THE COMMON LAW AS STATUTORY BACKDROP

Anita S. Krishnakumar

CONTENTS

THE COMMON LAW AS STATUTORY BACKDROP[†]

Anita S. Krishnakumar[*]

Amidst the whirl of commentary about how the U.S. Supreme Court has become increasingly textualist and what precise shape modern textualism should take, the Court's continued reliance on one decidedly atextual interpretive tool has gone largely unnoticed — the common law. Indeed, the common law has played an underappreciated, often dispositive, gap-filling role in statutory interpretation for decades, even as the textualist revolution has sidelined other non-text-focused interpretive tools. But despite the persistent role that the common law has played in statutory interpretation cases, the use of common law rules and definitions as an interpretive resource is surprisingly understudied and undertheorized in the statutory interpretation literature.

This Article provides the first empirical and doctrinal analysis of how the modern Supreme Court uses the common law to determine statutory meaning, based on a study of 602 statutory cases decided during the Roberts Court's first fourteen and a half Terms. The Article catalogs five different justifications the Court regularly provides for consulting the common law, as well as three different methods the Court uses to reason from the common law to statutory meaning. The Article also notes several problems with the Court's current use of the common law to determine statutory meaning. For example, the Court has provided no criteria indicating when the common law is relevant to an interpretive inquiry, leading to inconsistencies in the Court's use of the common law even with respect to the same statute. Moreover, the Court's reliance on the common law — an arcane, sophisticated set of legal rules inaccessible to the average citizen — is in tension with modern textualism's focus on the meaning that a statutory term would have in everyday conversation. In addition, there are democratic accountability problems inherent in the use of potentially antiquated doctrines created by unelected, elite judges to determine the meaning of modern statutes enacted by a legislature representing a diverse electorate.

In the end, the Article recommends that the Court limit its use of the common law to situations in which congressional drafting practices or rule of law concerns justify the practice — for example, where Congress itself has made clear that it intended for the relevant statute to incorporate the common law, where the statutory word or phrase at issue is a legal "term of art" with a clearly established common law meaning, or where courts have long construed the statute in light of the common law, so that it can be considered a "common law statute."

[†] The *Harvard Law Review* has not independently reviewed the data and analyses described herein.

[*] Professor of Law, Georgetown University Law Center. I owe deep thanks for valuable insights and conversations to Aaron-Andrew Bruhl, Elizabeth Beske, William N. Eskridge, Jill Hasday, Margaret H. Lemos, Victoria F. Nourse, Kevin Tobia, and participants at workshops at Georgetown University Law Center, the University of Minnesota Law School, and American University Washington College of Law. I am especially indebted to my husband, Ron Tucker, for his patience and support throughout this project. Special thanks to Dean William Treanor and Georgetown University Law Center for generous research assistance. Kathryn Baldwin, John Burger, Danielle DelGrosso, Thomas Combs, Christina Corcoran, Brian Dolan, Sade Forte, Elizabeth Fray, Kim Friedman, Sean Kelly, Theodore Miller, Ilya Mordukhaev, Vince Nibali, Melissa Parres, Barbara Reilly, Jennifer Roseman, Peter Ryan, Christine Sammarco, Jonathan Sclar, Ashleigh Shelton, Samuel Sroka, Jennifer Thomas, Rita Wang, and Lissa Yang provided excellent research assistance. Janet Ruiz-Kroll provided invaluable assistance with the tables. All errors are my own.

INTRODUCTION

Amidst the whirl of commentary about how the U.S. Supreme Court has become increasingly textualist[1] and what precise shape modern textualism should take,[2] the Court's continued reliance on one decidedly *atextual* interpretive tool has gone largely unnoticed — the common law. Indeed, the common law has played an underappreciated, often dispositive, gap-filling role in statutory interpretation for decades, even as the textualist revolution has sidelined other non-text-focused interpretive tools. This is curious because the common law — a body of unwritten legal rules and doctrines based on custom and judicial precedent that originated in early English law — embodies so many of the characteristics that modern textualism rejects: it is esoteric, arcane, and impenetrable to nonlawyers; it gives free reign to judicial discretion and policymaking; and it is changeable rather than definite. Whereas the common law is plastic and unfixed, capable of refinement from case to case, statutory law — at least according to textualist interpretive theory — is precise and stable.[3] And yet, it has long been the case that when courts — including the increasingly textualist U.S. Supreme Court — interpret statutes, they regularly turn to the common law to shed light on statutory meaning.

Consider the following example: In *Sekhar v. United States*,[4] the Court construed a Hobbs Act[5] provision that punishes "extortion."[6] 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

---

[1] *See, e.g.*, George T. Conway III, Opinion, *Why Scalia Should Have Loved the Supreme Court's Title VII Decision*, WASH. POST (June 16, 2020, 7:55 PM), https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-have-loved-supreme-courts-title-vii-decision [https://perma.cc/3JUG-HNG3] (arguing that the *Bostock* decision "represents a victory for textualism"); Jonathan Skrmetti, *The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law [https://perma.cc/EVY6-UVJ2].

[2] *See* Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265 (2020); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021); George F. Will, Opinion, *The Supreme Court's Decision on LGBTQ Protections Shows the Conflicting Ideas of Textualism*, WASH. POST (June 16, 2020, 4:48 PM), https://www.washingtonpost.com/opinions/the-supreme-courts-decision-on-lgbtq-protections-shows-the-conflicting-ideas-of-textualism/2020/06/16/c6979b76-aff8-11ea-8758-bfd1d045525a_story.html [https://perma.cc/UCZ7-CWMB].

[3] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 86 (2012) ("The meaning of rules is constant."); Joseph Kimble, *The Meaning of* Sex *in Michigan's Civil Rights Act — And the Expedient Overconfidence of Textualism*, 35 W. MICH. U. COOLEY L. REV. 151, 155 (2019) ("Textualists . . . insist that the meaning of statutory language is fixed as of its enactment. That original ordinary meaning is stable; it does not morph over time.").

[4] 570 U.S. 729 (2013).

[5] 18 U.S.C. § 1951.

[6] *Sekhar*, 570 U.S. at 733–37; *see also* 18 U.S.C. § 1951(a).

the managing partner's firm — and threatened to expose the general counsel's extramarital affair if he did not follow through with the investment.[7] 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 right."[8] The question before the Court was whether the managing partner had obtained, or attempted to obtain, property from the general counsel within the meaning of the statute.[9] In an opinion authored by the late Justice Scalia, the Court unanimously held that he had not and that the conduct engaged in therefore did not amount to "extortion."[10]

In so ruling, the Court relied heavily on the common law meaning of the word "extortion." Despite the fact that the Hobbs Act explicitly defines the term "extortion," Justice Scalia's opinion began by explaining that it is a "settled principle" of statutory interpretation that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses"[11] and quoted extensively from a Supreme Court case and a law review article to support this statement.[12] The opinion also cited several state law and old English cases to establish that at common law, the crime of extortion required the perpetrator to "obtain[] . . . items of value, typically cash, from the victim" — and that common law extortion "did not cover the mere coercion to act, or to refrain from acting."[13] Only then did the opinion turn to statutory text, noting that "[t]he text of the statute at issue *confirms* that the alleged property here cannot be extorted" because the statute defines "extortion" as "*the obtaining of property from another*."[14] The opinion then returned once more to the common law, quoting U.S. Supreme Court caselaw as well as a criminal law treatise, a dictionary, and a law review article for the proposition that "[o]btaining property requires 'not only the deprivation but also the acquisition of property'"[15] — such that the victim must "part with" his property and the extortionist must "gain possession" of it.[16] Because the managing partner had sought merely to coerce the general counsel to act, but not to acquire the general counsel's property, the Court reasoned that the managing partner's behavior did not constitute extortion.[17]

---

[7] *Sekhar*, 570 U.S. at 731.

[8] 18 U.S.C. § 1951(b)(2).

[9] *Sekhar*, 570 U.S. at 730.

[10] *Id.* at 732.

[11] *Id.* (quoting Neder v. United States, 527 U.S. 1, 23 (1999)).

[12] *See id.* at 733 (quoting Morissette v. United States, 342 U.S. 246, 263 (1952); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

[13] *Id.*

[14] *Id.* at 734 (first emphasis added) (quoting 18 U.S.C. § 1951(b)(2)).

[15] *Id.* (quoting Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404 (2003)).

[16] *Id.* (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 451 (3d ed. 1982); *Scheidler*, 537 U.S. at 403 n.8).

[17] *Id.* at 738.

The Court in *Sekhar* thus used the common law to establish a background legal understanding of the crime of "extortion" — and then used that background legal understanding to evaluate whether the defendant's conduct fell within the statute's coverage. In other words, the Court used the common law almost like a dictionary, or an authoritative external source of meaning. And significantly, the Court used the common law to determine the statute's meaning *without* seeking to identify the "ordinary" or "plain" meaning of the terms "extortion" or "obtaining of property" or otherwise parsing the structure or grammar of the Hobbs Act — two common, classic textualist interpretive moves.[18]

While the Court is not always so explicit about the role that the common law plays in its statutory constructions, its reliance on the common law to drive its interpretive analysis in *Sekhar* was not anomalous. On the contrary, despite modern textualism's relentless focus on the close parsing of statutory words and phrases,[19] the common law continues to play an important, enduring, and sometimes dominant role in the Supreme Court's statutory jurisprudence.

But while the common law has remained a persistent feature of the Court's statutory cases, the use of common law rules and definitions as interpretive aids is little understood and surprisingly undertheorized in the statutory interpretation literature. No article to date has systematically examined the Court's use of the common law to construe statutes, although some empirical studies have measured the overall frequency with which the Court employs the common law relative to other interpretive aids.[20] More importantly, no article has theorized broadly about how judicial reliance on the common law as a baseline for statutory meaning fits into larger debates about statutory interpretation theory — and in particular, how the practice coheres (or fails to cohere) with the Court's increasingly textualist, ordinary-reader approach to statutory interpretation.

This Article seeks to fill that gap. It provides the first empirical and doctrinal analysis of how the modern Supreme Court uses the common law to inform its statutory constructions, based on a study of 602 statutory cases decided during the Roberts Court's first fourteen and a half Terms (from January 2006 through July 2020). The Article aims to illuminate the manner in which the Court invokes the common law when construing statutes, including the justifications the Court provides for

---

[18] *See generally* SCALIA & GARNER, *supra* note 3, at 198.

[19] *See, e.g.*, Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 680–84 (2019) (noting that modern textualists "pull[] words out of the statutory context," *id.* at 682, and "slic[e] the text into smaller and smaller units," *id.* at 680).

[20] *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 30–31, 30 tbl.1 (2005); 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, 101–02, 101 tbl.1, 103 tbl.2 (2018).

consulting common law meaning and the methods by which it extrapolates from the common law to determine statutory meaning.

Five points stand out from the data and doctrinal analysis: (1) the Roberts Court's overall use of the common law to construe statutes is moderate — 16.9% of the cases in the dataset referenced the common law;[21] (2) nearly all of the Justices, irrespective of their interpretive methodology, have invoked the common law in the opinions they authored;[22] (3) when the Justices invoked the common law, they often relied *heavily* on this interpretive tool to determine the statute's meaning; (4) a sizeable minority (one-third) of the opinions that employed common law meaning did not expressly reference the "common law" — but merely noted that a particular legal principle was "well-settled" in a particular field;[23] and (5) the Justices exercised significant discretion when invoking the common law to construe statutes — both in articulating the substance of the relevant common law rule and in deciding whether the common law should play a role in determining statutory meaning at all.

Two doctrinal trends also are worth noting. First, the Court often justifies its reliance on the common law in ways that emphasize congressional expectations or intent — a practice that is at odds with textualism's increasing emphasis on the common conversational meaning of statutory terms and its rejection of legislative purpose and intent.[24] Second, in nearly one-fourth of the cases studied in the dataset, the members of the Roberts Court disagreed about the substance of the relevant common law rule, calling into doubt the argument that the common law should serve as a backdrop for statutory meaning because it consists of "well-settled" "default rules."[25]

This Article evaluates the normative and theoretical implications of these empirical and doctrinal trends. It argues that the justifications the Court articulates for employing the common law — when it articulates a justification — not only conflict with modern textualism's increasing emphasis on the ordinary reader, but reveal how much judicial discretion and sculpting are involved in establishing a common law baseline and extrapolating statutory meaning from it.

---

[21] Of the 602 statutory cases in the dataset, 102 contained at least one opinion that invoked the common law. For a list of these cases, see *infra* Appendix, pp. 675–88.

[22] The sole exception was Justice Kavanaugh, who authored only 13 opinions during October Terms 2018 and 2019.

[23] This was the case in 35.9% (47 of 131) of the opinions in the dataset. Such opinions were coded separately from opinions that cited previous judicial interpretations of the statutory language at issue or concluded that the relevant interpretive question was decided in an earlier case; the latter were coded as referencing "precedent" rather than "common law." For additional information about coding parameters, see Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, app. 2 (2021) (Appendix II: Codebook) [hereinafter Krishnakumar, *Whole Code*].

[24] *See infra* sections II.C.2, pp. 644–47, and III.B.1, pp. 660–65.

[25] *See infra* section III.A, pp. 656–59.

The Article proceeds in three Parts. Part I reviews the theory and justifications behind the use of common law referents in statutory interpretation as well as the limited scholarly commentary that exists thus far about this interpretive tool. Part II reports data about the Court's use of the common law in the 602 statutory cases decided during its first fourteen and a half Terms. Part II also provides some doctrinal observations about the Court's use of the common law to interpret statutes, including a taxonomy of different justifications and methods the Court uses to explain and effectuate its use of the common law in statutory cases. Part III evaluates the implications of the interpretive practices described in Part II, highlighting coherence and accountability problems created by the Court's current approach as well as the tension that exists between the Court's reliance on the common law to determine statutory meaning, on the one hand, and its insistence that statutory terms should be given the meaning they would have in common conversation, on the other. Part III concludes by considering a few ways the Court might address these theoretical and coherence problems.

I. THE THEORY BEHIND THE COMMON LAW AS GAP-FILLER

Before describing how precisely the Roberts Court has employed the common law to interpret statutes, it is worth pausing to describe the theory and justifications historically offered for this interpretive move. Section A explains how the common law canons developed as well as the justifications offered for their continued use in the modern era. Section B discusses the limited existing scholarly treatment of this interpretive tool, including some prominent criticisms.

A. History and Justifications

The use of the common law to fill gaps in statutory meaning appears to have originated in sixteenth- to seventeenth-century English caselaw, which directed that "if any doubt be conceived on the words or meaning of an Act of Parliament, it is good to . . . construe it according to the reason of the common law."[26] At the time, statutes were comparatively unimportant, and courts regarded them as exceptions — or unwelcome intrusions — upon the legal framework created by the far superior common law.[27] As one commentator has explained, "the reason for subjecting statutes which abrogate the common law to a strict construction is founded upon a belief that the common law represented the zenith of

---

[26] Fermor's Case (1602) 76 Eng. Rep. 800, 803; 3 Co. Rep. 77a, 77b–78a; Chudleigh's Case (1595) 76 Eng. Rep. 270, 303; 1 Co. Rep. 120a, 134a (dissenting opinion).

[27] *See* 3 J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61:1 (8th ed. 2020) (citing P.S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1 (1985); Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585 (1996)).

human wisdom."[28] As statutory law came to dominate the legal landscape during the nineteenth and twentieth centuries, this view of the common law as the background, or default, legal rule persisted — as, in one treatise writer's words, "at once a vestige of an earlier era and a conventional tool of interpretation."[29] Indeed, the idea of the common law as default became encapsulated in a canon, or maxim, directing that "[c]ourts [should] narrowly, or strictly, construe statutes in derogation of the common law."[30]

Over time, that nineteenth- and twentieth-century derogation canon has largely given way to two more modern canons or presumptions: (1) that statutes should not be construed to alter the common law unless there is clear indication of congressional intent to make the relevant change; and (2) that when a statute employs words or concepts that have a well-settled common law meaning, it should be construed to incorporate that common law meaning.[31]

Scholars and courts have defended the common law canons on a few different grounds. Some have argued that the common law canons reflect a norm that "changes in the existing order of things are generally effected on a piecemeal rather than a wholesale basis" — and that in this sense, the canons are consistent with an overall "precept of continuity and coherence that underwrites most of the canons."[32] Others have described the canons as ones that "recognize that law is premised on a tradition of settled expectations and necessarily disfavors alterations to its extant corpus, both unwritten and statutory."[33] In an oft-quoted passage, the Supreme Court has justified the practice based on a presumption about legislative awareness and expectations:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.[34]

---

[28] EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 250, at 490 (Thomas Law Book Co. 1940).

[29] SINGER, *supra* note 27, § 61:1.

[30] *See id.*

[31] *See, e.g.*, SCALIA & GARNER, *supra* note 3, at 318–21 (describing "Presumption Against Change in Common Law," *id.* at 318, and "Canon of Imputed Common-Law Meaning," *id.* at 320); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 348 (2016) (similar).

[32] ESKRIDGE, *supra* note 31, at 349 & n.123; *see also* SINGER, *supra* note 27, § 61:1 (noting that the rule serves a "policy of continuity and stability"); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992) (positing that the derogation canon "reflects the importance of reading a new statute against the legal landscape and . . . recognizing the value of minimal disruption of existing arrangements").

[33] *See, e.g.*, SINGER, *supra* note 27, § 61.1.

[34] Morissette v. United States, 342 U.S. 246, 263 (1952).

Then-Professor Felix Frankfurter put it more simply yet, observing that, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[35]

Two things stand out about these proffered justifications: First, invocation of the common law is premised, at least in theory, on a presumption about legislative drafting expectations. Second, it is part of a judicial project to ensure consistency between old and new law, rather than a tool for identifying a statute's "ordinary" or "plain" meaning.

With respect to the first, the presumption that legislators intend or expect a statute to incorporate a specific common law rule is little more than a legal fiction. In invoking this presumption, the Court tends merely to *assert* that Congress was aware of and expected the common law rule to apply — it rarely offers any evidence that Congress actually was aware of or mentioned the common law rule it supposedly incorporated.[36] Indeed, the Court's own rhetoric sometimes makes clear the fictitious nature of this presumption — as when it states that "courts *may take it as given* that Congress has legislated with the expectation that the [common law] will apply,"[37] or that "we presume that Congress legislates against the backdrop of the common law,"[38] or that "[*i*]*f* Congress examined the relevant legal landscape when it adopted [the statute at issue], *it could not have missed*" the common law rule.[39] The

---

[35] Frankfurter, *supra* note 12, at 537.

[36] *See, e.g.*, Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2307 (2021) (assuming that an opposing interpretation "would subvert congressional design" because "Congress 'legislate[s] against a background of common-law adjudicatory principles'" (alteration in original) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991))); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., 137 S. Ct. 954, 968 (2017) (Breyer, J., dissenting) (inferring congressional intent based on "a long history of prior case law"); Sekhar v. United States, 570 U.S. 729, 732 (2013) (presuming that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses" (quoting Neder v. United States, 527 U.S. 1, 23 (1999))); Rehberg v. Paulk, 566 U.S. 356, 362–63 (2012) (assuming that "Congress intended [§ 1983] to be construed in the light of common-law principles" (alteration in original) (quoting Kalina v. Fletcher, 522 U.S. 118, 123 (1997))).

[37] B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015) (emphasis added) (quoting *Astoria*, 501 U.S. at 108).

[38] Voisine v. United States, 136 S. Ct. 2272, 2286 (2016) (Thomas, J., dissenting).

[39] *SCA Hygiene Prods.*, 137 S. Ct. at 963–64 (emphases added); *see also, e.g.*, Babb v. Wilkie, 140 S. Ct. 1168, 1179 (2020) (Thomas, J., dissenting) ("But-for causation is . . . 'the default rul[e Congress] is presumed to have incorporated . . . .'" (alteration in original) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013))); Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 103 (2011) ("[B]asic principles of statutory construction require us to assume that Congress meant to incorporate 'the cluster of ideas' attached to the common-law term it adopted." (quoting Beck v. Prupis, 529 U.S. 494, 501 (2000))); Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010) (assuming that "when Congress enacts statutes, it is aware of relevant judicial precedent").

Court does sometimes talk about the presumption in terms of ascertaining congressional intent,[40] but the presumption aims, at bottom, to ensure continuity and consistency in the law, not to determine accurately the enacting legislature's intent. Notably, in this sense it is similar to the whole code rule's assumption that Congress is aware of other similar statutes and their interpretations when it drafts new statutes — an assumption that Justice Scalia acknowledged to be a legal fiction.[41]

The justifications that courts and scholars have offered for using the common law as an interpretive resource also sound loudly in continuity and coherence. In addition to Justice Frankfurter's "old soil" metaphor — which has since been quoted in several Supreme Court opinions[42] — the Court has emphasized "legal tradition," the "centuries of practice," the need to avoid "departure" from "widely accepted definitions,"[43] and the fact that a particular legal rule has "long [been] recognized"[44] when invoking common law principles to construe a statute. As Part III will argue, this rhetorical emphasis on continuity and coherence sometimes obscures the extent to which the Court uses the common law as an after-the-fact, seemingly neutral, justification for the interpretation it has chosen — or even massages the common law to fit that interpretation.

B. Criticisms

As noted earlier, the statutory interpretation literature has been fairly quiet about the use of the common law to interpret statutes. A handful of scholars have touched on the topic — either as part of a broader philosophical discussion about the role of the common law in American

---

[40] *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613 (2009) ("Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law.'" (quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983))); Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 296 (2012) ("Congress intended the term 'actual damages' in the [Privacy] Act to mean special damages."); Paroline v. United States, 572 U.S. 434, 476 (2014) (Sotomayor, J., dissenting) ("There is every reason to think Congress intended § 2259 to incorporate aggregate causation."); *SCA Hygiene Prods.*, 137 S. Ct. at 967 (Breyer, J., dissenting) ("Congress, when it wrote the 1952 statute, was aware of and intended to codify that judicial practice.").

[41] *See* 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 (1997).

[42] *See, e.g.*, Stokeling v. United States, 139 S. Ct. 544, 551 (2019); Hall v. Hall, 138 S. Ct. 1118, 1128 (2018); United States v. Kwai Fun Wong, 575 U.S. 402, 425 (2015) (Alito, J., dissenting); United States v. Castleman, 572 U.S. 157, 176 (2014) (Scalia, J., concurring in part and concurring in the judgment); Evans v. United States, 504 U.S. 255, 260 n.3 (1992).

[43] Morissette v. United States, 342 U.S. 246, 263 (1952).

