VOLUME 139 JANUARY 2026 NUMBER 3

HARVARD LAW REVIEW

ARTICLE

PRACTICAL CONSEQUENCES IN STATUTORY INTERPRETATION

Anita S. Krishnakumar

CONTENTS

PRACTICAL CONSEQUENCES IN STATUTORY INTERPRETATION

Anita S. Krishnakumar[*]

Modern textualism has long criticized the use of practical, or consequentialist, reasoning when construing statutes. And yet in practice, textualist jurists long have invoked practical consequences arguments to help justify their statutory constructions. Over the past several years, some scholars have noted this seeming disconnect, but few have attempted to study the Court's — or textualist Justices' — use of practical consequences arguments in detail. Indeed, for too long now, statutory interpretation theory has lumped the universe of practical consequences arguments into one undifferentiated bucket, treating all such arguments as essentially equivalent.

This Article provides the first in-depth empirical and doctrinal analysis of how the modern Supreme Court uses practical consequences arguments to determine statutory meaning, based on a study of 667 statutory cases decided during the Roberts Court's first sixteen-and-a-half Terms. The Article catalogues seven different forms of practical consequences–based arguments that the Court regularly invokes. The Article also notes several problems with the Court's current use of practical consequence arguments to construe statutes. For example, the Court currently invokes a hodgepodge of undefined practical concerns and provides no structure or parameters indicating what kinds of practical consequences concerns are, or should be, relevant in determining statutory meaning. Moreover, the Court's references to at least some forms of practical consequences — such as absurd, unjust, or adverse results, or results that would undermine a statute's purpose — are in tension with modern textualism's theoretical rejection of purpose, intent, and policy considerations in statutory interpretation.

In the end, the Article recommends that the Court (1) abandon the categorical rhetoric used by some Justices to paint all consequentialist reasoning as illegitimate; (2) adopt clear canons or presumptions regularizing those forms of practical consequences it determines should be part of the interpretive inquiry — for example, a "workability canon" supporting the rejection of interpretations that would prove difficult or unworkable to administer; and (3) limit the universe of acceptable practical consequences canons or presumptions to those forms of practical considerations that are grounded in longstanding, well-established legal principles.

---

[*] Agnes Williams Sesquicentennial Professor of Legislation, Georgetown University Law Center. I owe deep thanks for valuable insights and conversations to William Eskridge Jr., Daniel Deacon, Jonah Gelbach, Jonathan Gould, Margaret Lemos, Aaron-Andrew Bruhl, Nina Mendelson, Julian Davis Mortenson, and participants at workshops at Yale, Michigan, University of California, Berkeley, and Arizona State law schools. 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, Theodore Miller, Ilya Mordukhaev, Vince Nibali, Melissa Parres, Barbara Reilly, Jennifer Roseman, Peter Ryan, Christine Sammarco, Jonathan Sclar, Sean Kelly, 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

It is widely agreed that textualism is now the dominant interpretive methodology employed by the Justices on the U.S. Supreme Court.[1] Indeed, even those Justices not broadly considered textualists[2] regularly engage in close textual analysis and employ textual interpretive tools.[3] And yet, despite textualism's clear methodological victory, all of the members of the modern Roberts Court continue to regularly invoke one decidedly *atextual* interpretive tool without much explanation or justification — that is, practical consequences.[4]

This is curious because practical consequences exemplify nearly all of the interpretive characteristics that modern textualism rejects: They are divorced from the statute's text; they amplify judicial discretion and border on judicial policymaking; and they are loose and amorphous — lacking clear guiding principles or parameters. And yet, it has long been the case that when courts — including the increasingly textualist U.S. Supreme Court — interpret statutes, they regularly reference the practical consequences engendered by their chosen (or rejected) statutory reading.[5]

---

[1] *See* Charlie D. Stewart, Comment, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1486 (2018).

[2] Commentators widely consider Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett to be textualist or textualist-leaning. *See* John F. Duffy, In re Nuijten*: Patentable Subject Matter, Textualism and the Supreme Court*, PATENTLY-O (Feb. 5, 2007), http://patentlyo.com/patent/2007/02/in_re_nuijten_p.html [https://perma.cc/QZ8K-UYET] (noting that Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito "adhere to some form of fairly rigorous textualism"); Stewart, *supra* note 1, at 1486 (stating that Justice Gorsuch is a textualist); Domenico Montanaro, *Who is Brett Kavanaugh, President Trump's Pick for the Supreme Court?*, NPR (July 9, 2018, at 21:06 ET), https://www.npr.org/2018/07/09/626164904/who-is-brett-kavanaugh-president-trumps-pick-for-the-supreme-court [https://perma.cc/7FXH-YGVV] (explaining that Justice Kavanaugh "believes in textualism and originalism"); 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/V8MK-4SJA] (stating that Justice Barrett "is a textualist"). As explained further, Justices Sotomayor, Kagan, and Jackson are not widely considered textualists. *See infra* note 154; Kimberly Strawbridge Robinson & Lydia Wheeler, *Jackson Goes It Alone in Rebuke of Supreme Court Colleagues*, BLOOMBERG L. (June 20, 2025, at 15:22 ET), https://news.bloomberglaw.com/us-law-week/jackson-goes-it-alone-in-rebuke-of-supreme-court-colleagues [https://perma.cc/ENB3-N9NJ].

[3] *See infra* Table 2, pp. 705–06.

[4] *See infra* Table 2, pp. 705–06.

[5] *See, e.g.*, Riggs v. Palmer, 22 N.E. 188, 189–90 (N.Y. 1889); Pub. Citizen v. U.S. DOJ, 491 U.S. 440, 454 (1989).

Consider a few examples:

In *Van Buren v. United States*,[6] the Court construed a provision of the Computer Fraud and Abuse Act of 1986[7] (CFAA) that "makes it illegal 'to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter.'"[8] The case involved a police sergeant who ran a license-plate search in a law enforcement computer database in exchange for money from a private party.[9] The search violated police department policy, which authorizes officers to obtain database information only for law enforcement purposes.[10] At issue was whether Van Buren's search also violated the CFAA because he was not "'entitled so to obtain' the license-plate information."[11] In an opinion authored by Justice Barrett, the Court held that Van Buren's actions did not violate the CFAA because the statute covers only those who obtain information from areas in a computer that they are not authorized to access — and does not cover offenders, like Van Buren, who have improper motives for obtaining information that they *are* authorized to access.[12]

In so ruling, the Court relied on several traditional textual interpretive tools and also noted the practical consequences that would follow if it adopted the Government's proposed construction of the CFAA. Justice Barrett's majority opinion observed, for example, that "the Government's interpretation of the statute would attach criminal penalties to *a breathtaking amount of commonplace computer activity*," and that if the CFAA "criminalizes every violation of a computer-use policy, *then millions of otherwise law-abiding citizens are criminals*."[13] The opinion provided several real-world illustrations of such commonplace activity — noting that, on the Government's reading, "an employee who sends a personal e-mail or reads the news using her work computer has violated the CFAA" as has an internet user who "embellish[es] an online-dating profile" or "us[es] a pseudonym on Facebook" in violation of the service agreement she signed when joining.[14] The majority used these examples to demonstrate, in essence, that the Government's reading could not be correct because it would produce a series of absurd results — criminalizing commonplace behavior that most people would agree should not be criminalized[15] and "inject[ing] arbitrariness into the assessment of criminal liability."[16]

---

6 141 S. Ct. 1648 (2021).
7 18 U.S.C. § 1030.
8 *Van Buren*, 141 S. Ct. at 1652 (quoting 18 U.S.C. § 1030(e)(6)).
9 *See id.* at 1653.
10 *See id.*
11 *Id.* at 1654 (emphasis omitted) (quoting § 1030(e)(6)).
12 *See id.* at 1655, 1662.
13 *Id.* at 1661 (emphases added).
14 *Id.*
15 *See id.*
16 *Id.* at 1662.

Justice Thomas dissented, contending that the CFAA should be construed to cover Van Buren's conduct.[17] His opinion likewise relied on several textual interpretive tools — and offered competing practical consequences arguments. Specifically, Justice Thomas claimed that the majority's interpretation "also leads to awkward results"[18] and provided examples of situations in which the majority's construction would allow behavior that was clearly problematic to escape CFAA coverage: an employee at a credit-card company who uses his access to purchase-history data for fraud monitoring to obtain his ex-wife's purchase-history data;[19] an employee who "deletes every file on a computer" "minutes before resigning";[20] or a scientist authorized to "obtain blueprints for atomic weapons" who obtains that data "for the improper purpose of helping an unfriendly nation build a nuclear arsenal."[21] Like the majority, the dissent used these in-its-view absurd practical consequences to argue — that is, as evidence — that the Court's interpretation must be incorrect.

Similarly, in all of its recent "major questions" cases, the Court has placed significant weight on the practical effects that an agency's interpretation would impose — trotting out detailed facts and figures about the number of employees who would have to get vaccinated under OSHA's vaccine-or-test mandate,[22] the dollar amounts that landlords would lose under the Centers for Disease Control and Prevention's (CDC) eviction moratorium,[23] the economic costs of shifting to cleaner fuels under the EPA's Clean Power Plan,[24] and the cumulative financial burden on taxpayers and the federal government under the Education Department's student loan forgiveness program.[25]

In all of the cases and opinions described above, the Court's (or dissent's) consideration of practical consequences played a noticeable, but undefined, role in the interpretive analysis. Both *Van Buren* opinions and at least two of the "major questions" opinions led with textual analysis, and yet the fact that they took the time to also articulate practical consequences arguments (sometimes at length) is noteworthy. Moreover, neither *Van Buren* nor the "major questions" cases are

---

[17] *Id.* at 1663 (Thomas, J., dissenting).

[18] *Id.* at 1666.

[19] *See id.*

[20] *Id.*

[21] *Id.* at 1666–67.

[22] *See* NFIB v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (stating that eighty-four million Americans would be affected by the mandate).

[23] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (estimating fifty billion dollar cost to landlords).

[24] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022) (stating that the rejected regulation would "raise retail electricity prices" and "would entail billions of dollars in compliance costs . . . , require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs").

[25] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (estimating a "cost [to] taxpayers 'between $469 billion and $519 billion'").

anomalous. Rather, they are emblematic of the reality that whether textualists acknowledge it or not, practical consequences continue to play an important, enduring role in the Supreme Court's statutory jurisprudence.

The Court's regular use of practical consequences in statutory cases has not gone unnoticed. Several scholars have commented on the frequency with which the modern Court — and especially the textualist Justices — reference practical considerations in statutory cases.[26] But no article to date has systematically examined *how* precisely the Court uses practical consequences when construing statutes, or what kinds of practical arguments it employs to justify its statutory constructions.[27] More importantly, no article has theorized broadly about what the Court's continued reliance on practical consequences means, or should mean, for modern textualism — and its sometimes rigid rejection of nontextual interpretive aids.

This Article seeks to fill that gap. It provides the first empirical and doctrinal analysis of how the modern Supreme Court uses practical consequences to inform its statutory constructions, based on a study of 667 statutory cases decided during the Roberts Court's first sixteen-plus Terms (from January 2006 through June 2022). The Article aims to illuminate the manner in which the Court invokes practical consequences when construing statutes, including the many different forms of practical considerations the Court takes into account and offers as justifications when determining statutory meaning.

Five points stand out from the data and doctrinal analysis: (1) the Roberts Court's overall use of practical consequences to construe statutes is significant — 52.8% of the cases in the dataset contained at least

---

[26] *See* Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–2022*, 38 CONST. COMMENT. 1, 2 (2023); Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1009 (2011); 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, 21 (1998) [hereinafter Schacter, *Confounding Originalism*]; Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 237 (2010) [hereinafter Krishnakumar, *First Era*]; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1107–13 (1992).

[27] The closest precursors are a 1998 article by Professor Jane Schacter that examined one Term's worth of statutory interpretation cases, *see* Schacter, *Confounding Originalism*, *supra* note 26, at 21; a 2008 article by Professor Miranda McGowan that examined twenty Terms' worth of Justice Scalia's dissenting opinions, *see* Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 144 (2008); and two articles I authored in 2010 and 2012 that theorized about two forms of practical consequences arguments, *see* Krishnakumar, *First Era*, *supra* note 26, at 244, and examined closely the anti-messiness form of practical consequences argument, *see* Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1468 (2012). Each of these articles provides case examples of the kinds of practical arguments the Court employs, but none attempts to systematically categorize or evaluate the universe of such arguments; moreover, all of these articles are over a decade old and are limited in scope, covering only one to three Terms' worth of cases or only a subset of one Justice's opinions.

one opinion that referenced practical consequences;[28] (2) all of the Justices, irrespective of their interpretive methodologies, referenced practical consequences regularly in the opinions they authored;[29] (3) when the Justices invoked practical consequences, they only occasionally (14.7% of 505 opinions) did so defensively, to counter practical arguments raised by an opposing opinion;[30] (4) likewise, the Justices rarely invoked practical consequences in a "passing" or "minimal" manner — the vast majority of such references placed at least some weight on the practical considerations raised;[31] and (5) the Justices exercised significant discretion and normative leeway when discussing the practical consequences associated with a particular interpretation — both in predicting those consequences and in deciding what kinds of consequences should play a role in determining statutory meaning at all.

A number of doctrinal trends also are worth noting. First, the Court regularly ties its practical consequences arguments to claims about congressional intent or purpose[32] — a practice that is at odds with textualism's rejection of legislative purpose and intent as illegitimate interpretive tools.[33] Second, in 41.7% of the divided-vote cases studied in the dataset, majority (or concurring) and dissenting opinions offered competing predictions and assessments of the practical consequences that would follow from a particular interpretation.[34] In some of these cases, the Justices disagreed about what consequences an interpretation would generate;[35] in others they disagreed about whether those consequences would be desirable or undesirable;[36] and in still other cases majority and dissenting opinions focused on different kinds of consequences — as where a majority opinion stressed the absurdities a

---

[28] Of the 667 statutory cases in the dataset, 352 contained at least one opinion that invoked practical consequences. For a list of these cases, see Appendix, HARV. L. REV., https://harvardlawreview.org/print/vol-139/practical-consequences-in-statutory-interpretation [https://perma.cc/6VSJ-8XDY].

[29] *See infra* Table 2, pp. 705–06.

[30] *See infra* Table 4, p. 709

[31] *See infra* Table 3, p. 707 (reporting that 14.5% of opinions that referenced practical consequences placed "minimal" weight on such consequences, while 63.0% placed "some" weight and 22.6% placed "heavy" weight on such consequences).

[32] *See infra* Table 9, p. 722.

[33] *See* Nourse, *supra* note 26, at 56.

[34] *Compare, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) (discussing petitioners' desire to serve the poor without violating their consciences), *with, e.g.*, *id.* at 2400 (Ginsburg, J., dissenting) (discussing female employees' desire for continued contraception coverage). *See infra* section III.A, pp. 740–43.

[35] *Compare, e.g.*, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1512–13 (2020) (predicting that a contrary interpretation of the Copyright Act would lead states to charge subscriptions for access to their legislative materials), *with, e.g.*, *id.* at 1522 (Thomas, J., dissenting) (predicting that states may "stop producing annotated codes" under the majority's interpretation).

[36] *Compare, e.g.*, NFIB v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) (per curiam) (noting the economic costs of OSHA's regulation), *with, e.g.*, *id.* at 672 (Breyer, J., dissenting) (noting the health benefits of OSHA's regulation).

rejected interpretation would produce, while a dissenting opinion warned about the majority interpretation's effect on judicial resources.[37]

This Article evaluates the normative and theoretical implications of these empirical and doctrinal trends. It argues that the Court's current use of practical consequences is loose, untethered, and undefined — as well as in marked tension with textualism's theoretical ideals. It suggests that, going forward, the Court and modern textualism should acknowledge the role that practical consequences play in statutory interpretation — as well as seek to better define and cabin the parameters of that role.

The Article proceeds in three Parts. Part I reviews different theoretical takes on the role that practical consequences should play in statutory interpretation as well as the existing scholarly commentary on the Roberts Court's use of this interpretive tool. Part II reports data about the Court's use of practical consequences in the 667 statutory cases decided during its first sixteen-and-a-half Terms. Part II also provides some doctrinal observations about the Court's use of practical consequences in construing statutes, including a taxonomy of several different forms of practical arguments the Court uses in its statutory cases. Part III evaluates the implications of the interpretive practices described in Part II, highlighting the looseness and lack of structure that plague the Court's current references to practical consequences, as well as the tension between the textualist Roberts Court's theoretical rejection of purpose, intent, and policy considerations and its regular on-the-ground references to practical consequences arguments. Part III concludes by considering a few ways the Court might address these theoretical and coherence problems.

I. BACKGROUND

Before describing precisely how the Roberts Court employs practical consequences arguments when construing statutes, it is worth pausing to consider what role practical consequences are *supposed* to play in modern statutory interpretation. Section A of this Part explains how practical consequences–based reasoning is viewed by jurists and scholars from different interpretive schools, emphasizing modern textualism's disdain for such reasoning. Section B reviews the existing scholarly literature examining the Court's use of this interpretive tool.

---

[37] *Compare, e.g.*, Greenlaw v. United States, 554 U.S. 237, 251 (2008) (rejecting an interpretation that "would yield some strange results"), *with, e.g.*, *id.* at 261 (Alito, J., dissenting) (explaining that the Court's interpretation "may disserve the interest in judicial efficiency in some cases").

A. Practical Consequences in Theory

Judges and scholars hold a wide range of views about the role that practical consequences should play in the interpretation of statutes.[38] Some believe practical consequences should play a significant role in statutory construction, while others believe they should play no role at all. This section reviews these competing views.

1. Early Acceptance and Role. — Historically, practical consequences were considered a relevant, important factor in statutory interpretation. Blackstone's Commentaries lists such consequences as one of the five factors to be considered when interpreting a statute:

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, *the effects and consequence*, or the spirit and reason of the law.[39]

Blackstone also explicitly approved of the absurd-results form of practical consequences, declaring that "if there arise out of [statutes] . . . any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void."[40] Several nineteenth- and twentieth-century cases spoke in similarly favorable terms about the need to avoid absurd results.[41]

In the modern era, many nontextualist jurists have also defended, and even embraced, the use of practical consequences in statutory interpretation. Judge Posner, for example, has argued that a "pragmatic approach" that "asks judges to focus on the practical consequences of their decisions" possesses "certain advantages" over approaches that ignore practical considerations.[42] Those advantages include better awareness of the on-the-ground effects that an interpretation will produce in the real world.[43] In particular, Judge Posner urges judges to remain open-minded and attuned to empirical realities — including especially empirical evidence that tests judicial hypotheses about the effects that an interpretation will have on society.[44]

Justice Breyer similarly has argued that judges should consider the practical consequences of various possible interpretations, "including

---

[38] *Compare* STEPHEN BREYER, ACTIVE LIBERTY 17–18 (2005) (encouraging judges to generally consider practical consequences), *with* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 352 (2012) (encouraging a more restrained approach to practical considerations).

[39] 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (emphasis added and omitted).

[40] *Id.* at *91.

[41] *See, e.g.*, Calderon v. Atlas S.S. Co., 170 U.S. 272, 281 (1898) (stating that the plain meaning rule "does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity"); United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868) (defending the absurdity doctrine as a reflection of the "common sense of man").

[42] Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 HARV. L. REV. 31, 90 (2005).

[43] *See id.* at 92.

[44] *See* RICHARD A. POSNER, OVERCOMING LAW 15–19 (1995).

'contemporary conditions, social, industrial, and political, of the community to be affected'" — rather than look only to the language of the law.[45] In both his judicial and scholarly writing, Justice Breyer has urged judges to avoid wooden formulas and rigid rules and to instead balance a variety of factors, including pragmatic judgments, when construing statutes.[46]

Several scholars also have embraced and advocated for the use of practical consequences in statutory interpretation. Professor William Eskridge, for example, has argued that statutes should be interpreted in a manner that takes into account society's current circumstances and needs.[47] Specifically, Eskridge has theorized that courts should engage in a form of "dynamic interpretation," in which they update older statutes to reflect modern developments and societal views.[48] Indeed, Eskridge contended that this is what most judges already do, although they are not always explicit about (or perhaps even aware of) it.[49] Eskridge's frequent coauthor Professor Philip Frickey likewise argued that pragmatism is both the most descriptively accurate and the most normatively sound approach to interpreting statutes.[50] And Professor Jane Schacter has praised what she calls textualism's "pragmatic sensitivity to policy consequences" as a "virtue, not a vice."[51]

It also is worth noting that the interpretive approach known as purposivism, which seeks to identify the statutory reading that is most consistent with a statute's underlying purpose, envisions a role for practical consequences — because an interpretation that produces undesirable consequences is unlikely to be consistent with a statute's goals. Indeed,

---

[45] BREYER, *supra* note 38, at 18 (quoting Truax v. Corrigan, 257 U.S. 312, 356 (1921) (Brandeis, J., dissenting)); *see also* Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1688 (2006) (book review) (describing Justice Breyer's methodology of legal interpretation).

