CRACKING THE WHOLE CODE RULE

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Over the past three decades, since the late Justice Scalia joined the Court and ushered in a new era of text-focused statutory analysis, there has been a marked move towards the holistic interpretation of statutes and "making sense of the corpus juris." In particular, Justices on the modern Supreme Court now regularly compare or analogize between statutes that contain similar words or phrases—what some have called the "whole code rule." Despite the prevalence of this interpretive practice, however, scholars have paid little attention to how the Court actually engages in whole code comparisons on the ground.

This Article provides the first empirical and doctrinal analysis of how the modern Supreme Court uses whole code comparisons, based on a study of 532 statutory cases decided during the Roberts Court's first twelve-and-a-half Terms. The Article first catalogues five different forms of whole code comparisons employed by the modern Court and notes that the different forms rest on different justifications, although the Court's rhetoric has tended to ignore these distinctions. The Article then notes several problems, beyond the unrealistic one-Congress assumption identified by other scholars, that plague the Court's current approach to most forms of whole code comparisons. For example, most of the Court's statutory comparisons involve statutes that have no explicit connection to each other, and nearly one-third compare statutes that regulate entirely unrelated subject areas. Moreover, more than a few of the Court's analogies involve generic statutory phrases—such as "because of" or "any"—whose meaning is likely to depend on context rather than some universal rule of logic or linguistics.

This Article argues that, in the end, the Court's whole code comparisons amount to judicial drafting presumptions that assign fixed meanings to specific words, phrases, and structural choices. The Article critiques this judicial imposition of drafting conventions on Congress—noting that it is unpredictable, leads to enormous judicial discretion, reflects an unrealistic view of how Congress drafts, and falls far outside the judiciary's institutional expertise. It concludes by recommending that the Court limit its use of whole code comparisons to situations in which congressional drafting practices, rule of law concerns, or judicial expertise

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justify the practice—e.g., where Congress itself has made clear that one statute borrowed from or incorporated the provisions of another, or where judicial action is necessary to harmonize two related statutes with each other.

INTRODUCTION

Since the late Justice Scalia ushered in a new era of text-focused statutory analysis three decades ago, there has been a move towards holistic interpretation and "mak[ing] sense rather than nonsense out of the *corpus juris*" writ large.[1] On the modern Supreme Court, this has manifested in regular analogies and comparisons across statutes that contain similar words or phrases—what some have called the "whole code" rule.[2]

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[1] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991).

[2] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND

Consider two recent examples:

First, in *Bostock v. Clayton County*,[3] a case recently decided by the Supreme Court, the Solicitor General's Office argued that a provision in Title VII prohibiting discrimination in employment "because of" an individual's sex does not bar discrimination on the basis of sexual orientation.[4] One of the government's central justifications for this statutory reading was a whole code comparison: other antidiscrimination statutes dealing with federally funded programs, attempts to cause bodily injury, and hate crimes expressly list "sexual orientation" as a trait distinct from "sex" or "gender."[5] Congress's express use of "sexual orientation" in other statutes, the government argued, showed that Congress knows how to prohibit discrimination based on sexual orientation when it wants to and that it considers sexual orientation discrimination independent from, rather than included within, sex discrimination.[6] The government also cited several state and local antidiscrimination statutes, which it contended "confirm[ed]" this distinction.[7] Although the government's arguments did not carry the day, Justice Kavanaugh's dissenting opinion adopted them.[8]

Second, in *Burrage v. United States*,[9] the defendant faced a Controlled Substances Act (CSA) sentencing enhancement for supplying heroin to an addict who overdosed on numerous drugs, including heroin. The statutory question was whether the enhancement, which applies when death "results from" a drug supplied by the defendant, should be imposed absent evidence that heroin—as opposed to one of the other drugs taken by the addict—directly caused the addict's death.[10] The Court ruled that the enhancement should not apply, because the provision is triggered only when the drug supplied by the defendant was a "but-for" cause of the victim's

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REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 630–31 (6th ed. 2020) (describing a "whole code rule" that "looks beyond the statute in question to various additional enactments addressing an identical or comparable issue"); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 168, 172 (2012) (describing a "Whole-Text Canon" and "Presumption of Consistent Usage" canon).

3 140 S. Ct. 1731 (2020).

4 *See* Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 & Reversal in No. 17-1623 at 12–13, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618 & 17-1623), 2019 WL 4014070.

5 *See id.* at 14–15.

6 *See id.* at 15.

7 *Id.*

8 *See Bostock*, 140 S. Ct. at 1829 & n.5 (Kavanaugh, J., dissenting).

9 571 U.S. 204 (2014).

10 *See id.* at 208.

death.[11] In so ruling, the Court relied on numerous interpretive resources,[12] including the observation that "courts regularly read phrases like 'results from' to require but-for causality."[13] To support this claim, the Court cited cases interpreting such wide-ranging statutes as the Age Discrimination in Employment Act (ADEA), Title VII, the Fair Credit Reporting Act (FCRA), and the civil Racketeer Influenced and Corrupt Organizations Act (RICO) statute[14] and noted that "[s]tate courts, which hear and decide the bulk of the Nation's criminal matters, usually interpret similarly worded criminal statutes in the same manner."[15]

In both cases, the cross-statute analogies were designed to paint a consistent, inevitable picture: that federal and state statutes have a single, established formula for prohibiting sexual orientation discrimination and assign a single consistent causation standard to phrases like "results from." Never mind the fine print that none of the federal statutes invoked by the Court in *Burrage* contained the precise "results from" language at issue in the CSA[16] or was *in pari materia*—i.e., related in subject matter—to the CSA; or that none of the state statutes referenced in *Burrage* or *Bostock* was enacted by Congress; or that most of the federal statutes cited in *Bostock* were enacted nearly half a century after Title VII.[17] The Court and Justice Kavanaugh

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[11] *Id.* at 211. Notably, this is inconsistent with the meaning that lay people attributed to the phrase "results from" in a recent experimental study of causal language. *See* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 999–1000 (2019) (finding that most ordinary people think the death "result[s] from" the heroin even if the heroin wasn't a "but-for" cause of the death).

[12] *See Burrage*, 571 U.S. at 210–14.

[13] *Id.* at 212.

[14] *See id.* at 212–13 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (Title VII); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (ADEA); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63 (2007) (FCRA); Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 265–68 (1992) (Civil RICO); Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 653–54 (2008) (Civil RICO)).

[15] *Id.* at 213–14 (considering state cases that construed criminal statutes containing phrases such as "results in," "because of," and "as a result of").

[16] *See* cases cited *supra* note 14. Specifically, *University of Texas Southwestern Medical Center*, 570 U.S. 338, involved the retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), which contains the term "because"; *Gross*, 557 U.S. at 176, interpreted the ADEA, which contains the phrase "because of"; *Safeco*, 551 U.S. at 63, interpreted the FCRA, which contains the phrase "based on"; and *Holmes*, 503 U.S. at 265–68, and *Bridge*, 553 U.S. at 653–54, interpreted the civil RICO statute, which contains the phrase "by reason of."

[17] *See* Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 & Reversal in No. 17-1623 at 14–15, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623), 2019 WL 4014070, at *14–15 (citing 34 U.S.C. § 12291(b)(13)(A) (amended 2013); 18 U.S.C. § 249(a)(2)(A), (c)(4) (enacted 2009); 34 U.S.C. § 30503(a)(1)(C) (enacted 2009); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1796, 2096); *Bostock*, 140 S. Ct. at 1829 n.5 (Kavanaugh, J., dissenting) (citing 18 U.S.C. § 249(a)(2)(A); 20 U.S.C.

deemed the statutory phrases at issue *similar enough* to demand a single, consistent, standardized meaning—irrespective of variations in context, timing, or institutional source.

The cross-statute reasoning employed in *Burrage* and *Bostock*—and the attendant use of precedents interpreting other similar statutes—is not anomalous. Indeed, in recent years, statutory analogies of the kind articulated in *Burrage* and the *Bostock* brief (and Kavanaugh dissent) have become common features of the Court's statutory interpretation cases.[18] Yet despite the ubiquity of such cross-statute references in the Court's jurisprudence, the use of "other statutes" as an interpretive tool remains underexamined and undertheorized in the statutory interpretation literature.

To date, only two articles have addressed head on the Court's practice of analogizing to other federal (and sometimes state) statutes. The first, authored by Bill Buzbee and published nearly twenty years ago, insightfully criticized the Court for promoting what Buzbee labeled the "one-Congress fiction"—i.e., the notion that Congress is one static body of legislators who bring the same intentions and understandings to the drafting of each new statute year after year and who "know[] how to achieve a certain goal or capture a certain meaning" when they want to do so.[19] Buzbee's article, while important and groundbreaking, focused on a subset of "whole code" cases in which the Court relied primarily on text-to-text linguistic comparisons across statutes. It did not analyze cases in which the Court relied on its own precedents interpreting analogous statutes or analogized to a statute that served as the model for the statute at issue.[20] Moreover, the article drew its examples almost entirely from cases involving the administrative state, rather than the full universe of statutory cases

§ 1092(f)(1)(F)(ii) (amended 1998); 34 U.S.C. § 12291(b)(13)(A); 34 U.S.C. § 30501(1) (enacted 2009); 34 U.S.C. § 30503(a)(1)(C); 34 U.S.C. § 41305(b)(1), (3) (enacted 1990); 42 U.S.C. § 294e–1(b)(2) (effective 2010); U.S. SENT'G GUIDELINES MANUAL § 3A1.1(a) (U.S. SENT'G COMM'N 2018); 2E GUIDE TO JUDICIARY POLICY § 320 (2019) (adopted 2008)).

[18] For a highly controversial use of whole code comparisons by the executive branch, see Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President 5–6 (Aug. 1, 2002), https://www.justice.gov/olc/file/886061/download (invoking whole code comparisons to health benefits statutes defining an emergency medical condition to support an aggressive reading of the statutory term "severe pain" as used in a criminal statute defining "torture").

[19] William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173 (2000).

[20] *See id.* at 183, 222, 224–25 ("Interpretation by means of the one-Congress fiction, in contrast, seldom includes attention to courts' earlier statutory interpretations, focusing instead on statute-to-statute comparisons."). This Article addresses the role of precedent in whole code comparisons as well as modeled statutes *infra* Section II.C.1 and notes 140–44, 152–53, 160–61, 201–13, 224–29, 258–67 and accompanying text.

that involve cross-statute comparisons.[21] The second article, authored by Anuj Desai, employed a theoretical lens to examine a specific whole code doctrine, called the *in pari materia* rule, that instructs interpreters to construe statutes "on the same subject" consistently.[22] No article to date has provided a full catalogue of all the different techniques the Supreme Court uses to analogize or distinguish other statutes *in all subject areas*, and no article has broadly theorized the criteria courts should look for when determining whether it makes sense to analogize or distinguish between particular statutes.[23]

This Article seeks to fill that gap. It provides the first empirical and doctrinal analysis of the myriad ways in which the modern Supreme Court uses other statutes to inform (or justify) its construction of the statute at issue, based on a study of 532 statutory cases decided during the Roberts Court's first twelve-and-a-half Terms (from January 2006 through July 2018). The Article aims both to provide a catalogue of the different interpretive moves the Court makes when reasoning from statute to statute[24] and, more broadly, to eval-

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[21] *See* Buzbee, *supra* note 19, at 180 (explaining that the article focuses "primarily upon statutory interpretation cases arising in connection with laws implicating structures and power in the administrative state").

[22] Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 181 (2020).

[23] Desai does offer theoretical recommendations about how textualist versus intentionalist interpretive philosophies should impact the determination of whether two statutes are *in pari materia*. Specifically, he posits that textualist judges should treat similarly only those statutes that have the same intended audience whereas intentionalist judges should apply the *in pari materia* rule only to statutes drafted by the same congressional committee. *See id.* at 182, 215–16, 256. Because Desai's focus is on how theories and modalities of statutory interpretation intersect with the *in pari materia* doctrine—rather than on identifying universal parameters that all judges should use to determine when specific forms of cross-statute comparisons are appropriate—his recommendations are abstract and contingent on individual judges' jurisprudential philosophies.

[24] This Article refers to all interpretive techniques employed by the U.S. Supreme Court that involve comparisons between two or more statutes as "whole code" comparisons. This includes applications of certain well-known canons such as the *in pari materia* rule (sometimes referred to as the "related statutes" canon) and the borrowed statutes canon, as well as less well-defined forms of comparisons between statutes. Some of the cases described in this Article involve comparisons across multiple statutes, while others involve comparisons between only two statutes. In my view, all such cross-statute comparisons build on, or extend, logical inferences made from comparisons between different provisions of a single statute (the whole act rule) to the U.S. Code as a whole—that is, they treat different statutes as subparts of a larger body of law. *See infra* notes 34–36 and accompanying text (discussing the whole code rule as an extension of the whole act rule). Some of these comparator statutes are more closely related to one another than others, and some of these comparisons accordingly are more justified than others, as Part III will elaborate. However, all of these forms of comparisons in some way treat individual statutes as part of a larger whole—and may therefore be considered subparts of a "whole code rule." Indeed, while the statutory interpretation literature to date contains no

uate the normative and theoretical implications of the judicial trend to standardize meaning across statutes.

The study's findings paint a picture of an interpretive tool that is both widely influential and theoretically incoherent. Six points stand out: (1) when interpreting statutes, the Roberts Court regularly—in 32.5% of the cases in the dataset—compares the statute at issue to another statute; (2) despite rhetoric that treats the whole code rule as a monolith, the Court in practice employs five different forms of cross-statute comparisons—all of which rest on different theoretical justifications and whose normative value should be evaluated independently; (3) only a fraction of the Court's "whole code" opinions (13.4%) involve comparisons to a statute that served as a model for, or was incorporated by reference into, the statute at issue; (4) most of the Court's statutory analogizing involves statutes that are related in subject matter to each other (66.2%), but nearly one-third of the cases compare statutes that regulate entirely unrelated subjects;[25] (5) the Court rarely pays attention to whether the other statutes to which it is analogizing were enacted contemporaneously with the statute at issue, despite the importance that textualism places on the date of dictionary definitions (and that textualism's cousin, originalism,[26] places on contemporary meaning in constitutional interpretation[27]); and (6) all of the Justices regularly employ whole code comparisons in the opinions

definitive compilation of "whole code" interpretive techniques, this Article's conception of the "whole code" rule is consistent with the approach taken in a leading treatise in the legislation field. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 117–27 (2016) [hereinafter ESKRIDGE, INTERPRETING LAW] (listing the *in pari materia* rule, borrowed act canon, meaningful variation rule, and implied repeals canon under the heading "whole code canons").

[25] *See infra* notes 102–03 and accompanying text (explaining that another 6.5% of the cases involved comparisons between statutes that regulated different underlying subject areas, but that arguably were related because they all contained attorney's fees provisions, statutes of limitation, jurisdictional provisions, or other similar provisions that were the subject of the Court's interpretation).

[26] *See, e.g.*, Daniel S. Goldberg, *I Do Not Think It Means What You Think It Means: How Kripke and Wittgenstein's Analysis on Rule Following Undermines Justice Scalia's Textualism and Originalism*, 54 CLEV. ST. L. REV. 273, 278–79 (2006) (noting that "textualism and originalism are descendants and close kin to the traditions of legal formalism" and examining their basic premises).

[27] *E.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017) (characterizing originalist theories as holding that "the communicative content of the constitutional text is fixed at the time each provision is framed and ratified" and that "constitutional practice should be constrained by that communicative content of the text, which we can call the 'original public meaning'"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 851–52 (1989) (suggesting Chief Justice Taft's opinion in Myers v. United States, 272 U.S. 52 (1926), can be viewed as an example of originalism and noting its focus on evidence of contemporary meaning).

they author, irrespective of their preferred interpretive methodologies.

A number of doctrinal trends are also worth noting. First and foremost, the Court has no established criteria for determining which other statutes are appropriate analogues for the statute at issue in a given case, and no established rules for choosing among statutes when more than one is offered for comparison. Second, the Court sometimes rejects statutory analogies in precisely those cases in which the comparison seems most appropriate—i.e., when Congress has used one statute as the model for another. Third, in a growing number of cases, the Court almost seems to be inventing drafting rules of its own by assigning uniform policy consequences to generic phrases, as opposed to terms of art, across statutes—e.g., causal phrases denote but-for causation[28]—irrespective of statutory subject matter or context. Last, the Court's inattention to the temporal relationship between the statutes it is comparing is both puzzling and troubling, suggesting that it is really concerned not with Congress's intent or the public meaning of statutory terms but, rather, with finding a neutral-sounding justification for its preferred construction or imposing consistency on the U.S. Code from above.

Indeed, taken together, the data and doctrinal evidence suggest that the goal (or at least effect) of whole code comparisons, as employed by the modern Court, is judicially imposed drafting coherence rather than the fulfillment of congressional intent—even in opinions authored by the Court's purposivist and intentionalist Justices. This is true despite the fact that the Court regularly couches its whole code comparisons in intent-promoting language such as "if Congress had wanted to accomplish *A*, it would have followed *X* drafting practice."[29]

This Article evaluates the implications of the different forms of whole code comparisons employed by the modern Court and the theoretical justifications that undergird them. It argues that the real problem with many forms of whole code presumptions is not that they depend on a fictional view of Congress as a constant, never-changing body of legislators. Rather, it is that they presume that Congress—or

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[28] *See* Burrage v. United States, 571 U.S. 204, 212–14 (2014) (discussing various phrases as denoting but-for causation).

[29] *See, e.g.*, Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 633 (2018) ("Had Congress wanted to prioritize efficiency, it could have authorized direct circuit-court review of all nationally applicable regulations, as it did under the Clean Air Act."); Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1977 (2015) ("Congress has used clearer and more specific language when it has wanted to toll the statutes of limitations for civil suits as well as crimes. . . . [B]ut [here] it did not do so.").

any drafter—has one single drafting formula for effectuating specific policy choices[30] or, alternately, that they sanction the judicial imposition of drafting templates on Congress. In the end, the Article offers some recommendations and metarules designed to cabin the Court's use of statutory analogies to a narrower universe of cases in which context, timing, and institutional considerations justify the comparison.

The Article proceeds in three parts. Part I reviews the theory and justifications behind the whole code rule, as well as scholarly criticisms of the rule thus far. Part II reports data about the Court's use of whole code comparisons in the 532 cases decided during its first twelve-and-a-half Terms. Part II also provides a taxonomy of the several different forms of whole code comparisons the Court employs, and offers some doctrinal observations about the Court's use of this interpretive tool. Part III evaluates the implications of the interpretive practices described in Part II, noting that there are several problems, beyond the one-Congress fiction identified by other scholars, with the judicial creation of drafting conventions across statutes—including the decontextualization and isolation of textual phrases and the amplification of judicial discretion in a manner not justified by judicial expertise. Part III concludes by suggesting some metarules designed to constrain the Court's thus far largely unbridled, undisciplined use of whole code comparisons.

I
The Theory Behind the Whole Code Rule

Other statutes are one of several extrinsic sources—i.e., sources external to the four corners of a statute's text—that courts use to help determine statutory meaning.[31] Unlike the common law, another extrinsic source that courts sometimes use as a guide to statutory meaning,[32] other statutes originate with the legislature rather than the courts. This Part reviews the theoretical justifications that courts have offered to support whole code comparisons as well as some of the criticisms scholars have leveled thus far against this interpretive tool.

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[30] As I argue *infra* Section III.A.1, even if Congress were a single, never-changing body of legislators, it is unlikely that it would follow the same precise drafting formula across all statutes.

[31] *See* Eskridge et al., *supra* note 2, at 713 (describing "the common law, legislative background and history, and related statutes" as "sources extrinsic to the statutory text").

[32] *See id.*

A. The Corpus Juris

The "whole code rule" is based on a goal of construing each individual statute in a manner that is "compatible with previously enacted laws."[33] It is, essentially, an extension of the whole act rule, which directs interpreters to construe individual provisions of a statute in light of the whole statute of which they are a part.[34] The whole act rule is based on the idea that "a provision that may seem ambiguous in isolation" can often be "clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[35] The whole code rule takes this idea one step further, encouraging courts to give individual statutes a meaning that is consistent with the rest of the U.S. Code. As Justice Scalia once put it, "Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."[36]

The theory, or justification, behind the whole code rule is twofold. On the one hand, the Supreme Court often defends or explains its whole code analogies with references to congressional intent or expectations. That is, the Court posits that Congress intends for statutory terms or phrases used in one statute to mean the same thing in other similar statutes or that Congress has a consistent way of expressing certain policy choices, such that differences in the wording of two similar statutes reflect differences in congressional intent. For example, in *Wisconsin Central Ltd. v. United States*, the Court stated that language in the Railroad Retirement Tax Act which "mirrored" provisions in the Federal Insurance Contributions Act "demonstrate[d] that *Congress intended* these tax regimes to be treated the same."[37] In another example, the Court pointed out that a provision contained in one statute—one allowing for direct review by the Court of Appeals—is missing from another similar statute and argued that "[h]ad Congress wanted to" effectuate the same policy in the second

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[33] ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16 (Amy Gutmann ed., 2018).

[34] *See* ESKRIDGE ET AL., *supra* note 2, at 630–31.

[35] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (citation omitted).

[36] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) (citing 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5201 (3d ed. 1943)).

[37] 138 S. Ct. 2067, 2080 (2018) (emphasis added).

statute it would have used the language it employed in the first.[38] As these examples suggest, there are many different forms that whole code comparisons can take. One aim of this Article is to highlight those different forms, which too often get lumped together under one label.

On the other hand, the Court also regularly notes that Congress legislates against a backdrop of existing laws and precedents and presumes that Congress is aware of and incorporates these background legal rules when it drafts a new statute.[39] Justice Scalia openly acknowledged that this latter justification ignores the realities of the legislative process, calling it a "fiction."[40] Instead, he offered a different rationale—one that ascribes to judges an obligation to make sense of the law as a whole. In a now famous lecture, Justice Scalia explained that judges "look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[41] In later writing, he was even more candid about what he perceived to be the true justification for the whole code rule:

> Though it is often presented as effectuating the legislative "intent," the related-statute canon is not, to tell the truth, based upon a realistic assessment of what the legislature actually meant. That would assume an implausible legislative knowledge of related legislation in the past, and an impossible legislative knowledge of related legislation yet to be enacted. The canon is, however, based upon a realistic assessment of *what the legislature ought to have meant*. It rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so.[42]

Justice Scalia's judicial opinions similarly acknowledged that when judges analogize across statutes, they create or impose, rather than find, coherence:

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[38] Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 633 (2018); *see also* T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808, 820 (2015) (Roberts, C.J., dissenting) ("A comparison between Section 332(c)(7)(B)(iii) and other statutory provisions . . . also suggests that when Congress wants decisionmakers to supply explanations, it says so."); Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1977 (2015) ("Congress has used clearer and more specific language when it has wanted to toll the statutes of limitations for civil suits as well as crimes.").

[39] *See, e.g.*, Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 169 (2014) ("[W]e presume that 'Congress is aware of existing law when it passes legislation.'"); Ashcroft v. ACLU, 535 U.S. 564, 607 n.3 (2002) (Stevens, J., dissenting) ("[W]e presume that Congress legislates against the backdrop of our decisions.").

[40] SCALIA, *supra* note 33, at 16.

[41] *Id.* at 17.

[42] SCALIA & GARNER, *supra* note 2, at 252.

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.[43]

In other words, whole code comparisons are part of a judicial effort to ensure consistency across the legal landscape, rather than a tool for effectuating some master congressional plan or set of drafting rules. This judge-as-architect-of-coherence vision helps explain the central role that prior judicial interpretations play in whole code analogies. Under this approach, prior judicial interpretations of similar statutes are relevant because they are part of the body of law within which the statute at issue must be made to fit coherently, not because Congress must have had them in mind when drafting the statute at issue. Justice Scalia's candor about the true underlying justification for the whole code rule has not, however, been widely acknowledged or embraced by other jurists. Indeed, as Part II will show, the Roberts Court continues to frame its whole code comparisons in terms of congressional intent and expectations—and scholars similarly have framed their criticisms of the rule in terms of this intent-based justification.

B. Criticisms

As noted earlier, the whole code rule has not been the subject of significant scholarly attention. The little attention that the rule has enjoyed has tended, for the most part, to be critical. Most scholarly criticisms have focused on the intent-based justifications for the rule, pointing out that cross-statute analogies fail to account for legislative process realities that undermine the assumption that Congress drafted the statute at issue with other analogous statutes in mind. For example, Bill Buzbee has noted that Congress regularly changes its membership and that different committees draft statutes that deal with different substantive areas, so it is unlikely that any two (or more) statutes a court chooses to compare will have been drafted by the same legislators or their staff.[44] Judge Richard Posner similarly has

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[43] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991).

[44] Buzbee, *supra* note 19, at 204, 210; *see also* ESKRIDGE, INTERPRETING LAW, *supra* note 24, at 126 (criticizing meaningful variation cross-statute arguments as "highly unrealistic" because different legislative committees, or the same committees at different points in time, create different statutes); Abbe R. Gluck & Lisa Schultz Bressman,

observed that "Congressmen do not carry the statutes of the United States around in their heads any more than judges do."[45] And Deborah Widiss has noted that political calculations that had salience when one statute was drafted may have changed by the time a later statute is enacted.[46]

Another related criticism sometimes leveled against whole code comparisons is that different statutes may reflect different political choices or compromises, *even if* they are related in subject matter.[47] For example, a leading casebook on legislation and regulation notes that the Court interpreted an early antidiscrimination law, Title VI, to reach only intentional discrimination, but later construed identical antidiscrimination language in the Rehabilitation Act of 1973 to encompass "disparate impact" discrimination—suggesting that by 1973 national policy was more concerned with disparate impact discrimination than with the intentional discrimination that had been a focal point in 1964.[48] The casebook editors interpret the Court's reasoning to indicate that it is not necessarily helpful to analogize to or apply precedents interpreting older antidiscrimination statutes, such as Title VI, to more recently enacted antidiscrimination statutes.[49] On this evolving-policy theory, each statute should be treated as sui generis and evaluated on the basis of its individual structure and circumstances of enactment—because reasoning across statutes risks undermining Congress's goals, ignoring legal developments, and missing important political realities.[50]

The coherence-based rationale for whole code analogies has come under critical fire as well. Deborah Widiss has argued that it is unreasonable for courts to assume that statutes addressing very different areas of law should be construed similarly, noting that "the objectives of an antidiscrimination law will not necessarily be fur-

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Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 STAN. L. REV. 901, 936–37 (2013) (noting "significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multidrafter statutes pose to the realistic operation of [whole code and whole act] rules").

45 Friedrich v. City of Chicago, 888 F.2d 511, 516 (7th Cir. 1989).

46 Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 874 (2012).

