

¹⁸² 530 US 914 (2000).

¹⁸³ *Id* at 921–22, 939, 945–46.

¹⁸⁴ *Carhart*, 550 US at 132–33, 141–43.

¹⁸⁵ *Id* at 132–33.

arguing that despite Congress's attempts at precision, it too was unconstitutionally vague.¹⁸⁶

Before addressing the Act's constitutionality, the Court sought to determine the scope of the Act's operation and effect. The Act's challengers claimed that it was void for vagueness because, like the Nebraska statute, it was unclear about whether it reached D&E procedures other than the "partial-birth" procedure.¹⁸⁷ The Court disagreed, construing the Act to cover only the "partial-birth" procedure and not to prohibit other D&E procedures.¹⁸⁸ In so doing, the Court highlighted numerous places in which the Act deliberately differed from the Nebraska statute, observing that Congress sought "to meet the [] objections" the Court articulated in *Stenberg* and that "[t]he Act makes the distinction the Nebraska statute failed to draw."¹⁸⁹ The Court then referenced the canon of constitutional avoidance, noting that the canon "extinguishes any lingering doubt as to whether the Act covers the prototypical D&E procedure" because it requires that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."¹⁹⁰

Far from using the avoidance canon to justify rewriting or limiting the federal Act in a manner that inhibited the full implementation of Congress's intent, the Court in *Carhart* seemed to pay significant attention to what Congress was trying to achieve through its statutory override. The Court repeatedly compared the federal statute to the Nebraska statute invalidated in *Stenberg* and focused on the ways in which Congress had sought to address the problems the *Stenberg* Court had found with the Nebraska version.¹⁹¹ Moreover, as in *Skilling*, the Court made clear that the alternative to its limiting construction was constitutional invalidation, and that use of the avoidance canon offered a way to avert a reading that would render Congress's override ineffectual.¹⁹²

¹⁸⁶ *Id.* at 133, 147.

¹⁸⁷ *See id.* at 147–48.

¹⁸⁸ *See Carhart*, 550 US at 149–50.

¹⁸⁹ *Id.* at 149–53.

¹⁹⁰ *Id.* at 153–54.

¹⁹¹ *See id.* at 151–53.

¹⁹² *See Carhart*, 550 US at 153. A third example of a judicial interpretation that employed the avoidance canon to honor a congressional override is Roberts's dissenting opinion in *Boumediene*. In *Boumediene*, a majority of the Court struck down the Military Commissions Act of 2006 (MCA)—a legislative response to the Court's decisions in *Hamdi v. Rumsfeld*, 542 US 507 (2004), and *Hamdan*—on the grounds that the MCA

2. Respecting Congress's work product.

In two prominent cases and a dissenting opinion in a third case, the members of the Roberts Court also used (or advocated using) the avoidance canon to preserve a politically salient liberal statute from invalidation. The majority opinions in the first two cases were written by Roberts, and constituted notable instances of a conservative justice using a substantive canon to reach a liberal result.¹⁹³ The third case contained a dissenting opinion penned by Stevens that invoked the avoidance canon to argue for the preservation of a high-stakes liberal statute.¹⁹⁴

Perhaps the most famous of the cases is *National Federation of Independent Business v Sebelius*¹⁹⁵ (“NFIB”), in which a divided Roberts Court upheld most provisions of the Obama administration’s Affordable Care Act.¹⁹⁶ The key provision at issue was the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage or be forced to pay a penalty to the IRS when they file their income taxes.¹⁹⁷ Challengers claimed that the individual mandate exceeded Congress’s constitutional authority.¹⁹⁸ The Obama administration argued that Congress had the power to mandate the purchase of health insurance under the Commerce Clause, under the Necessary and Proper Clause, and, as a fallback, under its power to “lay and collect Taxes.”¹⁹⁹

A majority of the Court ruled that the health-care law exceeded Congress’s constitutional authority under the Commerce Clause and the Necessary and Proper Clause.²⁰⁰ However, a different majority of the Court upheld the mandate under Congress’s

violated the Suspension Clause. *Boumediene*, 553 US at 732–36. Roberts’s dissenting opinion argued that the Court should have applied the avoidance canon to interpret a related statute, the Detainee Treatment Act of 2005, to allow the DC Circuit to order the release of unlawfully detained individuals—which would have kept the MCA from running afoul of the Suspension Clause. See *id.* at 822–23 (Roberts dissenting).

¹⁹³ See generally *NFIB*, 132 S Ct 2566; *NAMUDNO*, 557 US 193.

¹⁹⁴ See *Citizens United*, 558 US at 405–08 (Stevens concurring in part and dissenting in part).

¹⁹⁵ 132 S Ct 2566 (2012).

¹⁹⁶ Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

¹⁹⁷ See 26 USC § 5000A(b)(1).

¹⁹⁸ *NFIB*, 132 S Ct at 2580.

¹⁹⁹ *Id.* at 2584–85, 2593.

²⁰⁰ See *id.* at 2608 (Roberts) (plurality); *id.* at 2647 (Scalia, Kennedy, Thomas, and Alito dissenting).

taxing power.²⁰¹ Roberts’s opinion acknowledged that “[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance.”²⁰² But it went on to construe the mandate to merely “establish[] a condition—not owning health insurance—that triggers a tax” and to hold that, under this reading, the mandate was “not a legal command to buy insurance.”²⁰³ In so doing, the opinion relied heavily on the avoidance canon. “The question,” Roberts stated, “is not whether [the tax reading] is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.”²⁰⁴ As he explained, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”²⁰⁵ Notably, Roberts’s opinion laid bare the institutional stakes involved, commenting that “[t]he *Government asks us to interpret the mandate as imposing a tax*, if it would otherwise violate the Constitution. *Granting the Act the full measure of deference owed to federal statutes*, it can be so read.”²⁰⁶

These statements make clear that the Court’s interpretation was driven by a strong commitment to preserving the statute before it if at all possible. Indeed, Roberts openly was influenced by institutional comity considerations—as evidenced by his explicit references to the “deference owed to federal statutes” and the fact that he was reading the statute as “[t]he *Government ask[ed]*.”²⁰⁷ Contrary to the conventional avoidance canon criticism, *NFIB* simply does not read as a case in which the Court used the canon to limit the scope of a statute to which it was hostile, or to fulfill judicial policy preferences at the expense of legislative ones. Rather, it reads as a case in which the Court used the avoidance canon to embrace an alternate reading that the government—that is, the president with the presumptive support of the enacting Congress—asked it to embrace.²⁰⁸

²⁰¹ See *id.* at 2594–95 (Roberts, joined by Ginsburg, Breyer, Sotomayor, and Kagan).

²⁰² *NFIB*, 132 S Ct at 2593 (Roberts) (opinion).

²⁰³ *Id.* at 2594 (Roberts) (opinion).

²⁰⁴ *Id.* (Roberts) (opinion).

²⁰⁵ *Id.* (Roberts) (opinion).

²⁰⁶ *NFIB*, 132 S Ct at 2594 (Roberts) (opinion) (emphases added).

²⁰⁷ *Id.* (Roberts) (opinion).

²⁰⁸ For an additional example, see *Citizens United*, 558 US at 405–408 (Stevens concurring in part and dissenting in part) (asserting that the majority opinion should have employed the avoidance canon to narrowly read the Federal Election Commission regulations at issue not to cover video-on-demand transmissions, rather than reaching out to decide the constitutional issue unnecessarily).

It is worth noting that *NFIB* involved an extraordinarily visible, high-stakes statute enacted by a recent Congress. This may explain why Roberts—hardly an intentionalist by philosophy²⁰⁹—voted to uphold the statute. As the chief justice, Roberts may have been particularly concerned about institutional considerations, including the need to respect the legislative branch, preserve Congress’s work product, and protect the legitimacy of the Court, in a case that was closely watched and certain to generate significant public attention. Some have read his avoidance canon opinions less charitably, suggesting that he has used the canon to perform radical surgery on statutory text, and that he has done so in order to pave the way for future constitutional invalidation.²¹⁰ I find this sinister view to be a bit extreme—indeed, there is nothing in *NFIB* that suggests the Court will invalidate the Affordable Care Act on constitutional grounds in the future.²¹¹ I discuss Roberts’s relatively high rate of reference to substantive canons in general in Part II.B.1.

3. Approximating intent.

The Roberts Court also has applied substantive canons in a manner that seeks to approximate Congress’s intent in run-of-the-mill cases that are not politically salient. Consider, for example,

²⁰⁹ See note 12.

²¹⁰ See *Re*, 17 Green Bag 2d at 175 (cited in note 19). Such criticisms have focused on the fact that the Court used the avoidance canon to punt deciding the constitutionality of the Voting Rights Act in *NAMUDNO*, only to turn around a few years later and invalidate the coverage formula in § 4(b) of the VRA in *Shelby County, Alabama v Holder*, 133 S Ct 2612, 2630–31 (2013). See *Re*, 17 Green Bag 2d at 175 (cited in note 19); Katyal and Schmidt, 128 Harv L Rev at 2111 (cited in note 7). But even if we assume that the *NAMUDNO* Court invoked the avoidance canon to set up its eventual invalidation of the coverage formula in § 4(b) of the VRA (an assumption that ignores the fact that four liberal justices voted with the majority in *NAMUDNO* and that Congress could have changed its coverage formula in the years between *NAMUDNO* and *Shelby County*), see *NAMUDNO*, 557 US at 195, this does not mean that the Court uses the avoidance canon strategically as a general matter, or in its other cases.

²¹¹ On the contrary, in *King v Burwell*, 135 S Ct 2480 (2015), the Court—led by Roberts—emphasized Congress’s purpose and design in interpreting a provision of the Affordable Care Act that allows tax subsidies to be paid to individuals who enroll in a health insurance plan through “an Exchange established by the State” to apply to individuals enrolled through *federally* operated exchanges. See *id* at 2495–96. The Court stressed that to construe the statute otherwise would bring about “the type of calamitous result that Congress plainly meant to avoid” and argued that “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.” *Id* at 2496.

