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## Judges' Varied Views on Textualism: The Roberts-Alito Schism and the Similar District Judge Divergence that Undercuts the Widely Assumed Textualism-Ideology Correlation

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TEXTUALISM:  
THE ROBERTS-ALITO SCHISM AND THE  
SIMILAR DISTRICT JUDGE DIVERGENCE  
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CORRELATION**

SCOTT A. MOSS\*

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## INTRODUCTION

Two of the Supreme Court's drier whistleblower cases turned on how to define mundane words, but they are terrific examples of similar judges interpreting text very differently. *Department of Homeland Security v. MacLean*<sup>1</sup> actually turned on a question you would think the Court resolved a century or two ago: how to define "law." Federal employee whistleblowers are unprotected if they disclosed something kept secret "by law"; does forbidden *by law* mean only *by statute*, or also forbidden by other "law" sources, like regulations? *Kellogg Brown & Root v. U.S., ex rel. Carter*,<sup>2</sup> a False Claims Act<sup>3</sup> case alleging military contractor corruption, turned on how to define two similarly prosaic terms: (1) when a lawsuit is "pending" so as to bar a similar later suit; and (2) whether "offenses" triggering a relaxed limitations period include only criminal, or also civil, violations.

Except to lawyers practicing federal employee whistleblower or False Claims Act litigation, the holdings were the least interesting aspects of these cases. The Court ruled for the plaintiff in both: in *MacLean*, holding that federal employee whistleblowers do something forbidden "by law" if they violate only a statute, not a regulation; and in *Kellogg Brown & Root*, holding that civil (rather than criminal) violations are not "offenses" triggering a relaxed limitations period, but also that the only prior similar lawsuits sufficiently "pending" to preclude a later suit are those still actively being litigated (not already-terminated prior suits). But the cases are more broadly informative to litigators with any types of cases, at any level, because they show how even ideologically similar judges can vary widely in their views of textualism, and thus can interpret statutes in very different ways. Lawyers and analysts viewing judges in purely ideological terms can miss such distinctions, and thus can fail to notice important differences in how different judges decide cases.

Part I below details how diametrically opposed views of textualism explain the infrequent but significant disagreements between two otherwise very similar Justices: Chief Justice John Roberts and Justice Samuel Alito. Their

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1. 135 S. Ct. 913 (2015).  
2. 135 S. Ct. 1970 (2015).  
3. 31 U.S.C. §§ 3729–3733 (2012).

opinions in *MacLean* and *Kellogg Brown & Root*, respectively, so illustrate: whereas Justice Alito cited dictionary definitions yet little caselaw in applying pure textualism to statutory questions, Chief Justice Roberts applied purposivism, mixing analysis of the text, of Congress's subjective intentions, and of his own view of whistleblower policy. Their opposing views of textualism left them on the same sides in these cases, but explain their divergence on the recent high-profile Obamacare cases, *King v. Burwell*<sup>4</sup> and *National Federation of Independent Business v. Sebelius*.<sup>5</sup>

Part II details how federal district judges display the same variation as the Justices in their use of textualism. A review of all decisions over twenty-five years by all thirteen judges in one federal district (the District of Colorado) confirms that district judges run the gamut: some decide cases by relying on dictionary definitions every bit as frequently as Justices Alito, Thomas, and Scalia; others rely on dictionaries much less often, and some never do. The variation among the judges is statistically significant, meaning that while random chance could account for some fluctuation in judges' rates of dictionary citations, the most frequent and least frequent dictionary-citers differ from the average by more than random fluctuation could explain. Critically, while the three most textualist Justices are also the most conservative, that pattern does *not* hold among district judges.

Part II details not only the Colorado data, but an identical examination of dictionary reliance by five of the most conservative and five of the most liberal district judges in the nation. Those ten judges' dictionary reliance shows no correlation to their ideologies; those citing dictionaries significantly more than average include some of the most well-known conservative judges and some of the most well-known liberal judges. These findings confirm that while textualism has earned a conservative reputation from the three most conservative Justices being the most textualist, that pattern may be happenstance, because it does not hold in the lower courts. With some conservative judges relying infrequently on dictionaries and some liberal judges relying frequently, a litigator in a lower court errs if she decides whether to make

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4. 135 S. Ct. 2480 (2015).

5. 132 S. Ct. 2566 (2012).

textualist arguments based on the judge's ideology—an important litigation strategy recommendation based on the findings of this Article that the Conclusion details.

## I. ROBERTS V. ALITO: STRIKING SIMILARITIES – EXCEPT AS TO STATUTORY TEXTUALISM

In many ways, Chief Justice John Roberts and Justice Samuel Alito are as similar as judges can be: less than five years apart in age, President George W. Bush appointed both in 2005, and by one recent four-year tally, they vote together an astounding 93% of the time—more often than commonly matched pairs like Justices Antonin Scalia and Clarence Thomas (86%); Justices Ruth Bader Ginsburg and Sonia Sotomayor (90%); and narrowly edged out by only one other pair, Justices Ginsburg and Elena Kagan (94%).<sup>6</sup> Especially through Roberts's and Alito's first several years together on the Court, analysts noted how their "similar voting records" matched more tightly than those of other groups of Justices appointed by the same President.<sup>7</sup>

But despite the similarities between Chief Justice Roberts and Justice Alito, their opinions show very different statutory interpretation methods. They deployed markedly different statutory interpretation methodologies in *Department of*

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6. Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES, June 24, 2014, <http://nyti.ms/To4ocP> [<https://perma.cc/C3QT-7VBR>] (analyzing cases from all 280 signed decisions in argued cases during the four Supreme Court terms spanning fall 2010 to spring 2014).

7. See Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838-2009*, 76 MO. L. REV. 999, 1001 (2011). Chabot & Chabot assert:

[T]he results of presidents' Supreme Court appointments are mixed. Consider the different experiences of George H.W. Bush and his son. Both of George W. Bush's appointees, John Roberts and Samuel Alito, have similar voting records, which are thought to align with executive preferences. The first Bush Administration did not fare as well. While Justice Clarence Thomas votes with Republican appointees at a high rate, David Souter voted with Democratic appointees at just as high a rate.

*Id.* See also Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1091 (2009) ("The evidence on Justice Alito suggests he is similar in minimalism to Chief Justice Roberts.").

*Homeland Security v. MacLean*<sup>8</sup> (a Roberts majority opinion) and *Kellogg Brown & Root v. U.S., ex rel Carter*<sup>9</sup> (an Alito majority opinion), as Section I.A details. Section I.B then elaborates that this methodological difference helps explain the few but high-profile differences between the votes Roberts and Alito cast—most notably, their votes in the “Obamacare” cases, *King v. Burwell*<sup>10</sup> and *National Federation of Independent Business v. Sebelius*.<sup>11</sup> Those methodological differences extend beyond the Supreme Court; as Part II details, federal district judges display the same ideology-defying divergence in statutory interpretation methodology.

A. *Alito’s Textualism in Kellogg Brown & Root versus Roberts’s Purposivism in MacLean*

Justice Alito’s *Kellogg Brown & Root* opinion pounded textualism, and little else. Dictionary definitions were the authority for holding that a statute suspending limitations periods for fraud “offenses” applied only to criminal, not civil, violations. Specifically, when Congress enacted the statutory language in the 1940s, then re-enacted it later, dictionaries defined “offenses” as including only crimes, not civil violations.<sup>12</sup> Hinting that the Supreme Court library’s “dictionaries” section must be quite impressive, Justice Alito cited three editions of *Black’s Law Dictionary* spanning 1933 to 2004, the 1948 edition of *Ballentine’s Law Dictionary*, two editions of Webster’s New International Dictionary (from 1942 and 1976), and one of the *American Heritage Dictionary* (from 1992).<sup>13</sup> The number of dictionaries Justice Alito cited in that section (seven) is more than double the number of cases he cited (three).<sup>14</sup> Justice Alito went beyond dictionaries mainly to note a textual difference between statutory provisions: an earlier version of the statute defined the relevant offenses as “indictable” wrongs, indicating that Congress meant to reference “crimes”; and the statute resides in Title 18 of the United States Code, which repeatedly defines only crimes as

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8. 135 S. Ct. 913 (2015).