47 ESKRIDGE ET AL., *supra* note 2, at 821–22.

48 *See id.*

49 *See id.*

50 *See* Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2328 (2019) (studying statutory interpretation at the National Labor Relations Board and arguing that overreliance on certain textual canons, including the whole code rule, "may result in decisions that bear little relationship to congressional intent about statutory purpose").

thered by interpreting language in the same way that similar language has been interpreted in a criminal statute or a securities law."[51] Relatedly, Nina Mendelson has criticized the whole code rule for "downgrad[ing] the importance of context" to ordinary English speakers, who tend to assess a word's meaning "only in its immediate context, rather than scour an entire statute or the U.S. Code to find other uses of the word."[52] Mendelson also suggests that whole code comparisons devalue notice, since readers do not necessarily know that they cannot reach a complete conclusion about a statute's meaning without comparing it to numerous other statutes—nor do they know how to identify which other statutes they should consult.[53]

In addition, Bill Buzbee has pointed out that the universe of statutes to which courts can analogize is so large, and judicial decisions interpreting those statutes so numerous, that there often will be more than one statutory analogue for a particular term.[54] This leaves courts free to pick and choose a comparator statute that advances their ideological preferences and undermines the consistency and predictability promised by the whole code approach. And Abbe Gluck and Lisa Bressman have criticized the whole code rule as "an interpretive approach that imposes coherence on the U.S. Code where such coherence is not within the realm of realistic legislative possibility."[55] They argue that judicial reliance on whole code comparisons "shapes the U.S. Code in ways that Congress never would or could" and is at bottom an activist, judge-empowering interpretive move.[56]

The data reported *infra* Part II bear out these criticisms, demonstrating that the Court often draws comparisons between statutes that deal with unrelated subjects, that the Justices regularly disagree about which of two (or more) statutes is the proper analogue for the statute at issue, and that there is substantial room for judicial discretion in drawing cross-statute comparisons.[57] The problem is exacerbated by the lack of any established criteria for determining what makes one statute sufficiently similar to another to serve as a good analogue.

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[51] Widiss, *supra* note 46, at 874–75.

[52] Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 82 (2018).

[53] *See id.*

[54] *See* Buzbee, *supra* note 19, at 239.

[55] Gluck & Bressman, *supra* note 44, at 963.

[56] *Id.* at 963; *see also* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 202–03 (2017) (recommending elimination of the whole code rule based on the structural separation of congressional committees and the lack of communication between committees).

[57] *See infra* Section II.D.

Finally, some scholars have noted that whole code comparisons are "most useful" when the statutes subject to comparison are *in pari materia* (deal with similar subject matter) or when Congress has deliberately modeled one statute after another[58] and have expressed doubts about whole code arguments that attribute significance to variations in wording between similar provisions of different statutes.[59] One scholar has suggested narrowing the universe of statutes that are considered *in pari materia* by requiring either that such statutes be drafted by the same congressional committee or that they have the same intended audience.[60] The empirical evidence reported in the next Part shows, paradoxically, that the Supreme Court regularly draws comparisons between statutes that are neither *in pari materia* nor modeled after one another, attributes significance to variations in the wording of similar provisions in different statutes, and even rejects whole code comparisons between statutes that are modeled after each other. The empirical evidence also shows that there are two forms of whole code comparisons—superfluity and harmonization—that scholars have largely ignored thus far.

II
Inside the Supreme Court's Whole Code Comparisons

This Part reports data based on quantitative and qualitative analysis of 532 statutory interpretation cases decided by the Roberts Court during its 2005 (post-January 31, 2006)[61] through 2017 Terms. Section A describes the methodology by which the cases reviewed for the study were gathered and coded. Section B presents quantitative data

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[58] *See* Eskridge, Interpreting Law, *supra* note 24, at 88 ("The whole code rule is most useful when the interpreter is able to compare statutes that are closely related . . . and is highly useful when there is evidence that the legislature actually considered the statutes *in pari materia* or borrowed language from an earlier statute . . . ."); Buzbee, *supra* note 19, at 234, 246 (criticizing cross-statute comparisons on the ground that legislators do not possess the layers of knowledge necessary to justify them, but excepting situations where there is indication that Congress had some knowledge of two or more laws' interconnection). The *in pari materia* doctrine is discussed in greater detail *infra* Section II.B.2.

[59] *See* Eskridge, Interpreting Law, *supra* note 24, at 126 (expressing "doubt that meaningful variation across statutes (even related statutes) ought to be a canon to start with"); Buzbee, *supra* note 19, at 210 (providing a hypothetical to illustrate that linguistic differences between two statutes should not necessarily be interpreted to require a different statutory meaning). This form of whole code comparison is referred to as the "meaningful variation rule" and is discussed *infra* Section II.C.3.

[60] *See* Desai, *supra* note 22, at 215–16, 256.

[61] This is the date that Justice Alito joined the Court. *See* David Stout, *Samuel Alito Confirmed for U.S. Supreme Court*, N.Y. Times (Jan. 31, 2006), https://www.nytimes.com/2006/01/31/world/americas/samuel-alito-confirmed-for-us-supreme-court.html.

regarding the manner and frequency with which the Roberts Court as a whole, and its individual members, employed the whole code rule in the Court's statutory cases. Section C provides a taxonomy of the different forms of whole code comparisons the Court employed, discussing several specific cases and noting patterns in the Court's analysis.

A. Methodology

The findings and conclusions presented in this Article are based on quantitative and qualitative analysis of all decisions in the Roberts Court's 2005 (post-January 31, 2006) through 2017 Terms that confronted a question of statutory interpretation. The data reported below are part of a broader project that was designed to code all of the interpretive tools used by the Roberts Court in all of its statutory cases each Term.[62] The cases included in the study were identified as follows: Every case decided by the U.S. Supreme Court between January 31, 2006 and July 1, 2018 was examined to determine whether it dealt with a statutory issue. Any case in which the Court engaged in some discussion of statutory meaning was included in the study.[63] Cases that involved the Federal Rules of Civil Procedure (FRCP), Federal Rules of Evidence, and the like were not included,[64] but a

[62] I have described the methodology used in this study in several prior articles. *See, e.g.*, 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) [hereinafter Krishnakumar, *First Era*]; Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 841–43 (2017) [hereinafter Krishnakumar, *Reconsidering*]; Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 921–23 (2016) [hereinafter Krishnakumar, *Dueling Canons*].

[63] Specifically, I or a research assistant examined every case listed on the Supreme Court's website for every Term. Cases were counted as statutory if they involved analysis of a statute's meaning. Cases were not counted as statutory merely because they mentioned a statute; thus, cases that evaluated the constitutionality of a statute without interpreting the statute's terms were not counted, nor were cases that involved the interpretation of an international treaty or other non-statutory text, such as a contract.

[64] I made this judgment call because the FRCP are created in a manner that differs significantly from federal statutes. Whereas federal statutes are enacted into law by both houses of Congress and the President pursuant to Article I, Section 7 of the Constitution, the FRCP are drafted by lawyers, judges, and academics, as part of the activities of specialized committees, and do not require the President's approval. *See* Jeffrey L. Rensberger, *At the Intersection of* Erie *and Administrative Law: Front-Loading the* Erie *Question into the Adoption of a Federal Rule*, 52 AKRON L. REV. 323, 334–36 (2018). Accordingly, several interpretive tools available when construing statutes are either not available when interpreting the FRCP or provide a very different kind of context when used to construe the FRCP. For example, the legislative history of a statute may involve committee reports, floor statements by members of Congress, hearing testimony, and the like; by contrast, the drafting history of the FRCP consists of comments, recommendations, and suggestions offered by a wide array of interested parties including the general public, the bench, and the bar. *See, e.g.*, *Federal Court Rules Research Guide*, GEO. L. LIBR.,

handful of constitutional cases in which the Court construed the meaning of a federal statute were included. This selection methodology yielded 532 statutory cases over twelve-and-a-half Terms, with 532 majority or plurality opinions,[65] 291 dissenting opinions, 220 concurring opinions, 27 part-concurring/part-dissenting opinions, and 2 part-majority/part-concurring opinions, for a total of 1,072 opinions.[66] Of these, 266 cases were decided unanimously and 266 were decided by a divided vote.[67]

In coding 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

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https://guides.ll.georgetown.edu/c.php?g=320799&p=2146449 (last updated Nov. 5, 2020). Interpretive resources that depend on congressional intent or consistency across multiple statutes enacted as part of the U.S. Code (the whole code rule) similarly fail to translate directly to the FRCP context. Notwithstanding the foregoing, if an opinion in the dataset compared or analogized the statute at issue to an international treaty, FRCP, Federal Rule of Evidence, model code, or state rule of professional conduct, that reference to another statute or source of law was coded as a "whole code" reference on the theory that it represented an attempt to construe the statute at issue to contain a meaning that "fits most logically and comfortably into the body of both previously and subsequently enacted law." W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) (citing 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5201 (3d ed. 1943)). Notably, there were only 12 opinions in the dataset that analogized to one of the above non-statute sources of law, and 4 of these also analogized to other federal statutes.

[65] For purposes of this Article, plurality opinions, majority opinions, and opinions consisting in part of a plurality and in part of a majority are grouped together in all statistics presented. For this reason, any whole code comparison in a plurality portion of an otherwise majority opinion is included in the majority/plurality group. There were a total of 3 plurality opinions and 8 part-plurality/part-majority opinions in the dataset that made some form of whole code comparison. *See infra* Appendix I (labeling as "Plurality" or "Part Plurality" opinions in which the portion of the opinion containing the whole code comparison was joined by only a plurality; part-plurality/part-majority opinions in which a majority joined the portion of the opinion containing the whole code comparison are labeled as "Majority" opinions).

[66] By way of comparison, the Spaeth Supreme Court database codes as statutory 593 cases that were decided between January 31, 2006 and July 1, 2018. *Modern Database: 2020 Release 01*, WASH. U. SCH. L.: SUP. CT. DATABASE, http://scdb.wustl.edu/data.php (last visited Nov. 22, 2020). Of these, 39 cases did not meet the criteria for inclusion in my study because they: (a) dismissed the writ as improvidently granted; (b) involved a purely constitutional question; (c) construed the FRCP, rather than a statute; (d) concerned interstate disputes based on the Court's original jurisdiction that did not center on statutory interpretation; or (e) involved the criteria for granting injunctive relief. Setting aside these cases, there were 22 cases which the Spaeth database identified as statutory that were not included in my dataset; 11 of these were cases involving the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in which the Court evaluated whether a state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ." 28 U.S.C. § 2254(d)(1). Counting these AEDPA cases, my coding methodology captured roughly 1.76 fewer statutory cases per Term, on average, than the Spaeth Supreme Court database.

[67] This figure counts as unanimous all decisions in which there was no dissenting opinion, even if concurring opinions offering different rationales were issued.

examined for references to the following interpretive tools: (1) text/plain meaning; (2) dictionary definitions; (3) grammar rules; (4) the whole act rule; (5) other statutes (the whole code rule); (6) common law precedent; (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.[68] 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.[69]

In recording the Court's use of particular interpretive tools, I counted only references that reflected substantive judicial reliance on the tool in reaching an interpretation. Where an opinion mentioned an interpretive canon or tool, but rejected it as inapplicable, I did not count that as a reference to the canon or tool.[70] Secondary or corroborative references to an interpretive tool, on the other hand, were counted; thus, where the Court reached an interpretation based primarily on one interpretive tool but went on to note that *X*, *Y*, and *Z*

[68] In order to reduce the risk of inconsistency, I and at least one research assistant separately read each opinion and separately recorded the use of each interpretive resource. In the event of disagreement, I reviewed the case and made the final coding determination. For a detailed explanation of my coding methodology, including instructions given to my research assistants, see Krishnakumar, *First Era*, *supra* note 62, at 231–35; *id.* at 291–96 (Codebook). A current version of the Codebook can also be found *infra* Appendix II. At the outset of the study, I did not keep track of intercoder reliability but began doing so with the 32 cases (74 opinions) decided during the 2017 Term. The intercoder agreement rate for those opinions was 90.3%. This is within typical acceptable intercoder reliability rates. *See* KIMBERLY A. NEUENDORF, THE CONTENT ANALYSIS GUIDEBOOK 143 (2002).

[69] *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 25, 27, 29, 58–59, 85–87, 102, 110 (2009) (describing statutory interpretations employing plain meaning, dictionary definitions, statutory comparisons, legislative history, legislative intent, substantive cannons, grammar rules, semantic canons, practical consequences, and agency deference); 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, 2–6 (1998) (focusing on the use of legislative history in statutory interpretation); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1089, app. A (1992) (identifying six broad categories of authority in statutory interpretation and further identifying numerous subcategories).

[70] An example may help illustrate. In *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008), the Court considered whether the Equal Access to Justice Act (EAJA) entitles prevailing parties to recover paralegal fees from the government at market rates, or merely at the cost to the law firm of the paralegal's time. The Court concluded that the statute authorized recovery at market rates, relying primarily on the statute's text and a precedent interpreting an analogous statute. *See id.* at 577–81. The Court also discussed and rejected two arguments raised by the government—one based on legislative history and another based on a substantive canon. *Id.* at 583–84, 589. The opinion was coded for reliance on text, precedent, and other statutes; it was not coded for reliance on legislative history or substantive canons.

interpretive tools further supported that interpretation, the references to *X*, *Y*, and *Z* were coded along with the primarily relied-upon tool.[71] In addition, each Justice's vote in each case was recorded, as were the authors of each opinion. This methodology was the same as that followed in my previous empirical studies.[72]

Finally, every opinion that contained a whole code comparison was coded as containing "minimal reliance," "some reliance," or "heavy or primary reliance" on the whole code rule. While this coding necessarily involved some judgment calls, I believe it adds valuable texture to our understanding of *how* the Court uses whole code analogies when it chooses to invoke them. In any event, my data and coding decisions are available for others to review and agree or disagree with.[73] The coding parameters for reliance were as follows: an opinion was coded as employing "minimal reliance" on other statutes if it made passing reference to another statute, or mentioned another statute as an add-on argument supporting a reading already arrived at through other interpretive tools. An opinion was coded as involving "some reliance" if it made more than minimal reference to another statute but did not rely on a whole code comparison as the main justification for the construction it adopted. Finally, an opinion was coded as involving "heavy or primary reliance" if it relied primarily or heavily on a whole code comparison to justify the result it reached.[74]

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[71] For example, in *Richlin*, the Court noted at the end of its opinion that it "also question[ed] the practical feasibility" of the rejected interpretation, because calculating the cost to the firm of paralegal services would involve complex accounting considerations. *Id.* at 588. Although this reference to practical consequences was made in passing, the opinion was coded for reliance on practical consequences.

[72] *See* Krishnakumar, *First Era*, *supra* note 62, at 231–33; Krishnakumar, *Reconsidering*, *supra* note 62, at 841–43; Krishnakumar, *Dueling Canons*, *supra* note 62, at 921–23.

[73] *See infra* Appendix I.

[74] Some examples may help illustrate: In *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 407 (2009), the Court concluded that the Jones Act did not abrogate an injured seaman's ability to recover punitive damages against his employer for willful failure to pay "maintenance and cure." For a definition of "maintenance and cure," see *infra* note 126. The majority opinion focused on the common law and also referenced the plain meaning rule, dictionary definitions, and Supreme Court precedent. At the tail end of its analysis, it observed that, "[i]n addition, the only statutory restrictions expressly addressing general maritime claims for maintenance and cure" expressly limit the availability of such claims for two discrete classes of people, not including seamen like Townsend. 557 U.S. at 416. These other statutes, the majority reasoned, demonstrated that "'Congress knows how to' restrict the traditional remedy of maintenance and cure 'when it wants to.'" *Id.* (quoting Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987)). The opinion was coded as placing minimal reliance on other statutes. By contrast, Justice Alito's dissenting opinion in *Atlantic Sounding Co.* relied heavily on a modeled statute argument, emphasizing that the Jones Act incorporated parts of the Federal Employers Liability Act (FELA) and that caselaw predating the Jones Act made clear that FELA did not allow punitive damages. The dissent concluded that "[w]hen Congress incorporated FELA

B. Statistics

Before reporting the data, it is important to note some limitations of this study. First, the study covers only twelve-and-a-half Supreme Court Terms and 532 statutory interpretation cases, decided by some combination of the same twelve Justices. While this dataset is large enough to teach us some things about the Court's use of the whole code rule, 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 whole code comparisons, 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 whole code comparison because the opinion's author was persuaded by the comparison, or merely because the author thought the statutory analogy provided a convincing justification for the chosen interpretation. The study's empirical and doctrinal claims are confined to describing how the Justices publicly engage whole code comparisons as justifications for their statutory constructions and to theorizing the discernable patterns in their public engagement of such comparisons.

1. Frequency, Weight, and Subject Matter

Table 1 reports the frequency with which the members of the Roberts Court as a whole referenced various interpretive canons and tools. There were 1,072 opinions in the dataset; the columns break down the rates at which each interpretive tool was referenced across all opinions, as well as the rates at which they were referenced in majority or plurality, dissenting, concurring, and part-concurring/part-

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unaltered into the Jones Act, Congress must have intended to incorporate FELA's limitation on damages as well." *Id.* at 427–28 (Alito, J., dissenting). Justice Alito's dissent was coded for "primary" reliance on the whole code rule. As an example of cases coded as placing "some reliance" on whole code comparisons, consider *Wyeth v. Levine*, 555 U.S. 555 (2009), which held that the Food Drug and Cosmetics Act (FDCA) does not preempt state-law failure-to-warn claims. The *Wyeth* majority opinion relied most prominently on a substantive canon, the statute's purpose, as well as precedent and legislative history. Alongside these other interpretive tools, it noted that another similar statute, the Medical Devices Act, contains an express preemption provision—and argued that if Congress similarly had wanted to preempt state law claims under the FDCA "it surely would have enacted" a comparable "express pre-emption provision at some point during the FDCA's 70-year history." *Id.* at 574. The opinion was coded as placing "some reliance" on other statutes.

dissenting opinions.[75] As the Table shows, the Justices invoked whole code comparisons in one-fifth (20.1%) of all opinions in the dataset, and in 27.1% of the 532 majority or plurality opinions in the dataset.[76] In addition, 32.5% of the 532 cases in the dataset contained at least one opinion that made a whole code comparison.[77] This puts the whole code rule in roughly the second tier of most frequently invoked interpretive tools—well behind Supreme Court precedent, text/plain meaning, practical consequences, and the whole act rule,[78] but at roughly similar rates of reference as dictionary definitions, legislative history, and statutory purpose.[79]

[75] *See infra* Table 1.

[76] *See infra* Table 1.

[77] Specifically, 173 of the 532 cases in the dataset contained at least one opinion that made a whole code comparison of some form.

[78] *See infra* Table 1. Each first-tier tool was referenced in over one-third of the opinions in the dataset.

[79] Dictionary definitions, legislative history, and statutory purpose were referenced in roughly 20% to 25% of the opinions in the dataset. *See infra* Table 1.

TABLE 1. OVERALL ROBERTS COURT RATES OF RELIANCE ON INTERPRETIVE CANONS AND TOOLS
2005–2017 TERMS

Canons / Interpretive Tools	All Opinions (n=1,072)	Majority / Plurality Opinions (n=532)	Dissenting Opinions (n=291)	Concurring Opinions (n=220)	Partial Opinions (n=29)
Text / Plain Meaning	40.8% (n=437)	49.8% (n=265)	36.8% (n=107)	26.4% (n=58)	24.1% (n=7)
Dictionary Definitions	21.6% (n=232)	29.5% (n=157)	18.3% (n=53)	8.2% (n=18)	13.8% (n=4)
Language & Grammar Canons	8.7% (n=93)	12.4% (n=66)	6.9% (n=20)	2.3% (n=5)	6.9% (n=2)
Whole Act Rule	27.7% (n=297)	37.4% (n=199)	26.1% (n=76)	8.2% (n=18)	13.8% (n=4)
Other Statutes (Whole Code Rule)	20.1% (n=216)	27.1% (n=144)	20.3% (n=59)	5.0% (n=11)	6.9% (n=2)
Common Law	11.8% (n=127)	15.0% (n=80)	8.9% (n=26)	7.3% (n=16)	17.2% (n=5)
Substantive Canons	14.9% (n=160)	16.7% (n=89)	18.6% (n=54)	7.3% (n=16)	3.4% (n=1)
Supreme Court Precedent	57.2% (n=613)	69.0% (n=367)	52.2% (n=152)	37.3% (n=82)	41.4% (n=12)
Purpose	24.3% (n=261)	28.6% (n=152)	27.8% (n=81)	10.0% (n=22)	20.7% (n=6)
Practical Consequences	34.9% (n=374)	35.5% (n=189)	46.4% (n=135)	20.5% (n=45)	17.2% (n=5)
Intent	11.5% (n=123)	10.9% (n=58)	18.6% (n=54)	4.5% (n=10)	3.4% (n=1)
Legislative History	23.8% (n=255)	26.9% (n=143)	30.2% (n=88)	8.2% (n=18)	20.7% (n=6)

Table 2 similarly reports the rate at which each individual Justice who has served on the Roberts Court referenced each interpretive tool in the opinions they authored. The Table shows that all of the Justices employed whole code comparisons regularly, and at rates that fell within roughly ten percentage points of each other.[80]

[80] *See infra* Table 2. This figure excludes Justice Gorsuch, whose 45.5% rate of reference is based on a small sample size of just 11 authored opinions.

TABLE 2. INDIVIDUAL JUSTICES' RATES OF RELIANCE ON DIFFERENT FORMS OF INTERPRETIVE TOOLS BY OPINION AUTHOR[α]
2005–2017 Terms
(n=1,040)[β]

Canons / Interpretive Tools	Alito (n=118)	Gorsuch (n=11)	Kennedy (n=77)	Roberts (n=73)	Scalia (n=127)	Thomas (n=155)	Breyer (n=129)	Ginsburg (n=110)	Kagan (n=51)	Sotomayor (n=93)	Souter (n=35)	Stevens (n=61)
Text / Plain Meaning*	42.4%	54.5%	41.6%	42.5%	52.8%	49.0%	24.8%	28.2%	49.0%	45.2%	45.7%	42.6%
Dictionary Definitions*	27.1%	45.5%	23.4%	17.8%	20.5%	23.9%	16.3%	12.7%	39.2%	32.3%	17.1%	16.4%
Language & Grammar Canons	8.5%	27.3%	11.7%	9.6%	8.7%	13.5%	4.7%	5.5%	3.9%	12.9%	5.7%	4.9%
Whole Act Rule	28.8%	54.5%	27.3%	35.6%	26.0%	27.7%	21.7%	21.8%	29.4%	45.2%	31.4%	21.3%
Other Statues (Whole Code Rule)	28.0%	45.5%	22.1%	28.8%	15.7%	15.5%	17.1%	22.7%	15.7%	24.7%	22.9%	14.8%
Common Law	16.9%	9.1%	6.5%	16.4%	11.8%	10.3%	13.2%	6.4%	9.8%	15.1%	14.3%	16.4%
Substantive Canons	12.7%	9.1%	18.2%	20.5%	13.4%	14.2%	9.3%	17.3%	21.6%	12.9%	14.3%	24.6%
Supreme Court Precedent	54.2%	72.7%	66.2%	64.4%	48.0%	54.8%	56.6%	53.6%	54.9%	61.3%	54.3%	54.1%
Purpose*	21.2%	18.2%	44.2%	12.3%	10.2%	10.3%	38.0%	34.5%	41.2%	29.0%	17.1%	29.5%
Practical Consequences*	40.7%	45.5%	51.9%	34.2%	28.3%	16.8%	46.5%	39.1%	33.3%	45.2%	31.4%	29.5%
Intent*	13.6%	0.0%	6.5%	6.8%	3.9%	1.9%	16.3%	14.5%	3.9%	18.3%	22.9%	41.0%
Legislative History*	21.2%	18.2%	27.3%	12.3%	6.3%	6.5%	41.9%	35.5%	31.4%	39.8%	28.6%	37.7%

[α] 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*).
[β] The total number of opinions reflected in this Table is 1,040, rather than 1,072 because this Table omits 32 per curiam opinions issued during the period studied.
* Indicates that a Pearson's chi-squared test revealed a statistically significant difference between rates of reliance by different Justices in the opinions they authored, with α set at 0.05. In other words, for each of these particular interpretive tools, the differences in rates of reference across Justices were less than 5.0% likely to have occurred merely by chance. These results were robust upon removal of Justices Gorsuch and Souter, who have relatively fewer opinions than other Justices, from the data.

Table 2 reveals that during the period studied, Justices Roberts, Alito, and Sotomayor were the most frequent users of whole code comparisons—employing such comparisons in 28.8%, 28.0%, and 24.7% of the opinions they authored, respectively—while Justices Stevens, Thomas, Scalia, and Kagan were the least frequent users of this interpretive tool, employing it in 14.8%, 15.5%, 15.7%, and 15.7% of the opinions each authored, respectively.[81] What is most noteworthy about these figures is that the whole code rule seems to be used regularly by all of the Justices across the board, irrespective of ideological or methodological preferences. Significantly, Justices Sotomayor, Ginsburg, and Souter—all considered purposivist jurists[82]—used whole code comparisons in nearly one-fourth of the statutory interpretation opinions they authored.[83] This is somewhat surprising because the whole code concept is one we might expect to appeal more to textualist than purposivist Justices, given its almost exclusive emphasis on comparing the text (rather than the purpose or intent) of one statute to another. And notably, 59.7% of the opinions that employed a whole code comparison also made a plain meaning or textual clarity argument. By contrast, only 30.6% also referenced legislative purpose and only 16.2% also referenced legislative intent.

The data also reveal some interesting information about the weight that the Justices placed on whole code comparisons when they invoked them. Table 3 reports how often the members of the Roberts Court placed "minimal," "some," or "heavy or primary" reliance on whole code comparisons when they employed this interpretive tool.[84]

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[81] *See supra* Table 2. Again, these figures exclude Justice Gorsuch.

[82] *See* Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823, 832 (2019) (noting that Justices Ginsburg and Sotomayor "generally follow[]" a purposivist approach to statutory interpretation); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 490 (2013) (calling Justice Souter a purposivist); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1296 & n.81 (2020) (describing Justices Souter, Ginsburg, and Sotomayor as purposivists); David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 174 n.158 (2019) (characterizing Justice Sotomayor as relatively purposivist).

[83] *See supra* Table 2 (reporting the following rates of reference: Justice Sotomayor 24.7%, Justice Ginsburg 22.7%, Justice Souter 22.9%).

[84] *See infra* Table 3.

TABLE 3. RELATIVE WEIGHT PLACED ON WHOLE CODE COMPARISONS
2005–2017 TERMS

	Minimal Reliance	Some Reliance	Heavy or Primary Reliance
All Opinions Invoking Whole Code Comparisons (n=216)	12.0% (n=26)	74.5% (n=161)	13.4% (n=29)
Majority / Plurality Opinions (n=144)	16.0% (n=23)	71.5% (n=103)	12.5% (n=18)
Concurring Opinions (n=11)	9.1% (n=1)	63.6% (n=7)	27.3% (n=3)
Dissenting Opinions (n=59)	3.4% (n=2)	83.1% (n=49)	13.6% (n=8)
Partial Opinions (n=2)	0.0% (n=0)	100.0% (n=2)	0.0% (n=0)

Notably, the data show that the members of the Roberts Court only occasionally relied on whole code comparisons as a "primary" justification or factor in their statutory analysis. The vast majority of opinions that made a whole code comparison placed "some" intermediate weight on this interpretive resource—meaning that they relied on the whole code rule as one of several factors that supported or confirmed a particular statutory construction. A typical formulation was as follows: the opinion began with an analysis of the statute's ordinary meaning and then went on to note that comparing the statute's text to that of another similar statute further supported the chosen reading.[85] Although the whole code rule rarely served as the primary justification for the Court's interpretive analysis, it was often used in an authoritative manner—accompanied by rhetoric suggesting that the statutory reading adopted by the Court was inevitable, or demanded by the surrounding legal landscape.

[85] *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379, 388 (2009) (beginning with the ordinary meaning and dictionary definitions of "now" before confirming that those definitions were consistent with use of the word "now" in other statutes); United States v. Ressam, 553 U.S. 272, 274–77 (2008) (starting with the "most natural reading" of the text and supporting that reading with a whole code comparison); United States v. Rodriquez, 553 U.S. 377, 391 (2008) (beginning with textual analysis and supporting with references to other statutes). Overall, as noted earlier, 130, or 59.9%, of the 217 opinions in the dataset that made a whole code comparison also concluded that the statute at issue had a plain meaning.