Howard Delivery Service, Inc v Zurich American Insurance Co,²¹² in which the Court invoked a substantive canon dictating that provisions in the Bankruptcy Code should be narrowly construed.²¹³ *Howard* involved a Bankruptcy Code section that “ac-cords a priority, among unsecured creditors’ claims, for unpaid ‘wages, salaries, or commissions’ and for unpaid contributions to ‘an employee benefit plan.’”²¹⁴ It was uncontested that the provi-sion covered “fringe benefits that complete a pay package”—for example, retirement plans and “group health, life, and disability insurance.”²¹⁵ *Howard* raised the question whether the priority provision “also encompass[e] claims for unpaid premiums on a policy purchased by an employer to cover its workers’ compensa-tion liability.”²¹⁶ The Court held that the priority provision did not cover such unpaid premiums.²¹⁷ In so ruling, it discussed the evolutionary history of the priority provision, citing legislative history explaining that the provision covers “health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that [are] not in the form of wages.”²¹⁸ The Court then observed that workers’ compensation does not compensate employees for work performed but, rather, for on-the-job injuries, and that workers’ compensation regimes substitute for tort liability, not for wage payments.²¹⁹ Finally, the Court emphasized that one of the Bankruptcy Code’s under-lying objectives is to ensure the “equal distribution” of payments to all creditors and invoked the “corollary” presumption that provisions in the Bankruptcy Code allowing preferences must be narrowly construed.²²⁰

Throughout its discussion, the Court’s focus was on Congress’s intent and design with respect to the scope of the priority provi-sion. Unsatisfied that that intent and design encompassed the premium payments at issue in the case, the Court fell back on the Bankruptcy Code’s underlying equal distribution purpose, and a substantive canon based on that underlying purpose. The

²¹² 547 US 651 (2006).

²¹³ See id at 667.

²¹⁴ Id at 654 (citation omitted), quoting 11 USC § 507(a)(4)(A), (a)(5).

²¹⁵ *Howard*, 547 US at 654.

²¹⁶ Id at 654–55.

²¹⁷ See id at 655.

²¹⁸ Id at 658–59 (brackets in original).

²¹⁹ See *Howard*, 547 US at 662–65.

²²⁰ Id at 667.

Court thus seemed to use the “narrow construction of Bankruptcy Code preferences” canon as a means to effectuate Congress’s intent and purpose—not as a vehicle for judicial abrogation of legislative policy preferences.

A number of the Court’s preemption cases also contain judicial efforts to divine congressional intent, often while invoking the presumption against preemption. In *Wyeth v Levine*,²²¹ for example, a majority of the Court concluded that the Federal Food, Drug, and Cosmetic Act²²² (FDCA) does not preempt state law tort claims alleging that manufacturers placed inadequate warnings on drug labels.²²³ In so ruling, the Court invoked the presumption against preemption in conjunction with the Act’s purpose, legislative history, congressional intent, and other canons.²²⁴ Notably, the Court emphasized that Congress enacted the FDCA in order to “bolster consumer protection against harmful products”—quoting congressional hearing testimony and floor statements to show that Congress intended to continue to allow state law claims of this kind when it enacted the FDCA.²²⁵ The Court also stressed Congress’s “awareness of the prevalence of state tort litigation” and argued that Congress’s failure to expressly preempt state tort law on inadequate warnings in labels despite such awareness “is powerful evidence that Congress did not *intend* FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.”²²⁶ Thus, far from using the preemption canon as a blunt instrument to curtail congressional intent in furtherance of judicially preferred policies, the Court employed the canon to help reinforce its sense of Congress’s intent. Moreover, it did not use the canon to supersede statutory purpose, legislative history, or other indicia of legislative intent; instead, it paid significant attention to these intent-focused interpretive resources and employed a substantive canon to achieve a result consistent with the reading dictated by these other resources.

Similarly, in *Riegel v Medtronic, Inc.*,²²⁷ the Court considered whether the Medical Device Amendments of 1976²²⁸ (MDA)’s

²²¹ 555 US 555 (2009).

²²² 52 Stat 1040 (1938), codified as amended at 21 USC § 301 et seq.

²²³ See *Wyeth*, 555 US at 558–59.

²²⁴ See *id.* at 566–68.

²²⁵ *Id.* at 574 & n 7.

²²⁶ *Id.* at 574–75 (emphasis added).

²²⁷ 552 US 312 (2008).

²²⁸ Pub L No 94-295, 90 Stat 539.

preemption clause bars common-law claims challenging the design or labeling of a medical device once the design or label has gained premarket approval from the FDA.²²⁹ This time, the Court concluded that the federal statute did preempt the state law claims.²³⁰ Justice Ruth Bader Ginsburg's dissenting opinion argued that the MDA should not be read to preempt state common-law claims seeking compensation for injuries caused by defectively designed or labeled medical devices because Congress did not intend for the MDA to radically curtail state common-law suits; rather, in enacting the MDA, Congress was trying to preempt only state *premarket* regulation of medical devices.²³¹ The dissent began its analysis with the presumption against preemption and then invoked House and Senate reports describing several medical device failures and resulting injuries that motivated Congress to enact the MDA,²³² as well as comments by the Act's sponsor indicating that "[this] legislation is written so that the benefit of the doubt is always given to the consumer."²³³ The dissent also made a "dog that did not bark" legislative intent argument, insisting that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for large numbers of consumers injured by defective medical devices."²³⁴ Thus, the dissent used the preemption canon in tandem with and as a means to fulfill congressional intent, not as a tool for trumping legislative intent with judicial preferences.

* * *

As noted above, in offering these examples of the justices' attentiveness to congressional intent, I do not mean to suggest that the Court does not at times use substantive canons in a manner that defeats or contradicts congressional intent. My argument is based purely on examples, and opposing examples surely exist. Indeed, some substantive canons are by nature designed to check Congress and, therefore, almost always are applied in a manner that restrains congressional intent. Federalism

²²⁹ See *Riegel*, 552 US at 315.

²³⁰ See *id.* at 330.

²³¹ See *id.* at 333 (Ginsburg dissenting).

²³² See *id.* at 334–36 & n 5 (Ginsburg dissenting).

²³³ *Riegel*, 552 US at 336 n 4 (Ginsburg dissenting), quoting Medical Devices Amendments of 1975, S 510, 94th Cong, 1st Sess, in 121 Cong Rec 10688 (Apr 17, 1975) (statement of Sen Kennedy).

²³⁴ *Riegel*, 552 US at 337 (Ginsburg dissenting) (quotation marks omitted).

clear statement rules impose deliberate obstacles to congressional interference with state authority, and the Roberts Court sometimes applied these without focusing on congressional intent.²³⁵ The rule of lenity, likewise, gives the benefit of the doubt to criminal defendants when Congress has not been clear enough about the reach of a criminal statute, even though it is almost always the case that Congress would prefer for the benefit of the doubt to go to the government.²³⁶ My point in providing the case examples in this Section is not to argue that the conventional view that judges use substantive canons to defeat legislative intent is *wrong* per se but, rather, that it is *overstated*. Substantive canons can be used, and sometimes are used, to defeat congressional intent—but they also regularly are used to further congressional intent. In other words, there is nothing inherent about substantive canons as an interpretive resource that necessitates that they will be used to contradict legislative preferences. Moreover, this is true even with respect to substantive canons that are designed to check Congress, such as the avoidance canon and the presumption against federal preemption of state laws, as the cases discussed in this Section show. Finally, it is significant that two of the Roberts Court's most frequent

²³⁵ See generally, for example, *Arlington Central*, 548 US 291; *Rapanos*, 547 US 715. In *Arlington Central*, for example, the Court interpreted a provision of the Individuals with Disabilities Education Act (IDEA) that authorizes courts to award “reasonable attorneys’ fees as part of the costs” to parents who prevail in lawsuits against their children’s school boards. 20 USC § 1415(i)(3)(B). At issue was whether costs associated with hiring expert witnesses and consultants who assisted in the parents’ litigation against the school boards were included in this provision. A conference committee report on the IDEA stated that “[t]he conferees intend that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.” *Arlington Central*, 548 US at 302 (bracket omitted and ellipsis in original), quoting *Handicapped Children’s Protection Act of 1986 Conference Report*, HR Conf Rep No 99-687, 99th Cong, 2d Sess 5 (1986), reprinted in 1986 USCCAN 1807, 1808. The Court rejected this on-point legislative history as well as arguments that the IDEA’s purpose to “ensure that all children with disabilities have available to them a free appropriate public education,” 20 USC § 1400(d)(1)(A), could be fulfilled only by reimbursing parents for expert testimony necessary to demonstrate the child’s disability and need for accommodations. See *Arlington Central*, 548 US at 302–04. Instead, it invoked and relied heavily on a substantive canon—a clear statement rule demanding that statutes enacted under the Spending Clause be crystal clear about any costs they might impose on state and local governments. See *id.* at 296–98, 303–04. This is a clear example of a case in which a substantive canon was used in the manner contemplated by the conventional wisdom—that is, to trump Congress’s clearly expressed intent to include such expert fees in the provision allowing for reallocation of costs.

²³⁶ See Gluck and Bressman, 65 Stan L Rev at 957 (cited in note 25).

employers of substantive canons—Stevens and Sotomayor—are intentionalist judges who view congressional intent as the lodestar of statutory interpretation. The fact that these intent-seeking justices invoked substantive canons at higher rates than did their textualist counterparts is strong evidence that the conventional account misses something important about textualism’s relationship to substantive canons²³⁷ and about the relationship between substantive canons and congressional intent.