9. 135 S. Ct. 1970 (2015).

10. 135 S. Ct. 2480 (2015).

11. 132 S. Ct. 2566 (2012).

12. 135 S. Ct. at 1976.

13. *Id.*

14. *Id.*

“offenses.”<sup>15</sup> Justice Alito’s analysis of the other statutory term, “pending,” had a similar ratio of dictionaries cited (two) to cases cited (one)—only *Marbury v. Madison*, and not for any point of law, but solely as an example of how a long-ago-ended case is no longer “pending”:

[A]s petitioners see things, the first-filed action remains “pending” even after it has been dismissed, and it forever bars any subsequent related action. This interpretation does not comport with any known usage of the term “pending.” Under this interpretation, *Marbury v. Madison* is still “pending.” So is the trial of Socrates.<sup>16</sup>

There is nothing inherently wrong with Justice Alito’s heavy reliance on dictionaries first, inter-statutory contrasts second, and caselaw and policy considerations either tied for a distant third or excluded entirely. His analysis is detailed, careful, and persuasive, and this Article, in analyzing how and when judges engage in textualism, does not engage in the longstanding debate over the pros and cons of textualism. But although Chief Justice Roberts joined Justice Alito’s majority opinion in *Kellogg Brown & Root*, Roberts’s own analyses of statutes are very different, as *MacLean* shows.

Roberts is not overtly hostile to textualism; one of his points in *MacLean* was a comparison of the texts of different statutory provisions:

Throughout Section 2302, Congress repeatedly used the phrase “law, rule, or regulation.” . . . In contrast, Congress did not use the phrase “law, rule, or regulation” in the statutory language at issue here; it used the word “law” . . . . Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.<sup>17</sup>

But to Roberts, textualism is just one among several methods of analysis, no more privileged than policy

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15. *Id.* at 1977.

16. *Id.* at 1979 (citation omitted) (holding that “an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed”).

17. *Department of Homeland Security v. Maclean*, 135 S. Ct. 913, 919 (2015).

considerations. His *MacLean* opinion expressly relied upon his view of which interpretation most likely reflected Congress's subjective intent and his own view of the statutory purpose:

If "law" included agency rules and regulations, then an agency could insulate itself . . . merely by promulgating a regulation that "specifically prohibited" whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word "law."<sup>18</sup>

It is hard to see Justices Alito, Scalia, or Thomas writing anything like the above passage relying on what Congress "[l]ikely . . . meant" and finding relevant that "Congress passed the . . . statute because" of certain policy motivations about "trust." Instead, the Court's textualists "refuse to consider the debating history of statutes as relevant context."<sup>19</sup> The preceding quotation addressed Justices Scalia and Thomas in 1998, but the past decade shows that Justice Alito has joined that Scalia/Thomas textualist camp, while Chief Justice Roberts definitely has not.

Instead, Chief Justice Roberts fits within the category of "pragmatists and purposivists, who are concerned with enabling judges to adapt old statutes to new problems and who believe [in] the process of legal reasoning from text, legislative purpose, and precedent" alike.<sup>20</sup> In so defining that methodology, statutory interpretation scholar William Eskridge considers "Justice Breyer, a liberal[,] . . . the Court's best representative of a pragmatic or purposivist approach," along with Justice Ginsburg.<sup>21</sup> Of course, judges' views of textualism fall along a spectrum: on one occasion, Justice Breyer opined against Roberts's use of a dictionary to analyze a statute;<sup>22</sup> on another, Justice Thomas detailed a "primary

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18. *Id.* at 920.

19. William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302 (1998).

20. William N. Eskridge, Jr., *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia and Bryan A. Garner, 113 COLUM. L. REV. 531, 533 (2013).

21. *Id.* at 550–51.

22. Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 612 (2011) (Breyer, J., dissenting) (criticizing Roberts majority opinion: "neither dictionary definitions nor the use of the word 'license' in an unrelated statute can



purpose” of the statute that “support[ed] the inclusive interpretation” his opinion adopted.<sup>23</sup> But the existence of grey area as to Justices’ use of textualism does not alter the overall picture that Roberts is closer methodologically to Breyer/Ginsburg “purposivism” than Scalia/Thomas “textualism,” as Eskridge defines each: “methodology that focuses on statutory text and considers committee reports generated by the legislative process that produced the statute (Breyer and Ginsburg’s purposivism) . . . [rather] than a methodology that focuses on statutory text and considers ‘valid canons’ created by judges (Scalia and Thomas’s new textualism).”<sup>24</sup>

Does this Alito-Roberts distinction lack a difference, given their strong pattern of voting together? To be sure, their differing methodologies do not prevent them from voting together, and they even joined each other’s opinions in *MacLean* and *Kellogg Brown & Root*. But their methodologies explain their differing views on the Patient Protection and Affordable Care Act (PPACA), a.k.a. Obamacare.<sup>25</sup>

*B. Alito’s Textualism versus Roberts’s Purposivism in the Health Care Cases: NFIB v. Sebelius and King v. Burwell*

In adjudicating the PPACA, Chief Justice Roberts first parted ways with Justice Alito and the other textualists when he wrote the majority opinion upholding the PPACA against constitutional challenge in *National Federation of Independent Business v. Sebelius (NFIB)*.<sup>26</sup> *NFIB* drew the most attention for its two-part constitutional ruling: first, that Congress’s power “To regulate Commerce”<sup>27</sup> does not allow mandating a

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demonstrate what scope Congress intended the word ‘licensing’ to have as it used that word in this federal statute.”) (emphasis omitted).

23. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (majority opinion by Thomas, J.) (holding that because a retaliation statute’s protection of “employees” was “ambiguous as to whether it includes former employees,” the statute should be deemed to include them for “consistency with a primary purpose of antiretaliation provisions: . . . access to statutory remedial mechanisms. . . . [I]t would be destructive of this purpose . . . for an employer to be able to retaliate with impunity[,] . . . [which] support[s] the inclusive interpretation . . .”).

24. Eskridge, *Reading Law*, *supra* note 20, at 551.

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

26. 132 S. Ct. 2566 (2012).

27. U.S. CONST. art. I, § 8, cl. 3.

purchase (there, of health insurance); but, second, that Congress's power "To lay and collect Taxes"<sup>28</sup> allows imposing a tax penalty for not making such a purchase. For illustrating the Court's varied views on textualism, however, Chief Justice Roberts's varied treatment of the word "tax" is more notable.

On the one hand, Chief Justice Roberts held that the tax penalty for not purchasing insurance qualified as a "tax" sufficiently to be an authorized exercise of the power: "That constitutional question was not controlled by Congress's choice of label. We have . . . held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax," Roberts explained, expressly declaring a "functional approach" instead of the opposing purely textual approach that a payment is a "tax" only if the statutory text says "tax."<sup>29</sup> On the other hand, he held that the same penalty was not a "tax" for purposes of the Anti-Injunction Act's rule that "no suit for the purpose of restraining the assessment or collection of *any tax* shall be maintained in any court,"<sup>30</sup> because "taxes can ordinarily be challenged only after they are paid, by suing for a refund."<sup>31</sup> In response to the argument that if the penalty is constitutionally authorized as a "tax," then it must be a "tax" protected from litigation by the Anti-Injunction Act, Chief Justice Roberts began with a concession: "It is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other."<sup>32</sup> But he elaborated that, for *statutory* purposes, Congress may use words however it intends. "The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress," he held, yielding the conclusion that "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant."<sup>33</sup> In short, the word "tax" has different meanings under the constitutional tax power and under the Anti-Injunction Act because, Chief Justice Roberts explained, the purpose of the former is a broad grant of legislative power while the latter is a narrow exception to

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28. U.S. CONST. art. I, § 8, cl. 1.

