The Ideology of Legal Interpretation

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INTRODUCTION

Legal scholars and political scientists often disagree over the degree to which legal interpretive strategies might, at least in part, drive judicial decision-making. In other words, when a judge uses "originalism" to interpret the Constitution, does she do so because she truly adheres to that strategy and finds its result determinative, or does she do so as a means to an ideological end? Political scientists most often consider "the law," as measured by case facts or precedent or invocations of the intent of the framers, mere "window dressing" that provides cover for judges to vote in accordance with their preferred policy outcome. Legal scholars, more often than political scientists, attribute decisions to legal analysis.[1]

But it is difficult to separate the influence of the legal and the attitudinal, due to the conflation of legal and ideological preferences. For example, political scientists Sara Benesh and Harold Spaeth argue that, in order to model the role of law on dissenting behavior on

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1. *See, e.g.*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841 (2006); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. R. 323 (1992); Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RES. Q. 131 (2004); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002).

the Supreme Court, one could examine the extent to which Justices disagree over "what the case is about" rather than how best to resolve the case.[2] In order to tap into that consideration, they look at factors such as legal provision, issue, authority for decision, declaration of unconstitutionality, and alteration of precedent. But might these factors be driven by ideological concerns? In other words, might strategic justices frame cases in ways that best suit their preferred outcome? Or might liberal and conservative justices see cases differently? This Article focuses on these possibilities by testing for ideological components in two modes of legal interpretation—originalism and legislative history—for judges of the U.S. Court of Appeals for the Seventh Circuit. Are these legal devices used in pursuit of policy or are they instead determinative (at least partially) of outcomes? Justice Scalia remains, of course, the most famous proponent of originalism.[3] Is it a coincidence that he is also one of the most conservative members of the Supreme Court? Justice Breyer suggests that one should interpret the Constitution in light of its democratic aims and champions the use of legislative history to enact the will of the people.[4] Is it a coincidence that he is one of the more liberal Justices?

This Article questions whether consistency in legal interpretation is truly a manifestation of the influence of law or instead a means to a preferred policy end. Part I of this Article discusses the legal interpretive tools of originalism and legislative history and how they might influence outcomes in cases. Part II discusses judicial decision-making in the U.S. Courts of Appeals and justifies their use in the analysis. Parts III and IV offer information on our data and methodology, as well as a discussion of the results. Finally, in Part V, we find that the use of legal interpretive strategies are indeed, at least in part, ideologically-driven, though not in a straightforward way. We conclude that arguments suggesting that legal interpretation is

2. Sara C. Benesh & Harold Spaeth, *The Constraint of Law: A Study of Supreme Court Dissensus*, 35 AM. POL. RES. 755 (2007).

3. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

4. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

determinative and hence alleviates room for attitudinally-motivated outcomes are over stated.

I. LEGAL INTERPRETATION

"Making sense of legal interpretation in theory is not the same as making sense of it in practice."[5] There are few points of agreement in the debate over legal interpretation. However, most judges and scholars agree that the text of the statute or constitutional provision is the starting point.[6] In addition, judges and legal academics accept that courts will rely heavily on their previous decisions interpreting the statute or constitutional provision in question. Beyond the text and precedent, however, considerable disagreement exists over the appropriate tools with which to derive a statute's or constitutional provision's meaning.[7]

Consider, for example, the relationship between a commitment to originalism and an acceptance of legislative history. If a judge desires to know the original meaning of any legal document, he or she might find both originalist documents and legislative history attractive. Yet, some judges embrace originalism but shy away from the potentially unwieldy documents of legislative history in an effort to promote legal interpretation that is more rule-bound and formal.[8] (An argument can be quite forcefully made, though, that the legal history surrounding the drafting of the Constitution is equally cumbersome.) Similarly, a judge may dislike legislative history either because the judge is non-originalist (i.e., has no interest in the intent of the drafter), or because the judge is a formalist preferring rules over

5. Czarnezki & Ford, *supra* note 1, at 853.

6. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 513–879 (2d ed. 1995); Bluewater Network v. EPA, 370 F.3d 1, 13 (D.C. Cir. 2004) ("We begin our interpretation of the provision with the assumption that legislative purpose is expressed by the ordinary meaning of the words used.") (internal citations omitted).

7. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995).

8. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 173–75 (1996) (discussing "hard originalism" as an attempt to make constitutional and statutory interpretation rule-like).

standards (i.e., legislative history documents open up far too many legal avenues compared to the plain text of the document).[9]

Indeed, two current Justices, Scalia and Breyer, disagree mightily over how best to make sense of the written words of Congress and the Founders. This section focuses on the warring interpretive strategies of originalism and legislative history, championed by these two Justices as well as by other judges and legal scholars.

A. Originalism

Professor Keith Whittington describes "the critical originalist directive" as the position that "the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification."[10] Justice Scalia believes that a judge who subscribes to an originalist view of interpreting a constitutional or statutory provision would agree with the following: "Laws mean what they actually say, not what legislators intended them to say but did not write into the law's text . . . . [I]t is the *original* meaning of the text . . . that should govern . . . ."[11] This is a rule-bound method of deciding cases, arguably constraining the applying judge to only those interpretations of the Constitution or of a statute that are reasonably inferred from the original public understanding of the document's text.[12] This means that the substance of a constitutional provision might be gleaned via contemporaneous dictionaries or *The Federalist Papers*, as opposed to the notes of James Madison.

As Justice Scalia recently stated in an address to The Federalist Society, "Scalia does have a philosophy, it's called originalism. That's what prevents him from doing the things he would like to

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9. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (stating that formalists are committed "to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases").

10. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999).

11. SCALIA, *supra* note 3, at vii.

12. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

do. . . ."[13] Originalism, according to its proponents, reduces judicial discretion and narrows the set of plausible outcomes. Even so, one substantial difficulty with originalism is that it cannot answer all legal queries. The original meaning of many constitutional provisions is unknown and the meaning of others is disputed.[14] In addition, formal originalism may provide no window into statutory interpretation cases of first impression; perhaps this is why overlap exists between originalists and textualists. That said, if, as Judge Robert Bork suggests, principles of originalism can apply to statutory interpretation,[15] then why would one rely on the meaning of the plain language of the text while rejecting any insight provided by the legislative history?

B. Legislative History

Other efforts to find meaning in legislation seek not only to determine what the words in a legal document mean, but also what the legislators who drafted the statute intended by the words. This approach is best characterized by a reliance on or use of legislative history. In practice, legislative history is a commonly used interpretive tool.

Despite this, there remains continued disagreement among both judges and legal scholars about the legitimacy of its usage. Such disagreement has ebbed and flowed over the decades. In 1930, Max Radin claimed that there was "no general agreement" on the appropriate use of legislative history in statutory interpretation.[16] However, soon thereafter, most lawyers accepted the validity of legislative history.[17] Jorge Carro and Andrew Brann, looking at

13. Jonathan Ewing, *Scalia Dismisses "Living Constitution,"* BREITBART.COM, Feb. 14, 2006, http://www.breitbart.com/article.php?id=D8FP4G40E&show_article=1.

14. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 88–95 (2004).

15. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144–45 (1990).

16. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930).

17. *See* Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 380 (1947) ("Despite earlier doubts, committee reports, committee amendments, responsible explanations on the floor, and similar legislative materials may now be considered by a federal court interpreting a statute, even when the words, taken alone, have an unambiguous meaning."); *The Johnson Act: Defining a "Plain, Speedy, and Efficient Remedy*

Supreme Court case law from 1938 to 1979, "detect[ed] a firm evolution that [went] from the almost absolute rejection of the use of legislative history in statutory interpretation to an almost absolute acceptance."[18]

But while legislative history is a common judicial tool, research indicates the rate of usage has declined, at least in the Supreme Court.[19] Although legislative history has lost popularity since the Burger Court, it has been argued that Justice Scalia's emergence on the Court "has not only blunted the growth of use of legislative history, but has led to its substantial decline," further inhibiting its use since the 1980s and early 1990s.[20] Scalia has continued his assault on legislative history. At his confirmation hearings, Scalia stated that if he "could create the world anew," he would get rid of legislative history.[21] Once on the Court, Scalia has at times refused to join sections or footnotes of majority opinions that deal with legislative history.[22]

Meanwhile, Justice Breyer champions legislative history and argues that "history that shows what the language likely meant to those who wrote it" should be relevant to a judge's inquiry with respect to a specific statute.[23] He argues that consideration of the purpose of a statute "helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."[24]

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in the State Courts, 50 HARV. L. REV. 813, 826 (1937) ("A few courts have forbidden the use of these materials, but the strong approval of a considerable body of authority now points to their free employability.").

18. Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 296 (1982).

19. James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 220–21 (2006); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386–87 (1999).