[44] Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 581 (2010); *id.* at 608 (Scalia, J., concurring in part and concurring in the judgment); *see also, e.g.*, Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 674 (2016) (Thomas, J., concurring in the judgment) ("one unbroken practice"); Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 557 (2014) ("long recognized"); Rosemond v. United States, 572 U.S. 65, 70 (2014) ("a centuries-old view").

jurisprudence[45] or as a datapoint in an empirical study of the statutory interpretation tools employed by the Court.[46] Most existing treatments of the common law have focused on the "statutes in derogation of the common law" formulation rather than on the presumption that statutory terms with an established common law meaning should be construed consistently with the common law rule. While some scholars have defended the derogation canon,[47] several have criticized the canon on the grounds that it disrespects the legislative process, undermines Congress's efforts to change the status quo, is a relic of an era in which legislation was disparaged and judge-made law revered, and generally makes little sense in the modern "age of statutes." Professor Roscoe Pound, for example, excoriated the derogation canon on the ground that:

> It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible. . . . [The canon] had its origin in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealousy of the reform movement; and . . . it is wholly inapplicable to and out of place in American law of today.[48]

Justice Stone similarly called the derogation canon an "ancient shibboleth,"[49] and Professor Reed Dickerson commented that, "[a]t best, the rule is an historical hangover from the time when judges were generally suspicious or distrustful of legislatures."[50] Judge Posner likewise noted that the canon "was used in nineteenth-century England to emasculate social welfare legislation"[51] and disparaged it as a "fossil remnant of the traditional hostility of English judges to legislation."[52]

More recently, scholars have expanded their criticisms beyond the derogation canon to include the canon that statutes should be presumed to incorporate the common law meaning of the terms they employ. Professor Abbe Gluck has argued that both common law canons "seem designed to push against congressional practice" and has questioned

---

[45] *See generally, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

[46] *See* sources cited *supra* note 20; *see also* Barbara Page, *Statutes in Derogation of Common Law: The Canon as an Analytical Tool*, 1956 WIS. L. REV. 78 (examining Wisconsin state courts' use of common law in statutory interpretation).

[47] *See supra* section I.A, pp. 614–17 and notes 32–35.

[48] Pound, *supra* note 45, at 387–88.

[49] Stone, *supra* note 45, at 18.

[50] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 207 (1975).

[51] Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 821 (1983).

[52] Wenfang Liu v. Mund, 686 F.3d 418, 421 (7th Cir. 2012).

"[w]hy on earth should [the derogation] canon, as well as its first cousin — that courts presume Congress incorporates the common-law meaning of terms — remain default presumptions in the 'Age of Statutes'?"[53] And Professor Nina Mendelson has contrasted the Court's regular use of the common law to construe statutes with Justice Scalia's "prominent questioning" of "whether the attitude of the common-law judge . . . is appropriate for [interpreting] statutory law."[54] Even Justice Scalia called the derogation canon "a relic of the courts' historical hostility to the emergence of statutory law"[55] and a "sheer judicial power-grab."[56] In fact, his treatise on statutory interpretation argued that "[t]he better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity."[57] Although that updated formulation is functionally not much different than the derogation canon — because it preserves the common law as the default rule and does nothing to curb judicial power to define the contours of the relevant common law rule — it at least recognizes that the use of the common law to construe statutes serves to empower judges.

What is striking about the critical commentary outlined above is that virtually none of it seems to focus on the practical reality that it is a legal fiction to presume that Congress is aware of common law doctrines and rules in the first place — or that Congress drafts statutes in the common law's shadow.[58] There is little reason to believe that members of Congress or their staff look to English or state caselaw, legal treatises, restatements, or law review articles — or otherwise pay attention to the common law meaning associated with particular words or phrases when they draft *most* statutes.[59] But judges — including Justice Scalia, despite his "power grab" comment — simply presume that Congress is aware of and incorporates common law doctrine as if this were an established fact.[60]

---

[53] Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 769 (2013) (emphasis omitted) (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 316 (1982)).

[54] Mendelson, *supra* note 20, at 102 (omission in original) (quoting Scalia, *supra* note 41, at 13).

[55] SCALIA & GARNER, *supra* note 3, at 318.

[56] Scalia, *supra* note 41, at 29.

[57] SCALIA & GARNER, *supra* note 3, at 318.

[58] *See* Gluck, *supra* note 53, at 769 (noting that the common law canons "rest[] on the same kind of legal fiction on which the other canons rely — namely, that Congress knows the canon and drafts in its shadow").

[59] *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegations, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (reporting results of an empirical study finding that many canons are not known to or consulted by Congressional members and staff).

[60] *See, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.–Owned Media, 140 S. Ct. 1009, 1014 (2020); Impression Prods., Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1531–36 (2017); B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015); Sehkar v. United States, 570 U.S. 729, 732 (2013); Bilski v. Kappos, 561 U.S. 593, 626 (2010) (Stevens, J., concurring in the judgment).

The empirical and doctrinal evidence reported in the next Part highlights the discretion judges possess to decide whether and when to use the common law to determine statutory meaning, infer what lessons to draw from the common law, and even to shape the contours of the common law rule itself.

II. INSIDE STORY: INVOKING COMMON LAW MEANING

This Part reports data based on a quantitative and qualitative analysis of 602 statutory interpretation cases decided by the Roberts Court during its 2005 (post–January 31, 2006)[61] through 2019 Terms. Section A describes the methodology by which the cases reviewed for the study were gathered and coded. Section B presents quantitative data regarding the frequency with which the Roberts Court as a whole, and its individual members, employed the common law in the Court's statutory cases. Section C explores in detail the different justifications and methods the Court employs when it invokes the common law, discussing several specific cases and noting patterns in the Court's analysis.

A. Methodology

Every case decided by the U.S. Supreme Court between January 31, 2006, and July 14, 2020, was examined to determine whether it dealt with a statutory issue. Any case in which the Court engaged in statutory interpretation was included in the study.[62] Cases that involved the Federal Rules of Civil Procedure, Evidence, and the like were not included,[63] but a handful of constitutional cases in which the Court construed the meaning of a federal statute were included. This selection methodology yielded 602 statutory cases over fourteen and a half Terms, with 602 majority or plurality opinions, 242 concurring opinions, 334 dissenting opinions, 41 part-concurring/part-dissenting opinions, and 4

---

[61] This is the date that Justice Alito joined the Court.

[62] Cases were identified as follows: I or a research assistant examined every case listed on the Supreme Court's website for every Term. Cases were coded as statutory if they involved the interpretation of a statute. Cases were not coded as statutory if they merely 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 a treaty, contract, or other nonstatutory text.

[63] I made this judgment call because the Federal Rules of Civil Procedure (FRCP) are created in a manner that differs significantly from federal statutes — that is, they are drafted by a committee of lawyers, judges, and academics rather than by Congress and do not require the President's approval. *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045–46 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498–501 (1986). Accordingly, several interpretive tools available when construing statutes are unavailable or provide a very different kind of context with respect to the FRCP. For example, the legislative history of a statute may involve committee reports, floor statements by members of Congress, hearing testimony, and so forth; by contrast, the drafting history of the FRCP consists of comments, recommendations, and suggestions offered by a wide array of interested parties. *See, e.g.*, *Federal Court Rules Research Guide*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=320799&p=2146449 [https://perma.cc/EZU9-LCV6].

part-majority/part-concurring opinions, for a total of 1223 opinions. And of these 602 statutory cases, 287 cases were decided unanimously and 315 were decided by a divided vote.[64]

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 examined for references to the following interpretive tools: (1) plain meaning/textual clarity; (2) dictionary definitions; (3) grammar rules; (4) the whole act rule; (5) other statutes (the whole code rule); (6) common law; (7) substantive canons; (8) Supreme Court precedent; (9) statutory purpose; (10) practical consequences; (11) legislative intent; (12) legislative history; (13) language canons such as *expressio unius*; and (14) references to some form of agency deference.[65] The interpretive resources coded for in this study are consistent with those examined in other empirical studies of the Court's statutory interpretation practices.[66]

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.[67] Secondary or corroborative

---

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

[65] 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, see Krishnakumar, *Whole Code*, *supra* note 23, at 93–94. At the outset of the study, I did not keep track of intercoder reliability, but began doing so with the 2017–2019 Terms. The intercoder agreement rate for those three Terms was 89.0%. This is within typical acceptable intercoder reliability rates. *See* KIMBERLY A. NEUENDORF, THE CONTENT ANALYSIS GUIDEBOOK 143 (2002).

[66] *See, e.g.*, Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 11–12 (1998); Mendelson, *supra* note 20, at 90–94; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 app. A (1992); FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 143–44 (2009).

[67] For example, in *Stokeling v. United States*, 139 S. Ct. 544 (2019), the Court considered whether a robbery offense that lists as an element the use of "force sufficient to overcome a victim's resistance" counts as a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *Stokeling*, 139 S. Ct. at 548–49. The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). The statutory question was whether the use of "force sufficient to overcome a victim's resistance" qualifies as "physical force." *Stokeling*, 139 S. Ct. at 550. The Court concluded that it does, relying primarily on the common law and the ACCA's statutory history: the Court noted that the previous version of the ACCA incorporated the common law of robbery's definition of "force" as force sufficient to overcome a victim's resistance — and reasoned that because the amended statute retained the term "force," it too should be read to incorporate the common law definition. *Id.* at 551–52.

references to an interpretive tool, on the other hand, were counted; thus, where the Court reached an interpretation based primarily on one interpretive source but went on to note that *X*, *Y*, and *Z* interpretive tools further supported that interpretation, the references to *X*, *Y*, and *Z* were coded along with the primarily-relied-upon source.[68] With respect to the common law, this meant that opinions that expressly argued that a common law rule or doctrine should be followed or incorporated into a statute were coded as referencing the common law, as were opinions that cited legal treatises, restatements, *Blackstone's Commentaries*, or occasionally, even legal dictionaries or law review articles to establish a common law rule. Opinions that mentioned the common law or cited one of the above sources but rejected the common law's applicability to the statute at issue were not coded for reliance on the common law.[69]

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.[70]

Last, every opinion that employed the common law to determine a statute's meaning was coded as placing "minimal reliance," "some reliance," or "primary reliance" on the common law. While this coding necessarily involved some judgment calls, I believe it adds valuable texture to our understanding of *how* the Court uses the common law when it chooses to employ it. In any event, my data and coding decisions are available for others to review and agree or disagree with.[71] The coding

---

The opinion was coded for reliance on common law and statutory history. Justice Sotomayor dissented, relying primarily on precedent and statutory purpose and criticizing the majority's inference that the amended ACCA necessarily incorporated the common law definition of robbery. *See id.* at 561–62 (Sotomayor, J., dissenting). Justice Sotomayor's dissent was coded for reliance on precedent and statutory purpose, but not common law or statutory history.

[68] For example, in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), the Court held that the Jones Act, 46 U.S.C. § 30104, does not abrogate an injured seaman's ability to recover punitive damages against his employer. *Atl. Sounding*, 557 U.S. at 409–16. In so ruling, the Court relied heavily on the historical availability of punitive damages in maritime actions at common law — bolstering its common law analysis with references to statutory purpose, ordinary meaning, dictionary definitions, precedent, and other maritime statutes. *Id.* at 416–24. Although the Court invoked these other interpretive tools to corroborate an interpretation arrived at primarily based on the common law, the opinion was coded for reliance on purpose, plain meaning, dictionary definitions, precedent, and other statutes.

[69] Justice Ginsburg's opinion for the Court in *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011), for example, quoted both the *Restatement (Second) of Contracts* and a prominent contracts law treatise in considering and rejecting Santa Clara County's common law–based argument that health care facilities should be permitted to sue manufacturers of pharmaceutical drugs in certain circumstances. *Id.* at 117–18. Because the opinion referenced the common law only to explain and reject the County's argument, *id.* at 118 — denying the applicability of the common law rule — the opinion was not coded for reliance on the common law.

[70] *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 231–33 (2010); Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 277–80 (2022); Krishnakumar, *Whole Code*, *supra* note 23, at 91–94; Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 841–46 (2017); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 921–26 (2016).

[71] *See infra* Appendix, pp. 675–88.

parameters for reliance were as follows: an opinion was coded as employing "minimal reliance" on the common law if it made passing reference to the common law or mentioned the common law as an add-on argument supporting a reading already arrived at through other interpretive tools.[72] An opinion was coded as involving "some reliance" if it made more than minimal reference to the common law but did not rely on the common law as the main justification for the construction it adopted.[73] Finally, an opinion was coded as involving "primary reliance" if it relied primarily or heavily on a common law meaning or doctrine to justify the result it reached.[74]

B. Statistics

Before reporting the data, it is important to note some limitations of this study. First, the study covers only fourteen and a half Supreme Court Terms and 602 statutory interpretation cases, decided by some combination of the same thirteen Justices. While this dataset is large enough to teach us some things about the Court's use of the common law as an interpretive tool, 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 the common

---

[72] For example, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010), the Court held that the "bona fide error" defense to the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p, does not apply to FDCPA violations that result from a debt collector's mistaken interpretation of the FDCPA's legal requirements. *Jerman*, 559 U.S. at 604–05. Justice Scalia concurred in part, writing separately to criticize the Court's reliance on legislative history and intent. *Id.* at 606 (Scalia, J., concurring in part and concurring in the judgment). In the midst of these criticisms, Justice Scalia made a passing reference to the common law — noting that "there is a long tradition in the common law and in our construction of federal statutes distinguishing errors of fact from errors of law." *Id.* at 608. Justice Scalia's opinion was coded for "minimal reliance" on common law.

[73] For example, in *Dean v. United States*, 556 U.S. 568 (2009), the Court held that a ten-year mandatory sentencing enhancement triggered when a firearm "is discharged" during a violent crime applies even if the gun is discharged accidentally. *Id.* at 577. The majority opinion relied prominently on the statute's plain meaning, grammar, and the whole act rule. *Id.* at 573–74. It also buttressed these textual tools with an appeal to the common law, quoting *Blackstone's Commentaries* and a criminal law treatise to establish that "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Id.* at 575–76. The opinion was coded as placing "some reliance" on the common law.

[74] For example, in *Comcast Corp. v. National Ass'n of African American–Owned Media*, 140 S. Ct. 1009 (2020), the Court held that a § 1981 plaintiff bears the burden of showing that race was a but-for cause of her injury. *Id.* at 1019. The Court relied heavily on the common law, starting from the premise that "it is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation." *Id.* at 1014 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)). The opinion also argued that the statute's structure, historical evolution, precedent, and judicial treatment of a neighboring statute supported the reading dictated by the common law. *Id.* at 1014–15. The opinion was coded as placing "primary reliance" on common law.

law, 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 common law meaning because the opinion's author was persuaded by the common law or merely because the author thought the common law provided a convincing justification for the chosen interpretation. The study's empirical and doctrinal claims are confined to describing how the Justices publicly engage the common law to justify their statutory constructions and to theorizing about discernable patterns in their public engagement of the common law.

1. Frequency and Weight. — Table 1 reports the frequency with which the members of the Roberts Court as a whole referenced various interpretive canons and tools. The Table reports rates of reference across all opinions in the dataset, as well as separate rates for majority, dissenting, concurring, and part-concurring/part-dissenting opinions.[75] As the Table shows, the Justices invoked the common law in 10.7% of all opinions in the dataset and in 13.8% of the 602 majority opinions in the dataset.[76] In addition, 16.9% of the 602 cases in the dataset contained at least one opinion that invoked the common law.[77] This puts the common law in the lowest tier of most-frequently-invoked interpretive tools — well behind Supreme Court precedent, text/plain meaning, practical consequences, the whole act rule, the whole code, dictionary definitions, legislative history, and statutory purpose,[78] but roughly similar in its rate of invocation to substantive canons, legislative intent, and language/grammar canons combined.[79]

---

[75] *See infra* Table 1, p. 625.

[76] *See infra* Table 1, p. 625.

[77] Specifically, 102 cases in the dataset contained at least one opinion that invoked the common law. *See infra* Appendix, pp. 675–88 (listing cases).

[78] The first tier tools (precedent, text/plain meaning, practical consequences, and the whole act rule) were referenced in over one-third of the opinions in the dataset; the second tier tools (whole code rule, dictionary definitions, legislative history, and statutory purpose) were referenced in roughly 20.0%–25.0% of the opinions in the dataset. *See infra* Table 1, p. 625.

[79] Substantive canons, legislative intent, and language/grammar canons were referenced in roughly 8.2%–15.0% of the opinions in the dataset. *See infra* Table 1, p. 625.

Table 1: Overall Roberts Court Rates of Reliance on Interpretive Canons and Tools in the 2005–2019 Terms

Interpretive Canons / Tools	All Opinions (n=1223)	Majority / Plurality Opinions (n=602)	Dissenting Opinions (n=334)	Concurring Opinions (n=242)	Partial Opinions (n=45)
Text / Plain Meaning	39.1%	49.2%	35.6%	22.7%	20.0%
Dictionary Rule	22.4%	30.2%	18.6%	7.9%	17.8%
Other Statutes / Whole Code	22.0%	29.7%	22.5%	4.5%	9.8%
Common Law	10.7%	13.8%	8.1%	6.2%	15.6%
Substantive Canons	15.0%	16.9%	17.4%	6.6%	15.6%
Whole Act Rule	28.5%	38.5%	26.6%	7.9%	20.0%
Language / Grammar Canons	8.2%	11.8%	6.3%	2.1%	6.7%
Supreme Court Precedent	58.9%	69.9%	54.5%	38.8%	51.1%
Practical Consequences	37.0%	37.4%	49.7%	19.4%	33.3%
Purpose	23.5%	27.7%	27.2%	9.5%	15.6%
Intent	11.4%	10.8%	18.3%	5.0%	2.2%
Legislative History	24.2%	28.2%	29.6%	8.7%	13.3%

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 he or she authored. The Table shows that all of the Justices other than Justice Kavanaugh employed the common law regularly — and at rates that fell within roughly ten percentage points of each other.[80]

[80] *See infra* Table 2, p. 626. Justice Kavanaugh authored only 13 opinions during October Terms 2018 and 2019; given this small sample size, his failure to invoke the common law in the opinions he authored should not be given too much weight.

Table 2: Individual Justices' Rates of Reliance on Different Forms of Interpretive Tools by Opinion Author† (n=1191)‡

Scalia (n=127)	Thomas (n=182)	Alito (n=137)	Roberts (n=83)	Kennedy (n=77)	Souter (n=35)	Ginsburg (n=123)	Breyer (n=148)	Stevens (n=61)	Sotomayor (n=112)	Kagan (n=62)	Gorsuch (n=31)	Kavanaugh (n=13)
Canons / Interpretive Tools												
Text / Plain Meaning* (%)												
51.2	46.2	43.1	39.8	45.1	42.9	26.0	23.0	42.6	39.3	46.8	51.6	46.2
Supreme Court Precedent (%)												
48.0	58.8	56.9	67.5	66.2	54.3	54.5	58.1	54.1	60.7	56.5	71.0	69.2
Dictionary Definitions* (%)												
20.4	25.8	29.2	15.7	23.9	17.1	12.2	16.9	16.4	31.3	37.1	45.2	15.4
Language / Grammar Canons (%)												
7.9	11.5	8.0	8.4	11.7	5.7	5.7	5.4	4.9	12.5	4.8	12.9	7.7
Whole Act Rule* (%)												
26.0	30.2	30.7	33.7	27.3	31.4	22.8	23.0	21.3	42.9	27.4	48.4	23.1
Other Statutes / Whole Code* (%)												
16.5	18.7	29.2	30.1	20.8	22.9	22.0	17.6	14.8	26.8	17.7	51.6	38.5
Common Law* (%)												
11.8	10.4	12.4	13.3	5.6	14.3	4.1	13.5	16.4	14.3	14.5	6.5	0.0
Substantive Canons (%)												
13.4	13.7	12.4	21.7	19.3	14.3	17.1	10.8	24.6	12.5	17.7	22.6	7.7
Practical Consequences* (%)												
28.3	20.3	44.5	38.6	50.7	31.4	40.7	50.0	29.5	44.6	33.9	45.2	46.2
Purpose* (%)												
10.2	9.9	19.0	12.0	45.1	17.1	35.0	39.2	29.5	25.9	40.3	9.7	15.4
Intent* (%)												
3.9	1.6	14.6	7.2	22.9	14.9	14.6	17.6	40.0	17.0	3.2	0.0	15.4
Legislative History* (%)												
7.1	7.7	23.4	12.0	28.2	28.6	35.8	41.9	37.7	38.4	32.3	29.0	15.4

† 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 beside each Justice's name, as n=X).

‡ The total number of opinions reflected in the Table is 1191, rather than 1223, because the Table omits 32 per curiam opinions issued during the period studied.

* Indicates that a one-way analysis of variance (ANOVA) test, using the Bonferroni multiple comparison test, reveals a significant difference between rates of reliance by different Justices in the opinions they authored at $p<.05$ (for Text/Plain Meaning, p=.0000; Dictionary Definitions, p=.0001; Whole Act Rule, p=.0006; Common Law, p=.0001; Practical Consequences, p=.0000; Intent, p=.0000; Legislative History, p=.0000; and Other Statutes/Whole Code, p=.0001). In other words, for these particular interpretive tools, the patterns or differences in rates of reference across Justices were less than 5.0% likely to have occurred merely by chance.

Table 2 reveals that during the period studied, Justices Stevens, Kagan, Sotomayor, and Souter were the most frequent users of the common law — invoking the common law as part of their interpretive analysis in 16.4%, 14.5%, 14.3%, and 14.3% of the opinions they authored, respectively — while Justices Ginsburg, Kennedy, and Gorsuch were the least frequent users of this interpretive tool, employing it in 4.1%, 5.6%, and 6.5% of the opinions they authored, respectively.[81] What is most noteworthy about these figures is that the common law seems to be used at fairly comparable rates by most of the Justices across the board, irrespective of ideological or methodological preferences. Significantly, Justices Roberts, Thomas, Alito, and Scalia — all considered textualist or textualist-leaning jurists — employed the common law in 10.4%–13.3% of the opinions they authored, not far behind the rates at which the nontextualist Justices invoked this interpretive tool, while committed-textualist Justice Gorsuch invoked the common law at a noticeably lower rate (6.5%), alongside nontextualist Justice Ginsburg (4.1%) and textualist-leaning Justice Kennedy (5.6%).[82] Thus, the Justices' rates of reference to the common law do not seem to track with their preferred theoretical or methodological approaches.