29. 132 S. Ct. at 2594–95.

30. 26 U.S.C. § 7421(a) (2012) (emphasis added).

31. 132 S. Ct. at 2582.

32. *Id.* at 2583.

33. *Id.*

judicial power. Under this view, the same word with the same dictionary definition can have different meanings, based on the purpose of the clause containing the word.

In his view, Chief Justice Roberts did not reject textualism entirely—he just respected Congress’s decision to use the term “penalty” to distinguish the charge for purchasing insurance from other “tax” statutes: “the best evidence of Congress’s intent is the statutory text.”<sup>34</sup> Yet Roberts’s view of the “text” as the “best evidence” was far from the Alito/Thomas/Scalia brand of textualism. He defined the same word, “tax,” differently based on statutory context and purposes—to the dismay of Justice Scalia, whose dissent Justices Alito and Thomas joined:

What the Government would have us believe . . . is that the very same textual indications that show this is *not a tax* under the Anti-Injunction Act show that it *is a tax* under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.<sup>35</sup>

Even more presently relevant than *NFIB* was when Chief Justice Roberts parted ways with Justice Alito as to the PPACA in a second case, but this time as to statutory interpretation, in *King v. Burwell*.<sup>36</sup> In *King*, Chief Justice Roberts wrote the majority opinion saving the health law from a drafting glitch that arguably disallowed federal subsidies in various states.<sup>37</sup> The statute providing subsidies references individuals in “an Exchange established by the *State*,” rather than by the federal government, so Justices Scalia, Thomas, and Alito deemed it “quite absurd” for the federal government to argue “that when the . . . Act says ‘Exchange established by the *State*’ it means ‘Exchange established by the *State or the Federal Government*.’”<sup>38</sup> Their logic was strong under their

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34. *Id.*

35. *Id.* at 2656 (Scalia, J., dissenting) (emphases added).

36. 135 S. Ct. 2480 (2015).

37. *Id.* at 2487–88 (so holding, after framing the issue as follows: “The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not ‘an Exchange established by the State’ . . . . The Government responds that . . . the phrase ‘an Exchange established by the State’ . . . should be read to include Federal Exchanges.”).

38. *Id.* at 2496 (Scalia, J., dissenting) (emphasis added).

purely textual reading; Chief Justice Roberts's majority opinion upheld nationwide subsidies, with logic that was no less strong but that instead relied heavily on perceived statutory purpose:

Given that the text is ambiguous, we must turn to the broader structure . . . "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. "We cannot interpret federal statutes to negate their own stated purposes."<sup>39</sup>

Explaining the Roberts votes in *NFIB* and *King* is an active parlor game. Some argue that his role as Chief Justice made him fear that striking down "Obamacare" would draft the Court into the nation's most charged political controversy.<sup>40</sup> The aphorism that hard cases make bad law is unclear about what makes cases "hard"; similarly ambiguous is the less judgmental aphorism: "Great cases, like hard cases, make bad law."<sup>41</sup> But even if not all "hard" or "great" cases make bad law, the Court essentially conceded that *highly political* cases yield *idiosyncratic* law when *Bush v. Gore* famously warned against applying its holding as precedent: "Our consideration is limited to the present circumstances"<sup>42</sup>—a pronouncement derided as

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39. *Id.* at 2492–93 (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973), respectively).

40. See, e.g., Robert J. Pushaw Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 1997 (2013) (recounting arguments that Roberts "sought to preserve the Court's image as an institution governed by law rather than politics, as the public would perceive that the outcome was contrary to his political views and showed . . . deference to the elected branches (and to voters, who could decide the fate of Obamacare . . .)"); Gregory P. Magarian, *Chief Justice Roberts's Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 NW. U. L. REV. COLLOQUY 15, 16 (2013) ("I share the prevalent assumption that the Chief Justice voted to uphold the individual mandate out of a deeply held concern for the Court's institutional reputation.").

41. Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 115 (2001) (quoting *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1904)) (Holmes, J., dissenting)).

42. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

“not how the legal system operates [because] [d]ecisions do create precedents,”<sup>43</sup> or even as “hypocrisy” or “rank partisanship.”<sup>44</sup> If, as some argue, *Bush v. Gore* reflected a Court adjudicating based on partisanship or a perceived need to end a controversy, then perhaps *NFIB* and *King* show the same. Or perhaps they show the opposite: a Court wary of upsetting the political apple cart again, as it did in *Bush v. Gore*.

A competing, more accusatory observation is that Chief Justice Roberts’s votes “for” the PPACA simply showed he was not the conservative many thought. That diagnosis is embedded in the many writings by commentators<sup>45</sup> and litigators<sup>46</sup> claiming surprise at Roberts’s votes with the majorities upholding the health care law. Roberts’s second such

43. Erwin Chemerinsky, *How Should We Think About Bush v. Gore*, 34 *LOY. U. L.J.* 1, 17 (2002).

44. Richard A. Posner, *The 2000 Presidential Election: A Statistical and Legal Analysis*, 12 *SUP. CT. ECON. REV.* 1, 37–38 (2004). Posner asserts:

[The] two most conservative Justices, Scalia and Thomas[,] . . . had gone out of their way . . . to urge a concept of adjudication that is inconsistent with the majority opinion that they joined . . . . Scalia’s statement [was] that when he writes a majority opinion, he limits his freedom of action: “If the next case should have such different facts that my political or policy preferences regarding the outcomes are quite the opposite, I will be unable to indulge those preferences” . . . . How does this square with the statement . . . “our consideration is limited to the present circumstances . . .”? It does not, thus inviting charges of hypocrisy, or worse—the charge of rank partisanship . . . .

*Id.* (citations omitted).

45. See, e.g., Brian G. Gilmore, *Brown v. Board of Education and National Federation of Independent Business v. Sebelius: A Comparative Analysis of Social Change*, 36 *U. ARK. LITTLE ROCK L. REV.* 621, 622–23 (2014) (“It was a surprise decision by Justice Roberts, as the conservative jurist voted with . . . four Justices typically associated with more liberal jurisprudence. The recognized conservatives . . . were left to dissent . . . when Roberts, a Justice with solid conservative credentials, voted in favor of the law.”); Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 *VAL. U. L. REV.* 883, 884 (2013) (calling Roberts’ *Sebelius* vote a “significant surprise”).

46. See, e.g., Alberto R. Gonzales & Donald B. Stuart, *Two Years Later and Counting: The Implications of the Supreme Court’s Taxing Power Decision on the Goals of the Affordable Care Act*, 17 *J. HEALTH CARE L. & POL’Y* 219, 261 n.350 (2014) (former Bush administration Attorney General and a business litigator “discussing the conservative backlash and criticisms of Chief Justice Roberts in the wake of his ‘surprise majority opinion’”); Clint Bolick, *Judicial Control: Up for Grabs*, *ORANGE COUNTY LAW.*, Aug. 2012, at 14 (conservative litigator noting that “conservatives are surprised and disappointed with . . . Roberts’s vote to uphold Obamacare”).

vote (*Burwell*) was a bit less of a surprise after his first such vote (*NFIB*), but it was no less disappointing to conservatives.<sup>47</sup>

But Roberts's rulings may not be a sign that he lacks conservative values, or that he placed his role as Chief Justice over such values. His refusal to strike down a major federal law on textualist logic would not have been as surprising if more attention were paid to certain of his prior statements on legal interpretation.