20. Koby, *supra* note 19, at 387, 395; *see also* Brudney & Ditslear, *supra* note 19, at 221.

21. *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 105-06 (1986).

22. *See, e.g.*, S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 373 (2006); KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 113 (2004); Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 420 (2003); Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 955 (1997); United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 215 (1996).

23. BREYER, *supra* note 4, at 7.

24. *Id.* at 99.

C. How Interpretative Strategies Might Influence Outcomes

Little research addresses the influence of interpretive strategies on judicial decision-making. While most research focuses on the question of whether use of interpretive strategies are, in themselves, evidence of the influence of the "legal," some articles do consider the questions of how and why interpretive strategies might influence outcomes, or whether interpretive tools are post hoc justifications of prior-held desires for a particular disposition in a particular case.

Professors Brudney and Ditslear, for example, study the use of legislative history in the U.S. Supreme Court, finding that such use has declined (as mentioned above) and that its use is not straightforwardly ideological.[25] Indeed, while liberal Justices are more likely to invoke legislative intent than are conservatives, they do not predominantly reach liberal outcomes in doing so. Brudney and Ditslear suggest that, rather than ideology, the frequent use of legislative history might be an interpretive philosophy regarding the role of the Court and Congress.[26] They argue that it moderates outcomes and may be a legitimizing influence for the Court.[27]

Professors Gates and Phelps, on the other hand, consider the use of "intentionalism" in the decision-making of Justices Rehnquist (a proponent) and Brennan (an opponent), seeking to determine whether the invocation of the Framers was exclusive to one ideology and whether it was influential as to outcomes.[28] They find that neither Brennan nor Rehnquist use the method often, that there is no large difference between the two in how often they use it or to what extent it is controlling (most often, it is not), and that each Justice uses the interpretive strategy to reach the outcome they personally prefer.[29] In other words, while it is not often controlling and is not often invoked, when one of the two Justices used intentionalism in their opinions, they did so to reach their preferred policy outcome. Consistent with

25. Burdney & Ditslear, *supra* note 19, at 228–29.
26. *Id.*
27. *Id.*
28. John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245 (1996).
29. *Id*. at 257.

an attitudinal model formulation,[30] Gates and Phelps argue that the intent of the framers is a tool, enabling the Justices to reach the outcomes they prefer (at least these two Justices, for the decisions under study).[31]

Finally, Professors Corley, Howard, and Nixon study use of *The Federalist Papers*, seeking to uncover the influence of the *Papers* (and hence, originalism) on outcomes as a pure legal influence on decision-making.[32] They note an increase in citations to *The Federalist Papers*, which many take to be a sign that the Justices are relying more heavily on the intent of the Framers, a legalistic criterion.[33] However, their research shows that references to *The Federalist Papers*, rather than being a constraint on ideological decision-making, facilitate it.[34] Indeed, liberal Justices are far less likely to cite to *The Federalist Papers* than are conservative Justices, and all Justices are more likely to cite to them when in need of additional legitimacy (i.e., in close cases, in cases in which they declare legislation unconstitutional or overturn precedent, and in cases when separate opinions in the case also cite to them).[35] In addition, they find that the rise in citations to *The Federalist Papers* over time is largely a result of increased dissensus on the Court.[36] In short, the evidence suggests that legitimacy needs and ideology drive citations to this source of original intent, not a legally-driven search for authority or the "right" answer.

In general, based on the studies discussed above and the conventional wisdom, as well as the prevalence of attitudinal expectations about judicial behavior, there is an expected relationship between interpretive strategy and ideology. Indeed, originalism is thought to be preferred by conservative jurists and rarely finds traction with more liberal judges and scholars.[37] Though some

30. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

31. Gates & Phelps, *supra* note 28, at 257.

32. Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329 (2005).

33. *Id*. at 330.

34. *Id*. at 339.

35. *Id*. at 335–36.

36. *Id*. at 337–38.

37. *But see* Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting)

conservatives, such as Judge Posner, are not originalists,[38] the movement is strongly aligned with the most conservative members of the judiciary.

