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## Foreword: The Books of Justices

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## FOREWORD

### THE BOOKS OF THE JUSTICES

By Linda Greenhouse\*

#### INTRODUCTION: TWO JUSTICES

On June 27, 1979, the Supreme Court upheld an affirmative-action plan that set aside half the places in a steel industry training program for African American steelworkers.<sup>1</sup> This is how then-Associate Justice William H. Rehnquist began his dissenting opinion in the case, *United Steelworkers of America v. Weber*:

In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd . . .<sup>2</sup>

Justice Rehnquist went on to recount how, in the novel, the Oceania official is handed a slip of paper and seamlessly redirects the crowd's attention to the new enemy, Eastasia.<sup>3</sup> "Today's decision," Justice Rehnquist continued, "represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII."<sup>4</sup> While the Civil Rights Act's employment provision had been previously understood to "prohibit racial discrimination in employment *simpliciter*," he wrote, it was now being invoked, to the contrary, as a shield for a racial quota.<sup>5</sup>

From this reference to George Orwell's iconic novel of a dystopian future, we learn several things. Clearly, Justice Rehnquist was familiar with the book and had most likely even read it, along with most readers of Supreme Court opinions. He thus had reason to expect the reference to resonate with

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1. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

2. *Id.* at 219–20 (Rehnquist, J., dissenting) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR 181–82 (1949)). Due to recent political events, Orwell's novel has shot to the top of Amazon's best-seller list. Michiko Kakutani, *Why '1984' Is a 2017 Must-Read*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/books/why-1984-is-a-2017-must-read.html> [<https://perma.cc/PXD9-Y5HW>].

3. *United Steelworkers*, 433 U.S. at 219–20.

4. *Id.* at 220.

5. *See id.* at 220–21.

his audience, and that invoking it would provide a dramatic image of a world turned cynically upside down. And by invoking a key scene familiar to all readers of the novel, he could suggest, without having to say so explicitly, that the majority was not simply wrong on a matter of statutory interpretation, but that it was deliberately, mischievously, even deviously wrong.

Fast forward thirty-seven years to this past June and to a very different justice who also sought to dramatize what she viewed as a majority opinion's profound error. Dissenting in *Utah v. Strieff*,<sup>6</sup> an exclusionary-rule case in which the majority refused to suppress evidence obtained after a suspicionless and concededly unlawful police stop, Justice Sonia Sotomayor put a shelf of books on display. These included classics of African American literature (W.E.B. Du Bois, *The Souls of Black Folk*, and James Baldwin, *The Fire Next Time*) as well as modern scholarship (Michelle Alexander, *The New Jim Crow*, and Lani Guinier and Gerald Torres, *The Miner's Canary*) along with a current best-selling memoir, *Between the World and Me* by Ta-Nehisi Coates.<sup>7</sup>

Justice Sotomayor cited ten books in all, of which the more recent ones concerned the impact of African Americans' encounters with the criminal justice system. The defendant in *Utah v. Strieff* happened to be white, a fact Justice Sotomayor used to rhetorical advantage: "The white defendant in this case shows that anyone's dignity can be violated in this manner," she wrote.<sup>8</sup> The case, she continued,

tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued.<sup>9</sup>

If Justice Sotomayor's goal was to add force to her dissent and make sure the case would not be submerged by the tide of more eagerly anticipated late-June opinions, there is no doubt that she succeeded. By the end of the day on which it was issued (June 20, 2016), her dissent had received wide and growing attention.<sup>10</sup> Would it have achieved the same impact without the books? From the way in which accounts of her dissent singled out the books for special attention, the answer is almost certainly "no."<sup>11</sup>

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6. 136 S. Ct. 2056 (2016).

7. See *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting).

8. *Id.* at 2070.

9. *Id.* at 2070–71.

10. See, e.g., Matt Ford, *Justice Sotomayor's Ringing Dissent*, ATLANTIC (June 20, 2016), <http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/> [https://perma.cc/9CTH-STJ5].

11. E.g., Victoria M. Massie, *You Need to Read Sonia Sotomayor's Devastating, Ta-Nehisi Coates-Citing Supreme Court Dissent*, Vox (June 20, 2016, 12:49 PM), <http://www.vox.com/2016/6/20/11976560/sonia-sotomayor-dissent-supreme-court> [https://perma.cc/LYQ8-2BXM].

## I. JUSTICES AND THEIR BOOKS: AN OVERVIEW

Justices cite books. Collectively, they cite many books: 132 separate volumes during October Term (OT) 2015, with 41 of the Term's 62 signed, published opinions<sup>12</sup> containing citations to books.<sup>13</sup>

For this *Michigan Law Review* issue devoted to recently published books about law, I thought it would be interesting to see what books made an appearance in the past year's work of the Supreme Court. I catalogued every citation to every book in those forty opinions in order to see what patterns emerged: what books the justices cited, which justices cited which books, and what use they made of the citations.<sup>14</sup>

To begin with, I should define what I mean by "books." For the purposes of this Foreword, I excluded some types of reading matter that may have a book-like appearance or that others might view as a book: government reports and statistical compilations, including the Federal Sentencing Guidelines; the Model Penal Code; the Congressional Record; the Federal Register; and other current compilations of statutes or regulatory codes. (I include some older compilations as primary source material, e.g., a volume of the *Vermont State Papers 1779–1786*, published in 1823 and cited by Chief Justice Roberts.<sup>15</sup>) I also excluded monographs, databases, and reference materials residing entirely on the Internet.