Roberts famously said little of substance at his 2005 Senate confirmation hearings,<sup>48</sup> but it went surprisingly little-noticed in 2005 that Roberts had said quite a bit more at his 2003 Senate confirmation hearings for his Court of Appeals seat. Pressed about methods of interpretation as an under-the-radar appellate nominee, Roberts forthcomingly elaborated an eclectic view of interpretation deeply at odds with the laser-like textual focus of a Scalia, Thomas, or Alito. In interpreting the Seventh Amendment jury trial right, a "very historical approach" is appropriate, Roberts said, consistent with the Scalia brand of textualism infused with historical research only

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47. See, e.g., Mark Walsh, *Supreme Restraint: John Roberts Marks 10 Years As Chief Justice by Taking the Long View*, A.B.A. J., Oct. 1, 2015, at 54, [http://www.abajournal.com/magazine/article/john\\_roberts\\_marks\\_10\\_years\\_as\\_chief\\_justice\\_by\\_taking\\_the\\_long\\_view](http://www.abajournal.com/magazine/article/john_roberts_marks_10_years_as_chief_justice_by_taking_the_long_view) (last visited Jul. 16, 2016) [<https://perma.cc/RC99-CXJY>] ("As if scripted by a screenwriter, Roberts wrote the majority opinion for the court in *King v. Burwell*, which again sided with President Barack Obama's administration in upholding the president's signature health care law. Despite Roberts's track record as a reliable conservative on many issues, the ACA decision reinforced doubts among many on the political right about his commitment to conservative ideals."); Ilya Shapiro, *Introduction: Cato Supreme Court Review*, 2012 CATO SUP. CT. REV. 1, 5 ("The sad thing about this entire episode is that the Chief Justice . . . damaged his own reputation by making this move after months of warnings . . . that striking down the law would be 'conservative judicial activism' . . . Had the Court struck down Obamacare, it would have 'simply' been a very high-profile legal ruling . . . Instead, we have a political or otherwise strategic decision dressed up in legal robes . . . Roberts, in refraining from making that hard balls-and-strikes call . . . , has shown why we don't want our judges playing politics.").

48. See, e.g., Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1, 2 (2006) (noting, but partly rejecting, the prevailing view that in "[Judiciary] Committee[] hearings on . . . Roberts' nomination for Chief Justice[,] . . . the coverage . . . has been predominantly negative . . . Committee members have been derided as timid and inept in their questioning, while [Roberts] was criticized as evasive, avoiding any clear picture of what his approach to major issues would be.").

into the original meanings of the words in the text.<sup>49</sup> But Roberts then espoused other, very different interpretive views: for the Fourth Amendment search and seizure provisions, “you have to look beyond the text” because it is “difficult to say just based on the text what’s unreasonable and what’s not”;<sup>50</sup> and for the Eleventh Amendment, “strict adherence to the text doesn’t give you what the Supreme Court says are the right answers.”<sup>51</sup>

Nothing in Roberts’s history hints that he was less Republican or conservative than Alito. But his 2003 comments hinted at what we saw in the health care cases a decade later: Roberts is not the textualist Alito is; and even if they vote together in over 90% of cases, their differences in the other nearly 10% can matter a great deal. Thus, the Roberts-Alito split traces to their divergent views on textualism, not to simple ideology. As detailed below, the same divergence as to textualism appears among federal district judges.

## II. DISTRICT COURT JUDGES’ SIMILARLY VARIED VIEWS ON TEXTUALISM: STRIKING DIFFERENCES IN USE OF DICTIONARIES TO DECIDE THE MEANING OF TEXT

This Part documents that federal district judges display methodological differences similar to the Roberts-Alito divergence as to dictionary-driven textualism. While dictionaries might seem too ubiquitous a tool of legal analysis to vary among judges, Section II.A details, based on analysis of a sample of judicial opinions, how district judges do vary greatly in the frequency and depth of their reliance upon dictionary definitions to determine the meanings of disputed texts. Section II.B then details, based on an analysis of selected conservative and liberal district judges, how reliance upon

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49. *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of John G. Roberts, Nominee to be Circuit Judge for the District of Columbia Circuit) (“We take a very historical approach to deciding whether you have a right to a jury trial because of the way the Seventh Amendment is worded.”).

50. *Id.* (“Unreasonable searches and seizures, that’s a little more difficult to say just based on the text I know what’s unreasonable and what’s not. You have to look beyond the text in interpreting that.”).

51. *Id.* (“[W]hen you get to the Eleventh Amendment, the one thing we know from the Supreme Court’s decision is that strict adherence to a text doesn’t give you what the Supreme Court says are the right answers. You have to look at the historical context a little more . . .”).

dictionary definitions does not appear to correlate closely with judicial ideology—contrary to extensive conventional wisdom that dictionary-driven textualism is a form of conservative judging that liberal jurists predominantly reject.

A. *Similar Textualism Variation Among District Judges: Twenty-Five Years of Data on Dictionary Reliance by One District's Judges*

As the 93% Roberts-Alito voting overlap shows, Supreme Court coalition-building tends to mute methodological differences. Justices do not always dissent or concur separately when agreeing on conclusions while disagreeing on analysis; Roberts joined Alito's dictionary-driven opinion in *Kellogg Brown & Root* while Alito joined Roberts's policy-driven opinion in *MacLean*. But in the lower courts, when only one, two, or three judges determine the decision, judges' individual methods of decision making can be far more dispositive.

Do federal district judges show differences, like that between Roberts and Alito, in their affinity for textualist analysis? The answer is a clear "yes." For each federal district judge in the United States District Court for the District of Colorado in the past twenty-five years,<sup>52</sup> I tallied how many decisions cited any of the three major mass-market English dictionaries<sup>53</sup> with a search for opinions by the particular judge

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52. While most of the included district judges were not on the bench for all twenty-five years from 1991 to 2015, I excluded only the two judges whose tenure included too small a portion of the twenty-five-year period to feature enough opinions to study: Judge Arraj had just two opinions, and Judge Carrigan had only 106 opinions, in the early 1990s. Given that dictionary usage ranges from roughly 0–3% for all district judges, roughly a hundred opinions or fewer seemed too small a sample to include in the study.

53. I considered any Webster's, Oxford, or American Heritage dictionary. Those are the three best-selling dictionaries on Amazon, but in reality, Webster's has the overwhelming majority of the market share of judicial citations: in the twenty-five years of Colorado district opinions reviewed, there were 126 citations to Webster's, but barely one-quarter as many (33) to the Oxford English Dictionary and barely one-fifth as many (26) to the American Heritage Dictionary. I did not include *Black's Law Dictionary*, because it is such a different resource from lay dictionaries; *Black's* defines mainly legal terms, so courts often cite it for specialized legal terms, not the ordinary English terms for which courts might cite Webster's or other mass-market dictionaries. See, e.g., *McLean v. Air Methods Corp.*, No. 1:12-CV-241-JGM, 2014 WL 2327045, at \*2 (D. Vt. May 29, 2014) (using *Black's* for definition of "proximate cause"); *Davidson v. Golden Living Ctr.—Mountainview*, No. 4:09-CV-94, 2010 WL 3155989, at \*2 (E.D. Tenn. Aug. 10, 2010) (using *Black's* for definition of "negligence per se").



that cited any of those dictionaries.<sup>54</sup> I then tallied how many opinions, total, each judge wrote, to allow a calculation of the percentage of each district judge's opinions that cited one of those major dictionaries. This is a methodology others have used to analyze the Supreme Court and various federal circuit courts,<sup>55</sup> but not district judges—an unfortunate example of the academic inclination to study appellate rather than district courts. For litigators, studies of judges' methodologies arguably are more useful as to district rather than appellate judges. District judges sit individually, not in panels, so a litigator who knows the methodology of his or her district judge knows exactly how the court's unitary decision-maker thinks. In contrast, an appellate litigator at most can learn the potentially differing methodologies of varied appellate panel members, without knowing which judge's methodology might prevail in a particular case.