Also worth noting is that the Court's whole code comparisons regularly relied on Supreme Court precedent in conjunction with their discussion of the meaning ascribed to similar words in other statutes. Indeed, a clear majority of opinions in the dataset that invoked the whole code rule—68.1%—also referenced the Court's prior interpretations of other statutes to support their cross-statute comparisons. Such opinions were coded as referencing both the whole code rule and precedent.

Lastly, Table 4 reports the subject matter of the opinions in which the members of the Roberts Court employed whole code comparisons as an interpretive resource. The data reveal that 20.8% of the opinions in the dataset that employed a whole code analogy involved the construction of a criminal statute and 8.8% involved the construction of a discrimination-related statute.[86] A smaller, but noteworthy percentage of the opinions that invoked whole code comparisons involved jurisdictional statutes (6.5%), immigration statutes (4.6%), intellectual property statutes (4.6%), or statutes whose preemption clauses were at issue (4.6%).[87] Indeed, these six subject areas together accounted for almost half (49.9%) of the opinions in the dataset that employed the whole code rule, and criminal and antidiscrimination statutes together accounted for nearly 30.0% of the Court's cross-statute comparisons.[88] These rates of whole code use across subject areas are largely consistent with the rates at which statutes involving these subject areas were represented in the dataset—suggesting that use of the whole code rule is fairly evenly distributed.[89]

[86] By way of comparison, 15.3% of the opinions in the full dataset, including opinions that did not make whole code comparisons, involved a criminal statute, while 7.6% involved a discrimination-related statute.

[87] In the full dataset, 7.4% of the opinions construed a jurisdictional statute, 4.1% construed an immigration statute, 5.4% construed an intellectual property statute, and 4.9% construed a preemption statute.

[88] These six subject areas accounted for 44.7% of the statutory interpretation opinions in the full dataset; criminal and discrimination-related statutes alone accounted for 22.9% of the opinions in the full dataset.

[89] *See supra* notes 86–88.

TABLE 4. SUBJECT MATTER OF STATUTORY OPINIONS INVOKING WHOLE CODE COMPARISONS 2005–2017 TERMS

	All Opinions (n=216)	Majority / Plurality Opinions (n=144)	Dissenting Opinions (n=59)	Concurring Opinions (n=11)	Partial Opinions (n=2)
Criminal (n=45)	20.8%	22.2%	16.9%	27.3%	0.0%
Environmental (n=2)	0.9%	1.4%	0.0%	0.0%	0.0%
Jurisdictional (n=14)	6.5%	6.9%	5.1%	9.1%	0.0%
Tax (n=8)	3.7%	4.9%	1.7%	0.0%	0.0%
FAA (n=3)	1.4%	2.1%	0.0%	0.0%	0.0%
Antidiscrimination (n=19)	8.8%	6.9%	13.6%	9.1%	0.0%
IDEA (n=3)	1.4%	0.7%	1.7%	9.1%	0.0%
Civil RICO (n=5)	2.3%	2.8%	0.0%	0.0%	50.0%
Securities (n=10)	4.6%	4.2%	3.4%	18.2%	0.0%
Preemption (n=10)	4.6%	4.2%	6.8%	0.0%	0.0%
Federal Tort Claims Act (n=5)	2.3%	2.1%	3.4%	0.0%	0.0%
Bankruptcy (n=8)	3.7%	2.8%	6.8%	0.0%	0.0%
Immigration (n=10)	4.6%	2.8%	8.5%	0.0%	50.0%
Communications Act (n=3)	1.4%	0.7%	3.4%	0.0%	0.0%
Prison Litigation Reform Act (n=1)	0.5%	0.7%	0.0%	0.0%	0.0%
Intellectual Property (n=10)	4.6%	6.9%	0.0%	0.0%	0.0%
False Claims Act (n=2)	0.9%	1.4%	0.0%	0.0%	0.0%
AEDPA (n=2)	0.9%	0.7%	1.7%	0.0%	0.0%
Miscellaneous (n=37)	17.1%	16.0%	20.3%	18.2%	0.0%
FSIA (n=1)	0.5%	0.7%	0.0%	0.0%	0.0%
Attorney's Fees (n=4)	1.9%	2.8%	0.0%	0.0%	0.0%
Procedure (n=3)	1.4%	2.1%	0.0%	0.0%	0.0%
Religion (n=4)	1.9%	1.4%	3.4%	0.0%	0.0%
Indian (n=7)	3.2%	2.8%	3.4%	9.1%	0.0%

Overall, the data described above paint a picture of the whole code rule as an interpretive tool that is widely accepted and fairly regularly invoked, across a wide array of statutes dealing with a wide variety of subjects. The members of the Roberts Court did not analogize across statutes as frequently as they referenced their own precedents, plain meaning, practical consequences, or the whole act rule—but they did draw whole code comparisons at rates comparable to the rates at which they invoked dictionary definitions, legislative history, and statutory purpose. Moreover, the frequency with which the Justices invoked whole code references in the opinions they authored did not seem to depend on a Justice's preferred interpretive methodology.

2. *Contemporaneousness & The* In Pari Materia *Rule*

Perhaps more interesting than the frequency with which the members of the Roberts Court employed whole code comparisons are the parameters of those comparisons. That is, what kind of statutes did the Justices invoke as analogues for the statutes at issue in the cases before them? Did they compare statutes in related subject areas, or was any statute that contained a similar term or phrase fair game? Did the Justices limit their analogies to statutes enacted contemporaneously with the statute at issue—or did they draw comparisons between statutes enacted in entirely different eras, by entirely different legislators? This Section examines both the contemporaneousness and the subject matter relatedness of the statutes the Court chooses to employ when it engages in whole code comparisons. These two subjects are treated together because both deal with the proximity between statutes offered for comparison in a given case—along two different axes. Specifically, contemporaneousness deals with the temporal proximity of the statutes at issue, while the *in pari materia* doctrine deals with subject-matter proximity.

Let us focus first on contemporaneousness. In theory, one would expect the Court to pay at least some attention to this factor: common definitions of words change over time, legal terminology evolves, and the membership of the legislature changes with every two-year election cycle. All of this means that the greater the gap between the dates of two statutes' enactments, the smaller the likelihood that words used in both statutes meant the same thing to those who drafted and voted for them. This is not just because legislative intent about the meaning of particular words is more likely to change over time but because the public meaning of specific words, as understood by the average member of society or the proverbial "reasonable reader," is likely to

change over time.[90] Indeed, in the context of dictionary definitions and common law meanings, the Court has repeatedly emphasized the importance of relying on contemporaneous sources—that is, dictionaries that were published and common law rules that were in effect at the time the statute was enacted.[91] And although the Court's practice has not always matched its rhetoric, opposing opinions have been quick to raise the contemporaneousness rule when it has been flouted.[92]

But the data from the Roberts Court's first twelve-and-a-half Terms demonstrate that, in practice, the Justices pay surprisingly little attention to contemporaneousness when they analogize across statutes. Only 29.6% of the opinions in the dataset that employed a whole code comparison analogized to a statute that was enacted within five years of the statute at issue (and 6.9% of these also analogized to other, non-contemporaneous statutes as well).[93] Moreover, only 5.6%

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[90] Originalist Justices have, in other contexts, championed the concept of an "original public meaning," which refers to "the meaning the words and phrases of the Constitution [or a statute] would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted." James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 21–22 (2016) (quoting Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003)).

[91] *See, e.g.*, Sekhar v. United States, 570 U.S. 729, 739 (2013) (Alito, J., concurring) ("*At the time Congress enacted the Hobbs Act*, the contemporary edition of Black's Law Dictionary included an expansive definition of the term." (emphasis added)); Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 568 (2012) (relying on dictionaries that "defined 'interpreter' *at the time of the statute's enactment*" (emphasis added)); Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 158 (2007) (invoking "[t]he prevailing common-law view *at the time FELA was enacted*" (emphasis added)); Pasquantino v. United States, 544 U.S. 349, 360 (2005) ("We examine the state of the common law as of 1952, the year Congress enacted the wire fraud statute."); *see also* Welsh v. United States, 398 U.S. 333, 351 (1970) (Harlan, J., concurring in result) ("In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress."); SCALIA & GARNER, *supra* note 2, at 419–24 (listing the "contemporaneous-usage dictionaries" that "are the most useful and authoritative for the English language generally and for law").

[92] *See, e.g.*, B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 167–68 (2015) (Thomas, J., dissenting) ("[T]he Lanham Act was enacted in 1946, 20 years before this Court said—even in dictum—that administrative preclusion was an established common-law principle."); Smith v. Wade, 461 U.S. 30, 57 (1983) (Rehnquist, J., dissenting) (insisting that "decisions of state courts in the last decade or so are all but irrelevant in determining the intent of the 42d Congress, and thus, the meaning of § 1983").

[93] I chose five years as the cut-off point for a number of reasons. First, word meanings are unlikely to change in such a short period of time. *See, e.g.*, Andreas Blank, *Why Do New Meanings Occur? A Cognitive Typology of the Motivations for Lexical Semantic Change* (describing reasons why languages change over time, and discussing examples of shifts in specific languages between multiple centuries, such as shifts in French terms for meal times between the Middle Ages, the sixteenth to nineteenth centuries, and the nineteenth and twentieth centuries), *in* HISTORICAL SEMANTICS AND COGNITION 61, 73–74

of the whole code-invoking opinions in the dataset called any attention to the fact that the comparator statute was enacted contemporaneously with the statute at issue.[94]

On the one hand, to the extent that the justification for whole code comparisons rests on legislative intent or expectations, the Court's lack of attention to the contemporaneousness of the statutes it is comparing is troubling. The common or ordinary meaning associated with specific words or phrases can change over time and legislators using a word in one era might intend to convey a meaning or

(Andreas Blank & Peter Koch eds., 1999); LAUREL J. BRINTON & ELIZABETH CLOSS TRAUGOTT, LEXICALIZATION AND LANGUAGE CHANGE 26–27 (2005) (discussing, in the context of diachronic approaches to grammaticalization, the concept of gradualness, defined as the "notion . . . that most changes occur in very small structural steps," and noting that the concept also indicates that "changes spread through the system slowly, often gaining momentum over time"). Second, five years represents only two elections and turnovers in the membership of the House and Senate—and given incumbency rates, the actual change in House and Senate membership over five years is likely to be small. *See, e.g.*, DAVID C. HUCKABEE, CONG. RSCH. SERV., 95-361 GOV, REELECTION RATES OF HOUSE INCUMBENTS: 1790-1994, at 2 (1995) (noting that since 1790, the re-election rate for incumbent House members "has rarely dropped below 70 percent" and "often has exceeded 80 percent," and that between 1968 and 1994, re-election rates exceeded 90% in most elections); Chris Cillizza, *People Hate Congress. But Most Incumbents Get Re-elected. What Gives?*, WASH. POST (May 9, 2013, 11:29 AM), https://www.washingtonpost.com/news/the-fix/wp/2013/05/09/people-hate-congress-but-most-incumbents-get-re-elected-what-gives (reporting that over the past four decades, 95% (or more) of House members typically have won re-election); Geoffrey Skelley, *There Was a Lot of Turnover in the House in the 2018 Cycle*, FIVETHIRTYEIGHT (Nov. 13, 2018, 5:58 AM), https://fivethirtyeight.com/features/retirements-resignations-and-electoral-losses-the-104-house-members-who-wont-be-back-next-year (reporting House membership turnover rates ranging from 8.8% to 26.1% in the 23 elections between 1974 and 2018).

[94] *See, e.g.*, Mohamad v. Palestinian Auth., 566 U.S. 449, 455 (2012) (comparing the TVPA to a statute enacted by "the very same Congress that enacted the TVPA"); Boyle v. United States, 556 U.S. 938, 949 (2009) (comparing criminal statutes that were "enacted together"); United States v. Ressam, 553 U.S. 272, 275–76 (2008) (noting that the model statute was enacted two years before the statute at issue). For additional examples, see Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1977 (2015); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2511 (2015); T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808, 820–21 (2015) (Roberts, C.J., dissenting); Lawson v. FMR LLC, 571 U.S. 429, 457 (2014); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 357 (2013); Merck & Co. v. Reynolds, 559 U.S. 633, 656 (2010) (Scalia, J., concurring); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 268 (2010); Corley v. United States, 556 U.S. 303, 319 (2009); Gomez-Perez v. Potter, 553 U.S. 474, 498–99 (2008) (Roberts, C.J., dissenting). Nina Mendelson has suggested that "a number of opinions decided during the Roberts Court's first ten Terms emphasized that a presumption of consistent usage was most appropriate when statutory provisions were enacted during the same congressional session. Mendelson, *supra* note 52, at 119. However, she cites only two such opinions. *See id.* at 119 (first citing *Mohamad*, 566 U.S. at 454–55; and then citing *Gomez-Perez*, 553 U.S. at 477, 487–88). In my dataset of opinions spanning a slightly longer time period (twelve-and-a-half Terms), I found only twelve opinions (listed at the outset of this footnote) that noted that the statutes being compared were enacted within a few years of each other.

policy entirely different from that intended by legislators who employ the word decades, or even a century, later. Further, as Bill Buzbee's one-Congress fiction criticism captures, legislative drafting practices may change from one Congress to the next, rendering it unfair and inaccurate to assume that specific drafting devices or turns of phrases used in a statute enacted at T_1 mean the same thing when used in another statute enacted at T_2. Even if one takes the Scalia view that judges should impose coherence on the law irrespective of legislative intent, one must reject the textualist concept of an original public meaning in order to justify giving the same word the same meaning throughout the U.S. Code *irrespective* of the date the statute was enacted.[95]

On the other hand, however, the lack of contemporaneousness between two statutes may not be the biggest problem with the Court's liberal use of cross-statute analogies. As Part III below elaborates, the larger problem may be that it is simply unrealistic to assume that even members of the *same Congress* use particular phrases consistently from statute to statute or intend that such phrases convey the same precise meaning each time they are used. Not only does the presumption that particular drafting phrases can be reduced to a single, consistent meaning across statutes—irrespective of context or statutory scope—seem dubious, but the assumption that different legislators (or their staff) serving on different committees and responding to different constituencies would use those phrases consistently if such singularity were possible seems untenable.[96] Indeed, even if the exact same legislators had served for every session of Congress from 1789 to the present, they likely would not have drafted every statute the same way, or employed one single method for achieving a particular policy result across statutes. In other words, while contemporaneousness may be a *relevant factor* in assessing the validity of particular whole code comparisons, it may not be *sufficient*, by itself, to justify such comparisons.

The data regarding statutory relatedness and the *in pari materia* doctrine are more in line with what one would expect. The phrase *in*

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[95] *See generally* Buzbee, *supra* note 19.

[96] *See, e.g.*, ESKRIDGE, INTERPRETING LAW, *supra* note 24, at 126 (arguing that "because different legislative committees (or the same committees at different points in time) create different statutes, it is highly unrealistic to impose the meaningful variation canon upon interstatutory comparisons in most cases"); Gluck & Bressman, *supra* note 44, at 936 (reporting that legislative staffers responsible for drafting statutes describe congressional committees as "islands" that rarely communicate with each other and "vigorously dispute[]" the whole code rule's presumption of consistent drafting across different statutes).

pari materia, which means "in the same matter"[97] in Latin, refers to an interpretive maxim which dictates that statutes governing related subjects should be "interpreted together, as though they were one law."[98] The *in pari materia* concept—and, indeed, common sense—suggests that cross-statute analogies are most appropriate when the statutes being compared deal with the same or similar subject matter. Accordingly, we would expect the Court's cross-statute reasoning to focus on comparisons and distinctions between statutes that regulate similar subjects.

That said, measuring subject matter similarity, or relatedness, is more difficult than one might anticipate because the Court has failed to articulate a theoretical framework, or even consistent criteria, for determining whether two or more statutes involve similar subjects.[99] The Court has provided a few, sparing examples of situations in which two statutes were not, in its view, *in pari materia*—and therefore were not worthy of cross-statute comparison;[100] but it has never established specific criteria by which to measure subject matter relatedness. For purposes of this Article, I took a generous approach to measuring subject matter relatedness, treating as "similar" any two statutes that regulated matters that fall within the same general area of law. Thus, all criminal statutes were treated as "similar" or "related" in subject matter irrespective of the specific crime they regulate and irrespective of whether they contain offense-defining provisions or sentencing enhancements; likewise, all intellectual property statutes were treated as "related" in subject matter irrespective of whether they regulate copyrights, trademarks, or patents; and all antidiscrimination statutes were treated as "similar" irrespective of whether they regulate race, age, gender, disability, or other forms of discrimination.[101] I opted to

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[97] *In Pari Materia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[98] SCALIA & GARNER, *supra* note 2, at 252; *see also* 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51:3 (7th ed. 2015).

[99] *See* Desai, *supra* note 22, at 185–86 ("[T]he [Supreme] Court has no theoretical framework, or even consistent approach, to the same-subject determination. Importantly, the Court has not even tried to articulate a theoretical underpinning for the doctrine other than that statutes on the same matter must cohere.").

[100] In *Wachovia Bank, National Ass'n v. Schmidt*, 546 U.S. 303, 315–16 (2006), for example, the Court rejected an *in pari materia* comparison between a venue and a jurisdictional statute, on the grounds that venue is a matter of litigation convenience that may be waived if not timely raised, whereas subject-matter jurisdiction concerns a court's competence to adjudicate a particular category of cases, "a matter far weightier than venue" and one that must be considered by the court on its own motion.

[101] It should be noted that my determination of whether the analogue statute(s) employed by an opinion was *in pari materia* with the statute at issue was independent of my original coding of the subject matter of the statute interpreted in each opinion. As the Codebook explains, all cases are initially coded to indicate the subject matter of the statute

take a capacious, rather than more rigid or stingy, approach to defining subject matter relatedness in order to give the Court the benefit of the doubt when evaluating the legitimacy of its cross-statute comparisons. Along these same lines, when an opinion drew a cross-statute comparison to more than one analogue statute and at least one of the analogue statutes dealt with a related subject area, I included the opinion in the count for opinions that compared related statutes (while noting in Appendix I that not all of the analogue statutes referenced in the opinion involved related subjects).

Based on the above criteria, the data reveal that the Roberts Court does, for the most part, draw comparisons between statutes that deal with similar underlying subject areas. A clear majority of the opinions (66.2%) in the dataset that made a whole code comparison referenced at least one other statute that was, broadly speaking, related in subject matter to the statute at issue. (Of these, 4.2% also drew comparisons to one or more additional statutes that involved subject matters unrelated to the subject of the statute at issue). Another 6.5% of the opinions in the dataset referenced analogous provisions—such as jurisdictional or fee-shifting provisions—in one or more statutes that dealt with different underlying subjects.

This means that, even under a capacious definition of relatedness, a sizeable percentage of the opinions in the dataset—27.3%—invoked comparisons with statutes that regulated entirely different subject areas.[102] Further, 31.5% of the opinions in the dataset compared the

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at issue. *See infra* Appendix II. Those subject matter designations often refer to specific statutes (such as the Foreign Sovereign Immunities Act (FSIA) or the Federal Employers Liability Act (FELA)), but also sometimes refer to broad statutory categories, such as criminal law, jurisdictional statutes, or antidiscrimination law. When evaluating whether an analogue statute involved a subject related to the subject of the statute at issue in the case, I looked beyond this subject matter coding and made a fresh determination regarding the underlying statutes' subject matter relatedness. Thus, for example, cases involving FELA (a statute that governs employer treatment of injured railroad workers) were initially coded distinctly from those dealing with the Jones Act (a maritime commerce statute that contains provisions governing ship owners' treatment of seamen), but for purposes of this Article, I treated comparisons between FELA and the Jones Act as involving "related" subjects—because both regulate employer liability for workers' injuries. *See* Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51–60 (making railroads liable for injury or death suffered by their employees under certain conditions); Jones Act, 46 U.S.C. §§ 30104–05 (providing seamen injured in the course of employment with a right of action against their employers). In general, I erred on the side of broad definitions of relatedness, in order to give the Court the benefit of the doubt in evaluating the validity of its cross-statute comparisons. My relatedness determinations are available for others to review and consider for themselves. *See infra* Appendix I.

[102] Examples include comparing the Fair Debt Collection Practices Act (FDCPA) to the ADEA, a food stamps statute, and the Fair Labor Standards Act (FLSA), *see* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 613–14 (2010) (Kennedy, J., dissenting), and comparing the Indian Reorganization Act with a federal criminal

statute at issue to at least one other statute that was entirely unrelated in subject matter to the statute at issue.

Overall, these figures are encouraging. It is a relief to find that in a supermajority of cases the Court is comparing like, or similar, statutes to one another. At the same time, however, the data also provide some cause for concern; the flip side of the 66.2% figure is that nearly one-third[103] of the opinions in the dataset analogized the statute at issue to one or more *wholly unrelated* statutes. This suggests that in a sizeable minority of cases, the Court may be elevating form over substance—and imposing a superficial linguistic consistency that is not justified on a substantive level. The next Section examines several specific examples of the Court's analogies to both related and unrelated statutes.

C. A Taxonomy

This Section gives some texture to the numerical data reported in Section II.B. Specifically, it examines several case examples that illustrate in detail how the Roberts Court employed whole code comparisons in its statutory cases. The Court's whole code comparisons tended to take five basic forms: (1) "modeled, borrowed, or incorporated statute" analogies to an earlier statute that served as a model for, or was incorporated by reference into, the statute at issue; (2) "consistent usage" comparisons between statutes that contain the

statute and a statute governing citizenship status, *see* Carcieri v. Salazar, 555 U.S. 379, 388–89 (2009).

[103] It is debatable whether opinions that compare the provisions of statutes regulating entirely different subjects should be treated as related when the compared provisions deal with fee shifting, jurisdiction, filing deadlines, arbitration clauses, statutes of limitations, reimbursement for translation services, or similar issues. Among other reasons, a statute that regulates a technical field involving scientific judgments—such as the environment or energy—might explicitly mention expert witness fees because Congress anticipates that expert testimony will be needed in lawsuits brought under such statutes, whereas a statute regulating a non-technical field, such as antidiscrimination, may not explicitly mention expert fees because Congress did not anticipate the need for expert testimony in that context. Whole code comparisons in such cases might lead to differential treatment of the two statutes—even though Congress may have intended for fees to be authorized in both contexts and the variation between the two statutes may be due to Congress's understanding that these contexts are different (e.g., expert fees may be de rigueur in cases involving complex scientific statutes, but less common in cases involving civil rights statutes). Because the point is debatable, and in order to give the Court the benefit of the doubt regarding subject-matter relatedness, I have omitted the 6.5% of opinions that compare fee-shifting, jurisdictional, statute-of-limitations, and other similarly technical provisions in otherwise unrelated statutes from the 27.3% and 31.5% figures reported for "wholly unrelated" statutory comparisons. The 31.5% figure does, however, include opinions in which the Court analogized to at least one subject-matter-related statute but also drew comparisons to one or more statutes that were wholly unrelated in subject matter to the statute at issue.

same or similar terminology; (3) "meaningful variation" arguments based on textual differences between two similar statutes; (4) "superfluity" comparisons that aim to prevent repetitiveness across statutes; and (5) "harmonization" comparisons that attempt to reconcile the provisions of two or more different statutes.[104] Table 5 reports the frequency with which the Court invoked each of these forms of whole code comparison.

[104] These five forms of whole code comparisons represent categories that naturally fit the data and that I identified by examining the cases that had been coded for use of the whole code rule. The categories identified either track different forms of logical inferences commonly associated with the whole act rule and used by judges to compare different parts of a single statute—e.g., the presumption of consistent usage, the meaningful variation presumption, the rule against superfluity—or are inspired by longstanding canons of construction, such as the borrowed statutes canon or the canon directing courts to interpret apparently conflicting statutes harmoniously. *See* ESKRIDGE ET AL., *supra* note 2, at 621–24 (describing the rule against superfluity, consistent usage, and meaningful variation corollaries to the whole act rule); *id.* at 816 (describing the rule that language in modeled or borrowed statutes is to be construed consistently); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2015) ("whole statute" interpretation); *id.* § 46:6 (presumption against superfluity); *id.* § 51:2 (presumption that apparently conflicting statutes on the same subject should be construed harmoniously); *id.* § 51:7 (statutes incorporated by reference); *id.* § 52:2 (statutes copied or borrowed from other states).

TABLE 5. ROBERTS COURT RATES OF RELIANCE ON DIFFERENT FORMS OF WHOLE CODE ARGUMENTS IN OPINIONS INVOKING WHOLE CODE COMPARISONS 2005–2017 TERMS

Overall Whole Code References	All Opinions (n=216)	Majority / Plurality Opinions (n=144)	Dissenting Opinions (n=59)	Concurring Opinions (n=11)	Partial Opinions (n=2)
Modeled, Borrowed, or Incorporated Statutes[γ] Comparisons	13.4% (n=29)	10.4% (n=15)	20.3% (n=12)	9.1% (n=1)	50.0% (n=1)
Consistent Usage[δ] Comparisons	50.0% (n=108)	48.6% (n=70)	50.8% (n=30)	54.5% (n=6)	50.0% (n=1)
Meaningful Variation[ε] Comparisons	28.2% (n=61)	31.3% (n=45)	18.6% (n=11)	45.5% (n=5)	0.0% (n=0)
Superfluity[ζ] Comparisons	3.2% (n=7)	2.1% (n=3)	6.8% (n=4)	0.0% (n=0)	0.0% (n=0)
Harmonization[η] Comparisons	8.8% (n=19)	11.1% (n=16)	5.1% (n=3)	0.0% (n=0)	0.0% (n=0)
Inconclusive	2.3% (n=5)	3.5% (n=5)	0.0% (n=0)	0.0% (n=0)	0.0% (n=0)

[γ] Includes 7 opinions that made Modeled/Borrowed/Incorporated as well as Consistent Usage or Meaningful Variation comparisons.
[δ] Includes 7 opinions that made Consistent Usage as well as Modeled/Borrowed/Incorporated, Meaningful Variation, or Superfluity comparisons.
[ε] Includes 6 opinions that made Meaningful Variation as well as Consistent Usage or Modeled/Borrowed/Incorporated comparisons.
[ζ] Includes 3 opinions that made both Superfluity and Consistent Usage or both Superfluity and Harmonization arguments.
[η] Includes 1 opinion that made both a Harmonization and a Superfluity argument.

The next several subsections explore in detail the five forms of whole code comparisons identified above, and the Court's use of its own precedents to buttress them.