The data also reveal some interesting information about the weight that the Justices placed on the common law when they invoked it. Table 3 reports how often the members of the Roberts Court placed "minimal," "some," or "primary" reliance on the common law when they employed this interpretive tool.[83]

Table 3: Relative Weight Placed on Common Law Referents in the 2005–2019 Terms

Opinion Type	Minimal Reliance (n=15)	Some Reliance (n=53)	Primary Reliance (n=63)
All Opinions that Invoke the Common Law (n=131)	11.5% (n=15)	40.5% (n=53)	48.1% (n=63)
Majority Opinions (n=83)	12.0% (n=10)	36.1% (n=30)	51.8% (n=43)
Concurring Opinions (n=15)	13.3% (n=2)	33.3% (n=5)	53.3% (n=8)

[81] *See supra* Table 2, p. 626. These figures exclude Justice Kavanaugh.
[82] *See supra* Table 2, p. 626.
[83] *See infra* Table 3, pp. 627–28.

Opinion Type	Minimal Reliance (n=15)	Some Reliance (n=53)	Primary Reliance (n=63)
Dissenting Opinions (n=27)	7.4% (n=2)	59.3% (n=16)	33.3% (n=9)
Partial Opinions (n=6)	16.7% (n=1)	33.3% (n=2)	50.0% (n=3)

The data show that the members of the Roberts Court only occasionally relied on the common law as a "minimal" or "passing" factor in their statutory analysis.[84] Indeed, in nearly one-half of the opinions in which the Justices invoked the common law, they placed "primary" weight on it in their interpretive analysis.[85] Another 40.5% of the opinions that invoked the common law placed "some" intermediate weight on this interpretive resource — meaning that they relied on the common law as one of several factors that supported a particular statutory construction.[86] Many of the "primary reliance" opinions — and some of the "some reliance" opinions — contained lengthy exegeses about the common law rule at issue.[87]

2. Subject Matter and Sources. — Perhaps more interesting than the frequency with which the members of the Roberts Court invoked the common law are the parameters of those invocations. That is, what

---

[84] *See supra* Table 3, pp. 627–28 (reporting that 11.5% of the opinions that invoked the common law placed "minimal" weight on the common law).

[85] *See supra* Table 3, pp. 627–28 (reporting that 48.1% of the opinions that invoked the common law placed "primary" weight on the common law).

[86] *See supra* Table 3, pp. 627–28.

[87] *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1942–49 (2020) (primary reliance); *id.* at 1950–53 (Thomas, J., dissenting) (primary); Comcast Corp. v. Nat'l Ass'n of Afr. Am.–Owned Media, 140 S. Ct. 1009, 1015–16 (2020) (primary); Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2279–84 (2019) (primary); Taggart v. Lorenzen, 139 S. Ct. 1795, 1801–02 (2019) (primary); Stokeling v. United States, 139 S. Ct. 544, 550–51 (2019) (primary); Impression Prods., Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1531–36 (2017) (primary); Husky Int'l Elecs. v. Ritz, 136 S. Ct. 1581, 1586–88 (2016) (primary); Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 674–76 (2016) (Thomas, J., concurring in the judgment) (primary); Tibble v. Edison Int'l, 575 U.S. 523, 528–30 (2015) (primary); Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 197–99 (2015) (Scalia, J., concurring in part and concurring in the judgment) (primary); CTS Corp. v. Waldburger, 573 U.S. 1, 8–9 (2014) (primary); Rosemond v. United States, 572 U.S. 65, 70–75 (2014) (primary); US Airways, Inc. v. McCutchen, 569 U.S. 88, 94–104 (2013) (primary); Filarsky v. Delia, 566 U.S. 377, 384–89 (2012) (primary); Rehberg v. Paulk, 566 U.S. 356, 362–64 (2012) (primary); Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766–68 (2011) (primary); Merck & Co. v. Reynolds, 559 U.S. 633, 644–48 (2010) (primary); Conkright v. Frommert, 559 U.S. 506, 529–35 (2010) (Breyer, J., dissenting) (primary); Cuomo v. Clearing House Ass'n, 557 U.S. 519, 525–29 (2009) (primary); *id.* at 540–45 (Thomas, J., concurring in part and dissenting in part) (primary); Wallace v. Kato, 549 U.S. 384, 388–91 (2007) (primary); Cigna Corp. v. Amara, 563 U.S. 421, 440–42 (2011) (some reliance); Bilski v. Kappos, 561 U.S. 593, 626–30 (2010) (Stevens, J., concurring in the judgment) (some); Hamilton v. Lanning, 560 U.S. 505, 515–17 (2010) (some); Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613–14 (2009) (some); Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 176–80 (2008) (Stevens, J., dissenting) (some); Hamdan v. Rumsfeld, 548 U.S. 557, 698–704 (2006) (Thomas, J., dissenting) (some).

kind of statutes did the Justices use the common law to construe? Were certain subject areas more represented than others in the subset of opinions in which the common law played a role in the Court's interpretive analysis? What specific sources did the Court rely on to establish the relevant background common law rule?

Table 4a reports the subject matter of the opinions in which the members of the Roberts Court employed the common law as an interpretive aid. The data reveal that 19.1% of the opinions in the dataset that invoked the common law involved a criminal statute and 9.9% involved a statute governing intellectual property.[88] A smaller but noteworthy percentage of the opinions that employed the common law involved jurisdictional statutes (6.1%), bankruptcy statutes (6.9%), or the Employee Retirement Income Security Act of 1974[89] (ERISA) (6.9%).[90] Indeed, these five subject areas together accounted for almost half (48.9%) of the opinions in the dataset that employed the common law; criminal and intellectual property statutes together accounted for nearly one-third (29.0%) of the Court's common law references.[91]

Table 4a: Subject Matter of Statutory Opinions Invoking the Common Law in the 2005–2019 Terms

Subject Matter	All Opinions (n=131)	Majority Opinions (n=83)	Dissenting Opinions (n=27)	Concurring Opinions (n=15)	Partial Opinions (n=6)
Criminal Law (n=25)	19.1%	18.1%	18.5%	20.0%	33.3%
Intellectual Property (n=13)	9.9%	8.4%	11.1%	20.0%	16.7%
Bankruptcy (n=9)	6.9%	9.6%	3.7%	0.0%	0.0%
ERISA (n=9)	6.9%	9.6%	3.7%	0.0%	0.0%
Jurisdictional (n=8)	6.1%	4.8%	7.4%	13.3%	0.0%
Securities (n=6)	4.6%	3.6%	7.4%	6.7%	0.0%

[88] *See infra* Table 4a, pp. 629–31.

[89] Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

[90] *See infra* Table 4a, pp. 629–31.

[91] By way of comparison, in the full dataset, including opinions that did not employ the common law, these five subject areas accounted for 33.4% of all opinions; criminal and intellectual property statutes alone accounted for 21.0% of all opinions.

Subject Matter	All Opinions (n=131)	Majority Opinions (n=83)	Dissenting Opinions (n=27)	Concurring Opinions (n=15)	Partial Opinions (n=6)
Discrimination (n=5)	3.8%	4.8%	3.7%	0.0%	0.0%
Preemption (n=5)	3.8%	3.6%	0.0%	0.0%	33.3%
§ 1983 (n=4)	3.1%	4.8%	0.0%	0.0%	0.0%
Immigration (n=4)	3.1%	1.2%	3.7%	6.7%	16.7%
AEDPA (n=3)	2.3%	2.4%	3.7%	6.7%	0.0%
Civil RICO (n=3)	2.3%	2.4%	3.7%	0.0%	0.0%
FELA (n=3)	2.3%	2.4%	3.7%	6.7%	0.0%
Jones Act (n=3)	2.3%	2.4%	3.7%	0.0%	0.0%
Indian Law (n=2)	1.5%	1.2%	0.0%	6.7%	0.0%
International (n=2)	1.5%	2.4%	0.0%	0.0%	0.0%
PLRA (n=2)	1.5%	1.2%	3.7%	0.0%	0.0%
Antitrust (n=1)	0.8%	1.2%	0.0%	0.0%	0.0%
APA (n=1)	0.8%	1.2%	0.0%	0.0%	0.0%
Attorney's Fees (n=1)	0.8%	1.2%	0.0%	0.0%	0.0%
Environmental Law (n=1)	0.8%	1.2%	0.0%	0.0%	0.0%
FAA (n=1)	0.8%	0.0%	3.7%	0.0%	0.0%
False Claims Act (n=1)	0.8%	1.2%	0.0%	0.0%	0.0%
Religion (n=1)	0.8%	0.0%	3.7%	0.0%	0.0%

SUBJECT MATTER	ALL OPINIONS (n=131)	MAJORITY OPINIONS (n=83)	DISSENTING OPINIONS (n=27)	CONCURRING OPINIONS (n=15)	PARTIAL OPINIONS (n=6)
Other Statutes (n=19)	14.5%	12.0%	18.5%	20.0%	0.0%

The subject matter data in Table 4a are interesting but not very revealing. Cases involving criminal statutes account for a sizeable portion of the dataset as a whole,[92] so it is to be expected that a comparable portion of the opinions in the dataset that invoke any one interpretive tool, including the common law, would involve criminal statutes. Further, criminal law statutes tend to codify preexisting common law crimes,[93] so from a legislative design perspective, it makes sense that the Court would turn to the common law to clarify the meaning of statutory terms that originated at common law. Cases involving intellectual property and jurisdictional statutes likewise make up a notable portion of the dataset (9.9% and 6.1% of all opinions, respectively), so it is to be expected that a comparable portion of common law–invoking opinions should involve these subject areas.[94]

If we look instead at what percentage of all opinions involving a particular statute (or subject) invoked the common law, the data become more interesting. Table 4b reports these figures. As the Table reveals, a noteworthy percentage of all Jones Act[95] (75.0%), Federal Employers' Liability Act[96] (FELA) (37.5%), ERISA (36.0%), § 1983[97] (33.3%), Civil Racketeer Influenced and Corrupt Organizations Act[98] (RICO) (21.4%), Administrative Procedure Act[99] (APA) (20.0%), and Bankruptcy Code (19.1%) opinions in the dataset invoked the common law.[100] These figures are in one sense unsurprising, as most of these statutes have long common law pedigrees. FELA, § 1983, and the Jones Act, for example, are tort law–related statutes that build upon well-established common

---

92 In the full dataset, 178 of 1223 (14.6%) opinions and 84 of 602 (14.0%) cases involved a criminal statute.

93 *See, e.g.*, Michael R. Fishman, Note, *Defining Attempts:* Mandujano*'s Error*, 65 DUKE L.J. 345, 345 (2015) ("Congress has codified criminal law . . . believing that courts would continue to use common-law meanings as they had always done."); Charles Patrick Thomas, Note, *A New Deal Approach to Statutory Interpretation: Selected Cases Authored by Justice Robert Jackson*, 44 J. LEGIS. 132, 145 (2017) ("[M]any criminal statutes were simply the codification of common law crimes.").

94 In the full dataset, 78 opinions in 42 cases involved an intellectual property statute and 81 opinions in 41 cases involved a jurisdictional provision.

95 46 U.S.C. § 30104.

96 45 U.S.C. §§ 51–60.

97 42 U.S.C. § 1983.

98 18 U.S.C. §§ 1961–1968.

99 5 U.S.C. §§ 551, 553–559, 701–706.

100 *See infra* Table 4b, pp. 633–34.

law frameworks.[101] Indeed, the Court has expressly noted that Congress intended for § 1983 "to be construed in the light of common-law principles"[102] and that "the elements of a FELA claim are determined by reference to the common law."[103] ERISA has a similar common law pedigree; the Court's opinions repeatedly explain that an ERISA fiduciary's duties are "derived from the common law of trusts"[104] and that "Congress invoked the common law of trusts" to define the scope of ERISA fiduciaries' authority.[105] Opinions involving the Bankruptcy Code and Civil RICO do not contain similar explanations, although scholars have noted that the Bankruptcy Code incorporates common law principles of restitution and unjust enrichment.[106] Some commentators have even called the Bankruptcy Code a "common-law statute[]"[107] or argued that "[b]ankruptcy statutes have always been, by necessity, enacted against and informed by the background of our common-law legal system."[108] Ultimately, it is interesting but impossible to determine with certainty why the members of the Roberts Court invoked the common law at noteworthy rates in cases involving these

---

101 FELA and the Jones Act give railroad workers and seamen who are injured on the job because of their employer's negligence the right to recover damages against their employers. Section 1983 establishes liability for violations of constitutional rights "under color of state law"; it has been described as a federal alternative to state common law tort claims. *See* Laird Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 45, 45 (1977).

102 Rehberg v. Paulk, 566 U.S. 356, 362 (2012).

103 Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 166 (2007).

104 Tibble v. Edison Int'l, 575 U.S. 523, 528 (2015) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)); *see also* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 416 (2014).

105 *Cent. States*, 472 U.S. at 570; *see also* Conkright v. Frommert, 559 U.S. 506, 534 (2015) (Breyer, J., dissenting); United States v. Jicarilla Apache Nation, 564 U.S. 162, 203 (2011) (Sotomayor, J., dissenting) (noting that "reference to general trust law" could flesh out statutory gaps (quoting Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001))); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 294 (2009) (explaining that the law of trusts "serves as ERISA's backdrop" (quoting Beck v. PACE Int'l Union, 551 U.S. 96, 101 (2007))); LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 253 n.4 (2008) (stating that the common law of trusts "informs our interpretation of ERISA's fiduciary duties").

106 *See* Ralph Brubaker, *An Introductory Note from the Editor-in-Chief*, BANKR. L. LETTER, Dec. 2011, at 1; Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265, 266 (1998).

107 Kull, *supra* note 106, at 266; *see also* Ashley S. Hohimer, Note, *Constructive Trusts in Bankruptcy: Is an Equitable Interest in Property More Than Just a "Claim"?*, 19 BANKR. DEVS. J. 499, 508 (2003).

108 Brubaker, *supra* note 106, at 1; *see also* Ralph Brubaker, *Preferential Payment of a Nondischargeable Debt and the Dischargeability of the Creditor's § 502(h) Claim upon Recovery Thereof: Considering the Common Law Origins and Nature of the Code's Avoidance Remedy*, BANKR. L. LETTER, Jan. 2007, at 5–7; Ralph Brubaker, *Lien Avoidance "for the Benefit of the Estate": Textualism, Equitable Powers, and Code Common Law*, BANKR. L. LETTER, Jan. 2006, at 5–8.

seven statutes versus cases involving other statutes or subjects — especially since many other statutes in the dataset also regulate fields with a rich common law history.[109]

Table 4b: Frequency of Common Law Usage in Opinions by Subject Matter in the 2005–2019 Terms

Subject Area	Percentage of Opinions Involving Subject Area that Invoked the Common Law	Number of Opinions Involving Subject Area that Invoked the Common Law
Criminal Law (n=178)	14.0%	25
Jurisdictional (n=81)	9.9%	8
Discrimination (n=83)	6.0%	5
Intellectual Property (n=78)	16.7%	13
Preemption (n=58)	8.6%	5
Immigration (n=57)	7.0%	4
Environmental Law (n=53)	1.9%	1
AEDPA (n=48)	6.3%	3
Bankruptcy (n=47)	19.1%	9
Securities (n=47)	12.8%	6
FAA (n=45)	2.2%	1
Indian Law (n=27)	7.4%	2
ERISA (n=25)	36.0%	9
Antitrust (n=16)	6.3%	1
Attorney's Fees (n=14)	7.1%	1
Civil RICO (n=14)	21.4%	3
Religion (n=13)	7.7%	1
§ 1983 (n=12)	33.3%	4
False Claims Act (n=12)	8.3%	1
PLRA (n=12)	16.7%	2
International (n=11)	18.2%	2

[109] For example, the Sherman Antitrust Act, 15 U.S.C. § 1, is often referred to as a common law statute, but only 6.3% of all opinions in the dataset involving an antitrust statute invoked the common law; and as noted above, criminal statutes tend to codify common law crimes, yet only 14.0% of opinions in the dataset involving a criminal statute invoked the common law. *See infra* Table 4b, pp. 633–34.

Subject Area	Percentage of Opinions Involving Subject Area that Invoked the Common Law	Number of Opinions Involving Subject Area that Invoked the Common Law
FELA (n=8)	37.5%	3
APA (n=5)	20.0%	1
Jones Act (n=4)	75.0%	3
Other Statutes (n=179)	10.1%	18

Table 5 reports the specific sources that the members of the Roberts Court cited to establish the content of the common law in cases in which they invoked the common law.[110] As the data reveal, the most common source the members of the Roberts Court invoked to establish the relevant common law rule was caselaw — that is, prior judicial decisions. Indeed, 79.4% of the opinions in the dataset that invoked the common law cited at least one judicial decision as the source of the relevant common law rule.[111] Treatises were the second-most often invoked common law source (63.4%), restatements were a distant third (27.5%), *Blackstone's Commentaries* were a distant fourth (12.2%), and law reviews/books and legal dictionaries were an even more distant fifth (8.4%) and sixth (6.1%), respectively.[112] It should be noted that most opinions cited more than one source to establish the content of the relevant common law rule or definition.[113]

---

[110] *See infra* Table 5, p. 635.

[111] *See infra* Table 5, p. 635.

[112] *See infra* Table 5, p. 635. References to legal dictionaries, typically *Black's Law Dictionary*, were coded as "common law" references only if the dictionary definition was used to establish the common law meaning of the term at issue, rather than merely its ordinary meaning. For example, both the majority and dissenting opinions in *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560 (2012), cited different editions of *Black's Law Dictionary* for definitions of the word "interpreter." *Id.* at 567; *id.* at 576 (Ginsburg, J., dissenting). Because they invoked *Black's Law Dictionary* to establish the ordinary meaning of "interpreter" rather than a common law rule about interpreters, neither opinion was coded as referencing the common law. By contrast, Justice Alito's dissenting opinion in *Johnson v. United States*, 559 U.S. 133 (2010), cited *Black's Law Dictionary* and LaFave and Scott's *Substantive Criminal Law* treatise for the "classic definition" of battery and argued that the "ACCA was meant to incorporate this traditional definition." *Id.* at 146 (Alito, J., dissenting). Justice Alito's dissent was coded as referencing the common law.

[113] This was true of 68.7% (90 out of 131) of the opinions in the dataset that invoked the common law. *See infra* Appendix, pp. 675–88.

Table 5: Sources Used to Establish Common Law Meaning in Opinions that Invoked the Common Law in the 2005–2019 Terms

SOURCES	ALL OPINIONS THAT INVOKED THE COMMON LAW (n=131)*
Caselaw	79.4% (n=104)
Treatise	63.4% (n=83)
Restatement	27.5% (n=36)
Blackstone's Commentaries	12.2% (n=16)
Law Reviews / Books / etc.	8.4% (n=11)
Legal Dictionaries	6.1% (n=8)
Miscellaneous / Other	3.1% (n=4)
None	1.5% (n=2)

3. Plain Meaning and the Common Law. — In order to gain a better understanding of how the common law is used by a Court widely regarded as predominantly textualist,[114] I also examined the Roberts Court's references to the clarity of the statute's text or its "plain meaning"[115] in the subset of opinions that invoked the common law. The data revealed that less than one-third (29.8%) of the opinions that invoked the common law also found that the statute at issue had a clear or "plain" meaning.[116] This finding raises additional questions — such as whether the Court tends to use the common law merely to support the statute's plain meaning in those opinions in which it references both the common law and plain meaning and whether, in the remaining opinions, the Court tends to use the common law to fill in gaps in statutory meaning after determining that the statute lacks a "plain" meaning.

In an effort to answer such questions, I further examined the 39 opinions in the dataset that invoked both the common law and text/plain meaning to determine, doctrinally, how those two tools were used in

* The figures below add up to more than 131 sources because many cases cited multiple sources to establish the relevant common law rule.

114 *See, e.g.*, Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), https://youtu.be/dpEtszFToTg [https://perma.cc/M4NX-WXGK] (statement of Kagan, J.) ("[W]e're all textualists now . . . ."); *see also* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22 (2014) ("In the Rehnquist-Roberts era, the Court has . . . [followed] a more textualist approach."); Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 673 (2016) (describing "the Roberts Court's deep commitment to the new textualist methodology"); Skrmetti, *supra* note 1 (noting that the Court's opinions in *Bostock* "put[] to rest any doubt" that the Court has embraced textualism).

115 References to a statute's "ordinary," "natural," or "unambiguous" meaning were counted as references to "plain meaning" for purposes of this coding.

116 *See infra* Table 6, p. 636.

relation to each other. I also examined the remaining 92 opinions in the dataset that invoked the common law, but not text/plain meaning, to determine whether the Court first looked for textual ambiguity before turning to the common law. Doctrinal review of the cases revealed that of the opinions that referenced both plain meaning and the common law, 53.8% (21 of 39) used the common law to support a construction they arrived at primarily based on the statute's text/plain meaning.[117] This means that 16.0% of all 131 opinions that invoked the common law used the common law as a confirmatory tool to support an interpretation based primarily on text/plain meaning.[118]

Table 6: Rates of Reliance on Plain Meaning in Opinions that Invoked the Common Law in the 2005–2019 Terms

Usage of Plain Meaning	Percentage of Opinions that Used Plain Meaning* out of Total Opinions that Invoked the Common Law
Common Law Supports Plain Meaning	16.0% (n=21)
Plain Meaning Supports Common Law	6.9% (n=9)
Common Law and Plain Meaning Used for Different Terms	3.8% (n=5)
Other	3.1% (n=4)
Total Opinions Referencing Plain Meaning	29.8% (n=39)

However, the reverse was also true: another 30.8% (12 of 39) of the opinions that referenced both plain meaning and the common law relied

---

[117] *See infra* Table 6, p. 636; Babb v. Wilkie, 140 S. Ct. 1168, 1177 (2020); Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1076 (2020) (Thomas, J., dissenting); Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1661 (2019); Voisine v. United States, 136 S. Ct. 2272, 2286 (2016) (Thomas, J., dissenting); Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1931–32 (2016); Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1590 (2016) (Thomas, J., dissenting); Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 557 (2014); Paroline v. United States, 572 U.S. 434, 474–75 (2014) (Sotomayor, J., dissenting); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 530 (2013); Lozman v. City of Riviera Beach, 568 U.S. 115, 122–25 (2013); *id.* at 134 (Sotomayor, J., dissenting); Cigna Corp. v. Amara, 563 U.S. 421, 435–36, 439 (2011); United States v. Tohono O'odham Nation, 563 U.S. 307, 315–16 (2011); Hamilton v. Lanning, 560 U.S. 505, 514–15 (2010); Samantar v. Yousuf, 560 U.S. 305, 313–16, 319–20 (2010); Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 182–83 (2010); Johnson v. United States, 559 U.S. 133, 138, 141 (2010); Dean v. United States, 556 U.S. 568, 579 (2009); Cuomo v. Clearing House Ass'n, 557 U.S. 519, 537 (2009) (Thomas, J., concurring in part and dissenting in part); Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 475 (2006); Woodford v. Ngo, 548 U.S. 81, 88 (2006).

[118] *See infra* Table 6, p. 636.