III. THEORETICAL IMPLICATIONS

The data reported in Part II have important theoretical implications, calling into question several conventional assumptions about substantive canons and the work that they perform in statutory interpretation. This Part explores the theoretical upshot of the data regarding the Roberts Court’s use of substantive canons. It argues that the data suggest that substantive canons have received a “bum rap” from academics, who have overestimated the role that such canons play in the Court’s statutory interpretation cases—and that such canons may not be as dangerous or dastardly as commentators have painted them out to be. The Article posits that one reason for the mismatch between academic perception and reality likely is an excessive scholarly focus on the federalism clear statement rules, which represent only a fraction of all the substantive canons employed by the Court.²³⁸ The data also suggest that Justice Scalia has received a bit of a bum rap for ostensibly using substantive canons aggressively, while criticizing them in theory; in reality, he invoked such canons in only nine of eighty-two opinions authored during the period studied and relied primarily on them in only three opinions.

The data also have important implications for two leading theories of statutory interpretation. First, they undermine longstanding scholarly assumptions that substantive canons provide a necessary “escape valve” for textualist judges who find a statute’s plain meaning unpalatable. It turns out that, in practice, textualist judges invoke substantive canons rarely, and less often than some of their intentionalist colleagues. Further, during the period studied, textualist judges invoked substantive canons

²³⁷ See Parts III.A–B.

²³⁸ See Part II.B.2.

to support liberal outcomes in a substantial minority of cases—sometimes at rates equal to the rates at which they invoked such canons to support conservative outcomes.²³⁹

At the same time, the data lend some support to pragmatic theories of statutory interpretation—demonstrating that practical reasoning, along with the Court’s own statutory precedents, plays a gap-filling or escape valve role similar to that which scholars have attributed to substantive canons. This Part concludes by discussing how the substantive canons employed most often by the Roberts Court align with state and federal legislators’ preferences regarding interpretive methodology and what the substantive canon data might add to recent discussions about methodological *stare decisis*—the suggestion that federal courts should adopt a binding statutory interpretation methodology.

A. A Bum Rap

As discussed in Part I.A, scholars of different theoretical stripes tend to share the views that textualist judges employ substantive canons regularly, that there is theoretical tension between substantive canons and textualism, and that substantive canons play a significant role in the interpretation of statutes. Further, many scholars view substantive canons as trump cards that judges illegitimately whip out to justify a construction that conflicts with the one dictated by other interpretive resources, including legislative intent.

But the data and doctrinal analysis of the Roberts Court’s first six and a half terms suggest that these scholarly assumptions may be overstated—and that, as an interpretive tool, substantive canons may not be as nefarious, or the Court may not be as wily in its use of them, as scholars have imagined. Substantive canons are infrequently invoked, and even when invoked, they are relied on only in passing or as a secondary interpretive resource in the vast majority of opinions (71.3 percent).²⁴⁰ Indeed, the much-maligned classic case in which the Court pulls a substantive canon out of a hat and uses it to reject a statutory reading dictated by the statute’s text, purpose, and other traditional tools may be the exception rather than the norm.

²³⁹ See Table 4.

²⁴⁰ See Tables 2 and 3.

Of course, there is a difference between measuring the Court's quantitative use of substantive canons and measuring its qualitative use of such canons. The fact that the justices infrequently invoke substantive canons does not mean that such canons are not powerful when used; nor do the data showing that the justices rely "primarily" on such canons in only 28.7 percent of opinions and that they appear to have used substantive canons to defeat congressional intent in only fifteen cases mean that those particular cases are not worth worrying about. Indeed, some may argue that even one nefarious use of a substantive canon to circumvent the statute's plain meaning or congressional intent is odious—and can work sufficient harm to justify the academic outcry against such canons. Some might even view the Court's infrequent and inconsistent use of substantive canons as *more* problematic than the widespread use of such canons would be, because infrequent use fails to put Congress on notice about the background norms that might suddenly pop up to do significant work in the odd case, and thereby increases the likelihood that Congress's intent will be undermined. These are legitimate worries. I do not necessarily disagree with individualized criticisms of the Court's use of particular substantive canons in particular cases, or mean to suggest that substantive canons are harmless merely because they are infrequently used. My point, rather, is that the data suggest that there is nothing *inherently* harmful, or intent defeating, or plain meaning eschewing, about substantive canons as an interpretive resource—and that the prevailing scholarly wisdom about substantive canons *as a category* has swept too broadly.

In addition, textualist judges and the substantive canons as a group may deserve greater credit for neutrality than scholars or the conventional account has given them. The ideological data reported in Tables 4 and 5, showing that the Roberts Court's textualist and textualist-leaning justices—who also are its most conservative justices—have employed substantive canons to reach liberal results in a substantial percentage of opinions,²⁴¹ are stunning. The data suggest that substantive canons may have some, at least mild, constraining effect on the conservative justices, and that the standard scholarly account that the justices wield substantive canons in a purely ideological manner, to

²⁴¹ See Tables 4 and 5.

justify judicial policy preferences, is not accurate in many cases. Indeed, scholars may owe both the conservative justices and the substantive canons, as an interpretive tool, an apology—and the latter a more charitable place in the statutory interpretation annals.

Scalia in particular may deserve more credit than scholars have given him for being consistent, in practice, with his theoretical criticism of substantive canons. As noted in Part II.B, during the Roberts Court's first six and a half terms, Scalia rarely invoked substantive canons in the opinions he authored (11.0 percent).²⁴² If we remove cases in which Scalia authored an opinion invoking the rule of lenity—a substantive canon he has argued is justified based on its antiquity²⁴³—then his rate of use for this interpretive resource falls to 7.3 percent.²⁴⁴ Further, Scalia joined or authored an opinion that invoked substantive canons in only 16.9 percent (50 of 296) of the cases in the data set,²⁴⁵ and only 3 (out of 9) of the opinions he authored that invoked substantive canons relied on a substantive canon as a primary interpretive resource.²⁴⁶ Thus, Scalia seems to have hewed more closely to his theoretical criticism of substantive canons, at least in recent years, than scholars have given him credit for.

The puzzle thus arises: What accounts for the mismatch between the conventional view of substantive canons and actual judicial practice during the Roberts Court's first six and a half years? Or for the differences in how many substantive canons the Court invoked during the Burger/Rehnquist Court years versus the Roberts Court years? One explanation may be that much of the conventional account—and criticism—regarding substantive canons seems to have been formulated in response to the Court's creation and aggressive application of several new “super-strong” clear statement rules during the 1980s and

²⁴² See Table 1.

²⁴³ See Scalia, *A Matter of Interpretation* at 29 (cited in note 2).

²⁴⁴ See Appendix. As the Appendix shows, there were four cases in which Scalia authored an opinion that invoked the rule of lenity; however, in one of these cases, he also invoked a federalism clear statement rule. The 7.3 percent figure reflects the percentage of opinions authored by Scalia that invoked a substantive canon other than the rule of lenity (including the one case that also invoked the federalism clear statement rule).

²⁴⁵ See Table 4.

²⁴⁶ See generally *Morrison v National Australia Bank Ltd*, 561 US 247 (2010); *United States v Santos*, 553 US 507 (2008); *Sackett v Environmental Protection Agency*, 132 S Ct 1367 (2012).

1990s.²⁴⁷ As Professors Eskridge and Frickey have pointed out, these clear statement rules were a “remarkable” and “striking innovation,” transforming background norms about federalism and sovereign immunity into nearly insurmountable obstacles to federal legislation that seeks to supersede state laws or waive the government’s immunity from suit.²⁴⁸ Clear statement rules also are extraordinarily counter-majoritarian and dismissive of congressional intent in that they “permit the Court to override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court.”²⁴⁹ Worse, super-strong clear statement rules sanction this judicial displacement of congressional preferences with virtually no notice to Congress, which may be aware of the background norm the Court seeks to enforce but receives no warning that it must be exceptionally clear about its intent to override that norm in the *text* of the statute—rather than, say, in the legislative history—until the Court issues its decision several years later. As Eskridge and Frickey have observed, this notice problem is particularly disturbing when the Court applies a new super-strong clear statement rule to an older statute, enacted during an era when different statutory interpretation techniques predominated and courts rarely required clear statements of any kind in the statute’s text.²⁵⁰

Given the radical effects worked by clear statement rules, the Rehnquist Court’s invention of several new and “super-strong” versions of these rules garnered significant academic attention²⁵¹ and criticism and may—uncoincidentally—have

²⁴⁷ For an example of such a rule, see generally *United States v Nordic Village, Inc.*, 503 US 30 (1992) (creating a super-strong clear statement rule for waiving federal sovereign immunity).

²⁴⁸ Eskridge and Frickey, 45 Vand L Rev at 597 (cited in note 7).

²⁴⁹ Id at 638.

²⁵⁰ See id at 622.