Justice Scalia, for example, relies on the writings of the Framers to "display how the text of the Constitution was originally understood."[39] Similarly, Justice Thomas has been known to cite *The Federalist Papers* "to show how far we have departed from the original understanding" of the United States Constitution.[40] Judge Bork states "that judges must always be guided by the original understanding of the Constitution's provisions. . . . [N]o set of propositions is too preposterous to be espoused by a judge or a law professor who has cast loose from the historical Constitution."[41] Professor Cass Sunstein argues that Republican presidents have sought to appoint originalists to the federal bench; Scalia and Thomas (and Bork) fall squarely within this category.[42] These originalist judges have been supported by the Conservative Right and belittled by the Liberal Left.[43]

Many claim that adoption of originalism as an interpretive strategy reduces the discretion judges have, thereby curbing the influence of ideology on their votes.[44] However, if originalism is statistically capable of increasing the probability of a conservative vote, discretion may not be taken from the judge; rather, conservative outcomes are more likely to result from originalist jurisprudence. On the other hand, invocations of originalism may be a choice and preference in favor of predictability and ease of decision-making regardless of ideological outcome.

(rejecting the idea that the Constitution should be construed in accordance with the current times, and arguing that using amendments to change the meaning of the Constitution was "good for our Fathers, and being somewhat old fashioned I must add it is good enough for me"); Akhil Reed Amar, *The Supreme Court 1999 Term, Foreward: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (2000).

38. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2003).

39. SCALIA, *supra* note 3, at 38.

40. United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

41. BORK, *supra* note 15, at 351–52.

42. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).

43. *See* MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005).

44. *See, e.g.*, SCALIA, *supra* note 3, at 45–46.

Relatedly, legislative history may be expected to be negatively related to a conservative vote, it being a tool favored by more liberal jurists. Conservative jurists like Justice Scalia and Judge Easterbrook disfavor its use[45] while Justice Breyer, for example, defends legislative history.[46] Professors Eskridge and Frickey suggest that an ideological component exists in the use of legislative history as well.[47]

All of this begs the question, which comes first? Is it that conservative jurists are expected to find originalism more seductive and liberals legislative history more persuasive? Or, are conservative outcomes more likely using originalism, liberal outcomes more likely using legislative history, and hence conservative and liberal justices choose them in order to reach their preferred outcomes? We attempt to shed some light on this question of causality as well as disentangle the effects of interpretation and ideology in the analysis below.

II. DECISION-MAKING ON THE U.S. COURTS OF APPEALS

The U.S. Courts of Appeals, charged with offering to every losing federal defendant their one appeal, are ideal laboratories in which to carefully analyze the ways in which legal interpretive strategies affect decisions. Given the infrequency of Supreme Court review of Court of Appeals decisions, these courts are the final hope for most litigants in federal court, hearing over 98% of all federal appeals each year.[48] Scholarship that considers the influences on the decisions at this level of court, attempts to predict how any given case or statute will fare, tries to determine how much confidence we should have in these judgments, or examines the importance (or lack thereof) of the nominations and confirmations process to policy in the United States is, therefore, especially important. This is where policy-making in American federal courts occurs. Disentangling the effects of law and

45. *Id*. at 29–30; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990).

46. BREYER, *supra* note 4, at 85–101.

47. ESKRIDGE & FRICKEY, *supra* note 6, at 603–13.

48. DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 17 (2000).

ideology here promises to bring us closer to knowing what drives decisions at this important level.

In the Courts of Appeals, due to their institutional position, the role of ideology is likely tempered, and law might have a more substantial effect on decision-making.[49] Such intermediate-level courts, understood to be subservient to the U.S. Supreme Court, should be bound by Supreme Court precedent.[50] Additionally, given the circuit courts' lack of docket control, "law" should matter more here. With the large number of "easy" cases these courts hear and the heavy caseload they bear, deference to the lower courts is rampant and disagreement among judges rare.[51] Unlike the U.S. Supreme Court, whose Justices fill its docket with hand-picked legally-challenging or ideologically-salient cases, basic legal interpretive strategies will likely have greater impact in the less dynamic, aggregate caseload of the Courts of Appeals. Thus, legal interpretive strategies may expeditiously resolve the conflicts with which this level of court deals (even if this is not necessarily the case at the Supreme Court level).[52]

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49. *See* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156 (2005).