This left 132 books, which I categorized as follows:

FIGURE 1. CATEGORIES OF BOOKS CITED

Type	Cited
Treatises and practice manuals	51
Primary sources, historical	27
History and political science	17
Law	16
Dictionaries	7
Restatements	6
Literature	5
Primary sources, modern	3

12. Excluded from this review are per curiam opinions, as well as concurrences with and dissents from per curiam opinions.

13. All data in this Foreword come from my own statistical compilations, which are on file with the *Michigan Law Review*. To the extent that judgment calls are involved (e.g., whether to count an opinion "concurring in part and dissenting in part" as a concurrence or dissent), my numbers may differ from those in other data sets.

14. Except where otherwise indicated, citations are counted as follows: multiple citations to a single book within a single opinion (whether it be a concurrence, dissent, or opinion for the Court) are counted as a single citation; in other words, repeat citations within a single opinion (such as "*id.*" citations) are not counted as additional citations separate from the original citation to the source. Citations to the same source across different opinions (even if authored by the same justice), however, count as multiple citations. Also, citations to different editions of the same book are treated as citations to the same book.

15. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1331 (2016) (Roberts, C.J., dissenting).

Every justice cited at least several books during the Term, with the exception of Justice Scalia, who cited only one book—*Black's Law Dictionary*—in the four opinions he produced (two for the Court and two in dissent) before his death in February.<sup>16</sup> But three of his colleagues (Justices Thomas, Sotomayor, and Kagan) cited Justice Scalia's 2012 collaboration with Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*.<sup>17</sup> In fact, Justices Sotomayor and Kagan cited this book on opposite sides of the same case.<sup>18</sup>

Having read many Supreme Court opinions over many years, I embarked on this project with only a few hunches about what I would find. For one, I assumed that the *Federalist Papers* would make a strong showing—and they did indeed during OT 15, with twelve of the papers garnering thirteen citations (although enthusiasm for the *Federalist Papers* was not particularly widespread, with eight of those citations coming from Justice Thomas). I expected justices looking for a reliable history of the Revolutionary period to turn to Gordon Wood, and three of them did (Chief Justice Roberts and Justices Thomas and Breyer).<sup>19</sup> I did not, however, expect Justice Sotomayor's citation-laden dissenting opinion in *Utah v. Strieff*.<sup>20</sup> It came as a gift.

There were other surprises as well. I was familiar with the oddly robust literature on Supreme Court justices' uses of dictionaries.<sup>21</sup> A recent note in

16. See *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784–89 (2016) (Scalia, J., dissenting) (citing BLACK'S LAW DICTIONARY (10th ed. 2014)); *Montgomery v. Louisiana*, 136 S. Ct. 718, 737–44 (2016) (Scalia, J., dissenting); *Kansas v. Carr*, 136 S. Ct. 633 (2016); *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

17. See *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring); *Lockhart v. United States*, 136 S. Ct. 958, 962–63 (2016) (majority opinion by Sotomayor, J.); *Lockhart*, 136 S. Ct. at 970 (Kagan, J., dissenting).

18. *Lockhart*, 136 S. Ct. 958. Justice Sotomayor cited *Reading Law* in her opinion for the Court, see *id.* at 962–63, while Justice Kagan cited it in dissent, see *id.* at 970 (Kagan, J., dissenting). Their dispute, which Scalia and Garner seem not to have resolved, was over which canon of construction to apply when a modifier or other limiting clause comes at the end of a sentence that contains a list of items such as criminal offenses. Compare *id.* at 962–66 (majority opinion) (rejecting the defendant's interpretation of the “rule of the last antecedent”), with *id.* at 969–73 (Kagan, J., dissenting) (reaching a contrary conclusion about the proper application of the last-antecedent rule).

19. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969). Chief Justice Roberts cited the book in his dissenting opinion in *Bank Markazi*, discussing the judicial role played by colonial legislatures. 136 S. Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting) (citing WOOD, *supra*, at 154–55, for the colonial legislatures' role). Justice Thomas cited the book in his opinion in *Evenwel v. Abbott*. 136 S. Ct. 1120, 1137 (2016) (Thomas, J., concurring) (citing WOOD, *supra*, at 170, for the Framers' belief in “equality of representation”). Justice Breyer cited the book in his dissenting opinion in *Puerto Rico v. Sanchez Valle*. 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting) (“The problem of sovereignty was not solved by the Declaration of Independence.” (quoting WOOD, *supra*, at 354)).