²⁵¹ For just a few examples, see id at 597, 619–29; Manning, 101 Colum L Rev at 1655 (cited in note 42). See also generally John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum L Rev 399 (2010); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv L Rev 1959 (1994); Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles through Presumptions and Clear Statement Rules*, 2004 Mich St L Rev 123; John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis L Rev 771; William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 Ind L J 211 (1982); William P. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DePaul L Rev 345 (1989).

distorted scholars' views of substantive canons as a category. That is, scholars may have been a little too quick to attribute the characteristics associated with clear statement rules—for example, their centrality to textualist jurisprudence and their inattentiveness to congressional intent—to *all* substantive canons. Moreover, the sheer shock value of the Court's creation and use of these "super-strong" clear statement canons during the early Rehnquist Court years may have created a heightened perception of the amount of work that substantive canons as a whole perform in the Court's statutory interpretations. I say "heightened perception" because, in reality, the Rehnquist Court may not have used substantive canons more often than the Roberts Court; recall that the Brudney-Ditslear study found low overall rates of judicial references to substantive canons in employment law cases decided by the Rehnquist Court during its 1986 through 2002 terms (15.6 percent).²⁵²

Of course, there also are other factors that may explain why substantive canons seem to be doing less work on the Roberts Court than scholars have assumed, and why such canons are being used less frequently and with less variety by the Roberts Court than during the early years of the Rehnquist Court.²⁵³ One such factor is that federalism clear statement rules may have been in their heyday during the early Rehnquist Court—the time period that Eskridge and Frickey happened to study—so that such canons may have been used more frequently and in greater variety during the period they studied than during other periods. That is, the early Rehnquist Court may have perceived a need to stake out strong protections for underenforced constitutional principles²⁵⁴ related to federalism and sovereign immunity and may have acted with vigor and urgency to articulate canons that helped it do so in its early years. By the time of the early Roberts Court, twenty years later, those battles may have been fought and won, so that the members of the Court—even those who employed substantive canons energetically during the early Rehnquist years—have found less need to create or invoke such canons than they once did. Relatedly, because federalism

²⁵² See Brudney and Ditslear, 58 Vand L Rev at 30 (cited in note 26).

²⁵³ For the range of substantive canons used by the Rehnquist Court, see generally Eskridge and Frickey, 45 Vand L Rev 593 (cited in note 7).

²⁵⁴ Consider Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212 (1978) (developing the concept of "underenforced constitutional norms").

clear statement rules are now well established, cases involving such rules may no longer need to be decided by the Supreme Court. That is, lower courts may be applying such clear statement rules to resolve cases before they even reach the Court; if this is true, then focusing on the Supreme Court's docket could understate the practical importance of substantive canons—particularly ones that establish bright-line rules that are easy for lower courts to implement.

Another, related, explanation could be that the Supreme Court has not undergone a significant political or ideological shift from the Rehnquist Court to the Roberts Court—and, indeed, seems to have become more solidly conservative since the early Rehnquist years (1986 through 1991).²⁵⁵ Thus, the canons created, or modified, by the Rehnquist Court may suit the justices on the Roberts Court—or at least a majority of those justices—quite well, and the justices accordingly may see little need to invent new canons as the Rehnquist Court once did. This could explain the low incidence of “new canon” creation observed in my study, and perhaps also the decrease in the variety of different canons invoked—that is, the current Court may be well settled into a comfort zone with respect to the canons it prefers to invoke, whereas the Rehnquist Court may have been in a substantive canon transition period of sorts. Finally, part of the explanation for the differences in findings may lie in the fact that, since 2010, the US Supreme Court and Congress have been more closely aligned, politically and ideologically (skewing conservative), than they were during the first decade of the Rehnquist Court—when both houses of Congress were controlled by liberal majorities, while the Court was moderately conservative.²⁵⁶ To the extent that the Court uses substantive canons to

²⁵⁵ See, for example, Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 *Wayne L Rev* 947, 948 (2008) (calling the Roberts Court “the most conservative Court since the mid-1930s”); Lee Epstein, Barry Friedman, and Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 *NC L Rev* 1299, 1321 (2008) (reporting an empirical finding that “the Roberts Court is significantly more conservative than the average Court sitting since the 1953 Term”); Adam Liptak, *Court under Roberts Is Most Conservative in Decades* (NY Times, July 24, 2010), online at <http://www.nytimes.com/2010/07/25/us/25roberts.html> (visited Apr 9, 2017) (Perma archive unavailable).

²⁵⁶ See, for example, Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 *Nw U L Rev* 737, 783 n 205 (2011) (describing “the ideological distance between the Roberts Court and the Democratic Congress” before the 2010 elections).

cut back the scope of legislation, it may see less need to use such canons in times of political alignment with Congress. Note, however, that while this theory is consistent with the Roberts Court's use of substantive canons in cases such as *Carhart*,²⁵⁷ it cannot explain Chief Justice Roberts's use of substantive canons in cases like *NAMUDNO*²⁵⁸ or *NFIB*,²⁵⁹ which upheld statutes enacted by Democrat-controlled Congresses.

B. Textualism's "Escape Valve"?

As discussed in Part I.A, leading legislation scholars have theorized that substantive canons operate as an "escape valve" for textualism, providing a justification—couched in time-honored rules—for construing a statute in a manner that conflicts with its plain meaning.²⁶⁰ However, the findings reported in Part II showing that textualist and textualist-leaning justices infrequently invoked substantive canons call this assumption into question.²⁶¹ Moreover, the findings raise the following queries: *If substantive canons do not regularly serve as an escape valve for textualist justices, does this mean that textualism in fact has no escape valve? Or is some other interpretive tool or technique doing the work of filling in gaps and providing an escape mechanism for textualism?*

More granular analysis of the Roberts Court's cases suggests that textualism may in fact have an alternate escape valve, or valves—namely, Supreme Court precedent, practical consequences, and perhaps also the common law and other statutory tools. In order to explore the answers to the above questions, I examined the thirty-six out of eighty-two cases in the data set authored by Scalia that did *not* reference statutory text or the plain meaning rule and the twenty-nine out of seventy-seven cases in the data set authored by Justice Thomas that did *not* reference statutory text or plain meaning and sought to identify what interpretive resources these textualist justices relied on when they did not base their statutory constructions on text or plain meaning. In these sixty-five cases, Scalia and Thomas

²⁵⁷ See text accompanying notes 180–92.

²⁵⁸ See note 210 and text accompanying notes 102–05.

²⁵⁹ See Part II.C.2.

²⁶⁰ See, for example, Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 743 (cited in note 1); Manning, 101 Colum L Rev at 125 (cited in note 1).

²⁶¹ See Table 1 and Part II.B.

overwhelmingly relied on Supreme Court precedent in lieu of statutory text or plain meaning; in a handful of cases, they also referenced practical consequences and, to a lesser extent, the common law and other statutes.²⁶² If we expand this closer study to examine the 333 opinions in the entire data set that did not reference text or plain meaning (authored by all of the justices), Supreme Court precedent and practical consequences again stand out as the two most frequently referenced alternate interpretive resources.²⁶³ Thus, Supreme Court precedent seems to be the real gap-filling interpretive tool in the Court's jurisprudence, followed by practical-consequences-based reasoning.

The Supreme Court's frequent use of practical consequences in statutory interpretation cases has been explored in several earlier empirical studies.²⁶⁴ But the Court's use of its own precedent as an interpretive resource has gone largely unstudied.²⁶⁵ Scholars may thus far have ignored the Court's use of its own precedents to construe statutes because precedent is such an intrinsic part of judging and judicial opinion writing that the Court's reliance on it has hardly seemed remarkable. But the data from the Roberts Court's first several terms—showing Supreme Court precedent to be the interpretive resource *most frequently invoked* across justices²⁶⁶—suggest that it is important for

²⁶² Of the non-plain meaning cases authored by Scalia or Thomas, thirty-one out of sixty-five (47.7 percent) relied on Supreme Court precedent, eleven (16.9 percent) referenced practical consequences, eight (12.3 percent) referenced common-law precedent, seven (10.8 percent) referenced other statutes, seven (10.8 percent) referenced substantive canons, and one referenced no other interpretive tools (1.5 percent). Notably, many of the practical-consequences-referencing cases also referenced precedent; overall, one-third of precedent-referencing cases also referenced other interpretive tools.

²⁶³ The justices referenced precedent in 179 out of 333 (53.8 percent) of these opinions, and practical consequences in 111 (33.3 percent) of these opinions. Of these opinions, 59 referenced both precedent and practical consequences. By way of comparison, only 43 of these 333 opinions referenced substantive canons (12.9 percent), 75 referenced legislative history (22.5 percent), 52 referenced intent (15.6 percent), 77 referenced statutory purpose (23.1 percent), 38 referenced common-law precedent (11.4 percent), 50 referenced other statutes (15.0 percent), and 29 referenced dictionary definitions (8.7 percent).

²⁶⁴ See, for example, Schacter, 51 *Stan L Rev* at 5, 12, 18, 21 (cited in note 89) (discussing the use of “judicially-selected policy norms”); Zeppos, 70 *Tex L Rev* at 1107–13 (cited in note 89) (discussing the Court's use of practical considerations in statutory interpretation); Krishnakumar, 62 *Hastings L J* at 237 (cited in note 87) (discussing the frequency of the Court's use of practical consequences as a tool of statutory interpretation compared to other interpretive tools).

²⁶⁵ Professor Lawrence M. Solan's recent article is a notable exception. See generally Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 *NC L Rev* 1165 (2016).

²⁶⁶ As Table 1 shows, Scalia, Thomas, and Justices Alito and Kagan invoked the text / plain meaning tool more often than they referenced Supreme Court precedent, but

scholars to examine critically how the Court uses such precedents when tackling a new statutory construction. Does the Court use its own prior interpretations to trump other interpretive tools, or does the Court use such precedents to corroborate the reading dictated by other interpretive resources? How often does the Court employ statutory *stare decisis* to decide a case? Are arguments from precedent typically used to “escape” the statute’s plain meaning, to reinforce it, or simply to fill in gaps when there is no plain meaning? These are just a few of the many questions that bear further exploration. At bottom, statutory interpretation theory lacks a good account of whether the Court uses its own precedents merely to supply authority for other canons and interpretive tools (for example, as authority for the rule of lenity or to explain what *noscitur a sociis* means) or as an independent interpretive tool that itself dictates a particular statutory construction.

The discovery that textualist judges employ Supreme Court precedent more often than substantive canons when construing statutes that do not seem to have a plain meaning also could have important implications for textualism’s claims to predictability and determinacy. Here is what I mean: Textualists long have argued that their approach to statutory interpretation is the most legitimate because it constrains judges, leading straightforwardly to the one correct reading of a statute.²⁶⁷ Critics have countered that textualism’s dependence on substantive canons undermines such claims to determinacy because substantive canons are policy based and unpredictable and because they empower judges to manipulate outcomes²⁶⁸—points that prominent textualists, including Scalia, have conceded.²⁶⁹

the other seven justices invoked the Court’s own precedent most often. Further, these four justices all invoked Supreme Court precedent in over 40.0 percent of the cases each of them authored. For Scalia, Thomas, and Alito, Supreme Court precedent was the tool used second most often; for Kagan, it was used fourth most often. See Table 1.