1. Modeled, Borrowed, and Incorporated Statutes

This Section describes three related forms of cross-statute comparisons that the Roberts Court employed when interpreting statutes: (1) comparisons between one statute and another that served as its *model*; (2) comparisons between one statute and a statute from another jurisdiction from which the first statute *borrowed* language; and (3) comparisons between one statute and another statute that was *incorporated by reference* into the first statute.[105] Unlike the other

[105] *See* ESKRIDGE ET AL., *supra* note 2, at 816, 824 (explaining the modeled and borrowed statutes concepts); SINGER & SINGER, *supra* note 98, § 51:7 (describing

forms of whole code comparisons discussed in this Section, comparisons to "modeled," "borrowed," or "incorporated" statutes are not merely an extension of the whole act rule. This is because they involve comparisons between statutes that Congress deliberately consulted—and copied from—when it drafted the statute before the Court. As a result, this form of comparison is based both on the identicalness of the language or provisions at issue and on the fact that that identicalness is the product of deliberate legislative design.[106] The typical modeled statute comparison looks something like this: In the course of interpreting Statute *A*, the Court references prior judicial interpretations of Statute *B*—where Statute *B* is a statute regulating a similar subject as Statute *A* and Congress expressly has indicated, in Statute *A*'s text or legislative history, that it modeled Statute *A*'s language on Statute *B*. In such cases, the Court regularly makes comments such as, "The 'interpretation of [Statute *B*] . . . applies with equal force in the context of [Statute *A*], for the substantive provisions of [Statute *A*] were derived *in haec verba* from [Statute *B*].'"[107]

Consider a few examples:

Modeled Statutes. In *Fitzgerald v. Barnstable School Committee*, the Court examined a discrimination claim brought by the parents of a kindergarten student who claimed that the local school system had failed to adequately respond to their allegations that their daughter had been sexually harassed at school.[108] The Fitzgeralds alleged viola-

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incorporation by reference); Frank E. Horack, Jr., *The Common Law of Legislation*, 23 Iowa L. Rev. 41 (1937) (stating that legislatures sometimes copy successful statutes from another jurisdiction, a process Horack dubs "stare de statute"). Whereas "modeled" statutes involve copying from a statute enacted within the same jurisdiction by the same legislative body, borrowed statutes copy another jurisdiction's work. Incorporation by reference occurs when one statute expressly references a definition or provision employed in another statute.

106 In one sense, the modeled statute form of comparison might be considered different from the other forms of whole code comparison contained in the taxonomy, in that it is as much about *which* statutes should be compared to each other as it is about *what sort* of comparison should be drawn (an analogy versus a distinction, harmonization, or attempt to avoid redundancy). In another sense, however, the modeled statute form of comparison is more about the sort of comparison that should be drawn, in that it directs courts to apply a sort of transferrable stare decisis to their own prior interpretations of statutory provisions whose language has been copied into later-enacted statutes. That is, unlike the consistent usage form of comparison, discussed *infra* Section II.C.2, the modeled statute form virtually *requires* that the statute at issue be interpreted to have the same meaning as the statute that served as its template; it does not merely *recommend* that similar words or phrases be given a consistent meaning across different statutes.

107 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 280 (2009) (Souter, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)). The Latin phrase *in haec verba* means "[i]n these same words." *In Haec Verba*, Black's Law Dictionary (11th ed. 2019).

108 *See* 555 U.S. 246, 250–51 (2009).

tions of Title IX and 42 U.S.C. § 1983, among other claims. The lower courts found insufficient evidence to support the Title IX claim and dismissed the § 1983 claim on the ground that Title IX's implied private remedy was "sufficiently comprehensive" to preclude the use of § 1983 to advance gender discrimination claims based on rights guaranteed by Title IX itself.[109] The statutory question thus was whether Title IX bars the use of § 1983 to redress unconstitutional gender discrimination in schools.

The Court unanimously held that Title IX does not bar coterminous § 1983 claims.[110] In so ruling, the Court relied on several interpretive tools, including a modeled statute comparison. Specifically, the Court noted that, "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was."[111] It then pointed out that at the time Title IX was enacted, "Title VI was routinely interpreted to allow for parallel and concurrent § 1983 claims."[112] Presuming that "Congress was aware of this [precedent] when it passed Title IX," the Court concluded that, "it follows that Congress intended Title IX to be interpreted similarly to allow for parallel and concurrent § 1983 claims"—or at least did not affirmatively intend for Title IX to preclude such claims.[113]

Borrowed. In *Sekhar v. United States*,[114] the Court considered the meaning of a Hobbs Act provision that punishes "extortion."[115] The case involved the managing partner of an investment fund, who sent emails to the general counsel for the New York State Comptroller demanding that the Comptroller invest New York's pension funds with the managing partner's firm and threatening to expose the general counsel's extramarital affair if he did not follow through with the investment.[116] The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official

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109 *See id.*

110 *See id.* at 258.

111 *Id.*

112 *Id.*

113 *Id.* at 258–59. For other similar examples of cross-statute analogies to modeled statutes, see Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1129–30 (2015); Loughrin v. United States, 573 U.S. 351, 359 (2014); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 583–84 (2010); Corley v. United States, 556 U.S. 303, 319 (2009); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 183–84 (2009) (Stevens, J., dissenting); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274–76 (2009) (Stevens, J., dissenting); *id.* at 278–81 (Souter, J., dissenting); United States v. Ressam, 553 U.S. 272, 275 (2008).

114 570 U.S. 729 (2013).

115 18 U.S.C. § 1951(a).

116 *See Sekhar*, 570 U.S. at 731.

right."[117] The statutory question was whether the managing partner had obtained, or attempted to obtain, *property* from the general counsel within the meaning of the statute. The Court unanimously held that he had not and that the conduct engaged in therefore did not amount to "extortion."[118]

In so ruling, the Court invoked the common-law meaning of the word "extortion" and the text of the statute.[119] It also remarked that the origins of the Hobbs Act reinforced its reading, noting that "[t]he Act was modeled after § 850 of the New York Penal Law" and that "Congress borrowed, nearly verbatim, the New York statute's definition of extortion."[120] However, the New York statute contained two separate and distinct offenses: the felony crime of extortion, and the misdemeanor crime of coercion.[121] While the "extortion" crime required "the criminal acquisition of . . . property,"[122] the "coercion" offense simply required the use of threats "to compel another person to do or to abstain from doing" a particular act.[123] The Court pointed out that Congress did not copy the New York statute's coercion provision when it enacted the Hobbs Act and concluded that "[t]he omission must have been deliberate."[124] In other words, Congress's choice to borrow the language from only one of two state offenses in enacting the Hobbs Act demonstrated that it meant for the federal statute to criminalize only the conduct associated with that offense.[125]

Incorporated. In *Atlantic Sounding Co. v. Townsend*, the Court considered whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure.[126] A majority of the Court concluded that the seaman could recover punitive damages, relying heavily on the historical availability of punitive

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117 18 U.S.C. § 1951(b)(2).

118 *See Sekhar*, 570 U.S. at 732 ("Whether viewed from the standpoint of the common law, the text and genesis of the statute at issue here, or the jurisprudence of this Court's prior cases, what was charged in this case was not extortion.").

119 *See id.* at 732–34.

120 *Id.* at 734.

121 *See id.* at 735.

122 *Id.* (quoting Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 403 (2003)).

123 *Id.* (quoting N.Y. PENAL LAW § 530 (1909)).

124 *Id.*

125 For other examples of cases in which the Roberts Court made whole code comparisons to language borrowed from a nonfederal statute, see Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 676 (2016), and Chamber of Com. v. Whiting, 563 U.S. 582, 595 (2011).

126 *See* 557 U.S. 404, 407 (2009). Black's Law Dictionary defines maintenance and cure as "[c]ompensation provided to a sailor who becomes sick or injured while a member of a vessel's crew. The obligation is broader than what would be covered under workers' compensation, as it applies to illness or injury whether or not arising out of shipboard duties." *Maintenance and Cure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

damages in maritime actions at common law.[127] Justice Alito's dissenting opinion, by contrast, noted that legislation, including the Jones Act, had replaced the common law governing maritime actions and concluded that the relevant question thus was whether punitive damages are available under the Jones Act.[128] In answering that question, Justice Alito observed that the Jones Act "makes applicable to seamen the substantive recovery provisions of the Federal Employers' Liability Act (FELA)."[129] In other words, the Jones Act incorporated FELA's substantive provisions by reference. Justice Alito next cited several of the Court's own precedents holding that punitive damages are not recoverable under FELA.[130] He then concluded that, "[w]hen Congress incorporated FELA unaltered into the Jones Act, Congress must have intended to incorporate FELA's limitation on damages as well" and assumed that "Congress is aware of existing law when it passes legislation."[131] Accordingly, it was "reasonable to assume that only compensatory damages may be recovered under the Jones Act."[132]

What is striking about these modeled/borrowed/incorporated statute opinions is how few of them there are in the dataset. As Table 5 shows, only 13.4% of the opinions that employed the whole code rule analogized to a statute from the same or another jurisdiction that served as a model for the statute at issue or from which the statute at issue borrowed language or invoked a statute whose provisions were incorporated by reference in the statute at issue. And only 10.4% of the *majority or plurality* opinions that referenced other statutes employed one of these forms of whole code comparison. Moreover, only 16 of the 29 total modeled/borrowed/incorporated statute comparisons in the dataset appeared in majority, plurality, or concurring opinions, while 13 appeared in dissenting opinions or in an opinion that otherwise dissented from the judgment. Some of these dissenting opinions were issued in cases in which the majority opinion also made

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127 *See Atl. Sounding Co.*, 557 U.S. at 409–15.

128 *See id.* at 426–27 (Alito, J., dissenting).

129 *Id.* at 427.

130 *See id.* at 427–28 (first citing Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59 (1913); and then citing St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648 (1915)).

131 *Id.* (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)). For additional examples of cases in which the Court employed the incorporated by reference form of whole code comparison, see Lawson v. FMR LLC, 571 U.S. 429, 437 (2014) ("Section 1514A incorporates by cross-reference AIR 21's administrative enforcement procedures."); Shinseki v. Sanders, 556 U.S. 396, 406–07 (2009) ("Legislative history confirms that Congress intended the Veterans Court 'prejudicial error' statute to 'incorporate a reference' to the APA's approach." (quoting S. REP. NO. 100-418, at 61 (1988))).

132 *Atl. Sounding Co.*, 557 U.S. at 428 (Alito, J., dissenting).

a modeled/borrowed/incorporated comparison, but drew different inferences from that comparison.[133] But several of these dissents were accompanied by majority opinions that explicitly rejected or ignored whole code comparisons between statutes that *Congress indicated it had consulted* when it drafted the statute at issue. These cases are noteworthy because they demonstrate that the Court sometimes refused to interpret closely connected sister statutes consistently with each other—despite its repeated willingness, as chronicled in the Sections that follow, to insist that other, unrelated statutes should be given a consistent meaning across the U.S. Code.[134] This is paradox-

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[133] *See Lawson*, 571 U.S. at 457–59, 467–68 (majority opinion; Sotomayor, J., dissenting); *Atl. Sounding Co.*, 557 U.S. at 416, 427–28 (majority opinion; Alito, J., dissenting); United States v. Ressam, 553 U.S. 272, 275–77, 280–82 (2008) (majority opinion; Breyer, J., dissenting); Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 49–50, 75–76 (2007) (majority opinion; Thomas, J., dissenting); Lopez v. Gonzales, 549 U.S. 47, 55–56, 62 (2006) (majority opinion; Thomas, J., dissenting).

[134] For a glaring example of the Court's refusal to interpret the ADEA consistently with Title VII, on which the ADEA is modeled, see Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). In *Gross*, the Court refused to construe the ADEA consistently with Title VII on the ground that "Title VII is materially different [from the ADEA] with respect to the relevant burden of persuasion." *Id.* at 173. As commentators have noted, this was a stunning argument, given well-established Supreme Court precedent holding that the substantive provisions of Title VII and the ADEA are to be interpreted identically because "the substantive provisions of the ADEA were derived *in haec verba* from Title VII." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)); *see* Widiss, *supra* note 46, at 890–92 (discussing how "[t]he Court's decision was equally surprising substantively" as it departed from precedent). Indeed, Justice Kennedy's dissent in an earlier case interpreting Title VII had assumed that the Title VII precedent would extend to the ADEA, *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 292 (1989) (Kennedy, J., dissenting), and all of the Courts of Appeals that considered the issue before *Gross* had unanimously applied the Title VII precedent to ADEA claims. *See* Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171 (2d Cir. 1992); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995); EEOC v. Warfield–Rohr Casket Co., 364 F.3d 160 (4th Cir. 2004); Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564 (6th Cir. 2003); Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655 (7th Cir. 1991) (en banc); Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995); Gonzagowski v. Widnall, 115 F.3d 744, 749 (10th Cir. 1997); Lewis v. Young Men's Christian Ass'n, 208 F.3d 1303 (11th Cir. 2000) (per curiam). Even respondent's brief acknowledged the unorthodoxy of treating Title VII and the ADEA differently, asking the Court to "overrule *Price Waterhouse* with respect to its application to the ADEA." Brief for Respondent at 26, *Gross*, 557 U.S. 167 (No. 08-441), 2009 WL 507026, at *26. For additional examples of cases rejecting modeled, borrowed, or incorporated comparisons, see RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2109–10 (2016) (acknowledging that RICO's private right of action was modeled after section 4 of the Clayton Act, but rejecting the assertion that the two statutes should be construed consistently); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1634, 1640–41 (2015) (rejecting the argument, accepted by the dissent, that the statute at issue should be construed consistently with the Tucker Act, whose language it arguably borrowed/incorporated); Chadbourne & Parke LLP v. Troice, 571 U.S. 377 (2014) (ignoring a

ical, because whole code comparisons seem *most justified* when one statute has been modeled after, or has borrowed or incorporated provisions from, another statute.

2. *Consistent Usage*

As Table 5 shows, consistent usage comparisons were by far the form of whole code comparison most commonly invoked by the Roberts Court during the twelve-and-a-half Terms studied. The Roberts Court opinions that employed consistent usage analogies tended to follow one of two forms. Some opinions focused on a specific word or phrase and noted that the word or phrase had been interpreted to mean *X*, or to include or exclude *X*, in other statutes in which it appeared. Other opinions made structural and even policy analogies across statutes—arguing, for example, that certain kinds of statutory threshold requirements are or are not jurisdictional, or that certain kinds of defenses should remain available under a statute of limitations.

Consider the following examples:

Specific words or phrases. In *Carcieri v. Salazar*, the Court reviewed the Secretary of the Interior's decision to accept a parcel of land into trust for an Indian tribe known as the Narragansetts. The Indian Reorganization Act of 1934 (IRA) authorizes the Secretary to acquire land and hold it in trust "for the purpose of providing land for Indians."[135] The statute defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*."[136] Thus, the Secretary's authority to take the land parcel into trust depended on whether the Narragansetts qualified as members of a "recognized Indian Tribe now under Federal jurisdiction."[137] The statutory issue was whether the phrase "now under Federal jurisdiction" refers to the date when the Secre-

comparison, adopted by the dissent, between the Securities Litigation Uniform Standards Act (SLUSA) and section 10(b) of the Securities Exchange Act of 1934, from which Congress "imported the key phrase" at issue in the case); Paroline v. United States, 572 U.S. 434 (2014) (failing to acknowledge the argument, highlighted by the dissent, that the statute at issue should be construed consistently with its predecessor statute); Negusie v. Holder, 555 U.S. 511, 518–19 (2009) (rejecting a comparison between the DPA and the INA on the grounds that the two statutes were enacted for different purposes); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 261–62 (2009) (rejecting a comparison between the ADEA and Title VII, despite the established fact that the ADEA was modeled after Title VII).

135 25 U.S.C. § 465.

136 *Id.* § 479 (emphasis added).

137 Carcieri v. Salazar, 555 U.S. 379, 388 (2009) (quoting 25 U.S.C. § 479).

tary accepted the land into trust (the late 1990s), or the date when Congress enacted the IRA (1934).[138]

In answering this question, the Court focused on identifying the ordinary meaning of the word "now," "as understood when the IRA was enacted."[139] In so doing, it quoted two dictionaries published in 1933 and 1934 to determine that the contemporaneous definition of the word "now" was "at the present time" or "at the present moment."[140] The Court went on to note that this definition "is consistent with interpretations given to the word 'now' by this Court, both before and after passage of the IRA" in other federal statutes.[141] In other words, the word "now" had a consistent meaning across the U.S. Code. In support of this consistent usage argument, the Court cited two of its own prior cases interpreting the word "now." The first involved a federal criminal statute that adopted the same punishment for crimes committed on military forts, yards, and armories "as the laws of the State in which such [fort, yard, armory] is situated now provide for the like offense"[142] and the second involved a statute that granted citizenship status to foreign-born "children of persons who now are, or have been, citizens of the United States."[143] The analogue statutes regulated subjects entirely different from that of the IRA and were enacted in the 1800s—more than thirty-five years before the IRA.[144] The Court's focus on the word "now" in isolation—rather than the full statutory phrase "now under Federal jurisdiction"—ignored these differences.

Structural and policy comparisons. Even more common than whole code comparisons involving a specific word or phrase are statutory analogies that focus on a statute's structure or assign specific policy consequences to certain kinds of statutory provisions. In *Flores-Figueroa v. United States*,[145] for example, the Court considered a federal criminal statute that prohibits "[a]ggravated identity theft."[146] The statute imposes a mandatory two-year prison term on offenders convicted of certain other crimes *if*, during (or in relation to) the com-

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138 *See id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 Franklin v. United States, 216 U.S. 559, 568–69 (1910) (emphasis omitted).

143 Montana v. Kennedy, 366 U.S. 308, 310 (1961) (emphasis omitted).

144 *See Franklin*, 216 U.S. at 568–69 (citing Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717, 717 and Act of Mar. 3, 1825, ch. 65, § 3, 4 Stat. 115, 115); *Kennedy*, 366 U.S. at 309–10 (citing 30 Revised Statutes of the United States § 2172 (1874) and Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155).

145 556 U.S. 646 (2009).

146 *Id.* at 647 (quoting 18 U.S.C. § 1028A(a)(1)).

mission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person*."[147] The statutory question was whether the government must show "that the defendant *knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact belonged to 'another person.'"[148] The Court ruled that the statute does require such a showing.[149] The majority opinion began by noting that there were "strong textual reasons" to read the statute to require knowledge of all elements of the crime[150] and commented that its construction was consistent with the meaning given to other criminal statutes that contain the word "knowingly": "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[151] In support, it discussed two precedents involving (1) a federal food stamp statute that criminalized the "knowing[ ]" misuse of food stamp coupons[152] and (2) a statute criminalizing the "knowing[ ]" transportation of visual depictions of minors engaging in sexually explicit acts.[153] Notably, the majority opinion in *Flores-Figueroa*, unlike the Court's opinion in *Carcieri*, limited its whole code analogizing to criminal statutes, which share more in common with each other than do statutes that govern entirely unrelated subject areas.

In *Jennings v. Rodriguez*,[154] a plurality of the Court went a step further, demonstrating how the whole code rule can be used to create a default policy rule across statutes that deal with entirely different subjects, use entirely different words, and only arguably share structural similarities. *Jennings* involved a claim that the Immigration and Nationality Act (INA) gives noncitizens detained under one of its provisions the right to periodic bond hearings while they are being detained.[155] Before reaching the merits of that question, however, a plurality composed of Chief Justice Roberts, Justice Alito, and Justice Kennedy addressed the more mundane issue of whether the Court had jurisdiction to hear the case. The relevant jurisdictional provision allows judicial review only of "final orders" for all questions of law and fact "*arising from* any action taken or proceeding brought to

147 *Id.* (quoting 18 U.S.C. § 1028A(a)(1)).
148 *Id.* (quoting 18 U.S.C. § 1028A(a)(1)).
149 *Id.*
150 *Id.* at 650 (arguing that ordinary English grammar rules compel this reading).
151 *Id.* at 652.
152 *See id.* (citing Liparota v. United States, 471 U.S. 419 (1985)).
153 *See id.* (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994)).
154 138 S. Ct. 830 (2018).
155 *See id.* at 836.

remove an alien from the United States."[156] In other words, if the question before the Court—whether the INA gives detained noncitizens a right to periodic bond hearings during the course of their detention—is considered one that "aris[es] from" an action or proceeding brought to remove a noncitizen, the Court would not have jurisdiction to decide that question until a final order of removal was issued against one or more noncitizens. Because Rodriguez filed his lawsuit before a final order of removal was issued in his case, a finding that the periodic bond hearing question "ar[ose] from" Rodriguez's removal proceeding would negate the Court's jurisdiction over his case.[157]

The plurality posited that the legal questions before the Court did not "aris[e] from" the actions taken to remove the noncitizens.[158] The plurality noted that the government's proposed reading of "arising from" would "lead to staggering results"—covering virtually any claim brought by a detained noncitizen and rendering claims of prolonged detention "effectively unreviewable."[159] It then compared the INA's "arising from" language to language contained in several other statutes and asserted that, "[i]n past cases, when confronted with *capacious phrases* like 'arising from,' we have eschewed 'uncritical literalism' leading to results that no sensible person could have intended."[160] In support of this "capacious phrases" rule, the plurality cited precedents interpreting the term "affecting" in the Federal Power Act, the phrase "in connection with" in the Driver's Privacy Protection Act, and the phrase "related to" in the Federal Aviation Administration Authorization Act and the Bankruptcy Act.[161] Each of these cases interpreted the "capacious" phrase at issue narrowly rather than expansively—and the plurality reasoned that the INA provision should be given a similarly narrow construction.

The *Jennings* plurality's use of whole code analogies comparing what it deemed "capacious phrases" is troubling because it compared entirely different language in entirely different statutes dealing with entirely different subjects in an entirely unpredictable manner—providing virtually no justification for treating the referenced statutes as

156 8 U.S.C. § 1252(b)(9) (emphasis added).

157 *See Jennings*, 138 S. Ct. at 840 (plurality opinion).

158 *Id.* at 839–41 (quoting 8 U.S.C. § 1252(b)(9)).

159 *Id.* at 840.

160 *Id.* (emphasis added) (quoting Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016)).

161 *See id.* (first citing Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 773–75 (2016); then citing Maracich v. Spears, 570 U.S. 48, 59–61 (2013); then citing Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 260–61 (2013); and then citing Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995)).

analogues. In effect, it deduced a drafting presumption that "capacious phrases"—however those are defined—should be interpreted to mean something less broad than they appear at face value to mean. And it did so with no reference to the purpose, design, or legislative intent that motivated any of the statutes.[162]

Notably, all of the consistent usage examples provided above relied significantly on the Court's precedents and none invoked Congress's intent or design as the justification for construing the relevant statutory term consistently with other statutes. In other words, the emphasis was very much on judicial construction and convention, rather than legislative expectations.

3. Meaningful Variation

The meaningful variation form of whole code comparison is the logical inverse of the consistent usage presumption. As one treatise puts it, "From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning."[163] Like the consistent usage presumption, the meaningful variation rule is most often associated with the comparison of different sections of the *same* statute—i.e., the whole act rule. However, the members of the Roberts Court also regularly used it to compare—and distinguish—the provisions of two (or more) different statutes.

The Court's meaningful variation arguments tended to take the following form: The Court interprets Statute *A* to mean *X*, as opposed

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[162] The Roberts Court has made numerous similar structural or policy-based consistent usage comparisons in other cases. *See, e.g.*, Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1198–99 (2017) (holding that the Federal Employees Health Benefits Act of 1959 (FEHBA) preempts state law to the extent that certain contractual terms fall within its scope, in a similar manner as the Employee Retirement Income Security Act (ERISA) and Federal Arbitration Act (FAA)); Ocasio v. United States, 136 S. Ct. 1423, 1430–32 (2016) (citing precedents interpreting the Mann Act in construing the requirements for a conspiracy conviction under the Hobbs Act); Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158, 2164–65 (2015) (noting that statutes that displace the American Rule as to attorney's fees, such as the EAJA, tend to mention "a reasonable attorney's fee," "fees," or "litigation costs," whereas the bankruptcy provision at issue did not include any similar language that would permit an award of attorney's fees to counsel retained by the bankruptcy trustee); Hillman v. Maretta, 569 U.S. 483, 484–94, 492 (2013) (holding that the Federal Employees' Group Life Insurance Act (FEGLIA) preempts state law through a "scheme" similar to that of two other federal statutes that the Court had previously construed); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 162–63 (2010) (applying to a provision of the Copyright Act the same "approach" the Court took in construing whether a Title VII provision imposed a jurisdictional requirement).

[163] P. ST. J. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES 282 (12th ed. 1969).

to *Y*, noting that similar Statute *B* (or several other similar Statutes *B*, *C*, and *D*), which previously has been interpreted to mean *Y*, contains language that is missing from, or different from that used in, Statute *A*. In other words, the Court identifies a drafting approach that Congress has used to achieve *Y* policy outcome in one or more other statutes and extrapolates that the drafting approach constitutes Congress's established (and effectively exclusive) method for achieving *Y* policy outcome. That is, the Court imposes a drafting presumption on Congress—assuming that if the legislature wants to achieve *Y* outcome, it will do so using the same language that it used in Statute *B*.

An example may help illustrate. In *Epic Systems Corp. v. Lewis*,[164] the Court considered the enforceability of the Federal Arbitration Act (FAA).[165] The case involved three consolidated lawsuits brought by employees who had entered into contracts with their employers that provided for employment disputes to be resolved in individual arbitration proceedings.[166] The employees later sought to litigate Fair Labor Standards Act (FLSA) and related state law claims through class actions in federal court. The FAA requires courts to enforce arbitration agreements as written, but the employees argued that the Act's "saving clause" removes this obligation if an arbitration agreement violates some other federal law; in this case, the employees contended that their arbitration agreements violated the National Labor Relations Act (NLRA).[167] The employees' argument was based on an NLRA provision that guarantees employees the right to "engage in other *concerted* activities" for the purpose of their "mutual aid or protection."[168] The employees argued that the agreement requiring individualized arbitration proceedings prevented them from engaging in the "concerted activity" of pursuing claims in a class or collective action.[169]

A majority of the Court disagreed, relying on the plain meaning and structure of the NLRA, precedent, the ejusdem generis canon, and a meaningful variation whole code comparison.[170] Specifically, the Court noted that Congress has repeatedly "shown that it knows how to override the Arbitration Act when it wishes"—and quoted four other statutes, dealing mostly with commerce and commodities

164 138 S. Ct. 1612 (2018).
165 *See* 9 U.S.C. §§ 2–4.
166 *Epic Sys. Corp.*, 138 S. Ct. at 1619–20.
167 *See id.* at 1619.
168 29 U.S.C. § 157 (enacted 1935) (emphasis added).
169 *See Epic Sys. Corp.*, 138 S. Ct. at 1622.
170 *See id.* at 1621–26.

trading, in which Congress explicitly overrode the FAA.[171] One of these statutes provided that "'arbitration may be used . . . only if' certain conditions are met"; two others provided that "[n]o predispute arbitration agreement shall be valid or enforceable" under certain specified circumstances; and one provided that requiring a party to arbitrate was "unlawful" in still other circumstances.[172] The Court reasoned that because the NLRA contains "nothing like" this limiting language regarding class actions, Congress did not intend for the NLRA to abrogate the FAA with respect to such actions.[173] In so reasoning, the Court effectively created, or attributed to Congress, a drafting formula for limiting the reach of the FAA—i.e., if Congress wants to ensure that a particular statute will be enforced in court, rather than through arbitration, it will expressly state that arbitration may not be used to enforce the statute or will list the specific circumstances under which arbitration may be invoked.

Notably, none of the analogue statutes invoked by the Court was related in subject matter to the NLRA; nor were any enacted contemporaneously with the NLRA. In fact, all but one were enacted long after the NLRA.[174] In this sense, the Court's decision to analogize between these particular statutes was unanticipated and unpredictable.[175] Moreover, there was no reason to presume that Congress had any of these statutes in mind when it drafted the others. Nor was there any independent reason to anticipate that the Court would find it appropriate to construe them similarly. In numerous other cases in the dataset, the Court similarly extrapolated statutory meaning or implied

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171 *Id.* at 1626.