[46] *See, e.g.*, Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 243 (2008) (Breyer, J., dissenting) (urging interpreters to look "beyond Latin canons" to consider purpose and practical effects); BREYER, *supra* note 38, at 17–18.

[47] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9–10 (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (explaining that statutes should be interpreted "in light of their present societal, political, and legal context"); William N. Eskridge, Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1564–65 (2021) (explaining how and why Title VII's "because of sex" provision should be dynamically updated to prohibit sexual orientation discrimination).

[48] Eskridge, Slocum & Gries, *supra* note 47, at 1509.

[49] Eskridge, *supra* note 47, at 1482 (explaining that dynamic interpretation provides a "candid" description of what the Court actually does in statutory cases).

[50] *See* William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990).

[51] Schacter, *Text or Consequences?*, *supra* note 26, at 1015.

both Judge Posner and Justice Breyer, prominent defenders of pragmatism, are widely considered to be purposivists.[52]

As the above summary suggests, practical consequences are considered by many to be an important piece of the statutory interpretation puzzle. However, as textualism has come to dominate the U.S. Supreme Court,[53] judicial and scholarly critiques of practical consequences–based reasoning have become increasingly common.

2. Textualist Rejection. — Textualist scholars and jurists have, by and large, taken a hard theoretical stance against the use of practical consequences in statutory interpretation. Justice Scalia notably issued several diatribes against consequences-based reasoning in statutory cases. His judicial opinions are full of comments such as: "I do not think, however, that the avoidance of unhappy consequences is adequate basis for interpreting a text."[54] And his treatise-style book, *Reading Law*, devotes an entire section to criticizing the "half-truth that consequences of a decision provide the key to sound interpretation."[55] Further, *Reading Law* insists that "the federal judicial oath" in which judges swear to "administer justice without respect to persons, and do equal right to the poor and to the rich" renders inappropriate, or "out of bounds," consequentialist considerations such as "Who wins?" or "Is this decision good for the 'little guy'?"[56] Justice Scalia's early writings on textualism, moreover, explicitly rejected the Eskridgean position that it is proper for judges to consider what a statute "ought to mean in terms of the needs and goals of our present day society" — arguing instead that "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[57]

---

[52] *See, e.g.*, Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 924 (2009) ("Justice Breyer advocates a method of statutory interpretation aimed at determining the purpose of the legislation, which is fundamentally a pragmatic approach."); Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. 1439, 1470 (2022) (explaining that Justice Breyer is a purposivist); Abigail R. Moncrieff, *Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory*, 72 RUTGERS U. L. REV. 39, 87–88 (2019) (describing Posner as a purposivist); Linda E. Fisher, *Pragmatism Is as Pragmatism Does: Of Posner, Public Policy, and Empirical Reality*, 31 N.M. L. REV. 455, 475 (2001) (explaining that Judge Posner "pragmatically searches all available evidence to unearth the policies and purposes underlying the text").

[53] *See* HARVARD LAW SCHOOL, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 8:29, 9:05 (YouTube, Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFToTg [https://perma.cc/4P28-ZB3P] (explaining that "we're all textualists now," *id.* at 8:29, and that "the center of gravity has moved towards the kinds of things that [Justice Scalia has] preached for quite some time," *id.* at 9:05).

[54] Nixon v. Mo. Mun. League, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in the judgment); *see also* King v. Burwell, 576 U.S. 473, 516 (2015) (Scalia, J., dissenting) (criticizing majority decision seeking to address "economic consequences predicted by the Court").

[55] SCALIA & GARNER, *supra* note 38, at 352.

[56] *Id.* at 352–53.

[57] 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 3, 22 (1997) (quoting ESKRIDGE, *supra* note 47, at 50).

At the same time, in spite of his strong stance against consequentialist reasoning, there is one form of practical consequence that Justice Scalia considered relevant in determining a statute's meaning — absurd results. Indeed, Justice Scalia and coauthor Professor Bryan Garner list the "Absurdity Doctrine" as one of fifty-seven valid canons of construction they approve in *Reading Law*.[58] *Reading Law* summarizes the absurd results doctrine as a maxim directing that "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."[59] *Reading Law* recognizes that allowing judges to correct textual errors to avoid absurdity "can be a slippery slope" that "can lead to judicial revision of public and private texts" according to judges' personal views.[60] But Justice Scalia and Garner insist that the slippery slope can be avoided by limiting the absurd results exception to situations in which (1) the absurdity is one that "no reasonable person could intend"[61] rather than merely "[s]omething that 'may seem odd'"[62]; and (2) the absurdity is reparable by fixing what "was obviously a technical or ministerial error."[63] In other words, "[i]f an easy correction is not possible, the absurdity [should] stand[]."[64]

As the data presented in Part II reveal, the members of the Roberts Court regularly invoke absurd-results arguments when construing statutes — but they rarely limit their use of such arguments to situations that meet the above two criteria.[65]

Justice Scalia's former law clerk and prominent academic textualist Provost John Manning also has taken a somewhat nuanced stance against the use of practical consequences in statutory interpretation. On the one hand, Manning has suggested that textualists are, or should be, willing to consider "practical consequences and broader policy considerations" when a statute's text is ambiguous.[66] (This is a point on which not all textualists agree.[67]) On the other hand, Manning, like Justice Scalia, has argued that when a statute's text is plain, the practical consequences generated by that meaning are irrelevant and cannot be used to justify a departure from the statute's text.[68] In fact, Manning has taken a harsher stance against the absurd results doctrine than has

---

58 *See* SCALIA & GARNER, *supra* note 38, at 234.

59 *Id.*

60 *Id.* at 237.

61 *Id.*

62 *Id.* (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565 (2005)).

63 *Id.* at 238.

64 *Id.* at 234.

65 *See infra* section II.C.1, pp. 722–25.

66 John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001).

67 *See, e.g.*, Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020).

68 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003).

almost any other textualist — insisting that when a statute's text is plain, the committed textualist should follow that plain meaning, *even if* it produces an absurd result.[69]

More recently, textualist scholar Tara Grove has argued that there is a form of textualism — which she calls "flexible textualism" — that allows interpreters to consider practical consequences.[70] Grove points to Justices Alito's and Kavanaugh's dissenting opinions in *Bostock v. Clayton County*[71] as exemplars of this approach,[72] because they considered the "social context" in which Title VII was enacted[73] and warned of the "far-reaching consequences" the majority's chosen interpretation would produce.[74] Grove is critical of the "flexible textualism" approach, advocating instead that the Court stick to a more "formalistic textualism" that applies a "closed set" of interpretive canons and rejects interpretive aids such as practical consequences that enhance judicial discretion.[75] It is worth noting that the "flexible textualism" Grove describes does not seem to be openly embraced by any textualist scholar or jurist, although some originalist constitutional law scholars do seem to approve of it.[76] Indeed, the label is one that Grove seems to have crafted based on her observations of the Justices' reasoning in the *Bostock* case.[77]

Scholar Lawrence Solum also has advocated for a form of textualism — which he calls "Plain Meaning Textualism" — that takes into account practical considerations.[78] Solum's form of pragmatics is somewhat different, however, from the kind of practical consequences–based reasoning that I am referring to in this Article. Rather, Solum uses the term "pragmatics" in the philosophy of language and linguistics senses, to refer to the roles of context and communicative intentions in the production of meaning.[79]

Finally, several Justices currently serving on the Court have explicitly criticized the use of practical consequences to construe statutes.

---

[69] *See id.* ("[A] principled understanding of textualism would necessarily entail abandoning the absurdity doctrine."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 115 (2001) (explaining adherence to the absurdity doctrine "subjects textualists to the charge that there is no principled difference between their (narrow) absurdity doctrine and more robust forms of strong purposivism or equitable interpretation").

[70] Grove, *supra* note 67, at 267.

[71] 140 S. Ct. 1731 (2020).

[72] *See* Grove, *supra* note 67, at 286.

[73] *See id.* at 284 (emphasis omitted) (quoting *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting)).

[74] *Id.* at 285 (quoting *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting)).

[75] *Id.* at 269 (quoting Manning, *supra* note 68, at 2474).

[76] *See, e.g.*, John O. McGinnis, Essay, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), https://lawliberty.org/errors-of-will-and-of-judgment [https://perma.cc/XN28-AT8J] (endorsing Justice Alito's use of social context to argue that in 1964 sexual orientation discrimination was distinct from sex discrimination); Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 162 (2020) (similar).

[77] *See* Grove, *supra* note 67, at 286.

[78] *See* Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL'Y, no. 2, 2025, at 2, 89.

[79] *See id.*

Justice Gorsuch has explained that "[i]t is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking."[80] Justice Thomas similarly has declared that "policy concerns cannot justify an interpretation of [a statute] that is inconsistent with the text"[81] and that "[i]f Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them."[82] And Justice Barrett has stated that "we inevitably swerve out of our lane when we put policy considerations in the driver's seat. As we have emphasized many times before, policy concerns cannot trump the best interpretation of the statutory text."[83]

In short, then, practical consequences play an uncertain role in modern statutory interpretation practice. They have historically been considered an essential feature of statutory construction, but they also have been sharply criticized by modern textualists — including several members of the current Supreme Court. Further, while textualism in theory seems blatantly inconsistent with an inquiry into practical consequences, it is becoming increasingly clear that in practice "textualism" has many faces and encompasses many interpretive tools that textualist philosophy rejects. And as Part II details, irrespective of what role practical consequences *are supposed to* play on a textualist Court, the on-the-ground reality is that all the members of the Roberts Court — including its textualist Justices — regularly reference practical consequences when determining a statute's meaning.

B. Existing Literature

Before presenting the data, it is worth reviewing the existing scholarly literature about the use of practical consequences in statutory interpretation. That scholarly literature took off in the 1990s, when a handful of scholars began conducting empirical analyses of the U.S. Supreme Court's statutory interpretation cases.[84] Many of these empirical studies noted the Court's frequent reliance on some form of practical reasoning.[85]

---

[80] Pereida v. Wilkinson, 141 S. Ct. 754, 766–67 (2021).

[81] Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 220 (2012).

[82] *Id.* (quoting Herb's Welding, Inc. v. Gray, 470 U.S. 414, 427 (1985)); *see also* Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 413 (2017) (explaining that courts should focus on a statute's text, not engage in a "free-ranging search for the best copyright policy").

[83] Patel v. Garland, 142 S. Ct. 1614, 1627 (2022).

[84] *See, e.g.*, Zeppos, *supra* note 26, at 1097; Schacter, *Confounding Originalism*, *supra* note 26, at 10; Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y. L. SCH. L. REV. 149, 149–55, 150 n.3, 192–97 apps. A–B (2001).

[85] *See* sources cited *supra* note 84; *cf.* Eskridge & Frickey, *supra* note 50, at 383 (non-empirical article arguing that practical arguments play a prominent role in the Court's statutory cases).

Most notably, Schacter conducted a study of forty-five statutory interpretation cases decided during the Supreme Court's 1996 Term;[86] Schacter's study reports a "[p]revalence" of what she labeled "judicially-selected policy norms" — basically, normative judgments about the "desirable or adverse policy consequences [that would] flow from a particular" statutory construction[87] and "value-laden interpretive baselines against which the meaning of the disputed language is measured and assessed."[88] Schacter found that 73% of all cases she studied employed this interpretive resource; her article briefly summarizes a handful of decisions that invoked one or more of these "judicially-selected policy norms" and argues that many contained a "strong flavor of unabashed, Posnerian consequentialism."[89]

Schacter's early work on practical consequences is enlightening and insightful. But it is also outdated and limited in scope — because it is based on a small sample of cases decided more than twenty-five years ago during one Supreme Court Term, and because it touches only briefly on the Court's use of practical policy norms as part of an article focused on the Court's use of multiple interpretive resources and the legislative history debate.[90]

About a decade after Schacter's empirical study, Professor Miranda McGowan conducted a study of twenty years' worth of Justice Scalia's dissenting opinions.[91] McGowan found that about 55% of the dissents Justice Scalia authored during the period studied contained some form of consequentialist or purposive argument.[92] McGowan sought to disaggregate Justice Scalia's consequentialist and purposive arguments into roughly four categories: "absurdity-lite" arguments that assert that a particular interpretation is or is not anomalous;[93] arguments that effectively "[p]ut[] [p]urposes in Congress's [m]outh";[94] arguments based on an appeal to "common sense";[95] and arguments about the "workability" of an interpretation.[96] McGowan's work, like Schacter's, is illuminating but limited in scope — because it focuses on dissenting opinions authored by a single Supreme Court Justice.

My own early empirical work on the Roberts Court's statutory interpretation practices, published around the same time as McGowan's study, likewise noted the frequency with which the Justices invoke

---

86 Schacter, *Confounding Originalism*, *supra* note 26, at 4.
87 *Id.* at 21.
88 *Id.* at 24.
89 *Id.* at 21.
90 *See id.* at 21–28, 36–37.
91 McGowan, *supra* note 27, at 144.
92 *See id.* at 175.
93 *Id.* at 176.
94 *Id.* at 183.
95 *Id.* at 185.
96 *Id.* at 186.

practical consequences when deciding statutory cases.[97] Like McGowan, I sought to disaggregate the Court's practical consequences arguments into two broad categories: (1) "administrability" arguments that express concerns about the effects an interpretation will have on lower courts or judicial or governmental resources; and (2) "policy constancy" arguments that emphasize the normative effects an interpretation will have — ranging from absurd, to unjust, to undesirable, to inconsistent effects.[98] Some of my early work also focused closely on one specific form of "administrability" argument — what I called "anti-messiness" arguments advocating that courts should choose simple interpretations over "messy" interpretations that would be difficult to administer.[99] Like Schacter's and McGowan's early articles, my early work on practical consequences was limited in scope — focusing on three Terms' worth of cases and stopping well short of a systematic examination of how the Court employs this interpretive tool.

More recently, Professor Victoria Nourse studied both constitutional *and* statutory cases decided during the Court's 2020–2021 Terms and found that textualist Justices invoked practical consequences in a "supermajority" of the Court's nonunanimous cases.[100] Nourse points out that textualist Justices sometimes make practical consequences arguments in the same breath as they decry the use of consequentialist reasoning.[101] Nourse argues that textualist jurists' reliance on consequential arguments — which she labels textualism's "consequentialist paradox" — "is a feature of a system" that refuses to consider statutory purpose or legislative history, "leaving the Justices to imagine (or not imagine) their own ends."[102]

This Article differs from the scholarly literature described above in several important ways. First, it provides significantly more data about the Court's use of practical consequences in statutory interpretation than any other study to date — examining 667 cases decided over sixteen-and-a-half Terms by all of the Justices who served on the Roberts Court during that period, as opposed to a few Terms' worth of data focused on a single Justice or the textualist Justices as a subset. Second, and more importantly, it provides deeper doctrinal and empirical analysis of *how* the Court uses practical consequences in statutory cases than any prior study. That is, this Article presents the first empirical study that focuses *exclusively* on practical consequences arguments — seeking to catalogue, both doctrinally and empirically, the full array of practical consequences arguments the Justices invoke, the weight they place on such arguments, the statutory subject areas that correlate most

---

97 *See* Krishnakumar, *First Era*, *supra* note 26, at 236–37.

98 *See id.* at 244–46.

99 *See* Krishnakumar, *supra* note 27, at 1469.

100 *See* Nourse, *supra* note 26, at 56.

101 *See id.*

102 *Id.* at 11.

frequently with practical consequences arguments, and other similar details about how the Court employs practical consequences arguments in statutory cases.

II. INSIDE STORY: PRACTICAL CONSEQUENCES IN STATUTORY CASES

This Part reports data based on quantitative and qualitative analysis of 667 statutory interpretation cases decided by the Roberts Court during its 2005 (post–January 31, 2006[103]) through 2021 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, referenced practical consequences in the Court's statutory cases. Sections C and D explore in detail the different forms of practical consequences arguments the Court employs, discussing several specific cases and noting patterns in the Court's analysis.

A. Methodology

This study examined each case decided by the U.S. Supreme Court between January 31, 2006, and June 30, 2022, to determine whether it dealt with a statutory issue. Any case in which the Court engaged in statutory interpretation was included.[104] Cases that involved the Federal Rules of Civil Procedure (FRCP), the Federal Rules of Evidence (FRE), and the like were not included,[105] but a handful of constitutional

---

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

[104] Cases were identified as follows: I or a research assistant examined every case listed on the Supreme Court's website from October Term 2005 through October Term 2021. 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 non-statutory text.

[105] I made this judgment call because most Federal Rules 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 Congress and do not require the President's approval. *See, e.g.*, Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002) (noting how proposed rules become effective "[i]f Congress takes no contrary action," *id.* at 1104); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1656 (1995) (noting "the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors"). Accordingly, several interpretive tools available when construing statutes are unavailable, or provide a very different kind of context, with respect to the Federal Rules. For example, the legislative history of a statute may include committee reports, floor statements by members of Congress, hearing testimony, and the like; by contrast, the drafting history of the FRCP consists of comments 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/4WRE-5MY9]. Similarly, interpretive resources that depend on congressional intent, consistency across multiple statutes enacted as part of the U.S. Code (the whole code rule), or substantive policy canons

cases in which the Court construed the meaning of a federal statute were included. This selection methodology yielded 667 statutory cases over sixteen-and-a-half Terms, with 667 majority or plurality opinions, 264 concurring opinions, 368 dissenting opinions, 52 part-concurring/part-dissenting opinions, and 7 part-majority/part-concurring opinions, for a total of 1,358 opinions. Of these, 318 cases were decided unanimously and 349 were decided by a divided vote.[106]

In coding these cases, my primary goal was to determine the frequency with which the Roberts 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 precedent; (7) substantive canons; (8) Supreme Court precedent; (9) statutory purpose; (10) practical consequences; (11) legislative intent; (12) legislative history; (13) language canons such as *expressio unius*; and (14) references to some form of agency deference.[107] The interpretive resources coded for in this study are similar to those examined in other empirical studies of the Court's statutory interpretation practices.[108]

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

---

like the rule of lenity may fail to translate directly to the Federal Rules context. I note that the FRE, unlike other Federal Rules, were enacted by Congress. *See* Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911, 918 (2022). Thus, legislative history materials comparable to those created during the process of enacting a federal statute may be available for the FRE; however, other interpretive resources such as substantive canons or whole-code comparisons may not translate easily to the FRE context either. *See* Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 551 (1996).

106 This figure counts as unanimous all cases in which there was no dissenting opinion, even if concurring opinions offering different rationales were issued. If cases in which concurring opinions were issued are removed from this count, the figure for unanimous decisions drops to 191.

107 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. The coding methodology is the same as that I employed in an earlier article about the whole code rule. *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 91–94 (2021). At the outset of the study, I did not keep track of intercoder reliability, but began doing so for October Term 2017 through October Term 2021. The intercoder agreement rate for those five terms was 89.2%. This is within typically acceptable intercoder reliability rates. *See* KIMBERLY A. NEUENDORF, THE CONTENT ANALYSIS GUIDEBOOK 168 (2d ed. 2017). For a detailed explanation of my coding methodology, see Krishnakumar, *First Era*, *supra* note 26, at 291–96.

108 *See, e.g.*, Schacter, *Confounding Originalism*, *supra* note 26, at 11–12; 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, 90–94 (2018); Zeppos, *supra* note 26, at 1089, app. A at 1138–41. *See generally* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009) (providing an overview of methods, tools, and canons of statutory interpretation).

that as a reference to the canon or tool.[109] Secondary or corroborative references to an interpretive tool, on the other hand, were counted; thus, where the Court reached an interpretation based primarily on one interpretive 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.[110] 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.[111]

In addition, every opinion that referenced practical consequences in determining a statute's meaning was coded as placing "minimal reliance," "some reliance," or "primary reliance" on practical consequences. While this coding necessarily involved some judgment calls, I believe it adds valuable texture to our understanding of *how* the Court uses practical consequences as an interpretive aid. Further, my data and coding decisions are available for others to review and agree or disagree with.[112] The coding parameters were as follows: An opinion was coded as employing "minimal reliance" on practical consequences if it made a passing reference to an interpretation's practical effects or mentioned practical consequences as an add-on argument supporting a reading already arrived at through other interpretive tools. An opinion was coded as involving "some reliance" if it made more than minimal reference to an interpretation's practical effects but did not rely on such practical

---

[109] For example, in *Watson v. United States*, 552 U.S. 74 (2007), the Court held that "a person who trades . . . drugs [in exchange] for a gun" does not "'use[] a firearm 'during and in relation to . . . [a] drug trafficking crime.'" *Id.* at 76 (final two alterations in original) (quoting 18 U.S.C. § 924(c)(1)(A)). In so ruling, the Court relied on the plain meaning of the word "use," along with several corroborative dictionary definitions. *Id.* at 79 & n.7. The Court also rejected the government's practical argument that it would be asymmetrical for the criminal law to penalize a person who trades his gun for drugs (an earlier case held that such a trade constitutes "use" under the relevant statute), but not to penalize the person on the other end of the exchange who receives the gun. *Id.* at 82–83. The opinion was coded for reliance on text/plain meaning and dictionary definitions, but not for reliance on practical consequences.