Table 1 contains the findings on dictionary citation by district judges in the District of Colorado from 1991 through 2015; Tables 2 and 3, in Section II.B below, contain the findings as to selected other judges in different federal judicial districts. The columns show the following: (1) the name of each judge; (2) the judge's number of opinions citing dictionaries; (3) the judge's total number of opinions; (4) the judge's percentage of opinions citing dictionaries (i.e., column 2 divided by column 3); and (5) the z-score of the difference between that judge's dictionary-citing rate and the average rate of all judges examined. The z-score is a measure of how likely a judge's above- or below-average dictionary-citing rate is a real

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54. A separate search was conducted for each judge in the Westlaw database for federal district court decisions ("DCT"): *JU*( [last name of judge] ) & *DA*(after 12/31/1990) & *DA*(before 1/1/2016) & ((Webster! "American Heritage" Oxford) /6 Dictionary). I then eliminated any opinions from a different judge who might have had the same last name.

55. *E.g.*, John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 *YALE L.J.* 484 (2014) (analyzing "a comprehensive dataset covering dictionary usage in every Supreme Court and circuit court opinion from 1950 to 2010"); Joseph Scott Miller & James A. Hilsenteger, *The Proven Key: Roles and Rules for Dictionaries at the Patent Office and the Courts*, 54 *AM. U. L. REV.* 829, 832–33 (2005) (noting initially that "[o]ver the past twenty years, the Supreme Court has increasingly relied on dictionaries to explain its constructions of legal text," and proceeding to detail a study documenting "that the U.S. Court of Appeals for the Federal Circuit . . . which hears all appeals arising under the U.S. patent laws, has also turned increasingly to dictionaries when explaining its constructions of disputed terms in patent claims").

tendency or the result of random chance (e.g., perhaps the judge randomly had more or fewer cases implicating word definitions). A score of 2.0 or more (or under -2.0), for example, means the judge's dictionary-citing rate differed from the average (here, 1.47%) greatly enough that there is only an approximately 5% probability that difference resulted from random chance; a score of 1.65 (or -1.65) means only a roughly 10% probability that difference traces to random chance.<sup>56</sup>

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56. These statistical significance calculations are premised on assumptions that real-world social science data sets rarely fulfill perfectly, such as a bell-curve-shaped normal distribution of the variable (here, dictionary-citing rate). That said, the distribution of judges' dictionary-citing rates (those in Tables 1-3 combined) does appear somewhat bell-curve-like, with a peak between roughly 1.0 and 1.6, somewhat fewer in the 0.5-1.0 and 1.6-2.2 range, and scattered points near zero and above 3.0.

<b>Table 1:</b> Opinions by Federal District Judges in the District of Colorado Citing Major Dictionaries, 1991–2015				
<b>Judge</b>	<b># Dictionary- Citing Opinions</b>	<b>Total # Opinions</b>	<b>% Dictionary- Citing Opinions</b>	<b>Z-Score</b>
<b>Edward W. Nottingham</b>	18	495	3.64%	4.02
<b>John L. Kane</b>	15	936	1.60%	0.34
<b>Marcia S. Krieger</b>	25	1300	1.54%	0.22
<b>Christine Arguello</b>	19	1333	1.43%	-0.11
<b>Richard Matsch</b>	8	595	1.34%	-0.26
<b>Philip A. Brimmer</b>	22	1854	1.19%	-0.99
<b>Raymond P. Moore</b>	3	303	0.99%	-0.69
<b>Lewis T. Babcock</b>	20	2317	0.86%	-2.43
<b>Wiley Y. Daniel</b>	14	1688	0.83%	-2.18
<b>Walker Miller</b>	6	763	0.79%	-1.56
<b>Robert E. Blackburn</b>	11	1984	0.55%	-3.40
<b>William J. Martinez</b>	4	775	0.52%	-2.19
<b>R. Brooke Jackson</b>	1	566	0.18%	-2.55

As with any quantitative analysis, there are caveats about what this one might omit. It does not consider other dictionaries, for example. But given that Webster's is cited four to five times as often as the other leading dictionaries,<sup>57</sup> considering dictionaries beyond the top several is unlikely to

57. See *supra* note 53.

make a material difference, much less help low-dictionary-usage judges catch up to those using dictionaries two to ten times as often. The data also fails to consider that some senior judges may have fewer criminal cases, which conceivably could make their caseloads different. But it is not clear whether criminal and civil cases meaningfully differ in how often they implicate dictionary definitions—and random assignment still predominates enough that caseload differences are unlikely to explain why some judges cite dictionaries so much more than others.

Despite any caveats, it is hard to ignore the simple fact: some judges, on the Supreme Court and in this district alike, find dictionary-based textual reasoning more persuasive than others—a fact lawyers should (and likely do) know. Litigators with cases before Judge Nottingham, for example, should (and likely would) know to make textual arguments that might not be as strategic to make (or to focus on) with judges who almost never cite dictionaries, such as Judges Daniel, Jackson, Martinez, or Moore.

And the anecdotes confirm the data: the ways in which the judges cite dictionaries show how differently they view dictionaries as persuasive textualist authority. The judges who rarely cite dictionaries tend to cite them to respond to parties' own dictionary-based arguments or as mere secondary supporting authority for holdings they support mainly with caselaw, drawing more primary support from caselaw and other legal authorities. The one time Judge Jackson cited a dictionary, it was because one of the parties made "reference to a dictionary definition" as "extrinsic evidence" supporting its patent interpretation.<sup>58</sup> Of Judge Martinez's four decisions citing dictionaries, the most detailed was the one below, which relied primarily on prior caselaw interpreting the statute, citing only dictionaries submitted in court filings (as shown by their "ECF" docket citations), and only as a "see also" following the caselaw citations:

[A]n alien who commits any offense . . . is subject to mandatory detention "when the alien is released." 8 U.S.C. § 1226(c)(1). Mr. Beltran argues that . . . does not apply to

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58. *Cellport Sys., Inc. v. Peiker Acoustic GmbH & Co.*, 847 F. Supp. 2d 1293, 1304 (D. Colo. 2012).

him because immigration officials detained him several years after he was released . . . . The Court finds that the plain meaning of “when” . . . imposes a temporal limitation on when mandatory detention should apply and does not authorize . . . detain[ing] . . . any time after release . . . . *Castillo-Hernandez* . . . (citing *Castaneda v. Souza* . . .); AMERICAN HERITAGE DICTIONARY . . . (defining “when” as “at the time that” . . .) (ECF No. 18-5 . . .); THE OXFORD ENGLISH DICTIONARY . . . (defining “when” as “in reference to a definite actual occurrence or fact . . . at the time that, on the occasion that”) (ECF No. 18-5 . . .). Mr. Beltran’s detention . . . five years after his release . . . does not satisfy the statutory directive of detention “when . . . released.” The Court rejects Respondents’ efforts to read an ambiguity into the statute for the reasons discussed by . . . *Castillo-Hernandez* and . . . *Baquera* . . . . [T]he statute requires . . . officials to detain . . . at the time the alien is released . . . for mandatory detention under § 1226(c) to apply.<sup>59</sup>

The judges rarely citing dictionaries are not at all like Justice Alito, who in *Kellogg Brown & Root* cited dictionaries more often, and as more primary authority, than caselaw.<sup>60</sup> Paralleling Justice Alito, Judge Nottingham relied almost entirely on legal and lay dictionaries to decide the key issue: does water damage caused by a vandalized sprinkler qualify as damage “caused by vandalism” that the insurer need not cover? To Judge Nottingham, the answer depended less on contract law or insurance law than on dictionary definitions of “vandalism”:

Plaintiffs assert that . . . dictionary consultation is appropriate to understand the term . . . . The court agrees . . . . Plaintiffs cite the widely-recognized Black’s law dictionary and Merriam-Webster’s Collegiate Dictionary to establish that “vandalism” is . . . either “willful or ignorant destruction of public or private property” or “willful or malicious destruction or defacement of public or private property.” . . . Plaintiffs then turn to the [insurance] report,

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59. *Beltran v. Holder*, No. 13-CV-03067-WJM, 2014 WL 1491250, at \*4–6 (D. Colo. Jan. 21, 2014) (citations omitted), *vacated in part*, 2014 WL 321369 (D. Colo. Jan. 29, 2014).