* Includes three majority opinions that employed both "derogation canon redux" and "legislation expectations" or "settled rule" arguments.

significantly on the common law and used the statute's plain meaning as a secondary tool to support a construction arrived at primarily based on the common law.[119] In *United States Forest Service v. Cowpasture River Preservation Ass'n*,[120] for example, the Court considered the National Trails System Act,[121] which authorizes the Secretary of the Interior to establish the location and width of the Appalachian Trail by entering into "rights-of-way" agreements with other federal agencies, states, local governments, and private landowners and also provides that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands."[122] At issue was whether the Secretary's decision to assign responsibility over the Appalachian Trail to the National Park Service transformed the land over which the trail passes into land controlled by, or within the regulatory jurisdiction of, the National Park Service.[123] The Court concluded that it did not, relying heavily on common law rules about easements (that is, that easements grant a limited right of use to the grantee and the grantor retains ownership over the land itself).[124] After explaining the common law rule, the Court observed that "[w]hen applied to a private or state property owner," the statutory term "'right-of-way' would carry its *ordinary meaning* of a limited right to enjoy another's land" — and that the same should be true as applied to a federal agency.[125] That is, the Court essentially used the common law rule to derive, or determine, the ordinary meaning of the term "right-of-way."

The remaining 9 opinions that referenced both plain meaning and the common law tended to use the two interpretive tools to address two different interpretive questions or to analyze different statutory terms.[126]

---

[119] *See supra* Table 6, p. 636; U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1844–46 (2020); Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 589–90 (2020); Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 1999 (2016); Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158, 2164 (2015); CTS Corp. v. Waldburger, 573 U.S. 1, 8, 12–13 (2014) (contrasting common law rules about statutes of repose with those about statutes of limits and only secondarily turning to textual and structural analysis); *Paroline*, 572 U.S. at 444–46; Burrage v. United States, 571 U.S. 204, 210 (2014) (making common law argument that "the law has long considered causation a hybrid concept" and turning in next paragraph to a discussion about ordinary meaning); Sekhar v. United States, 570 U.S. 729, 732–34 (2013); Sossamon v. Texas, 563 U.S. 277, 293 (2011) (Sotomayor, J., dissenting); Atl. Sounding Co. v. Townsend, 557 U.S. 404, 419 (2009); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–58, 63 (2007); *Domino's Pizza*, 546 U.S. at 475.

[120] 140 S. Ct. 1837.

[121] 16 U.S.C. §§ 1241–1251.

[122] *Id.* § 1246(a), (d), (e).

[123] *Cowpasture River Pres.*, 140 S. Ct. at 1844.

[124] *Id.*

[125] *Id.* at 1845 (emphasis added).

[126] *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 416 (2014); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 372 (2013) (Ginsburg, J., dissenting) (finding that phrase "any employment practice" plainly covers retaliation); *id.* at 382–83 (using common law to interpret meaning of

Finally, I conducted a close analysis of the 92 opinions in the dataset that invoked the common law but did not find a plain meaning. In 6 of these opinions (6.5%), the Court noted that the statute was ambiguous before referencing the common law to construe the statute.[127] In the remaining vast majority of these opinions (93.5%), the Court made no attempt to identify or discuss the statute's plain meaning or the clarity of the statute's text, often simply jumping straight into a discussion of the common law.[128] Indeed, most of the Court's common law–invoking opinions provided no guidance whatsoever regarding when it is appropriate to use the common law to determine a statute's meaning or what the interpretive relationship should be between the search for plain meaning, on the one hand, and the incorporation of meaning dictated by background common law rules, on the other.

4. Briefs v. Opinions. — Finally, in order to measure the extent to which the Court's use of the common law to construe statutes is dependent on litigants' or amici curiae's invocation of common law arguments, I examined the briefs filed by all parties and certain prominent amici in every case in the dataset.[129] The data reveal that the Justices often ignored litigants' or amici's invocation of common law doctrine, declining to reference the common law even when multiple briefs raised common law–based arguments about how a statute should be construed. There were 499 cases in the dataset in which the members of the Roberts Court declined to invoke the common law in either the majority or an ancillary opinion. In half of these cases (50.9%), at least one of the parties' briefs invoked the common law;[130] and in more than a quarter of the cases (28.9%), multiple briefs made common law–based arguments.[131] The

---

phrase "because of"); Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 635 (2012); Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 242–43 (2010); Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613–14 (2009); Munaf v. Geren, 553 U.S. 674, 693 (2008); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–58, 68–70 (2007).

127 Babb v. Wilkie, 140 S. Ct. 1168, 1180 (2020) (Thomas, J., dissenting); Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 475 (2015) (Ginsburg, J., dissenting); Bullock v. BankChampaign, N.A., 569 U.S. 267, 273 (2013); Bilski v. Kappos, 561 U.S. 593, 623 (2010) (Stevens, J., concurring in the judgment); Negusie v. Holder, 555 U.S. 511, 526 (2009) (Scalia, J., concurring).

128 This describes 71 of 92 opinions that invoked the common law but not text/plain meaning.

129 Specifically, I or a research assistant examined the petitioner's opening and reply briefs as well as the respondent's brief; where there were multiple petitioners or respondents, all petitioners' and respondents' briefs were examined. Amicus briefs filed by the United States, individual States, or Members of Congress also were examined. For each brief, a word search was conducted for ("common law" blackstone "black's law" restatement treatise "C.J.S." "AmJur"); citations to these terms were further reviewed to determine whether they reflected an argument that the statute should be construed consistently with the common law.

130 In 254 of the 499 cases in which none of the Court's opinions invoked the common law, at least one brief referenced the common law (and in all but 4 cases, the common law argument appeared in one of the litigant's briefs).

131 In 144 of the 499 cases in which none of the Court's opinions invoked the common law, two or more briefs filed by the parties or prominent amici employed the common law.

data suggest that the Justices exercise discretion about when to rely on the common law to determine or justify a statute's meaning — rather than merely invoke the common law anytime a brief does so.

At the same time, the data from the cases in which the Court did invoke the common law suggest that the Justices do not tend to invoke the common law in a sua sponte manner, without prompting from the parties (or amici). There were 102 cases in the dataset that contained at least one opinion that invoked the common law; in 94.1% of these cases, one or more of the litigants' or amici's briefs raised common law arguments. Moreover, in the vast majority of these cases, more than one brief invoked the common law. Thus, while the Court appears to have exercised some discretion in declining to reference the common law in a sizeable number of cases in the dataset in which multiple briefs raised common law arguments (144 cases), the data also suggest that the Court very rarely (7 cases) employed the common law in one of its opinions when *none* of the briefs filed by the parties (or prominent amici) raised common law arguments.

* * *

Overall, the data described above paint a picture of the common law as an interpretive tool that is widely accepted by nearly all of the Justices on the Roberts Court — although it is invoked in a moderate subset of the Court's statutory cases. The members of the Roberts Court tended to reference other interpretive tools, such as plain meaning, precedent, practical consequences, the whole act rule, and dictionary definitions, more often than they invoked the common law — but they employed the common law to construe statutory meaning at rates comparable to the rates at which they invoked language and grammar canons *combined*.[132] Moreover, the frequency with which the Justices invoked the common law in the opinions they authored did not seem to depend on a Justice's preferred interpretive methodology. Perhaps most importantly, when the members of the Roberts Court did invoke the common law to construe a statute, they tended to give significant weight to the meaning dictated by the common law — relying on it "primarily" in 48.1% of the opinions and placing at least some weight on it in another 40.5% of the opinions.[133] This suggests that the common law may be playing an underappreciated role in the Court's statutory interpretation cases, and one worth examining.

The next section provides several specific examples of how the Court has employed the common law to help determine a statute's meaning.

---

[132] *See supra* Table 2, p. 626.
[133] *See supra* Table 3, p. 627–28.

C. Justifications

This section adds texture to the numerical data reported in section B. It both illuminates patterns in the Roberts Court's use of the common law and provides case examples that illustrate how the Court employs the common law in its statutory cases.

The members of the Roberts Court tended to provide one of four basic forms of explanations or justifications when invoking the common law: (1) "derogation-resembling" assertions that the statute at issue did not displace the common law or should be construed consistently with the common law absent express language to the contrary; (2) "legislative expectations" arguments declaring that Congress legislates against the backdrop of the common law and *expected* common law meanings to be incorporated into the statute at issue; (3) "settled principle" arguments asserting that a particular legal principle "has long been recognized" or is "well-settled" or that "general principles" in the relevant field of law support a particular reading; and (4) "miscellaneous" arguments providing idiosyncratic reasons why a particular statute should be construed consistently with a particular common law rule. A few opinions provided no justification at all for invoking the common law and accordingly were coded as (5) "no reason." Table 7 reports the frequency with which the Court employed each of these justifications for relying on the common law to inform its statutory constructions.[134]

Table 7: Rates of Reliance on Different Forms of Common Law Arguments in Opinions that Invoked the Common Law in the 2005–2019 Terms

Common Law Argument	All Opinions (n=131)	Majority Opinions (n=83)	Dissenting Opinions (n=27)	Concurring Opinions (n=15)	Partial Opinions (n=6)
Derogation-Resembling Arguments	20.6% (n=27)	20.5% (n=17)	25.9% (n=7)	13.3% (n=2)	16.7% (n=1)
Legislative Expectations* Arguments	19.1% (n=25)	20.5% (n=17)	25.9% (n=7)	6.7% (n=1)	0.0% (n=0)
Settled Principle† Arguments	47.3% (n=62)	48.2% (n=40)	33.3% (n=9)	60.0% (n=9)	66.7% (n=4)

[134] *See infra* Table 7, pp. 640–41.

* Includes three majority opinions and one dissenting opinion that employed both "legislative expectations" and other forms of arguments ("settled principle" or "derogation-resembling") in explaining their reliance on the common law.

† Includes one majority opinion and one dissenting opinion that employed both "settled principle" and "legislative expectations" justifications in explaining their reliance on the common law.

COMMON LAW ARGUMENT	ALL OPINIONS (n=131)	MAJORITY OPINIONS (n=83)	DISSENTING OPINIONS (n=27)	CONCURRING OPINIONS (n=15)	PARTIAL OPINIONS (n=6)
Other Arguments	9.9% (n=13)	6.0% (n=5)	14.8% (n=4)	20.0% (n=3)	16.7% (n=1)
No Reason	3.8% (n=5)	4.8% (n=4)	3.7% (n=1)	0.0% (n=0)	0.0% (n=0)

The next several subsections explore in detail the five forms of common law justifications described above. As the discussion in these sections reveals, all of these forms of argument leave judges substantial discretion to define the parameters of the relevant, often dispositive, common law rule — and thereby amplify judicial power even while claiming fidelity to legislative expectations and/or the ordinary reader. All of these forms also rest on justifications that are in tension with textualism's theoretical focus on the ordinary or reasonable "common person" reader.

1. Derogation-Resembling Justifications. — None of the opinions in the dataset expressly invoked the canon directing that "statutes in derogation of the common law should be narrowly construed." However, several opinions (20.6%) did make derogation-type arguments without expressly labeling or naming the presumption. For example, some opinions argued that the common law provides the "default" or "backdrop" rule in light of which a statute must be construed,[135] while others asserted that a statute did not "displace" the common law and/or should be construed to "retain" the common law.[136] Still others declared that common law rules and meanings must be presumed to be incorporated into a statute "absent express language to the contrary."[137] All of these formulations amount, at bottom, to presumptions that the common law survives intact despite the passage of the statute at issue and that the statute must be interpreted in light of the preexisting common law rule.

---

[135] *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) ("backdrop"); US Airways, Inc. v. McCutchen, 569 U.S. 88, 101 (2013) ("default"); Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011) ("background"); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 294 (2009) ("backdrop" (quoting Beck v. PACE Int'l Union, 551 U.S. 96, 101 (2007))).

[136] *See, e.g.*, Babb v. Wilkie, 140 S. Ct. 1168, 1179 (2020) (Thomas, J., dissenting) ("not clearly displaced"); Rotkiske v. Klemm, 140 S. Ct. 355, 363 (2019) (Ginsburg, J., dissenting) ("no reason to believe the [statute] displaced"); Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158, 2164 (2015) ("retention"); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) ("retain" (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010))).

[137] *See, e.g.*, CSX Transp., Inc. v. McBride, 564 U.S. 685, 706 (2011) (Roberts, C.J., dissenting); *see also* Dean v. United States, 566 U.S. 568, 580 (2009) (Stevens, J., dissenting); Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165–66 (2007).

Accordingly, all of these formulations can be viewed as essentially modern-day variations on the old, judicial supremacy–preserving derogation canon.

Consider a few examples: *Kirtsaeng v. John Wiley & Sons, Inc.*[138] involved the Copyright Act of 1976,[139] which grants "the owner of copyright" certain "exclusive rights," including the right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership."[140] The Act also contains a provision that qualifies the copyright owner's exclusive rights by providing that "the owner of a particular copy . . . [that has been] lawfully made . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."[141] Known as the "first sale" doctrine, this qualification limits the copyright owner's exclusive rights to the initial sale of copyrighted material — and authorizes purchasers of copyrighted materials to later sell their copy of the copyrighted material without violating the copyright owner's exclusive rights.[142] Kirtsaeng was a citizen of Thailand who moved to the United States to study mathematics.[143] While living in the United States, he asked friends and family in Thailand to buy copies of foreign-edition English-language textbooks at Thai bookshops, where they sold at low prices, and mail them to him in the United States.[144] Kirtsaeng then resold the textbooks to students in the United States at a profit; John Wiley & Sons, the company that published the textbooks, sued Kirtsaeng for copyright infringement.[145] The statutory question was whether the "first sale" provision in the Copyright Act applies to copies of copyrighted material that are "lawfully made" outside the United States.[146]

A majority of the Court concluded that the "first sale" provision does apply to copies of a copyrighted work that are "lawfully made" abroad.[147] In so ruling, the Court relied on the statute's plain meaning bolstered by dictionary definitions, the whole act rule, practical consequences, the statute's historical evolution — and the common law.[148] Specifically, the Court noted that the "first sale" doctrine is a common law doctrine with a long pedigree and argued that "'[w]hen a statute

---

138 568 U.S. 519.
139 Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code).
140 17 U.S.C. § 106.
141 *Id.* § 109(a).
142 *See Kirtsaeng*, 568 U.S. at 524.
143 *See id.* at 527.
144 *See id.*
145 *See id.*
146 *See id.* at 525.
147 *See id.* at 530.
148 *See id.* at 530–39.

covers an issue previously governed by the common law,' *we must presume that* '*Congress intended to retain the substance of the common law*.'"[149] It then quoted a seventeenth-century treatise authored by Lord Coke that described the reasoning behind the "first sale" doctrine in the context of horses and "other chattell," criticized restraints on resales, and emphasized "the importance" of the "freedom to resell."[150] A law that permits a copyright holder to control the resale of copyrighted materials once sold, the Court reasoned, would be inconsistent with this common law policy favoring the freedom to resell.[151] The Court in *Kirtsaeng* thus used the common law to establish a background policy norm — the importance of the freedom to resell — and then used that background policy norm to support reading the statutory provision broadly to cover copies made abroad.[152]

Consider also *United States Patent & Trademark Office v. Booking.com B.V.*,[153] which raised the question whether the website "Booking.com" should be considered a generic term — and therefore nonregistrable for federal trademark registration purposes under the Lanham Act.[154] The Lanham Act provides that in order to be registrable, a mark must be one "by which the goods of the applicant may be distinguished from the goods of others"[155] and that a mark that becomes "the generic name for the goods or services" is deemed abandoned.[156] The U.S. Patent and Trademark Office (PTO) argued in favor of a categorical rule that a generic corporate designation (such as ".com") added to a generic term can *never* confer trademark eligibility, claiming that such an exclusionary rule follows from common law principles.[157] A majority of the Court rejected that argument, concluding instead that whether any given "generic.com" term is considered generic for federal trademark registration purposes depends on whether consumers in fact perceive that term as the name of a class.[158]

Justice Breyer disagreed and authored a dissenting opinion that relied, in part, on the common law principle invoked by the PTO. Specifically, Justice Breyer acknowledged that "the Lanham Act altered the common law in certain important respects" but emphasized that the

---

[149] *Id.* at 538 (emphasis added) (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010)).

[150] *Id.* at 538–39 (quoting Charles M. Gray, *Two Contributions to Coke Studies*, 72 U. CHI. L. REV. 1127, 1135 (2005)).

[151] *See id.* at 539.

[152] *See id.* at 538–40.

[153] 140 S. Ct. 2298 (2020).

[154] Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.); *Booking.com*, 140 S. Ct. at 2301.

[155] 15 U.S.C. § 1052.

[156] *Id.* § 1127.

[157] *See Booking.com*, 140 S. Ct. at 2305–07. The PTO noted only one possible exception to its proposed categorical bar: when adding a generic term to a generic domain would result in wordplay. *Id.* at 2305 n.4.

[158] *Id.* at 2304–05.

Act "did not disturb the basic principle that *generic* terms are ineligible for trademark protection."[159] He went on to make a classic derogation-resembling argument, stating that "[w]e normally assume that Congress did not overturn a common-law principle *absent some indication to the contrary*."[160] Because there was "no such indication" — that is, no indication that Congress meant to allow some generic terms (like those with ".com" added to them) to be eligible for trademark protection — the common law rule should govern and "Booking.com" should be deemed ineligible for trademark registration.[161] Justice Breyer's dissent, like the majority opinion in *Kirtsaeng*, thus referenced the common law to establish a background policy norm, which the opinion then presumed that the Lanham Act left undisturbed.[162] *Kirtsaeng* and the *Booking.com* dissent are not anomalies in this respect; this "policy norm" approach is the method that nearly all of the derogation-resembling justification cases employed when reasoning from the common law.

As the warring majority and dissenting opinions in *Booking.com* illustrate, judges retain substantial discretion to decide when they believe the common law remains intact versus when it has been superseded in a particular case. The Court has not, to date, articulated any clear criteria governing that determination.

2. Legislative Expectations. — A little under one-fifth (19.1%) of the opinions in the dataset that invoked the common law made some reference to Congress's expectations or intent when explaining their use of the common law to determine a statute's meaning.[163] These opinions typically declared that a particular common law doctrine formed the "background against which Congress legislate[d]"[164] or that Congress intended — or should be presumed to have intended — to "incorporate" the common law rule into the statute.[165] Some of the opinions openly asserted that Congress meant for the statute to be construed consistently

---

159 *Id.* at 2311 (Breyer, J., dissenting).

160 *Id.* (emphasis added).

161 *Id.*

162 *Compare id.* at 2309, *with* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 530 (2013).

163 *See supra* Table 7, pp. 640–41.

164 Babb v. Wilkie, 140 S. Ct. 1168, 1179 (2020) (Thomas, J., dissenting) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)); *see, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.–Owned Media, 140 S. Ct. 1009, 1014 (2020); Stokeling v. United States, 139 S. Ct. 544, 551 (2019); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1426 (2018) (Sotomayor, J., dissenting); Impression Prods., Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1532 (2017); Voisine v. United States, 136 S. Ct. 2272, 2286 (2016) (Thomas, J., dissenting); B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015); Paroline v. United States, 572 U.S. 434, 458 (2014); Sossamon v. Texas, 563 U.S. 277, 298 n.3 (2011) (Sotomayor, J., dissenting).

165 *See, e.g.*, Sekhar v. United States, 570 U.S. 729, 732 (2013); Johnson v. United States, 559 U.S. 133, 147 (2010) (Alito, J., dissenting) ("When Congress selects statutory language with a well-known common-law meaning, we generally presume that Congress intended to adopt that meaning.").

with the common law,[166] while others speculated that it was "unlikely" that Congress intended a meaning that would depart from the common law.[167]

A few examples may help illustrate. Recall *Sekhar v. United States*, from the introduction.[168] In concluding that the Hobbs Act did not reach an investment fund partner's attempt to blackmail a state official into investing state funds with the partner's company, the Court relied heavily on the common law meaning of the term "extortion" — which requires the perpetrator to obtain items of value from the victim, not merely to coerce the victim to perform a particular act.[169] The Court justified its heavy reliance on the common law with the explanation that "*Congress intends to incorporate* the well-settled meaning of the common-law terms it uses."[170]

Consider also *B&B Hardware, Inc. v. Hargis Industries, Inc.*,[171] which raised the question whether issue preclusion applies, in the context of trademark law, to decisions made by administrative agencies.[172] Under the Lanham Act, an applicant can seek to register a trademark through an administrative process within the U.S. Patent and Trademark Office.[173] But if another party believes that the PTO should not register a mark because it is too similar to its own, that party can oppose registration before the Trademark Trial and Appeal Board.[174] Here, Hargis Industries tried to register the mark SEALTITE, but B&B Hardware — which owned the mark SEALTIGHT — opposed

---

166 *See, e.g.*, SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 967 (2017) (Breyer, J., dissenting) ("Congress, when it wrote the 1952 statute, was aware of and intended to codify that judicial practice."); *Paroline*, 572 U.S. at 476 (Sotomayor, J., dissenting) ("There is every reason to think Congress intended § 2259 to incorporate aggregate causation."); Rehberg v. Paulk, 566 U.S. 356, 362 (2012) ("Congress intended [§ 1983] to be construed in the light of common-law principles." (alteration in original) (quoting Kalina v. Fletcher, 522 U.S. 118, 123 (1997))); Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 102–03 (2011) (presuming that Congress intended to codify the common law meaning of terms it used); Conkright v. Frommert, 559 U.S. 506, 534 (2010) (Breyer, J., dissenting) ("'Congress invoked the common law of trusts' in enacting ERISA . . . ." (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985))); Skilling v. United States, 561 U.S. 358, 404 (2010) ("There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud."); Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613 (2009) ("Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law.'" (quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983))).

167 *Johnson*, 559 U.S. at 141; *see also* Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 296 (2012) (underlining the possibility that Congress intended the term "actual damages" to mean special damages based on the common law torts of libel *per quod* and slander).

168 570 U.S. 729.

169 *See id.* at 733–34.

170 *Id.* at 732 (emphasis added) (quoting Neder v. United States, 527 U.S. 1, 23 (1999)).

171 575 U.S. 138 (2015).

172 *See id.* at 141.

173 15 U.S.C. § 1051.

174 *B&B Hardware*, 575 U.S. at 141.