[110] For example, in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Court held that § 10(b) of the Securities Exchange Act of 1934 does not provide a cause of action for foreign plaintiffs suing American defendants for misconduct involving securities traded on foreign exchanges. *Id.* at 273. In so ruling, the Court relied heavily on a substantive canon called the presumption against extraterritoriality and practical consequences arguments detailing how lower courts' disregard of the presumption had led to a collection of complex and unpredictable tests for § 10(b) liability. *Id.* at 255–61. The Court then bolstered these arguments with references to the statute's text, the whole act rule, precedent, purpose, and another federal statute. *Id.* at 264–66, 268–70. Although the Court invoked these other tools as secondary support for an interpretation arrived at primarily based on the extraterritoriality presumption and related practical arguments, the opinion was coded for reliance on text/plain meaning, the whole act rule, precedent, purpose, and other statutes in addition to substantive canons and practical consequences.

[111] *See* Krishnakumar, *First Era*, *supra* note 26, at 231–33; Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 277–79 (2022); Krishnakumar, *Cracking the Whole Code Rule*, *supra* note 107, at 91–94; Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 841–44 (2017); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 921–24 (2016).

[112] *See* Appendix, *supra* note 28.

consequences as the main justification for the construction it adopted. Finally, an opinion was coded as involving "primary reliance" if it relied primarily or heavily on a practical consequences argument to justify the result it reached.

A few examples may help illustrate how these coding parameters were applied. A good example of "primary reliance" is *Hertz Corp. v. Friend*,[113] which involved the federal diversity jurisdiction statute.[114] The statute provides that "a corporation shall be deemed to be a citizen of . . . the State . . . where it has its principal place of business."[115] Different circuits had articulated different tests for determining where a corporation's "principal place of business" is located.[116] In *Hertz*, the Court adopted one of those tests, known as the "nerve center" test.[117] In so ruling, the Court placed "primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."[118] It explained that "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate" and that "[s]imple jurisdictional rules also promote greater predictability";[119] the Court argued that the "nerve center" test was "comparatively" simple to apply.[120] The opinion was coded as placing "primary reliance" on practical consequences.[121]

For an example of the kind of opinion that met the parameters for "some reliance," consider again *Van Buren v. United States*, from the Introduction.[122] Recall that the Court concluded that a CFAA provision that subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access" did not apply to a police sergeant who ran a license-plate search in a law enforcement computer database for a nonwork purpose.[123] The majority opinion relied prominently on the statute's plain meaning and dictionary definitions, extensively parsing the meaning of the terms "so" and "entitled."[124] It also buttressed these textual tools with arguments about the statute's structure, history, precedent,[125] and practical consequences — noting that the government's interpretation "would attach criminal

---

113 559 U.S. 77 (2010).

114 *Id.* at 80.

115 28 U.S.C. § 1332(c)(1).

116 *See Hertz*, 559 U.S. at 90–91.

117 *See id.* at 92–93.

118 *Id.* at 80; *see id.* at 92.

119 *Id.* at 94.

120 *Id.* at 95 (emphasis omitted).

121 The Court also observed that the "nerve center" test is consistent with the statute's plain meaning, dictionary definitions of "principal," and the statute's legislative history. *See id.* at 93, 95. The opinion also was coded for references to these interpretive tools.

122 141 S. Ct. 1648 (2021).

123 *See id.* at 1652 (quoting 18 U.S.C. § 1030(a)(2)).

124 *See id.* at 1654–56 (quoting 18 U.S.C. § 1030(e)(6)).

125 *See id.* at 1658–61.

penalties to a breathtaking amount of commonplace computer activity" and providing examples of innocuous everyday activities that would be criminalized under the government's reading.[126] Because the opinion discussed practical considerations supporting its chosen interpretation in some detail — but neither emphasized practical consequences as the primary factor favoring that interpretation nor mentioned such consequences only in passing — the opinion was coded as placing "some reliance" on practical consequences.

For an example of "minimal reliance," consider Justice Alito's concurring opinion in *Flores-Figueroa v. United States*.[127] The majority in *Flores-Figueroa* held that a criminal statute that forbids "'[a]ggravated identity theft' . . . requires the Government to show that the defendant knew that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'"[128] Justice Alito concurred in part, writing separately to explain that despite strong language in the majority opinion, the mens rea of a federal criminal statute does not "always appl[y] to every element of the offense."[129] Justice Alito provided examples of other federal statutes that lower courts had construed *not* to require knowledge of every element of the offense[130] — but agreed that in this case, the knowledge requirement was appropriate because there were no contextual features supporting a different reading.[131] His opinion also made a passing practical consequences argument in its second-to-last sentence, commenting that "the Government's interpretation leads to exceedingly odd results" such that "if a defendant uses a made-up Social Security number" his liability "depends on chance: If it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated."[132] Because the opinion referenced practical consequences only in its last two sentences, as a passing observation, it was coded for "minimal reliance" on practical consequences.

There were a few "some reliance" opinions that could be considered on the borderline between "some reliance" and either "minimal" or "primary" reliance. For insight into the parameters used to code such cases, consider the following example. In *Rapanos v. United States*,[133] the Court construed a provision of the Clean Water Act[134] (CWA) that requires landowners to obtain a permit before discharging pollutants into

---

126 *Id.* at 1661.
127 556 U.S. 646 (2009).
128 *Id.* at 647 (alteration in original) (emphasis omitted) (quoting 18 U.S.C. § 1028A, 1028A(a)(1)).
129 *Id.* at 659 (Alito, J., concurring in part and concurring in the judgment).
130 *Id.* at 660 (citing 18 U.S.C. § 2423(a); 8 U.S.C. § 1327).
131 *See id.* at 660–61.
132 *Id.* at 661.
133 547 U.S. 715 (2006).
134 33 U.S.C. §§ 1251–1389.

"navigable waters," defined as "the waters of the United States."[135] At issue was whether wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters[] constitute 'waters of the United States' within the meaning of the" CWA.[136] The Army Corps of Engineers, which administers this part of the CWA, interpreted the statute to cover the wetlands at issue.[137] In a plurality opinion authored by Justice Scalia, the Court rejected this interpretation, holding that the wetlands at issue were not "navigable waters."[138] Notably, Justice Scalia's plurality opinion *opened* by commenting on the "burden" that federal regulation under the CWA places on landowners, declaring that "[i]n deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot."[139] "The average applicant for an individual permit," the opinion further observed, "spends 788 days and $271,596 in completing the process," and "[o]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits."[140] Justice Scalia concluded this opening commentary with the observation that "[t]he enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act."[141] The plurality opinion then went on to engage in extensive analysis of the statute's plain meaning, relying heavily on dictionary definitions and several other supporting canons and interpretive tools.[142] Toward the end of the opinion, Justice Scalia referred back to his opening remarks about the high costs imposed by CWA regulations and insisted that such costs were "in no way the basis for [the Court's] decision" — and that the plurality's ruling was based primarily on the statute's plain meaning.[143]

The plurality opinion was coded for "some reliance" on practical consequences. I recognize that an argument could be made that because the opinion *opened* with a discussion of the costs imposed by CWA regulations, it should have been coded as placing "primary reliance" on such costs. Conversely, one could argue that because the opinion disclaimed reliance on regulatory costs, it should have been coded as placing only "passing reliance" on practical consequences arguments (or perhaps not

---

135 *Id.* § 1362(7); *see id.* § 1311(a) (generally prohibiting the discharge of pollutants notwithstanding a list of enumerated exceptions in scattered sections of 33 U.S.C.); *id.* § 1362(12) (defining "discharge of pollutants" as the "addition of any pollutant to navigable waters from any point source").

136 *Rapanos*, 547 U.S. at 729 (plurality opinion).

137 *See id.* at 727–28.

138 *See id.* at 731–32.

139 *Id.* at 721.

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

141 *Id.* at 722.

142 *See id.* at 732–38.

143 *Id.* at 753.

coded as referencing practical consequences at all). I concluded that the opinion discussed practical consequences in too much detail (and length) to be coded as placing only "passing reliance" on such consequences; at the same time, because the opinion relied heavily on the statute's plain meaning and dictionary definitions and expressly disclaimed reliance on practical consequences, I also concluded that it should not be coded as placing "primary reliance" on such consequences.

Last, every opinion in the dataset was coded for whether it discussed practical consequences "defensively" — that is, in response to an opposing opinion's claims about the consequences that a particular interpretation would produce. Specifically, where an opinion referenced practical consequences arguments made in an opposing opinion and countered with its own competing practical consequences arguments, the opinion was coded as engaging in a "defensive" practical consequences argument.[144] This coding was done in order to determine whether the Court's — and especially the textualist Justices' — noteworthy rates of reference to practical consequences might reflect efforts to set the record straight or to neutralize an opposing opinion's arguments, rather than efforts to avoid (or adopt) a particular interpretation because of the practical consequences it would produce. (While it is of course impossible to determine with certainty why an authoring Justice references practical consequences, the "defensive" use coding aims to at least differentiate between references that are merely responsive versus those that are invoked at the authoring Justice's own initiative.)

B. Statistics

Before reporting the data, it is important to note some limitations of this study. First, the study covers only sixteen-and-a-half Supreme Court Terms and 667 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 practical consequences as an interpretive tool, the data reported may reflect trends

---

[144] An example may help illustrate: In *Banister v. Davis*, 140 S. Ct. 1698 (2020), the Court held that motions to alter or amend a judgment are not "second or successive" habeas petitions subject to the gatekeeping provision of the Antiterrorism and Effective Death Penalty Act of 1996. *Id.* at 1702 (quoting 28 U.S.C. § 2244(b)). In so ruling, the Court noted that unlike successive habeas petitions, motions to alter or amend a judgment may actually make habeas proceedings more efficient by enabling the district court to reverse a mistaken judgment, thereby avoiding unnecessary appeals. *Id.* at 1708. Justice Alito dissented, noting that although "[t]he Court is probably right that, once in a while, a [motion to alter or amend a judgment] could save the need for an appeal[,] . . . that positive effect is very likely outweighed by the burden imposed by the entirely meritless . . . motions" the Court's decision will encourage prisoners to file. *Id.* at 1718 (Alito, J., dissenting). The dissent then detailed the incentives prisoners will have to file meritless motions under the Court's construction and predicted that "the aggregate burden on the district courts" would be "quite substantial." *Id.* Both the majority and dissenting opinions were coded for referencing "practical consequences," but only the dissent was coded as employing practical consequences "defensively."

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 practical consequences arguments, 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 practical consequences because the opinion's author was persuaded to interpret the statute a certain way based on those consequences, or merely because the author thought the practical consequences produced by an interpretation provided a convincing justification for choosing that interpretation. The study's empirical and doctrinal claims are confined to describing how the Justices publicly engage practical consequences arguments to justify their statutory constructions and to theorizing about discernible patterns in their public engagement of such consequentialist arguments.

1. Frequency, Weight, and Defensiveness. — Table 1a 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. As the Table shows, the Justices referenced practical consequences in more than one-third (37.2%) of all opinions in the dataset, and in 36.1% of the 667 majority opinions in the dataset.[145] In addition, 52.8% of the 667 cases in the dataset contained at least one opinion that referenced practical consequences.[146] This makes practical consequences the Court's third most-frequently-invoked interpretive tool — behind only Supreme Court precedent (58.9%) and nearly tied with text/plain meaning (38.3%).

---

[145] *See infra* Table 1a, p. 703.

[146] Specifically, 352 cases in the dataset contained at least one opinion that invoked practical consequences.

Table 1a: Overall Roberts Court Rates of Reliance on Interpretive Canons and Tools 2005–2021 Terms

Canons / Interpretive Tools	All Opinions (N=1358)	Majority / Plurality Opinions (N=667)	Dissenting Opinions (N=368)	Concurring Opinions (N=264)	Partial Opinions (N=59)
Text / Plain Meaning	38.3%	47.8%	35.3%	20.8%	28.8%
Dictionary Rules	22.9%	30.7%	20.4%	8.3%	15.3%
Whole Code Rule / Other Statutes	21.5%	29.1%	21.5%	4.9%	20.3%
Common Law Precedent	11.6%	14.7%	9.2%	6.8%	13.6%
Substantive Canons	14.6%	16.5%	16.3%	7.2%	15.3%
Whole Act Rule	28.9%	38.7%	27.7%	7.6%	20.3%
Language & Grammar Canons	8.3%	11.8%	6.5%	1.9%	8.5%
Supreme Court Precedent	58.9%	69.1%	54.6%	39.0%	59.3%
Practical Consequences	37.2%	36.1%	50.3%	20.8%	40.7%
Purpose	23.5%	27.1%	27.4%	9.5%	20.3%
Intent	11.7%	10.8%	19.3%	4.9%	5.1%
Legislative History	18.4%	19.9%	24.2%	8.0%	11.9%
Statutory History	9.4%	12.6%	10.3%	0.8%	5.1%

Some may wonder whether the Court's reliance on practical consequences has decreased over time, as textualism has come to dominate the Court's interpretive methodology. But the figures actually get *worse* if we look at the Court's more recent 2017 to 2021 Terms, when textualist Justices have dominated the Court. As Table 1b below shows, the Court's rate of reference to practical consequences was actually *higher* during these later years, as 47.3% of opinions authored during this period referenced practical consequences.

Table 1b: Overall Roberts Court Rates of Reliance on Interpretive Canons and Tools 2017–2021 Terms

Canons / Interpretive Tools	All Opinions (N=364)	Majority / Plurality Opinions (N=169)	Dissenting Opinions (N=107)	Concurring Opinions (N=64)	Partial Opinions (N=24)
Text / Plain Meaning	35.4%	48.5%	30.8%	10.9%	29.2%
Dictionary Rules	29.4%	37.9%	24.3%	6.3%	20.8%
Whole Code Rule / Other Statutes	27.2%	38.5%	21.5%	6.7%	16.7%
Common Law Precedent	13.7%	17.8%	14.0%	4.7%	8.3%
Substantive Canons	13.7%	17.2%	7.5%	9.4%	29.2%
Whole Act Rule	34.3%	46.2%	33.6%	7.8%	25.0%
Language & Grammar Canons	10.4%	16.0%	5.6%	3.1%	12.5%
Supreme Court Precedent	65.4%	72.2%	63.6%	46.9%	75.0%
Practical Consequences	47.3%	41.4%	69.2%	25.0%	50.0%
Purpose	19.5%	20.7%	26.2%	9.4%	8.3%
Intent	11.3%	10.1%	18.7%	4.7%	4.2%
Legislative History	17.3%	19.5%	21.5%	9.4%	4.2%
Statutory History	14.8%	20.1%	17.8%	1.6%	0.0%

Table 2 similarly reports the rate at which each individual Justice who has served on the Roberts Court referenced each interpretive tool in the opinions they authored. The Table shows that all of the Justices referenced practical consequences regularly, at rates that ranged from 21.8% to 52.6%.

Table 2: Individual Justices' Rates of Reliance on Interpretive Canons and Tools by Opinion Author[147] 2005–2021 Terms (n=1307)[148]

Interpretive Tool	Alito (N=151)	Thomas (N=202)	Kavanaugh (N=25)	Gorsuch (N=49)	Roberts (N=90)	Kennedy (N=76)	Scalia (N=127)
Text / Plain Meaning	41.1%	46.5%	40.0%	44.9%	38.9%	39.5%	48.8%
Dictionary Rule	31.8%	26.7%	8.0%	40.8%	14.4%	22.4%	19.7%
Whole Code Rule / Other Statutes	29.1%	18.3%	24.0%	46.9%	27.8%	21.1%	15.7%
Whole Act Rule	30.5%	30.2%	24.0%	46.9%	34.4%	26.3%	26.0%
Language Canons / Grammar	9.3%	11.9%	4.0%	16.3%	8.9%	10.5%	7.9%
Substantive Canons	11.9%	13.4%	12.0%	20.4%	24.4%	13.2%	12.6%
Practical Consequences	45.0%	21.8%	40.0%	44.9%	40.0%	52.6%	28.3%
Common Law	12.6%	11.4%	4.0%	14.3%	14.4%	6.6%	11.8%
Supreme Court Precedent	56.3%	58.9%	44.0%	67.3%	68.9%	67.1%	48.0%
Purpose	19.2%	9.4%	8.0%	14.3%	13.3%	44.7%	10.2%
Intent	13.9%	2.0%	12.0%	6.1%	8.9%	6.6%	3.9%
Legislative History	15.2%	3.5%	4.0%	10.2%	6.7%	23.7%	2.4%
Statutory History	10.6%	5.0%	8.0%	20.4%	8.9%	11.8%	3.1%

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

[148] The total number of opinions reflected in the Table is 1,307, rather than 1,358, because the Table omits thirty-eight per curiam opinions as well as thirteen opinions authored by Justice Barrett during the period studied.

Table 2 (continued):

Interpretive Tool	Ginsburg (N=125)	Breyer (N=159)	Sotomayor (N=131)	Souter (N=35)	Kagan (N=76)	Stevens (N=61)
Text / Plain Meaning	25.6%	22.0%	38.9%	45.7%	47.4%	42.6%
Dictionary Rule	12.8%	17.6%	29.0%	17.1%	36.8%	16.4%
Whole Code Rule / Other Statutes	21.6%	18.2%	24.4%	22.9%	17.1%	14.8%
Whole Act Rule	24.0%	22.6%	41.2%	31.4%	28.9%	21.3%
Language Canons / Grammar	5.6%	4.4%	13.0%	5.7%	5.3%	3.3%
Substantive Canons	15.2%	10.7%	13.0%	14.3%	17.1%	26.2%
Practical Consequences	38.4%	49.7%	43.5%	28.6%	38.2%	26.2%
Common Law	5.6%	14.5%	16.0%	14.3%	14.5%	13.1%
Supreme Court Precedent	55.2%	59.1%	59.5%	54.3%	60.5%	54.1%
Purpose	34.4%	40.3%	26.7%	17.1%	42.1%	29.5%
Intent	14.4%	18.9%	16.8%	22.9%	6.6%	41.0%
Legislative History	30.4%	39.6%	28.2%	25.7%	26.3%	29.5%
Statutory History	11.2%	11.9%	9.2%	5.7%	7.9%	16.4%

Table 2 reveals that during the period studied, Justices Kennedy, Breyer, Alito, Gorsuch, and Sotomayor were the most frequent users of practical consequences — referencing practical arguments in 52.6%, 49.7%, 45.0%, 44.9%, and 43.5% of the opinions they authored, respectively. Table 2 also shows that Justices Stevens and Thomas were the least frequent users of practical consequences, referencing such concerns in 26.2% and 21.8% of the opinions they authored, respectively. What is most noteworthy about these figures is that practical consequences were referenced regularly, and at noteworthy rates, by all of the Justices across the board, irrespective of ideological or methodological preferences. Significantly, Justices Thomas, Scalia, Kavanaugh, Gorsuch, and Alito — all considered textualist or textualist-leaning jurists —

referenced practical consequences in 21.8% to 45.0% of the opinions they authored, all comparable *or higher rates* than the rates at which the nontextualist Justices invoked this interpretive tool. Indeed, after Justices Stevens and Thomas, Justices Scalia (28.3%), Souter (28.6%), Kagan (38.2%), and Ginsburg (38.4%) had the next lowest rates of reference to practical consequences. Thus, the Justices' rates of reference to practical consequences do not seem to track with their preferred theoretical or methodological approaches — even though, in theory, nontextualist approaches such as purposivism, pragmatism, and intentionalism all contemplate a more significant role for practical reasoning than does textualism.[149]

The data also reveal some interesting information about the weight that the Justices placed on practical consequences when they referenced them. Table 3 reports how often the members of the Roberts Court placed "minimal," "some," or "primary/heavy" reliance on practical consequences when they employed this interpretive tool.

Table 3: Relative Weight Placed on Practical Consequences 2005–2021 Terms

Opinions Referencing Practical Consequences	Minimal Reliance (N=73)	Some Reliance (N=318)	Primary or Heavy Reliance (N=114)
All Opinions (N=505)	14.5% (n=73)	63.0% (n=318)	22.6% (n=114)
Majority Opinions (N=241)	20.7% (n=50)	66.8% (n=161)	12.4% (n=30)
Concurring Opinions (N=55)	9.1% (n=5)	52.7% (n=29)	38.2% (n=21)
Dissenting Opinions (N=185)	8.6% (n=16)	60.0% (n=111)	31.2% (n=58)
Partial Opinions (N=24)	8.7% (n=2)	70.8% (n=17)	21.7% (n=5)

The data show that the members of the Roberts Court only occasionally invoked practical consequences as a "minimal" or "passing" factor in their statutory analysis.[150] Rather, in the majority of opinions in which the Justices referenced practical consequences, they placed "some" weight on this interpretive resource (63.0%) — meaning that they relied on practical consequences as one of several factors that supported a particular statutory construction. And in nearly a quarter of the opinions in which they invoked practical consequences (22.6%), the

---

[149] *See supra* notes 42–46 and accompanying text.

[150] Table 3 reports that only 14.5% of the opinions that referenced practical consequences placed "minimal" weight on those consequences.