60. *See supra* note 14 and accompanying text.

which indicates that “the cause of the failure of the subject sprinkler head was from deliberate tampering . . . .”

Any variance between “vandalism” and “deliberate tampering” is . . . without a difference. “Deliberate” is defined as “characterized by or resulting from slow, careful, thorough calculation and consideration of effects or consequences: not hasty, rash, or thoughtless.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 596. . . . “To tamper” is defined as “to interfere so as to weaken or change for the worse.” *Id.* at 2336. . . . How slowly and carefully calculated interference so as to weaken or worsen could be characterized as anything other than purposeful destruction escapes this court . . . . Given the facts as presented, the court finds that Plaintiffs have failed to raise an issue of fact concerning the applicability of the vandalism limitation.<sup>61</sup>

In sum, judges citing dictionaries *less often* (e.g., Martinez and Jackson) typically also rely on them *less deeply* than judges (e.g., Nottingham and Alito) who cite dictionaries more often and as more authoritative sources.

### *B. Textualism’s Non-Correlation with Ideology: The Court’s Mixed-Ideology Caselaw, and Data on Conservative and Liberal District Judges*

The most conservative three Justices (Scalia, Thomas, and Alito) cite dictionaries far more than other current or prior justices,<sup>62</sup> giving their “textualist interpretation” of statutes a reputation as the “conservative perspective on statutory interpretation.”<sup>63</sup> Textualism is inherently narrowing, making

61. Saiz v. Charter Oak Fire Ins. Co., No. 06 CV 01144-EWN-BNB, 2007 WL 2701398, at \*6 (D. Colo. Sept. 12, 2007), *aff’d*, 299 F. App’x 836 (10th Cir. 2008).

62. Calhoun, *supra* note 55, at 490 (“[T]extualist judges like Justices Scalia and Thomas do in fact cite dictionaries in a higher percentage of their opinions than non-textualist judges like Justices Ginsburg and Breyer.”).

63. Ramona L. Paetzold, *Supreme Court’s 2005–2006 Term Employment Law Cases: Do New Justices Imply New Directions?*, 10 EMP. RTS. & EMP. POL’Y J. 303, 348–49 (2006). Though beyond the scope of this Article, it bears mention that some argue that notionally “textualist” Justices implicitly rely on non-textual values and policy arguments. See, e.g., Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 25–26 (1994) (so noting as to constitutional textualism, detailing how, despite

it a conservative way for judges to read the remedial statutes they frequently interpret, some argue: “Barring judges from looking at the history of a statute and confining them strictly to its text means that the statute will only apply in those instances that Congress explicitly passes upon. The scope of governmental regulation is thereby constricted.”<sup>64</sup> More bluntly put, “textualism arguably makes it more difficult for Congress to achieve its underlying objectives because courts have a tendency to interpret the law in a relatively stingy fashion.”<sup>65</sup> Or conservative judges may simply dislike the liberal slant of the legislative history of most modern remedial statutes—a suggested explanation for conservative judges’ “ungenerous approach to statutes” by William Eskridge: “the debating history of federal statutes, most of which were enacted by Democratic Congresses[,] . . . [is] slanted . . . in a more regulatory-state direction.”<sup>66</sup>

But the broader Supreme Court jurisprudence, and this Article’s district judge data, show that it is overly simplistic to say that textualism is “conservative,” or to declare that “[s]tatutory textualism has adherents . . . throughout the federal judiciary, and . . . almost all of them are politically conservative.”<sup>67</sup> As statutory interpretation scholar Margaret

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Justices Hugo Black’s and Antonin Scalia’s “intense and persistent proclamations of fidelity to . . . text . . . , neither Justice has avoided basing his interpretation . . . on values not grounded in the text. Both have relied heavily on their personal and political judgments regarding the role of the federal judiciary . . . .”). This Article takes no side as to such arguments that valueless textualism is impossible, or at least more rare than textualists acknowledge; whether or not that argument is true does not affect this Article’s more empirical point that textualism, as currently practiced, is not as uniformly conservative as commonly assumed.

64. Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 68 (1991).

65. Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 183 n.178 (2009); see also Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens’s Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769, 786 (2012) (“[I]n the great majority of cases in which the challenge is to choose among plausible alternative interpretations of nondefinitive statutory words, . . . the practical effect of the rigidities of contemporary conservatives’ textualist doctrine is to deny judges the most commonsense options for resolving ambiguities—thoughtful analysis of reliable indicia of purpose and legislative history materials generally.”).

66. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

67. Paul Killebrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1895 (2007); see also Caleb Nelson, *What Is Textualism?*, 91 VA. L.

Lemos notes, “textualism is not inherently conservative in design, nor does it reliably produce conservative results.”<sup>68</sup> But while “the theory of textualism is not conservative, the broader practice of textualism surely is”—at least on the modern Court. Lemos details:

[C]onservatives embraced textualism in statutory interpretation (together with originalism in constitutional interpretation) as the antidotes to the “judicial activism” of the Warren and Burger Courts. Textualism and originalism were united in their appeal to judicial restraint and their challenge to the legal status quo. Adopting the language of methodology therefore gave . . . [a] means of critiquing existing law and pushing for legal change . . . . [I]t became clear that the “new textualism” was a force for moving the law to the right . . . .<sup>69</sup>

Because the ideological implications of textualism are nuanced, as Lemos notes, the modern Court’s brand of statutory textualism has generated a number of conservative outcomes, but also more ideologically mixed outcomes than is often acknowledged. To be sure, statutory textualism can yield conservative decisions by construing remedial statutes strictly: “Our inquiry . . . must focus on the text,” Justice Thomas wrote for the majority in *Gross v. FBL Financial Services, Inc.*,<sup>70</sup> citing multiple dictionaries contemporaneous with relevant statutory enactments to impose a stricter causation standard under the age discrimination statute (the ADEA) than under the race, gender, and religious discrimination statute (Title

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REV. 347, 373 (2005) (“Some of the differences may simply boil down to politics; today’s textualists tend to be politically conservative . . . .”); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 829 (2008) (making the argument in more nuanced form: “accepting that some judges select interpretive methods at least partly by ideology[,] a plausible theory explaining the apparent determinacy of textualism is that textualist judges, who are on average more conservative, have systematically disagreed more often with agency interpretations, and have therefore found a plain meaning in order to substitute their more conservative understanding of the statute”).

68. Margaret H. Lemos, *The Politics of Statutory Interpretation: Reading Law: The Interpretation of Legal Texts*. By Antonin Scalia and Bryan A. Garner, 89 NOTRE DAME L. REV. 849, 853 (2013).

69. *Id.*

70. 557 U.S. 167, 174 (2009).