SEALTITE's registration.[175] The Court, in an opinion authored by Justice Alito, held that issue preclusion does apply to decisions made by agencies, so long as the ordinary elements of issue preclusion are met.[176] "Both this Court's cases and the Restatement," the majority explained, "make clear that issue preclusion is not limited to those situations in which the same issue is before two *courts*."[177] Instead, "where a single issue is before a court and an administrative agency, preclusion also often applies."[178] The Court then invoked legislative expectations — reasoning that because the principle of issue preclusion was well established at common law, "courts may take it as given that *Congress has legislated with the expectation that the principle* [*of issue preclusion*] *will apply*" to situations in which Congress has authorized agencies to resolve disputes.[179]

As *B&B Hardware* illustrates, the Court sometimes presumes, rather than asserts, that Congress intended the statute at issue to be interpreted consistently with the common law. But whichever formulation it uses, the Court in such cases is justifying its (often heavy) reliance on the common law with an appeal to legislative understandings and expectations — that is, what members of Congress presumably had in mind — when drafting the statute. This is a surprisingly legislative-intent-focused style of argument from the textualist and textualist-leaning Justices on the Roberts Court. Indeed, some of the opinions in this category sound rather similar to legislative acquiescence arguments,[180] a traditionally purposive form of reasoning that presumes that Congress is aware of judicial precedents and has ratified any precedents it fails to change when enacting or amending a statute involving the same subject.[181] Textualists have roundly criticized traditional legislative acquiescence arguments;[182] and as section III.B.2 argues, their reli-

---

175 *See id.*

176 *See id.* at 141–42.

177 *Id.* at 148.

178 *Id.*

179 *Id.* (alteration in original) (emphasis added) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).

180 *See, e.g.*, Banister v. Davis, 140 S. Ct. 1698, 1707 (2020); Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010).

181 *See, e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) (describing "acquiescence rule"); Donald R. Livingston & Samuel A. Marcosson, *The Court at the Crossroads:* Runyon*, Section 1981 and the Meaning of Precedent*, 37 EMORY L.J. 949, 967 (1988) (discussing this doctrine's use as an interpretive tool by the Supreme Court).

182 *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 300 (2014) (Thomas, J., concurring in the judgment) ("'Congressional inaction lacks persuasive significance' because it is indeterminate; 'several equally tenable inferences may be drawn from such inaction.'" (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting).

ance on such arguments when invoking the common law is incongruous — and suggests the need for greater theoretical clarity about the role that the common law plays in textualist interpretive analysis.[183]

3. Settled Principles. — Nearly half (47.3%) of the opinions in the dataset that invoked the common law employed a "settled principles" argument to justify their reliance on this interpretive tool.[184] This form of justification emphasizes the longevity or established nature of the relevant common law rule, as opposed to Congress's expectations or its failure to abrogate the common law. The opinions in this category tended to claim that a particular common law doctrine has "long been recognized,"[185] that the doctrine is "well-settled,"[186] or that general principles in a particular legal field dictated a particular rule.[187] The Court occasionally used this justification in conjunction with the "legislative expectations" justification, as when the Court in *B&B Hardware* declared that "because the principle of issue preclusion was so 'well established' at common law, . . . *courts may take it as given that Congress has legislated with the expectation that the principle* [*of issue preclusion*] *will apply*."[188]

The Court's opinion in *Atlantic Sounding Co. v. Townsend*[189] is a good example of the "long been recognized" form of "settled principles" justification. The case raised the question whether an injured seaman could recover punitive damages for his employer's willful failure to pay maintenance and cure — or whether the Jones Act, which regulates

---

183 *See infra* sections III.B–C, pp. 659–74.

184 *See supra* Table 7, p. 640–41.

185 *See, e.g.*, Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1074 (2020) (Thomas, J., dissenting) ("[f]or well over a century"); Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2290 (2019) (Ginsburg, J., dissenting) ("long common-law pedigree"); Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("has long governed"); Burrage v. United States, 571 U.S. 204, 210 (2014) ("law has long considered"); Arizona v. United States, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part) ("long been recognized"). For additional cases, see *infra* Appendix, pp. 675–88.

186 *See, e.g.*, Peter v. Nantkwest, Inc., 140 S. Ct. 365, 371 (2019) ("has been consistently followed" (quoting Summit Valley Indus., Inc. v. Loc. 112, United Bhd. of Carpenters, 456 U.S. 717, 721 (1982))); *Dutra Grp.*, 139 S. Ct. at 2284 ("well-established"); Marvin M. Brandt Revocable Tr. v. United States, 572 U.S. 93, 105 (2014) ("well settled"); Woodford v. Ngo, 548 U.S. 81, 88 (2006) ("well established" (quoting McKart v. United States, 395 U.S. 185, 193 (1969))); Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 475 (2006) ("well known").

187 *See, e.g.*, McDonough v. Smith, 139 S. Ct. 2149, 2155 (2019) ("common-law tort principles" (quoting Wallace v. Kato, 549 U.S. 384, 388 (2007))); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 475 (2015) (Ginsburg, J., dissenting) ("courts generally"); Elonis v. United States, 575 U.S. 723, 734 (2015) ("basic principle"); Cuomo v. Clearing House Ass'n, 557 U.S. 519, 540 (2009) (Thomas, J., concurring in part and dissenting in part) ("common-law tradition"); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 111 (2008) ("principles of trust law" (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989))).

188 B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015) (alteration in original) (emphasis added) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)); *see also* SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 963–64 (2017) ("If Congress examined the relevant legal landscape when it adopted 35 U.S.C. § 282, it could not have missed our cases endorsing this general rule.").

189 557 U.S. 404 (2009).

maritime commerce and sailors' rights, precludes such damages.[190] The Court concluded that the seaman could recover punitive damages, relying heavily on the historical availability, at common law, of punitive damages in maritime actions.[191] Justice Thomas's majority opinion opened by observing that "[p]unitive damages have *long been an available remedy* at common law for wanton, willful, or outrageous conduct,"[192] including for "claims arising under federal maritime law."[193] The Court cited English and U.S. cases as well as legal treatises to establish the common law rule — and its longevity — and concluded that because punitive damages historically have been available at common law, seamen are entitled to pursue such damages against their employers.[194] Noting that "[t]he only statute that could serve as a basis for overturning the common-law rule in this case is the Jones Act,"[195] the Court then reviewed the Jones Act's provisions and found that nothing in the Act or in the Court's decisions interpreting it undermined the availability of punitive damages for the delayed or improper provision of maintenance and cure.[196]

Justice Alito authored a dissenting opinion that relied on precedent and a whole code argument. Justice Alito argued that the Jones Act replaced common law rules governing maritime actions and that the relevant question thus was whether punitive damages are available under the Jones Act.[197] The dissent observed that the Jones Act "makes applicable to seamen the substantive recovery provisions of the Federal Employers' Liability Act"[198] and that the Court's precedents establish that punitive damages are not recoverable under FELA.[199] The dissent reasoned 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 that punitive damages therefore must not be available under the Jones Act.[200] The majority and dissenting opinions' conflicting views about whether the Jones Act abrogated the common law rule illustrate the considerable substantive discretion judges wield in deciding whether, when, and how the common law is relevant to the interpretation of a particular statute.

Consider also the majority opinion in *Babb v. Wilkie*,[201] which exemplifies the "general principles in X field" form of "settled principles"

---

190 *Id.* at 407.
191 *See id.* at 409–15.
192 *Id.* at 409 (emphasis added).
193 *Id.* at 411.
194 *Id.* at 409–12, 414–15.
195 *Id.* at 415.
196 *Id.* at 418.
197 *Id.* at 426–27 (Alito, J., dissenting).
198 *Id.* at 427.
199 *See id.* at 427–28.
200 *Id.* at 428 (citing Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)).
201 140 S. Ct. 1168 (2020).

justification. The case involved the Age Discrimination in Employment Act[202] (ADEA), which provides that "personnel actions" affecting individuals aged forty and older "shall be made free from any discrimination based on age."[203] The statutory question was whether the ADEA imposes liability only when age is a but-for cause of an employment decision or if liability may lie when age plays any part in the challenged decision.[204]

In an opinion authored by Justice Alito, the Court held that the ADEA requires that personnel actions be untainted by *any* consideration of age and that age accordingly need not be a but-for cause for an employment decision to violate the ADEA.[205] However, the Court also held that plaintiffs who demonstrate that age was a factor, rather than a but-for cause, in an adverse personnel decision may receive only injunctive relief — and that plaintiffs cannot obtain reinstatement, back pay, compensatory damages, or other monetary relief related to the end result of an employment decision unless they can show that age discrimination was a but-for cause of their adverse employment outcome.[206]

In so ruling, the Court relied on the ADEA's plain meaning, supported by dictionary definitions, grammar precepts, the whole act rule, precedent — and the common law. After explaining that the statute's plain meaning precludes the "but-for" cause interpretation, the Court noted that this reading was "supported by *traditional principles* of tort and remedies law."[207] Justice Alito's majority opinion quoted from a remedies law treatise and the *Restatement (Third) of Torts* to establish the background (that is, common law) rule that "[r]emedies *generally* seek to place the victim of a legal wrong . . . in the position that person would have occupied if the wrong had not occurred"[208] and that tortious actors are liable only for the "harms that result from the risks that made the actor's conduct tortious."[209] The majority opinion then extrapolated from these established background rules that "[r]emedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination."[210] The majority concluded that "this is precisely what would happen if individuals who cannot show that discrimination was a but-for cause" of the adverse personnel action at issue could nevertheless "receive relief that alters or compensates for" that adverse personnel action.[211]

---

[202] 29 U.S.C. §§ 621–634.
[203] *Id.* § 633a(a).
[204] *See Babb*, 140 S. Ct. at 1171.
[205] *Id.*
[206] *See id.* at 1177–78.
[207] *Id.* at 1178 (emphasis added).
[208] *Id.* (omission in original) (emphasis added) (quoting RUSSELL L. WEAVER ET AL., PRINCIPLES OF REMEDIES LAW 5 (3d ed. 2017)).
[209] *Id.* (citing RESTATEMENT (THIRD) OF TORTS § 29 (AM. L. INST. 2005)).
[210] *Id.*
[211] *Id.*

Justice Thomas dissented, relying heavily on a derogation-resembling argument. His dissent began by quoting Supreme Court precedent and a different edition of the *Restatement of Torts* than the majority to argue that "'[c]ausation in fact — *i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury — is a standard requirement of any tort claim,' including claims of discrimination."[212] He then referenced precedent and *Prosser and Keeton on the Law of Torts* for the proposition that but-for causation is "the default rul[e Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself."[213] "Given this established backdrop," Justice Thomas reasoned, "the question becomes whether . . . the ADEA contains sufficiently clear language to overcome the default rule."[214] Because he found the ADEA's discrimination provision ambiguous at best, he concluded that it did not displace the default but-for causation rule.[215] Notably, both the majority and dissenting opinions in *Babb* as well as the majority opinion in *Atlantic Sounding* used the "policy norm" method to reason from the common law to a statutory meaning — that is, they referenced the common law to establish background policies in the relevant areas of law and then read the statutes to ensure consistency, rather than conflict, with that background policy.

Numerous other opinions in the dataset made similar "settled principle" type arguments to justify their use of the common law to determine a statute's meaning.[216]

4. Miscellaneous Justifications. — A small subset of opinions in the dataset (9.9%) employed the common law in an idiosyncratic manner that was difficult to classify.[217] For example, one dissenting opinion criticized the majority's reliance on the common law meaning of a statutory term and then asserted that "[b]ankruptcy treatises confirm" the validity of the alternate reading advocated by the dissent.[218] Another opinion noted that the statute at issue (the Sherman Act) is a common law statute and accordingly updated the statute's meaning to reflect modern economic conditions and theories.[219] A third held that a habeas

---

[212] *Id.* at 1179 (Thomas, J., dissenting) (alteration in original) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013)).

[213] *Id.* (alteration in original) (quoting *Nassar*, 570 U.S. at 347 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984))).

[214] *Id.*

[215] *Id.* at 1180.

[216] For a list of all 62 "settled principle" opinions, see *infra* Appendix, pp. 675–88.

[217] There were 13 such opinions. *See supra* Table 7, pp. 640–41; *infra* Appendix, pp. 675–88.

[218] Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1591 (2016) (Thomas, J., dissenting) (citing 3 WILLIAM L. NORTON III & WILLIAM L. NORTON, JR., BANKRUPTCY LAW AND PRACTICE § 57:15 (3d ed. 2015); 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e], at 523–47 (Richard Levin & Henry J. Sommer eds., 16th ed. 2015)).

[219] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899–902, 905 (2007).

court is not bound to issue the writ in every case, noting that the writ did not issue "as of mere course" in eighteenth-century England.[220]

There also were a handful of opinions in the dataset (3.8%) that provided no explanation at all for construing a statute in light of the common law.[221] These opinions merely cited caselaw, treatises, *Blackstone's Commentaries*, restatements, or the like to establish that a particular doctrine or background legal rule supported a given statutory reading, assuming without explanation that the common law should inform the statutory question at issue.[222]

D. Methods of Use

In addition to the justifications the Court provided for invoking the common law in a particular case, there were three basic methods the Court used to reason from the common law to statutory meaning. In some cases, the Court used the common law to establish that a statutory word or phrase was a legal "term of art" that had a well-known, specialized meaning in the relevant field of law.[223] In other cases, the Court merely asserted that the "common law controls" the statutory question at issue — usually because earlier judicial decisions established that the question should be resolved by consulting the common law.[224] In the clear majority of the opinions in the dataset, however, the Court invoked the common law in a much looser fashion, using it to establish a background policy norm or default rule and declaring that the statute should be construed consistently with that policy norm.[225] Some of these opinions even expressly framed the policy norm as a rule of construction or presumption — essentially using the common law to establish a substantive canon of construction.[226] Table 8 reports the figures and rates at which the Court used each of these three methods ("term of art," "common law controls," or "policy norm") in the opinions in which it invoked the common law.

---

[220] *See* Munaf v. Geren, 553 U.S. 674, 693 (2008) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 132 (1768)).

[221] *See supra* Table 7, pp. 640–41.

[222] *See* Shaw v. United States, 137 S. Ct. 462, 466 (2016); Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 635 (2012); Corley v. United States, 556 U.S. 303, 306, 320 (2009); Hamdan v. Rumsfeld, 548 U.S. 557, 595–98 (2006); *id.* at 683–91 (Thomas, J., dissenting).

[223] Roughly 15.3% of the opinions in the dataset used the common law in this manner. *See infra* Table 8, p. 652.

[224] Roughly 17.6% of the opinions in the dataset followed this method. *See infra* Table 8, p. 652.

[225] Some 62.6% of the opinions in the dataset employed the common law in this manner. *See infra* Table 8, p. 652.

[226] *See, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.–Owned Media, 140 S. Ct. 1009, 1014 (2020) (presumption that common law "but-for" causation test applies); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 475 (2015) (Ginsburg, J., dissenting) (presumption that ambiguous contract terms are construed against the drafter); Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158, 2164 (2015) (presumption against fee shifting); Filarsky v. Delia, 566 U.S. 377, 389 (2012) (presumption that common law immunity applies absent clear abrogation); Dean v. United States, 556 U.S. 568, 580 (2009) (Stevens, J., dissenting) (presumption of mens rea requirement).

Table 8: Rates of Reliance on Different Methods of Common Law Use in Opinions that Invoked the Common Law in the 2005–2019 Terms

Methods of Common Law Use	All Opinions (n=131)	Majority Opinions (n=83)	Dissenting Opinions (n=27)	Concurring Opinions (n=15)	Partial Opinions (n=6)
Common Law as Term of Art Arguments	15.3% (n=20)	16.9% (n=14)	18.5% (n=5)	6.7% (n=1)	0.0% (n=0)
Common Law Controls Arguments	17.6% (n=23)	20.5% (n=17)	18.5% (n=5)	6.7% (n=1)	0.0% (n=0)
Common Law as Policy Norm Arguments	62.6% (n=82)	57.8% (n=48)	63.0% (n=17)	73.3% (n=11)	100.0% (n=6)
Other Arguments	4.6% (n=6)	4.8% (n=4)	0.0% (n=0)	13.3% (n=2)	0.0% (n=0)

The next several subsections explore in detail the three methods the Court used to reason from the common law to statutory meaning.

1. The Common Law as "Term of Art". — Aside from the justifications the Court offered for invoking the common law, there were three *methods* the Court used to reason from the common law to a statutory meaning. One method the Court regularly employed was to invoke the common law like a dictionary — that is, as a source of specialized meaning for statutory terms or phrases considered to be legal "terms of art." This "term of art" method was on display in several (15.3%) of the opinions in the dataset that invoked the common law.[227]

For example, in *Merck & Co. v. Reynolds*,[228] the Court considered the timeliness of a complaint filed in a private securities fraud action.[229] The federal statute governing time limits in civil actions provides that a complaint is timely if filed no more than two years after the plaintiffs "discover[] . . . the facts constituting the violation."[230] The statutory question was whether the term "discovery" refers only to a plaintiff's

[227] *See supra* Table 8, p. 652.
[228] 559 U.S. 633 (2010).
[229] *Id.* at 637.
[230] 28 U.S.C. § 1658(b)(1).

actual discovery of certain facts or also to the potential discovery of facts that a reasonably diligent plaintiff could have been expected to discover.[231] The Court concluded that the term refers to both and that a cause of action accrues for limitations purposes either "(1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation' — whichever comes first."[232] In so ruling, the Court relied on the common law and precedent — citing nineteenth-century cases and a treatise — to establish that "in the statute of limitations context, the word 'discovery' is often used as a *term of art*"[233] and that courts historically have deemed fraud "to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered."[234]

The Appendix shows the correlation between the Court's use of the common law as a source of meaning for a "term of art" and the justifications the Court gave for invoking the common law in the first place. As the Appendix indicates, nearly half of all "term of art" opinions employed a "legislative expectations" justification.[235] In other words, the Court often married an argument that a statutory word or phrase was a "term of art" carrying an established common law meaning with an argument that Congress intended that common law meaning to be incorporated into the statute. Most of the remaining "term of art" opinions explained their reliance on the common law by noting how "well-settled" a particular principle or doctrine was in a particular field of law.[236]

2. The Common Law as Controlling. — In roughly 17.6% (23 of 131) of the opinions in the dataset that invoked the common law, the Court simply declared that the common law controlled the interpretive inquiry, often making a derogation-resembling argument or explaining that settled common law principles dictated a particular reading of the statute.[237]

Chief Justice Roberts's dissenting opinion in *CSX Transportation, Inc. v. McBride*[238] is illustrative. *McBride* involved the Federal Employers' Liability Act and raised the question whether a railroad employee seeking compensation for an injury suffered while performing railroad switching operations must satisfy the common law proximate

---

[231] *Merck*, 559 U.S. at 644.

[232] *Id.* at 637 (quoting 28 U.S.C. § 1658(b)(1)).

[233] *Id.* at 644 (emphasis added).

[234] *Id.* at 645 (alteration in original) (quoting 2 H.G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY § 276b(11), at 1402 (4th ed. 1916)).

[235] 9 of 20 "term of art" opinions referenced legislative expectations in explaining their reliance on the common law. *See supra* Table 8, p. 652; *infra* Appendix, pp. 675–88.

[236] 8 of 20 "term of art" opinions took this approach. *See supra* Table 8, p. 652; *infra* Appendix, pp. 675–88.

[237] 23 opinions in the dataset made "common law controls" arguments; of these, 6 offered a "derogation-resembling" justification and 8 offered a "settled principles" justification. *See infra* Appendix, pp. 675–88.

[238] 564 U.S. 685 (2011).

cause standard or, instead, merely demonstrate that the railroad's negligence played a part in bringing about his injury.[239] The Court concluded that FELA does not require employees to satisfy the common law proximate cause standard.[240] Chief Justice Roberts dissented, arguing that when Congress creates federal torts, it "adopts the background of general tort law."[241] Thus, the dissent insisted, "[a]bsent express language to the contrary, *the elements of a FELA claim are determined by reference to the common law*."[242] That is, the dissent took the view that the common law controlled, or determined outright, what elements are required for a FELA claim.

Several other opinions in the dataset similarly declared that common law principles "control" or "resolve" the cases at hand.[243]

3. The Common Law as Policy Norm. — The third, and most common, method in which the Justices on the Roberts Court used the common law was to establish a background policy, or default rule, which the Court then presumed that the statute incorporated. Most of the opinions in this category explained their reliance on the common law by emphasizing the longevity or established nature of the common law rule — that is, over half of the opinions that employed the common law as a "policy norm" also used the "settled principle" form of justification (52.4%).[244]

The Court's opinion in *Comcast Corp. v. National Ass'n of African American–Owned Media*[245] provides a good example. The case involved section 1 of the Civil Rights Act of 1866,[246] now codified at 42 U.S.C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens."[247] At issue was whether a § 1981 plaintiff bears the burden of showing that race was a *but-for* cause of her injury, even at the early stages of her lawsuit.[248] The Court held that § 1981 does require a *but-for* causation showing throughout all stages of a lawsuit.[249] In so doing, it relied heavily on the common law,

---

239 *See id.* at 688.

240 *Id.*

241 *Id.* at 706 (Roberts, C.J., dissenting) (quoting Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011)).

242 *Id.* (alteration in original) (emphasis added) (quoting Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165–66 (2007)).

243 *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1942–44 (2020); *id.* at 1950–51 (Thomas, J., dissenting); Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2284 (2019); Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651, 658 (2016); Marvin M. Brandt Revocable Tr. v. United States, 572 U.S. 93, 104–05 (2014); Hemi Grp., LLC v. City of New York, 559 U.S. 1, 12 (2010); Rehberg v. Paulk, 566 U.S. 356, 362–63 (2012).

244 There were 82 "policy norm" opinions in the dataset; 43 used the "settled principles" justification. *See infra* Appendix, pp. 675–88.

245 140 S. Ct. 1009 (2020).

246 Ch. 31, 14 Stat. 27.

247 42 U.S.C. § 1981(a).

248 *Comcast*, 140 S. Ct. at 1013.

249 *Id.* at 1019.

among other interpretive tools.[250] Specifically, the Court noted, citing treatises and caselaw, that "[i]t is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation."[251] The Court then argued that the common law rule — which it exalted as "[t]his ancient and simple 'but for' common law causation test" — should "suppl[y] the 'default' or 'background' rule against which Congress is normally presumed to have legislated" when it enacts statutes like § 1981.[252] In short, the Court used the common law almost like a substantive canon, dictating how certain kinds of statutes (here, those involving causation) should be construed based on background policy norms.

The clear majority of opinions in the dataset that referenced the common law used the common law in this "policy norm" method (62.6%).[253] That is, rather than investigate whether Congress actually referenced the common law rule when enacting the statute at issue, and rather than establish that a particular statutory term is a legal "term of art" understood to have a specialized meaning in the legal community, the Court simply cited a common law doctrine and presumed or insisted that the statute at issue should be construed consistently with that doctrine.