20. 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).

21. 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, 486–87 n.4 (2013) (compiling sources).

the *Yale Law Journal*, compiling data through 2013, concluded that Justice Alito was “now the most frequent user of dictionaries on the Supreme Court.”<sup>22</sup> But in OT 15, Justice Alito was nowhere near the top of the list, with only four citations to dictionaries, compared with Justice Sotomayor’s ten, Justice Kagan’s eighteen, and Justice Thomas’s fourteen.

Individual citation practices vary widely, in suggestive ways. For example, Justice Kennedy’s opinions contained by far the fewest citations.<sup>23</sup> From his omnipotent position at the center of the Court (insofar as an eight-member Court has a center), perhaps Justice Kennedy had no need to reach for outside authority in order to persuade others; he could sit back and watch his colleagues compete for his vote. He published twelve opinions during the term (nine for the Court, one in dissent, and two concurring), citing books in only two of them, for a total of five citations: Blackstone, cited three times in a single dissenting opinion,<sup>24</sup> and four treatises.<sup>25</sup> By contrast, Justice Thomas’s thirty-seven opinions (seven for the Court, sixteen in dissent, and fourteen concurrences) contained sixty-five citations, with many references to historical sources, perhaps reflecting his belief that the answer to any question lies somewhere in history.<sup>26</sup>

Because justices differ so greatly in their opinion production (although majority opinion assignments are distributed roughly equally, justices are free to write as many concurring and dissenting opinions as they like), the raw numbers can be uninformative and even misleading. To give a more accurate snapshot of the individual citation practices, I compiled a citation ratio (CR), which is simply the number of book citations divided by the number of opinions, for each justice. Although Justice Thomas’s sixty-five citations were the most numerous, he did not emerge at the top of the citation ratio list, as shown here, from the lowest CR to the highest:

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22. John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 *YALE L.J.* 484, 508 (2014).

23. See *infra* Figure 2.

24. See *Luis v. United States*, 136 S. Ct. 1083, 1106–07 (2016) (Kennedy, J., dissenting) (citing 4 *WILLIAM BLACKSTONE, COMMENTARIES* (1769)).

25. *Luis*, 136 S. Ct. at 1111 (citing 4 *AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS* (2d ed. 1956)); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045–46 (2016) (first citing 2 *WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS* (5th ed. 2012); then citing 7A *CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE* (3d ed. 2005)); and then citing *MANUAL FOR COMPLEX LITIGATION* (4th ed. 2004)).

26. See *infra* text accompanying notes 67, 81, 83.

FIGURE 2. CITATIONS, OPINIONS, AND CITATION RATIOS BY JUSTICES

Justice	Citations	Opinions	CR
Kennedy	5	12	0.41
Breyer	14	16	0.88
Ginsburg	19	16	1.19
Sotomayor	30	18	1.67
Thomas	65	37	1.76
Kagan	25	12	2.08
Roberts	24	11	2.18
Alito	38	16	2.38

Among the forty-one cases that cite any books, there was an average of 4.8 citations per case (by which I mean separate citations, not separate books, since not infrequently, justices cite the same book or, as Justice Kagan put it in *Luna Torres v. Lynch*, engage in “brandishing dictionaries”<sup>27</sup>).

There was little correlation between the prominence of a case and the number of citations the opinions contained. For example, among the dozen decisions with only one book citation was *Fisher v. University of Texas*,<sup>28</sup> surely one of the Term’s most high-profile cases. Its paucity of citations reflected the fact that the majority opinion’s author was the citation-averse Justice Kennedy. Justice Alito, as part of his argument in dissent, challenged the university’s use of SAT scores as a measure of applicants’ academic quality.<sup>29</sup> He bolstered his argument by citing a book of essays edited by a sociologist, Joseph A. Soares, arguing against reliance on the SAT and making the case for eliminating the test from the admissions process.<sup>30</sup> Another of the Term’s most prominent cases, the Texas abortion case *Whole Woman’s Health v. Hellerstedt*, included no books about abortion, but instead contained dueling citations to the *Restatement (Second) of Judgments* and to civil procedure treatises.<sup>31</sup> These reflected the dispute between Justice Breyer for the Court and Justice Alito in dissent about the case’s justiciability.

The case with the most citations, twenty-four, was *Evenwel v. Abbott*, which held 8–0 that states may continue to draw their legislative districts

27. *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016). The battle of the dictionaries in this statutory case about the definition of “aggravated felony” concerned the meaning of “describe.” See *id.*

28. 136 S. Ct. 2198 (2016).

29. See *Fisher*, 136 S. Ct. at 2233–35 (Alito, J., dissenting).

30. *Id.* at 2234 (citing SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS (Joseph A. Soares ed., 2012)).