VII).<sup>71</sup>

Yet textualism has yielded outcomes in favor of civil rights plaintiffs too: “Our precedents make clear that the starting point for our analysis is the statutory text,” Justice Thomas also wrote for a unanimous Court in *Desert Palace, Inc. v. Costa*,<sup>72</sup> imposing a less strict Title VII causation standard because of one word in the statutory causation language:

[If] words of the statute are unambiguous, the judicial inquiry is complete . . . . [Title VII] unambiguously states that a plaintiff need only “demonstrat[e]” that an employer used a forbidden consideration . . . . On its face, the statute does not . . . require[] . . . a heightened showing through direct evidence.<sup>73</sup>

Justice Scalia expressly detailed a key reason that textualism can yield broad interpretations of remedial statutes in *Oncale v. Sundowner Offshore Services, Inc.*<sup>74</sup>: that sometimes, lawyers and judges can conclude that the text goes further than a decades-ago Congress had intended. In *Oncale*, Justice Scalia used textualism to hold that Title VII bars same-sex harassment, even though that holding went well beyond the actual purposes of the 1964 Congress:

[M]ale-on-male sexual harassment . . . was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils[.] [A]nd it is ultimately the provisions of our laws rather than . . . concerns of our legislators by which we are governed.<sup>75</sup>

Justice Alito’s textualism-based ruling for a plaintiff in *Kellogg Brown & Root* fits easily into the above Scalia-Thomas

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71. *Id.* at 175–76 (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’ . . . The words ‘because of mean ‘by reason of: on account of.’”) (citing three dictionaries, including two from 1966, a year before ADEA enactment; other citations omitted).

72. 539 U.S. 90, 98 (2003).

73. *Id.* at 98–99 (citations omitted).

74. 523 U.S. 75, 79 (1998).

75. *Id.*

pro-plaintiff textualist caselaw: textualism is a tool; while it can yield limited-to-the-words narrow readings of remedial statutes, it can support broader-than-intended readings of remedial statutes too.

The district judge data shows the same, but even more strongly. Though decades of dictionary citations by Justices Scalia and Thomas have given the practice a conservative reputation, among the broader federal judiciary there is little, if any, correlation between judges' reliance upon dictionaries and their reputations as conservatives or liberals. The District of Colorado's #2 dictionary user, Judge Kane,<sup>76</sup> is a liberal icon,<sup>77</sup> and a review of famously conservative and liberal judges outside the district shows that their dictionary usage varies greatly.

Review of five district judges with a record or reputation as conservatives,<sup>78</sup> and five with a record or reputation as

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76. Judge Kane's 1.60% dictionary-citing rate comes with a z-score of 0.34, which indicates that his rate is not above average to a statistically significant degree. Yet that rate is higher than that of many other judges in the district to a statistically significant degree, as shown by comparison to the three judges appointed by President Obama: Kane's rate is significantly higher than those of Judges William J. Martinez (0.52%, with a z-score of -2.19) and R. Brooke Jackson (0.18%, with a z-score of -2.55); Kane's rate also is higher than that of Judge Raymond P. Moore (0.99%), just not quite to a statistically significant degree, in large part because the recency of Moore's appointment limits his sample size.

77. See Kirk Mitchell, *Feisty Federal Judge in Denver Knows All About Challenging Authority*, DENVER POST, Aug. 3, 2014, noting:

Early in Kane's judicial career, a Colorado prisoner sued the state claiming that his cramped prison cell . . . violated his constitutional rights. When Kane refused to dismiss the case and demanded that the state abide a federal standard of holding inmates in cells that were at least 72-square feet, it set off a maelstrom of outrage by legislators who claimed it would bankrupt the state. Kane was not swayed . . . His decision withstood appeals and in more than 30 years since then has been cited as a standard of law throughout the country. What irks the judge more than anything is encountering leaders who abuse their authority, he said. "People who are subject to the whims and caprice of other people," Kane said . . .

78. I chose the five reputedly conservative federal district judges as follows: Four were those who had the most high-profile conservative rulings of the past several years (each detailed below); the fifth, Judge Mukasey, was appointed to be United States Attorney General, making him the district judge who subsequently held the highest-profile public office above that of a United States District Judge.

• Two were appointees of President George W. Bush who ruled against the Obama administration in high-profile cases. Judge Rosemary M. Collyer (D. D.C.) ruled that the House of Representatives had standing to sue the Obama administration over appropriations for the Patient Protection and Affordable Care Act. *House of Representatives v. Burwell*,

liberals,<sup>79</sup> corroborates the lack of correlation between ideology

130 F. Supp. 3d 53 (D.D.C. 2015). Judge Andrew S. Hanen (S.D. Tex.) ruled against the Obama administration's action to grant deferral of deportation action and work authorization to certain undocumented immigrants. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) *aff'd*, 809 F.3d 134 (5th Cir. 2015).

• Judge Amul Roger Thapar (E.D. Ky.) drew initial attention as a Federalist Society member nominated by President Bush at age 38, then for issuing lengthy sentences in a high-profile case of peace protesters who broke into a nuclear facility. Associated Press, *Nun, 84, gets 3 years in prison for breaking into nuclear weapons complex*, CBS NEWS (Feb. 18, 2014), <http://www.cbsnews.com/news/nun-84-gets-3-years-in-prison-for-breaking-in-nuclear-weapons-complex/> (last visited Jan. 15, 2016) [<https://perma.cc/PBX8-HSXX>] (“Judge Amul Thapar said he was concerned they showed no remorse and he wanted the punishment to be a deterrent for other activists.”).

• Judge Michael Mukasey (S.D.N.Y.) was appointed a district judge by President Ronald Reagan, then appointed Attorney General by President George W. Bush.

• Judge Rudolph Randa (E.D. Wis.), another Reagan appointee, is a Federalist Society advisor with controversial rulings against criminal defendants and in politically charged cases. Daniel Bice, *Federal Judges Lynn Adelman, Rudolph Randa Are Polar Opposites*, MILWAUKEE J. SENTINEL (May 10, 2014) (“Randa threw out a federal law . . . [on] access to abortion clinics . . . [and] was reversed . . . Randa ordered . . . [a] state purchasing official . . . jailed while she appealed her conviction for steering a travel contract . . . to supporters of then-Gov. Jim Doyle . . . The appeals court . . . call[ed] the evidence ‘beyond thin,’ order[ing] her . . . freed immediately. . . . Randa was overturned for forcing a prisoner to wear prison garb . . . during his civil rights case . . . Judge Richard Posner wrote that . . . prisoner clothing in front of a jury is ‘highly prejudicial.’”).

79. I chose the five reportedly liberal federal district judges as follows. One (Sotomayor) was the only Democratic appointee to the United States Supreme Court in decades to have been a United States District Judge; one (Jenkins) was the district judge who approved the highest profile civil rights class action of recent decades, one that subsequently led the Supreme Court to reshape class action law by reversing his decision; the three others (Gertner, Bennett, and Adelman) are widely known, as detailed by the below citations to their writings and media coverage, as the most prominent and outspoken liberal district judges in recent decades.

• Sonia Sotomayor was a district judge (S.D.N.Y.) before her promotion to the Second Circuit and then the United States Supreme Court in 2009 by President Barack Obama.

• Judge Nancy Gertner (D. Mass.), appointed by President Bill Clinton, issued controversial rulings such as barring mandatory arbitration in discrimination cases, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 995 F. Supp. 190 (D. Mass. 1998), and became all the more outspoken after retiring. *E.g.*, Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 117 (Oct. 16, 2012) (claiming that judges are trained “to get rid of civil rights cases”: “At the start of my judicial career . . . , the

and dictionary reliance. Among the reputed conservatives, only one of the five cites dictionaries at roughly Judge Nottingham's high 3% rate; two others are relatively high at roughly 2%, but two others are near 1%. Among the reputed liberals, the numbers are strikingly similar: one around 3%; two just over 2%; and two near 1.5%.