Justices placed "primary" or "heavy" weight on such consequences to help justify their chosen statutory construction. This means that in the overwhelming majority of opinions in which they referenced practical consequences (85.6%), the Justices placed more than minimal weight on those consequences. Indeed, many of the "heavy reliance" opinions — and some of the "some reliance" opinions — contained lengthy discussions about the practical consequences expected to follow from a particular statutory construction.[151]

In a similar vein, the data also reveal that the members of the Roberts Court — including its textualist Justices — only occasionally invoked practical consequences arguments in direct response to practical arguments raised by an opposing opinion. That is, only 14.7% (74 of 505) opinions in the dataset that referenced practical consequences did so in a "defensive" manner. Table 4 reports the individual Justices' rates of "defensive" use of practical consequences in the opinions they authored.

---

[151] *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 153–58 (2013); *id.* at 170–73 (Roberts, C.J., dissenting); Kisor v. Wilkie, 139 S. Ct. 2400, 2413–14 (2019); *id.* at 2425–26 (Gorsuch, J., concurring in the judgment); McGirt v. Oklahoma, 140 S. Ct. 2452, 2500–02 (2020) (Roberts, C.J., dissenting); U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298, 2314–15 (2020) (Breyer, J., dissenting); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351, 2354–56, 2361–62, 2365–66, 2372–73 (2021) (Kagan, J., dissenting); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1495–98 (2021) (Kavanaugh, J., dissenting); Shoop v. Twyford, 142 S. Ct. 2037, 2048–50 (2022) (Breyer, J., dissenting); NFIB v. Dep't of Lab., 142 S. Ct. 661, 665–66 (2022) (per curiam); *id.* at 669 (Gorsuch, J., concurring); Badgerow v. Walters, 142 S. Ct. 1310, 1323–25 (2022) (Breyer, J., dissenting); United States v. Davis, 139 S. Ct. 2319, 2337, 2353–55 (2019) (Kavanaugh, J., dissenting); Hughes v. United States, 138 S. Ct. 1765, 1779–80 (2018) (Sotomayor, J., concurring); *id.* at 1782–83 (Roberts, C.J., dissenting); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405–07 (2018); *id.* at 1410–12 (Alito, J., concurring in part and concurring in the judgment); Marinello v. United States, 138 S. Ct. 1101, 1116–17 (2018) (Thomas, J., dissenting); Terry v. United States, 141 S. Ct. 1858, 1864, 1867–68 (2021) (Sotomayor, J., concurring in part and concurring in the judgment); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 894–99 (2007); United States v. Santos, 553 U.S. 507, 515–20 (2008) (plurality opinion); *id.* at 535–40 (Alito, J., dissenting); Bartlett v. Strickland, 556 U.S. 1, 27, 32–34 (2009) (Souter, J., dissenting); Conkright v. Frommert, 559 U.S. 506, 518–20 (2010); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 617–24 (2010) (Kennedy, J., dissenting); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 258–61 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348–51 (2011); Brown v. Plata, 563 U.S. 493, 517–22 (2011); Chamber of Com.. v. Whiting, 563 U.S. 582, 616–22 (2011) (Breyer, J., dissenting); Descamps v. United States, 570 U.S. 254, 291–94 (2013) (Alito, J., dissenting).

Table 4: Opinions Referencing Practical Consequences in a Defensive Manner by Authoring Justices 2005–2021 Terms

Justice	Rate of Defensive Uses of Practical Consequences
Scalia (N=36)	25.0% (n=9)
Thomas (N=44)	13.6% (n=6)
Alito (N=69)	10.1% (n=7)
Roberts (N=35)	11.4% (n=4)
Kennedy (N=40)	7.5% (n=3)
Gorsuch (N=22)	45.5% (n=10)
Kavanaugh (N=10)	10.0% (n=1)
Barrett (N=3)	33.3% (n=1)
Sotomayor (N=57)	15.8% (n=9)
Kagan (N=29)	6.9% (n=2)
Breyer (N=79)	6.3% (n=5)
Ginsburg (N=48)	16.7% (n=8)
Souter (N=10)	50.0% (n=5)
Stevens (N=16)	18.8% (n=3)
Per Curiam (N=7)	14.3% (n=1)
Total (N=505)	14.7% (n=74)

As the Table reveals, the Justices with the highest rates of defensive practical consequences use were Justices Gorsuch (45.5%) and Souter (50.0%); Justice Scalia was a distant third with a 25.0% rate of defensive practical consequences use.[152] With the exception of Justice Gorsuch, most of the textualist Justices had rather low rates of "defensive" practical consequence use — meaning that they did not typically invoke practical consequences arguments in response to an opposing opinion's practical arguments.[153] Indeed, most of the textualist Justices had somewhat *lower rates* of defensive practical consequences use than several of the pluralist Justices,[154] who are philosophically open to considering practical consequences in their interpretive analysis. In light of the data presented in Tables 3 and 4, it seems fair to say that the textualist Justices' regular use of practical consequences in statutory cases cannot be chalked up primarily to passing mentions or defensive references to such consequences.

Finally, Table 5 reports the ideological valence of all opinions in the dataset that referenced practical consequences, broken down according to opinions authored by individual Justices.

---

[152] This ranking leaves out Justice Barrett, who authored only three opinions that referenced practical consequences during the period studied.

[153] *See supra* Table 4, p. 709 (reporting rates of "defensive" practical consequence use ranging from 7.5%–13.6% for Justices Kennedy, Thomas, Roberts, and Alito).

[154] I count as pluralist/purposivist/not-purely-textualist Justices Stevens, Souter, Ginsburg, Breyer, and Kagan. This labeling is consistent with how other scholars and commentators have described these Justices. *See* 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 (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) (citing John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 174–75 (2012)) (observing that Justices Stevens, Breyer, and Kagan are purposivists). Moreover, 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 courts should pay attention to "Congress' actual purpose" in enacting a statute); BREYER, *supra* note 38, at 99 (similar). The data show that all of these Justices regularly invoked nontextual interpretive resources including legislative history, intent, and statutory purpose in the opinions they authored. *See supra* Table 2, pp. 705–06.

Table 5: Ideological Direction of Opinions that Referenced Practical Consequences by Opinions Authored[155] 2005–2021 Terms (n=495)

Justice	Conservative	Liberal	Unspecified	Conservative - Liberal Differential
Scalia (N=36)	58.3% (n=21)	38.9% (n=14)	2.8% (n=1)	19.4%
Thomas (N=44)	77.3% (n=34)	22.7% (n=10)	0.0% (n=0)	54.6%
Alito (N=69)	71.0% (n=49)	23.5% (n=16)	5.9% (n=4)	47.5%
Roberts (N=35)	60.0% (n=21)	36.1% (n=13)	2.8% (n=1)	23.9%
Kennedy (N=40)	62.5% (n=25)	35.0% (n=14)	2.5% (n=1)	27.5%
Gorsuch (N=22)	54.5% (n=12)	45.5% (n=10)	0.0% (n=0)	9.0%
Kavanaugh (N=10)	80.0% (n=8)	20.0% (n=2)	0.0% (n=0)	60.0%
Sotomayor (N=57)	42.1% (n=24)	54.4% (n=31)	3.5% (n=2)	-12.3%
Kagan (N=29)	34.5% (n=10)	62.1% (n=18)	3.4% (n=1)	-27.6%
Breyer (N=79)	30.4% (n=24)	67.1% (n=53)	2.5% (n=2)	-36.7%
Ginsburg (N=48)	31.3% (n=15)	68.8% (n=33)	0.0% (n=0)	-57.5%
Souter (N=10)	30.0% (n=3)	70.0% (n=7)	0.0% (n=0)	-40.0%
Stevens (N=16)	31.3% (n=5)	62.5% (n=10)	6.3% (n=1)	-31.2%

As the Table reveals, each Justice's use of practical consequences in the opinions authored or joined correlated strongly with their conservative-liberal ideological preferences.[156] This means that in the vast majority of opinions the Justices authored or joined that referenced practical consequences, they used consequentialist arguments to support an interpretation that corresponded to their ideological preferences. As discussed in section III.A below, this makes sense because the

[155] Does not include the six per curiam opinions, one joint dissent, and the three Justice Barrett opinions that referenced practical consequences.

[156] Only Justice Gorsuch exhibited a low conservative-liberal differential.

consideration of practical consequences, perhaps more than any other interpretive tool or resource, readily lends itself to subjective judicial policymaking.

2. Subject Matter. — Perhaps more interesting than the frequency with which the members of the Roberts Court referenced practical consequences are the circumstances in which they invoked such consequences. That is, what kinds of statutes did the Justices regularly invoke practical consequences to construe? Were certain subject areas more represented than others in the subset of opinions in which practical consequences played a role in the Court's interpretive analysis?

Table 6a reports the subject matter of the opinions in which the members of the Roberts Court referenced practical consequences as an interpretive aid. The data reveal that 16.0% of the opinions in the dataset that referenced practical consequences involved a criminal statute, 7.3% involved an antidiscrimination statute, and another 7.3% involved a statute dealing with immigration law. A slightly smaller, but still noteworthy, percentage of the opinions that invoked practical consequences involved jurisdictional statutes (5.7%) or intellectual property statutes (6.3%). Indeed, these five subject areas together accounted for almost half (42.6%) of the opinions in the dataset that referenced practical consequences, while criminal, antidiscrimination, and immigration statutes together accounted for 30.6% of the Court's practical consequences references.[157]

---

[157] In the full dataset, including opinions that did not reference practical consequences, these five subject areas accounted for 38.9% of all opinions, while criminal (14.2%), antidiscrimination (6.6%), and immigration (5.7%) statutes together accounted for 26.5% of all opinions.

Table 6a: Share of Practical Consequences References in Opinions by Subject Matter[158] 2005–2021 Terms

Subject Matter Involved	Share of Total Practical Consequences References
Criminal Law (N=81)	16.0%
Jurisdictional (N=29)	5.7%
Environmental Law (N=20)	4.0%
Federal Arbitration Act (N=14)	2.8%
Antidiscrimination (N=37)	7.3%
Tax (N=10)	2.0%
Securities (N=10)	4.0%
Antitrust (N=8)	1.6%
Preemption (N=20)	4.0%
Section 1983 (N=6)	1.2%
Bankruptcy (N=17)	3.4%
Immigration (N=37)	7.3%
ERISA (N=10)	2.0%
PLRA (N=5)	1.0%
Intellectual Property (N=32)	6.3%
AEDPA (N=22)	4.4%
Other Statutes (N=83)	16.4%
Attorney's Fees (N=5)	1.0%
Indian Law (N=11)	2.2%

The subject matter data in Table 6a are interesting, but not very revealing. Cases involving criminal law–related statutes account for a sizeable portion of the dataset as a whole,[159] so it is to be expected that a comparable portion of the opinions in the dataset that invoke any one interpretive tool, including practical consequences, would involve criminal statutes. Cases involving jurisdictional, antidiscrimination, intellectual property, and immigration statutes likewise make up a notable portion of the dataset (5.7%, 7.3%, 6.3%, and 7.3% of all opinions, respectively), so it is to be expected that a comparable portion of

[158] Any subject matter in which fewer than five opinions referenced practical consequences (that is, any subject area that represented < 1.0% of the practical consequences–referencing opinions in the dataset) was not included in this Table.

[159] In the full dataset, 193 of 1,358 (14.2%) opinions and 89 of 667 (13.3%) cases involved a criminal statute. *See supra* Table 1a, p. 703; *infra* Table 6b, p. 714.

practical consequences referencing–opinions should involve these subject areas.[160]

If we flip the subject matter data and look instead at what percentage of all opinions involving a particular statute (or subject) referenced practical consequences, the data become more interesting. Table 6b reports these figures.

Table 6b: Frequency of Practical Consequences References in Opinions by Subject Matter[161] 2005–2021 Terms

Subject Matter Involved	% of Opinions that Referenced Practical Consequences	Raw # of Opinions that Referenced Practical Consequences
Criminal Law (N=193)	42.0%	81
Jurisdictional (N=83)	34.9%	29
Environmental Law (N=59)	33.9%	20
Federal Arbitration Act (N=53)	26.4%	14
Antidiscrimination (N=89)	41.6%	37
Tax (N=35)	28.6%	10
Securities (N=50)	40.0%	20
Antitrust (N=18)	44.4%	8
Preemption (N=58)	34.5%	20
Section 1983 (N=14)	42.9%	6
Bankruptcy (N=49)	34.7%	17
Immigration (N=77)	48.1%	37
ERISA (N=27)	37.0%	10
PLRA (N=12)	41.7%	5
Intellectual Property (N=85)	37.6%	32
AEDPA (N=59)	35.6%	21
Other Statutes (N=213)	39.0%	83
Attorney's Fees (N=14)	35.7%	5
Indian Law (N=31)	35.5%	11

As the Table reveals, a noteworthy percentage of *all* opinions involving any of the listed subject areas referenced practical consequences. Indeed, practical consequences were referenced in over one-third of

[160] In the full dataset, eighty-nine opinions involved an antidiscrimination statute, eighty-five opinions involved an intellectual property statute, seventy-seven opinions involved an immigration statute, and eighty-three opinions involved a jurisdictional provision.

[161] As in Table 6a, any subject matter in which fewer than five opinions referenced practical consequences (that is, any subject area that represented < 1.0% of the practical consequences–referencing opinions in the dataset) was not included in this Table.

all opinions issued *for every statute/subject area* other than tax and arbitration. A few subject areas exhibited even higher rates of reference, including antidiscrimination statutes (41.6%), criminal law statutes (42.0%), securities law statutes (40.0%), antitrust statutes (44.4%), Section 1983 (42.9%), immigration statutes (48.1%), and the Prison Litigation Reform Act (PLRA) (41.7%). The antitrust statutes may be a special case because they have been interpreted to delegate broad policymaking authority to courts to determine what constitutes an "unreasonable" restraint on trade[162] — an inherently practical, consequences–oriented inquiry. But it is unclear why the other subject areas might generate slightly higher-than-usual rates of reference to practical consequences. Ultimately, what stands out most about the subject matter data in Table 6b is the breadth of cases and statutory subject areas in which the members of the Roberts Court openly discuss the practical consequences that will be generated by a particular statutory reading. This is an interpretive tool that, although criticized by textualists, is used widely, across the board, in cases and opinions interpreting all statutes in all subject areas.

3. Practical Consequences and Plain Meaning. — In order to gain a better understanding of how practical consequences are employed by a Court that is text focused, I also examined the Roberts Court's references to the clarity of the statute's text or its "plain meaning"[163] in the subset of opinions that reference practical consequences. The data revealed that a substantial portion of the opinions that invoked practical consequences (37.6%) also found that the statute at issue had a clear or "plain meaning."[164] This finding raises additional questions — such as whether the Court tends to use practical consequences merely to support the statute's plain meaning in those opinions in which it references both practical consequences and plain meaning, and whether, in the remaining opinions, the Court tends to use practical consequences after establishing that the statute is ambiguous or lacks a "plain meaning."

In an effort to answer such questions, I further examined the 190 opinions in the dataset that invoked both practical consequences and text/plain meaning to determine how those two tools were used in relation to each other. Doctrinal review of the cases revealed that of the opinions that referenced both plain meaning and practical consequences,

---

[162] *See, e.g.*, Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 370 (2010); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 59 (2d ed. 2000) (explaining that the Sherman Act "invest[ed] the federal courts with a jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts"); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 50–51 (1993) (explaining that the Sherman Act was designed to punt to courts the difficult questions of antitrust policy).

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

[164] *See infra* Table 7a, p. 716.

50.0% (95 of 190) used practical consequences to support a construction arrived at primarily based on the statute's text/plain meaning.[165] This means that 18.8% of all 505 opinions that invoked practical consequences used such consequences as a confirmatory tool to support an interpretation based primarily on text/plain meaning.

Table 7a: Roberts Court Rates of Reliance on Text/Plain Meaning in Opinions that Invoke Practical Consequences 2005–2021 Terms

	Overall (N=505)	Practical Consequences Support Plain Meaning	Plain Meaning Supports Practical Consequences	Ambiguity Mentioned in Subset of Cases that Invoke Practical Consequences but not Plain Meaning (N=111)
% of Opinions that Referenced Plain Meaning	37.6% (n=190)	50.0% (n=95)	8.4% (n=16)	10.8% (n=12)

Table 7b: Roberts Court Rates of Reliance on Substantive Canons or Constitutional Principles in Opinions that Invoke Practical Consequences 2005–2021 Terms

	Opinions that Referenced Substantive Canons (N=81)	All Opinions that Referenced Practical Consequences (N=505)
Opinions that Referenced Practical Consequences (N=505)	16.0% (n=81)	***
Practical Consequences Argument Distinct from Substantive Canon	67.9% (n=55)	94.9% (n=479)
Practical Consequences Argument Connected to a Substantive Canon	32.1% (n=26)	5.1% (n=26)
Practical Consequences Argument Connected to a Constitutional Principle	19.8% (n=16)	3.2% (n=16)

[165] *See* Appendix, *supra* note 28.

By contrast, only 8.4% (16 of 190) of the opinions that referenced both plain meaning and practical consequences used the statute's text/plain meaning as a secondary tool to support a construction arrived at primarily based on practical consequences.[166]

Finally, I conducted a close analysis of a subset of 111 of the 315 opinions in the dataset that referenced practical consequences but did not find a plain meaning.[167] Twelve of these opinions (10.8%) at least arguably noted that the statute was ambiguous before referencing practical consequences.[168] The remaining, vast majority of these opinions (89.2%) made no threshold determination that a statute was ambiguous as a justification or explanation for invoking practical consequences.[169] Indeed, most of the practical consequences–invoking opinions provided no guidance whatsoever regarding when it is appropriate to consider practical consequences in determining a statute's meaning — or what the interpretive relationship should be between the search for plain meaning, on the one hand, and the use of practical-effects-based reasoning, on the other.

4. Practical Consequences and Substantive Canons. — There is some natural overlap between certain forms of practical consequences

---

166 *See* Sossamon v. Texas, 563 U.S. 277, 302–06 (2011) (Sotomayor, J., dissenting); Atl. Sounding Co. v. Townsend, 557 U.S. 404, 417–18, 420 (2009); Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 126–27 (2015); Burrage v. United States, 571 U.S. 204, 210–12, 214, 216 (2014); CTS Corp. v. Waldburger, 573 U.S. 1, 8–9, 13–14, 17 (2014); Paroline v. United States, 572 U.S. 434, 446–48, 452, 457 (2014); Sekhar v. United States, 570 U.S. 729, 733–34, 738 (2013); U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1846–47, 1849 (2020); Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 190–92 (2016); Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 590–92 (2020).

167 The 111 opinions analyzed for these purposes constituted all of the opinions decided during the 2017–2021 Terms that referenced practical consequences but did not find a plain meaning. *See* Appendix, *supra* note 28.

168 *See* Babb v. Wilkie, 140 S. Ct. 1168, 1180 (2020) (Thomas, J., dissenting) ("In my view, however, the provision is also susceptible of the Government's interpretation . . . ."); Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) (noting that the statute's "literal language" is "neutral," "broad," and "can refer to anything"); Artis v. District of Columbia, 138 S. Ct. 594, 609 (2018) (Gorsuch, J., dissenting) (explaining that laws that "'toll' a limitations period . . . may be telling us to do one of (at least) two different things"); Iancu v. Brunetti, 139 S. Ct. 2294, 2309 (2019) (Sotomayor, J., concurring in part and dissenting in part) (arguing that the term "scandalous" can have more than one meaning); Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1068 (2020) (arguing that a term in a statute could "reasonably encompass" more than one meaning); Liu v. SEC, 140 S. Ct. 1936, 1953 (2020) (Thomas, J., dissenting) (contending that term at issue "is a word with no fixed meaning"); United States v. Briggs, 141 S. Ct. 467, 469 (2020) (acknowledging "there are reasonable arguments on both sides"); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) (concluding that the statute "does not by its own terms provide or delineate the definition of a cause of action for violations of international law"); Banister v. Davis, 140 S. Ct. 1698, 1705 (2020) (finding that statutory phrase at issue "is not self-defining" (quoting Slack v. McDaniel, 529 U.S. 473, 486 (2000))); Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 773 (2019) (Breyer, J., dissenting) (asserting that statute is "opaque"); Return Mail, Inc. v. USPS, 139 S. Ct. 1853, 1863 (2019) (concluding that "there is no clear trend" about the term's meaning in the statute); Pereira v. Sessions, 138 S. Ct. 2105, 2122 (2018) (Alito, J., dissenting) (describing choice between two proffered interpretations as "a challenge").