50. *See* SARA C. BENESH, THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS: PERSPECTIVES ON THE HIERARCHY OF JUSTICE (2002); Donald Songer, Jeffrey A. Segal & Charles Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

51. *See* VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 110, 117 (2006); Cross, *supra* note 49; Erin B. Kaheny, Susan Brodie Haire & Sara C. Benesh, *Change over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals*, 52 AM. J. POL. SCI. 490 (2008). According to the Songer Database and its update, both of which are random samples by circuit by year, between 1925 and 2002, about 88% of the decisions made in the circuit courts were unanimous (i.e., they had neither concurring nor dissenting opinions attached). *See* Appeals Court Data, http://www.cas.sc.edu/poli/juri/appctdata.htm (follow "Original Appeals Court Database (1925–1996)" and "Update to Appeals Court Database (1997–2002)" hyperlinks) (last visited Apr. 8, 2009); Ashlyn K. Kuersten & Susan B. Haire, Update to the Appeals Court Database (2007), http://www.cas.sc.edu/poli/juri/appctdata.htm.

52. *See* Howard & Segal, *supra* note 1. Our focus on the Seventh Circuit in particular is pragmatic; it is the only one for which career usage scores over interpretative strategies are available.

III. RESEARCH DESIGN

A. Data

Are legal interpretive strategies purely legal, or are they driven—in part—by desired ideological outcome? Judge Easterbrook maintains, with respect to a text-based interpretive strategy, that, "If the textualist is interpreting laws written in a more conservative era, the results will appear 'conservative' to modern eyes. . . . When the text is to the left of today's consensus, textualism produces results that are politically 'liberal.'"[53] Is this confirmed in empirical analysis?

In order to test the effects of legal interpretation, all non-unanimous decisions[54] made by the U.S. Court of Appeals for the Seventh Circuit from the 1997 term through the 2003 term in the areas of criminal procedure, civil rights, First Amendment, due process, and privacy were coded for the ideological direction of their outcomes.[55] Using judge vote as the unit of analysis and direction of vote (as coded in the Songer database)[56] as the dependent variable, this project seeks to determine whether modes of legal interpretation (coded as career usage scores for each individual judge's invocation of originalism and legislative history as tools of interpretation), after

53. Easterbrook, *supra* note 45, at 50.

54. Non-unanimous cases are those eliciting either a dissenting opinion or a concurrence from one of the judges on the three-judge panel. Scholars have shown that unanimous cases can mask disagreement among judges and may sometimes give the misleading impression that a particular case is "easy." While there are certainly exceptions, perhaps where a collegial judge defers to his or her more interested colleagues, many unanimous cases are easy (or at least easier than the non-unanimous cases), either because the outcomes are resolved by precedent or because the judges' policy preferences on the issue are similar. We use only nonconsensual cases in order to give ideology an opportunity to exert some influence, making our test of ideology versus legal interpretation a more rigorous one. Pragmatically, the data we use were collected for another project on coalitions, hence the lack of interest in unanimous decisions.

55. The project is limited to these issue areas because in other areas it is not possible to define a liberal or conservative outcome. Cases heard en banc, panel decisions vacated on rehearing, dissents from anything but the majority opinion (dissents from denials of rehearing, denials of rehearing en banc, and petitions for rehearing or stay), or cases in which Judge Jesse Eschbach participated (because there were so few) are excluded. Songer's coding helps determine whether outcomes are ideologically liberal or conservative. *See* Songer, *supra* note 51.

56. *Id.*

controlling for ideology (measured by career liberalism scores compiled from the Songer database), predict the decision.

B. Model of Decision-Making

This section describes how the model's variables are operationalized, including measures of the use of legal interpretative strategies, measures of ideology, and controls for lower court direction and liberalism of the Supreme Court in the term previous to the decision. It treats each in turn.

1. Modes of Legal Interpretation

The measures for modes of legal interpretation are derived from the research of law professors Jason Czarnezki and William Ford.[57] Czarnezki and Ford (and their research assistants) coded every opinion (majority, dissent, concurrence, and *dubitante*)[58] written by sixteen current and former judges on the Seventh Circuit Court of Appeals over the course of their careers (excluding those cases here under study) for the use of various modes of legal interpretation.[59] Difficulties arise in measuring the "law," especially in determining how best to code cases for reliance on various strategies of legal interpretation. The Czarnezki and Ford strategy considered judicial use of interpretive documents and phrases as evidenced by reliance upon them in opinions written by individual judges. This provided a proxy for the use of interpretive strategies overall. This Article specifically considers originalism (interpreting the Constitution in light of the meaning as understood at the time of drafting) and legislative history (the use of committee reports, floor speeches, or other tools to discern what legislators meant when they wrote specific words into statutes). Is reliance on such interpretive tools ideologically motivated, or separately determinative of outcomes?

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57. Czarnezki & Ford, *supra* note 1.