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trainer teaching discrimination law to new judges announced, 'Here's how to get rid of civil rights cases . . . .'); Conor Friedersdorf, *Federal Judge: My Drug War Sentences Were Unfair and Disproportionate*, ATLANTIC, June 29, 2015 ("Gertner . . . compares the damage caused by drug prohibition to the destruction of cities in World War II").

• Judge Mark W. Bennett (N.D. Ia.), also a Clinton appointee, argues that "the time has come to bury summary judgment" because of its "abuse and overuse by my federal judge colleagues," especially in discrimination cases due to docket pressure and "implicit bias in judicial decisions." Mark W. Bennett, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 686 (2013).

• Judge Lynn Adelman (E.D. Wis.), also a Clinton appointee, issued a later-reversed ruling striking down a politically controversial voter identification law, as well as numerous controversial rulings reversing criminal convictions. Daniel Bice, *Federal Judges Lynn Adelman, Rudolph Randa Are Polar Opposites*, MILWAUKEE J. SENTINEL (May 10, 2014) (recounting numerous such rulings by Adelman).

• Judge Martin Jenkins (N.D. Cal.), also appointed by President Clinton, certified the Wal-Mart national gender discrimination class action that was reversed in a 2011 Court decision disallowing such broad classes. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), *rev'd*, 564 U.S. 338 (2011).

<b>Table 2:</b>				
Opinions by Selected Reputedly Conservative Federal Judges Citing Major Dictionaries, 1991–2015				
<b>Judge</b>	<b># Dictionary- Citing Opinions</b>	<b>Total # Opinions</b>	<b>% Dictionary- Citing Opinions</b>	<b>Z-Score</b>
Andrew S. Hanan (S.D. Tex.)	6	186	3.23%	2.00
Amul R. Thapar (E.D. Ky.)	11	493	2.23%	1.41
Rosemary M. Collyer (D.D.C.)	24	1202	2.00%	1.54
Michael Mukasey (S.D.N.Y.)	17	1308	1.30%	-0.50
Rudolph Randa (E.D. Wis.)	14	1464	0.96%	-1.61

<b>Table 3:</b>				
Opinions by Selected Reputedly Liberal Federal Judges Citing Major Dictionaries, 1991–2015				
<b>Judge</b>	<b># Dictionary- Citing Opinions</b>	<b>Total # Opinions</b>	<b>% Dictionary- Citing Opinions</b>	<b>Z-Score</b>
Mark W. Bennett (N.D. Ia.)	64	1831	3.28%	6.45
Nancy Gertner (D. Mass.)	12	520	2.31%	1.60
Sonia Sotomayor (S.D.N.Y.)	9	438	2.05%	1.01
Lynn Adelman (E.D. Wis.)	40	2394	1.67%	0.82
Martin Jenkins (N.D. Cal.)	10	674	1.48%	0.03

The above data show that district judges' divergence as to textualism does not cleanly track their ideologies. This finding parallels the example of Chief Justice Roberts and Justice Alito, who differ greatly as to textualism, but otherwise share great ideological similarities.

These findings are not just an intellectual analysis; they contain a real lawyering lesson. Many district judges come to the bench with identifiable ideological backgrounds. Lawyers might naturally assume that the textualism that guides Justices Scalia, Thomas, and Alito to use dictionary definitions identically would guide the decision making of district judges with similar conservative reputations, and thus that a briefing before a judge like Rudolph Randa or Michael Mukasey should cite dictionary definitions and other textualist arguments that those judges are likely to deem persuasive. Conversely, a lawyer with a case before a reputedly liberal district judge like Mark Bennett or Nancy Gertner might naturally assume that such a judge would be unreceptive to the sort of dictionary-based textualist arguments that appeal to Justices Scalia, Thomas, and Alito. All of those assumptions would be wrong, however. Judges Bennett (3.28%) and Gertner (2.31%) are double to triple as likely to rely on dictionaries than Judges Randa (0.96%) and Mukasey (1.30%).

"[I]f you are a litigator" deciding how to advocate a particular interpretation, "your presumptive position in favor of your favorite theory will . . . be slight": because your goal is to win your case, "[y]ou will thus almost always be willing to deviate from your favorite theory in a case where a different theory would work better."<sup>80</sup> This Article's findings show that lawyers rely on erroneous stereotypes if they write briefs and present arguments on the assumption that textualist arguments persuade conservative judges, but not liberal judges. This is not to disagree with the conventional wisdom that "litigators know that the identity of the judge has a profound effect on the odds of winning a case, and will make extraordinary efforts to get their case before an ideologically receptive" judge or panel.<sup>81</sup> Where this Article disagrees with

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80. Volokh, *supra* note 67, at 839.

81. Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 194 (2011).

the conventional wisdom is in noting that conservative does not imply textualist, as is commonly assumed. The perfect overlap between the three most conservative Justices and the three most textualist Justices is a pattern that simply does not hold in the lower courts—an important fact for lawyers to know as they strategize which arguments might persuade their judges, and thus which arguments might help them win their cases.

## CONCLUSION

The Supreme Court is an important enough institution that even its driest cases offer useful hints about how judges operate. *Department of Homeland Security v. MacLean*<sup>82</sup> and *Kellogg Brown & Root v. U.S., ex rel. Carter*<sup>83</sup> resolved questions of importance to narrow fields of law (federal employee whistleblowing and False Claims Act cases, respectively), but for this Article's purposes, their import was what they showed about the Justices' methodologies: that Justice Alito is every bit the dictionary-reliant statutory textualist that Justices Scalia and Thomas are; but that Chief Justice Roberts is more of a purposivist, relying on statutory history, purposes, and structure, in addition to the text itself. This difference sheds light on the more famous Roberts-Alito divergence: their repeated divergence on the Patient Protection and Affordable Care Act, first in *National Federation of Independent Business v. Sebelius*,<sup>84</sup> then in *King v. Burwell*.<sup>85</sup> In both cases, to interpret a complex statutory scheme, Alito looked only to the text (e.g., a "tax" is a "tax" if and only if labeled as such), while Roberts looked to the policy intent of Congress—a clear difference in methodology that parallels Alito's textualism-only analysis in *Kellogg Brown & Root* and Roberts's pragmatic purposivism in *MacLean*.

But the Roberts-Alito divergence is just an example of a broader judicial phenomenon: that ideologically similar judges can vary widely in their adherence to textualism. Textualism has earned a conservative reputation, but mainly from the specific historical context of three particular Justices joining the Court in an era when some conservatives saw strict textual

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82. 135 S. Ct. 913 (2015).

83. 135 S. Ct. 1970 (2015).

84. 132 S. Ct. 2566 (2012).

85. 135 S. Ct. 2480 (2015).

interpretations as a way to rein in the excesses of prior rulings. A broader look at the Court's jurisprudence confirms that textualism can yield ideologically mixed results, including surprising rulings for plaintiffs suing under remedial statutes.

The District Court data and findings in this Article corroborate the above interpretation: that textualism need not be a conservative tool; and that judicial ideology does not clearly predict the use or rejection of textualist analysis. Analysis of all District of Colorado judges shows an imperfect at best correlation between judicial ideology and textualism, and a broader national analysis of five reputedly conservative district judges and five reputedly liberal district judges shows no pattern whatsoever: the most frequent dictionary-citers include some of the judges identified as most conservative and some identified as most liberal; and the most infrequent dictionary-citers include a similar conservative-liberal mix of judges. Lawyers should know this: it is too simplistic to assume that a reportedly conservative judge will adhere to Scalia-brand textualism while a reportedly liberal judge will not; judges are individuals, and while they can display patterns in their methodologies, a textualism-ideology pattern is not one of them.



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