169 This describes 99 of 111 opinions that referenced practical consequences but not text/plain meaning.

arguments and at least some substantive canons. This makes sense given that substantive canons are, at bottom, policy presumptions. In order to better understand the relationship between practical consequences arguments and substantive canons, I examined the Roberts Court's references to substantive canons in the subset of opinions that reference practical consequences. Table 7b reveals that a small but nontrivial portion of the opinions that invoked practical consequences also referenced one or more substantive canons (16.0%).[170] This data raised additional questions — such as (1) whether the practical consequences arguments the opinions invoked were part and parcel of, or in some way related to, the substantive canons applied in those cases; and (2) whether the practical consequences arguments invoked in at least some cases were based on constitutional principles, since several of the substantive canons most frequently invoked by the Court are based on constitutional concerns.[171] Such connections between practical consequences arguments and substantive canons and/or constitutional principles are relevant because the latter are well-established statutory interpretation tools;[172] thus, to the extent that the practical consequences arguments invoked by the Roberts Court are based on substantive-canon and/or constitutional principles, those arguments may be more textually and theoretically anchored than they at first appear — and the Court's (and textualist Justices') use of such arguments may be less amorphous and theoretically problematic than it seems.

Closer inspection of the dataset revealed that in 32.1% (26 of 81) of the opinions that referenced both practical consequences and substantive canons, the practical consequences argument at issue was related in some way to the substantive canon invoked in that same opinion.[173] This means that overall, 5.1% of the opinions in the dataset that referenced practical consequences made a consequentialist argument that was connected to an established substantive canon.[174] The remaining 67.9% of the opinions in the dataset that referenced both practical consequences and substantive canons (and 94.9% of all practical consequences–invoking opinions in the dataset) articulated practical consequences arguments that were separate and distinct from any substantive canons referenced in those same opinions.[175]

The data also revealed that in 61.5% of the opinions in which practical consequences arguments were related to a substantive canon (16 of

---

[170] Of the 505 opinions in the dataset that referenced practical consequences, eighty-one also referenced substantive canons.

[171] *See* Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 111, at 856, 901–08.

[172] *See id.* at 835–36; William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 552–55 (2013) (reviewing SCALIA & GARNER, *supra* note 38).

[173] *See supra* Table 7b, p. 716.

[174] *See id.* That is, 26 of 505 practical consequences opinions in the dataset were in some way connected to a substantive canon.

[175] *See id.*

26), the substantive canon — and practical consequences argument — were based on a constitutional principle, such as the rule of lenity (due process/separation of powers), a federalism clear statement rule or the presumption against preemption of state law (federalism), the presumption in favor of judicial review of administrative action (separation of powers), or the constitutional avoidance canon.[176] This suggests that overall, 3.2% of the opinions in the dataset that referenced practical consequences discussed consequences that were related to a constitutional provision.[177] Based on this data, it seems fair to say that only a small subset of the opinions in the dataset that referenced practical consequences focused on consequences connected to a substantive canon or constitutional provision — and that most of the opinions in the dataset that referenced practical consequences focused on some other form of normative, consequentialist concern that was tethered neither to constitutional text nor to a well-established policy canon.

Overall, the data described above paint a picture of practical consequences as an interpretive tool that is widely accepted by all of the Justices on the Roberts Court. The Justices referenced some form of practical consequences in at least one opinion in over half (52.8%) of the statutory cases they decided.[178] Moreover, when the Justices invoked practical consequences to construe a statute, they tended to place at least "some" weight on those consequences, rather than to reference such consequences merely in passing; indeed, in 63.0% of the opinions in the dataset, the Justices placed "some" interpretive weight on a practical consequences argument, and in 22.6% of the opinions in the dataset, they placed "primary" or "heavy" weight on such arguments.[179] This suggests that practical consequences play a substantial, untheorized role in the Court's statutory interpretation cases.

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

C. Forms of Practical Consequences: Policy Concerns

This section and the next add texture to the numerical data reported in section II.B. Both sections illuminate patterns in the Roberts Court's use of practical consequences and provide case examples that illustrate

---

176 *See id.* This means that in 19.8% (16 of 81) of the opinions that referenced both practical consequences and substantive canons, the practical consequences argument was connected to a constitutional principle.

177 *See id.* This was true for 16 of 505 opinions. I say "suggests" because I did not independently examine all 505 practical consequences–invoking opinions to see if they made arguments connected to a constitutional principle. Nevertheless, it seems likely that most opinions that invoked a Constitution-related practical argument would also have been coded as referencing a substantive canon and thus would be captured by the data and close review described above.

178 *See supra* note 28 and accompanying text.

179 *See supra* Table 3, p. 707.

the different forms of practical consequences the Court employs in its statutory cases.

In earlier work, I have noted that there are two different overarching forms of practical consequences that the Justices on the Roberts Court tend to reference when deciding statutory cases: policy-based consequences and administrability-based consequences.[180] This section catalogues five different forms of policy-based consequences that the Justices on the Roberts Court regularly employed, while section II.D explores in detail two different forms of administrability-based consequences the Court regularly discussed.

It is worth noting at the outset that the vast majority of practical consequences references in the opinions studied employed policy-based (61.4%), rather than administrability-based (26.1%), arguments — while a small portion of the opinions employed both policy and administrability arguments (12.5%). Indeed, policy arguments outnumbered administrability arguments by *more than two to one*.

Table 8: Textualist Versus Pluralist Rates of Reliance on Different Forms of Practical Consequences in Opinions that Reference Practical Consequences 2005–2021 Terms

Forms of Argument	All Opinions (N=505)	Textualist Judges (N=259)	Pluralist Judges (N=239)
Administrability Arguments	26.1% (n=132)	33.6% (n=87)	18.4% (n=44)
Policy Arguments	61.4% (n=310)	53.7% (n=139)	69.0% (n=165)
Both Administrability and Policy Arguments	12.5% (n=63)	12.7% (n=33)	12.6% (n=30)

The five basic forms of policy-based arguments the members of the Roberts Court tended to raise when they referenced practical consequences in their statutory cases were: (1) "absurd results" arguments asserting that an interpretation would produce nonsensical or odd results; (2) "undermines purpose" arguments contending that an interpretation would undercut the goals a statute was designed to achieve; (3) "undesirable or beneficial results" arguments describing the negative or (less often) positive policy outcomes that an interpretation would generate; (4) "fairness or inequity" arguments about the injustices or inequitable results an interpretation would produce (or avoid); and (5) "facts about

---

[180] *See* Krishnakumar, *Dueling Canons*, *supra* note 111, at 975–76; Krishnakumar, *First Era*, *supra* note 26, at 244–46.

the world" arguments that recounted real-world facts and figures to support one statutory reading over another. Table 9 reports the frequency with which the Justices employed each of these forms of practical consequences in its statutory cases.

I note here that these categories are somewhat porous; several opinions in the dataset (ninety-seven) made more than one of the forms of practical consequences arguments.[181] Moreover, there is a sense in which *almost all* practical consequences arguments might be classified as falling under the broad umbrella of "undesirable or beneficial results" — as it is the very nature of consequentialist arguments to predict negative or, less often, positive outcomes. But results can be undesirable (or beneficial) for different kinds of reasons — such as that they are contrary to common sense, contrary to the statute's purpose, unfair, unworkable, and so on. Because a blanket category for undesirable consequences would miss many of these nuances, I opted instead to provide a taxonomy that teases out these different reasons, in an effort to help scholars, judges, and lawyers better understand the many different forms of practical concerns that play a visible role in the interpretation of statutes — while preserving a catchall "undesirable or beneficial results" category for those opinions that employ a more general, or even nakedly normative, argument rather than frame their criticism in terms of rule-of-law-sounding concerns about rationality, statutory purpose, justice, judicial resources, or workability.

---

[181] There were 97 of 505 opinions in the dataset that employed more than one form of practical consequences argument.

Table 9: Roberts Court Rates of Reliance on Different Forms of Practical Consequences Arguments in Opinions that Invoke Practical Consequences 2005–2021 Terms

	All Opinions (N=505)	Majority Opinions (N=241)	Dissenting Opinions (N=185)	Concurring Opinions (N=55)	Partial Opinions (N=24)
Policy Coherence Arguments					
Absurd Results	20.4% (n=103)	24.9% (n=60)	18.9% (n=35)	12.7% (n=7)	4.2% (n=1)
Undermines Purpose	9.7% (n=49)	12.0% (n=29)	7.6% (n=14)	9.1% (n=5)	4.2% (n=1)
Undesirable / Beneficial Results	37.4% (n=189)	33.2% (n=80)	41.1% (n=76)	38.2% (n=21)	50.0% (n=12)
Fairness / Inequity Concerns	13.7% (n=69)	10.0% (n=24)	17.3% (n=32)	16.4% (n=9)	16.7% (n=4)
Facts About the World	7.3% (n=37)	4.6% (n=11)	10.8% (n=20)	10.9% (n=6)	0.0% (n=0)
Administrability Arguments					
Institutional Resources Arguments	9.9% (n=50)	9.1% (n=22)	9.7% (n=18)	9.1% (n=5)	20.8% (n=5)
Workability Arguments	21.4% (n=108)	22.0% (n=53)	20.5% (n=38)	21.8% (n=12)	20.8% (n=5)

The next several sections explore in detail the five forms of policy-based practical consequences arguments described above. As the discussion in these sections reveals, all of these forms of argument leave judges substantial discretion to define the parameters of desirable versus undesirable policy outcomes. And none — save perhaps the absurd results form of consequence — is recognized as an accepted interpretive tool by textualists.

1. Absurd Results. — Absurd results arguments are probably the best-known, most-discussed form of practical consequences argument.[182] Perhaps unsurprisingly, a substantial portion of the opinions

[182] *See, e.g.*, Manning, *supra* note 68, at 2388–93 (offering a thorough treatment of the absurd results doctrine); Michael D. Cicchini, *The New Absurdity Doctrine*, 125 Penn. St. L. Rev. 353, 376 (2021) (advocating that absurdity doctrine be limited to instances of outrageous unfairness in criminal cases); Linda D. Jellum, *But That Is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 Brook. L. Rev. 917, 927–32 (2011) (exploring differences between specific and general absurdity). Scholars have differed in how they categorize the "absurd results" rule, with some treating it as a linguistic canon or exception to the plain meaning rule, others treating it as a substantive

in the dataset (20.4%) that referenced practical consequences employed an absurd-results-type argument. Several of the opinions (20 of 103, or 19.4%) explicitly used the word "absurd" to describe the problematic results the rejected interpretation would effect[183] — but the vast majority did not. Instead, these latter opinions warned that a contemplated interpretation would produce results that were "bizarre,"[184] "odd,"[185] "strange,"[186] "arbitrary,"[187] "nonsensical,"[188] "anomalous,"[189] defied "common sense,"[190] and so on. This coding captured varying degrees of

---

policy canon, and still others lumping it into a broader category of "judicially-selected policy norms." *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 69 (2016) (treating "[a]bsurdity and [s]crivenor's [e]rror" as "consistent with [a statute's] ordinary meaning"); Mendelson, *supra* note 108, at 100 (treating absurd results as a substantive canon); Schacter, *Confounding Originalism*, *supra* note 26, at 63–66 app. B (treating absurd results under umbrella of "Judicially-Selected Policy Norms," *id.* at 63). I have coded absurd results arguments as a form of "practical consequences" because, as this section describes, they advocate for or against particular statutory readings based on the practical effects those readings would generate.

183 *See, e.g.*, Artis v. District of Columbia, 138 S. Ct. 594, 604 (2018) ("absurdity"); *id.* at 612 (Gorsuch, J., dissenting) ("absurdities"); McNeill v. United States, 563 U.S. 816, 822 (2011); Jennings v. Rodriguez, 138 S. Ct. 830, 840 (2018) (opinion of Alito, J.); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1492 (2021) (Kavanaugh, J., dissenting) ("absurdities"); PLIVA, Inc. v. Mensing, 564 U.S. 604, 643 (2011) (Sotomayor, J., dissenting).

184 *See, e.g.*, Cuomo v. Clearing House Ass'n, 557 U.S. 519, 529 (2009); Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 151 (2016) (Ginsburg, J., dissenting); Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2287 (2019); Badgerow v. Walters, 142 S. Ct. 1310, 1320 (2022); Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1951 (2022) (Roberts, C.J., dissenting).

185 *See, e.g.*, HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2189 (2021) (Barrett, J., dissenting); Van Buren v. United States, 141 S. Ct. 1648, 1666 (2021) (Thomas, J., dissenting); Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2442 (2021); Flores-Figueroa v. United States, 556 U.S. 646, 661 (2009) (Alito, J., concurring in part and concurring in the judgment); Barber v. Thomas, 560 U.S. 474, 491 (2010); Nielsen v. Preap, 139 S. Ct. 954, 973 (2019) (Kavanaugh, J., concurring); Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1060 (2019).

186 *See, e.g.*, Kansas v. Garcia, 140 S. Ct. 791, 803 (2020); Bloate v. United States, 559 U.S. 196, 222 (2010) (Alito, J., dissenting) ("anomalous" and "strange, asymmetrical result"); Greenlaw v. United States, 554 U.S. 237, 251 (2008); United States v. Santos, 553 U.S. 507, 515 (2008) (plurality opinion); Dean v. United States, 556 U.S. 568, 582 (2009) (Stevens, J., dissenting); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245 (2009); McQuiggin v. Perkins, 569 U.S. 383, 394 (2013) ("passing strange"); Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 575 U.S. 650, 663 (2015); Simmons v. Himmelreich, 578 U.S. 621, 630 (2016).

187 *See, e.g.*, *Van Buren*, 141 S. Ct. at 1662 ("arbitrariness"); Judulang v. Holder, 565 U.S. 42, 57 (2011) ("arbitrariness"); Bank of Am., N.A. v. Caulkett, 575 U.S. 790, 797 (2015); Mathis v. United States, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring); Shaw v. United States, 580 U.S. 63, 68 (2016).

188 *See, e.g.*, Thryv, Inc. v. Click-to-Call Techs., LP, 140 S. Ct. 1367, 1381 (2020) (Gorsuch, J., dissenting) ("nonsense"); Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 46 (2013) (Alito, J., dissenting).

189 *See, e.g.*, Wachovia Bank v. Schmidt, 546 U.S. 303, 317 (2006); Mellouli v. Lynch, 575 U.S. 798, 810 (2015); *Mathis*, 579 U.S. at 538 (Alito, J., dissenting); Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 418 (2017) ("anomaly"); *Nielsen*, 139 S. Ct. at 982 (Breyer, J., dissenting); Riley v. Kennedy, 553 U.S. 406, 426 (2008).

190 *See, e.g.*, Borden v. United States, 141 S. Ct. 1817, 1848 (2021) (Kavanaugh, J., dissenting); Barton v. Barr, 140 S. Ct. 1442, 1462 (2020) (Sotomayor, J., dissenting) ("at odds with common sense"); CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 431 (2016) ("Common sense undermines [one intepretation] . . . .").

absurdity — from the "crazy/insane/preposterous" to the merely "arbitrary" or "odd" to the "anomalous." The degree of absurdity was not separately coded or recorded; thus, the cases in this category represent a wide range of judicial claims about the level of oddity that a particular interpretation could be expected to produce. Irrespective of the precise adjective the Court employed or the level of absurdity asserted, all of these formulations amount, at bottom, to an argument that a particular interpretation cannot be correct and should not be adopted because it would lead to illogical, irrational results.

Consider, for example, the Court's decision in *Borden v. United States*.[191] *Borden* involved the Armed Career Criminal Act of 1984[192] (ACCA), which "mandates a [fifteen]-year minimum sentence for persons found guilty of illegally possessing a gun who have three or more prior convictions for a 'violent felony.'"[193] The ACCA defines a "violent felony" as one of several specific offenses, or as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[194] The statutory question at issue was "whether a criminal offense can count as a 'violent felony' if it requires only a *mens rea* of recklessness — a less culpable mental state than purpose or knowledge."[195] A plurality of the Court, in an opinion authored by Justice Kagan, concluded that a reckless offense does not qualify for the ACCA's minimum sentence.[196]

In so ruling, the Court relied on the statute's plain meaning, bolstered by dictionary definitions, precedent, the statute's purpose, comparisons to other federal statutes[197] — and an absurd-results-type practical consequences argument. Specifically, the Court pointed out that many low-level crimes — what it called "the too-common stuff of ordinary offenders" — would be subject to the ACCA's fifteen-year minimums if it adopted the statutory reading advocated by the government.[198] To prove its point, the Court listed several examples of reckless-assault convictions in states with laws similar to the one at issue — including convictions for a father whose child was injured while go-karting without safety equipment, a police officer who hit another patrol car while speeding to a crime scene, and several driving-related violations that resulted in injury, such as running a stop sign, veering onto the sidewalk, and texting while driving.[199] It then posed a rhetorical question — "Are these really ACCA predicates?" — using

---

191 141 S. Ct. 1817 (2021).
192 18 U.S.C. § 924(e).
193 *Borden*, 141 S. Ct. at 1821 (plurality opinion) (quoting § 924(e)(1)).
194 § 924(e)(2)(B).
195 *Borden*, 141 S. Ct. at 1821–22 (plurality opinion) (quoting § 924(e)(1)) .
196 *See id.* at 1825.
197 *See id.* at 1825–30.
198 *Id.* at 1831.
199 *See id.*

these sympathetic, relatable offenses to persuade the reader that it *does not make sense* (a lesser degree absurd-results-type argument) to subject those convicted of reckless offenses to the ACCA's fifteen-year sentencing minimum.[200]

Recall also the *Van Buren* case discussed in the introduction, in which Justices Barrett and Thomas offered competing lists of "arbitrary" or "awkward" outcomes that would result from the government's (or defendant's) proffered statutory readings — such as criminalizing the embellishment of an online dating profile or *failing to criminalize* the sharing of atomic weapons blueprints with a hostile foreign nation.[201] The upshot of such arguments, like the upshot of Justice Kagan's examples in *Borden*, is that a particular statutory reading would lead to consequences that *do not make sense* — again, an absurd-results-style argument.

As the above examples illustrate, it is a feature of the absurd-results form of practical consequences argument to provide examples of extreme, unthinkable situations that might be swept into, or left out of, the statute's coverage if a particular interpretation were adopted. And as the competing majority and dissenting opinions in *Van Buren* illustrate, judges often disagree about what constitutes an unthinkable potential consequence — and they retain substantial discretion to decide what should or should not count. The Court has not, to date, articulated any clear parameters to guide the determination of what counts as absurd.

Further, the Court has virtually ignored the parameters set forth in Justice Scalia and Professor Garner's treatise, *Reading Law*, for invoking the absurd results canon. Recall that *Reading Law* directs courts to employ the absurd results doctrine only when the absurdity can be fixed by remedying "an obvious[] technical or ministerial error" or when the absurdity is one that "no reasonable person could intend" — but not when the absurdity is merely something that seems odd.[202] Yet the opinions in the dataset that invoke the absurd-results form of argument make no mention of an "obvious[] technical or ministerial error," nor do they claim that "no reasonable person" could intend a particular result. Moreover, the opinions in the dataset regularly assert that a particular interpretation would seem "odd"[203] or "strange"[204] or "arbitrary"[205] or "anomalous"[206] — characterizations that fall noticeably short of the high bar that Justice Scalia and coauthor Garner advocated as the threshold for employing the absurdity doctrine.

---

200 *Id.*

201 *See supra* notes 6–21 and accompanying text.

202 SCALIA & GARNER, *supra* note 38, at 237–38.

203 *See, e.g.*, cases cited *supra* note 185.

204 *See, e.g.*, cases cited *supra* note 186.

205 *See, e.g.*, cases cited *supra* note 187.

206 *See, e.g.*, cases cited *supra* note 189.

2. Undesirable or Beneficial Consequences. — Over one-third of the opinions in the dataset that referenced practical consequences (37.4%) made an essentially normative argument that a particular interpretation would lead to *X*, *Y*, or *Z* undesirable or beneficial result.[207] The vast majority of these opinions warned of potential undesirable, rather than beneficial, results.[208] Although the line between such undesirable-consequences arguments versus the absurd-results-type arguments discussed in the previous section is not absolute, the former differ from the latter in that they predict truly negative or adverse consequences — rather than merely bizarre or incongruous ones — and take a more candidly normative stance against such consequences than do the absurd-results-type arguments. Indeed, the upshot of the absurd-results-type arguments tends to be that "this can't possibly be the result any sane Congress could have intended," while the upshot of the undesirable-consequences arguments is that a particular interpretation would be bad for society or lead to a parade of horrible follow-on consequences. For example, some opinions argued that a particular statutory reading would create perverse incentives or encourage undesirable behavior by those governed by the statute.[209] Others argued that a certain interpretation would impose heavy burdens on certain groups,[210] threaten individual rights,[211] or lead to circumvention of the statute's requirements.[212] Some of the opinions frankly asserted that an

---

[207] *See supra* Table 9, p. 722.

[208] There were 189 opinions in the dataset that made an undesirable/beneficial result argument; 165 (87.3%) of these argued that an interpretation would produce undesirable results, while twenty-four argued that it would produce beneficial results.