* * *

Finally, it is worth noting that while a clear majority — 67.2% — of the opinions in the dataset that referenced the common law explicitly used the words "common law" to describe the interpretive tool they were employing, a sizeable minority of common law–invoking opinions — 32.8% — failed even *to mention* the term "common law."[254] Instead, these opinions quoted treatises, restatements, *Blackstone's Commentaries*, and/or caselaw and noted how long-lived or "well-established" a particular legal rule was, how Congress had legislated with the expectation that the rule would continue to apply, or how the rule reflected "traditional" principles in the relevant field of law. This suggests that the members of the Roberts Court may be turning to the common law reflexively, without giving serious thought to when reliance on common law rules to fill gaps in statutory meaning makes sense or how such reliance fits with a theoretical emphasis on textualism or on "ordinary" versus "legalistic" meaning. The next Part explores these kinds of questions in detail.

---

[250] *See id.* at 1014. The Court also referenced other statutes, precedent, statutory history, and the whole act rule to confirm its common law–based construction. *See id.* at 1014–17.

[251] *Id.* at 1014 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)).

[252] *Id.* (quoting *Nassar*, 570 U.S. at 347).

[253] *See supra* Table 8, p. 652.

[254] There were 131 opinions in the dataset that referenced the common law; 88 explicitly mentioned the term "common law," while 43 did not. *See infra* Appendix, pp. 675–88 (denoting opinions that did not explicitly mention the term "common law" with an *).

III. IMPLICATIONS: SOME THEORETICAL TENSIONS

As the cases discussed in Part II demonstrate, there is significant judicial discretion involved in the practice of articulating and using common law rules to interpret statutes. Judges determine which common law rules are applicable in a given case, what meaning those rules dictate, and whether the common law has been (clearly) abrogated by the statute at issue. In so doing, they preserve an often outsized role for judicial policy preferences and judicially crafted meaning in the interpretation and implementation of statutes — a distinctly legislatively produced source of law.

This Part explores the theoretical implications and tensions inherent in the judiciary's reliance on the common law to determine statutory meaning. Section A highlights the inconclusiveness and incoherence of the Court's current approach to invoking the common law in statutory cases as well as some democratic accountability problems inherent in the Court's reliance on sometimes-antiquated common law rules to assign meaning to modern statutes. Section B explores the tension between textualism's theoretical emphasis on "ordinary" or "common conversational" meaning — versus the Court's (and textualist Justices') regular reliance on common law rules that are highly sophisticated, legalistic, and known only to judges and lawyers. Section B also highlights the disconnect between the Court's (and modern textualism's) theoretical focus on the "consumers" of statutes — that is, ordinary readers — versus the Justices' on-the-ground emphasis on the legislature's expectations and understandings — that is, on the "producers" of legislation. Section C concludes by discussing possible paths to resolving these tensions.

A. Coherence and Accountability

As the doctrinal analysis in Part II shows, the Court's current approach to consulting the common law to construe statutes is ad hoc and provides no clear or consistent guidelines for determining when the common law should be relevant in a particular statutory case. Recall that there were 254 cases in the dataset in which at least one brief invoked the common law in support of its proposed construction (and 144 cases in which multiple briefs raised common law arguments) — but in which the Court ignored or declined to use the common law in its opinion(s).[255] The Court's opinions offer almost no insight into what differentiates these 254 cases from the 102 cases in the dataset in which the Court or an individual Justice writing separately embraced — and even relied heavily upon — a litigant's common law arguments. The Court did occasionally note that "the elements of a FELA claim are determined

---

[255] *See supra* notes 130–31 and accompanying text.

by reference to the common law"[256] or that "the common law of trusts . . . informs our interpretation of ERISA's fiduciary duties"[257] — but such comments were rare and there were, perplexingly, other FELA and ERISA cases in the dataset in which the Court failed even to mention the common law, let alone to rely on it.[258] All of this bespeaks significant judicial discretion to determine if, when, and how the common law is used to interpret statutes — and leads to confusion among lower courts, litigants, and their lawyers about the role that the common law plays in statutory cases.

Further, in nearly one-quarter of the cases (23.5%), the Justices disagreed about the *substance* of the relevant common law rule — that is, they disagreed about what rule the common law established and, therefore, what statutory meaning the common law prescribed.[259] Such judicial disagreement about the content of the relevant common law rule calls into serious question claims that the common law provides "settled" or "well-established" rules that Congress must be presumed to have incorporated into statutes governing the relevant field or that Congress legislated with a particular common law rule in mind. If the Justices disagree about the substance of the common law rule, then perhaps that rule is in flux and not so "settled" — and perhaps members of Congress did not have the rule in mind when legislating.

Relatedly, the Court sometimes seems to get the relevant common law doctrine *wrong* — or to oversimplify it in a manner that leads to incorrect applications — when it invokes the common law as a guide to statutory meaning. Consider, for example, that the Court has in several cases construed statutes containing causal language to require a showing of "but-for" cause — based on the common law tort principle of "but-for" causation.[260] As Professor Sandra Sperino has shown, however, this does not accurately describe the common law of factual causation, which

---

[256] *E.g.*, Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165–66 (2007); CSX Transp., Inc. v. McBride, 564 U.S. 685, 706 (2011) (Roberts, C.J., dissenting).

[257] LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 254 n.4 (2008); *see also* Conkright v. Frommert, 559 U.S. 506, 534 (2010) (Breyer, J., dissenting) (noting that courts "look[] to trust law in order to determine 'the particular duties and powers' of ERISA plan administrators" (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985))).

[258] *See, e.g.*, CSX Transp., Inc. v. Hensley, 556 U.S. 838 (2009) (FELA); Intel Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768 (2020) (ERISA); Advoc. Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017) (ERISA); Amgen Inc. v. Harris, 136 S. Ct. 758 (2016) (ERISA); Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99 (2013) (ERISA); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006) (ERISA).

[259] There were 102 common law–invoking cases in the dataset; 19 of these contained majority and dissenting opinions that used the common law to reach opposing statutory constructions; 5 others contained majority and concurring opinions that drew different conclusions about the common law. *See infra* Appendix, pp. 675–88.

[260] *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) ("because of"); Comcast Corp. v. Nat'l Ass'n of Afr. Am.–Owned Media, 140 S. Ct. 1009, 1015 (2020) (words "suggestive" of causation); Burrage v. United States, 571 U.S. 204, 206 (2014) ("results from"); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47, 350 (2013) ("because").

employs several different tests to determine causation — including, but not limited to, the "but-for" test.[261] Indeed, it is one of the "central tenets of common law causation" that "requiring the plaintiff to establish 'but for' cause is problematic in some circumstances."[262] Thus, it is not necessarily the case that whenever a statute employs causal language, that language should be read to import the common law's "but-for" causation test; yet this is what the Court repeatedly has held.

A third problem with the use of the common law to determine statutory meaning is that even if the Court were accurate, consistent, and coherent in its invocation of the common law as an interpretive aid, there can be serious drawbacks and limitations to the use of this distinctly judge-made body of law to determine the meaning of statutes enacted by a democratically elected legislature. The common law dates back to the eighteenth and nineteenth centuries and was and continues to be formulated by a privileged class of elite judges. This creates at least two sets of accountability problems. First, the common law is likely to ignore the views of minorities and disfavored segments of the population, as judges tend to belong to the more powerful groups in society and to reflect those groups' sensibilities.[263] Privileging policy choices established disproportionately by a wealthy, white, and male class over those enacted into law by the people's representatives — or interpreting the laws enacted by the people's representatives in light of the policy choices made by the historically unrepresentative judiciary — can undermine the legal system's democratic accountability.

Second, as other scholars have noted, using common law doctrines that originated in a bygone era to determine the meaning of modern statutes could "hobble[] Congress's efforts to respond to modern problems that may have sparse or strained common law analogues."[264] That is, by tying statutes to the common law and effectively requiring a clear statement to displace the common law (as in the derogation-resembling cases), the Court could seriously inhibit the creation of new solutions

---

[261] *See* Sandra F. Sperino, *The Causation Canon*, 108 IOWA L. REV. (forthcoming 2022) (manuscript at 2, 5) (on file with the Harvard Law School Library) ("The new causation canon is not consistent with the common law," *id.* at 2, but rather "is one of several standards the common law uses to analyze factual cause," *id.* at 5, and "the common law also recognizes that there are situations in which this [but-for] standard does not work well," *id.* at 2.).

[262] *See id.* at 5 (citing David W. Robertson, *Causation in the* Restatement (Third) of Torts*: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1011 (2009)).

[263] *See* Eskridge & Nourse, *supra* note 2, at 1811; NEIL M. GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 139 (2019) (commenting that "judges are, by and large, drawn from the majority or more powerful groups in society," so if judges are biased, that "bias will often harm minorities and disfavored groups"); Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1094 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)) ("Judges are disproportionately rich, elderly lawyers drawn from the upper classes of society.").

[264] *See* Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729, 773 n.353 (2022).

and prophylactic rules.[265] Consider, for example, legislative efforts to prevent identity theft through statutes like the Fair Credit Reporting Act[266] (FCRA); the common law is likely to have little utility in such contexts and, if invoked, to tilt the scales in favor of older values, such as punishing only false statements, at the expense of newer values, like preventing the disclosure of personal information in an effort to stave off identify theft ex ante.[267] This is not to say that the use of the common law to construe statutes *always* has a privilege-entrenching effect that disfavors disadvantaged groups or *always* hobbles Congress's efforts to address modern problems. But there is a serious danger that it will do one (or both) of these things in a nontrivial subset of cases, as several cases in the dataset have demonstrated.[268]

B. Tensions with Modern Textualism

In addition to the coherence and accountability problems outlined above, the Court's use of the common law to determine statutory meaning also is in serious tension with at least two fundamental tenets of modern textualism — an emphasis on the meaning that statutory terms have in everyday conversation and a related rejection of the meaning that legislators understood or intended a statutory term to express. This is a problem primarily and especially for the Court's textualist Justices, but also for the entire Court — because a clear majority of the Court is now composed of textualist, or at least textualist-leaning, Justices[269] and

---

[265] *See id.* at 773 & n.353.

[266] 15 U.S.C. §§ 1681–1681x.

[267] Similar, although not identical, values were pitted against each other in a recently decided standing case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). *See* Beske, *supra* note 264, at 734–35. *See generally* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1438–40 (2017) (noting that Congress frequently enacts legislation to respond to changed facts, novel problems, and new industries).

[268] *See, e.g.*, Babb v. Wilkie, 140 S. Ct. 1168, 1179 (2020) (Thomas, J., dissenting); Comcast Corp. v. Nat'l Ass'n of Afr. Am.–Owned Media, 140 S. Ct. 1009, 1019 (2020); Peter v. Nantkwest, Inc., 140 S. Ct. 365, 371 (2019); Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2284 (2019); Artis v. District of Columbia, 138 S. Ct. 594, 608 (2018) (Gorsuch, J., dissenting); Vance v. Ball State Univ., 570 U.S. 421, 428–29 (2013); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013); Smith v. United States, 568 U.S. 106, 112–13 (2013); Arizona v. United States, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part); Filarsky v. Delia, 566 U.S. 377, 389 (2012) (presumption that common law immunity applies to protect city attorney from suit by firefighter); Rehberg v. Paulk, 566 U.S. 356, 362–63 (2012); CSX Transp., Inc. v. McBride, 564 U.S. 685, 706 (2011) (Roberts, C.J., dissenting); Gonzalez v. United States, 553 U.S. 242, 257 (2008) (Scalia, J., concurring in the judgment) (common law supports attorney's ability to waive criminal defendant's rights); Wallace v. Kato, 549 U.S. 384, 388–91 (2007); Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165–66 (2007).

[269] For purposes of this article, I count Justices Scalia, Thomas, Gorsuch, Kavanaugh, and Barrett as textualists and Chief Justice Roberts and Justices Kennedy and Alito as textualist-leaning. Justices Scalia, Thomas, Gorsuch, Kavanaugh, and Barrett self-identify as textualists and clearly follow a textualist interpretive methodology — seeking to identify the plain meaning of stat-

because even those Justices who are open to the use of purposive interpretive tools[270] have embraced a "text-first" approach in most cases.[271] This section discusses these theoretical tensions in detail.

1. Ordinary v. Lawyerly Meaning. — At least in its rhetoric, and arguably on a more fundamental level, modern textualism increasingly has focused not just on the ordinary *meaning* of statutory

utory text, informed by dictionary definitions, language canons, and the whole act rule and eschewing reliance on legislative history, intent, and purpose. Chief Justice Roberts and Justices Kennedy and Alito are less absolutist in their methodology, but also emphasize these tools when construing statutes. *See supra* Table 2, p. 626. This labeling is consistent with how other scholars and commentators have characterized the Justices. *See* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1887 (2008) ("[S]everal Justices — clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy — on the Supreme Court now consider themselves textualists."); John F. Duffy, In re Nuijten*: Patentable Subject Matter, Textualism and the Supreme Court*, PATENTLY-O (Feb. 5, 2007), https://patentlyo.com/patent/2007/02/in_re_nuijten_p.html [https://perma.cc/RNY9-3562] (noting that Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito "adhere to some form of fairly rigorous textualism in statutory interpretation"); Charlie D. Stewart, Comment, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1486 (2018) (claiming that Justice Gorsuch is a "champion[]" of textualism); Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of* Chevron, YALE J. ON REGUL.: NOTICE & COMMENT (July 3, 2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick [https://perma.cc/6QXG-886N] (contending that then-Judge Barrett is a textualist); Domenico Montanaro, *Who Is Brett Kavanaugh, President Trump's Pick for the Supreme Court?*, NPR (July 9, 2018, 11:00 PM), https://www.npr.org/2018/07/09/626164904/who-is-brett-kavanaugh-president-trumps-pick-for-the-supreme-court [https://perma.cc/4UKB-BLM2] (commenting that then-Judge Kavanaugh "believes in textualism and originalism").

270 I count as purpose-friendly Justices Stevens, Souter, Ginsburg, Breyer, Sotomayor, and Kagan. Justices Stevens and Breyer have openly advocated for a purposivist approach to interpreting statutes. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (arguing that courts should pay attention to "Congress' actual purpose" in enacting a statute); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 98–99 (2005) (similar). All of these Justices regularly invoked purposive interpretive resources including legislative history, intent, and statutory purpose in the opinions they authored. *See supra* Table 2, p. 626. Again, my labeling is consistent with how other scholars and commentators have described these Justices. 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 Justices Stevens, Souter, and Breyer purposivists); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 551 (2013) (reviewing SCALIA & GARNER, *supra* note 3) (describing Justices Ginsburg and Breyer as purposivists); Asher Hawkins, Note, *The Least "Constructive" Provisions?: Analyzing the Bankruptcy Code's Codified Canons*, 59 N.Y. L. SCH. L. REV. 625, 638 (2014–2015) (same for Justices Stevens, Breyer, and Kagan).

271 The Court's current purpose-friendly Justices — Justices Sotomayor and Kagan — have largely embraced a textual approach to statutory interpretation, turning to purposive interpretive tools primarily when the text runs out. *See* Ryan Lovelace, *Elena Kagan: The Supreme Court Is a "Textualist Court" that Reasons More like Scalia than Breyer*, WASH. EXAM'R (Oct. 16, 2017, 7:04 PM), https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer [https://perma.cc/7JZV-GERP] (quoting Justice Kagan commenting that "we are a generally, fairly textualist court, which will generally think when the statute is clear you go with the statute"); Max Alderman & Duncan Pickard, Essay, *Justice Scalia's Heir Apparent?: Justice Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 187 (2017) (noting Justices Sotomayor's and Kagan's textualist analyses in Lockhart v. United States, 136 S. Ct. 958 (2016)).

language, but on the ordinary *reader* of statutory language. As then-Professor Amy Coney Barrett explained in a law review article titled *Congressional Insiders and Outsiders*, textualists do not just reject the use of legislative history and demand a focus on statutory text; "[t]hey also insist that the hypothetical reader of language — the construct they use in the task of interpretation — be a congressional outsider."[272] That is, they insist that "the relevant user of language be *ordinary*."[273] Judge Easterbrook, a noted textualist jurist, has similarly commented that courts "should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."[274] And Dean John Manning, a noted textualist scholar, has argued that judges should ascribe to statutes the meaning that "a reasonable person conversant with applicable social conventions would have understood them to be adopting."[275]

This raises the natural question — just who is the hypothetical reasonable reader of statutory language? Is it an ordinary member of the public — a layperson — or is it a lawyer? Neither textualists nor the Court as an institution has provided a satisfactory — or clear, or consistent — answer to this question. Justice Scalia once declared that textualists look for "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*"[276] — suggesting perhaps that the ordinary reader is a lawyer, since nonlawyers cannot reasonably be expected to be familiar with the corpus juris. And Manning has described the reasonable reader as a "skilled . . . user of words" — who is aware of "the specialized connotations and practices" known to lawyers.[277] But Justice Scalia also talked about ordinary meaning in terms of how guests at a "cocktail party" would understand the statutory term(s) at issue — suggesting that the ordinary reader is an average member of the public.[278] Moreover, many of the textualist (and purpose-friendly) Justices on the Roberts Court tend to speak about ordinary meaning in terms that suggest that such meaning should be measured by how people speak in everyday conversation with their "friends," or what the average citizen would think — and that the reasonable reader thus is the common person on the street, rather than a lawyer.[279]

---

[272] Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200 (2017).

[273] *Id.*

[274] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

[275] John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006).

[276] Scalia, *supra* note 41, at 17.

[277] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005) (emphasis omitted) (quoting Easterbrook, *supra* note 274, at 65).

[278] *See, e.g.*, Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

[279] *See infra* notes 280–97.

Consider, for example, the dissenting opinions in *Bostock v. Clayton County*.[280] The *Bostock* majority concluded that Title VII, which prohibits discrimination in employment "because of" an individual's "sex," bars discrimination on the basis of sexual orientation;[281] the majority focused heavily on the phrase "because of," insisting that it "incorporates the 'simple' and 'traditional' standard of but-for causation."[282] Justices Alito and Kavanaugh authored dissenting opinions that criticized the majority's lawyerly analysis — and insisted that the Court should be seeking the meaning that the statutory text would have to average citizens or members of the public.[283] Justice Alito's dissent explicitly invoked the image of "*a group of average Americans* [who] decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval" — and insisted that these "ordinary citizens" formed the relevant "linguistic community" for determining the statute's meaning.[284] Justice Kavanaugh's dissent similarly emphasized that "common parlance matters in assessing the ordinary meaning of a statute, *because courts heed how 'most people' 'would have understood' the text of a statute* when enacted."[285] Justice Kavanaugh also noted that the plaintiffs in the case "probably did not tell their friends that they were fired because of their sex."[286]

Similarly, in *Wisconsin Central Ltd. v. United States*,[287] the Court held that stock options paid to railroad employees do not qualify as a form of taxable "money remuneration" under the Railroad Retirement Tax Act of 1937[288] because the ordinary meaning of "money" is "a medium of exchange."[289] Justice Gorsuch's majority opinion reasoned: "While stock can be bought or sold for money, *few of us* buy groceries or pay rent or value goods and services in terms of stock. When was the last time you *heard a friend say* his new car cost '2,450 shares of Microsoft'?"[290] Likewise, in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*,[291] Justice Barrett dissented from the Court's holding that a refinery could obtain an "extension[] of the exemption" it

---

[280] 140 S. Ct. 1731 (2020).

[281] *Id.* at 1738.

[282] *Id.* at 1739 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346, 360 (2013)).

[283] *Id.* at 1754–822 (Alito, J., dissenting); *id.* at 1822–37 (Kavanaugh, J., dissenting).

[284] *Id.* at 1767 (Alito, J., dissenting) (emphasis added).

[285] *Id.* at 1828 (Kavanaugh, J., dissenting) (emphasis added) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)).

[286] *Id.*

[287] 138 S. Ct. 2067 (2018).

[288] Ch. 382, 50 Stat. 307.

[289] *Wisconsin Cent.*, 138 S. Ct. at 2070–71 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1583 (2d ed. 1942)).

[290] *Id.* at 2071 (emphasis added).

[291] 141 S. Ct. 2172 (2021).

had received under the Clean Air Act[292] (CAA) even if its original exemption had already lapsed.[293] Justice Barrett argued that the CAA does not authorize the "extension" of a lapsed exemption, accusing the majority of "cater[ing] to an outlier meaning of 'extend'"[294] that flouted the statute's "ordinary meaning."[295] As evidence of that "ordinary meaning," she noted:

> One would not normally ask to "extend" a newspaper subscription long after it expired. Or request, after child number two, to "extend" the parental-leave period completed after child number one. Or report that an athlete signed a contract "extension" with her first team after spending several seasons with a rival squad.[296]

Numerous similar examples abound.[297]

The Court's emphasis in such cases on how "most people" or one's "friends" talk in everyday contexts is in notable tension with its reliance, described in Part II, on common law rules and doctrines that reflect specialized legal meaning and are largely inaccessible to nonlawyers. On the one hand, the Justices regularly engage in extensive speculation about how ordinary people speak in everyday situations, dismissing out of hand more formal or legal standard–based clues about statutory meaning, such as tort law's but-for causation rules.[298] In so invoking common speech, the Court essentially takes a "common conversation" approach to ordinary meaning.[299] But on the other hand, the Justices also regularly (in 16.9% of the cases in the dataset) rely on legal definitions and doctrines as powerful guides to statutory meaning. In thus borrowing from the common law, the Justices are employing judicially created, legalistic meaning — not the common or reasonable meaning

---

[292] 42 U.S.C. §§ 7401–7671q.

[293] *HollyFrontier*, 141 S. Ct. at 2183 (Barrett, J., dissenting).

[294] *Id.* at 2183.

[295] *Id.* at 2185.

[296] *Id.*

[297] *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1475 (2020) (referencing recipe instructions as evidence of ordinary meaning of provision of the Clean Water Act, 33 U.S.C. §§ 1251–1387, forbidding "addition" of pollutants to "navigable waters"); Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1722 (2017) (invoking everyday conversations between friends as evidence of the ordinary meaning of "debt[s] owed" in Fair Debt Collection Practices Act); Loughrin v. United States, 573 U.S. 351, 369 (2014) (commenting that when a child lies to their parent to get a cookie, "an ordinary English speaker would say" the child obtained the cookie "by means" of the lie); Abramski v. United States, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting) (arguing that when a parent sends their son to the store with ten dollars to buy milk and eggs, "no English speaker would say that the store 'sells' the milk and eggs to [the parent]"); Bond v. United States, 572 U.S. 844, 860 (2014) ("[A]n educated user of English would not describe Bond's crime as involving a 'chemical weapon.'"); Sekhar v. United States, 570 U.S. 729, 738 (2013) ("No fluent speaker of English would say . . . ."); Marx v. Gen. Revenue Corp., 568 U.S. 371, 391 (2013) (Sotomayor, J., dissenting) (analogizing a criminal statute to a medication label).