172 *See id.* (first citing 15 U.S.C. § 1226(a)(2) (enacted 2002; commerce and trade of motor vehicles); then citing 7 U.S.C. § 26(n)(2) (enacted 1922; whistleblowing relating to commodities trading); then citing 12 U.S.C. § 5567(d)(2) (enacted 2010; Dodd-Frank Wall Street Reform and Consumer Protection Act); and then citing 10 U.S.C. § 987(e)(3) (enacted 2006; extension of credit to members of the armed forces)).

173 *Id.*

174 The NLRA was enacted in 1935, whereas the analogue statutes were enacted in 1922, 2002, 2006, and 2010. *See supra* notes 168 and 172.

175 The commerce and whistleblowing statutes cited by the Court had been cited in an earlier arbitration case and were referenced in the petitioner's brief, so their use may have been somewhat anticipatable in a different sense. *See* Brief for Petitioner at 22–24, Ernst & Young LLP v. Morris, 138 S. Ct. 1612 (2018) (No. 16-300), 2017 WL 2544863, at *22–24 (citing CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) and statutes referenced therein). But Dodd-Frank and the statute regarding extending credit to members of the armed forces were not previously cited or referenced in the parties' briefs and there was no indication that Congress paid attention to any of these statutes when it drafted the NLRA; indeed, as noted, most of these statutes were enacted long after the NLRA.

drafting presumptions from variations in statutory language or structure.[176]

4. Superfluity

Another form of cross-statute comparison the Roberts Court employed was comparisons focused on redundancy in the U.S. Code. This form of cross-statute reasoning was not common, but the members of the Roberts Court did employ it occasionally.[177]

The superfluity form of whole code comparison typically involves an argument that one statute must be interpreted to mean *X* rather than *Y* because *Y* interpretation would render another related statute "superfluous." This form of whole code reasoning is exemplified by the argument made by the Solicitor General and the Kavanaugh dissent in *Bostock*, discussed earlier, that construing Title VII to prohibit sexual orientation discrimination would render superfluous provisions in other federal and state statutes that explicitly list "sexual orientation" as a trait separate from "sex."[178]

Justice Stevens's dissenting opinion in *Dean v. United States*[179] provides another good example. *Dean* involved a sentencing enhancement statute with three subparts: the first imposes a five-year mandatory-minimum enhancement if a firearm is "use[d] or carrie[d]" during a violent crime, the second increases the enhancement to seven

[176] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014) ("Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations."); Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776, 787 (2011) (comparing the Bayh-Dole Act to other statutes in which Congress used explicit language to divest inventors of their rights in inventions); United States v. Tinklenberg, 563 U.S. 647, 662 (2011) ("Congress has tended specifically to exclude weekend days and holidays from statutory time periods of 10 days when it intended that result."); Carr v. United States, 560 U.S. 438, 450 (2010) (concluding that because numerous federal statutes use past-perfect tense when coverage of preenactment events is intended, absence of similar phrasing in the Sex Offender Registration and Notification Act (SORNA) shows that it targets only postenactment travel); Hamilton v. Lanning, 560 U.S. 505, 514–15 (2010) (reasoning that when Congress wants to mandate simple multiplication, it does so by using the term "multiplied" instead of "projected"); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 583–84 (2010) (contrasting the FDCPA with other statutes that explicitly provide a mistake-of-law defense); United States v. Hayes, 555 U.S. 415, 421–22 (2009) (noting that other criminal statutes use "elements" in the plural when they want their offense-defining provisions to require more than one element for the offense); *see also* Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778 (2018); Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1977 (2015); Hui v. Castaneda, 559 U.S. 799, 807 (2010); Boyle v. United States, 556 U.S. 938, 949 (2009); United States v. Ressam, 553 U.S. 272, 274–77 (2008).

[177] *See supra* Table 5 (showing that superfluity arguments represented 3.2% of the Court's whole code comparisons).

[178] *See supra* notes 5–8 and accompanying text.

[179] 556 U.S. 568 (2009).

years "if the firearm is brandished," and the third increases the enhancement to ten years "if the firearm is discharged."[180] At issue was whether the ten-year mandatory enhancement applies if the gun is discharged accidentally, or whether there is an intent requirement for the ten-year enhancement. A majority of the Court interpreted the statute not to contain an intent requirement.[181]

Justice Stevens dissented, citing the statute's structure, the common law, legislative history and intent, the rule of lenity, practical considerations, and precedent.[182] Tucked in among these numerous interpretive tools was a cross-statute comparison: Justice Stevens pointed out that the felony murder statute and Sentencing Guidelines provisions which permit increased punishment based on the seriousness of the harm caused by the predicate act already "penalize the unintended consequences of felonious conduct."[183] He then made a classic superfluity argument, insisting that the fact "[t]hat a defendant will be subject to punishment for the harm resulting from a discharge whether or not he is also subject to the enhanced penalty imposed by [the statute] indicates" that the enhancement at issue "was intended to serve a different purpose—namely, to punish the more culpable act of intentional discharge."[184] In other words, Congress already ensured extra punishment for harms caused by accidental discharge, so reading the provision at issue also to punish accidental discharges would be redundant.[185] Notably, the superfluity comparison made by Justice Stevens's dissent in *Dean* is more of a policy-based superfluity argument than a linguistic superfluity argument, and in this sense differs from the Solicitor General's and Justice Kavanaugh's superfluity argument in *Bostock*.

5. Harmonization

The last form of cross-statute comparison employed by the Roberts Court was comparisons that harmonized two federal laws or state and federal laws in some way. I use the term "harmonization" to describe a few different, but related, forms of cross-statute reasoning. In some cases, the Court reconciled two statutes whose provisions oth-

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[180] 18 U.S.C. § 924(c)(1)(A).

[181] *Dean*, 556 U.S. at 572.

[182] *See id.* at 578–83 (Stevens, J., dissenting).

[183] *Id.* at 582–83.

[184] *Id.* at 583.

[185] For other similar cross-statute superfluity arguments, see, for example, Sossamon v. Texas, 563 U.S. 277, 301 (2011) (Sotomayor, J., dissenting); Bilski v. Kappos, 561 U.S. 593, 607–08 (2010); United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 8–9 (2008); CBOCS W., Inc. v. Humphries, 553 U.S. 442, 462 (2008) (Thomas, J., dissenting); United States v. Santos, 553 U.S. 507, 515–16 (2008) (plurality opinion).

erwise would conflict with each other.[186] In other cases, it compared a federal statute to state statutes that established the conditions under which the federal statute is triggered.[187] In still other cases the Court construed one statute in a manner that made it logically consistent with another related statute.[188] The Court did not employ this form of cross-statute reasoning often, but it did do so in a handful of cases.[189]

Consider, for example, *Nijhawan v. Holder*,[190] which involved an immigration law providing that any "alien who is convicted of an aggravated felony at any time after admission is deportable."[191] A related statute defines "aggravated felony" to include "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[192] The statutory question was whether the "exceeds $10,000" language refers to an element of the fraud or deceit offense. If so, then in order for a defendant's conviction to count as an "aggravated felony," the state fraud or deceit statute under which he was convicted would have to contain a monetary threshold of $10,000 or more.[193]

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186 *See, e.g.*, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1858 (2018) (Breyer, J., dissenting) (noting that one voting statute directs courts to interpret its provisions consistently with another, and rejecting majority's reading on the ground that it would render the second statute meaningless); TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 (2017) (harmonizing two venue provisions by holding that Congress did not change the meaning of one when it amended another); *Clintwood Elkhorn Mining Co.*, 553 U.S. at 8–9 (reconciling conflicting statutes of limitations in the Revenue Act versus the Tucker Act by holding that a shorter statute of limitations is appropriate for tax statutes for policy reasons).

187 *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571–72 (2017) (using state statutes defining the age of consent for rape to determine if a violation of a California statute can trigger a deportation under the Immigration and Nationality Act (INA)); Voisine v. United States, 136 S. Ct. 2272, 2280–81 (2016) (examining state statutes and arguing that the rejected interpretation would render sentencing enhancement "broadly inoperative" in thirty-five states); Descamps v. United States, 570 U.S. 254, 272–73 (2013) (reconciling the federal Armed Career Criminal Act (ACCA) enhancement with state laws); Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 551–52 (2012) (using various state statutes and the Uniform Probate Code (UPC) to show that Congress did not intend for "child" status under federal benefits law to be determined by "biological" parentage).

188 *See, e.g.*, Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2080 (2018) (Breyer, J., dissenting) (seeking to create uniformity between the treatment of income under the Railroad Retirement Tax Act's pension-like taxing system and the Social Security system governed by the Federal Insurance Contributions Act (FICA)); Astra USA, Inc. v. Santa Clara County, 563 U.S. 110, 121 (2011) (reasoning that the Medicaid Rebate Program statute's ban on disclosing pricing information supports construing the Public Health Services Act to prohibit a private suit).

189 *See supra* Table 5 (showing that harmonization of two or more statutes accounted for 8.8% of the Roberts Court's cross-statute comparisons).

190 557 U.S. 29 (2009).

191 8 U.S.C. § 1227(a)(2)(A)(iii).

192 8 U.S.C. § 1101(a)(43)(M)(i).

193 *Nijhawan*, 557 U.S. at 32.

The Court unanimously ruled that the "exceeds $10,000" language does not refer to an element of the fraud or deceit crime.[194] In so ruling, it referenced the wording of several state fraud and deceit statutes and noted that in 1996, when Congress added the $10,000 threshold to the statute at issue, only eight states had fraud or deceit statutes that contained a $10,000 monetary threshold.[195] Thus, if the Court construed the "exceeds $10,000" language in the immigration statute to constitute an element of the fraud or deceit offense, the federal "aggravated felony" definition would encompass fraud and deceit convictions in only eight states in the country.[196] The Court reasoned that Congress could not have intended the federal statute "to apply in so limited and so haphazard a manner."[197] In other words, because the state fraud or deceit statutes triggered the operation of the federal statute, the Court gave the federal statute a meaning that cohered with the wording of the vast majority of state fraud and deceit statutes. Numerous other cases make similar efforts to harmonize two or more federal or state statutes.[198]

D. Dueling Analogues

Finally, it is worth noting that in nearly one-quarter of the cases (21.4%) in which the Justices made some form of whole code comparison, they disagreed about what inferences to draw from such comparisons—and, indeed, about which statutes constituted appropriate analogues to the statute at issue.[199]

In some of the cases, the majority and dissenting opinions both analogized to the same external statute(s), but drew different inferences from the comparison.[200] In other cases, a majority, plurality, or

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194 *See id.* (finding instead that the language refers to the circumstances in which the crime was committed).

195 *See id.* at 40 (noting that if the $10,000 threshold were interpreted as the petitioners argue, the statute would only have "full effect" in eight states).

196 *See id.*

197 *Id.*

198 *See* cases cited *supra* notes 186–88; *see also* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 198 (2012) (discussing how multiple statutes intersect with the Indian Self-Determination and Education Assistance Act); Smith v. Bayer Corp., 564 U.S. 299, 317–18 (2011) (harmonizing the Anti-Injunction Act with the Class Action Fairness Act).

199 This figure reflects 37 cases in which both the majority or plurality opinion and a dissenting, concurring, or part-concurring/part-dissenting opinion made some form of whole code comparison but each opinion drew different forms of inferences and/or analogized to different statutes. The vast majority (34) of these cases involved a disagreement between, on the one hand, a majority or plurality opinion and, on the other, a dissenting or part-concurring/part-dissenting opinion, but a handful (3) involved different whole code inferences drawn by majority and concurring opinions in the same case.

200 *See, e.g.*, Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158, 2164, 2171–72 (2015) (majority opinion; Breyer, J., dissenting) (majority making a meaningful variation

dissenting opinion analogized the statute at issue to another statute while the opposing opinion argued that the other statute was an inapposite analogue, different from the statute at issue in some important respect.[201] In most cases, however, the majority or plurality opinion and the dissenting opinion compared the statute at issue to entirely different statutes—sometimes pausing to distinguish the analogue statute(s) invoked by the opposing opinion, but sometimes simply offering their own alternate analogue without seeking to discredit the opposing opinion's cross-statute comparison.[202]

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comparison between a bankruptcy statute and the EAJA, while the dissent makes a consistent usage comparison to the EAJA); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519, 2547, 2549 (2015) (majority opinion; Alito, J., dissenting) (majority analogizing to Title VII and the ADEA; dissent making a meaningful variation comparison to Title VII and rejecting the analogy to the ADEA); Lawson v. FMR LLC, 571 U.S. 429, 434, 467–68 (2014) (majority opinion; Sotomayor, J., dissenting) (majority making a consistent usage argument based on Aviation Investment and Reform Act (AIR 21); dissent drawing a meaningful variation comparison to same statute); Dean v. United States, 556 U.S. 568, 575, 582–83 (2009) (majority opinion; Stevens, J., dissenting) (majority and dissent drawing opposing inferences from analogies to felony murder statute); Gonzalez v. United States, 553 U.S. 242, 247–48, 262–63 (2008) (majority opinion; Thomas, J., dissenting) (majority and dissent drawing opposing inferences from statute requiring defendant's personal consent for magistrate judge to preside over trial); United States v. Ressam, 553 U.S. 272, 274–77, 280–81 (2008) (majority opinion; Breyer, J., dissenting) (majority and dissent drawing opposing inferences from differences between amended versions of a statute regulating explosives and the gun control statute on which it was modeled); Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 49, 75 (2007) (majority opinion; Thomas, J., dissenting) (majority and dissent drawing opposing inferences from Interstate Commerce Act).

[201] *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 260–64, 274–76, 280–81 (2009) (majority opinion; Stevens, J., dissenting; Souter, J., dissenting) (majority rejecting the dissent's analogy between Title VII precedent and the ADEA because the collective bargaining agreements at issue were worded differently); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173–74, 178, 183 (2009) (majority opinion; Stevens, J., dissenting) (majority rejecting analogy to Title VII precedent because subsequent amendments to Title VII were not also made to ADEA and because Title VII's burden-shifting framework has not been applied to the ADEA, while the dissent notes that the language in Title VII is identical to the ADEA's); *see also* United States v. Santos, 553 U.S. 507, 513, 533–34 (2008) (plurality opinion; Alito, J., dissenting) (plurality rejecting the dissent's analogy to statutes that "postdate the 1986 federal money-laundering statute by several years").

[202] *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403–04, 1433 (2018) (plurality opinion; Sotomayor, J., dissenting) (plurality analogizing to Tort Victim Protection Act (TVPA) and international practice while the dissent analogizes to the Anti-Terrorism Act); Patchak v. Zinke, 138 S. Ct. 897, 905–06, 918–19 (2018) (plurality opinion; Roberts, C.J., dissenting) (plurality analogizing to federal question jurisdiction and federal appeals procedure statutes while the dissent analogizes to the Copyright Act); Pereira v. Sessions, 138 S. Ct. 2105, 2116 n.8, 2126–27 (2018) (majority opinion; Alito, J., dissenting) (majority analogizing to statutes regulating drug fast-tracking, medical rehabilitation, and healthcare personnel's pay while dissent analogizes to FRCP 11(a)); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2071–72, 2080 (2018) (majority opinion; Breyer, J., dissenting) (majority analogizing to Tax Code and distinguishing FICA while the dissent analogizes to FICA); Torres v. Lynch, 136 S. Ct. 1619, 1631, 1641 (2016) (majority opinion; Sotomayor, J., dissenting) (majority citing the Assimilative Crimes Act while the dissent cites other

The opposing opinions in *Arlington Central School District Board of Education v. Murphy*[203] provide a good example of the latter, more common, approach. The case involved the Individuals with Disabilities Education Act (IDEA), which provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who

criminal statutes that compare state and federal offenses); RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2109–10, 2113–14 (2016) (majority opinion; Ginsburg, J., concurring in part and dissenting in part) (majority rejecting an analogy to the Clayton Act and citing the Foreign Trade Antitrust Improvements Act instead while the concurrence in part and the dissent in part cites the Clayton Act); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1634–35, 1640–41 (2015) (majority opinion; Alito, J., dissenting) (majority citing the Clayton Act while the dissent cites the Tucker Act); Maracich v. Spears, 570 U.S. 48, 61, 89 (2013) (majority opinion; Ginsburg, J., dissenting) (majority analogizing to state bar rules of professional conduct while the dissent analogizes to federal obstruction of justice statute); Marx v. Gen. Revenue Corp., 568 U.S. 371, 385–86, 393–94 (2013) (majority opinion; Sotomayor, J., dissenting) (majority analogizing to fee-shifting statutes involving the Consumer Financial Protection Bureau, commerce and trade, taxes, labor disputes, and telecommunications while the dissent analogizes to the Comprehensive Environmental Response, Compensation, and Liability Act right of contribution provision); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349–50, 368–69 (2013) (majority opinion; Ginsburg, J., dissenting) (majority relying on ADEA precedent while the dissent relies on a "line of decisions" interpreting § 1982, Title IX, and ADEA differently); Chamber of Com. v. Whiting, 563 U.S. 582, 595, 623 (2011) (majority opinion; Breyer, J., dissenting) (majority analogizing to the Administrative Procedures Act (APA) while the dissent analogizes to the Farm Labor Contractor Registration Act of 1963 and the Migrant and Seasonal Agricultural Worker Protection Act); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 8–9, 20 (2011) (majority opinion; Scalia, J., dissenting) (majority citing state and federal statutes and regulations while the dissent cites the Mine Health and Safety Act); Dolan v. United States, 560 U.S. 605, 610–11, 622 (2010) (majority opinion; Roberts, C.J., dissenting) (majority analogizing to statutes imposing deadlines for bail detention, misuse of federal grant funds, and retiree benefits while the dissent analogizes to statutes authorizing penalties to be imposed at some time other than sentencing); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 583–84, 613–14 (2010) (majority opinion; Kennedy, J., dissenting) (majority comparing the FDCPA to Federal Trade Commission Act, Portal-to-Portal Act, and FLSA while the dissent compares the FDCPA to the ADEA, a food stamps statute, and the FLSA); Atl. Sounding Co. v. Townsend, 557 U.S. 404, 416, 427–28 (2009) (majority opinion; Alito, J., dissenting) (majority citing other maritime statutes while the dissent cites FELA); United States v. Hayes, 555 U.S. 415, 422, 432 (2009) (majority opinion; Roberts, C.J., dissenting) (majority citing criminal statutes that use "elements" in the plural while the dissent cites criminal statutes that use "element" in the singular); Gomez-Perez v. Potter, 553 U.S. 474, 479–81, 498–99 (2008) (majority opinion; Roberts, C.J., dissenting) (majority comparing ADEA to § 1982 and Title IX while the dissent compares the ADEA to the FLSA and rejects analogies to § 1982 and Title IX); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300–01, 308 (2006) (majority opinion; Souter, J., dissenting) (majority relying on the language of § 1988 and FRCP 54(d) while the dissent emphasizes the Handicapped Children's Protection Act (HCPA)); Lopez v. Gonzales, 549 U.S. 47, 55, 62 (2006) (majority opinion; Thomas, J., dissenting) (majority analogizing to the Controlled Substances Act (CSA) while the dissent compares the text to a firearm enhancement statute).

[203] 548 U.S. 291 (2006).

prevail in an action brought under the Act.[204] The statutory question was whether this fee-shifting provision authorizes prevailing parents to recover fees paid to expert witnesses in IDEA actions. A majority of the Court held that the statute does not authorize the recovery of expert fees. In so ruling, the Court relied heavily on a clear statement rule based on the Spending Clause.[205] In addition, it noted that "perhaps the strongest support" for its interpretation came from precedents interpreting the term "costs" in other similar fee-shifting provisions in § 1988 and FRCP 54(d) *not* to authorize a district court to award expert fees to a prevailing party.[206] "To decide in favor of [the parents] here," the Court commented, "we would have to interpret the virtually identical language in [IDEA] as having exactly the opposite meaning."[207] Justice Ginsburg concurred in the Court's judgment, relying almost entirely on a whole code comparison to "other statutes too numerous and varied to ignore" that explicitly "include expert fees *as part of* the attorney's fee" or "explicitly shift expert . . . fees *as well as* attorney's fees" rather than treat such fees as covered by the term "costs" or "attorney's fees."[208]

Justice Souter dissented, authoring a separate dissent in addition to joining Justice Breyer's principal dissent. His dissent made two points: one was to highlight distinctions between this case and a precedent; the other was to emphasize the importance of a different whole code comparison than the one embraced by the majority.[209] Specifically, Justice Souter invoked section 4 of the Handicapped Children's Protection Act (HCPA), which directed the Government Accounting Office (GAO) to compile data regarding "the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party" in IDEA cases, along with "the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents."[210] The parents argued that HCPA's direction to the GAO "would be inexplicable if Congress did not anticipate that [expert consultant fees] would be recover-

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204 20 U.S.C. § 1415(i)(3)(B).

205 *See Arlington*, 548 U.S. at 296–98 (stating that the text "certainly fails to provide the clear notice" the Spending Clause requires).

206 *See id.* at 300–01 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) (interpreting FED. R. CIV. P. 54(d)); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) (interpreting 42 U.S.C. § 1988)).

207 *Id.* at 302.

208 *Id.* at 306–07 (Ginsburg, J., concurring in part and in judgment) (first emphasis added) (first quoting 42 U.S.C. § 1988(c); then quoting *W. Va. Univ. Hosps., Inc.*, 499 U.S. at 88–92 & n.4).

209 *See id.* at 308 (Souter, J., dissenting).

210 *Id.* at 298–99 (majority opinion) (quoting Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 4, 100 Stat. 796, 797–98).

able,"[211] especially given that IDEA's fee-shifting provision was enacted as part of the HCPA.[212] The majority opinion had expressly rejected the comparison between IDEA and HCPA, instead placing significant weight on comparisons between IDEA and § 1988 and FRCP 54(d).[213] Neither the majority opinion nor Justice Souter's dissent expressly discussed the choice it made between multiple competing analogue statutes or offered any specific justification for why § 1988 and FRCP 54(d) were better analogues to IDEA than HCPA, or vice versa.

The *Arlington Central* majority and dissenting opinions' silence on this choice-of-analogue question is, unfortunately, common across cases that involve competing whole code comparisons. The Court, or individual Justices, often simply assert that an analogue statute is similar to the statute at issue, sometimes noting that it contains similar language—but rarely discussing other factors that might support (or counsel against) treating one statute as analogous to another. Such silence, and the lack of interpretive guidelines it reflects, raises several important unresolved questions: What makes a particular statute an appropriate analogue to another statute? How should courts choose among potential analogue statutes when confronted with more than one seemingly similar statute? Without established answers to these questions, the Court's use of the whole code rule is haphazard and individual Justices are free to invoke or reject particular comparisons based on inconsistent criteria—or, worse, personal whims.

This is particularly problematic because the universe of potential statutory analogues is often quite large. To obtain an idea of just how large this universe is, I conducted a mini-experiment: for 150 of the 173[214] cases in the dataset that made a whole code comparison, I conducted a word search of the U.S. Code (using Westlaw's U.S. Code database) to identify how many other federal statutes contain the key term or phrase at issue in the case. Those searches revealed that a majority of terms and phrases at issue in the whole code cases

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211 *Id.* at 298–300.

212 *See id.* at 309 (Breyer, J., dissenting).

213 *See id.* at 298–302 (majority opinion).

214 *See supra* notes 75–79 and accompanying text. In 23 of the cases, I was unable to identify the appropriate term or phrase to search for, because the opinion(s) in the case focused on the lack of certain language in the statute at issue rather than comparing a specific term or phrase in the statute at issue to other statutes. For the full data from this experiment, please see a list of the results for each case on file with the *New York University Law Review*.

returned over 100, and in many cases over 1,000 potential comparator statutes.[215]

Section III.B below suggests some guidelines that would limit the universe of relevant analogue statutes and help prioritize among dueling analogues.

III
Implications: A Common Law of Statutory Drafting

As the cases discussed in Part II demonstrate, there is significant judicial discretion involved in the practice of analogizing, distinguishing, and reconciling across the U.S. Code and even state statutes. The judiciary determines which statutes are worthy of comparison to one another, articulates drafting conventions based on its own past interpretations of similar language in other statutes, and demands clear statements from Congress in order to contravene those judge-made conventions. In so doing, it essentially creates its own drafting presumptions—almost a common law of drafting practices—that it either presumes Congress follows, or demands that it follow, when crafting statutes.

This Part explores the normative implications of such a judicially imposed common law of statutory drafting. Section A considers some practical and theoretical problems with judicial efforts to presume, or impose, consistency across the U.S. Code. Section B evaluates how the justifications underlying the whole code rule and the problems identified in Section A match up with each of the five forms of whole code comparisons discussed in Part II—and recommends limiting use of this interpretive tool to those circumstances in which it is both justified and most likely to add value to the interpretive endeavor.

A. Some Problems

This Section highlights several problems with judicial efforts to impose consistency across the U.S. Code. Subsection 1 argues that the real danger, or fiction, that plagues the Court's whole code comparisons is not the presumption that a single Congress enacted all of the relevant statutes, but rather the presumption that Congress has, or should have, one consistent way of achieving particular results or

[215] Specifically, 55.3% (83 of 150) of the whole code cases selected for the mini experiment involved a term or phrase that was employed in over 100 other federal statutes; and 22.0% (33 of 150) of these involved a term or phrase that was employed in over 1,000 other federal statutes. Only 16.0% of the cases (24 of 150) involved a term or phrase that was employed in 10 or fewer other federal statutes.

policy consequences. Indeed, it suggests that one-size-fits-all drafting rules are not a realistic goal—whether forged by the legislature *or by the judiciary*. Subsection 2 explores some significant institutional competence concerns that are implicated when the judiciary articulates and imposes drafting presumptions on the legislature.

1. The Fiction of One, Single Drafting Approach

As discussed in Section I.A, jurists often defend the whole code rule with assertions that it furthers, or is consistent with, legislative intent or design. In his seminal article on the one-Congress fiction, Bill Buzbee criticized this rationale, and the Court's practice of reasoning across statutes, for depending on a false "assumption of an ideal unitary drafter" who integrates multiple statutes into a "super-text."[216] While Buzbee's critique captured an important flaw inherent in whole code reasoning, I want to suggest that the logical and theoretical problems with whole code analogies extend beyond the one-Congress fiction. It is not merely the assumption that Congress acts as a unitary, consistent drafter across time that is flawed; it is also the assumption that Congress has one consistent way of achieving a given result or policy consequence. As noted earlier, even if the exact same legislators had served for every session of Congress from 1789 to the present, they likely would not have employed the exact same language to achieve the same policy result across statutes.[217] This is not just because different committees draft statutes dealing with different subject matters, but also because there is more than one way to convey *X* policy consequence and because it sometimes makes sense for a particular word or phrase to mean different things in different contexts. Consider, for example, the common statutory phrases "based on" and "because of," both of which appear throughout the U.S. Code. It may make eminent sense—and legislative drafters may intend—for these phrases to require a showing of but-for cause in, say, the tort context, where responsibility for a physical injury may be shared by the plaintiff and the defendant, but to require only a showing of contributory or motivating-factor causation in, say, the antidiscrimination context, where the injury and the wrong are typically more one-sided.

Further, Congress is a human institution that has finite resources and often works against deadlines to draft and enact legislation. It is unrealistic to expect legislators (or their staff) to run a comparison check on the entire U.S. Code every time they draft a new statute, let

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216 Buzbee, *supra* note 19, at 174.

217 *See supra* note 96 and accompanying text.

alone to contemplate how every new statute or amendment they enact intersects with other extant statutes.