[209] *See, e.g.*, Lawrence v. Florida, 549 U.S. 327, 336 (2007) (incentivizing delay tactics by habeas petitioners); Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 547 (2008) (disincentivizing certain long-term contracts); Conkright v. Frommert, 559 U.S. 506, 535 (2010) (Breyer, J., dissenting) (incentivizing drafting ambiguous retirement plans); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1939 (2021) (disincentivizing intergovernmental efforts for fear of being subjected to private lawsuits); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting) (encouraging "already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation"); Rehberg v. Paulk, 566 U.S. 356, 365–66 (2012) (quoting Imbler v. Pachtman, 424 U.S. 409, 423 (1976)) (incentivizing prosecutor to "shade his decisions"); FTC v. Actavis, Inc., 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting) (discouraging settlement).

[210] *See, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2408 (2020) (Ginsburg, J., dissenting) (arguing that the majority's interpretation "imposes significant burdens on women employees"); Watters v. Wachovia Bank, 550 U.S. 1, 17–18 (2007) (arguing that the rejected interpretation would require "duplicative state examination, supervision, and regulation [and] would significantly burden mortgage lending").

[211] *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting) ("[T]he position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety.").

[212] *See, e.g.*, Kansas v. Garcia, 140 S. Ct. 791, 810 (2020) (Breyer, J., concurring in part and dissenting in part) ("States could evade the Act simply by creating their own work-authorization form with the same requirements . . . ."); Liu v. SEC, 140 S. Ct. 1936, 1954 (2020) (Thomas, J., dissenting)

interpretation would lead to policy outcomes that the Court, or an individual opinion's author, considered bad for society,[213] while others openly balanced competing policy concerns.[214]

A few examples may help illustrate. *NFIB v. Department of Labor*[215] raised the question of whether the Occupational Safety and Health Act[216] (OSH Act) authorized OSHA to adopt an emergency rule directing all employers with at least 100 employees to require their employees to either obtain the COVID-19 vaccine or show a negative test result once a week.[217] The Court, in a per curiam opinion, held that the OSH Act does not authorize such a vaccine-or-test mandate, relying primarily on the major questions doctrine combined with a clear statement rule and the practical consequences created by such a mandate.[218] Specifically, the Court explained that the mandate was "no 'everyday exercise

---

(noting that the Court's interpretation has "made it possible to circumvent the careful limitations imposed on other equitable remedies"); BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1546 (2021) (Sotomayor, J., dissenting) (noting that the Court's decision allows defendants to "circumvent the bar on appellate review entirely"); Limtiaco v. Camacho, 549 U.S. 483, 496 (2007) (Souter, J., concurring in part and dissenting in part) (noting that the Court's decision "gives the legislature a green light to subvert its own stated limit"); LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248, 258 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) (noting that the Court's decision will allow plaintiffs to "circumvent safeguards for plan administrators" established by statute).

213 *See, e.g.*, Crawford v. Metro. Gov't, 555 U.S. 271, 283 (2009) (Alito, J., concurring in the judgment) (noting that "[t]he number of retaliation claims filed with the EEOC has proliferated in recent years" and that the rejected interpretation "would likely cause this trend to accelerate"); Johnson v. United States, 559 U.S. 133, 153 (2010) (Alito, J., dissenting) (noting that under the Court's interpretation "a great many persons convicted for serious spousal or child abuse will be allowed to possess firearms"); United States v. Stevens, 559 U.S. 460, 482 (2010) (Alito, J., dissenting) (predicting that the Court's interpretation will have the practical effect of increasing the production of animal crush videos — "a form of depraved entertainment that has no social value"); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) (contending that a specific interpretation "greatly increases risks to defendants"); Arizona v. United States, 567 U.S. 387, 431 (2012) (Scalia, J., concurring in part and dissenting in part) (expressing concern that "'federal policies' of nonenforcement will leave the States helpless" to respond to the "evil effects of illegal immigration"); Moncrieffe v. Holder, 569 U.S. 184, 210 (2013) (Alito, J., dissenting) (lamenting that the Court's holding grants "drug traffickers in about half the States . . . a dispensation"); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) ("What is tragic here is that the Court has (yet again) rewritten — in order to weaken — a statute that stands as a monument to America's greatness, and protects against its basest impulses."); U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298, 2314 (2020) (Breyer, J., dissenting) (arguing that the Court's interpretation "threatens serious anticompetitive consequences"); Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66, 86 (2012) (noting that granting patents that "tie up" the use of basic tools of scientific work "will inhibit future innovation").

214 *See, e.g.*, Dolan v. United States, 560 U.S. 605, 616 (2010) (arguing that the "burden on the defendant is a small cost relative to the prospect of depriving innocent crime victims of their due restitution"); Descamps v. United States, 570 U.S. 254, 278–79 (2013) (Kennedy, J., concurring) (balancing risk to defendants against burden on states to amend their indivisible criminal statutes).

215 142 S. Ct. 661 (2022) (per curiam).

216 29 U.S.C. §§ 651–678.

217 142 S. Ct. at 662–63 (per curiam).

218 *See id.* at 664–65.

of federal power,'"[219] that it would affect eighty-four million people, and that it would constitute "a significant encroachment into the lives — and health — of a vast number of employees."[220] It also noted that a vaccine "cannot be undone at the end of the workday"[221] and that employers claimed the mandate would force them "to incur billions of dollars in unrecoverable compliance costs" and "cause hundreds of thousands of employees to leave their jobs."[222] In other words, the per curiam opinion listed a parade of horribles, or negative consequences, that would follow from the vaccine mandate if the statute were construed to authorize it — some involving the number of people the mandate would impact, others involving the high monetary costs it would impose, and still others involving the extent to which it would interfere with individual citizens' autonomy.

Justices Breyer, Sotomayor, and Kagan issued a joint dissent arguing that the language of the OSH Act was broad enough to authorize a vaccine-or-test mandate.[223] The dissent relied on the statute's text and invoked practical consequences arguments of its own.[224] The dissent opened, for example, by noting that COVID-19 had "killed almost 1 million Americans and hospitalized almost 4 million" and that the virus "spreads by person-to-person contact in confined indoor spaces," therefore "caus[ing] harm in nearly all workplace environments.[225] The dissent also pointed out that OSHA estimated that the mandate would "save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time."[226] The dissent then criticized the Court's ruling, arguing that it "stymies the Federal Government's ability to counter the unparalleled threat that COVID-19 poses to our Nation's workers."[227] Thus, while the majority argued that OSHA's mandate would have undesirable consequences for employers and employees (raising costs, encroaching on individual liberty), the dissent argued that the mandate would have *beneficial* policy consequences (saving lives). This is, at bottom, a policy debate rather than an argument about statutory construction — and one with a significant ideological valence.

The dataset contains several additional examples of undesirable-or-beneficial-consequences arguments that essentially boiled down to ideological agreement or disagreement with the policy underlying an interpretation. For example, in *Lawrence v. Florida*,[228] the Court held

---

[219] *Id.* at 665 (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

[220] *Id.*

[221] *Id.* (quoting *In re MCP No. 165*, 20 F.4th at 274 (Sutton, C.J., dissenting)).

[222] *Id.* at 666.

[223] *See id.* at 671–72 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[224] *Id.* at 671–72, 674–75.

[225] *Id.* at 670.

[226] *Id.*

[227] *Id.*

[228] 549 U.S. 327 (2007).

that the federal habeas statute's one-year statute of limitations for seeking federal habeas relief from a state-court judgment is not tolled during the period in which a petition for certiorari to the U.S. Supreme Court is pending.[229] In so ruling, Justice Thomas's majority opinion expressed concern that allowing tolling during this period would incentivize habeas petitioners to delay their deadline by filing potentially meritless certiorari petitions.[230] Similarly, in *Johnson v. United States*,[231] Justice Alito dissented from the Court's ruling that a defendant's prior battery conviction was not a "violent felony" under the ACCA.[232] His dissent warned that "[t]he Court's interpretation will have untoward consequences,"[233] noting specifically that "a great many persons convicted for serious spousal or child abuse will be allowed to possess firearms."[234] Both of these opinions raised practical concerns consistent with conservative ideological views about punishment and accountability.

Liberal Justices likewise have invoked "undesirable results" arguments that contain a clear ideological valence. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[235] for example, Justice Ginsburg's dissenting opinion criticized the majority for interpreting the Affordable Care Act to contain a religious exception for employers who object to providing contraception coverage for employees under their employer health plans.[236] Justice Ginsburg pointed out that "[t]he expansive religious exemption at issue here imposes significant burdens on women employees," noting that "[b]etween 70,500 and 126,400 women of childbearing age" are likely to "experience the disappearance of the contraceptive coverage formerly available to them."[237] These practical concerns are consistent with liberal political views about contraception and women's right to control their reproductive capacity.

There were 184 other cases in the dataset that made "undesirable" or "beneficial" results arguments similar to those outlined above.[238]

3. Undermines Purpose. — Roughly one-tenth (9.5%) of the opinions in the dataset that referenced practical consequences argued that a disfavored statutory reading would undermine the statute's purpose.[239] This form of practical consequences argument typically contends that *X* statutory reading is better than *Y* statutory reading because *Y* reading would undermine the statute's underlying objectives. The opinions in this category tend to first describe an anticipated consequence that

---

229 *Id.* at 329.
230 *See id.* at 336.
231 559 U.S. 133 (2010).
232 *Id.* at 145–46 (Alito, J., dissenting).
233 *Id.* at 151.
234 *Id.* at 153.
235 140 S. Ct. 2367 (2020).
236 *Id.* at 2404–08 (Ginsburg, J., dissenting).
237 *Id.* at 2408.
238 *See* Appendix, *supra* note 28 (listing 188 such cases).
239 *See supra* Table 9, p. 722.

would follow from *Y* interpretation, and then note that that consequence would "undermine,"[240] "threaten,"[241] or "frustrate"[242] the statute's goals.

Consider, for example, *CSX Transportation, Inc. v. Georgia State Board of Equalization*.[243] The case involved the Railroad Revitalization and Regulatory Reform Act of 1976,[244] which "prohibits States from discriminating against railroads by taxing railroad property more heavily than other commercial property in the State."[245] The provision at issue dictates that States "may not '[a]ssess rail transportation property at a value that has a higher ratio to the [property's] true market value . . . than the ratio' between the assessed and true market values of other commercial and industrial property in the same taxing jurisdiction."[246] Additionally, "[i]f the railroad ratio exceeds the ratio for other property by at least five percent, the district court may enjoin the tax."[247] The statutory question was whether a railroad may challenge a state's methodology for determining the value of railroad property, or just the assessments that result from those methods.[248]

The Court, in an opinion by Chief Justice Roberts, held that railroads may challenge state valuation methods, not just the application of those methods.[249] Specifically, the Court commented that under Georgia's reading of the statute, the state "would be free to employ appraisal techniques that routinely overestimate the market worth of railroad assets" and "[b]y then levying taxes based on those overestimates, States could implement the very discriminatory taxation Congress sought to eradicate."[250] This in turn would leave the provision "a largely empty command."[251] In other words, the Court suggested that Georgia's

---

240 *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 292 (2009) (Breyer, J., concurring) ("undermine the objective"); Crawford v. Metro. Gov't, 555 U.S. 271, 279 (2009) ("undermine the . . . statute's 'primary objective'" (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998))); Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 558 (2010) (undermines "a major purpose of the lodestar method"); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 11 (2011) ("undermine the Act's basic objectives"); Elgin v. Dep't of Treasury, 567 U.S. 1, 14 (2012) ("objective . . . would be seriously undermined"); *see also* Chamber of Com. v. Whiting, 563 U.S. 582, 621 (2011) (Breyer, J., dissenting) ("undercut[s] federal statutory objectives").

241 *See, e.g.*, Bloate v. United States, 559 U.S. 196, 210 (2010) ("threatens the Act's manifest purpose"); Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 298 (2016) (Alito, J., concurring in part and dissenting in part) ("threatens to undermine that carefully designed [statutory] scheme").

242 *See, e.g.*, Descamps v. United States, 570 U.S. 254, 293 (2013) (Alito, J., dissenting) ("frustrate[s] fundamental ACCA objectives"); United States v. Hayes, 555 U.S. 415, 427 (2009) ("would frustrate Congress' manifest purpose"); Maracich v. Spears, 570 U.S. 48, 92 (2013) (Ginsburg, J., dissenting) ("would frustrate the evident congressional purpose").

243 552 U.S. 9 (2007).

244 Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 15, 31, 45 & 49 U.S.C.).

245 *CSX Transp.*, 552 U.S. at 12.

246 *Id.* at 13 (alterations in original) (quoting 49 U.S.C. § 11501(b)(1)).

247 *Id.* (citing § 11501(c)).

248 *Id.* at 12.

249 *Id.*

250 *Id.* at 17–18.

251 *Id.* at 17.

statutory reading would incentivize behavior that would frustrate the statute's goals by enabling rather than preventing discriminatory taxation.

There were several other opinions in the dataset (forty-eight) that made similar "undermines purpose"–type arguments in the course of determining a statute's meaning.[252]

4. Fairness or Inequity Concerns. — Another subset of opinions in the dataset (13.7%) employed practical consequences arguments based on fairness or inequity concerns.[253]

Consider, for example, *Niz-Chavez v. Garland*,[254] which construed an immigration statute that requires the government to serve "a notice to appear" on individuals whom it seeks to remove from the country.[255] The notice to appear serves as a "stop-time" point that terminates the immigrant's period of "continuous . . . presence in the United States"[256] — which matters because immigrants must meet a ten-year continuous-presence requirement in order to be eligible for discretionary relief from removal.[257] The statute requires that the notice to appear include the reasons for removal, as well as "[t]he time and place" for the hearing.[258] A majority of the Court, in an opinion authored by Justice Gorsuch, held that the government was required to include all of the relevant information in a single notice.[259]

In so ruling, the majority employed several textual interpretive tools,[260] and then observed that if it were to read the immigration statute to allow multiple piecemeal notices to stop the clock on an alien's "continuous presence," this would have unfair, potentially harsh consequences for a vulnerable population of immigrants.[261] Specifically, the majority pointed out that "[o]n the government's account, it would be free to send a person who is not from this country — someone who may be unfamiliar with English and the habits of American bureaucracies — a series of letters" that "might trail in over the course of weeks, months, maybe years, each containing a new morsel of vital information" that the noncitizen "would have to save and compile in order to prepare for a removal hearing" and "as soon as the last letter arrives, the [noncitizen's] ability to accrue time toward the residency requirement would be suspended indefinitely."[262] Although Justice Gorsuch did not explicitly label this practical consequence "unjust" or

---

252 For a list of all forty-nine "undermines purpose" opinions, see Appendix, *supra* note 28.
253 There were sixty-nine such opinions. *See supra* Table 9, p. 722; Appendix, *supra* note 28.
254 141 S. Ct. 1474 (2021).
255 *Id.* at 1478 (quoting 8 U.S.C. § 1229(a)).
256 *Id.* at 1479 (quoting § 1229b(d)(1)).
257 *Id.* at 1487 (Kavanaugh, J., dissenting) (citing § 1229b(b)(1)(A)).
258 § 1229(a)(1)(C)–(D), (G)(i).
259 *Niz-Chavez*, 141 S. Ct. at 1478, 1486.
260 *Id.* at 1480–85.
261 *Id.* at 1485.
262 *Id.*

"inequitable," the picture he painted of a powerless immigrant versus a cold, harsh bureaucracy sounds in such concerns.

Similarly, in *Terry v. United States*,[263] Justice Sotomayor's part-concurring opinion bemoaned the unfairness of the First Step Act's incomplete remediation of sentencing disparities between crack versus powder cocaine, noting that, "[w]hile career offenders convicted under subparagraph (A) or subparagraph (B) can now seek resentencing, that door remains closed to career offenders convicted under subparagraph (C). This is no small injustice."[264] And in *Moncrieffe v. Holder*,[265] Justice Alito's dissenting opinion criticized the majority's interpretation of the Immigration and Nationality Act[266] for essentially ensuring the unequal treatment of immigrants who commit similar crimes — such that an illegal immigrant prosecuted and convicted for possession with intent to distribute marijuana in Georgia would remain eligible for cancellation of removal, whereas an illegal immigrant prosecuted and convicted of the same crime in Florida would likely not be eligible.[267]

Several other opinions in the dataset made similar equity-type practical consequences arguments.[268]

Finally, a handful of opinions in the dataset (2.4%) made a specific form of "fairness" claim, arguing against an interpretation on the ground that the interpretation would upset settled reliance interests.[269] For example, in *Ricci v. DeStefano*,[270] the Court sustained a Title VII challenge to a city's decision to throw out test results that had a disparate impact on minority firefighters.[271] In so ruling, the Court noted that "[e]xaminations like those administered by the City create legitimate expectations" and that many firefighters had "invested substantial time, money, and personal commitment in preparing for the tests."[272] Similarly, in *Kirtsaeng v. John Wiley & Sons, Inc.*,[273] the Court held that

---

263 141 S. Ct. 1858 (2021).

264 *Id.* at 1867 (Sotomayor, J., concurring in part and concurring in the judgment).

265 569 U.S. 184 (2013).

266 Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

267 *Moncrieffe*, 569 U.S. at 211 (Alito, J., dissenting).

268 For a complete list of all sixty-nine opinions that employed a "fairness" argument, including the twelve opinions that made "reliance" arguments, see Appendix, *supra* note 28.

269 *See, e.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 457–58 (2015) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)) (discussing the impact on settled expectations about patent licenses); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016) (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)) (discussing reliance on longstanding agency position); Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 66 (2013) (discussing "settled expectations" of parties who contracted "to litigate disputes in a particular forum"); Appendix, *supra* note 28 (listing twelve cases).

270 557 U.S. 557 (2009).

271 *Id.* at 562–63.

272 *Id.* at 583–84.

273 568 U.S. 519 (2013).

copyright law's "first sale" doctrine applies to works first sold abroad.[274] In so ruling, the Court commented that "reliance upon the 'first sale' doctrine is deeply embedded in the practices of those, such as booksellers, libraries, museums, and retailers, who have long relied upon its protection."[275]

5. Facts About the World. — A small subset of opinions in the dataset (7.3%) also described the practical consequences that would follow from a particular interpretation in numerical terms or provided real-world insight into how a particular industry works — and argued that the statute at issue should be construed in a manner that accounts for these practical realities.[276] In other words, these opinions offered specific facts or figures demonstrating the impact that an interpretation would have, or the real-world conditions under which it would operate.

A few examples may help illustrate. As noted earlier, all of the Court's recent "major questions" cases have employed detailed facts and figures as a key feature of their practical consequences arguments.[277] In *NFIB v. Department of Labor*, for example, both the per curiam and concurring opinions repeatedly noted that OSHA's vaccine-or-test mandate would affect eighty-four million workers; the per curiam described this as "a significant encroachment into the lives — and health — of a vast number of employees."[278] The joint dissent conversely stressed that COVID-19 had "killed almost 1 million Americans and hospitalized almost 4 million" and that the vaccine-or-test mandate was expected to "save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time."[279] Similarly, in *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[280] the per curiam opinion stressed that the CDC's eviction moratorium would cover "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction" and would have an "economic impact" close to $50 billion.[281] And in *Biden v. Nebraska*,[282] a 2022 Term major questions case not in the dataset, the Court underscored that the student-loan forgiveness program adopted by the Secretary of Education had canceled $430 billion of student-loan principal[283] and would "cost taxpayers 'between $469 billion and $519 billion'" — an amount equal to "nearly

---

274 *Id.* at 525. The "first sale" doctrine dictates that the "first sale" of a work "'exhaust[s]' the copyright owner's . . . exclusive distribution right." *Id.* at 524.

275 *Id.* at 544.

276 *See supra* Table 9, p. 722.

277 *See supra* notes 22–25 and accompanying text.

278 142 S. Ct. 661, 665 (2022) (per curiam); *see id.* at 667 (Gorsuch, J., concurring).

279 *Id.* at 670 (Breyer, Sotomayor & Kagan, JJ., dissenting).

280 141 S. Ct. 2485 (2021) (per curiam).

281 *Id.* at 2489.

282 143 S. Ct. 2355 (2023).

283 *Id.* at 2362.

one-third of the Government's $1.7 trillion . . . annual discretionary spending" budget.[284]

Other opinions in the dataset provided "facts about the world," explaining market power in the antitrust or intellectual property contexts,[285] quantifying the dangerousness of particular crimes,[286] or documenting the length of time different immigration proceedings typically take.[287] Still other opinions provided statistical comparisons to other cities' methods of evaluating firefighter candidates[288] or explained workplace realities that would affect an interpretation's real-world impact.[289]

Nearly half (eighteen of thirty-seven) of the opinions that invoked this form of practical consequence also employed another form of practical consequences argument, in addition to providing detailed "facts about the world."[290]

D. Forms of Practical Consequences: Administrability Concerns

In addition to the five forms of policy-based arguments described above, there were two basic forms of "administrability" arguments that the members of the Roberts Court regularly employed. In some cases, the Court raised concerns about administrative efficiency or burdens on judicial (or other public) resources.[291] In other cases, the Court focused on the "workability" of the legal rule created by an interpretation — typically asserting that the rule lacked clear parameters and would prove confusing for lower courts to implement.[292] And in a small subset of

---

284 *Id.* at 2373.

285 *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–94 (2007) (citing studies about competitive effects of resale-price maintenance); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321–25 (2007) (explaining predatory bidding); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44–46 (2006) (explaining relationship between patents and market power).