31. See 136 S. Ct. 2292 (2016). Justice Breyer cited RESTATEMENT (SECOND) OF JUDGMENTS (AM. LAW. INST. 1980), along with 29 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE (2016) and 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (2d ed. 2002). See *Whole Woman’s Health*, 136 S. Ct. at 2305–08, 2317. Justice Alito cited both the First and Second Restatements of Judgments, RESTATEMENT OF JUDGMENTS (AM. LAW. INST. 1942) and RESTATEMENT (SECOND) OF JUDGMENTS, *supra*, along with CHARLES ALAN WRIGHT ET AL., *supra*. See *Whole Woman’s Health*, 136 S. Ct. at 2332–53 (Alito, J., dissenting).

based on total population and are not obliged to count only the number of eligible voters.<sup>32</sup> Not surprisingly for a case that called for an understanding of constitutional history, Justice Ginsburg, for the Court, and Justices Thomas and Alito, in opinions concurring in the judgment, all drew on both primary and secondary historical sources. All three justices cited Farrand's *Records of the Federal Convention of 1787*.<sup>33</sup> While Justice Ginsburg found it necessary to cite only one of the *Federalist Papers* (No. 54),<sup>34</sup> Justice Thomas threw in Numbers 1, 10, 14, 22, 39, 43, 51, and 62, along with the papers of John Adams and Thomas Jefferson; Gordon Wood; Blackstone; and Akhil Amar's 2005 book, *America's Constitution: A Biography*.<sup>35</sup> Justice Alito also cited Amar.<sup>36</sup> These overlapping citations might lead one to ask why the three justices couldn't agree on a single opinion, but readers of *Evenwel* will quickly see that while the three may have invoked the same books, they were not on the same page.<sup>37</sup>

## II. WHY CITE A BOOK?

Why would a Supreme Court justice even bother to cite a book? Shouldn't factors internal to the case—*stare decisis*, legislative history, briefs of the parties and amici—suffice to provide justices with the material they need to reach a result and the ammunition they need to defend it?

The answer is yes, *unless*: Unless a justice wants to magnify the impact of an opinion, as Justice Sotomayor did in her *Utah v. Strieff* dissent.<sup>38</sup> Unless a justice wants to surround a conclusion with presumably unimpeachable authority as, for example, Justice Thomas did in his opinion for the Court in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*.<sup>39</sup> "To resolve this issue, we turn to standard equity treatises," he wrote

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32. 136 S. Ct. 1120 (2016).

33. See *Evenwel*, 136 S. Ct. at 1127 (majority opinion by Ginsburg, J.); *id.* at 1137 (Thomas, J., concurring); *id.* at 1146 (Alito, J., concurring).

34. *Id.* at 1127 (majority opinion).

35. *Id.* at 1137–40 (Thomas, J., concurring).

36. *Id.* at 1149 (Alito, J., concurring).

37. All three justices cited the same passage in Farrand that recounts Alexander Hamilton's argument that Senate seats should be allocated by population. But each drew a different conclusion about the relevance of Hamilton's views to the question at hand. See *id.* at 1127 (majority opinion); *id.* at 1137 (Thomas, J., concurring); *id.* at 1146 (Alito, J., concurring) (each citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 473 (Max Farrand ed., 1911)).

38. See *supra* text accompanying notes 6–11.

39. 136 S. Ct. 651 (2016).

to introduce his reference to two treatises and a restatement volume.<sup>40</sup> Citation to recognized authority can serve as armor, protecting a majority opinion as it circulates in draft inside the Court, and it can add persuasive weight once the opinion reaches the public.

One purpose for reading, of course, is to acquire information, and I'm willing to assume that justices do occasionally turn to books for this reason. In *Sturgeon v. Frost*, Chief Justice Roberts wrote for a unanimous Court that the Ninth Circuit's reading of the Alaska National Interest Lands Conservation Act failed to take account of the state's unique characteristics.<sup>41</sup> It's easy to picture the Chief Justice, a Harvard *summa* in American history,<sup>42</sup> immersing himself in the state's colorful history, which he proceeded to describe with evident enthusiasm. His citations to a recently published history of Alaska and to a 1972 account of the gold rush seem simply to attest to the fact that he did some enjoyable homework.<sup>43</sup>

Justices may also cite to books to send a subtler message to specific audiences, a kind of "dog whistle" meant for certain ears but likely to go unheard by others.<sup>44</sup> Justice Thomas sent such a coded message in his concurring opinion in *Cuozzo Speed Technologies, LLC v. Lee*, a patent case in which the Court deferred to the U.S. Patent and Trademark Office in upholding one of the PTO's regulations.<sup>45</sup> Given the administrative law context, Justice Breyer's opinion for the Court not surprisingly invoked the familiar rule of *Chevron* deference.<sup>46</sup> As he has in the past, Justice Thomas called in his concurring opinion for overturning *Chevron*.<sup>47</sup> This time, he cited to a newly published collection of essays entitled *Liberty's Nemesis: The Unchecked Expansion of the State*, edited by two conservative luminaries, Dean Reuter, vice president of the Federalist Society, and John Yoo, the law professor and former Justice Department official.<sup>48</sup> To the general public, the book was surely unknown. It was, however, a selection of the Conservative Book Club, and

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40. *Montanile*, 136 S. Ct. at 658–59 (first citing 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE (Spencer W. Symons ed., 5th ed. 1941); then citing RESTATEMENT OF RESTITUTION (AM. LAW INST. 1936); and then citing 1 DAN B. DOBBS, LAW OF REMEDIES (2d ed. 1993)).