²⁶⁷ See, for example, Scalia, *A Matter of Interpretation* at 16–18 (cited in note 2); Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 *Tex Rev L & Polit* 261, 263–64 (2004) (arguing that courts should adopt textualism to “eliminate unpredictability and confusion” and install “a disciplined interpretative approach”).

²⁶⁸ See, for example, Eskridge, et al, *Cases and Materials on Legislation and Regulation* at 743 (cited in note 1). See also note 43.

²⁶⁹ See, for example, Scalia, *A Matter of Interpretation* at 28 (cited in note 2); Manning, 101 *Colum L Rev* at 125 (cited in note 1).

The surprising finding that the Roberts Court relies on the Court's own precedents to fill in gaps in statutory context far more often than it relies on substantive canons could change the contours of this debate in important ways. On the one hand, Supreme Court precedent cannot be invented and reinvented the way that substantive canons sometimes can—for example, the federalism clear statement rules in the 1980s and 1990s. In this sense, the Court's heavy reliance on its own precedents may be less problematic than similar reliance on substantive canons. On the other hand, reliance on prior judicial decisions is a very common-law, judge-centered approach to statutory interpretation—not an approach that puts the legislature at its center, as statutory interpreters are supposed to do. Indeed, most foundational theories of statutory interpretation rest, to some degree, on a faithful agent model of the Court-Congress relationship—one that envisions the Court as the agent in a master-servant relationship with Congress.²⁷⁰ Textualism, notably, claims that it is more faithful to the legislature than approaches that look to statutory purpose or legislative history, because it pays close attention to the text that is the product of compromise among differently motivated legislators, rather than elevating the views of some legislators over others' as suits the judge's fancy.²⁷¹ But textualism's form of faithfulness, it turns out, relies significantly on a judicially generated interpretive resource—the Court's own past precedents. This is significant because there is, of course, substantial room for different interpretations of what precedents mean when applied to new circumstances—rendering the use of past precedent as a guide to statutory interpretation a notoriously unpredictable and judge-empowering exercise.²⁷² Indeed, legal realist Professor Karl Llewellyn delineated no fewer than sixty-four different ways in which judges can apply a prior precedent.²⁷³

²⁷⁰ See, for example, Gluck and Bressman, 65 *Stan L Rev* at 907, 913–14 (cited in note 25).

²⁷¹ See, for example, John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 *Harv L Rev* 1161, 1162 (2007).

²⁷² See Peter L. Strauss, *The Common Law and Statutes*, 70 *U Colo L Rev* 225, 232–37 (1999) (arguing that *stare decisis* in statutory cases gives the courts a lawmaking role and that this distinguishes our common-law system from code-based legal systems).

²⁷³ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 77–91 (Little, Brown 1960). Llewellyn's list has been described as comprising “eight ways to follow but constrict a precedent, eight to stand by it, thirty-two to expand it, twelve ways to

Further, even before judges get to the point of arguing over a precedent's meaning, they have significant discretion to decide whether a precedent is even applicable in a particular case, just as they have discretion to decide whether a substantive canon is applicable in a particular case. Recent studies are just beginning to explore the ways in which the members of the Supreme Court disagree, or "duel," over the application of the same precedent in the same case.²⁷⁴ But the lesson from this Article may simply be that more analysis of this kind is necessary—that is, that scholars need to pay closer attention to how textualists (and other jurists) employ the Court's prior precedents, no less than they have paid attention in the past to textualists' use of substantive canons. Ultimately, whether textualists supplement textual analysis with substantive canons or with precedent, they are supplementing with a judicial source rather than a legislative source—and that, in itself, is both enormously interesting and potentially worrisome.

C. Purposivism

This Article's findings also have important theoretical implications for other leading theories of statutory interpretation. Purposivism is an interpretive approach that encourages jurists to interpret a statute by identifying the statute's purpose and selecting the meaning that best effectuates that purpose.²⁷⁵ 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 shed light on 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.²⁷⁶

Purposivism once was the dominant approach to statutory interpretation, but over the past few decades it has come under

avoid it and four to kill it." E.M. Wise, *The Doctrine of Stare Decisis*, 21 *Wayne L Rev* 1043, 1051 (1975).

²⁷⁴ See generally, for example, Krishnakumar, 65 *Duke L J* 909 (cited in note 94); Solan, 94 *NC L Rev* 1165 (cited in note 265).

²⁷⁵ See Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (Foundation Press 1994) (William N. Eskridge Jr and Philip P. Frickey, eds).

²⁷⁶ See John Paul Stevens, *Judicial Predilections*, 6 *Nev L J* 1, 2 (2005); Eskridge, Book Review, 96 *Mich L Rev* at 1548–49 (cited in note 2).

significant attack.²⁷⁷ The criticism has come both from textualism and from public-choice theorists, who have condemned it 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.²⁷⁸

The data regarding the Roberts Court's substantive canon use have at least two important implications for purposivism. First and foremost, the data show that despite textualism's thirty-year-old campaign against legislative history—and despite scholars' warnings that substantive canon use has increased while legislative history use has decreased²⁷⁹—substantive canons have not displaced legislative history on the modern Supreme Court. As noted earlier, eight of the eleven justices who have served on the Roberts Court—including conservative, textualist-leaning Justices Alito and Kennedy—referenced legislative history more often than they referenced substantive canons in the opinions they authored.²⁸⁰ Moreover, a comparison of my data to Professors Brudney and Ditslear's data from the Burger and Rehnquist Courts shows that the conventional scholarly wisdom is only half correct: legislative history use did decline significantly from the Burger Court (46.6 percent) to the Rehnquist (27.7 percent)

²⁷⁷ See Roger Colinvaux, Note, *What Is Law? A Search for Legal Meaning and Good Judging under a Textualist Lens*, 72 Ind L J 1133, 1139 (1997) (stating that purposivism “came under heavy attack” in the 1970s); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 Houston L Rev 565, 574 (2005) (“Both intentionalism and purposivism came under increasing criticism in the 1980s.”); John F. Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2415–17 (2003) (criticizing the reliability of using legislative history in statutory interpretation). See also John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum L Rev 70, 103–04 (2006) (arguing that relying on the text is the best way to make sense of the legislative process); William N. Eskridge Jr and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321, 333–37 (1990) (describing multiple problems with the purposivist approach).

²⁷⁸ See, for example, Eskridge, *Dynamic Statutory Interpretation* at 25–29 (cited in note 162) (criticizing purposivism and arguing that the application of statutory purpose is dependent on the perspective of the interpreter); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan L Rev 1833, 1884–85 (1998) (criticizing the “malleability of purposive interpretation”); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn L Rev 241, 250–51 (1992) (describing flaws in the purposive approach that could lead principled judges to reach the wrong results).

²⁷⁹ See Part I.A.

²⁸⁰ See Table 1.

and Roberts Courts (25.0 percent),²⁸¹ but it has not been replaced by substantive canon use. Indeed, while substantive canon use increased from 8.3 percent during the Burger Court to 15.6 percent during the Rehnquist Court and 14.4 percent during the Roberts Court,²⁸² this 6.1 percentage point increase hardly makes up for the 21.6 percentage point drop in legislative history references since the Burger Court, nor does it show that substantive canon use has surged ahead of legislative history use.

This is significant because, as scholars have noted, an important part of what divides textualists from purposivists on the modern US Supreme Court supposedly is disagreement about what interpretive tools should be consulted when there is textual ambiguity (with textualists putting substantive canons second, while purposivists list legislative history and purpose in that slot).²⁸³ The Roberts Court data suggest that scholars have been too quick to sound the alarm bells about the death of legislative history at the hand of substantive canons, or about the inversion of these two tools in the hierarchy of interpretive resources to be consulted. Judicial reliance on legislative history may have declined, but substantive canons have not filled the resulting void.

Second, substantive canons may have something to offer purposivism as an interpretive tool. That is, given the doctrinal evidence discussed in Part II.C showing that substantive canons such as the avoidance canon at least sometimes are used to fulfill congressional intent, and given purposivist/intentionalist Justices Stevens's and Sotomayor's willingness to invoke such canons in a nontrivial percentage of the opinions they author, purposivism may stand to benefit, as an interpretive theory, from expanding its interpretive tool kit to encompass certain substantive canons or to acknowledge ways in which substantive canons can be used to reinforce statutory purpose.

D. What Role Do the Canons Play?

Scholars have long operated on the assumption that judges rely significantly on the canons of construction when interpreting statutes.²⁸⁴ This study shows that assumption to be false

²⁸¹ Compare Table 2 with Brudney and Ditslear, 58 Vand L Rev at 30 (cited in note 26).

²⁸² Compare Table 2 with Brudney and Ditslear, 58 Vand L Rev at 30 (cited in note 26).

²⁸³ See Gluck, 119 Yale L J at 1842 (cited in note 20).

²⁸⁴ See, for example, Brudney and Ditslear, 58 Vand L Rev at 11 (cited in note 26) (noting that "so many scholars and judges believe the canons perform important interpretive

with respect to substantive canons, in terms of both the frequency of the Court's references and the weight it places on substantive canons when it references them. But the study also, surprisingly, shows that the Court relies on traditional tools of legal analysis, including Supreme Court precedent, practical consequences, and its own sense of what the words in a statute mean, at much higher rates than it relies on most statute-specific interpretive tools.²⁸⁵ That is, the Court invokes its own prior precedents, practical consequences, and text / plain meaning with far more frequency than it references statutory purpose, legislative history, congressional intent, or dictionary definitions.²⁸⁶ The only statute-specific interpretive tool the Court invokes at rates somewhat comparable to the traditional legal

functions" and that judges "refer to them as an integral part of the *ratio decidendi* that drives their decisions").