58. A *dubitante* opinion is written when a judge desires to express reservations about the majority's conclusion, but does not deem his or her reservations to rise to a level justifying a concurring or dissenting opinion. *See* Jason J. Czarnezki, *The* Dubitante *Opinion*, 39 AKRON L. REV. 1 (2006).

59. Czarnezki & Ford, *supra* note 1, at 856–57.

In order to code for each interpretive strategy, Czarnezki and Ford use LEXIS searches coupled with extensive content analysis in order to differentiate between frequent mention of such tools and real reliance upon them in decision-making.[60] Their "filtered" career scores, which compute the percentage of a given judge's written opinions that rely on a particular tool, prove most valuable. In order to be included in this "reliance" category, a judge had to have used the interpretive tool to interpret a statute or constitutional provision. In other words, the judge needed to have positively relied on the tool in his or her legal analysis of the case, not merely mentioned it.[61] In this Article, these scores are used as a measure of how a given judge legally approaches a case. The Article then explores the impact of the judge's legal philosophy on his or her vote in a given case.

However, given the anticipated role of ideology in the career usage scores of the judges, the career usage scores are first purged of the impact of ideology by regressing career ideology score on the career usage scores for both originalism and legislative history. The saved residuals are then used as measures of the frequency of usage in the model of judge votes. Hence, the measures of originalism and of legislative history can be said to have been "cleaned" of the influence of the career liberalism score of each judge and therefore independent from ideology.[62]

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60. The LEXIS searches were as follows: the original meaning of the Constitution (("original understanding" or "original intent" or "originalism" or "original meaning" or ratifie!) /10 (constitution! or amendment or clause)), or (Federalist or "founding fathers" or "constitutional convention"), or (framers /5 constitution! or amendment or clause); legislative history ("legislative history" or "committee report" or "U.S.C.C.A.N." or "floor debate" or "committee statement" or "committee hearing" or "legislative counsel" or "H.R." or "S.J. Res." or "Cong. Rec." or "S. Res." or "H.R.J. Res." or "S. Doc. No." or "S. Rep."). Czarnezki & Ford, *supra* note 1, at 862 n.95.

61. *Id.* at 876.

62. The result of those regressions are as follows (standard errors in parentheses): Leghist = 3.51 (0.25) + 19.47 (1.06) Career Ideology + e. Career ideology is highly significant and signed such that as liberalism increases, the extent to which the judge uses legislative history also increases. Originalism = 0.186 (0.027) + 0.75 (0.114) Career Ideology + e. Again, career ideology is significant, but much less influential (as seen by the coefficient) and in the opposite direction as one might posit; as liberalism goes up, the career originalism score goes up.

2. Ideology

In order to control for what most scholars have found to be at least somewhat influential, the model includes a measure of judge ideology, created to comport with the legal interpretative scores. As those scores are career scores and, as noted above, are employed as measures of the way in which a judge legally approaches a given case, a measure for ideology that approximates a career score is included as well, measuring the ideological approach favored by a given judge. In order to calculate this measure, the Songer Database is used, from which the percentage of cases voted on by each judge in an ideologically liberal direction over the course of those votes from his or her career captured in the Songer data are calculated.[63] The measure, then, should decrease the likelihood that a conservative vote will be reached; as the judge's liberalism increases, any given case she decides should be less likely to be conservative in nature, especially since unanimous decisions are excluded, as noted above. Other measures of ideology are measured at the individual level, rather than the career level, and while they might help predict the likelihood of a conservative vote in a given case, they tap into different considerations (e.g., nominations and confirmations) than does a score based on career voting.[64]

63. The Songer data is a sample by circuit, so some judges have more votes than others and the measure does not consider every vote cast by any of the judges in the Seventh Circuit. It should, however, approximate the average as the sample is random. Songer, *supra* note 51.

64. An appointment-based measure of ideology is popular in the research analyzing circuit court decision-making; however, the influence of that measure is also estimated. The most widely-used score based on the appointment derives from Michael W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001). Their measure, based on Poole and Rosenthal's NOMINATE scores for the President when sentorial courtesy does not operate and for the home state Senator(s) when senatorial courtesy does operate ranges from -1 (most liberal) to +1 (most conservative). *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998). See *infra* note 67 for the findings when employing the "GHP" scores, rather than career liberalism.