286 *See, e.g.*, Begay v. United States, 553 U.S. 137, 156–57 (2008) (Alito, J., dissenting) (highlighting statistics about driving under the influence); Chambers v. United States, 555 U.S. 122, 129 (2009) (reporting statistics about crime of "failure to report" for weekend incarceration); Sykes v. United States, 564 U.S. 1, 10–12 (2011) (citing statistics about vehicular-flight crimes).

287 *See, e.g.*, Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2294–95 (2021) (Breyer, J., dissenting) (noting that removal proceedings "often take[] over a year" and some last "well over two years," *id.* at 2294); Dada v. Mukasey, 554 U.S. 1, 17 (2008) (explaining that Bureau of Indian Affairs (BIA) proceedings have doubled between 1992 and 2000 and BIA's backlog has more than tripled in that time).

288 *See* Ricci v. DeStefano, 557 U.S. 557, 634–35 (2009) (Ginsburg, J., dissenting).

289 *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) (explaining pay disparities may not come to employee's attention for some time); Vance v. Ball State Univ., 570 U.S. 421, 454, 458–61 (2013) (Ginsburg, J., dissenting) (explaining that the Court's interpretation ignores workplace realities about supervisors). For a list of all thirty-seven opinions that referenced "facts about the world," see Appendix, *supra* note 28.

290 *See* Appendix, *supra* note 28.

291 Roughly 10.0% of the opinions in the dataset employed an "institutional resources" argument. *See supra* Table 9, p. 722.

292 Roughly 21.4% of the opinions in the dataset employed a "workability" argument. *See supra* Table 9, p. 722.

cases, the Court asserted that an interpretation would force lower courts to engage in difficult factual inquiries that lack determinate answers or require technical expertise that judges do not possess.[293]

The next several subsections explore in detail the different forms of "administrability" arguments the Court regularly employed during the period studied.

1. Institutional Resources Arguments. — Several opinions in the dataset (10.0%) made "institutional resources" arguments that focused on ways in which an interpretation might burden judicial or other public administration of the law.[294] Many of these opinions predicted that an interpretation would lead to a "flood" of lawsuits or administrative proceedings,[295] while others cautioned that an interpretation would produce other kinds of inefficiencies.[296] Some opinions, conversely, argued that an interpretation would make judicial or administrative proceedings more efficient.[297]

An example may help illustrate. In *Pereida v. Wilkinson*,[298] the Court considered the Immigration and Nationality Act's provision governing the cancellation of an order to remove an immigrant with nonpermanent resident status.[299] In order to be eligible for such cancellation of removal, a nonpermanent resident must prove several things — including that he has not been convicted of "a crime involving moral turpitude."[300] Pereida was a nonpermanent resident who had

---

[293] Some 6.1% of the opinions in the dataset employed a "difficult factual inquiries" argument. *See supra* Table 9, p. 722.

[294] *See supra* Table 9, p. 722 (reporting that 50 of 505 opinions in the dataset employed an "institutional resources" argument).

[295] *See, e.g.*, Babb v. Wilkie, 140 S. Ct. 1168, 1182 (2020) (Thomas, J., dissenting) (predicting "a flood of investigations by the EEOC or litigation from dissatisfied federal employees"); Johnson v. Williams, 568 U.S. 289, 311–12 (2013) (Scalia, J., concurring in the judgment) (warning of "a flood of litigation," *id.* at 311); McQuiggin v. Perkins, 569 U.S. 383, 411–12 (2013) (Scalia, J., dissenting) (documenting "[f]loods of stale, frivolous and repetitious petitions," *id.* at 412 (quoting Brown v. Allen, 344 U.S. 443, 536 (1953) (Jackson, J., concurring in the result))); Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2077 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (predicting that the decision will "flood district court dockets with individual habeas actions"); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1497–98 (2021) (Kavanaugh, J., dissenting) (arguing that the Court's decision incentivizes "extra applications for cancellation of removal," *id.* at 1497).

[296] *See, e.g.*, Pereida v. Wilkinson, 141 S. Ct. 754, 775 (2021) (Breyer, J., dissenting) (cautioning against "adding . . . complexity to immigration proceedings"); Brownback v. King, 141 S. Ct. 740, 751 (2021) (Sotomayor, J., concurring) (predicting that respondent's interpretation would incentivize plaintiffs to bring multiple suits); Lawrence v. Florida, 549 U.S. 327, 342–43 (2007) (Ginsburg, J., dissenting) (arguing that the majority's approach causes duplicative claims to "be pending in two courts at once," *id.* at 343); Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 542 (2007) (Scalia, J., concurring in the judgment in part and dissenting in part) ("*Pro se* cases impose unique burdens on lower courts . . . .").

[297] *See, e.g.*, Banister v. Davis, 140 S. Ct. 1698, 1708 (2020) (arguing that the Court's interpretation "may make habeas proceedings more efficient"); Woodford v. Ngo, 548 U.S. 81, 94 (2006) ("Proper exhaustion reduces the quantity of prisoner suits . . . .").

[298] 141 S. Ct. 754 (2021).

[299] *Id.* at 758; *see also* 8 U.S.C. §§ 1229a(c)(4), 1229b(b)(1).

[300] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I); *see also id.* §§ 1229a(c)(4)(A), 1229b(b)(1)(C).

been convicted of attempted criminal impersonation under Nebraska state law.[301] The Nebraska statute lists four ways a person can commit criminal impersonation; three of the four ways involve fraud and therefore would qualify as crimes "involving moral turpitude."[302] In Pereida's immigration proceeding, the government presented evidence showing that Nebraska had *charged* Pereida "with using a fraudulent social security card to obtain employment" (a crime "involving moral turpitude"). Pereida offered no competing evidence about the crime for which he was convicted, but he argued that just because Nebraska charged him with the fraudulent use of a social security card did not mean that was the crime of which he was convicted.[303] The statutory question was whether ambiguity about a nonpermanent resident's conviction should work against the government or the immigrant — that is, whether nonpermanent residents like Pereida meet the burden of proving eligibility for cancellation of removal when the record shows they have been convicted under a statute that lists some disqualifying offenses, but the conviction is ambiguous as to which specific offense the nonpermanent resident was found guilty of committing.[304]

The Court, in an opinion authored by Justice Gorsuch, held that any lingering uncertainty about whether a nonpermanent resident stands convicted of a crime of moral turpitude operates to defeat a nonpermanent resident's application for cancellation of removal, and that the burden is on the immigrant to show affirmatively that he has met the necessary conditions to be eligible for relief.[305]

Justice Breyer dissented,[306] relying on precedent and a "judicial resources" form of practical consequences argument. Specifically, he argued that the Court's precedents dictate that immigration judges must follow a "categorical approach" that limits their ability to investigate the nature of the underlying offense for which a noncitizen was convicted — and requires that unless it is clear from a specified set of documents that the offense at issue qualifies as a "crime involving moral turpitude," the judge must find that it does not.[307] Justice Breyer explained that there are sound practical reasons behind the categorical approach, including that "[i]mmigration . . . and sentencing judges have limited time and limited access to information about prior convictions"[308] and that "allowing parties to introduce a wide range of documentary evidence and testimony to establish the crime of conviction"

---

[301] *Pereida*, 141 S. Ct. at 759.

[302] *Id.* at 759–60; *see* NEB. REV. STAT. § 28-608 (2008) (current version at NEB. REV. STAT. § 28-638 (2024)).

[303] *Pereida*, 141 S. Ct. at 760.

[304] *See id.*

[305] *See id.* at 758, 761.

[306] *See id.* at 767 (Breyer, J., dissenting).

[307] *See id.*

[308] *Id.* at 771.

could "undermine . . . 'judicial and administrative efficiency.'"[309] The dissent went on to describe several different kinds of evidence that immigration judges might be forced to review under the majority's interpretation, including "plea agreements made long ago, cursory state records," and testimony from state prosecutors "who have imperfect memories or who have long since departed for other places."[310] In light of these practical realities, the dissent noted that "there is a real risk of adding time and complexity to immigration proceedings" and "strain to 'our Nation's overburdened immigration courts.'"[311]

Several other opinions in the dataset made similar arguments about the effects that an interpretation would have on judicial or other public resources.[312]

2. Workability Arguments. — In roughly 21.4% (108 of 505) of the opinions in the dataset that referenced practical consequences, the Court raised concerns that a particular interpretation would prove confusing, difficult, or otherwise unworkable for subsequent courts to administer.[313] Some of these opinions asserted that the rule created by an interpretation was too vague or unpredictable,[314] while others argued that an established statutory precedent already had proved confusing for lower courts.[315] Still other opinions in this category defended the interpretation they adopted on the ground that it would prove predictable,

---

[309] *Id.* at 775 (quoting Moncrieffe v. Holder, 569 U.S. 184, 200 (2013)).

[310] *Id.*

[311] *Id.* (quoting *Moncrieffe*, 569 U.S. at 201).

[312] For a list of all fifty opinions in the dataset that employed "institutional resources" arguments, see Appendix, *supra* note 28.

[313] *See supra* Table 9, p. 722.

[314] *See, e.g.*, Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 187 (2010) (referring to standard as "indeterminate and unworkable"); Lozman v. City of Riviera Beach, 568 U.S. 115, 140 (2013) (Sotomayor, J., dissenting) (calling majority's interpretation "opaque and unpredictable"); County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1482–83 (2020) (Alito, J., dissenting) (complaining that the majority's rule "invites arbitrary and inconsistent application," *id.* at 1483); James v. United States, 550 U.S. 192, 215 (2007) (Scalia, J., dissenting) (critiquing majority approach as "almost entirely ad hoc"); Nautilus, Inc. v. Biosig Instruments, Inc., 572 U.S. 898, 912 (2014) (finding that lower court's interpretation would "leave courts and the patent bar at sea"); Elonis v. United States, 575 U.S. 723, 742 (2015) (Alito, J., concurring in part and dissenting in part) (asserting the Court's ruling was "certain to cause confusion"); *id.* at 750 (Thomas, J., dissenting) (predicting "a state of uncertainty"); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 398 (2015) (Scalia, J., dissenting) (critiquing majority's "amorphous standard"); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (noting lower court "could not say" what conduct qualified under law); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 392 (2016) (arguing proposed interpretation would "undermine consistency and predictability" if adopted).

[315] *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 92 (2008) (Thomas, J., dissenting) (arguing that precedent created an "unworkable test" for lower courts); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179 (2009) (criticizing "burden-shifting framework" established by precedent as "difficult to apply"); Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 485 (2020) (Thomas, J., concurring) (claiming that precedent "has proven . . . difficult to apply consistently"); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255–56 (2010) (calling lower courts' approach "complex in formulation and unpredictable in application," *id.* at 256); Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1944 (2022) (noting that precedent "has engendered a quarter century of confusion and dispute").

clear, or workable — often in *contrast* to a competing, rejected interpretation.[316]

Consider the following example. *Pacific Operators Offshore, LLP v. Valladolid*[317] involved the Outer Continental Shelf Lands Act[318] (OCSLA), which extends the federal workers' compensation scheme established in the Longshore and Harbor Workers' Compensation Act[319] to injuries "occurring as the result of operations conducted on the outer Continental Shelf" (OCS) in order to extract natural resources from the shelf.[320] The statutory question was whether employees who are involved in extraction operations but are injured outside the OCS are covered under the OCSLA.[321] A majority of the Court concluded that the OCSLA covers injured employees who demonstrate a "substantial nexus" between their employer's extraction operations and their injury.[322] Justice Scalia concurred in part and in the judgment, writing separately to take issue with the "substantial nexus" test — based on workability concerns.[323] Specifically, Justice Scalia complained that "'[s]ubstantial nexus[]' . . . is an indeterminate phrase that lacks all pedigree"[324] and warned that "[t]he Court has given us a new test whose contours are entirely undescribed, and which has nothing to be said for it except that it will add complexity to the law and litigation to the courts."[325]

Justice Scalia's warnings about the "indeterminacy" and "complexity" that the Court's interpretation would produce are echoed in numerous (108) other "workability" cases.[326]

---

316 *See, e.g.*, Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008) (prioritizing a "predictable, workable framework"); Vance v. Ball State Univ., 570 U.S. 421, 432 (2013) (favoring an "easily workable" interpretation); *id.* at 451 (Thomas, J., concurring) (claiming that chosen interpretation presents "the narrowest and most workable rule"); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 459 (2015) (arguing precedent has not "proved unworkable").

317 565 U.S. 207 (2012).

318 43 U.S.C. §§ 1331–1356c.

319 33 U.S.C. §§ 901–950.

320 43 U.S.C. § 1333(b).

321 *Pacific Operators*, 565 U.S. at 211.

322 *Id.* at 210.

323 *Id.* at 222–23 (Scalia, J., concurring in part and concurring in the judgment).

324 *Id.* at 225.

325 *Id.* at 226.

326 *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1482–83 (2020) (Alito, J., dissenting) (contending majority's rule "provides no clear guidance and invites arbitrary and inconsistent application," *id.* at 1483); Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 485 (2020) (Thomas, J., concurring) (deriding interpretations that "yielded more confusion"); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008) (preferring a "predictable, workable" interpretation over one that would generate "uncertain and complex" effects); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277 (2009) (critiquing interpretation that would entail "confusing division of . . . authority"); Mac's Shell Serv., Inc. v. Shell Oil Prods. Co. LLC, 559 U.S. 175, 187 (2010) (rejecting standard that "would be indeterminate and unworkable"). For a complete list of the 108 opinions in the dataset that employed "workability" arguments, see Appendix, *supra* note 28.

It is worth noting that a sizeable minority of the opinions (6.1% of the total 505) argued that an interpretation would prove "difficult" for lower courts to administer.[327] Some of these opinions provided a list of difficult factual questions that a particular interpretation would force courts to grapple with — often arguing that such questions lack a determinate answer or that judges lack the expertise necessary to answer them.[328] Others simply highlighted the ways in which a particular interpretation would complicate an interpreting court's job.[329]

Finally, it is worth noting that a number of the opinions in the dataset (25.1%) that invoked practical consequences arguments sought to connect their consequentialist arguments to legislative intent or expectations.[330] Significantly, 41.7% of these opinions (53 of 127) were authored by Justices considered by commentators to be textualist,[331] while 58.3% (74 of 127) were authored by Justices widely considered to be pluralist, purposivist, or not purely textualist.[332] Often, these references took the form of comments that Congress "could not have intended" a particular consequence, or that a particular consequence was inconsistent with Congress's statutory plan or intent.[333] As I have

---

[327] Of the 108 opinions in the dataset that employed "workability" arguments, thirty-one (28.7%), or a little over one-quarter, asserted that an interpretation would prove "difficult" to administer. *See* Appendix, *supra* note 28.

[328] *See, e.g.*, Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 483–84 (2006) (Breyer, J., concurring in part and dissenting in part) (describing difficult factual questions about effects of anticompetitive behavior); Bartlett v. Strickland, 556 U.S. 1, 17 (2009) (plurality opinion) (describing difficult factual questions about voting behavior); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 454 (2009) (describing difficult factual questions about determining fair pricing).

[329] *See, e.g.*, Robers v. United States, 572 U.S. 639, 644 (2014) (noting that valuing property as of date it was received would prove difficult); United States v. Apel, 571 U.S. 359, 372 (2014) (finding proposed interpretation "would frustrate the administration of military facilities and raise difficult questions for judges, who are not expert in military operations"); N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 517 (2015) (Alito, J., dissenting) ("Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task . . . ."); Mathis v. United States, 579 U.S. 500, 529 (2016) (Breyer, J., dissenting) (describing interpretation scheme as "too complex to work"); Ocasio v. United States, 578 U.S. 282, 298–99 (2016) (arguing rejected interpretation would make Hobbs Act conspiracy "depend on difficult property-law questions," *id.* at 299). For a full list of the thirty-one opinions in the dataset that made a "difficult to administer" or "difficult factual questions" argument, see Appendix, *supra* note 28.

[330] Of the 505 opinions in the dataset that referenced practical consequences, 127 explicitly mentioned congressional intent or expectations. *See* Appendix, *supra* note 28 (denoting such cases with an asterisk).

[331] *See supra* note 2.

[332] *See supra* note 154 (listing the Justices who are members of the pluralist group).

[333] *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1473 (2020) ("We do not see how Congress could have intended . . . ."); *id.* at 1489 (Thomas, J., dissenting) ("Congress most certainly did not intend . . . ."); Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1171 (2021) (arguing an interpretation "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel"); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2290 (2021) ("Congress had obvious reasons to treat these two groups differently."); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1943 (2021) (Gorsuch, J., concurring) (rejecting outcome that would effectuate "exactly what Congress adopted the [statute] to avoid"); United States v. Briggs, 141 S. Ct. 467, 473 (2020) (declining interpretation that was "not the sort of . . . provision that Congress is likely to have chosen").

elsewhere noted, in such cases the Court is not really looking for *actual evidence* of Congress's legislative intent — it is merely presuming or declaring that Congress could not have intended a particular undesirable consequence, or that a particular policy consequence is inconsistent with Congress's intent.[334] In other words, the Court is imputing to Congress judicially defined policy judgments and normative concerns about the practical consequences an interpretation will produce.

III. IMPLICATIONS

This Part explores the theoretical implications and tensions inherent in the Court's references to practical consequences when determining statutory meaning. Section III.A explores the tension between textualism's theoretical rejection of non-text-bound interpretive sources — versus textualist Justices' regular reliance on practical consequences arguments that are decidedly nontextual, and that sometimes allude to legislative intent. Section III.A also highlights the open-ended, ad-hoc nature of the Court's current use of practical consequences in statutory cases. Section III.B offers some suggestions for how the modern Court might articulate a coherent role for practical consequences in statutory interpretation, as well as place some parameters around the use of such consequences.

A. Some Problems

This section highlights several problems with the judicial use of practical consequences to determine a statute's meaning. Most obviously, the use of practical consequences as a statutory interpretation tool is in serious tension with modern textualism's fundamental rejection of non-text-bound tools that invite judicial discretion and policymaking. Indeed, as outlined in Part I, modern textualist judges and scholars have roundly criticized the use of practical consequences in statutory interpretation, calling judicial reliance on such consequences "out of bounds," "not compatible with democratic theory," and "freewheeling judicial policymaking."[335]

And yet the members of the Roberts Court — including its textualist Justices — employed consequentialist reasoning in a sizable percentage of the opinions in the dataset, and in more than half (52.8%) of all cases in the dataset.[336] Indeed, textualist Justices sometimes both criticized

---

[334] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1279 (2020).

[335] *See supra* section I.A.2, pp. 689–92.

[336] *See* Table 2, pp. 705–06 (reporting rates of reference to practical consequences above 25.0% for all Justices except Justice Thomas and above 40.0% for five of the seven textualist Justices); *supra* note 28 and accompanying text (reporting that 352 of 667 cases in the dataset contained at least one opinion that referenced practical consequences).

and employed consequentialist arguments in the same opinion.[337] Nourse has referred to the textualist-dominated Court's heavy use of consequentialist arguments as a "paradox."[338] Whatever one calls it, the Court's ubiquitous use of consequentialist arguments when determining statutory meaning is an enduring, persistent reality with which modern textualism — and modern statutory interpretation theory — must grapple.

Further, the modern Court's references to consequentialist reasoning to date have been chaotic and unsystematic: Although the Court frequently employs consequentialist arguments, it follows no consistent guidelines or parameters in doing so. Apart from the "absurd results" doctrine, there are no canons that dictate what kinds of practical consequences courts should consider relevant when interpreting a statute — let alone what kinds of consequences should be deemed undesirable or, conversely, beneficial. Moreover, the Court's use of practical consequences arguments in individual cases has tended to be rather subjective and ideologically correlated.

Recall that in *Van Buren*, discussed in the Introduction and in section II.C.1, both Justice Barrett's majority opinion and Justice Thomas's dissent argued that their opposing interpretations of the CFAA would avoid absurd results — but expressed entirely different intuitions about what constitutes an absurd result.[339] Justice Barrett argued that "the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity" and rattled off several examples of such seemingly innocuous behavior — such as sending personal emails from a work computer or "embellishing an online-dating profile";[340] while Justice Thomas argued that the majority's reading would "also lead[] to awkward results" and pointed to egregious behaviors — such as a person who, "minutes before resigning, deletes every file on a [work] computer" or a scientist who uses his access to atomic blueprints weapons to "help[] an unfriendly nation build a nuclear arsenal" — that would not be covered under the majority's interpretation.[341]

The problem, in short, is that the very idea of "practical consequences" invites judicial discretion and policymaking. What counts as absurd is a notoriously open-ended concept that ultimately is in the eye

---

[337] *See, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474, 1485–86 (2021) (Gorsuch, J.) (criticizing dissenting opinion's "raw consequentialist calculation" and "policy-talk" while noting hardships that government's reading could impose on immigrants, *id.* at 1486); Van Buren v. United States, 141 S. Ct. 1648, 1666, 1668 (2021) (Thomas, J., dissenting) (faulting majority for discussing policy arguments "at length," *id.* at 1668, after detailing how majority's interpretation "leads to awkward results," *id.* at 1666).