²⁸⁵ See Tables 1 and 2.

²⁸⁶ I consider text / plain meaning analysis more akin to traditional tools of legal analysis than to the canons, because judges often rely on their own linguistic experience or intuition to determine plain meaning—rather than invoking a legal maxim or rule of thumb. Consider, for example, the recent case *Yates v United States*, 135 S Ct 1074 (2015), which is not part of my data set. *Yates* involved a criminal evidence-tampering statute that punishes one who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence [an] investigation." 18 USC § 1519. See also *Yates*, 135 S Ct at 1078 (Ginsburg) (plurality). At issue was whether a commercial fisherman who had been cited for catching undersized red grouper and instructed to preserve his catch could be convicted of violating this statute when he instructed a crew member to throw the undersized fish overboard, destroying the evidence of his crime. *Yates*, 135 S Ct at 1079–80 (Ginsburg) (plurality). A plurality of the Court concluded that a fish could not be considered a "tangible object" within the meaning of the statute, relying in part on the *noscitur a sociis* language canon. Specifically, the plurality observed that "we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id* at 1085 (Ginsburg) (plurality) (quotation marks omitted). The plurality then noted that "[t]angible object' is the last in a list of terms that begins 'any record or document'" and that "[t]he term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information." *Id* (Ginsburg) (plurality) (brackets omitted). The dissenting opinion, by contrast, focused on the plain meaning of the term "tangible object," arguing that "'tangible object' means the same thing in § 1519 as it means in everyday language—any object capable of being touched" and that "[a] 'tangible object' is an object that's tangible." *Id* at 1091 (Kagan dissenting). See also *id* (Kagan dissenting) ("As the plurality must acknowledge, the ordinary meaning of 'tangible object' is 'a discrete thing that possesses physical form.' A fish is, of course, a discrete thing that possesses physical form. So the ordinary meaning of the term 'tangible object' in § 1519, as no one here disputes, covers fish.") (citations omitted).

tools of analysis is the combined language canons + whole-act rule + grammar canons tool.²⁸⁷

This observation highlights one of the central questions in statutory interpretation theory—that is, what role do the canons play? In light of the data, it is worth asking whether the canons are really playing much of a role at all in the Roberts Court’s statutory cases—or whether they are, indeed, “window-dressing,” as legal realist Llewellyn once argued.²⁸⁸ Leading legislation scholars have debated these questions for decades, with Eskridge, Frickey, and Professor Cass Sunstein countering Llewellyn’s charge and arguing that the canons play an important role, at least as default rules, in guiding courts to certain statutory constructions.²⁸⁹ But the data from the Roberts Court suggest that the truth may lie somewhere in between the two opposing positions scholars have staked out. That is, the answer may depend on whether we are talking about substantive canons or about language canons (defined to include the whole-act rule and grammar rules). Based on the frequency of references to particular interpretive resources, it appears that the Court does employ language canons often when construing statutes (in 32.3 percent of all opinions and 67.9 percent of all majority opinions in the data set, compared to a rate of reference of only 14.4 percent of all opinions and 15.5 percent of majority opinions for substantive canons).²⁹⁰

Further work and analysis is necessary to fully understand the differences between the Court’s use of language and its use of substantive canons, but a few possibilities exist. Whole-act

²⁸⁷ See Tables 1 and 2.

²⁸⁸ Eskridge, 66 U Chi L Rev at 679 (cited in note 22), citing Llewellyn, 3 Vand L Rev at 401–06 (cited in note 22).

²⁸⁹ Llewellyn famously argued that the canons are after-the-fact justifications, while Eskridge, Frickey, and Sunstein argued that they are useful default rules. Compare Llewellyn, 3 Vand L Rev at 401–06 (cited in note 22) (listing the canons in “Thrust” and “Parry” pairings and stating that the “construction contended for must be sold [] by means other than the use of the canon”), with Eskridge and Frickey, 108 Harv L Rev at 65–67 (cited in note 75) (arguing that canons are useful as an interpretive regime), Sunstein, *After the Rights Revolution* at 147–57 (cited in note 26) (describing the debate around the canons and arguing that they are an important and unavoidable part of statutory interpretation), and Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 451–54 (1989) (describing how the canons were “virtually discredited by the legal realist movement,” but defending their use on the grounds that “the interpretation of a text requires courts to refer to background norms in interpreting terms”).

²⁹⁰ See Table 2.

rule comparisons or lists susceptible to various Latin maxims may, for example, be more readily available in a larger number of cases than are on-point substantive canons; if the Court is straightforward in its use of substantive canons, employing them as helpful guides rather than inventing and reinventing them as after-the-fact justifications for interpretations reached based on policy preferences, it may simply be finding fewer occasions in which substantive canons, as compared to language canons, are helpful. Alternately, the members of the Roberts Court may consider language canons and whole-act rule comparisons to be more persuasive interpretive tools than substantive canons—and may thus employ the former more often in an effort to persuade colleagues to join an opinion. Future studies might find it useful to explore these and other possible reasons for the Court’s dramatically different rates of reference to these two forms of interpretive canons.

E. Codified Canons and Methodological Stare Decisis

The data regarding the Roberts Court’s substantive canon use also shed new light on recent calls for methodological stare decisis—the suggestion that federal courts should adopt a binding statutory interpretation methodology. Recent work has revealed that several state courts and state legislatures have attempted to dictate a binding hierarchy of interpretive tools that courts in their jurisdictions must follow, in a prescribed order—what has been called “methodological stare decisis.”²⁹¹ A leading example is the three-step interpretive framework adopted by the Oregon Supreme Court in the case *Portland General Electric Co v Bureau of Labor and Industries*.²⁹² That framework imposed a three-tier hierarchy of interpretive tools that required courts to consult textual canons at step one, legislative history at step two if and only if the textual canons prove inconclusive, and substantive canons at step three, only as a last resort if both textual tools and legislative history prove indeterminate.²⁹³ One scholar has labeled this approach “modified textualism” and has suggested that it may constitute a compromise solution that provides textualism’s

²⁹¹ Gluck, 119 Yale L J at 1754 (cited in note 20).

²⁹² 859 P2d 1143 (Or 1993).

²⁹³ Id at 1146–47.

best hope of convincing purposivist judges to adopt a text-centric interpretive methodology.²⁹⁴

Relatedly, every state legislature in the country has enacted legislation codifying certain canons of construction that state courts are expected to follow when interpreting statutes.²⁹⁵ A recent study of these legislated interpretive rules found that only a handful of judicially created substantive canons make it onto state legislatures' lists of preferred interpretive tools.²⁹⁶ Among these favored substantive canons are the avoidance canon, the presumption against retroactive application of later-enacted statutes, and the sovereign immunity canon.²⁹⁷

What is striking about both the state courts' "modified textualism" and state legislatures' lists of codified canons is how much they overlap with the Roberts Court's current approach to substantive canons. Notably, modified textualism puts substantive canons last in the hierarchy of interpretive tools, well behind plain meaning, text-based language canons and the whole-act rule, other statutes, and legislative history.²⁹⁸ The members of the Roberts Court, as Part II showed, likewise invoke substantive canons far less often than they invoke these other interpretive resources.²⁹⁹

The big difference between the Court's practices and the methodological approach adopted by several state courts, then, is the state courts' commitment *not to consult* substantive canons at all when textual canons or legislative history provides a clear answer. The data from the Roberts Court's first six and a half terms are not consistent with such a commitment—the justices frequently employed substantive canons alongside text / plain meaning, language canons / the whole-act rule, or other statutes (in sixty-two of eighty-seven opinions).

Perhaps even more intriguing, however, is the pattern of state legislature codification of substantive canons reported in Jacob Scott's study.³⁰⁰ Very few substantive canons make it onto state legislatures' lists of codified canons. But those that do overlap in important ways with the canons referenced most often by

²⁹⁴ Gluck, 119 Yale L J at 1758–59, 1832–34, 1842 (cited in note 20).

²⁹⁵ Scott, 98 Georgetown L J at 341, 350 & n 35 (cited in note 24).

²⁹⁶ Id at 382–401.

²⁹⁷ Id at 384–85, 389–90, 398–99.

²⁹⁸ See, for example, *Portland General Electric*, 859 P2d at 1146.

²⁹⁹ See Tables 1 and 2.

³⁰⁰ See generally Scott, 98 Georgetown L J 341 (cited in note 24).

the Roberts Court. For example, the substantive canons most often invoked by the Roberts Court were the avoidance canon, the rule of lenity, the presumption against preemption, various federalism clear statement rules, the sovereign immunity canon, and the presumption against retroactive application of new rules.³⁰¹ Of these, all but the federalism, preemption, and lenity canons were codified by state legislatures.³⁰² The omission of these three canons, moreover, is hardly surprising; federalism clear statement rules and the presumption against preemption have little application to the judicial review of *state* laws, and the rule of lenity is much loathed by legislatures, which tend to take a “tough on crime” stance³⁰³ and have even gone so far as to enact legislation seeking to abrogate this canon.³⁰⁴

There are also several canons that many state legislatures have codified that never show up in the Roberts Court’s cases, such as the presumption that statutes should be construed so as to “promote justice” or the presumption that remedial statutes should be liberally construed.³⁰⁵ Still, the fact that three out of six of the substantive canons most often referenced by the Roberts Court appear on the short list of substantive canons favored by state legislatures suggests a noteworthy degree of consensus between the US Supreme Court and legislators about which policy-based interpretive rules are most helpful and authoritative in the judicial interpretation of statutes. It also reinforces the point emphasized in Part II.C—that the judicial use of substantive canons may not be nearly as frustrating to legislative intent in practice as scholars have assumed. Both of these points of convergence, in turn, suggest that substantive canons may be less threatening, in terms of democratic legitimacy, to the judicial review of statutes than scholars have feared—on the theory that legislatures are not likely to endorse interpretive rules that empower courts to undermine or usurp legislative authority.