[298] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting).

[299] *See* Eskridge & Nourse, *supra* note 2, at 1810 (describing modern textualism as a "move to a statutory populism purportedly grounded in the illusory, even constructed *common person's* interpretation").

that the terms at issue would have to the average member of the public — to determine a statute's "ordinary" meaning.

Not coincidentally, this latter move has the effect of empowering judges, who are left with significant discretion to define the contours of the relevant common law rule in ways that influence the interpretive outcome, as well as to decide if and when the common law rule is applicable at all. It also collides headfirst with some of textualism's theoretical tenets and claims to legitimacy, including then-Professor Barrett's exhortation that "Congress must be presumed to play by the linguistic rules ordinary English speakers follow *rather than its own special set*."[300] Presuming that statutory terms incorporate often complicated common law doctrines is tantamount, at bottom, to assuming that Congress plays by a special set of rules — that is, esoteric legal doctrines and definitions — that are unknown (and unknowable) to ordinary English speakers. Reliance on the common law to determine statutory meaning also recalls Justice Scalia's colorful warning, echoed by Justice Barrett, that "[f]airness requires that laws be interpreted in accordance with their ordinary meaning, lest they be like Nero's edicts, 'post[ed] high up on the pillars, so that they could not easily be read.'"[301] When courts construe statutes based on inaccessible, background legal doctrines that only lawyers and judges are familiar with, they engage in the functional equivalent of posting statutes high up on pillars, beyond the reach (or understanding) of ordinary citizens.

One possible response to the criticisms offered in this section might be that the common law is just another form of precedent — and that textualism acknowledges that an on-point precedent must be followed, even if it conflicts with a statute's ordinary meaning. I find this counterargument unpersuasive for at least two reasons. First, the Roberts Court's textualist Justices have proved quite willing to reject stare decisis and overrule even directly on-point precedents when they believe a precedent conflicts with a statute's plain meaning.[302] I and others have elsewhere written about this feature of modern textualism in detail.[303] Second, when the Court employs common law rules and doctrines to determine statutory meaning, it is almost never simply applying an on-point, controlling precedent. That is, it is not simply saying that "we've construed the term in this statute to mean *X* in an earlier case," or even

---

300 Barrett, *supra* note 272, at 2207 (emphasis added).

301 *Id.* at 2209 (alteration in original) (quoting Scalia, *supra* note 41, at 17).

302 Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 165–83 (2018).

303 *Id.*; Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1929–30, 1930 n.81 (2009) (describing Michigan Supreme Court's quick overruling of numerous statutory precedents after the appointment of several textualist justices); Todd C. Berg, *Marilyn Kelly Named New Michigan Supreme Court Chief Justice*, MICH. LAWS. WKLY., Jan. 12, 2009, 2009 WLNR 31183284 (Westlaw NewsRoom) (noting that Michigan Supreme Court's textualist majority overruled sixty-one precedents between 2000 and 2005).

that "we've construed the same term in a different, but related, statute to mean *X*." Rather, when the Court invokes the common law to construe a statute, it tends to frame its argument as follows: "The background rule/definition in the field this statute governs has long said *A*, and *X* reading of the statute is consistent with that background rule/definition, so we should adopt *X* rather than *Y* interpretation — or presume that Congress incorporated *X* rather than *Y* meaning into the statute." In other words, the Court uses the common law in a manner similar to the manner in which it invokes substantive canons or dictionaries — that is, as a form of judicially crafted background policy or external source of meaning that puts a thumb on the scale in favor of a particular interpretation.[304] That is quite different from how precedent and stare decisis — which dictate that once a court has decided a particular legal question, its ruling should be followed in future cases *involving that same legal question* — operate.

2. The Consumer v. Production Economy. — A second theoretical tension created by the Court's use of the common law to interpret statutes stems from the fact that the Court sometimes justifies its reliance on the common law by asserting that Congress intended to incorporate a particular common law concept when it drafted the relevant statute — a legislative design–focused rationale that conflicts with modern textualism's core tenets. This section explores that tension in greater detail.

In a recent article, Professors William Eskridge and Victoria Nourse theorize that the now-dominant interpretive approach taken by the Supreme Court is one that elevates the perspective of statutory *consumers* (the general public) over the perspective of statutory *producers* (Congress).[305] They call the former, now-dominant approach the "consumer economy" and the latter, disfavored approach the "production economy."[306] The production economy refers to the process by which a statute is drafted, or "produced," and interpreters who emphasize it derive statutory meaning from the intentions of those who authored the statute.[307] By contrast, the currency of the consumer economy is public, or "common person," meaning those who focus on this approach care not what Congress intended.[308] The consumer-versus-production-economy framework is consistent with the central point made in section B.1 — that the modern Roberts Court regularly defines ordinary meaning as the meaning that average members of the public, rather than legislators or lawyers, would understand a statutory term to hold.

---

[304] *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 239–41 (2010) (describing how judges use substantive canons and dictionaries).

[305] *See* Eskridge & Nourse, *supra* note 2, at 1718, 1722.

[306] *See id.* at 1761.

[307] *See id.* at 1781, 1789–91.

[308] *See id.* at 1761–62.

Yet as Part II illustrates, when the members of the Roberts Court use common law rules to inform statutory meaning, they often justify this interpretive move with reference to legislative intent or expectations — that is, by invoking the production rather than the consumer economy. This is true not just in the subset of "legislative expectations" opinions that expressly invoke Congress's intent or claim that "Congress legislated with the expectation" that the common law rule would be incorporated into the statute.[309] It also occurs in many of the "derogation-resembling" and "settled principle" opinions, in which the Court asserts that "[w]e normally assume that Congress did not overturn a common-law principle absent some indication to the contrary"[310] or that "we must presume that 'Congress intended to retain the substance of the common law.'"[311]

I have written at length about how the members of the Roberts Court, including its textualist and textualist-leaning Justices, tend to speculate about legislative purpose and intent even when applying seemingly mechanical, objective textual canons — a practice I call "backdoor purposivism."[312] When the Court invokes legislative expectations to justify its use of common law meaning, it is doing something similar — that is, quietly speculating or making presumptions about legislative intent, while purporting to apply neutral, objective interpretive tools to reach an inevitable, straightforward reading of the statute.

Indeed, if we look closer, it becomes clear that in several of these cases the Court is not looking for actual evidence that Congress legislated with the common law rule in mind — it is merely *presuming* or *guessing* that Congress did so. In such cases, it remains theoretically discordant for the Court to hearken back to the production economy to justify its interpretive choices, but there is also something more subtle going on. That is, the theoretical disconnect obscures an important separation-of-powers move — i.e., that the Court is imposing judge-made common law rules and policies on a text crafted by the legislature. For despite the Court's surface-level appeals to legislative expectations, the use of common law rules and doctrines to determine statutory meaning serves, at bottom, to ensure that judicially crafted policy choices continue to play a significant, and sometimes dispositive, role in the statutory scheme enacted by Congress. In other words, it is really a *judicial* economy, rather than a *consumer* or *production* economy, that the Court is privileging when it invokes the common law in statutory

---

[309] For a list, see cases cited *supra* notes 164–66 and *infra* Appendix, pp. 675–88.

[310] *See, e.g.*, U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298, 2311 (2020) (Breyer, J., dissenting).

[311] *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010)); Smith v. United States, 568 U.S. 106, 112 (2013).

[312] *See generally* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020).

interpretation.[313] Indeed, the Court's references to Congress's expectations could even be viewed as an attempt to legitimize what is essentially a judicial power grab.

Textualists might counter that importing doctrines or definitions from the common law does not empower the present-day judge who is doing the importing, because it is her predecessors — that is, *different judges* — who came up with the doctrines and definitions being imported. On this view, the common law might even be viewed as a constraint on present-day judges, because rather than permit them to rely on their own sense of what a statutory term means, the common law forces judges to defer to doctrines and rules developed by (many) other judges over long periods of time.[314] The problem with this argument is that it depends on a vision of the common law as straightforward, conveying a clear, readily discernible meaning. But the common law "rule" is rarely crystal clear, and judges necessarily exercise discretion in the course of identifying it, as evinced by the 23.5% of cases in the dataset in which opposing opinions used the common law to support different statutory constructions. Further, even if the meaning dictated by the common law is clear on a particular point, it remains unclear, based on the Court's jurisprudence to date, whether and when the common law is relevant and should be consulted in a particular case. Recall the 254 cases in the dataset in which at least one of the parties' briefs invoked the common law but the Court's opinion(s) did not rely on the common law. The lack of clear guidelines regarding when the common law can or will be consulted to construe a particular statute ensures that there is substantial judicial discretion involved even in the simple act of declaring that "*the common law should guide our interpretive inquiry here*."

For all of these reasons, the use of common law rules and doctrines to inform statutory meaning is a judge-empowering interpretive move that shifts power from the legislature to the judiciary — just as those who criticized the old derogation canon warned that it would be.[315]

C. Some Recommendations

So where does this leave us? This section turns from the descriptive and normative to the prescriptive, advocating that the Court (1) adopt a narrow, significantly more constrained approach to invoking the common law in statutory cases going forward, and (2) clarify the role that the common law plays in statutory interpretation.

1. Narrowing the Universe of Common Law References. — As section A highlighted, the use of the common law to determine statutory

---

[313] This is a point that Eskridge and Nourse make more broadly. *See* Eskridge & Nourse, *supra* note 2, at 1728–29.

[314] I thank Professor Margaret Lemos for highlighting this counterargument.

[315] *See, e.g.*, DICKERSON, *supra* note 50, at 207; Gluck, *supra* note 53, at 769; Pound, *supra* note 45, at 387–88.

meaning can be antidemocratic and has the potential to hobble legislative efforts to design new solutions for modern problems. Moreover, as section B explained, the use of the common law to define statutory meaning is in theoretical tension with modern textualism's emphasis on conversational, everyday meaning. Given these realities, it is my view that the use of common law meaning to interpret statutes ideally should be limited to the following three situations: (1) where there is evidence in the statute's text or in the legislative record that Congress intended for the statute to codify or incorporate the common law, or otherwise drafted the statute with the common law meaning in mind; (2) where there is clear evidence that the statute uses a word or phrase that is a common law "term of art" that carries a specialized legal meaning — *and* there is no countervailing evidence that Congress meant to reject the common law meaning when enacting the statute; or (3) where courts have consistently and historically construed the statute to reflect the common law, so that it is essentially considered a "common law statute."

This approach would have several advantages over the Court's current chaotic, inconsistent practices. First, it would bring greater coherence and predictability to the use of the common law in statutory interpretation; courts would simply have to evaluate whether there is evidence indicating that Congress intended to codify or incorporate background common law rules when it drafted the statute at issue, or that the statutory word or phrase at issue is a "term of art," or that the statute is a "common law statute." When the first "intent" criterion is met, courts would have to consider the common law in all cases that involve that particular statute — such as, ERISA or FELA or bankruptcy statutes — rather than remaining free, in their unfettered discretion, to invoke the common law in some ERISA cases but to ignore it in others, without explanation.[316] If the intent criterion is not met, then the common law should be deemed irrelevant and ignored in all future cases involving that particular statute. Litigants, attorneys, and lower courts thus would know with greater certainty whether the common law is relevant to the construction of a particular statute, and we should see greater coherence in how the common law is employed across cases dealing with the same statute. Similarly, where the third "common law statute" criterion is met, courts should consider the common law in all cases involving that statute, again improving coherence and predictability in the application of this interpretive tool.

The second, "term of art," criterion would not lead to similar predictability on the level of the individual statute. But the clarity required to demonstrate "term of art" status should significantly limit the universe of cases in which the common law is invoked as well as cabin judicial discretion and lead to greater predictability about when the

---

[316] *Cf.* cases cited *supra* notes 256–58 and accompanying text.

common law may be used to determine the meaning of a statutory term. Notably, only 20 opinions in the dataset employed the "term of art" form of argument — so the universe of statutory terms that clearly qualify as "terms of art" seems small.[317] Moreover, 11 of the 20 "term of art" opinions in the dataset appeared in unanimously decided cases,[318] suggesting that there is relatively little disagreement among the Justices about whether a particular word or phrase is a legal "term of art," or how to construe a statute when it does contain such a term. In general, the small number of opinions in the dataset that made a "term of art" argument suggests that this standard should be a workable one.

A second advantage is that the recommended approach should mitigate some of the democratic accountability problems created by the Court's unbounded invocation of often archaic common law rules created by an unrepresentative class of elite judges to interpret modern statutes applicable to a diverse citizenry. Where Congress itself has indicated that a statute should be interpreted in light of the common law, we at least know that outdated common law rules are not being used to thwart Congress's efforts to craft solutions to modern problems. Rather, Congress itself chose to incorporate the common law — that is, to bring old ideas to bear on its solutions to modern problems. Moreover, where Congress has chosen to incorporate or codify a common law doctrine, the decision to impose a doctrine or rule created by unrepresentative, elite judges at least has been made by modern legislators who are elected by and who represent the present-day electorate.

The "term of art" category does not provide similar assurances for democratic accountability, but the requirement that the Court ensure there is no affirmative evidence that Congress intended to reject the common law meaning should act as a failsafe to ensure that the common law is not used to thwart clear legislative efforts to modernize or democratize the law in a particular field. Similarly, the "common law statute" category necessarily encompasses statutes that are older, such that courts have long construed them in light of the common law — so the risk of bringing outdated doctrines to bear on modern statutes should be lower.

Of course, none of the above recommendations can ensure the elimination of the historical exclusion of minority groups and disfavored populations that permeates the legal system. Statutes enacted by Congress, despite its democratic pedigree, can incorporate common law

---

[317] *See supra* Table 8, p. 652.

[318] *See* Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492, 1498 (2020) (Sotomayor, J., concurring in the judgment); Burrage v. United States, 571 U.S. 204, 210 (2014); Sekhar v. United States, 570 U.S. 729, 733 (2013); Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 102–03 (2011); Bilski v. Kappos, 561 U.S. 593, 622–23 (2010) (Stevens, J., concurring in the judgment); Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 241 (2010); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 294–95 (2009); United States v. Castleman, 572 U.S. 157, 176 (2014); Wilkie v. Robbins, 551 U.S. 537, 563–64 (2007); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–58 (2007).

rules that (intentionally or unintentionally) entrench privilege or ignore the views of disfavored groups. But by at least limiting the universe of cases and statutes with respect to which the common law is invoked as a relevant interpretive aid, we can perhaps limit the overall instances of minority exclusion that occur as part of the process of interpreting and implementing statutes. Moreover, it is at least possible that the "common law statute" category of cases could help counter the historical exclusion of disfavored groups: because common law statutes are widely viewed as statutes that "evolve to meet the dynamics" of present-day conditions,[319] they may be interpreted in a manner that makes room for the views or plights of historically disfavored minority groups. Thus, for example, some scholars have advocated that Title VII (which is not generally considered a "common law statute"[320]) *should be* considered a "common law statute" that cedes to courts the responsibility to interpret its provisions in light of evolving social practices.[321] If courts should embrace this designation, the thinking goes, Title VII can and will be interpreted to "address new social and workplace issues that were not salient in 1964 or 1972" (the dates when Title VII was enacted and amended, respectively).[322]

Lastly, the recommended approach would resolve some of the tensions that currently exist between the Court's use of common law doctrines crafted by highly sophisticated judges, on the one hand, and its rhetorical insistence that statutory terms should be given the meaning they would have in everyday conversation, on the other. At bottom, the recommended approach creates a clearly delineated exception, or set of circumstances, in which the "common conversation" approach is superseded, or simply does not apply. That is, the recommended approach provides that where Congress has indicated that a statute incorporates or codifies the common law, that express indication in the statutory text or legislative record shows that the statute's terms were meant to convey something *other than* the meaning those terms would have in ordinary, everyday conversation. And that evidence of legislative design justifies allowing the common law, legalistic meaning of the statutory term to trump the meaning that term would have in common, everyday conversation. Similarly, when there is a clearly established common law "term of art" meaning associated with a word or phrase employed in a statute,

---

[319] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (citing Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978)).

[320] *See* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 96 (Shyamkrishna Balganesh ed., 2013) (calling Title VII a "'normal' statute that most would agree lies outside the privileged common law category"); David A. Strauss, *Sexual Orientation and the Dynamics of Discrimination*, 2020 SUP. CT. REV. 203, 225 (2021) ("Title VII is not usually included on the list of 'common law' statutes . . . .").

[321] *See* William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 404 (2017).

[322] *Id.*

or the statute is widely considered a "common law statute," those too should be treated as situations in which the "common conversational" meaning is trumped, or superseded.

Notably, the approach this Article advocates should permit the Court to continue invoking the common law to construe those statutes it regularly employs the common law to construe — that is, those statutes that exhibited the highest rates of common law reference in Table 4b. As discussed earlier, many of those statutes are statutes that Congress has expressly indicated it drafted with common law principles in mind (e.g., ERISA) or that are considered "common law statutes" (e.g., § 1983).[323]

Of course, the intent prong of the approach this Article advocates would not resolve the consumer-versus-production-economy tension highlighted in section B.2, at least to the extent that Congress's intent to incorporate the common law is reflected in the legislative record rather than in the statute's text. And for that reason, this prong might appeal more to the Court's purpose-friendly Justices than it does to the Court's textualist Justices. (Although, to the extent that the statute's text itself references or clearly incorporates the common law, textualist jurists should have no problem following this approach.)

Some may question whether the above recommendations will actually succeed in curbing judicial discretion — and wonder whether the Justices will continue to disagree about when the text of a particular statute (or legislative record, for those willing to consult it) clearly indicates that Congress intended to codify the common law, or when a particular statutory term is a "term of art," or even whether a particular statute is a "common law statute." This is a legitimate concern. No set of interpretive rules or recommendations can entirely eliminate judicial discretion — all judicial review involves some level of discretion. That said, the discretion involved in determining whether the above conditions are met should prove significantly *less* capacious than the discretion currently exercised by the Court when it invokes the common law to determine statutory meaning. This is because, as noted above, many statutes (or legislative record materials) do clearly indicate that Congress intends to incorporate or codify common law rules[324] and because there

---

[323] *See supra* notes 101–08 and accompanying text.

[324] *See, e.g.*, Internal Revenue Code of 1954, Pub. L. No. 83-951, § 3306(i), 68A Stat. 3, 452–53 (codified as amended at 26 U.S.C. § 3121(d)) (stating that the term "employee" does not include "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor"); Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(a)(5)(A), 124 Stat. 1029, 1068 ("The term 'economic substance doctrine' means the common law doctrine under which tax benefits under subtitle A with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose."); H.R. REP. NO. 94-1476, at 66 (1976) ("Section 107 [of the Copyright Act] is intended to restate the [pre-existing] judicial doctrine of fair use . . . ."); S. REP.

is at least some consensus that certain statutory terms are legal "terms of art"[325] and that certain statutes should be considered "common law statutes."[326] Thus the universe of cases, and statutes, with respect to which there is room for judicial discretion should be smaller if the above rules for invoking the common law are followed.

2. Clarifying the Common Law's Role. — If textualists, or the Court as a whole, are unwilling to limit their references to the common law in the manner this Article advocates, then they, or the Court as a whole, should at least seek to provide some clarity about the proper role of the common law in statutory cases — both in terms of the common law's relationship to other interpretive tools and in terms of the universe of cases in which it is appropriate (or inappropriate) to use the common law to determine statutory meaning. Moreover, the Court should find some way to reconcile the tensions between "common conversational" meaning and the sophisticated, lawyerly meaning embodied in the common law. This section offers some thoughts about how the Court might seek to resolve these coherence and other problems.

One approach the Court might take is to articulate a clear set of rules specifying certain circumstances in which it is appropriate for everyday conversational meaning to govern versus circumstances in which, conversely, it is appropriate for the Court to import common law meaning into a statute. For example, the Court might establish a bright-line interpretive hierarchy dictating the relative order in which ordinary-meaning-as-common-conversational meaning versus common law meaning should be considered. At present, the Court has said virtually nothing about how common law meaning intersects, or should intersect, with textualism or ordinary meaning analysis, and academic textualists have not stepped in to fill this void. The Court could provide clarity on this issue by dictating, for example, that common law meaning is a second-order interpretive aid, to be consulted only if the Court finds that a statute is ambiguous — that is, lacks an ordinary meaning. In other words, the Court could establish that the first step in any interpretive inquiry should be to determine the statute's ordinary meaning, understood to mean the common conversational usage of the term(s) at issue.

NO. 71-1496, at 6 (1931) (remarks of trademark law supporter Edward Rogers explaining that the law aimed "generally to apply the common law of trade-marks to commerce over which Congress has jurisdiction"); 74 CONG. REC. 6106 (1931) (remarks of Senator Hebert to similar effect); 72 CONG. REC. 7350 (1930) (remarks of Representative Vestal to similar effect); CARL PERKINS, EMPLOYEE BENEFIT SECURITY ACT OF 1973, H.R. REP. NO. 93-533, at 11–13 (1973) ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." *Id.* at 11.).

[325] *See* cases cited *supra* note 318 and accompanying text.

[326] *See* Lemos, *supra* note 320, at 89–90 (noting that "[t]he list always begins with the Sherman Act and typically includes § 1983, the Taft-Hartley Act, and statutory provisions on securities fraud" and that many scholars have argued that many intellectual property statutes should also count (footnotes omitted)).

If the interpreter concludes that the statute has a clear ordinary meaning, then she should not look to the common law at all. But if the interpreter concludes that the statute does not have an ordinary meaning, she may consider relevant common law background rules along with other second-order interpretive tools and resources. In this manner, the common law truly would operate as a gap-filling device, to be consulted only when the statute lacks a clear ordinary meaning. At present, only a handful of cases in the dataset — 6 of 131 — expressly take this approach.[327] An alternative, similar approach would be for the Court to dictate that common law rules and doctrines can be used only to *confirm* a statute's ordinary meaning, but not to contradict it — a methodological approach sometimes advocated with respect to legislative history.[328]

A second approach the Court could take is to establish nuanced, metarules dictating that common law meaning should govern the interpretation of certain types of statutes — perhaps based on subject area, or based on whether a particular statute builds upon existing common law rules — even trumping ordinary meaning analysis where the two conflict. Statutes that do not fall within the "common law" orbit could continue to be construed using the usual array of interpretive tools, minus the common law. To determine the universe of statutes that should be interpreted in light of the common law, the Court might think about and articulate who it believes to be the appropriate audience for the statute — such as, the general public, lawyers, members of a particular profession or trade, and so forth. The Court might even conduct a survey of its own caselaw to determine the statutes or subject areas with respect to which it has found the common law most relevant or useful, and use its findings as a guidepost for establishing subject area–based metarules. The data reported in Table 4b might provide a starting point for such an approach.