Indeed, even if Congress were an ever-continuing body composed of a single set of drafters who crafted every statute themselves rather than delegating that task to staffers, changes in thinking and language use over time, experience with older statutes, and even simple failures of memory would combine to prevent individual statutes from following a stock drafting format—and would make it unlikely that common statutory phrases like "based on" are used to mean the exact same thing in every statute. To illustrate this, consider a relatable real-world example: Suppose I must travel out of town for work and ask my children's afterschool babysitter to make their dinner while I am gone. I tell the sitter that I want her to serve my children only "healthy items" and to avoid giving them "unhealthy items." Suppose that when I return, I learn that the babysitter served my children soda, Gatorade, and lemonade with dinner. I consider soda, Gatorade, and lemonade to be "unhealthy."

The next time I travel out of town for work, let's say I ask the sitter to pack my children's school lunches while I am gone. I again instruct her to give them only "healthy items" and to avoid "unhealthy items"—but this time I also specify that I consider "sugary drinks" to be "unhealthy items." Does the fact that I was explicit about banning sugary drinks in my second directive mean that I did not intend to ban them in the first? Or that the language of my initial directive cannot be interpreted to ban sugary drinks? Of course not. Or at least, not necessarily. My initial directive about "unhealthy items" (Statute *A*) certainly could, on its face, be considered broad enough to ban sugary drinks, even if it does not explicitly mention drinks, or sugary drinks, at all. And I in fact intended for my initial directive (Statute *A*) to ban sugary drinks, even though I did not specifically anticipate that the babysitter might serve my kids sugary drinks at the time when I issued the directive. Just because my second directive (Statute *B*) is exceptionally clear about banning sugary drinks does not mean that my initial directive (Statute *A*) did not also ban them. I simply worded my second directive (Statute *B*) more explicitly in an effort to be especially clear and to avoid a problem I had not anticipated when I issued the initial directive.

One problem, then, with cross-statute drafting presumptions is that they focus on a particularly clear expression of a policy consequence in one statute and extrapolate that the drafting approach used in that statute represents Congress's sole, established method for achieving that policy consequence. A second, related problem is that cross-statute drafting presumptions often decontextualize and isolate

individual statutory terms and give them an independent, generic meaning that transcends the individual statute of which they are a part (e.g., focusing on the isolated term "now" rather than on the full phrase "now under Federal jurisdiction").[218] The generic meaning and extrapolated drafting method are then applied across a disparate and diverse array of statutes to create a common-law-like definition or legal consequence *that has nothing to do with the substance of the individual statute*. This practice is in many ways the definition of form over substance, and contravenes the basic premise that statutes should be interpreted in light of their context.[219] Such decontextualization, moreover, may well explain why empirical studies have found that statutory decisions that rely heavily on the whole code rule are disproportionately likely to be overridden by Congress.[220]

Another problem is that the Court's current approach to whole code comparisons fails to distinguish between the consistent treatment of operative words or legal terms of art, on the one hand, and generic phrases on the other. It is one thing to construct a consistent meaning across the U.S. Code for operative words or legal terms of art such as "violent felony," "license," "stock," "knowingly," or "stay."[221] It is quite another to impose a uniform meaning on generic phrases that have little to do with the substantive policy of the statute, such as "respecting," "in relation to," "based upon," or "arising from."[222]

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[218] *See* Carcieri v. Salazar, 555 U.S. 379, 388 (2009).

[219] *See, e.g.*, Abramski v. United States, 573 U.S. 169, 179 (2014) (explaining that courts must "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose'" (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013))); Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 862 (2013) ("[A]ll leading modern theories of statutory interpretation acknowledge . . . that statutes must always be interpreted in context.").

[220] *See* Matthew Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1405–06 (2014) (reporting that while only 8% of Supreme Court statutory decisions rely on the whole code rule as a determining factor, decisions in which the Court relies on the whole code rule as a determining factor account for "just under a quarter" of Supreme Court overrides—a difference that is statistically significant at the 99% confidence level).

[221] *See* Johnson v. United States, 559 U.S. 133, 140 (2010) ("violent felony"); Chamber of Com. v. Whiting, 563 U.S. 582, 595 (2011) ("license"); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2071–73 (2018) ("stock"); Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009) ("knowingly"); Nken v. Holder, 556 U.S. 418, 442 (2009) (Alito, J., dissenting) ("stay").

[222] *See, e.g.*, Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1760 (2018) ("respecting"); Travelers Indem. Co. v. Bailey, 557 U.S. 137, 148 (2009) ("in relation to" and "based upon"); Jennings v. Rodriguez, 138 S. Ct. 830, 840 (2018) (plurality opinion) ("capacious phrases" such as "arising from"). By "generic" I mean terms or phrases that have no specific, individual meaning and that are used to describe a general or vague group or class, rather than some specific thing. *See Generic*, MERRIAM-WEBSTER, https://

Operative words and legal terms of art are connected to the statute's underlying subject matter and policy prescriptions and tend to appear in statutes that share a subject-matter connection; generic phrases, by contrast, tend to bear no connection to a statute's subject matter or policy objectives and often occur across disparate statutes that have little in common with each other. Thus, ensuring or imposing cross-statute consistency for operative words or legal terms of art may be defensible in at least some circumstances, whereas imposing cross-statute consistency for generic phrases rarely makes sense. And yet, a number of the Justices' whole code comparisons during the past twelve-and-a-half Terms have involved generic phrases rather than operative words or terms of art.[223]

This is particularly problematic because generic phrases do not have an inherent, singular meaning and almost necessarily depend on statutory context to define their import and scope. Thus, detaching such phrases from their larger statutory context and imposing a universal, one-size-fits-all meaning on them is especially illogical. Indeed, a one-size-fits-all meaning may not even be realistically attainable with respect to generic phrases: ironically, despite its rhetoric about the value of whole code consistency, the Court itself has been inconsistent in its efforts to assign uniform meanings and policy consequences to particular drafting choices. That is, it has ascribed one meaning to a generic phrase in one case—cross-referencing other statutes to establish a drafting convention—only to turn around in a later case and ascribe a different meaning to the same generic phrase, cross-referencing different analogue statutes for support. Recall, for example, that in *Burrage v. United States*, the Court interpreted the phrase "results from" to require "but-for" causation, citing precedents that interpreted similar phrases in other statutes to support the proposition that this was the meaning "regularly" given to such phrases.[224] Two years earlier, by contrast, the Court had construed the similar phrase "as the result of" to have a very different meaning in a dif-

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www.merriam-webster.com/dictionary/generic (last visited Nov. 10, 2020) (defining "generic" to mean "relating to or characteristic of a whole group or class; general").

223 *See* Burrage v. United States, 571 U.S. 204, 212 (2014) ("results from"); United States v. Ressam, 553 U.S. 272, 275–77 (2008) ("in relation to"); Mellouli v. Lynch, 135 S. Ct. 1980, 1992 (2015) (Thomas, J., dissenting) ("relating to"); *Carcieri*, 555 U.S. at 388 ("now"); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 182–83 (2009) (Stevens, J., dissenting) ("because of"); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 253 (2011) ("categorical . . . language" such as "all" and "declarative language" such as "shall"); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350, 376–80 (2013) (majority opinion; Ginsburg, J., dissenting) ("because of"); *see also* sources cited *supra* note 222.

224 *See supra* text accompanying notes 9–15.

ferent case, *Pacific Operators Offshore, LLP v. Valladolid*.[225] *Pacific Operators* involved a provision of the Outer Continental Shelf Lands Act, which extends the federal workers' compensation scheme to injuries "occurring as the result of operations conducted on the outer Continental Shelf."[226] Unlike in *Burrage*, the Court in *Pacific Operators* held that the phrase "as the result of" did not require "but for" causation, instead adopting a "substantial-nexus" test for determining whether the injury at issue was caused by an employer's outer continental shelf operations.[227] In so doing, the Court claimed that its construction "is consistent with our past treatment of similar language in other contexts"—and cited one of the same statutes (and precedent cases) invoked by the *Burrage* majority for support![228] The Court's inconsistent readings of the "results from" phrases in these two statutes stand in sharp contrast to the picture of uniformity it painted in *Burrage*, and suggests that there is no single, universally applicable way to read such generic phrases. Nor are *Burrage* and *Pacific Operators* the only cases in which the Court has flip-flopped on the meaning of a statutory phrase or, for that matter, the relative similarity of two statutes.[229]

Even if we set aside generic phrases and focus on operative words and legal terms of art, the Court's whole code comparisons present other significant problems. Most notably, whole code comparisons make little logical sense if the statutes at issue deal with wildly different subject matters. Congress may wish to require different levels of culpability or knowledge, or to establish different thresholds for damages or causation, in the context of criminal laws as compared to the context of tort, employment, business, or environmental laws. Accordingly, a term of art such as "knowingly" or "projected" or "tangible object" may mean something different in statutes dealing

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225 565 U.S. 207 (2012).

226 43 U.S.C. § 1333(b).

227 *See Pac. Operators*, 565 U.S. at 221–22.

228 *Compare id.* at 221 (noting that in Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258 (1992), "we rejected a 'but for' interpretation" of similar "by reason of" language in civil RICO on the ground that "such a construction was 'hardly compelled' and that it was highly unlikely that Congress intended to allow all factually injured plaintiffs to recover" (quoting *Holmes*, 503 U.S. at 265–66)), *with Burrage*, 571 U.S. at 212–13 (construing "results from" language in the Controlled Substances Act to require "but-for" causation, citing several cases including *Holmes*, 503 U.S. at 265–68).

229 *See, e.g.*, Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 291–94 (2012) (chronicling the Court's varying, inconsistent interpretations of the term "actual damages" across different statutes). *Compare* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 162–63 (2010) (applying Title VII precedent to the Copyright Act), *with* Fogerty v. Fantasy, Inc., 510 U.S. 517, 522–25 (1994) (attributing different meanings to "virtually identical language" in the Copyright Act and Title VII).

with each of these subject areas. And yet, as the data reported in Section II.B.2 revealed, nearly one-third of the statutory opinions that invoked the whole code rule made comparisons to one or more statutes that dealt with wholly unrelated subjects.

Moreover, even when two statutes do deal with similar subjects, it does not necessarily make sense to construe similar words or phrases in those statutes to mean the same thing. Recent work by Ryan Doerfler has shown that, as a matter of linguistics, it often makes sense to treat the same word as having different meanings *even within the same statute*.[230] Ordinary speakers often speak and write this way, intending for the same words to convey different meanings to different audiences.[231] The question, in each case, is whether differential versus similar treatment fits Congress's design. What we need, then, are carefully laid out criteria for distinguishing situations in which the same word should have the same meaning across different statutes from situations in which it should have different meanings. The Court, unfortunately, has offered virtually no guidance on this front. Instead, it has lurched wildly from case to case, making ad hoc analogies and distinctions without articulating any consistent criteria by which to evaluate whether specific terms in two or more statutes should be construed similarly or dissimilarly.[232] To address some of the problems with the Court's current use of whole code comparisons, Section B below suggests certain threshold conditions that should be present before courts should treat two statutes as appropriate analogues to one another.

2. Institutional Competence

Another problem with cross-statute drafting presumptions is that even if a single, universal set of drafting rules were an attainable interpretive goal, there are serious institutional competence problems with a system in which that set of rules is articulated by the judiciary rather than the legislature. Judges, of course, are not the ones responsible for drafting statutes—so they cannot know which drafting rules, formulas, or conventions members of Congress or their staff actually follow. Instead, they are merely guessing, based on their own observations

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230 *See generally* Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213 (2019).

231 *See id.* at 218 ("[S]peakers can and often do transparently communicate different things to different audiences with the same verbalization or written text."). I remain agnostic as to whether Doerfler is correct that the same statute can mean different things in different contexts; my point is merely that it is context, rather than language alone, that should determine whether two statutes should be construed consistently with each other.

232 *See, e.g.*, discussion *supra* Section II.D.

and intuitions, that because Congress used *X* phrasing or format to convey *A* meaning in one statute, *X* is the phrasing or format that it uses *whenever it intends* to convey *A* meaning.

Even if we abandon the fiction that courts employing whole code comparisons are seeking to capture Congress's actual intent or drafting practices and adopt instead the more realistic view that they use whole code comparisons to impose consistency on Congress from above, there are still two problems with judicially crafted drafting conventions. The first is that judges are not linguists and have no special expertise in this area.[233] This matters because if judges possessed some special expertise about sentence structure or word meanings it might make sense to let them establish default drafting rules and hold Congress to those rules—even if those rules do not reflect Congress's actual drafting practices—on the theory that there are some metalinguistic norms that are worth preserving even if Congress does not typically follow them. This is, essentially, the defense offered for the Court's use of the so-called substantive canons of construction.[234] In contrast to the drafting presumptions described in this Article, substantive canons derive from the Constitution, common-law practices, or other background legal norms.[235] As with drafting presumptions, empirical evidence suggests that Congress pays little attention to the substantive canons when it drafts statutes.[236] Despite this, commentators have defended substantive canons on the ground that they reflect judicial efforts to protect important constitutional principles or background norms embedded in our legal system.[237] Given the judiciary's

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[233] *Cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 183 (2006) (arguing that judges lack the institutional competence to do more than "stick close to [the] surface or apparent meaning" of statutory text and advocating that most interpretive tools, including "holistic textual comparison" to the provisions of other statutes, be "excluded from the judicial kit-bag").

[234] *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005) (explaining that substantive canons "are not predicated on what the words of a statute should be presumed to mean" but rather reflect "judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies"); Krishnakumar, *Dueling Canons*, *supra* note 62, at 934 (noting that "substantive canons are policy-based").

[235] *See* ESKRIDGE ET AL., *supra* note 2, at 649 (describing how "the Constitution, federal statutes, and the common law" drive formulation of substantive canons); Krishnakumar, *Reconsidering*, *supra* note 62, at 833 (describing substantive canons as "norms derived from the Constitution, common-law practices, or policies").

[236] *See* Gluck & Bressman, *supra* note 44, at 941–48 (observing that congressional staffers responsible for drafting statutes have little familiarity with clear statement rules, the rule of lenity, or the avoidance canon, and misunderstand federalism canons).

[237] *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 176–77 (2010) ("It would be a rigid approach to statutory interpretation that denied the ability of federal courts to guard against the inadvertent congressional exercise of extraordinary constitutional powers."); Andrew C. Spiropulous, *Making Laws Moral: A*

special expertise and role in safeguarding constitutional, common law, and legal policy norms, there is some logic to allowing the Court to establish default presumptions based on such norms and to interpret statutes in light of them. By contrast, there is no similar reason to privilege or defer to the judiciary's intuitions about word meanings or drafting formats. Indeed, judicially articulated presumptions about drafting choices may be random and unpredictable because there is nothing comparable to the Constitution or the common law to guide the inferences judges may draw from Congress's decision to use particular words or drafting formats.

All of this leads, in the end, to an interpretive tool that is highly unpredictable in application.[238] Neither litigants, practicing lawyers, nor Congress can predict which specific statutes the Court will deem analogous, which statutory analogues it will dismiss as somehow inapposite, or what precise drafting conventions it will extrapolate from a series of arguably similar statutes. Litigants can, of course, seek to push the Court to analogize to certain statutes rather than others, but as Section II.D explained, the Justices regularly split over which statutory analogies they find compelling—with majority or plurality and dissenting opinions making competing whole code comparisons.

A second problem with judicially imposed drafting conventions is that Congress does not closely parse the Court's decisions and adopt as its own the drafting rules that the Court articulates. Indeed, there is no evidence that Congress pays attention to, let alone incorporates into its drafting practices, judicially articulated presumptions about the meaning of common phrases or the policy consequences of particular drafting choices—and there is some evidence that it does not.[239] Thus, a judicially imposed external coherence runs the very real risk of clashing with Congress's actual intent in at least some cases—a risk that is borne out by empirical evidence indicating that Congress is dis-

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Defense of Substantive Canons of Construction, 2001 UTAH L. REV. 915, 958 ("Explicit reliance on these background understandings, as expressed by the adoption of substantive canons of construction, not only helps resolve difficult cases, but it also has the salutary effect of educating the citizenry in our fundamental principles of law."); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Quasi-Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) (describing "canons of statutory construction" as a "way to articulate and protect underenforced constitutional norms").

238 *See* Buzbee, *supra* note 19, at 236–40, 243–44 (making similar points).

239 *See* Gluck & Bressman, *supra* note 44, at 936 (noting that congressional staffers "vigorously dispute[ ]" that the whole code rule reflects how Congress drafts "or even how it *tries* to draft" and that only 9% of staffers intend for terms to apply consistently across statutes unrelated in subject matter).

proportionately likely to override statutory decisions that rely heavily on the whole code rule.[240]

Some might wonder what is so bad about letting judges create a common law of statutory drafting conventions and word meanings. After all, our legal system is, at bottom, a common-law system, and judges have long been in charge of establishing common-law definitions for legal concepts such as "fraud," "negligence," and the like. Indeed, *Black's Law Dictionary* derives many of its definitions from caselaw.[241] This is a counterargument that is more appealing at first blush than upon closer inspection. The problem with letting judges dictate one-size-fits-all definitions for terms used in *statutes*—as opposed to letting them establish definitions for legal concepts like "fraud" that courts themselves created through the incremental law-making process that is the common law—is that judges are not the drafters, or originators, of statutory words and phrases. *Congress* is. And Congress, unlike common-law judges, enacts individual statutes to address specific social problems; it does not engage in incremental rulemaking or carefully seek to harmonize new statutes with older ones already on the books. Moreover, Congress's drafting choices are political—often taken from proposals provided by interest groups[242]—and are influenced by the need for political compromise and coalition building. So when judges insist, without any legislative-record support, that two statutes enacted under different political conditions should be presumed to use specific words and phrases consistently, they are not being "faithful agents" of the legislatures that drafted those statutes. Rather, they are imposing the distinctly judicial goals of coherence, elegance, and logical consistency onto a political product that is messy, chaotic, and full of often-contradictory compromises.

Notably, judges who externally impose coherence across disparate statutes are behaving inconsistently with textualists' own repeated exhortations that each statute's text is the product of a finely

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240 *See* Christiansen & Eskridge, *supra* note 220, at 1406 (reporting that while only 8% of Supreme Court statutory decisions rely on the whole code rule as a determining factor, decisions in which the Court relies on the whole code rule as a determining factor account for "just under a quarter" of Supreme Court overrides).

241 *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 303–10 (1998) (discussing the development of American legal dictionaries from the mid-nineteenth century to the present).

242 *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 24 (2d ed. 2013) ("Many bills that result in major legislation are proposed by the executive branch or significant interest groups."); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 106 (2015) (explaining that draft legislation often originates with private authors, including "interest groups, industry, academics, individual policy experts").

wrought political compromise: Textualists often emphasize this point in arguing that interpreters should attend carefully to each statute's precise wording rather than its overall purpose, on the theory that the statute's final words are the result of political bargains and reflect "a decision to go so far and no farther."[243] But if this is so—if the precise wording of each statute reflects a delicate political compromise following a messy "legislative battle among interest groups, Congress, and the President"[244]—then that suggests not only that interpreters should "hew closely to the semantic meaning"[245] of the enacted text, but also that the bar should be very high for gauging similarity between different statutes enacted after different legislative battles producing different political compromises.[246]

Finally, there are reasons independent of judicial competence or "faithful agency" concerns for questioning the tenability of a judicially forged common law of drafting presumptions. Specifically, the way that statutes are codified in the U.S. Code can make it difficult for judges—or anyone else—to obtain a clear picture of how different statutes enacted at different times relate to each other. As recent work by Jesse Cross, Abbe Gluck, and Jarrod Shobe explains, most laws enacted by Congress are broken up and codified at various locations throughout the U.S. Code by lawyers who work in the nonpartisan Office of the Law Revision Counsel (OLRC), rather than by congressional members or their staff.[247] OLRC makes decisions about how to split up different sections of a public law, placing some provisions in one section of the U.S. Code and other provisions in other sections, leaving some parts of the enacted text *out of the Code altogether*, and relegating some enacted text to the notes that accompany the codified sections of the statute.[248] Moreover, OLRC codifies some statutes in "nonpositive law" titles that are not themselves the law, but

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[243] E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment); *see also, e.g.*, John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2029 (2006) (quoting *E. Associated Coal Corp.*, 531 U.S. at 68–69 (Scalia, J., concurring in the judgment)).

[244] Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002) (Thomas, J.).

[245] Manning, *supra* note 243, at 2029.

[246] At least one textualist scholar seems to have recognized this. *See* John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 738 (2014) (arguing that the process of mutual, particularistic compromise that enables legislative action does not translate to "global normative coherence" and that when judges impose coherence across the law, they "unravel the very compromises that allowed Congress to act").

[247] Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1544–45 (2020) (describing role of OLRC); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640, 642–46 (2020) (same).

[248] *See* Cross & Gluck, *supra* note 247, at 1553 (noting "OLRC's work to edit and significantly rearrange the words passed and the organization in which they originally

merely collections of statutory material, or even restatements of the law, arranged by OLRC.[249] Thus, if and when the Court draws comparisons between different parts of the U.S. Code rather than referencing the Statutes at Large (which contain the original versions of statutes enacted by Congress),[250] it may (1) miss provisions enacted by Congress that OLRC has decided to leave out of the Code; (2) ignore clarifying provisions that have been relegated to the notes by OLRC; or even (3) focus on organizational or structural choices that were effectuated not by Congress but, rather, by OLRC.[251]

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In short, one significant problem with the Court's current approach to whole code comparisons is that the Court has essentially transformed an interpretive canon that is based on making sense out of legislative policy across similar subject areas into one that is based on linguistic consistency across the U.S. Code. That is, the Court has shifted the focus of the interpretive inquiry from similarities in statu-

appeared"); Shobe, *supra* note 247, at 643 ("OLRC can also decide to leave out enacted text from the Code altogether.").

249 Shobe, *supra* note 247, at 644.

250 Courts typically look to the U.S. Code rather than the Statutes at Large when interpreting statutes. *See* Shobe, *supra* note 247, at 659–60, 693 (providing evidence suggesting that judges "almost certainly" look to the Code rather than the Statutes at Large, even when the Statutes at Large are the actual law). One reason for this is that the Statutes at Large consist of a series of volumes of all the laws enacted during a single session of Congress, in chronological order of passage. The Statutes at Large do not update or synthesize existing statutes to reflect changes or amendments enacted in later statutes during later legislative sessions. As a result, the Statutes at Large can be unwieldy and difficult to make sense of. *See, e.g.*, Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 283, 284–85 (2007); Shobe, *supra* note 247, at 649–50. For example, when a law enacted by Congress amends an earlier statute by striking out certain words and replacing them with others, the new law as recorded in the Statutes at Large will simply say something like "Section 1467 of title 18, United States Code, is amended—(1) in subsection (a)(3), by inserting a period after 'of such offense' and striking all that follows." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 505, 120 Stat. 587, 629. In order to make sense of the amended version of the law, a judge employing the Statutes at Large would have to look up the original version of the statute in a different volume (containing the laws enacted in an earlier legislative session), cross-reference it with the above amended language, and imagine for themselves how the statute should read with the relevant language eliminated and updated as described in the later law. *See* Dorsey, *supra*, at 284–85. This is far more complicated than looking to the U.S. Code version of the statute, in which OLRC will have struck and replaced the relevant language to reflect the revisions enacted by the amendment. *See id.* (commenting that "[t]he Code carries out the amendments for us, ministerially (for the most part), giving us a single clean text" but in so doing "alter[s]" and "throw[s] away" "[m]any pieces" of the original law).

251 Indeed, for these reasons and others, Cross and Gluck second the Gluck-Bressman study's call for courts to abandon the whole code rule entirely and urge that methods of interpretation be resituated around subject matter areas. Cross & Gluck, *supra* note 247, at 1682.

tory subject matter to similarities between statutory words and phrases—so that the "same subject matter" rule embodied in the *in pari materia* doctrine is now a "same words or phrases" rule.

B. Some Recommendations

So where does this leave us? This Section turns from the descriptive and normative to the prescriptive, advocating that the Court abandon or limit many of the whole code comparisons it currently employs and offering a narrow path forward for a more constrained use of this interpretive tool. Recall that Section II.C identified five forms of whole code comparisons regularly employed by the Roberts Court: (1) modeled, borrowed, or incorporated statutes; (2) consistent usage; (3) meaningful variation; (4) superfluity; and (5) harmonization. In my view, whole code analogies make sense and are justified in only three of these situations: (1) when one statute is modeled after another, borrows from it, or incorporates its language by reference; (2) when harmonization of different, but related, statutes is necessary, and (3) when horizontal equity or other similar considerations demand that similar terms in statutes dealing with similar subjects be given a consistent meaning.

There are several reasons why limiting the use of whole code comparisons to the above forms makes sense. Let us begin by considering the different justifications that have been offered for construing one statute consistently with another. The most prominent justification the Court has offered rests on congressional intent—that Congress specifically intended for two statutes to be construed similarly, that Congress expects a particular word to be given the same meaning across similar statutes, or that Congress has established a fixed format for achieving a given policy and that deviations from that format reflect an intent to convey a different statutory meaning. We have also seen the Court, both explicitly and implicitly, justify whole code reasoning on the ground that the same term *should* mean the same thing across different statutes and that it is the Court's role to create coherence across the U.S. Code.[252] The Court has not tended to tie this latter, judicial-role justification to the *type of statute* at issue, rarely mentioning the subject matter of the statutes involved or the *in pari materia* rule when framing its whole code arguments in terms of a judicial responsibility to ensure consistency across the law. But relatedness of statutory subject matter is a factor that could play a role not

[252] This justification is exemplified by statements such as "courts ordinarily read the phrase at issue to mean *X*." *See, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009) (explaining how courts typically interpret "knowingly" in a statute).

only in intent-based but also in judicial-role-based justifications for whole code comparisons—on the theory that it is logical, or desirable, for the Court to ensure that the same word is given the same meaning across statutes that deal with similar subjects.

Of these two forms of justifications, the former is, in my view, more powerful. That is, whole code comparisons are most defensible, and most powerful, when there is evidence that Congress intended for the specific statutes at issue to be construed similarly. They are less justified—although still worthy of interpretive weight—when they involve statutes that deal with related subjects *and* there is some additional factor that supports allowing the Court to impose consistency on the relevant statutes, such as the need to treat like situations or entities alike (horizontal equity) or the need to honor important background legal norms. Finally, whole code comparisons are least justified—and therefore least powerful or worthy of interpretive weight—when based solely on the notion that it is the judiciary's prerogative to make sense of the corpus juris. For the reasons discussed in Section III.A, the judicial prerogative form of justification is highly problematic: it bears no connection to congressional intent or legislative process realities, it gives judges unfettered control over linguistic meaning and drafting norms—subjects regarding which judges have no special competence or expertise—and it presumes the possibility of assigning a single, consistent meaning to particular words or drafting choices that is belied by the Court's own caselaw. Further, as Bill Eskridge has pointed out, because the judicial-prerogative rationale is completely disconnected from legislative expectations and drafting practices, it poses significant democratic legitimacy problems.[253] Moreover, it does so without offering any countervailing equitable or judicial-competence reasons for sacrificing this legislative-process connection.[254] Thus, only those whole code comparisons that bear some connection to legislative drafting practices or expectations, or that involve

[253] *See* ESKRIDGE, INTERPRETING LAW, *supra* note 24, at 118, 126.