3. Control Variables

Finally, control variables must be added. These controls include, first, the directionality of the lower court in recognition that the Courts of Appeals are highly deferential to the lower court's decision. This is both legally and contextually defensible. Legally, there are standards of review that require deference to the lower court's determination of the facts at issue. Contextually, because the Court of Appeals has a mandatory docket, they will arguably receive many factually-resolvable cases (i.e., "easy" cases). For that reason, the Court of Appeals should often defer to the lower court's decision for both legal and merit-related reasons.[65]

In addition to deference to the lower court, much research has suggested that the Courts of Appeals defer to the Supreme Court.[66] In order to control for the potential influence of the U.S. Supreme Court on decision-making by its subordinates, a measure of the Supreme Court's overall liberalism in the term prior to the one at issue in the circuit court case is also included (since the Court, if it has an impact, can only have that impact after it has made its decision).

IV. RESULTS AND DISCUSSION

TABLE 1: INFLUENCE OF LEGAL INTERPRETIVE STRATEGIES ON IDEOLOGICAL OUTCOMES

Variable	Coefficient	Robust Std. Error	Sig Level[a]
Originalism	2.28	0.58	0.00
Legislative History	-0.09	0.06	0.06
Career Liberalism	1.32	1.12	0.12
Lower Court Liberal	-1.19	0.22	0.00
Supreme Court Liberalism	-1.96	2.38	0.21
Constant	2.14	1.10	0.05

[a] All significance levels are for one-tailed tests.
Dependent Variable: 1 = conservative vote, 0 = liberal vote
N=476. Model Fit: Wald chi2 = 45.97, prob > chi2 = 0.00; pseudo R2 = 0.10; Area under ROC = 0.72; PRE = 7.88%

65. Of course, given the focus only on non-unanimous cases, such deference may be less notable than in other studies that include unanimous decisions as well.

66. *See* BENESH, *supra* note 50; Songer, Segal & Cameron, *supra* note 50.

The results of our primary analysis can be seen in Table 1. Using one-tailed tests, we find that as career usage of legislative history scores increases, a judge is less likely to vote conservatively in any given case, though the significance of the variable does not quite reach the conventional $p<0.05$ standard (as seen in the table, $p<0.06$ for this variable). In addition, and as expected, as career usage of originalism increases, a judge is more likely to vote conservatively in any given case. It is also the case that, when the lower court reached a liberal outcome, the circuit judge is less likely to vote conservatively (and hence more likely to uphold the lower court's liberal vote). Finally, neither career liberalism nor Supreme Court liberalism has a significant impact on the vote. Career liberalism is actually in the opposite direction as that suggested by the research.[67] In terms of predicted probabilities, compared to the situation in which all variables are held at their respective means, a one-standard-deviation increase in use of legislative history makes a conservative outcome 3.5% less likely, while a one-standard-deviation increase in use of originalism makes a conservative outcome 8.2% more likely. A case decided liberally in the lower court is 15.6% less likely to be decided conservatively by the circuit; a case decided conservatively by the lower court is 7.7% more likely to be decided conservatively.[68]

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67. "GHP" scores perform similarly; they do not reach standard levels of significance and are incorrectly signed. Using them to purge ideology from the interpretive measures also results in strikingly similar results. The model fit is worse using GHP scores, but nothing else appreciably changes. Hence, because the legal interpretation scores are measured as career scores, the career liberalism scores are preferable.

68. The predicted probability of a conservative vote is 0.753 when all variables are at their respective means.

TABLE 2: INFLUENCE OF LEGAL INTERPRETIVE STRATEGIES ON IDEOLOGICAL OUTCOMES FOR LIBERAL AND CONSERVATIVE JUDGES

Liberal Judges Only			
Variable	Coefficient	Robust Std. Error	Sig Level[a]
Originalism	-1.78	1.04	0.09
Legislative History	-0.54	0.17	0.00
Career Liberalism	-40.92	11.18	0.00
Lower Court Liberal	-0.62	0.44	0.08
Supreme Court Liberalism	4.65	6.04	0.22
Constant	12.67	4.27	0.00

Conservative Judges Only			
Variable	Coefficient	Robust Std. Error	Sig Level[a]
Originalism	4.90	1.09	0.00
Legislative History	-0.05	0.07	0.23
Career Liberalism	-1.93	1.82	0.15
Lower Court Liberal	-1.47	0.27	0.00
Supreme Court Liberalism	-3.32	2.78	0.12
Constant	3.43	1.31	0.01

[a] All significance levels are for one-tailed tests except for originalism for liberal judges, as it is wrongly signed.
Dependent Variable: 1 = conservative vote, 0 = liberal vote
Liberal Judges: N=145. Model Fit: Wald chi2 = 19.51, prob > chi2 = 0.00; pseudo R2 = 0.15; Area under ROC=0.76; PRE = 9.5%. Conservative Judges: N=331. Model Fit: Wald chi2 = 54.81, prob > chi2 = 0.00; pseudo R2 = 0.1523; Area under ROC= 0.76; PRE = 8.17%.