At the same time, however, the data from the Roberts Court’s first six and a half terms suggest that neither state courts’ interpretive hierarchies nor state legislatures’ codified rules account adequately for the role that judicial precedent

³⁰¹ See Appendix.

³⁰² See Scott, 98 *Georgetown L J* at 382–400 (cited in note 24).

³⁰³ Gluck and Bressman, 65 *Stan L Rev* at 957 (cited in note 25).

³⁰⁴ See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 *Colum L Rev* 2162, 2203–04 (2002).

³⁰⁵ Scott, 98 *Georgetown L J* at 400–01 (cited in note 24).

plays in statutory interpretation. Some state legislative codes of construction do mention the common law, but none lists judicial precedent or the courts' constructions of similar statutes among the interpretive tools courts should consult. On the one hand, state legislatures' failure to include precedent in their legislated rules may not be shocking, because legislatures may consider references to precedent to be an inherent part of judicial decision-making, rather than an independent resource or rule/maxim/canon that itself dictates a particular interpretation. State courts, similarly, may consider precedent to be something that courts use as authority for the various textual rules or other interpretive canons they employ, rather than an independent interpretive tool that directs courts to adopt a particular construction and requires its own place in an interpretive hierarchy. As discussed in Part III.B, statutory interpretation theory lacks a clear understanding of whether precedents are used mostly as authority for other interpretive tools or as interpretive guides that themselves dictate a particular statutory reading. Again, future work examining how precisely the Court uses its own precedents in statutory cases would be illuminating.³⁰⁶

At the federal level, Congress has not prescribed any codes or rules of statutory construction for courts to follow.³⁰⁷ But recent empirical work based on interviews with congressional staffers provides some evidence about Congress's views regarding several of the substantive canons invoked most often by the Roberts Court.³⁰⁸ Most interestingly, such work reveals that while congressional staffers do not know the avoidance canon by name, they want and expect courts to interpret statutes in a manner that is consistent with the canon's underlying assumptions.³⁰⁹ That is, the staffers responsible for drafting legislation indicate that they try hard to legislate within constitutional bounds, pay attention to prior case law on questions of constitutionality, and expect the Court to err on the side of "upholding

³⁰⁶ As noted, Solan has begun this undertaking. See generally Solan, 94 *NC L Rev* 1165 (cited in note 265).

³⁰⁷ There is a Dictionary Act, 1 USC § 1, which provides definitions of certain words that are supposed to apply throughout the United States Code. But the Act does not prescribe any interpretive methodology for courts to follow or provide a hierarchy of tools to be consulted in any particular order.

³⁰⁸ See Gluck and Bressman, 65 *Stan L Rev* at 940–60 (cited in note 25).

³⁰⁹ See *id.* at 947–48.

federal statutes” whenever possible.³¹⁰ This, again, is consistent with the doctrinal analysis in Part II.C demonstrating that the Roberts Court has often used the avoidance canon to uphold federal statutes against constitutional challenges and to give effect to congressional overrides. In other words, despite academic criticism of the avoidance canon, there seems to be widespread legislative support for the canon as a saving mechanism, and the Court, perhaps surprisingly, seems to be employing the canon consistently with how legislative staffers expect the canon to be used.

The Roberts Court’s regular use of federalism canons and the rule of lenity, by contrast, seems more problematic when measured against congressional expectations. When interviewed, congressional staff demonstrated little knowledge of the federalism canons or the rule of lenity,³¹¹ and many reported an expectation that when a conflict arises between state and federal laws, courts should give greater effect to the *federal* law—the precise opposite of the presumption embodied in the federalism canons.³¹²

Both the federal and state evidence regarding legislator preferences, then, suggest that scholars have gotten the story half right regarding substantive canons. That is, with respect to the federalism canons and the rule of lenity, the academic consensus that substantive canons operate in a manner that contradicts legislative preferences seems accurate. But for several other canons regularly employed by the Roberts Court, including the much-criticized avoidance canon, academic concerns that the Court invents or prioritizes substantive canons that preserve judicial rather than legislative preferences may be unwarranted. Indeed, the canons most often invoked by the Court seem to align with those that state legislators and, to some extent, federal legislators endorse.

At bottom, the data regarding the Roberts Court’s use of substantive canons teach both that (1) a methodological stare decisis that ranks substantive canons low in its interpretive hierarchy might be closer to the modern Court’s practices and less difficult to garner support for—even from textualists—than scholars thus far have assumed; and (2) with two notable exceptions,

³¹⁰ Id at 948.

³¹¹ Id at 942–47.

³¹² Gluck and Bressman, 65 Stan L Rev at 944 (cited in note 25).

there may be greater consistency between legislative preferences about substantive canons and the modern Court's on-the-ground use of such canons than scholars have recognized.

CONCLUSION

Substantive canons long have received a bum rap from legal scholars. Commentators have argued that there are too many substantive canons, that courts invent and reinvent them to suit their whims, that textualist judges use substantive canons as an escape valve to end-run plain meaning, and that courts employ substantive canons in a manner that elevates judicial policy concerns over legislative intent. Most of these claims have been based on casual observations, with little empirical testing. This Article offers the first detailed empirical study of the modern Court's substantive canon use—with several surprising results. Its findings suggest that much of the conventional academic account of substantive canons may be wrong, or at least overstated. Throughout, the Article's aim has been to illuminate the Court's actual practices regarding substantive canons—and to evaluate the implications that those practices have for statutory interpretation theory.

APPENDIX. CASES AND SUBSTANTIVE CANONS INVOKED:^z
2006–2012^f

Case Name	Canon	Opinion Author	Ideology
* <i>National Federation of Independent Business v Sebelius</i> , 132 S Ct 2566 (2012)	Avoidance Presumption favoring severability	Roberts (m)	Liberal
^ø <i>Reynolds v United States</i> , 132 S Ct 975 (2012)	Avoidance Rule of lenity	Scalia (d) (avoidance) Breyer (m) (rule of lenity)	Conservative Liberal
^Ω <i>Brown v Plata</i> , 563 US 493 (2011)	Avoidance	Kennedy (m)	Liberal
* <i>Citizens United v Federal Election Commission</i> , 558 US 310 (2010)	Avoidance	Stevens (c/d)	Liberal
^Ω <i>Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich, LPA</i> , 559 US 573 (2010)	Avoidance	Kennedy (d)	Conservative
* <i>Holder v Humanitarian Law Project</i> , 561 US 1 (2010)	Avoidance	Breyer (d)	Liberal
* <i>Skilling v United States</i> , 561 US 358 (2010) (override)	Avoidance Rule of lenity	Ginsburg (m)	Liberal
^Ω <i>Bartlett v Strickland</i> , 556 US 1 (2009)	Avoidance	Kennedy (p)	Conservative

^z In the Appendix, Ø indicates a “passing” or “minimal reliance” case, Ω indicates a “some reliance” case, and * indicates a “primary reliance” case. Opinions are coded as (m), (p), (c), or (d) to indicate whether the canon in question was applied within a majority opinion, plurality opinion, concurrence, or dissent, while (u) indicates that the opinion applying the canon was unanimous. “Override” indicates a case in which the Court was construing a statute that Congress enacted to override a prior Supreme Court interpretation.

^f *Gonzales v Oregon*, 546 US 243 (2006), which employed a substantive canon that presumes against statutory interpretations that would alter the federal-state balance, was not included in this study because it fell outside the time period of the study—that is, it was decided on January 17, 2006, before Justice Alito joined the Court on January 31, 2006.

^o <i>Hawaii v Office of Hawaiian Affairs</i> , 556 US 163 (2009)	Avoidance	Alito (m) (u)	Unspecifiable
* <i>Northwest Austin Municipal Utility District Number One v Holder</i> , 557 US 193 (2009) (“NAMUDNO”)	Avoidance Equal sovereignty principle (presumption against unequal treatment of the states)	Roberts (m)	Liberal
^o <i>Federal Communications Commission v Fox Television Stations, Inc.</i> , 556 US 502 (2009)	Avoidance	Breyer (d)	Liberal
* <i>Boumediene v Bush</i> , 553 US 723 (2008) (override)	Avoidance	Roberts (d)	Conservative
^o <i>Gonzalez v United States</i> , 553 US 242 (2008)	Avoidance	Thomas (d)	Liberal
* <i>Gonzales v Carhart</i> , 550 US 124 (2007) (override)	Avoidance	Kennedy (m)	Conservative
^o <i>Office of Senator Mark Dayton v Hanson</i> , 550 US 511 (2007)	Avoidance	Stevens (m) (u)	Conservative
^o <i>Rapanos v United States</i> , 547 US 715 (2006)	Avoidance Federalism clear statement (state has primary power over land and water use)	Scalia (p)	Conservative
* <i>Arizona v United States</i> , 132 S Ct 2492 (2012)	Presumption against preemption	Alito (c/d)	Conservative
^o <i>Chamber of Commerce of the United States of America v Whiting</i> , 563 US 582 (2011)	Presumption against preemption	Roberts (m)	Conservative