41. 136 S. Ct. 1061, 1070–72 (2016).

42. See John G. Roberts, Jr., OYEZ, [https://www.oyez.org/justices/john\\_g\\_roberts\\_jr](https://www.oyez.org/justices/john_g_roberts_jr) [<https://perma.cc/7ADK-P5HQ>].

43. See *Sturgeon*, 136 S. Ct. at 1064–66 (first citing CLAUS-M. NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY (Univ. of Okla. Press 2011) (1979); and then citing DAVID WHARTON, THE ALASKA GOLD RUSH (1972)).

44. For the "dog whistle" reference, see IAN HENRY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 3–4 (2014).

45. 136 S. Ct. 2131 (2016).

46. *Cuozzo*, 136 S. Ct. at 2142 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

47. See *id.* at 2148 (Thomas, J., concurring).

48. *Id.* (citing LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds., 2016)).

on April 25, the day the *Cuozzo Speed Technologies* case was argued, it was the subject of a glowing review in *National Review*.<sup>49</sup> The review called the book an “indispensable guide” that “should be an essential part of any vetting process to fill the seat vacated by the departed Justice Antonin Scalia” and might even persuade the Supreme Court to “undo the damage of its hundred years of servitude to the absolutism of the majority.”<sup>50</sup> Critiques of *Chevron* deference are hardly rare.<sup>51</sup> By selecting this particular book to cite, Justice Thomas was sending his base a strong signal of his sympathy and availability.

Purely literary references in Supreme Court opinions are uncommon. In OT 15 there were only five. The three in Justice Sotomayor’s *Utah v. Strieff* dissent were, as explained earlier, put to serious rhetorical purpose.<sup>52</sup> The other two references, however, seem intended to amuse the opinion’s authors. There was this from Chief Justice Roberts, dissenting in *Bank Markazi v. Peterson*: “In reality, the Court’s ‘plenty’ is plenty of nothing, and, apparently, nothing is plenty for the Court.”<sup>53</sup> His citation, of course, was to the libretto of *Porgy and Bess*.<sup>54</sup> (The Chief Justice’s dissenting opinion in *Bank Markazi*, in which the Court upheld an unusual 2012 law that ordered

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49. *Liberty’s Nemesis: The Unchecked Expansion of the State*, CONSERVATIVE BOOK CLUB, <http://www.conservativebookclub.com/book/libertys-nemesis-the-unchecked-expansion-of-the-state> [https://perma.cc/H9JJ-PEV8]; Mario Loyola, *Leviathan Rising*, NAT’L REV. (Apr. 25, 2016), <https://www.nationalreview.com/magazine/2016-04-25-0100/john-yoo-dean-reuter-liberty’s-nemesis> [https://perma.cc/S88Z-XQBW].

50. Loyola, *supra* note 49.

51. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

52. See 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (first citing W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903); then citing JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); and then citing TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015)).

53. 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).

54. *Bank Markazi*, 136 S. Ct. at 1335 (citing DUBOSE HEYWARD & IRA GERSHWIN, *PORGY AND BESS: LIBRETTO* (1958)). The Chief Justice deployed the quote to refute the majority’s assertion that the challenged law left “plenty” of factual matters for the district court to adjudicate. See *id.* at 1325 n.20 (majority opinion). This is not the first time the Chief Justice has cited a lyric. In a 2008 case, *Sprint Communications v. APCC Services*, his dissenting opinion argued that the respondents lacked Article III standing because they “never had any share” in the amount of money at issue and thus “cannot benefit from the judgment they seek.” 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting). He then offered: “When you got nothing, you got nothing to lose.” *Id.* (citing BOB DYLAN, *LIKE A ROLLING STONE* (Columbia Records 1965)). In citing the future Nobel laureate, however, the Chief Justice mangled the quote. As Adam Liptak later pointed out in the *New York Times*, the line actually begins, “When you ain’t got nothing.” Adam Liptak, *How Does It Feel, Chief Justice Roberts, to Hone a Dylan Quote?*, N.Y. TIMES (Feb. 22, 2016), [http://www.nytimes.com/2016/02/23/us/politics/how-does-it-feel-chief-justice-roberts-to-hone-a-dylan-quote.html?\\_r=0](http://www.nytimes.com/2016/02/23/us/politics/how-does-it-feel-chief-justice-roberts-to-hone-a-dylan-quote.html?_r=0) [https://perma.cc/6J9D-7ZJH]. Justice Scalia also quoted Dylan, although without any citation, or even quotation marks. “The-times-they-are-a-changin’ is a feeble excuse for disregard of duty,” he wrote in a partial concurrence in *City of Ontario v. Quon*. 560 U.S. 746, 768 (2010) (Scalia, J., concurring). Judicial quotations from Dylan are frequent enough to have inspired a law review compilation. See Alex B. Long, *The Freewheelin’ Judiciary: A Bob Dylan Anthology*, 38 *FORDHAM URB. L.J.* 1363 (2011).