Either of these approaches would go a long way towards remedying the haphazardness and theoretical incoherence that characterizes the Court's current use of the common law in statutory cases, while also ameliorating the tension between the Court's "everyday speech" rhetoric, on the one hand, and its regular use of specialized, common law meaning to construe statutes, on the other.

In short, the Court has several potential avenues through which it could seek to resolve the theoretical chaos and tensions illuminated in this Article. Whichever option it might choose, it should be upfront and transparent about its interpretive analysis — and should not purport to

---

[327] *See* cases cited *supra* note 127.

[328] *See, e.g.*, Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 81 (2017); Christa J. Laser, *The Scope of IPR Estoppel: A Statutory, Historical, and Normative Analysis*, 70 FLA. L. REV. 1127, 1155 (2018); Carrie J. Williams, Recent Decision, Chesapeake Amusements, Inc. v. Riddle — *Defining Slot Machines: The Court of Appeals Refuses to Expand Section 264B to Include Pull-Tab Dispensers*, 61 MD. L. REV. 1027, 1040 (2002).

follow "common conversational" meaning while actually following judicially crafted policies and specialized meanings.

CONCLUSION

This Article has sought to shed light on the Court's use of the common law as a tool of statutory interpretation. It has argued that the Court's current approach to construing statutes based on the common law is theoretically chaotic, empowers judges, and conflicts in fundamental ways with modern textualism's "common conversation" approach to statutory interpretation. The Article has also highlighted theoretical tensions between the Court's use of legislative expectations to justify its reliance on the common law, on the one hand, and modern textualism's categorical rejection of legislative process–related interpretive tools, on the other. In the end, it advocates that the Court retreat from its loose, amorphous use of common law rules and doctrines and instead limit its reliance on the common law to cases in which Congress has expressly indicated that it legislated with the intent to incorporate the common law into the statute, or in which the disputed statutory term is a "term of art" that has a clearly established common law meaning, or in which the statute at issue is widely considered a "common law statute" — or, barring that, set forth clear criteria for determining when common law meaning is, and is not, relevant to the interpretation of a statute. Throughout, the Article's goal has been to illuminate an understudied and undertheorized, but important and often dispositive, statutory interpretation tool — and to inspire deeper reflection about its appropriate scope and application.

APPENDIX

The Roberts Court's Use of Common Law in Statutory Interpretation Cases in the 2005–2019 Terms

CASE NAME	FORM OF COMPARISON	LEVEL OF RELIANCE	OPINION TYPE	AUTHOR	SOURCES CITED
Arizona v. United States, 567 U.S. 387 (2012)*	Settled Principles, Policy Norm	Primary	Partial Concurrence / Partial Dissent	Scalia	Treatises
Artis v. District of Columbia, 138 S. Ct. 594 (2018)	Legislative Expectations, Settled Principles, Policy Norm	Minimal	Dissent	Gorsuch	English Treatises, Caselaw
Atlantic Sounding Co. v. Townsend, 557 U.S. 404 (2009)	Settled Principles, Policy Norm	Primary	Majority	Thomas	Caselaw, Treatise
B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138 (2015)	Legislative Expectations, Policy Norm	Primary	Majority	Alito	Restatement, Caselaw
B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138 (2015)	Other, Term of Art	Primary	Dissent	Thomas	Restatement, Treatises, Caselaw
Babb v. Wilkie, 140 S. Ct. 1168 (2020)*	Settled Principles, Policy Norm	Some	Majority	Alito	Treatises, Restatement
Babb v. Wilkie, 140 S. Ct. 1168 (2020)	Derogation-Resembling, Policy Norm	Primary	Dissent	Thomas	Caselaw, Treatises, Restatement
Baker Botts L.L.P. v. Asarco LLC, 135 S. Ct. 2158 (2015)	Derogation-Resembling, Policy Norm	Primary	Majority	Thomas	Caselaw
Banister v. Davis, 140 S. Ct. 1698 (2020)	Legislative Expectations, Term of Art	Primary	Majority	Kagan	Caselaw, Treatise

* Indicates an opinion that did not explicitly use the phrase "common law."

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Bilski v. Kappos, 561 U.S. 593 (2010)*	Legislative Expectations, Term of Art	Some	Concurrence	Stevens	Treatises, Caselaw, Law Reviews, Books
Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co., 137 S. Ct. 1312 (2017)*	Derogation-Resembling, Policy Norm	Some	Majority	Breyer	Restatement
Bullock v. Bank-Champaign, N.A., 569 U.S. 267 (2013)*	Other, Other Method	Minimal	Majority	Breyer	Treatise
Burlington Northern & Santa Fe Railway Co. v. United States, 556 U.S. 559 (2009)	Legislative Expectations, Policy Norm	Some	Majority	Stevens	Restatement, Treatise
Burrage v. United States, 571 U.S. 204 (2014)*	Settled Principles, Term of Art	Primary	Majority	Scalia	Restatement, Caselaw, Treatises
CSX Transportation, Inc. v. McBride, 564 U.S. 685 (2011)	Derogation-Resembling, Common Law Controlling	Primary	Dissent	Roberts	Treatise, Caselaw
CTS Corp. v. Waldburger, 573 U.S. 1 (2014)	Settled Principles, Policy Norm	Primary	Majority	Kennedy	CJS, Treatise, Caselaw, Restatement, Legal Dictionary, Traditional Principles
Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016)	Settled Principles, Policy Norm	Primary	Concurrence	Thomas	Caselaw, Treatises

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Cigna Corp. v. Amara, 563 U.S. 421 (2011)*	Settled Principles, Policy Norm	Some	Majority	Breyer	Treatises, Caselaw, Restatement
Comcast Corp. v. National Ass'n of African American–Owned Media, 140 S. Ct. 1009 (2020)	Legislative Expectations, Policy Norm	Primary	Majority	Gorsuch	Caselaw, Treatise, Law Reviews
Conkright v. Frommert, 559 U.S. 506 (2010)	Legislative Expectations, Policy Norm	Primary	Dissent	Breyer	Restatement, Treatises, Caselaw
Corley v. United States, 556 U.S. 303 (2009)	No Reason, Common Law Controlling	Some	Majority	Souter	Caselaw
Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009)*	Settled Principles, Policy Norm	Primary	Majority	Scalia	Blackstone, Legal Dictionary, Caselaw, Treatises
Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009)	Settled Principles, Policy Norm	Some	Partial Concurrence / Partial Dissent	Thomas	Caselaw, Blackstone, Treatises, Law Reviews
Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131 (2016)*	Settled Principles, Policy Norm	Minimal	Partial Concurrence / Partial Dissent	Alito	Treatise
Dean v. United States, 556 U.S. 568 (2009)*	Settled Principles, Policy Norm	Some	Majority	Roberts	Blackstone, Treatise
Dean v. United States, 556 U.S. 568 (2009)	Derogation-Resembling, Policy Norm	Some	Dissent	Stevens	Caselaw
DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015)	Settled Principles, Policy Norm	Some	Dissent	Ginsburg	Caselaw, Restatement
Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006)	Settled Principles, Policy Norm	Primary	Majority	Scalia	Treatise

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Dutra Group v. Batterton, 139 S. Ct. 2275 (2019)	Settled Principles, Common Law Controlling	Primary	Majority	Alito	Caselaw, Treatises
Dutra Group v. Batterton, 139 S. Ct. 2275 (2019)	Settled Principles, Common Law Controlling	Some	Dissent	Ginsburg	Caselaw
Elonis v. United States, 575 U.S. 723 (2015)*	Settled Principles, Policy Norm	Some	Majority	Roberts	Treatise, Caselaw
Elonis v. United States, 575 U.S. 723 (2015)	Derogation-Resembling, Policy Norm	Some	Partial Concurrence / Partial Dissent	Alito	Treatise
Elonis v. United States, 575 U.S. 723 (2015)	Derogation-Resembling, Policy Norm	Primary	Dissent	Thomas	Caselaw, Blackstone
Federal Aviation Administration v. Cooper, 566 U.S. 284 (2012)	Legislative Expectations, Policy Norm	Some	Majority	Alito	Caselaw
Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014)	Other, Common Law Controlling	Minimal	Majority	Breyer	Caselaw, Restatement
Filarsky v. Delia, 566 U.S. 377 (2012)	Derogation-Resembling, Policy Norm	Primary	Majority	Roberts	Treatise, Caselaw, Blackstone
Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011)*	Settled Principles, Policy Norm	Some	Majority	Alito	Caselaw
Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)	Settled Principles, Common Law Controlling	Some	Majority	Breyer	Treatise, Caselaw
Gonzalez v. United States, 553 U.S. 242 (2008)	Other, Other Method	Minimal	Concurrence	Scalia	Caselaw

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020)*	Settled Principles, Policy Norm	Some	Dissent	Thomas	Treatise, Caselaw
Halo Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923 (2016)*	Settled Principles, Policy Norm	Minimal	Majority	Roberts	Treatise, Caselaw, Restatement
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	No Reason, Common Law Controlling	Some	Majority	Stevens	Law Review, Caselaw, Treatise
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	No Reason, Common Law Controlling	Some	Dissent	Thomas	Treatise
Hamilton v. Lanning, 560 U.S. 505 (2010)*	Derogation-Resembling, Policy Norm	Some	Majority	Alito	Caselaw, Treatises
Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010)	Derogation-Resembling, Common Law Controlling	Some	Majority	Roberts	Caselaw
Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010)*	Other, Common Law Controlling	Some	Dissent	Breyer	Caselaw, Treatises
Husky International Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (2016)	Settled Principles, Term of Art	Primary	Majority	Sotomayor	Treatises, English Caselaw
Husky International Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (2016)	Other, Term of Art	Some	Dissent	Thomas	Treatises
Impression Products, Inc. v. Lexmark International, Inc. 137 S. Ct. 1523 (2017)	Legislative Expectations, Policy Norm	Primary	Majority	Roberts	Treatises, Caselaw, English Law

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573 (2010)	Settled Principles, Policy Norm	Minimal	Concurrence	Scalia	None
Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)	Derogation-Resembling, Common Law Controlling	Some	Majority	Kennedy	Blackstone, Caselaw
Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)	Legislative Expectations, Policy Norm	Some	Dissent	Sotomayor	Caselaw
Johnson v. United States, 559 U.S. 133 (2010)	Legislative Expectations, Policy Norm	Some	Majority	Scalia	Blackstone, Treatises
Johnson v. United States, 559 U.S. 133 (2010)	Legislative Expectations, Term of Art	Primary	Dissent	Alito	Treatises, Black's Law Dictionary, Blackstone
Kennedy v. Plan Administrator for DuPont Savings & Investment Plan, 555 U.S. 285 (2009)	Derogation-Resembling, Term of Art	Some	Majority	Souter	Caselaw, Treatises, Restatement
Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)	Settled Principles, Policy Norm	Minimal	Majority	Roberts	Blackstone, Treatise
Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)	Other, Policy Norm	Primary	Concurrence	Breyer	Blackstone, Restatement, Caselaw
Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013)	Derogation-Resembling, Policy Norm	Some	Majority	Breyer	Caselaw, Treatises, Law Reviews, English Law
Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013)*	Settled Principles, Policy Norm	Some	Concurrence	Kagan	Caselaw

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Kisor v. Wilkie, 139 S. Ct. 2400 (2019)	Derogation-Resembling, Common Law Controlling	Some	Majority	Kagan	Caselaw, Law Reviews
Kurns v. Railroad Friction Products Corp., 565 U.S. 625 (2012)*	No Reason, Policy Norm	Some	Majority	Thomas	Restatement
Kurns v. Railroad Friction Products Corp., 565 U.S. 625 (2012)	Other, Policy Norm	Primary	Partial Concurrence / Partial Dissent	Sotomayor	Restatement, Caselaw, Law Reviews
LaRue v. DeWolff, Boberb & Associates, Inc., 552 U.S. 248 (2008)	Settled Principles, Policy Norm	Minimal	Majority	Stevens	Restatement, Caselaw, Treatises
Leegin Creative Leather Products, Inc. v. PSKS, Inc. 551 U.S. 877 (2007)	Other, Common Law Controlling	Primary	Majority	Kennedy	Economics Literature
Liu v. SEC, 140 S. Ct. 1936 (2020)	Settled Principles, Common Law Controlling	Primary	Majority	Sotomayor	Restatement, Caselaw, Treatises
Liu v. SEC, 140 S. Ct. 1936 (2020)*	Settled Principles, Common Law Controlling	Primary	Dissent	Thomas	Legal Dictionaries, Caselaw, Treatises
Lozman v. City of Riviera Beach, 568 U.S. 115 (2013)*	Settled Principles, Policy Norm	Some	Majority	Breyer	Caselaw, Treatises
Lozman v. City of Riviera Beach, 568 U.S. 115 (2013)*	Settled Principles, Policy Norm	Some	Dissent	Sotomayor	Caselaw, Treatises
Mac's Shell Service, Inc. v. Shell Oil Products Co., 559 U.S. 175 (2010)*	Settled Principles, Policy Norm	Some	Majority	Alito	Caselaw, Treatises, Law Reviews

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Marvin M. Brandt Revocable Trust v. United States, 572 U.S. 93 (2014)	Settled Principles, Common Law Controlling	Primary	Majority	Roberts	Restatement
McDonough v. Smith, 139 S. Ct. 2149 (2019)	Settled Principles, Common Law Controlling	Primary	Majority	Sotomayor	Restatement, Caselaw, Treatises
Merck & Co. v. Reynolds, 559 U.S. 633 (2010)*	Legislative Expectations, Term of Art	Primary	Majority	Breyer	Treatises
Metropolitan Life Insurance Co. v. Glenn, 554 U.S. 105 (2008)	Settled Principles, Other Method	Primary	Majority	Breyer	Restatement, Caselaw, Treatises
Michigan v. Bay Mills Indian Community, 572 U.S. 782 (2014)	Settled Principles, Other Method	Primary	Majority	Kagan	Caselaw
Michigan v. Bay Mills Indian Community, 572 U.S. 782 (2014)*	Settled Principles, Other Method	Primary	Concurrence	Sotomayor	Caselaw, Law Reviews
Microsoft Corp. v. i4i Ltd. Partnership, 564 U.S. 91 (2011)	Derogation-Resembling, Legislative Expectations, Term of Art	Some	Majority	Sotomayor	Caselaw, Treatises
Microsoft Corp. v. i4i Ltd. Partnership, 564 U.S. 91 (2011)	Derogation-Resembling, Policy Norm	Primary	Concurrence	Thomas	None
Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)*	Settled Principles, Term of Art	Minimal	Majority	Sotomayor	Caselaw
Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 (2019)*	Settled Principles, Policy Norm	Some	Majority	Kagan	Caselaw, Treatises

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Montanile v. Board of Trustees, 136 S. Ct. 651 (2016)*	Settled Principles, Common Law Controlling	Primary	Majority	Thomas	Treatises, Restatement, Caselaw
Munaf v. Geren, 553 U.S. 674 (2008)	Other, Policy Norm	Some	Majority	Roberts	Blackstone, Caselaw
Negusie v. Holder, 555 U.S. 511 (2009)	Settled Principles, Policy Norm	Some	Concurrence	Scalia	Caselaw, Treatises
Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007)	Derogation-Resembling, Common Law Controlling	Primary	Majority	Roberts	Treatises, Restatement, Caselaw
Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007)	Derogation-Resembling, Policy Norm	Primary	Concurrence	Souter	Treatises, Caselaw
Ocasio v. United States, 136 S. Ct. 1423 (2016)*	Settled Principles, Policy Norm	Primary	Majority	Alito	Treatises, Caselaw
Ocasio v. United States, 136 S. Ct. 1423 (2016)	Settled Principles, Term of Art	Primary	Dissent	Thomas	Treatises, Caselaw
Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545 (2014)	Settled Principles, Policy Norm	Some	Majority	Sotomayor	Caselaw
Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 575 U.S. 175 (2015)	Settled Principles, Policy Norm	Primary	Majority	Kagan	Restatement, English Caselaw
Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 575 U.S. 175 (2015)	Settled Principles, Policy Norm	Primary	Concurrence	Scalia	Restatement, Treatises

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Paroline v. United States, 572 U.S. 434 (2014)*	Derogation-Resembling, Policy Norm	Primary	Majority	Kennedy	Treatises, Restatement, Caselaw
Paroline v. United States, 572 U.S. 434 (2014)*	Legislative Expectations, Policy Norm	Some	Dissent	Sotomayor	Treatises, Restatement
Peter v. Nantkwest, Inc., 140 S. Ct. 365 (2019)	Settled Principles, Policy Norm	Primary	Majority	Sotomayor	Caselaw
Rehaif v. United States, 139 S. Ct. 2191 (2019)	Settled Principles, Policy Norm	Primary	Majority	Breyer	Caselaw, Legal Dictionaries, ALI
Rehberg v. Paulk, 566 U.S. 356 (2012)	Legislative Expectations, Common Law Controlling	Primary	Majority	Alito	Caselaw
Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020)*	Settled Principles, Policy Norm	Minimal	Majority	Ginsburg	Treatises, Caselaw
Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020)*	Settled Principles, Term of Art	Primary	Concurrence	Sotomayor	Caselaw, Treatises
Rosemond v. United States, 572 U.S. 65 (2014)	Settled Principles, Policy Norm	Primary	Majority	Kagan	Treatises, Caselaw
Rosemond v. United States, 572 U.S. 65 (2014)	Settled Principles, Policy Norm	Primary	Partial Concurrence / Partial Dissent	Alito	Treatises, Caselaw
Rotkiske v. Klemm, 140 S. Ct. 355 (2019)*	Derogation-Resembling, Policy Norm	Primary	Dissent	Ginsburg	Caselaw

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954 (2017)	Settled Principles, Policy Norm	Some	Majority	Alito	Treatises, Caselaw
SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954 (2017)	Settled Principles, Term of Art	Some	Dissent	Breyer	Caselaw
Safeco Insurance Co. of America v. Burr, 551 U.S. 47 (2007)	Settled Principles, Term of Art	Primary	Majority	Souter	Treatises, Caselaw
Samantar v. Yousef, 560 U.S. 305 (2010)	Other, Other Method	Primary	Majority	Stevens	Restatement, Caselaw
Sekhar v. United States, 570 U.S. 729 (2013)	Legislative Expectations, Term of Art	Primary	Majority	Scalia	Treatises, Caselaw, Law Reviews
Sekhar v. United States, 570 U.S. 729 (2013)	Settled Principles, Policy Norm	Primary	Concurrence	Alito	Treatises, Blackstone, Legal Dictionaries
Shaw v. United States, 137 S. Ct. 462 (2016)	No Reason, Policy Norm	Minimal	Majority	Breyer	Treatises, Blackstone, American Jurisprudence
Skilling v. United States, 561 U.S. 358 (2010)*	Legislative Expectations, Common Law Controlling	Some	Majority	Ginsburg	Caselaw
Skilling v. United States, 561 U.S. 358 (2010)	Other, Common Law Controlling	Some	Concurrence	Scalia	Caselaw
Smith v. United States, 568 U.S. 106 (2013)	Derogation-Resembling, Policy Norm	Some	Majority	Scalia	Caselaw, Blackstone

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Sossamon v. Texas, 563 U.S. 277 (2011)	Legislative Expectations, Policy Norm	Some	Dissent	Sotomayor	Caselaw
Staub v. Proctor Hospital, 562 U.S. 411 (2011)*	Derogation-Resembling, Policy Norm	Primary	Majority	Scalia	Restatement
Stokeling v. United States, 139 S. Ct. 544 (2019)	Legislative Expectations, Term of Art	Primary	Majority	Thomas	Treatises, Blackstone
Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)	Derogation-Resembling, Policy Norm	Some	Dissent	Stevens	Caselaw
Sturgeon v. Frost, 139 S. Ct. 1066 (2019)*	Derogation-Resembling, Policy Norm	Some	Majority	Kagan	Caselaw
Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)*	Legislative Expectations, Policy Norm	Primary	Majority	Breyer	Treatises, Caselaw
Tibble v. Edison International, 575 U.S. 523 (2015)	Legislative Expectations, Policy Norm	Primary	Majority	Breyer	Treatises, Caselaw
US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013)*	Settled Principles, Policy Norm	Primary	Majority	Kagan	Treatises, Caselaw
U.S. Forest Service v. Cowpasture River Preservation Ass'n, 140 S. Ct. 1837 (2020)	Settled Principles, Policy Norm	Primary	Majority	Thomas	Treatises, Caselaw, Legal Dictionaries
U.S. Patent & Trademark Office v. Booking.com B.V., 140 S. Ct. 2298 (2020)	Derogation-Resembling, Policy Norm	Some	Dissent	Breyer	Treatises, Caselaw

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
United States v. Castleman, 572 U.S. 157 (2014)	Legislative Expectations, Term of Art	Primary	Majority	Sotomayor	Treatises, Caselaw, Blackstone
United States v. Tinklenberg, 563 U.S. 647 (2011)	Derogation-Resembling, Policy Norm	Minimal	Majority	Breyer	American Jurisprudence
United States v. Tohono O'odham Nation, 563 U.S. 307 (2011)*	Settled Principles, Policy Norm	Minimal	Majority	Kennedy	Caselaw, Restatement, Treatises
United States v. Tohono O'odham Nation, 563 U.S. 307 (2011)*	Settled Principles, Policy Norm	Some	Concurrence	Sotomayor	Caselaw, Restatement, Treatises
Universal Health Services, Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016)	Legislative Expectations, Policy Norm	Primary	Majority	Thomas	Treatises, Caselaw, Restatements
University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338 (2013)	Other, Policy Norm	Minimal	Dissent	Ginsburg	Caselaw
Vance v. Ball State University, 570 U.S. 421 (2013)*	Settled Principles, Policy Norm	Some	Majority	Alito	Caselaw, Restatements
Voisine v. United States, 136 S. Ct. 2272 (2016)	Legislative Expectations, Policy Norm	Some	Dissent	Thomas	Treatises, Caselaw, Restatements, Legal Dictionaries
Wallace v. Kato, 549 U.S. 384 (2007)	Derogation-Resembling, Common Law Controlling	Primary	Majority	Scalia	Treatises, Caselaw
Wilkie v. Robbins, 551 U.S. 537 (2007)	Legislative Expectations, Term of Art	Primary	Majority	Souter	Treatises, Caselaw, Blackstone

Case Name	Form of Comparison	Level of Reliance	Opinion Type	Author	Sources Cited
Woodford v. Ngo, 548 U.S. 81 (2006)	Settled Principles, Term of Art	Primary	Majority	Alito	Caselaw, Treatises
Woodford v. Ngo, 548 U.S. 81 (2006)*	Settled Principles, Policy Norm	Some	Dissent	Stevens	Caselaw