[254] Some may argue that there are administrative efficiency benefits to construing a particular word or phrase to have the same meaning across the U.S. Code. That is, they might suggest that such an approach reduces decision costs and judicial gamesmanship. *See* VERMEULE, *supra* note 233, at 192–96. While it is no doubt more efficient, in terms of time and judicial effort, to impose a one-size-fits-all meaning on particular words and phrases than to closely examine statutory context, I am skeptical that such an approach will in practice prove as efficient as its advocates expect. As discussed *supra* Section III.A.1, whether for ideological reasons or because different contexts often do call for different meanings, the Court itself has been inconsistent and unpredictable in its interpretation of the same words and phrases in different statutes. *See supra* notes 224–29 and accompanying text. Moreover, its current approach leaves judges far too much leeway to pick and choose cross-statute comparisons that suit their fancy—which has the effect of expanding rather than constraining the avenues for judicial gamesmanship.

related statutes *and* implicate some additional reason for imposing coherence across statutes should be part of the Court's statutory interpretation toolkit.

Let us consider how the above justifications map on to the five forms of whole code comparisons identified in Section II.C:

Modeled, Borrowed, and Incorporated Statutes. The modeled/borrowed/incorporated form of whole code comparison matches well with the above justifications because it is closely tied to legislative expectations and intent. In the case of modeled or borrowed statutes, Congress typically has indicated—either in the statute's text or in its legislative history—that it had the original, analogue statute in mind when it drafted the second, modeled or borrowed statute.[255] In other words, there is a direct relationship between the statutes subject to comparison—one that Congress itself has forged and highlighted—and reason therefore exists to believe that Congress intended, or at least anticipated, that similar words and phrases used in both statutes would be given the same meaning in both statutes. For this reason, judicial efforts to interpret a later-enacted statute consistently with an earlier statute that served as its model or whose language the later-enacted statute incorporated by reference are likely both to further congressional intent and to honor, rather than ignore, legislative process realities. In addition, it is worth noting that Congress typically models new statutes on existing statutes that deal with similar subjects, so employing whole code analogies in this context also seems likely to promote the like treatment of like situations and litigants.

Harmonization. The harmonization form of whole code comparison also measures well against the above justifications because it too involves statutes that Congress has linked together—either explicitly, through drafting triggers, or indirectly through statutory conflict. In the harmonization cases, the Court typically is dealing with (1) a fed-

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[255] *See, e.g.*, United States v. Ressam, 553 U.S. 272, 280 (2008) (Breyer, J., dissenting) (quoting House committee report in explaining that explosives statute at issue was modeled on the previously enacted Gun Control Act); Lorillard v. Pons, 434 U.S. 575, 580 (1978) (noting that the text of the ADEA provides that the statute should "be enforced in accordance with the 'powers, remedies, and *procedures*' of the FLSA" (quoting Age Discrimination in Employment Act (ADEA) of 1967 § 7(b), 29 U.S.C. § 626(b))); Corley v. United States, 556 U.S. 303, 319–20 (2009) (quoting statements from the Congressional Record to show that a federal criminal procedure provision was modeled on another statute Congress had enacted to address crime and criminal procedure in the District of Columbia); Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 724 (1989) (noting that the section of statute at issue (§ 1983) "was explicitly modeled on § 2 of the 1866 Act" and quoting statements from the Congressional Globe explaining that the 1866 Act served as the model for the provision at issue); Chrysler Corp. v. Brown, 441 U.S. 281, 298 (1979) (citing a House committee report in explaining that Congress "essentially borrowed the form of Rev. Stat. § 3167 and the Tariff Commission statute" in enacting the provision at issue).

eral statute that incorporates a state statute as a trigger or explicitly mentions another federal statute; or (2) two statutes that overlap in coverage and/or conflict with each other. In the former situation, whole code comparisons are likely to further legislative intent. This is because Congress itself deliberately has linked the two statutes together by using one as a trigger for the other or cross-referencing one in the other. In the latter, the second justification applies because there is both subject matter relatedness and additional reason to allow judicial imposition of coherence—i.e., cross-statute harmonization may be necessary to avoid substantive statutory conflict and ensure that two related statutory regimes interact with each other in a functional manner.

That said, courts should be sparing in their use of harmonization-based whole code comparisons. Specifically, they should carefully interrogate the relationship between the statutory schemes at issue and step in to harmonize only when one statute directly references the other or when there is a real conflict between the two statutes. Thus far, the Court appears to have been circumspect in its use of this form of whole code reasoning—employing harmonization in only nineteen opinions in the dataset.[256] It should continue in this constrained vein.

Consistent Usage. The role of the consistent usage form of whole code comparison is more complicated than that of the modeled/borrowed/incorporated or harmonization forms. Here, I am not able to offer either a blanket endorsement or a blanket rejection; some forms of consistent usage comparisons match up well with the justifications discussed above, while others do not. As in the context of modeled, borrowed, or incorporated statutes and harmonized statutes, the focus in assessing the validity of consistent usage comparisons should be on the relationship between the statutes at issue. Where the statutes at issue are wholly unrelated in subject matter—as they were in 31.5% of the opinions in the dataset that made cross-statute comparisons—the Court should not attempt to give terms used in both statutes a consistent meaning. But where the statutes at issue are *in pari materia*, a consistent usage construction may be appropriate, and the Court should determine whether other additional factors support a whole code comparison.

Specifically, the Court should consider whether the statutory term at issue in the case is a term of art that has, or should have, a specialized meaning within a particular field of law or, alternately, whether it is merely a generic word or phrase. For the reasons discussed above, consistent usage comparisons should apply only to

[256] *See supra* Table 5.

terms of art, and not to generic words or phrases.[257] The Court also should evaluate whether special circumstances exist that justify or necessitate the consistent treatment of the relevant statutory term across different statutes, even absent evidence that Congress specifically intended for the statutes to be construed consistently. Such circumstances should include situations where similarly situated groups otherwise would be treated differently, where a background legal norm would be violated, or where a procedural requirement would be unevenly applied. This is because where such situations exist, the *in pari materia* rule dovetails with fairness or horizontal equity (i.e., treating similarly situated entities alike) as well as with judicial expertise. Thus, in such situations there are strong rule of law reasons—not just a judicial power grab—that justify giving the statutes at issue a consistent meaning. Finally, when dealing with statutes that are *in pari materia*, courts should pay attention to the dates when the statutes were enacted and should treat contemporaneousness as a factor that weighs in favor of consistent treatment.

For an example of how the *in pari materia* rule combined with horizontal equity concerns can and should justify the consistent usage presumption, consider *Hillman v. Maretta*.[258] *Hillman* involved the Federal Employees' Group Life Insurance Act (FEGLIA), which permits employees to name a beneficiary for their life insurance proceeds, and directs that proceeds accrue to the named beneficiary.[259] The statutory question was whether FEGLIA preempted a state statute that revokes, upon divorce, a beneficiary designation that lists a former spouse. The Court concluded that FEGLIA does preempt the relevant state statute, relying in part on whole code analogies to its own prior interpretations of two other federal insurance statutes that conflicted with state laws directing different beneficiaries to be paid.[260] While the Court's opinion sounded in precedent and congressional intent regarding preemption,[261] in my view the whole code comparison was justified primarily on horizontal equity grounds. That is, if the government had failed to construe FEGLIA to preempt the relevant state law, similarly situated named beneficiaries in different states would have been treated differently from one another. That is in tension with the generality principle, which dictates that a nation's

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257 *See* discussion *supra* Section III.A.

258 569 U.S. 483 (2013).

259 5 U.S.C. § 8705(a).

260 *See Hillman*, 569 U.S. at 492–93.

261 *See id.* at 491, 495.

civil and criminal laws should be applied equally to all of its citizens.[262]

Another common scenario in which consistent usage analogies are justified is one in which the Court construes a series of statutes a particular way in order to protect a background policy or constitutional norm that implicates the judiciary's expertise. This typically occurs when the Court creates an exception not clearly contained in the statutes' text, and references other statutes and precedents interpreting those statutes to support the exception. In such cases, it is the background norm rather than text-to-text comparisons or inferences about drafting conventions that is doing the work; and the whole code comparison serves merely to demonstrate that the Court has relied on the same background norm in the past when construing similarly worded statutes. Consider two examples. In *Sebelius v. Auburn Regional Medical Center*, the Court concluded that a 180-day limit on healthcare providers' ability to appeal Medicare reimbursement determinations was not jurisdictional, invoking a background norm that procedural rules should be deemed "jurisdictional" only when Congress has "clearly" labeled them as such.[263] As support for this construction, the Court noted that, "we have repeatedly held that filing deadlines ordinarily are not jurisdictional" and cited several cases construing filing deadlines in other statutes.[264] Similarly, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, Justice Breyer's dissenting opinion advocated reading a laches defense into the Copyright Act's statute of limitations.[265] The opinion noted that "[t]his Court has read laches into statutes of limitations otherwise silent on the topic of equitable doctrines in a multitude of contexts" and "[u]nless Congress indicates otherwise, courts normally assume that equitable rules continue to operate alongside limitations periods."[266]

In both of these opinions, the key to the Court's (or dissent's) construction was a background norm favoring the recognition of equitable or other policy exceptions to time limits, not a text-to-text comparison of the wording of multiple statutes or the assertion of a drafting norm. Indeed, the cross-statute analogies in these cases served merely as precedential support for construing the statute at issue in light of the background norm. Further, the presumptions

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[262] *See, e.g.*, F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153–54 (1960) (noting that, to avoid arbitrariness, laws must be "general rules that apply equally to everybody" and must not "single out any specific persons or group of persons").

[263] 568 U.S. 145, 153 (2013).

[264] *Id.* at 154.

[265] 572 U.S. 663, 688–89 (2014) (Breyer, J., dissenting).

[266] *Id.* at 694–95.

applied by the Court in these cases—filing deadlines are nonjurisdictional and statutes of limitations should be read to allow laches defenses—were based on substantive policies, rather than linguistic inferences.[267] Moreover, the policies underlying the presumptions were quintessentially legal in nature—involving matters of jurisdiction or litigation procedure—and thus fell squarely within the Court's institutional expertise. Finally, allowing courts to impose policy-based drafting norms for procedural legal issues such as these is defensible because it promotes the like treatment of like situations across cases.

Meaningful variation. The meaningful variation form of cross-statute comparison, by contrast, does not match up well with the underlying justifications for cross-statute comparisons discussed above for several reasons. First, as noted earlier, although meaningful variation arguments gesture at congressional intent, they lack any actual connection to legislative drafting practices and ignore numerous legislative process realities. Meaningful variation comparisons assume, for example, that different legislators on different committees, acting perhaps decades apart, would not use different phrasing or statutory structures to convey the same meaning or policy. Second, except in those few cases where they are applied to a statute that was modeled after another statute—and may therefore be justified—meaningful variation analogies consist almost entirely of the judicial extrapolation and invention of a drafting norm. As noted earlier,[268] this form of whole code comparison amounts, in the end, to the Court declaring that there is one established way to effectuate *X* policy—and proclaiming alternative phrasing inadequate to convey *X*—in the name of consistency and coherence. Such an approach is arbitrary and depends on questionable assumptions that (1) Congress will adapt its drafting practices to follow the Court's prescribed conventions; or that (2) achieving coherence in how specific words and phrases are used throughout the U.S. Code should trump Congress's specific intent or design for each individual statute.

As noted earlier, other commentators have been critical of the meaningful variation form of whole code argument as well, for varying reasons. Bill Eskridge, for example, has faulted the use of meaningful variation comparisons *across* statutes on the ground that it generates democratic accountability problems. Specifically, he notes that congressional drafters are oblivious to the canon, that state legislatures' codified canons of construction ignore the concept of meaningful vari-

[267] *See supra* notes 233–37 and accompanying text (arguing that substantive canons involving legal norms align better with judicial expertise, and are more justified, than are drafting rules based on judicial assumptions about linguistic meaning).

[268] *See supra* Section II.C.3 and text accompanying notes 217–20.

ation across disparate statutes, that legislative drafting manuals endorse the meaningful variation rule at the whole act level but not at the U.S. Code level, and that it is unrealistic to assume that different legislative committees drafting different statutes at different times use specific phrases in a consistent manner.[269] Bill Buzbee similarly has argued that linguistic differences, even between related statutes enacted at different points in time, "should not necessarily be interpreted to require a different interpretation of statutory meaning" because changes in the political landscape, often wrought by other institutional actors such as administrative agencies, may cause even the same legislative drafters to use different words in subsequent statutes without intending a different substantive meaning.[270] And Abbe Gluck and Lisa Schultz Bressman have argued that the whole code rule writ large is inconsistent with the "realm of realistic legislative possibility," "shapes the U.S. Code in ways that Congress never would or could," and should be abandoned in its entirety.[271] This Article endorses and expands on these earlier recommendations (although it does not go as far as Gluck and Bressman would) with the observation that meaningful variation inferences do not make sense even within the same legislative session because neither members of Congress nor the legislative staffers responsible for statutory drafting have a uniform, one-size-fits-all formula for effectuating specific policy choices. Thus, as elaborated in Section III.A, slight variations in wording, even by the same drafter, do not necessarily reflect meaningful policy differences. Accordingly, the Court should abandon the practice of making meaningful variation comparisons across different statutes, except possibly in those situations where Congress has indicated that it used one statute as the model for another and inferences about the meaning of textual variations between two statutes are therefore supported by evidence of legislative practice.

Superfluity. Like meaningful variation comparisons, superfluity arguments match poorly with the above justifications for the whole code rule—and similarly should be abandoned. Specifically, the superfluity rule assumes that legislators serving on different committees and acting at different points in time are aware of all prior statutes that might touch on topics related to the one at hand—and then further assumes that legislators make a deliberate, thorough effort to streamline their wording to avoid overlapping coverage across statutes. It does not take a deep understanding of the legislative process to recog-

269 *See* ESKRIDGE, INTERPRETING LAW, *supra* note 24, at 126.

270 Buzbee, *supra* note 19, at 210.

271 *See* Gluck & Bressman, *supra* note 44, at 963–64.

nize that efficient drafting is unlikely to be at the top of legislators' priorities during the often harried scramble to enact a new law. In fact, there is empirical evidence, based on interviews with legislative staffers, demonstrating that this assumption of efficient, parsimonious drafting is false even with respect to different provisions of the same statute—let alone across different statutes enacted by different committees, in different Congresses, at different points in time. This evidence suggests that even if it were realistic to assume that legislators are aware of all other relevant, related statutes when drafting a new statute, they would not try to avoid superfluity because there are political incentives to "intentionally err on the side of redundancy to 'capture the universe,' or 'because you just want to be sure you hit it,'" or because "that senator, that constituent, that lobbyist wants to see that word."[272]

Recall the *Bostock* litigation discussed at the outset of this Article. There, the government made—and Justice Kavanaugh found compelling—what is essentially a superfluity comparison, arguing that Congress's explicit use of the term "sexual orientation" alongside "sex" in later-enacted statutes demonstrates that the term "sex" in Title VII does not include sexual orientation-based discrimination.[273] This real-world case mirrors, in many ways, the "sugary drinks" hypothetical discussed above. As in the "sugary drinks" example, the mere fact that later-acting Congresses sought to "capture the universe" or "just be sure" to erase any doubt that the later-enacted statutes prohibited sexual orientation discrimination ("sugary drinks") should not be taken as conclusive evidence that the earlier statute, Title VII, did not also prohibit such discrimination under the term "sex" ("unhealthy items").[274]

In a recent article, James Brudney and Ethan Leib argued that courts should recognize an important countercanon to the rule against

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[272] *See id.* at 934 (quoting questionnaire responses).

[273] *See supra* notes 3–8 and accompanying text; Bostock v. Clayton County, 140 S. Ct. 1731, 1829 (2020) (Kavanaugh, J., dissenting).

[274] Nor does the fact that Congress does not return to the first statute and amend it to similarly "capture the universe" or "be sure" mean that Congress does not intend for that statute to mean the same thing as the later-enacted statute. Legislators are extraordinarily busy and likely do not see a need either to ensure linguistic consistency or to expend energy revising a statute that, in their view, already accomplishes the policy goal they intended. *Cf.* Widiss, *supra* note 46, at 931–32 (noting that "Congress must juggle many competing priorities" and arguing that statutory interpretation rules and doctrines "should be cognizant of the institutional realities of Congress," and that "[i]t makes no sense to infer purpose to congressional inaction when the expected action would be prohibitively difficult").

superfluities—what they call the "belt-and-suspenders canon."[275] The belt-and-suspenders canon recognizes the legislative process reality that members of Congress often deliberately enact statutory provisions that are redundant, out of an abundance of caution or in order to build consensus—and urges courts to limit their use of the superfluities canon accordingly.[276] The legislative process realities that support a belt-and-suspenders approach are equally applicable, if not more so, to whole code comparisons. In fact, some of the classic examples of belt-and-suspenders legislative behavior described by Brudney and Leib involved efforts to ensure that a newly enacted statute did not abrogate a policy established in an earlier statute, or conflict with some aspect of an existing statutory scheme.[277]

Given its inconsistency with legislative process realities, the only realistic justification for the superfluity form of whole code comparison is a jurisprudential philosophy that it is the Court's job to ensure that the U.S. Code is not repetitive or redundant. But it is hard to envision where judicial authority to streamline the Code to eliminate redundancies would stem from. Indeed, such a power of judicial dispensation is notably at odds with whole code-favoring textualist Justices' emphasis on employing interpretive tools that constrain, rather than enlarge, judicial discretion.[278]

The upshot of these recommendations is that the Court should significantly rethink the manner in which it employs whole code comparisons. Rather than reject analogies between modeled, borrowed, or incorporated statutes,[279] the Court should recognize that this is pre-

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[275] Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735 (2020).

[276] *See id.* at 741–43, 767–69.

[277] *See id.* at 744–45 (explaining that in order to "bring at least one colleague on board," Congress consciously adopted a clarifying amendment as a "re-emphasis" that the Victims of Trafficking and Violence Protection Act did not conflict with the Internet Tax Freedom Act, and highlighting a similar approach taken with respect to the National Environmental Policy Act in another proposed bill).

[278] *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26 (2006) (describing how textualists saw their approach as means of constraining judges); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 79 (2000) (concluding that textualism minimizes costs of judicial decisionmaking and legal uncertainty); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 376–77, 398 (2005) (arguing that "textualism can be seen as a more rule-based method of ascertaining what the enacting legislature probably meant" and that "part of what drives textualists toward rules in the first place is their skepticism about judges' abilities to apply an underlying justification consistently from case to case"); *see also* Gluck & Bressman, *supra* note 44, at 963–64 (arguing that interpretive approaches that depend on judicially imposed coordination or coherence are "activ[ist]" in nature and that "[a]n interpretive theory that shapes the U.S. Code in ways that Congress never would or could is not a theory based on a cabined conception of the judicial role").

[279] *See supra* notes 133–34 and accompanying text.

cisely the category of statutes with respect to which presumptions of coherence and consistency make the most sense. Perhaps more importantly, the Court should be far more sparing in presuming that Congress uses words or phrases consistently across different statutes. Rather, it should closely evaluate whether statutes offered for comparison address like situations and whether there are judicial competence or horizontal equity reasons to construe them similarly. Moreover, it should reject comparisons between statutes that deal with entirely different subjects or that involve generic phrases. Finally, the Court should abandon the meaningful variation and superfluity forms of whole code comparison altogether. All of these recommendations depend on statutory context and return us to the *in pari materia* and whole code rules' origins—i.e., a focus on the similarity of the statutes offered for comparison, not just the (decontextualized) words they contain.

The above recommendations could be operationalized through a sort of whole code rule "step zero" or threshold inquiry similar to the one the Court has established in the administrative law *Chevron* deference context.[280] That is, before drawing an analogy or other comparison between different statutes, the Court could first engage in a threshold determination of whether the statutes being compared are good analogues, worthy of comparison. Specifically, it could ask whether (1) the statute at issue is modeled after, or borrowed from, the comparator statute or incorporates it by reference, (2) whether the statutes conflict in a manner that requires judicial harmonization, and (3) whether the two statutes deal with similar subjects *and* judicial competence or horizontal equity reasons support construing them consistently with each other. With respect to statutes that are *in pari materia*, courts should also pay attention to the dates when the statutes were enacted and should treat contemporaneousness as a factor that weighs in favor of consistent treatment. If one or more of the above conditions are met, then the Court may proceed to analogize and construe the statutes consistently with each other. If none of these

[280] In *United States v. Mead Corp.*, the Supreme Court held that administrative agency interpretations of statutory provisions qualify for *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226–27 (2001). This threshold requirement that an agency be authorized to make rules carrying "the force of law" and that the interpretation at issue be promulgated under that authority has come to be known as "*Chevron* Step Zero." *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). I thank Neel Sukhatme for suggesting the *Chevron*/*Mead* analogy.

criteria is met, then—as with the *Chevron* step zero inquiry—the presumption of consistent usage should not apply.

If these recommended threshold limitations on the use of the whole code rule prove too radical for the Court, an alternate solution may be to treat whole code comparisons as operating along a continuum from more to less powerful, somewhat like a lightbulb with a dimmer switch.[281] Under such an approach, whole code comparisons could be treated as more justified, and therefore more entitled to interpretive weight, when certain circumstances are present. Conversely, whole code comparisons could be treated as less justified, and therefore less deserving of interpretive influence, when those circumstances are not present. Specifically, whole code comparisons could be treated as more strongly justified the closer the subject-matter relationship between two statutes, the closer their dates of enactment, and the more similar the language being compared. The "closer" statutes are in these respects, the more sense it makes to presume that Congress thought about them together or intended for them to be similarly construed, and the more valuable it is to ensure that they are interpreted consistently with each other. This continuum approach is, in my view, less ideal than the narrow use of whole code comparisons recommended above, because it leaves significant discretion in judges' hands and is too loose to confine courts to those forms of whole code comparisons that are most justified. Nevertheless, this second-best approach would be an improvement over the Court's current unbridled use of whole code comparisons. In particular, it would have the virtue of establishing clear criteria by which to evaluate which of several competing statutes is the best analogue to the statute at issue in a given case.

Conclusion

This Article has sought to shine a light on the Court's use of the whole code rule as a tool of statutory interpretation. Throughout, its aim has been to illuminate an understudied and undertheorized, but prevalent, statutory interpretation tool and to inspire deeper reflection about its appropriate scope and application. The Article has shown that the Court's current approach to whole code comparisons is undisciplined, unpredictable, and often misguided. And it has suggested that this approach amounts, in effect, to the articulation of a judicial common law of drafting conventions. The Article also has highlighted several legislative process and institutional competence problems that plague the Court's current use of whole code compari-

[281] I thank Aaron-Andrew Bruhl for this suggestion.

sons. In the end, it advocates that the Court retreat from its loose, standardless use of whole code comparisons and presumptions and instead confine its use of such comparisons to a limited set of circumstances: where Congress has explicitly indicated that two statutes share a drafting connection, where the Court must step in to harmonize two statutes, or where other background legal norms justify the judicial imposition of coherence.