blocked Iranian assets released to satisfy a particular set of judgments, included citations to twelve books, by far the most in any of his opinions.<sup>55</sup> In fact, without those twelve, the Chief Justice's CR would have been only 1.09 instead of twice that number.<sup>56</sup>)

It's undoubtedly questionable to refer to a *Lonely Planet* travel guide as "literature," but the other obvious choice—a separate category for travel guides—is unappealing. In any event, Justice Kagan cited the publisher's guidebook to Brazil in her opinion for the Court in *Luna Torres v. Lynch*, an immigration case, as part of the extended discussion of what it means for a particular offense to be "described in" the federal criminal code.<sup>57</sup> The question in the case was whether an offense under state law could count as an "aggravated felony" for federal immigration purposes even if it did not precisely track every element of the corresponding federal offense.<sup>58</sup> Justice Kagan answered the question in the affirmative with reference to a hypothetical vacation trip that deviated in one particular from the itinerary described in a travel guide.<sup>59</sup> Without suggesting why she chose Brazil as a hypothetical destination, Justice Kagan observed that "[i]t would be natural, for example, to say . . . that a person followed the itinerary for a journey through Brazil that is 'described in' a Lonely Planet guide if he traveled every leg of the tour other than a brief 'detour north to Petrópolis.'"<sup>60</sup>

Whether Justice Kagan's analogy served to enlighten readers or, just as likely, confuse them, it's no doubt the case that justices who strive for accessibility and quotability, as Justice Kagan and Chief Justice Roberts clearly do, find that books can be useful tools.

Then there are the dictionaries. Why would a justice cite a dictionary? Why do some (Kennedy, Ginsburg, Breyer) cite no dictionaries at all, while others seem to have concluded that if it's worth citing one dictionary, it's worth citing several? *Voisine v. United States* offers an example.<sup>61</sup> Writing for the Court, Justice Kagan deployed three dictionaries in search of the definition of the noun "use," as in "use of force."<sup>62</sup> In dissent, Justice Thomas searched two of the same dictionaries plus a third for the definition of "force."<sup>63</sup> One might describe the two justices as citing past each other on

55. 136 S. Ct. at 1329–38 (Roberts, C.J., dissenting).

56. See *supra* Figure 2.

57. 136 S. Ct. 1619, 1626 n.5 (2016) (citing *On the Road: Destination Brazil*, LONELY PLANET, <http://media.lonelyplanet.com/shop/pdfs/brazil-8-getting-started.pdf> [<https://perma.cc/FV39-HFM8>]).

58. *Luna Torres*, 136 S. Ct. at 1623.

59. *Id.* at 1626 n.5.

60. *Id.* (citing *On the Road: Destination Brazil*, LONELY PLANET, <http://media.lonelyplanet.com/shop/pdfs/brazil-8-getting-started.pdf> [<https://perma.cc/FV39-HFM8>]).

61. 136 S. Ct. 2272 (2016).

62. *Voisine*, 136 S. Ct. at 2278 (first citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1954); then citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987); and then citing BLACK'S LAW DICTIONARY (6th ed. 1990)).

63. *Id.* at 2283 (Thomas, J., dissenting) (first citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987); then citing OXFORD ENGLISH DICTIONARY (no edition

their way to opposite conclusions about whether a misdemeanor conviction for a “reckless” domestic assault triggers a federal statutory ban on firearms possession. (The majority said yes; Justice Thomas, joined in part by Justice Sotomayor, said no.<sup>64</sup>)

Justice Alito cited three dictionaries in his opinion for the Court in *Spokeo v. Robins*.<sup>65</sup> Discussing the question of Article III standing at the heart of the case, he probed the distinction between “concrete” and intangible harm:

We have made it clear time and time again that an injury in fact must be both concrete *and* particularized . . . . A “concrete” injury must be “*de facto*”; that is, it must actually exist. See Black’s Law Dictionary 479 (9th ed. 2009). When we have used the adjective “concrete,” we have meant to convey the usual meaning of the term—“real,” and not “abstract.” Webster’s Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967).<sup>66</sup>

(Justice Thomas used a concurring opinion in *Spokeo* to discuss the common-law roots of the injury-in-fact requirement. He cited no dictionaries, instead offering six references to *Blackstone* within his *Spokeo* opinion.<sup>67</sup>)

Those who have studied the Supreme Court’s use of dictionaries have expressed considerable skepticism about the practice. “[T]he risk is that judges will overlook or ignore salient differences and instead engage in selective reliance on the particular dictionary, definition, or edition date that is congenial to their notion of what the word should mean,” James J. Brudney and Lawrence Baum wrote in a 2013 article on the emergence of what they called the Court’s “pervasive dictionary culture.”<sup>68</sup> They pointed to a second problem:

There is a real risk that judges, in their search for correct or appropriate definitions, will ignore background understandings about the words in dispute. This larger background context often involves understandings from the Congress that enacted the words, from agencies that have applied the words, and even from the Court itself as it has construed the words in prior decisions.<sup>69</sup>

Professors Brudney and Baum surveyed the use of dictionaries in 150 statutory cases from 1986 (the beginning of the Rehnquist Court) to 2011,

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or date given); and then citing BLACK’S LAW DICTIONARY (7th ed. 1999)). Note that Justices Kagan and Justice Thomas cite to two different editions of *Black’s Law Dictionary*.

64. Compare *id.* at 2280 (majority opinion), with *id.* at 2282 (Thomas, J., dissenting).

65. 136 S. Ct. 1540, 1548 (2016).

66. *Spokeo*, 136 S. Ct. at 1548.

67. See *id.* at 1551 (Thomas, J., concurring) (citing 3–4 WILLIAM BLACKSTONE, COMMENTARIES).

68. Brudney & Baum, *supra* note 21, at 539, 565.

69. *Id.* at 565.

with a focus on criminal, labor, and business law cases.<sup>70</sup> They found the justices' use of dictionaries to be "highly subjective and ad hoc."<sup>71</sup> Justices cited dictionaries in more than one-third of the cases, with no differences among justices of different ideologies or interpretive methods.<sup>72</sup> In the cases they examined, the authors found that rather than constraining opinion-writers in reaching a desired result, dictionaries served as "ornament[s]" to "enhance the authoritative tone of the decision" or as "barrier[s]" that justify ignoring a broader context.<sup>73</sup>

In many instances, treatises may serve the same purposes, bolstering an argument or shutting off further debate. But justices seem also to turn to treatises to enhance their understanding of areas of law they rarely encounter. Justice Sotomayor seems to have used two treatises on fraudulent conveyances and the history of commercial fraud at common law for this purpose in a section of her opinion for the Court in *Husky International Electronics, Inc. v. Ritz*, a bankruptcy case.<sup>74</sup>

In the treatise category, I include what might more precisely be called practice manuals, such as a manual on the defense of drunk-driving cases cited by both Justice Alito and Justice Sotomayor in *Birchfield v. North Dakota*, a drunk-driving case;<sup>75</sup> such books seem to serve the same purpose as treatises. As with other categories of books, citation frequency varied widely during the Term. Justice Thomas cited treatises twenty-two times, Justice Kagan twice, and Justice Kennedy four times.

Treatises, including manuals, constitute by far the biggest category of cited books: forty-seven, more than one-third of the total. The number is so relatively large not necessarily because justices are especially treatise dependent, but because they turn to treatises to address questions specific to the case at hand. That means that very few treatises in OT 15 were cited by multiple justices; dictionaries, on the other hand, were cited en masse, with nineteen citations by seven different justices to *Black's Law Dictionary* and eight citations to the *Oxford English Dictionary*.<sup>76</sup> (Similarly, although justices cited six different restatements (Conflict of Laws, Contracts, Judgments, Restitution, Torts, and Trusts), three of those received only one citation. The *Restatement (Second) of Judgments* was cited by Justices Breyer,

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70. *Id.* at 488.

71. *Id.* at 566.

72. *Id.* at 523–26.

73. *Id.* at 540.

74. See 136 S. Ct. 1581, 1587–88 (2016) (first citing ORLANDO F. BUMP, *FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS* (3d ed. 1882); and then citing GARRARD GLENN, *THE LAW OF FRAUDULENT CONVEYANCES* (1931)).

75. 136 S. Ct. 2160, 2167, 2191 (2016) (majority opinion by Alito, J.) (citing 2 RICHARD E. ERWIN, *DEFENSE OF DRUNK DRIVING CASES* (3d ed. 2015)); *id.* at 2191–92 (Sotomayor, J., concurring in part and dissenting in part) (citing the same).

76. Citations to the *Concise Oxford Dictionary* and *New Oxford American Dictionary* are excluded from this count.

Alito, and Sotomayor, and the *Restatement (Second) of Torts* was cited by Chief Justice Roberts and Justice Thomas.)

The only two treatises cited by more than two justices writing in separate cases were Wright and Miller's *Federal Practice and Procedure*, cited by six justices,<sup>77</sup> and *Prosser and Keeton on the Law of Torts*, cited by three.<sup>78</sup> "Stern and Gressman,"<sup>79</sup> the bible for Supreme Court practice, was cited by only Justices Alito, Roberts, and Thomas.<sup>80</sup> While it's hard to believe that there is any justice (or law clerk) who doesn't turn regularly to Stern and Gressman, perhaps those three are the only ones candid enough not to pretend to have learned by heart the volume's 1,530 pages.