[338] Nourse, *supra* note 26, at 11.

[339] *See Van Buren*, 141 S. Ct. at 1661; *id.* at 1666–67 (Thomas, J., dissenting); *see also supra* pp. 682–83.

[340] *Van Buren*, 141 S. Ct. at 1661 (majority opinion).

[341] *Id.* at 1666–67 (Thomas, J., dissenting).

of the beholder — and different judges will have different intuitions about what kinds of consequences rise to that level. The same is true for the other forms of practical consequences: One judge's "undesirable" consequence may be another judge's idea of "good policy" or, conversely, two judges may anticipate different consequences from the same statutory construction. For example, in *Georgia v. Public.Resource.Org, Inc.*,[342] Chief Justice Roberts and Justice Thomas expressed competing concerns about the consequences of a finding that a state's annotated code is copyrightable.[343] Chief Justice Roberts warned that if the Code were found to be copyrightable, "citizens, attorneys, nonprofits, and private research companies" would lose access to the Code and that states might begin to charge a premium for certain legal works that would exclude the nonwealthy.[344] By contrast, Justice Thomas warned of a different potential adverse consequence — that absent copyright protection, "many States will stop producing annotated codes altogether."[345] In other words, although Chief Justice Roberts and Justice Thomas agreed that the Court should adopt an interpretation that would preserve access to state annotated codes, they could not agree on — and made different predictions about — which interpretation would better achieve that end.

As the two examples above illustrate, there are myriad ways in which individual Justices might disagree about the practical consequences that will follow from a particular interpretation, the normative desirability of those consequences, or how best to balance the advantages and disadvantages associated with a particular interpretation. Indeed, perhaps unsurprisingly, the Court exhibited high rates of judicial "dueling" over practical consequences. That is, in 41.7% of the 254 divided-vote cases in which a majority (or concurring) opinion referenced practical consequences, a dissenting (or part-dissenting) opinion also invoked a practical consequences argument to support a competing interpretation of the same statute.[346]

All of this adds up to significant judicial discretion to determine if, when, how, and what kind of practical consequences will be used to help determine a statute's meaning — and sows confusion among lower courts, litigants, and their lawyers about the role that practical consequences play in statutory cases. For, absent some guidelines or parameters indicating how judges should use practical consequences to construe statutes — for example, what kinds of consequences matter, what evidence to consult to accurately predict the consequences, or what

---

342 140 S. Ct. 1498 (2020).

343 *See id.* at 1512–13; *id.* at 1522 (Thomas, J., dissenting).

344 *Id.* at 1512–13 (majority opinion).

345 *See id.* at 1522 (Thomas, J., dissenting).

346 That is, 106 of the 254 divided-vote cases in the dataset contained opposing opinions that each invoked practical consequences to reach conflicting interpretations. *See* Appendix, *supra* note 28.

kinds of consequences are normatively good/bad, workable/unworkable, fair/unfair — judges are left with wide discretion to characterize and apply practical consequences arguments however they want, including based on their personal policy preferences. (Recall again that the data reported in Table 5 reveal that the ideological valence of opinions that employed practical consequences correlated closely with the ideological preferences of the Justices who authored the opinions.[347]) Modern textualism — which is premised in large part on the ideal of cabining judicial discretion and limiting judicial policymaking[348] — has largely failed to grapple with this reality. The next section offers some recommendations for steps modern textualists might take both to clarify the role that practical consequences should play in statutory interpretation and to bring some order to the use of such consequences in statutory cases.

B. Some Recommendations

So where do we go from here? This section turns from the descriptive and normative to the prescriptive, advocating that the Court acknowledge — as well as more clearly limit and define — the role that practical consequences should play in statutory interpretation.

1. Articulating a Role for Practical Consequences. — Practical consequences currently play a muddled role in statutory interpretation. They are both theoretically maligned by the Court's textualist majority yet ubiquitous in the Court's interpretive practice. Even those Justices who have not disparaged practical consequences in theory have offered no coherent framework for when or how such consequences should play a role in determining a statute's meaning. As a way to bring the Court's rhetoric and practice into closer alignment, this Article advocates that the Court (1) abandon the categorical rhetoric used by some Justices to paint all consequentialist reasoning as illegitimate (even while themselves engaging in such reasoning), and (2) instead adopt some parameters and ground rules that could bring some coherence to the wide-ranging, unstructured use of practical consequences in statutory cases.

This means, first and foremost, that the Court as a whole — including its textualist Justices — should openly acknowledge that at least some kinds of consequentialist concerns can and should influence how courts interpret statutes. Indeed, as the data reports in Part II and as textualist jurists' on-the-ground practices make clear, the vision of absolute judicial constraint and inattention to practical consequences that Justice Scalia's new textualism once promised is an unattainable pipe dream.[349] Moreover, even if that vision were attainable, it would be deeply problematic and worrisome for the Court to ignore entirely how

---

[347] *See supra* Table 5, p. 711.

[348] *See* Scalia, *supra* note 57, at 17–18, 22–23.

[349] *See, e.g.*, Table 2, pp. 705–06; *supra* section II.C–D, pp. 719–40.

the statutes it interprets operate in the world.[350] Thus, it is time for modern textualism to acknowledge the important role that practical consequences play in statutory construction — and to stop pretending that statutory interpretation can be reduced to a mechanical exercise that disregards such consequences.

At the same time, however, neither the Court nor modern textualism need necessarily embrace the unstructured hodgepodge approach that currently dominates the judicial use of practical consequences. Instead, modern textualism and the modern Court could get serious about defining *what kinds* of consequentialist concerns are relevant and appropriate in determining a statute's meaning.

Perhaps the easiest way for the Court (and modern textualists) to do this would be to define clear canons or presumptions regularizing those forms of practical consequences that they determine should be relevant to the interpretive inquiry. For example, the Court might adopt or articulate:

(a) A "Workability" Canon. Such a canon would establish a presumption against interpretations that would prove difficult or confusing for lower courts to implement; and

(b) An "Institutional Resources" Canon. Such a canon would establish a presumption in favor of avoiding interpretations that would result in a waste of judicial, administrative, or other institutional resources.

Such canons might rest on a background understanding recognizing that, as the highest court in the land, the Supreme Court exercises a supervisory monitoring function vis-à-vis the lower federal courts.[351] And in that capacity, the Court has a duty to ensure the clarity and workability of any interpretations it adopts in order to minimize lower court confusion, avoid wasting judicial resources, avoid interpretations that are difficult to administer, and so on. Alternately, such canons might be justified on the grounds that administrability concerns emphasize clarity and simplicity — values that are consistent with, or in the same vein as, textualism's theoretical commitment to "plain" meaning and to streamlining the interpretive process. Thus, embracing such consequences does not seem like too much of a stretch from — and could even be considered consistent with — a textualist approach to interpreting statutes.

---

[350] There is also evidence suggesting that it would be inconsistent with Founding-era practices — something textualist Justices tend to care about — for courts to ignore practical consequences when determining a statute's meaning. *See* Saikrishna Prakash, *The Inconvenience Doctrine*, 78 STAN. L. REV. (forthcoming 2026) (manuscript at 4) (on file with the Harvard Law School Library).

[351] *See, e.g.*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 346 (2005) (arguing that the Supreme Court is better positioned than Congress to monitor lower courts); Michael C. Dorf, *The Supreme Court, 1997 Term — Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998) (noting that the Supreme Court sees "its role as principally one of promoting uniformity in the interpretation of federal law").

The Court's current caselaw likely, at bottom, already implicitly reflects such background understandings about the Supreme Court's supervisory role and/or the value of simplicity,[352] but putting such understandings in canon form would have the advantage of formalizing the Court's use of these types of practical considerations — which in turn should produce greater transparency regarding its interpretive analysis. Perhaps most importantly, turning these "administrability"-type practical consequences into canons could help bring practical consequences arguments out of the netherworld of loose considerations the Court articulates in random places in its statutory opinions, and instead give such consequences a more defined role to play in the Court's statutory analysis.

Here is how this might work: The Court and modern textualists will have to decide whether "workability" and "resources" considerations can be considered in *all* cases — or only those cases in which the text is ambiguous. I would advocate that practical consequences be deemed relevant in all cases, as a secondary factor considered after the initial assessment of plain meaning — even when the text is clear. In my view, this is the best approach because the Court's obligations to avoid lower court confusion and be mindful of institutional resources are meta-concerns that might legitimately influence the Court to read the text one way rather than another. But the Court (and textualist Justices) could choose instead to take "workability" and "resources" consequences into account only when the text is ambiguous. Either way, transforming such practical considerations into canons should help clarify (and regularize) where in the interpretive process they come into play — and should force the Court to openly grapple with the relationship between the statute's text and the practical consequences it is taking into account.

The Court, and the textualist Justices, might also articulate canons codifying other, policy-based forms of practical consequences — if after careful consideration they deem such consequences appropriate factors in the interpretive process. The policy-based forms of practical consequences outlined in section II.C are more subjective and look and feel more like normative judicial policy judgments than do the administrability-type practical consequences arguments.[353] For this reason, it is important (at least for textualists) that any policy-based practical consequences canons the Court might adopt should be cabined by narrow triggers that limit their applicability. Moreover, any policy-based concerns the Court invokes should be tied to some external tether, beyond just a Justice's intuition — such as the statute's text (including preambles or legislative findings), legislative record materials, or objective evidence of the circumstances surrounding the statute's enactment. Below are a few policy-based canons the Court might consider adopting:

---

[352] *See* Krishnakumar, *supra* note 27, at 1466.

[353] *See supra* section II.C, pp. 719–34.

(c) An "Equity" Canon. Such a canon would seek to avoid unjust or inequitable results. Such a canon might be based on the legal system's background concern with ensuring "equity" — a norm that has long undergirded American law.[354] *Black's Law Dictionary* defines "equity" as "[f]airness; impartiality; evenhanded dealing."[355] If the Court, and modern textualists, were to adopt an equity canon, they should also provide some guiding principles for determining what counts as unfair or unjust — in order to limit the possibility of judicial abuse of such a canon to reject any interpretation the Court dislikes. Specifically, the Court and modern textualists should establish an ex ante definition of what counts as unjust. For example, the Court could define "unfairness" or "injustice" in a manner that limits the canon's reach to those situations in which an interpretation would disadvantage (1) a group that the statute was designed to protect, or (2) a group that is well-recognized as politically disadvantaged (such as a *Carolene Products* group).[356] As with all of the policy-based forms of consequences, when determining which groups a statute was designed to protect, courts should look for evidence in the statute's text, legislative record materials, or objective historical sources that establish the circumstances surrounding the statute's enactment.

Alternately, modern textualists could reject the use of equitable considerations as a legitimate factor in the interpretation of statutes — on the theory that such considerations entail too much subjectivity and judicial discretion. However, I think a rule that permits "fairness" considerations to be taken into account only when there is some concrete evidence that the kind of "unfairness" at issue is one that the statute was designed to guard against, or that is well-established within our legal system, is the better approach because it leaves room for a concern that modern textualists regularly take into account[357] — but in a manner that is more closely tied to the statute as enacted.

(d) An "Undermines Purpose" Canon. Such a canon would create a presumption against interpretations that would undermine a statute's underlying goals. While it may seem strange to suggest that textualist jurists consider adopting a formalized canon based on statutory purpose, there are several reasons why doing so may make sense. First and foremost, most modern textualists agree that statutory purpose remains an important feature of the interpretive inquiry; where textualists differ from purposivists is that they maintain that a statute's purpose should

---

354 *See* Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53, 71 ("Equitable doctrine is part of the warp and woof of our substantive law.").

355 *Equity*, BLACK'S LAW DICTIONARY (12th ed. 2024).

356 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

357 During the period studied, 11.2% (29 of 259) of the textualist-authored opinions in the dataset that invoked some form of practical consequences argument employed a fairness/inequity argument. Of these twenty-nine, six made a settled reliance interests argument. *See* Appendix, *supra* note 28.

be divined from the statute's text — rather than through judicial extrapolation from broad statements in the statute's legislative history.[358] Thus, a canon that recognizes the importance of statutory purpose — but that limits the sources from which judges may identify that purpose — might well serve textualist Justices' interpretive preferences.

My own view is that legislative record evidence that is directly on point to the statutory question at issue — but not broad, unspecific statements in the legislative record — should also be considered a legitimate source of statutory purpose; however, textualists need not embrace such record evidence in order to adopt a purpose-based practical consequences canon.

Second, an "undermines purpose"–type canon is something textualist jurists should seriously consider adopting because, whether they formally acknowledge it or not, textualists have in practice invoked this form of practical consequences argument in a number of their statutory opinions.[359] Moreover, even when their opinions do not expressly mention statutory purpose, textualist Justices often make other interpretive arguments that impute legislative purpose or intent to Congress.[360]

(e) Absurd Results. The Court and modern textualists also might consider clarifying the scope of the existing absurd results canon — to note that it is not really intended to cover situations in which an interpretation would produce a result that is merely "odd" or even makes no sense, but rather is meant to cover only those situations in which an interpretation would produce results that are truly "unthinkable."[361] At the same time, given the on-the-ground reality that the Court (and its textualist Justices) often do find "odd" or "nonsensical" results problematic,[362] the Court might allow for such "absurdity-adjacent" consequentialist arguments to be invoked when there is evidence in the statute's text/preamble, legislative record, or circumstances surrounding the statute's enactment that indicates that a supposedly odd or nonsensical outcome is one that conflicts with the statute's goals.

2. Establishing Some Parameters. — If the Court were to adopt the above canon recommendations, this could go a long way toward clarifying and promoting transparency around the role that practical consequences play in determining statutory meaning. Indeed, if the Court merely acknowledges that there are different forms of consequences that

---

358 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) ("[B]ecause textualists understand that speakers use language purposively, they recognize that evidence of purpose (if derived from sources other than the legislative history) may also form an appropriate ingredient of the context used to define the text."); SCALIA & GARNER, *supra* note 38, at 56 ("Of course, words are given meaning by their context, and context includes the purpose of the text.").

359 Roughly 6.9% (18 of 259) of textualist-authored opinions in the dataset that invoked practical consequences arguments took the "undermines purpose" form. *See* Appendix, *supra* note 28.

360 *See* Krishnakumar, *supra* note 334, at 1279.

361 Manning, *supra* note 68, at 2394.

362 *See supra* Table 9, p. 722.

it considers when construing statutes — perhaps distinguishing between administrability and policy-type consequences — that itself would be a significant improvement over its current unstructured, unsystematic use of practical consequences arguments.

But a few other adjustments would also be helpful. Notably, the list of practical consequences canons proffered in section III.B.1 above leaves out two forms of consequences identified in Part II: "undesirable/beneficial results"–type arguments and "facts about the world" arguments. This is because these two forms of practical consequences arguments differ in important ways from the other practical consequences arguments regularly employed by the Roberts Court. As noted earlier, "undesirable/beneficial results" arguments are almost an umbrella category of policy arguments that often amount to thinly veiled proxies for individual Justices' personal policy preferences: What constitutes an "undesirable" versus "beneficial" policy consequence, perhaps even more than what constitutes an "absurd" result, is often very much within the eye of the beholder.[363] And unlike the other forms of practical consequences discussed in section III.B.1, concerns about such consequences may not necessarily overlap with established rule-of-law values such as administrability, equity, rationality, or statutory consistency that undergird our legal system.

Given the open-endedness and naked normativity of the "undesirable/beneficial results" form of practical consequences argument, I would urge the Court and textualist jurists to become more disciplined in their invocation of such arguments. Specifically, when contemplating an "undesirable/beneficial results"–type argument, the Court should consider whether its argument is in some way connected to one of the other policy consequence canons described in section III.B.1: For example, are the practical concerns at issue at bottom concerns about workability, institutional resources, equity, purpose, or absurdity? If so, the Court should frame its discussion in terms of those other practical consequences reasons and canons. As noted in section II.C.2, some "undesirable/beneficial results" arguments warn of perverse incentives that might follow from an interpretation or express concern that an interpretation will lead to circumvention of the statute's requirements;[364] at least some of these arguments might be recast as "undermines purpose" arguments. Likewise, some "undesirable/beneficial results" arguments predict that an interpretation will impose heavy burdens on certain groups or threaten individual rights;[365] at least some of these arguments might be recast as "equity" arguments.

In addition, the Court should consider whether the desirability or undesirability of the consequences it considers relevant are supported

---

[363] *See supra* section II.C.2, pp. 726–29.

[364] *See supra* notes 208–13 and accompanying text.

[365] *See supra* section II.C.4, pp. 731–33.

by the statute's text, purpose (as evinced by the preamble or legislative record), or the circumstances that prompted Congress to enact the statute. If the "undesirable/beneficial results" argument the Court is contemplating is neither motivated by one of the concerns undergirding the other, rule-of-law-based practical consequences canons, nor is tethered to the statute's text, purpose, or original mischief, then the Court should be candid about that fact and acknowledge that it is making a normative policy argument. Alternately, textualist Justices may wish to abandon the normative argument at this point on the grounds that it is inconsistent with their interpretive ideals.

With respect to the "facts about the world" form of argument, my recommendation is similar. This form of practical consequences argument accounts for only a small slice of opinions in the dataset (7.3%) — and as noted earlier, about half of those opinions also referenced another form of practical consequences.[366] Thus, this Article recommends that the Court frame any such "facts about the world" arguments in terms of one of the practical consequences canons described in section III.B.1 whenever possible. In cases in which a ready connection to one of the practical consequences canons outlined in section III.B.1 is not available, the Court and its textualist Justices should think hard about whether the facts (and real-world impact arguments) they are invoking connect in some way to the statute's text, purpose, or original mischief. In other words, does the real-world impact that a particular interpretation would have pose equity, workability, institutional resources, or absurdity problems — or would it undermine the statute's goals? If not, the Justices should be candid about the fact that the practical argument they are making falls outside the realm of established practical consequences concerns, and that they are appealing to a unique type of practical consideration in the particular case at issue.

I'd also add a further caution for Justices invoking the "facts about the world" form of argument: Given the important role that real-world facts and figures often play in the Court's analysis and argument,[367] it is crucial that the facts the Justices cite be as accurate and trustworthy as possible. That is, the Court should take special pains to ensure that the facts it cites come from reputable, vetted sources — and not merely the Justices' own instincts or estimations of how things work in the real world. Accordingly, the Court should be extremely careful about the sources of any facts it recites in its opinions — being open about citing reports or studies from which the facts it employs are derived and refraining from relying on unsupported assertions based on the Justices' own gut instincts or unverified declarations in a litigant's brief.

---

[366] *See supra* section II.C.5, pp. 733–34.
[367] *See supra* section II.C.5, pp. 733–34.

* * *

Some may question whether the above recommendations will make any difference in how judges actually employ practical consequences to construe statutes. Alternately, they may wonder whether, even if such recommendations have some effect on how courts *talk* about practical consequences, they will actually succeed in curbing judicial discretion — or preventing the Justices' own policy preferences from controlling their statutory constructions. These are legitimate and fair questions. Judges are human beings, and statutory interpretation will never be a purely neutral or mechanical exercise; no set of interpretive rules or recommendations can entirely eliminate judicial policy preferences or discretion. Moreover, as I have suggested above, I do not think it would be a good thing to entirely ignore the consequences that an interpretation will effect when construing statutes, even if such a goal were attainable.[368] My goal is much more modest: By identifying specific forms of practical consequences arguments the Court considers legitimate and insisting that the Court connect such consequentialist arguments to independent, external evidence beyond the Justices' own intuitions, I aim to bring greater transparency to the Court's use of practical consequences arguments and perhaps to limit, or check, some of the subjectivity that can accompany such consequences-based arguments.

Embracing the above recommendations should at least decrease the haphazardness and theoretical disorder that characterize the Court's current use of practical consequences in statutory cases. Above all, the key is that the Court should be upfront and transparent about the practical, consequentialist considerations that are influencing its statutory constructions — and, as much as possible, should seek to confirm that any consequences it finds worthy of considering are ones that the statute's text, history, or purpose deem relevant.

CONCLUSION

This Article has sought to shed light on the Court's use of practical consequences as a tool of statutory interpretation. It has argued that the Court's current approach to incorporating consequentialist considerations into its statutory constructions is theoretically incoherent and open-ended. It has outlined a taxonomy that should provide judges, lawyers, and scholars with a more systematic way to think about and distinguish between the many different kinds of consequentialist arguments the Justices invoke. And it has sought to use that taxonomy to identify the most problematic forms of practical consequences arguments — as well as to suggest some ways to cabin, or limit, the dangers associated with each form. In the end, the Article advocates that the

---

[368] *See supra* note 350 and accompanying text.

Court retreat from its loose, unstructured use of practical consequences arguments and instead (1) reframe its reliance on such arguments in canon form; and (2) seek to connect its practical consequences arguments to the text, structure, history, or purpose of the statute at issue. Throughout, the Article's goal has been to illuminate an undertheorized, but important and prevalent, statutory interpretation tool — and to inspire deeper reflection about its appropriate scope and application.