APPENDIX I

The Roberts Court's Use of Whole Code Comparisons 2005–2017 Terms

Case Name	**Form of Comparison / Level of Reliance**	**Opinion**	**Related Subject**	**Contemp.**
Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)	Meaningful Variation / Some Reliance	Majority	Yes	No
Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)	Meaningful Variation / Heavy or Primary Reliance	Concurrence	Yes	No
Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)	Consistent Usage / Some Reliance	Dissent (Souter)	Yes	No
Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)	Consistent Usage / Minimal Reliance	Majority	No	Yes
Ebay Inc. v. Mercexchange, L.L.C., 547 U.S. 388 (2006)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	Consistent Usage / Some Reliance	Majority	Yes	No
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	Consistent Usage / Some Reliance	Concurrence (Kennedy)	No	No
Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006)	Inconclusive / Minimal Reliance	Majority	No	Yes
Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006)	Consistent Usage / Some Reliance	Dissent	No	Yes
Kircher v. Putnam Funds Tr., 547 U.S. 633 (2006)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
Lance v. Dennis, 546 U.S. 459 (2006)	Harmonization / Minimal Reliance	Majority	No	No
Lopez v. Gonzales, 549 U.S. 47 (2006)	Modeled, Borrowed, or Incorporated / Some Reliance	Majority	No	No
Lopez v. Gonzales, 549 U.S. 47 (2006)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent	No	No
Rapanos v. United States, 547 U.S. 715 (2006)	Modeled, Borrowed, or Incorporated / Some Reliance	Plurality	Yes	No
Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006)	Modeled, Borrowed, or Incorporated / Some Reliance	Majority	Yes	No
EC Term of Years Tr. v. United States, 550 U.S. 429 (2007)	Harmonization / Some Reliance	Majority	No	No
Glob. Crossing Telecomm. v. Metrophones Telecomm., 550 U.S. 45 (2007)	Modeled, Borrowed, or Incorporated / Some Reliance	Majority	Yes	No
Glob. Crossing Telecomm. v. Metrophones Telecomm., 550 U.S. 45 (2007)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent (Thomas)	Yes	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)	Harmonization / Minimal Reliance	Majority	Yes	No
James v. United States, 550 U.S. 192 (2007)	Consistent Usage / Some Reliance	Majority	Yes	No
Jones v. Bock, 549 U.S. 199 (2007)	Consistent Usage / Some Reliance	Majority	No*	No
Kimbrough v. United States, 552 U.S. 85 (2007)	Meaningful Variation / Some Reliance	Majority	Yes	No
Logan v. United States, 552 U.S. 23 (2007)	Consistent Usage / Some Reliance	Majority	Yes	No
Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007)	Meaningful Variation / Some Reliance	Dissent	Yes	No
Osborn v. Haley, 549 U.S. 225 (2007)	Meaningful Variation / Some Reliance	Majority	No	No
Osborn v. Haley, 549 U.S. 225 (2007)	Consistent Usage / Some Reliance	Dissent	No	No
Permanent Mission of India to the United Nations v. City of N.Y., 551 U.S. 193 (2007)	Consistent Usage / Some Reliance	Majority	No	No
Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224 (2007)	Meaningful Variation / Some Reliance	Majority	Yes/No**	Yes/No**
Wilkie v. Robbins, 551 U.S. 537 (2007)	Modeled, Borrowed, or Incorporated / Some Reliance	Majority	Yes	No
Zuni Pub. Sch. Dist. No. 89 v. Dep't of Ed., 550 U.S. 81 (2007)	Meaningful Variation / Some Reliance	Majority	Yes/No**	No
Ali v. Fed. Bureau of Prisons, 552 U.S. 214 (2008)	Meaningful Variation / Some Reliance	Dissent (Kennedy)	Yes	No
Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008)	Consistent Usage / Some Reliance	Majority	Yes	No
Boumediene v. Bush, 553 U.S. 723 (2008)	Meaningful Variation / Some Reliance	Majority	Yes	No
Boumediene v. Bush, 553 U.S. 723 (2008)	Consistent Usage / Some Reliance	Dissent (Roberts)	Yes	No
Burgess v. United States, 553 U.S. 124 (2008)	Meaningful Variation / Some Reliance	Majority	No	No
CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008)	Superfluity / Some Reliance	Dissent	Yes	No
Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008)	Consistent Usage / Minimal Reliance	Majority	Yes	Yes
Gomez-Perez v. Potter, 553 U.S. 474 (2008)	Consistent Usage / Heavy or Primary Reliance	Majority	Yes	No
Gomez-Perez v. Potter, 553 U.S. 474 (2008)	Meaningful Variation / Some Reliance	Dissent (Roberts)	Yes	Yes
Gonzalez v. United States, 553 U.S. 242 (2008)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
Gonzalez v. United States, 553 U.S. 242 (2008)	Consistent Usage / Some Reliance	Dissent	Yes	Yes
Knight v. Comm'r, 552 U.S. 181 (2008)	Consistent Usage / Minimal Reliance	Majority	No	No
Meacham v. Knolls Atomic Power Lab'y, 554 U.S. 84 (2008)	Consistent Usage / Some Reliance	Majority	Yes	Yes/No**
Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571 (2008)	Consistent Usage / Some Reliance	Majority	Yes	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Riegel v. Medtronic, Inc., 552 U.S. 312 (2008)	Consistent Usage / Some Reliance	Majority	Yes/No**	No
Riegel v. Medtronic, Inc., 552 U.S. 312 (2008)	Consistent Usage / Some Reliance	Dissent	Yes	No
Rowe v. N.H. Transp. Ass'n, 552 U.S. 364 (2008)	Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Majority	Yes	No
Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)	Harmonization / Some Reliance	Majority	Yes	No
United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008)	Harmonization & Superfluity / Some Reliance	Majority	Yes	No
United States v. Ressam, 553 U.S. 272 (2008)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
United States v. Ressam, 553 U.S. 272 (2008)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent	Yes	Yes
United States v. Rodriquez, 553 U.S. 377 (2008)	Harmonization / Some Reliance	Majority	Yes	No
United States v. Santos, 553 U.S. 507 (2008)	Consistent Usage & Superfluity / Some Reliance	Plurality	No	No
United States v. Santos, 553 U.S. 507 (2008)	Meaningful Variation / Some Reliance	Concurrence	Yes	No
United States v. Santos, 553 U.S. 507 (2008)	Consistent Usage / Heavy or Primary Reliance	Dissent (Alito)	Yes	No
14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009)	Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Dissent (Souter)	Yes	Yes
14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent (Stevens)	Yes	Yes
Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009)	Meaningful Variation / Minimal Reliance	Majority	Yes	No
Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009)	Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Dissent	Yes	No
Boyle v. United States, 556 U.S. 938 (2009)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
Carcieri v. Salazar, 555 U.S. 379 (2009)	Consistent Usage / Some Reliance	Majority	No	No
Corley v. United States, 556 U.S. 303 (2009)	Modeled, Borrowed, or Incorporated / Minimal Reliance	Majority	Yes	Yes
Dean v. United States, 556 U.S. 568 (2009)	Consistent Usage / Minimal Reliance	Majority	Yes	Yes
Dean v. United States, 556 U.S. 568 (2009)	Superfluity / Some Reliance	Dissent (Stevens)	Yes	No
Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009)	Meaningful Variation & Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Majority	Yes	No
Flores-Figueroa v. United States, 556 U.S. 646 (2009)	Consistent Usage / Some Reliance	Majority	Yes	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009)	Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Dissent (Stevens)	Yes	Yes
Hawaii v. Office of Hawaiian Affs., 556 U.S. 163 (2009)	Meaningful Variation / Minimal Reliance	Majority	Yes	No
Negusie v. Holder, 555 U.S. 511 (2009)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent	Yes	No
Negusie v. Holder, 555 U.S. 511 (2009)	Consistent Usage / Some Reliance	Part Concurrence / Part Dissent	Yes	Yes
Nijhawan v. Holder, 557 U.S. 29 (2009)	Harmonization / Some Reliance	Majority	Yes	No
Nken v. Holder, 556 U.S. 418 (2009)	Consistent Usage / Some Reliance	Dissent	Yes	No
Republic of Iraq v. Beaty, 556 U.S. 848 (2009)	Meaningful Variation / Minimal Reliance	Majority	Yes	No
Shinseki v. Sanders, 556 U.S. 396 (2009)	Modeled, Borrowed, or Incorporated & Consistent Usage / Some Reliance	Majority	No	No
Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm'n of Adjustment, 558 U.S. 67 (2009)	Meaningful Variation / Some Reliance	Majority	No	No
United States v. Hayes, 555 U.S. 415 (2009)	Meaningful Variation / Heavy or Primary Reliance	Majority	No	No
United States v. Hayes, 555 U.S. 415 (2009)	Meaningful Variation / Some Reliance	Dissent	No	No
Wyeth v. Levine, 555 U.S. 555 (2009)	Meaningful Variation / Some Reliance	Dissent	Yes	No
Astrue v. Ratliff, 560 U.S. 586 (2010)	Meaningful Variation / Minimal Reliance	Majority	No	No
Bilski v. Kappos, 561 U.S. 593 (2010)	Superfluity / Some Reliance	Majority	Yes	No
Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010)	Consistent Usage / Minimal Reliance	Majority	No	No
Carr v. United States, 560 U.S. 438 (2010)	Meaningful Variation / Some Reliance	Majority	No	No
Dillon v. United States, 560 U.S. 817 (2010)	Meaningful Variation / Minimal Reliance	Majority	Yes	Yes
Dolan v. United States, 560 U.S. 605 (2010)	Consistent Usage / Heavy or Primary Reliance	Majority	No*	No
Dolan v. United States, 560 U.S. 605 (2010)	Meaningful Variation / Some Reliance	Dissent	No	No
Hamilton v. Lanning, 560 U.S. 505 (2010)	Consistent Usage & Meaningful Variation / Heavy or Primary Reliance	Majority	Yes/No**	No
Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242 (2010)	Consistent Usage / Some Reliance	Majority	No*	No
Hui v. Castaneda, 559 U.S. 799 (2010)	Meaningful Variation / Some Reliance	Majority	Yes	No
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573 (2010)	Meaningful Variation & Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Majority	Yes	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573 (2010)	Consistent Usage / Some Reliance	Dissent	No	No
Johnson v. United States, 559 U.S. 133 (2010)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89 (2010)	Consistent Usage / Some Reliance	Dissent	No	No
Mac's Shell Serv., Inc. v. Shell Oil Prods. Co. LLC, 559 U.S. 175 (2010)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Magwood v. Patterson, 561 U.S. 320 (2010)	Meaningful Variation / Some Reliance	Majority	Yes/No**	No
Merck & Co. v. Reynolds, 559 U.S. 633 (2010)	Consistent Usage / Heavy or Primary Reliance	Concurrence (Scalia)	Yes	Yes
Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010)	Consistent Usage / Some Reliance	Majority	No	No
United States v. O'Brien, 560 U.S. 218 (2010)	Harmonization / Some Reliance	Majority	Yes	Yes
United States v. Stevens, 559 U.S. 460 (2010)	Consistent Usage / Some Reliance	Majority	Yes	Yes
United States v. Stevens, 559 U.S. 460 (2010)	Harmonization / Some Reliance	Dissent	Yes	Yes
Astra USA, Inc. v. Santa Clara County, 563 U.S. 110 (2011)	Harmonization / Some Reliance	Majority	Yes	No
Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776 (2011)	Meaningful Variation / Some Reliance	Majority	Yes	No
Bruesewitz v. Wyeth LLC, 562 U.S. 223 (2011)	Meaningful Variation / Some Reliance	Dissent	Yes	No
Chamber of Com. v. Whiting, 563 U.S. 582 (2011)	Consistent Usage & Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Majority	Yes	No
Chamber of Com. v. Whiting, 563 U.S. 582 (2011)	Consistent Usage / Some Reliance	Dissent (Breyer)	Yes	No
Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011)	Inconclusive / Some Reliance	Majority	Yes/No**	No
Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011)	Consistent Usage / Some Reliance	Dissent	Yes	No
Ransom v. FIA Card Servs., N.A., 562 U.S. 61 (2011)	Meaningful Variation / Some Reliance	Dissent	Yes	Yes
Smith v. Bayer Corp., 564 U.S. 299 (2011)	Harmonization / Some Reliance	Majority	No	No
Sossamon v. Texas, 563 U.S. 277 (2011)	Superfluity / Some Reliance	Dissent	No	Yes/No**
Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011)	Meaningful Variation / Minimal Reliance	Majority	No	No
United States v. Tinklenberg, 563 U.S. 647 (2011)	Meaningful Variation / Minimal Reliance	Majority	No*	Yes/No**
Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541 (2012)	Harmonization / Some Reliance	Majority	Yes/No**	Yes/No**

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012)	Meaningful Variation / Some Reliance	Majority	No*	No
Fed. Aviation Admin. v. Cooper, 566 U.S. 284 (2012)	Inconclusive / Some Reliance	Majority	No	No
Gonzalez v. Thaler, 565 U.S. 134 (2012)	Consistent Usage / Some Reliance	Dissent	No	No
Mohamad v. Palestinian Auth., 566 U.S. 449 (2012)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207 (2012)	Consistent Usage / Some Reliance	Majority	No	No
Salazar v. Ramah Navajo Chapter, 567 U.S. 182 (2012)	Harmonization / Minimal Reliance	Majority	No	No
Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560 (2012)	Consistent Usage / Minimal Reliance	Majority	No*	Yes/No**
Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560 (2012)	Consistent Usage / Some Reliance	Dissent	Yes	No
Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1 (2013)	Consistent Usage / Some Reliance	Majority	No	No
Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49 (2013)	Consistent Usage / Some Reliance	Majority	Yes	Yes
Bullock v. BankChampaign, N. A., 569 U.S. 267 (2013)	Consistent Usage / Some Reliance	Majority	No	No
Descamps v. United States, 570 U.S. 254 (2013)	Harmonization / Heavy or Primary Reliance	Majority	No	No
Hillman v. Maretta, 569 U.S. 483 (2013)	Consistent Usage / Heavy or Primary Reliance	Majority	No	No
Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013)	Consistent Usage / Some Reliance	Dissent	No	Yes/No**
Levin v. United States, 568 U.S. 503 (2013)	Meaningful Variation / Some Reliance	Majority	No	No
Maracich v. Spears, 570 U.S. 48 (2013)	Consistent Usage / Some Reliance	Majority	No	No
Maracich v. Spears, 570 U.S. 48 (2013)	Consistent Usage / Some Reliance	Dissent	No	No
Marx v. Gen. Revenue Corp., 568 U.S. 371 (2013)	Consistent Usage / Some Reliance	Majority	Yes	Yes/No**
Marx v. Gen. Revenue Corp., 568 U.S. 371 (2013)	Consistent Usage / Some Reliance	Dissent	No	Yes
Mut. Pharm. Co. v. Bartlett, 570 U.S. 472 (2013)	Consistent Usage / Some Reliance	Dissent (Sotomayor)	Yes	No
Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013)	Consistent Usage / Heavy or Primary Reliance	Majority	No*	No
Sekhar v. United States, 570 U.S. 729 (2013)	Modeled, Borrowed, or Incorporated / Some Reliance	Majority	Yes	No
Sekhar v. United States, 570 U.S. 729 (2013)	Consistent Usage / Some Reliance	Concurrence	Yes	Yes
Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)	Consistent Usage & Meaningful Variation / Some Reliance	Majority	Yes	Yes
Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)	Consistent Usage / Heavy or Primary Reliance	Dissent	Yes	Yes
Vance v. Ball State Univ., 570 U.S. 421 (2013)	Inconclusive / Minimal Reliance	Majority	No	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Burrage v. United States, 571 U.S. 204 (2014)	Consistent Usage / Some Reliance	Majority	Yes/No**	Yes/No**
Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)	Meaningful Variation / Some Reliance	Majority	No	No
Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)	Consistent Usage / Minimal Reliance	Dissent (Ginsburg)	No	Yes/No**
Chadbourne & Parke LLP v. Troice, 571 U.S. 377 (2014)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent	Yes	No
Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559 (2014)	Consistent Usage / Some Reliance	Majority	No*	No
Lawson v. FMR LLC, 571 U.S. 429 (2014)	Modeled, Borrowed, or Incorporated / Some Reliance	Majority	Yes	Yes
Lawson v. FMR LLC, 571 U.S. 429 (2014)	Modeled, Borrowed, or Incorporated & Meaningful Variation / Some Reliance	Dissent	Yes	Yes
Loughrin v. United States, 573 U.S. 351 (2014)	Modeled, Borrowed, or Incorporated & Meaningful Variation / Some Reliance	Majority	Yes	No
Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014)	Consistent Usage / Some Reliance	Dissent (Thomas)	No	No
Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161 (2014)	Consistent Usage / Heavy or Primary Reliance	Majority	Yes	No
Nw., Inc. v. Ginsberg, 572 U.S. 273 (2014)	Meaningful Variation / Minimal Reliance	Majority	Yes	No
Octane Fitness, LLC v. Icon Health & Fitness, 572 U.S. 545 (2014)	Consistent Usage / Some Reliance	Majority	No*	No
Paroline v. United States, 572 U.S. 434 (2014)	Modeled, Borrowed, or Incorporated / Some Reliance	Dissent (Roberts)	Yes	No
Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2014)	Consistent Usage / Some Reliance	Dissent	No*	Yes/No**
Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014)	Consistent Usage / Some Reliance	Dissent (Sotomayor)	Yes	Yes
United States v. Apel, 571 U.S. 359 (2014)	Consistent Usage / Minimal Reliance	Majority	Yes	Yes
United States v. Castleman, 572 U.S. 157 (2014)	Consistent Usage / Heavy or Primary Reliance	Concurrence (Scalia)	Yes	Yes
United States v. Quality Stores, Inc., 572 U.S. 141 (2014)	Consistent Usage / Some Reliance	Majority	Yes	No
Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158 (2015)	Meaningful Variation / Heavy or Primary Reliance	Majority	No*	Yes/No**
Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158 (2015)	Consistent Usage / Some Reliance	Dissent	Yes	No
Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913 (2015)	Consistent Usage & Meaningful Variation / Some Reliance	Majority	Yes	No
Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015)	Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Majority	Yes	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Elonis v. United States, 135 S. Ct. 2001 (2015)	Consistent Usage / Some Reliance	Dissent	Yes	Yes
Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970 (2015)	Meaningful Variation / Minimal Reliance	Majority	No	Yes
Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 135 S. Ct. 2507 (2015)	Consistent Usage / Heavy or Primary Reliance	Majority	Yes	Yes
Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 135 S. Ct. 2507 (2015)	Meaningful Variation / Heavy or Primary Reliance	Dissent (Thomas)	Yes	Yes
T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808 (2015)	Meaningful Variation / Some Reliance	Dissent (Roberts)	Yes	Yes
United States v. Kwai Fun Wong, 135 S. Ct. 1625 (2015)	Consistent Usage / Some Reliance	Majority	No*	No
United States v. Kwai Fun Wong, 135 S. Ct. 1625 (2015)	Modeled, Borrowed, or Incorporated / Heavy or Primary Reliance	Dissent	No	No
Yates v. United States, 135 S. Ct. 1074 (2015)	Consistent Usage / Some Reliance	Dissent	No*	No
Young v. United Parcel Serv., 135 S. Ct. 1338 (2015)	Meaningful Variation / Minimal Reliance	Concurrence	Yes	No
Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016)	Modeled, Borrowed, or Incorporated & Consistent Usage / Some Reliance	Concurrence	Yes	No
Cuozzo Speed Tech., LLC v. Lee, 136 S. Ct. 2131 (2016)	Consistent Usage / Some Reliance	Majority	Yes	No
Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016)	Consistent Usage / Some Reliance	Dissent	Yes	No
Lockhart v. United States, 136 S. Ct. 958 (2016)	Consistent Usage / Some Reliance	Majority	Yes	No
Mathis v. United States, 136 S. Ct. 2243 (2016)	Meaningful Variation / Some Reliance	Majority	Yes/No**	No
McDonnell v. United States, 136 S. Ct. 2355 (2016)	Consistent Usage / Some Reliance	Majority	Yes	No
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016)	Consistent Usage / Some Reliance	Majority	Yes	No
Nebraska v. Parker, 136 S. Ct. 1072 (2016)	Meaningful Variation / Some Reliance	Majority	Yes	No
Ocasio v. United States, 136 S. Ct. 1423 (2016)	Consistent Usage / Some Reliance	Majority	Yes	No
RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090 (2016)	Consistent Usage / Some Reliance	Part Plurality	Yes	No
RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090 (2016)	Modeled, Borrowed, or Incorporated / Some Reliance	Part Concurrence / Part Dissent (Ginsburg)	Yes	No
Torres v. Lynch, 136 S. Ct. 1619 (2016)	Consistent Usage / Some Reliance	Majority	Yes	No
Torres v. Lynch, 136 S. Ct. 1619 (2016)	Meaningful Variation / Some Reliance	Dissent	Yes	No
Voisine v. United States, 136 S. Ct. 2272 (2016)	Harmonization / Some Reliance	Majority	Yes	No
Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017)	Inconclusive / Minimal Reliance	Majority	Yes	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190 (2017)	Consistent Usage / Some Reliance	Majority	No	No
Dean v. United States, 137 S. Ct. 1170 (2017)	Meaningful Variation / Some Reliance	Majority	Yes	No
Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017)	Harmonization / Some Reliance	Majority	Yes	Yes
Impression Prods., Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523 (2017)	Consistent Usage / Heavy or Primary Reliance	Majority	Yes	No
SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., 137 S. Ct. 954 (2017)	Consistent Usage / Minimal Reliance	Majority	Yes	No
TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017)	Harmonization / Heavy or Primary Reliance	Majority	Yes	No
Artis v. Dist. of Columbia, 138 S. Ct. 594 (2018)	Consistent Usage / Some Reliance	Majority	Yes	No
Ayestas v. Davis, 138 S. Ct. 1080 (2018)	Consistent Usage / Some Reliance	Majority	No	No
China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018)	Consistent Usage / Some Reliance	Majority	Yes	No
China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018)	Meaningful Variation / Some Reliance	Concurrence	Yes	No
Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)	Meaningful Variation / Some Reliance	Majority	No	Yes/No**
Hughes v. United States, 138 S. Ct. 1765 (2018)	Consistent Usage / Some Reliance	Dissent	No	No
Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018)	Harmonization & Superfluity / Minimal Reliance	Dissent (Breyer)	Yes	No
Jennings v. Rodriguez, 138 S. Ct. 830 (2018)	Consistent Usage / Some Reliance	Part Plurality	No	No
Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)	Consistent Usage / Some Reliance	Part Plurality	Yes	Yes/No**
Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)	Consistent Usage / Some Reliance	Concurrence (Gorsuch)	No	No
Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)	Consistent Usage / Some Reliance	Dissent	Yes	No
Lagos v. United States, 138 S. Ct. 1684 (2018)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
Marinello v. United States, 138 S. Ct. 1101 (2018)	Consistent Usage / Heavy or Primary Reliance	Majority	No	Yes/No**
Murphy v. Smith, 138 S. Ct. 784 (2018)	Consistent Usage / Some Reliance	Majority	No	No
Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018)	Meaningful Variation / Some Reliance	Majority	Yes	No
Patchak v. Zinke, 138 S. Ct. 897 (2018)	Consistent Usage / Some Reliance	Plurality	Yes	No
Patchak v. Zinke, 138 S. Ct. 897 (2018)	Meaningful Variation / Some Reliance	Concurrence (Ginsburg)	No	No
Patchak v. Zinke, 138 S. Ct. 897 (2018)	Consistent Usage / Some Reliance	Dissent	No	No

Case Name	Form of Comparison / Level of Reliance	Opinion	Related Subject	Contemp.
Pereira v. Sessions, 138 S. Ct. 2105 (2018)	Consistent Usage / Some Reliance	Majority	No	No
Pereira v. Sessions, 138 S. Ct. 2105 (2018)	Consistent Usage / Some Reliance	Dissent	No	No
SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348 (2018)	Meaningful Variation / Some Reliance	Majority	Yes	No
Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018)	Meaningful Variation / Some Reliance	Majority	Yes	Yes
Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018)	Harmonization / Some Reliance	Dissent	Yes	Yes

* Denotes that the two or more statutes being compared dealt with different underlying subject matters, but both or all involved fee-shifting provisions, filing deadlines, arbitration clauses, statutes of limitations, or reimbursement for translation services (or, in *Yates*, witness tampering compared to evidence tampering).

** The "Yes/No" designation denotes that the opinion drew cross-statute comparisons to more than one analogue statute and that at least one of the analogue statutes used for comparison was related in subject matter to the statute at issue in the case (or, where the double asterisk appears in the "contemporaneous" column, was enacted within five years of the statute at issue in the case). At the same time, however, at least one of the analogue statutes used for comparison in the opinion was not related in subject matter to the statute at issue (or, where the double asterisk appears in the "contemporaneous" column, was not enacted within five years of the statute at issue). For purposes of any calculations regarding the proportion of opinions in the dataset in which the statutes offered for comparison involved related subject matter areas or were enacted within a few years of each other, I counted any "Yes/No" opinion as a "Yes"—that is, as involving at least one related statute and at least one contemporaneous statute. I made this choice in order to give the Court the benefit of the doubt in critiquing its approach to cross-statute comparisons.

Appendix II

Codebook

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

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

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

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

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

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

Ideology = Imported Spaeth database coding for ideological outcome of the opinion. "1" denotes a conservative opinion outcome, "2" denotes a liberal opinion outcome.

Case Name = Name of case.

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

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

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

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

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

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

Whole Act Rule = Code "1" if the opinion references different parts of the statute at issue to determine the meaning of the provision/words at issue (common variants include the rule against derogation, meaning that different parts of a single statute must be consistent in their policy implications and that one part of a statute should not be interpreted in a manner that derogates or undermines another part; the rule of meaningful variation, which dictates that if one part of the statute says X, and another similar part omits X, the difference is assumed to be intentional and to require a different interpretation; the rule against superfluity, which dictates that one part of a statute should not be interpreted in a manner that renders another part of the same statute redundant or superfluous, and so on). Code "0" if the opinion does not reference the whole act rule or if it considers and rejects whole act rule arguments.

LanGRWA = Code "1" for opinions that reference any one or more of the following: language canons, grammar rules, and/or the

whole act rule. Code "0" for opinions that do not reference **any** of these interpretive tools.

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

Common Law = Code "1" if the opinion references the common law, cites a treatise or Blackstone's commentaries, or analogizes to common practice in the same or another area of law (e.g., "failure to exhaust is treated *X* way in the administrative law and criminal law contexts"). Code "0" if no reference is made to common-law precedents or practices, or if the opinion considers but rejects such precedents or practices.

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

Supreme Court Precedent = Code "1" if the opinion references prior caselaw (Supreme Court opinions) interpreting the same statute or interpreting the same or similar words in a different statute or to otherwise establish the meaning of the term at issue. Code "0" if the opinion does not reference prior Supreme Court caselaw to interpret the statute.

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

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

AdditionalInfo = A variable recording additional legislative history information. Code "1" if the opinion is one in which Justice Scalia refused to join because of its legislative history use. Code "2" if the

opinion is one that references the evolution of the statute rather than committee reports, floor debates, or other internal legislative records about the process of statutory enactment. Code "3" if the opinion is one that references both the evolution of the statute and internal legislative records. Code "4" if the opinion is one that references or draws inferences based on legislative inaction. Code "0" if the opinion does not fit one of the above special cases.

Intent = Code "1" if the opinion references Congress's intent or presumed intent. Code "0" if the opinion does not reference legislative intent or rejects reliance on legislative intent.

Agencysimp = Code "1" if the opinion defers to the relevant agency's interpretation of the statute. Code "0" if the opinion does not mention or if it rejects/goes against the agency's interpretation of the statute.

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

Practical Consequences = Code "1" if the opinion references the practical consequences that would follow from a particular interpretation or outcome in reaching its construction of the statute, including references to the absurdity doctrine, the practical difficulty of administering the rule created by the interpretation, the justness or fairness of an interpretation, the interpretation's predicted effect on judicial or other government institutions' resources, the interpretation's effect on the clarity or predictability of the legal rule in the relevant area of the law, and the interpretation's consistency with the policy of the statute. Code "0" if the opinion does not reference the practical consequences that would flow from a particular interpretation, or if the opinion rejects arguments based on practical consequences.

Practical Type = Code "1" for opinions that reference practical consequences that focus on the administrability of an interpretation—that is, opinions that discuss the practical difficulty of administering the rule created by the interpretation, the interpretation's predicted effect on judicial or other government institutions' resources, or the interpretation's effect on the clarity or predictability of the legal rule in the relevant area of the law. Code "2" for opinions that reference practical consequences that focus on the internal statutory consistency

or the constancy of the policy created by the interpretation—that is, opinions that reference absurdities created by an interpretation, the justness or fairness of an interpretation, or the interpretation's consistency with the underlying policy of the statute. Code "3" for opinions that reference both administrability and consistency-type practical consequence concerns. Code "0" for opinions that make no reference to the practical consequences of an interpretation.

Subject Area = Statute or field of law of statute being interpreted. Code "1" for criminal statutes; "2" for environmental statutes; "3" for jurisdictional statutes; "4" for the Internal Revenue Code; "5" for the Federal Arbitration Act; "6" for discrimination-related statutes; "7" for the Individuals with Disabilities Education Act (IDEA); "8" for Civil RICO; "9" for securities statutes; "10" for antitrust statutes; "11" for preemption statutes; "12" for the Federal Tort Claims Act (FTCA); "13" for the Bankruptcy Code; "14" for immigration statutes; "15" for ERISA; "16" for the Communications Act; "17" for the Prison Litigation Reform Act; "18" for intellectual property statutes; "19" for the False Claims Act; "20" for the Anti-terrorism and Effective Death Penalty Act (AEDPA); "21" for the Federal Employers Liability Act (FELA); "22" for other statutes; "23" for the Truth in Lending Act (TILA); "24" for the Foreign Sovereign Immunities Act (FSIA); "25" for provisions of statutes involving attorney's fees; "26" for procedural statutes; "27" for the Freedom of Information Act (FOIA); "28" for the National Labor Relations Act (NLRA); "29" for statutes dealing with religion; "30" for statutes involving Indian law; and "31" for statutes dealing with labor law (other than the NLRA).

Author = Name of the Justice who authored the opinion being coded. Code "0" for per curiam opinions; "1" for opinions authored by Justice Scalia; "2" for opinions authored by Justice Thomas; "3" for opinions authored by Chief Justice Roberts; "4" for opinions authored by Justice Alito; "5" for opinions authored by Justice Kennedy; "6" for opinions authored by Justice Souter; "7" for opinions authored by Justice Ginsburg; "8" for opinions authored by Justice Breyer; "9" for opinions authored by Justice Stevens; "10" for opinions authored by Justice Sotomayor; "11" for opinions authored by Justice Kagan; "12" for opinions authored by Justice Gorsuch; and "13" for opinions authored by Justice Kavanaugh.

Scalia, Thomas, Roberts, Alito, Kennedy, Souter, Ginsburg, Breyer, Stevens, Sotomayor, Kagan, Gorsuch, Kavanaugh = Each

Justice's name is a separate variable coded for agreement in the case. "0" = Authored Majority; "1" = Joined Majority/Plurality; "2" = Joined Concurrence; "3" = Joined Dissent; "4" = Joined Majority and Concurrence; "5" = Not Participating; "6" = Authored Concurrence; "7" = Authored Dissent; "8" = Authored Dissent + Joined Dissent; "9" = Authored Concurrence + Joined Majority; "10" = Joined 2 Dissents; "11" = Authored Concurrence/Dissent; "12" = Authored Concurrence + Joined Concurrence; "13" = Authored Concurrence + Partially Joined Dissent; "14" = Authored Concurrence + Partially Joined Majority; "15" = Authored Concurrence/Dissent + Partially Joined Majority; "16" = Joined Part Concurrence/Part Dissent; "17" = Authored Concurrence/Dissent + Joined Dissent; "18" = Partially Joined Majority + Joined Concurrence/Dissent; "19" = Partially Joined Majority + Joined Concurrence/Dissent + Authored Concurrence/Dissent; "20" = Partially Joined Majority; "21" = Voted to Grant a Writ; "22" = Part Dissent; "23" = Authored Dissent + Partially Joined Dissent; "24" = Joined Majority + Authored Concurrence + Joined Concurrence; "25" = Partially Joined Majority + Joined Dissent.