It remains unclear, however, whether liberal and conservative judges might still behave distinctively when it comes to employing either legislative history or originalism as a tool to better understand texts. As noted above, in the regressions purging ideology from the career interpretive scores, the former was significantly related to the latter. Indeed, it is also true that career originalism predicts career ideology fairly well, as does career legislative history use. Again, though, both are positive (originalism would be expected to be negative) and statistically significant, though their coefficients are much smaller than the coefficient on ideology in the regressions on

the interpretive scores.[69] This provides some indication that liberal and conservative judges are different in terms of their reliance on these tools and the ideological connection they may have with them. Table 2 presents results of two models attempting to test that notion. Defining "liberal" as those judges with a career liberalism score of more than 0.25,[70] the table demonstrates that there are clear differences across judges in the relationship between use of interpretive strategy, ideology, and a given vote in a given case. The "liberal" judges are far more influenced by ideology and their use of a tool always decreases the likelihood of a conservative vote. These judges appear to use the tools to their ideological advantage; they employ the tools to reach liberal outcomes. The conservative judges, on the other hand, enhance the likelihood of a conservative vote when they use originalism and decrease that likelihood when they rely on legislative history (though not to a statistically significant degree in the latter case). Ideology works in the expected direction, though it does not attain conventional levels of statistical significance. This suggests that judges employ tools differentially and that, perhaps, liberal judges are more ideological than conservative judges.[71]

CONCLUSION

It is indeed the case that judges who invoke originalism frequently in their opinions vote more conservatively in this set of cases. In addition, judges who frequently cite legislative history are more likely to vote liberally. Does this mean that judges are using legal interpretive tools strategically in order to advance their preferred resolution of a case? Maybe so, especially given the findings from the regression focusing on liberal justices only. Does it mean that

69. The results of those regressions are (standard errors in parentheses): Career Liberalism = 0.182 (0.007) + 0.11 (0.017)Originalism + e; Career Liberalism = 0.055 (0.01) + 0.021 (0.001)Legislative History + e.

70. The range of liberalism score was 0 to 0.50. A score of 0.25 or greater included the top 30% of liberal voting judges.

71. Of course, caution should be used in attributing too much to these findings. Labeling a judge as "liberal" because the judge voted in a liberal direction in more than 25% of the cases decided over the course of his or her career is a fairly low threshold for liberalism. However, using the GHP scores as the liberal/conservative cutoff, similar findings emerge, though some signs switch on the insignificant variables (Liberal = GHP > 0.).

conservatives tend to be more convinced by originalist interpretations and hence employ them more often? Possibly. Does this evidence show definitely which comes first—the decision or the rationale? It does not, as bivariate regressions testing the influence of career ideology on career tool usage and vice versa both produce significant coefficients. However, the analysis here does show that at least *some* attempts to justify a particular version of "the best way in which to interpret the Constitution or a statute" by using terms that suggest its neutrality may be disingenuous or post hoc rationalizations of ideological decisions.[72]

Why does this matter? Many have argued that the legitimacy of the Supreme Court stems in part from citizen beliefs that they decide cases in an impartial, non-ideological way. The use of interpretive strategies attempts to perpetuate that belief, with Scalia arguing that such reliance eliminates much of the room to politically maneuver in decision-making on the Court. This Article—as well as others exploring similar relationships at the Supreme Court level—casts some doubt on those claims, doubt that is supported by common-sense notions about the difficulty in discerning the intent either of the Framers or of legislators, especially due to lack of collective intent and lack of accurate descriptions of motivations. Judicial opinions, normatively, attempt to justify the decision made by the court or by the judge with evidence legitimizing that outcome. Perhaps some evidence is selected with the preferred outcome already in mind.

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72. Of course, the reader should recognize that not all cases in the dataset would be affected by originalism or legislative history, and there may be other legal influences on decisions in those cases not captured by the model. It should also be noted that we consider a limited dataset in this Article.