^o <i>PLIVA, Inc v Mensing</i> , 564 US 604 (2011)	Presumption against preemption	Sotomayor (d) (presumption against preemption)	Conservative
	<i>Non obstante</i> (allowing implied repeal)	Thomas (p) (<i>non obstante</i>)	Liberal
^o <i>Wyeth v Levine</i> , 555 US 555 (2009)	Presumption against preemption	Stevens (m)	Conservative
^o <i>Altria Group, Inc v Good</i> , 555 US 70 (2008)	Presumption against preemption	Stevens (m)	Conservative
^o <i>Riegel v Medtronic, Inc</i> , 552 US 312 (2008)	Presumption against preemption	Ginsburg (d)	Conservative
^o <i>Watters v Wachovia Bank, NA</i> , 550 US 1 (2007)	Presumption against preemption	Stevens (d)	Conservative
^o <i>Empire HealthChoice Assurance, Inc v McVeigh</i> , 547 US 677 (2006)	Presumption against preemption	Ginsburg (m)	Conservative
^o <i>Fowler v United States</i> , 563 US 668 (2011)	Federalism clear statement (presumption against changing the federal-state balance of crime prosecution)	Breyer (m) (federalism clear statement)	Liberal
	Rule of lenity	Scalia (c) (rule of lenity and federalism clear statement)	Liberal
^o <i>Bruesewitz v Wyeth LLC</i> , 562 US 223 (2011)	Federalism clear statement (police powers not superseded by a federal act)	Sotomayor (d)	Conservative
^o <i>Smith v Bayer Corp.</i> , 564 US 299 (2011)	Doubts about federal court injunctions resolved in favor of allowing state proceedings	Kagan (m)	Conservative
[*] <i>Florida Department of Revenue v Piccadilly Cafeterias, Inc</i> , 554 US 33 (2008)	Federalism clear statement (exemption from state taxation)	Thomas (m)	Conservative

<i>*Arlington Central School District Board of Education v Murphy</i> , 548 US 291 (2006)	Federalism clear statement (notice Spending Clause condition)	Alito (m)	Conservative
^o <i>Barber v Thomas</i> , 560 US 474 (2010)	Rule of lenity	Kennedy (d)	Liberal
^o <i>United States v Hayes</i> , 555 US 415 (2009)	Rule of lenity	Roberts (d)	Liberal
^{oo} <i>Dean v United States</i> , 556 US 568 (2009)	Rule of lenity	^o Stevens (d) ^o Breyer (d)	Liberal Liberal
^o <i>United States v Santos</i> , 553 US 507 (2008)	Rule of lenity	*Scalia (p) ^o Stevens (c)	Liberal Liberal
^o <i>United States v Rodriguez</i> , 553 US 377 (2008)	Rule of lenity	Souter (d)	Liberal
^o <i>Begay v United States</i> , 553 US 137 (2008)	Rule of lenity	Scalia (c)	Liberal
^o <i>James v United States</i> , 550 US 192 (2007)	Rule of lenity	Scalia (d)	Liberal
<i>*Federal Aviation Administration v Cooper</i> , 132 S Ct 1441 (2012)	Sovereign immunity (waiver)	Alito (m)	Conservative
^o <i>Sossamon v Texas</i> , 563 US 277 (2011)	Sovereign immunity (waiver)	Thomas (m)	Conservative
<i>*Permanent Mission of India to the United Nations v City of New York</i> , 551 US 193 (2007)	Sovereign immunity (waiver)	Stevens (d)	Conservative
^o <i>Dolan v United States Postal Service</i> , 546 US 481 (2006)	Sovereign immunity (waiver)	Thomas (d)	Liberal
^o <i>Carciere v Salazar</i> , 555 US 379 (2009)	Liberal construction in favor of Indian tribes	Stevens (d)	Liberal
^o <i>Bilski v Kappos</i> , 561 US 593 (2010)	Elephants in mouseholes	Stevens (c)	Unspecifiable

^o <i>Ali v Federal Bureau of Prisons</i> , 552 US 214 (2008)	Elephants in mouseholes	Breyer (d)	Conservative
* <i>Morrison v National Australia Bank Ltd.</i> , 561 US 247 (2010)	Extraterritorial application of law	Scalia (m)	Conservative
^o <i>Microsoft Corp v AT&T Corp</i> , 550 US 437 (2007)	Extraterritorial application of law	Ginsburg (m)	Liberal
^o <i>Exxon Shipping Co v Baker</i> , 554 US 471 (2008)	No derogation of the common law	Souter (m)	Conservative
^o <i>BP America Production Co v Burton</i> , 549 US 84 (2006)	Narrow construction against the government	Alito (m) (u)	Liberal
^o <i>Kucana v Holder</i> , 558 US 233 (2010)	Presumption favoring judicial review of administrative action	Ginsburg (m)	Liberal
* <i>Sackett v Environmental Protection Agency</i> , 132 S Ct 1367 (2012)	APA presumption of judicial review of all final agency action	Scalia (m) (u)	Liberal
^o <i>Knight v Commissioner of Internal Revenue</i> , 552 US 181 (2008)	Burden on taxpayer seeking deduction	Roberts (m) (u)	Liberal
^o <i>Hamdan v Rumsfeld</i> , 548 US 557 (2006)	Common law of war must clearly authorize trial by military commission	Stevens (m) (common law must clearly authorize)	Liberal
	Deference to the executive on matters of war	Thomas (d) (deference to the executive on war)	Conservative
^o <i>CBOCS West, Inc v Humphries</i> , 553 US 442 (2008)	Affirmative evidence of congressional intent necessary for an implied remedy	Thomas (d)	Conservative
* ^o <i>Vartelas v Holder</i> , 132 S Ct 1479 (2012)	Presumption against retroactivity	*Ginsburg (m) ^o Scalia (d)	Liberal Conservative

^o <i>Carr v United States</i> , 560 US 438 (2010)	Presumption against retroactivity	Sotomayor (m)	Liberal
^o <i>AT&T Corp v Hulteen</i> , 556 US 701 (2009)	Presumption against retroactivity	Souter (m)	Conservative
* <i>Fernandez-Vargas v Gonzales</i> , 548 US 30 (2006)	Presumption against retroactivity	Souter (m)	Conservative
* <i>eBay Inc v MercExchange, LLC</i> , 547 US 388 (2006)	Presumption against major departures from the “long tradition” of equity practice	Thomas (m) (u) Roberts (c)	Liberal Liberal
^o <i>Stoneridge Investment Partners, LLC v Scientific-Atlanta, Inc.</i> , 552 US 148 (2008)	No expansion of private rights of action beyond congressional intent	Kennedy (m)	Conservative
* <i>Holland v Florida</i> , 560 US 631 (2010)	Presumption in favor of equitable tolling (nonjurisdictional statutes) Constitutional right to access federal courts	Breyer (m)	Liberal
^o <i>Woodford v Ngo</i> , 548 US 81 (2006)	Constitutional right to access federal courts	Stevens (d)	Liberal
^o <i>Gonzalez v Thaler</i> , 132 S Ct 641 (2012)	Clear statement rule for statutory limits on jurisdiction	Sotomayor (m)	Conservative
* <i>Mims v Arrow Financial Services, LLC</i> , 132 S Ct 740 (2012)	Presumption in favor of concurrent state court jurisdiction	Ginsburg (m) (u)	Liberal
^o <i>Hardt v Reliance Standard Life Insurance Co</i> , 560 US 242 (2010)	Clear statement rule for attorney’s fee award	Thomas (m)	Liberal
Subject-Matter-Specific Canons			
^o <i>Henderson v Shinseki</i> , 562 US 428 (2011)	Ambiguity resolved in favor of veterans	Alito (m) (u)	Liberal
^o <i>Shinseki v Sanders</i> , 556 US 396 (2009)	Ambiguity resolved in favor of veterans	Souter (d)	Liberal

⁹ <i>Kawashima v Holder</i> , 132 S Ct 1166 (2012)	Ambiguity construed in favor of aliens	Ginsburg (d)	Liberal
⁹ <i>Carachuri-Rosendo v Holder</i> , 560 US 563 (2010)	Ambiguity construed in favor of aliens	Stevens (m)	Liberal
* <i>Felkner v Jackson</i> , 562 US 594 (2011)	AEDPA imposes a highly deferential standard (state court decisions are entitled to the benefit of doubt)	Per curiam (m) (u)	Conservative
⁹ <i>Riley v Kennedy</i> , 553 US 406 (2008)	Liberal construction of the Voting Rights Act	Stevens (d)	Liberal
⁹ <i>Howard Delivery Service, Inc v Zurich American Insurance Co</i> , 547 US 651 (2006)	Narrow construction of preferences in the Bankruptcy Code	Ginsburg (m) (narrow construction and equality of distribution)	Liberal
	“Equality of distribution for similar creditors” principle	Kennedy (d) (equality of distribution)	Conservative
⁹ <i>Travelers Casualty & Surety Co of America v Pacific Gas & Electric Co</i> , 549 US 443 (2007)	Clear statement rule for disallowing state law claims	Alito (m) (u)	Liberal
⁹ <i>Hall Street Associates, LLC v Mattel, Inc</i> , 552 US 576 (2008)	Presumption in favor of freedom to contract (to add to what FAA says)	Stevens (d)	Liberal
⁹ <i>Hall v United States</i> , 132 S Ct 1882 (2012)	Presumption that the Bankruptcy Code does not erode past practice absent clear intent	Sotomayor (m)	Liberal
⁹ <i>Hamilton v Lanning</i> , 560 US 505 (2010)	Presumption that the Bankruptcy Code does not erode past practice absent clear intent	Alito (m)	Liberal
* <i>CompuCredit Corp v Greenwood</i> , 132 S Ct 665 (2012)	Presumption in favor of arbitration	Sotomayor (c)	Conservative
⁹ <i>Nken v Holder</i> , 556 US 418 (2009)	Presumption “favoring the retention of long-established and familiar principles”	Roberts (m)	Liberal

<i>*Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc.</i> , 563 US 776 (2011)	Presumption that an inventor owns a property right in a patentable invention	Roberts (m) (inventor owns property right)	Conservative
	Presumption denying inventors patent rights growing out of research for which the public has already paid	Breyer (d) (deny if research paid for by public)	Liberal