#### CONCLUSION: AND WHAT ABOUT LAW?

From time to time—but not very often—the justices did actually turn to books about law. Holmes' *The Common Law* made one appearance, a reference by Justice Thomas in his dissenting opinion in *Voisine v. United States*.<sup>81</sup> So did more recent work of the sort that might be discussed in this *Michigan Law Review* issue: Bruce Ackerman's *We the People: Transformations*, cited by Justice Alito in *Evenwel v. Abbott*<sup>82</sup> and Akhil Reed Amar's *America's Constitution: A Biography*, cited in *Evenwel* by both Justice Alito and Justice Thomas.<sup>83</sup> Justice Sotomayor included in her *Utah v. Strieff* dissent three recent books by law professors dealing with race and the criminal justice system: Michelle Alexander's best-selling *The New Jim Crow; The Eternal Criminal Record* by James B. Jacobs; and *The Miner's Canary* by Lani Guinier and Gerald Torres.<sup>84</sup>

77. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016) (majority opinion by Breyer, J.); *id.* at 2335 (Alito, J., dissenting); *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2152 (2016) (Alito, J., concurring); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016) (majority opinion by Ginsburg, J.); *Bank Markazi*, 136 S. Ct. at 1333 n.1 (Roberts, C.J., dissenting); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (majority opinion by Kennedy, J.); *Tyson Foods*, 136 S. Ct. at 1057 n.2 (Thomas, J., dissenting).

78. See *Utah v. Strieff*, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting); *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2000 n.3 (2016) (majority opinion by Thomas, J.); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016) (Roberts, C.J., writing for the Court).

79. SUPREME COURT PRACTICE (Shapiro et al. eds., 10th ed. 2013).

80. Justices Alito and Roberts cited "Stern and Gressman" in their respective opinions for *Foster v. Chatman*, 136 S. Ct. 1737 (2016). Since those opinions were written for the same case, this book was not included in the group of popularly cited treatises above.

81. 136 S. Ct. 2272, 2284 (2016) (Thomas, J., dissenting) (citing O. W. HOLMES, JR., THE COMMON LAW (1881)).

82. 136 S. Ct. 1120, 1147 (2016) (Alito, J., concurring) (citing 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)).

83. *Evenwel*, 136 S. Ct. at 1139 (Thomas, J., concurring) (citing AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005)); *id.* at 1145 nn.5–6, 1149 (Alito, J., concurring) (citing the same).

84. 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (first citing JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015)); then citing MICHELLE ALEXANDER, THE

Seven justices, all except Justice Kennedy (and Justice Scalia), cited at least one book about law, but aside from Justice Sotomayor in *Strieff*, there was an almost random quality to the use the justices made of such books. Justice Breyer obviously had reason to look into the Puerto Rican Constitution for his dissenting opinion in *Puerto Rico v. Sanchez Valle*, a criminal case on certiorari to the Supreme Court of Puerto Rico.<sup>85</sup> But what was there about Telford Taylor's *Two Studies in Constitutional Interpretation* that inspired Justice Alito to cite this forty-seven-year-old book in his opinion for the Court in a drunk-driving case, *Birchfield v. North Dakota*?<sup>86</sup>

Aside from Akhil Reed Amar's *American's Constitution*, the only book about law to receive more than one citation was Antonin Scalia's and Bryan A. Garner's 2012 *Reading Law: The Interpretation of Legal Texts*, cited by Justices Thomas, Sotomayor, and Kagan. It will be interesting to see in future terms how this volume fares in the citation count. Were any of these justices—or all of them—offering a one-time gesture of respect to their departed colleague, or will this book enter the tiny canon of frequently cited books about law?

It's fitting to end this Foreword with a question, because this journey through the justices' collective bookshelves during the 2015 Term raises as many questions as it answers. I have indulged the conceit that it was the justices, and not their law clerks, who selected the books to cite, in much the same way that we treat Supreme Court opinions as if the justices write every word of the opinions that bear their names. In fact, the process for both is probably collaborative, rather than either/or. It's hard to believe that rogue law clerks withheld dictionaries from Justice Kennedy or forced treatises on Justice Thomas. I assume that the patterns that emerged during OT 15, if not every citation in every opinion, reflect the justices' actual preferences.

It would also be useful, for an energetic researcher of the future, to probe further and cross-check the opinions against the briefs submitted in each case. That would show whether the books that appear in the published opinions, especially the more obscure ones, were introduced into the Court via the briefs, as opposed to occurring spontaneously to the justices or cropping up in law clerk research. I did not take this further step. Better to tempt readers than to try their patience.

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NEW JIM CROW (2010); and then citing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (2002)).

85. 136 S. Ct. 1863, 1882 (2016) (Breyer, J., dissenting) (citing ANTONIO FERNÓS-ISERN, *ORIGINAL INTENT IN THE CONSTITUTION OF PUERTO RICO* (2d ed. 2002)).

86. 136 S. Ct. 2160, 2175 (2016) (citing TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969)).