

CHOOSING INTERPRETIVE METHODS: A POSITIVE THEORY OF JUDGES AND EVERYONE ELSE

Alexander Volokh^{*}

In this Article, I propose a theory of how rational, ideologically motivated judges might choose interpretive methods, and how rational, ideologically motivated laymen—legislators, litigation organizations, lobbyists, scholars, and citizens—might respond. I assume that judges not only have ideological preferences but also (perhaps merely strategically) want to write plausible opinions. As a result, if judges decide to use any particular method of statutory or constitutional interpretation, the plausibility demands of the method they use will make them deviate from their own ideal points in the direction of the “most plausible point” of that method.

When judges can choose their interpretive method, they select the method that (taking these deviations into account) comes as close as possible to their favored outcome. This creates a selection bias, which makes interpretive methods’ observed distributions differ systematically from their true distributions. This bias explains how one can favor mandating an interpretive method even though one is politically closer to the current practitioners of a different method.

Judges can also choose whether to use the same method from case to case. I explain why, even though ideologically motivated judges (or litigation groups) might want to make the method they prefer in most cases mandatory for everyone, they do not personally have much effect on whether other judges use that method, and so it is rational for them to deviate from that preferred method in those cases where they prefer a different method.

^{*} Visiting Associate Professor, Georgetown University Law Center, av266@law.georgetown.edu. I am grateful to Charles F. Abernathy, David Arkush, Randy E. Barnett, Abheek Bhattacharya, Matthew Bower, Sherman L. Cohn, Michael R. Diamond, Daniel W. Drezner, Heather Elliott, James Forman, Jr., Amanda Frost, Lisa Heinzerling, John H. Jackson, Vicki C. Jackson, Gregory Klass, Richard J. Lazarus, Martin S. Lederman, Amanda Leiter, Jacob T. Levy, David J. Luban, Ulrike Malmendier, John Mikhail, Jonathan T. Molot, Scott L. Nelson, Nathan B. Oman, Michael Pakaluk, Justin Pidot, Nicholas Quinn Rosenkranz, Warren F. Schwartz, Louis Michael Seidman, Jeremy N. Sheff, Girardeau A. Spann, Matthew Stephenson, Mark Tushnet, David C. Vladeck, Eugene Volokh, Hanah Metchis Volokh, Vladimir Volokh, Robin L. West, Ethan Yale, David Zaring, participants in Georgetown University Law Center’s Summer Faculty Workshop, and commenters on the Volokh Conspiracy blog, <http://volokh.com>, for their helpful comments. I am also grateful to Jane Dimmitt, Isaac Rethy, and Benjamin P. Zogby for their able research assistance, Suzan Benet, and the law librarians at Georgetown University Law Center. Research for this Article was partly funded by a Summer Writing Grant from Georgetown University Law Center. “Where I am not understood, it shall be concluded that something very useful and profound is couched underneath.”

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I. INTRODUCTION

“Do nine men interpret?” “Nine men,” I nod.

— Leigh Mercer¹

Textualism is a “conservative”² method of statutory interpretation, according to the conventional wisdom.³ William Eskridge calls it “anti-governmental”;⁴ Andrei Marmor calls it “neo-conservative” and anti-regulatory.⁵ Bradford Mank reports a widespread belief that “most judges associated with textualism are hostile to environmentalism,”⁶ and rejects the suggestion that textualism can be friendly to environmental concerns⁷ by noting that “textualists tend to devalue the policy balances struck by environmental agencies between broad pro-environmental aspirational language and narrow pro-industry exceptions.”⁸

One commonly stated reason—stated by both Frank Easterbrook, a textualist, and Marmor, an anti-textualist—is that textualists let loopholes in regulatory statutes lie, rather than filling them in by reading them broadly in ways that make sense or that accord with the intent of the enacting legislature.⁹ Eskridge suggests another, more long-term, reason: By forcing Congress to change the statute, rather than changing it for them, textualists raise the cost of legislation, thus reducing the amount of legislation in the future.¹⁰

The conventional wisdom likewise holds that textualist opinions are more likely to be overridden by Congress. Why? Because, Justice Ste-

¹ MICHAEL DONNER, I LOVE ME, VOL. I: S. WORDROW’S PALINDROME ENCYCLOPEDIA 104 (1996) (speculatively attributing the phrase to palindromist Leigh Mercer, *see id.* at 201); DMITRI A. BORGMANN, LANGUAGE ON VACATION: AN OLIO OF ORTHOGRAPHICAL ODDITIES 59 (1965); *see also* “WEIRD AL” YANKOVIC, *Bob, on POODLE HAT* (Volcano 2003).

² William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994).

³ *See* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. L. REV. 1409, 1414 (2000); McNollgast, *The Theory of Interpretive Canon and Legislative Behavior*, 12 INT’L REV. L. & ECON. 235, 237 (1992).

⁴ William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991).

⁵ Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2064 & n.3, 2066 (2005).

⁶ Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1233 (1996).

⁷ *See* Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 23 (1995).

⁸ Mank, *supra* note 6, at 1267.

⁹ *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988) (if textualism “yields no confident answer, we may put the statute down—the question is not within its domain”); Marmor, *supra* note 5, at 2066.

¹⁰ *See* Eskridge, *supra* note 4, at 410.

vens writes, textualists “ignore[] the available evidence of congressional purpose.”¹¹ Or, suggests Eskridge—focusing on *present*, not past, intent—because “[t]he formalist group on the Court is not interested in the preferences of the *current* Congress.”¹² Or, says Daniel Bussel—taking a pragmatic approach (with particular reference to bankruptcy cases)—because of textualists’ “agnostic stance with respect to the practical consequences, purpose, and efficacy of a particular construction.”¹³

Finally, a considerable literature argues that textualism is more likely to make judges find that a statute has a “plain meaning”—and thus deny deference to an administrative agency’s interpretation of the statute under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁴ Justice Scalia himself has candidly avowed: “One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.”¹⁵ And he has attributed his willingness to find plain meaning to being “(for want of a better word) a ‘strict constructionist’ of statutes”¹⁶—a term that he later rejected,¹⁷ but that in context just means a textualist.¹⁸ And various empirical studies (though not all) tend to confirm Scalia’s intuition.¹⁹

Why might this be so? Most obviously, textualism might actually be more determinate.²⁰ Less charitably, some have suggested psychological explanations why textualists might *think* their method yields determinate answers: Textualists are more likely to find a plain meaning because they see the quest for meaning as a puzzle to test their ingenuity, while intentionalists are more likely to find ambiguity because they approach their task as historical researchers uncovering pieces of evidence.²¹

¹¹ *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112–15 (1991) (Stevens, J., dissenting).

¹² Eskridge, *supra* note 4, at 406 (emphasis added); *see also* John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 274 (1992).

¹³ Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 885, 897 (2000); *see also id.* at 911.

¹⁴ 467 U.S. 837 (1984).

¹⁵ The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

¹⁶ Scalia, *supra* note 15, at 521.

¹⁷ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Rule of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 23 (1997).

¹⁸ Scalia, *supra* note 15, at 521 (“Contrariwise, one who abhors a ‘plain meaning’ rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history . . .”).

¹⁹ *See* section III.B.4 *infra*.

²⁰ *See* Scalia, *supra* note 17, at 36; Easterbrook, *supra* note 9, at 62, 65; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 63, 65, 67 (1994); *cf.* Scalia, *supra* note 17, at 45. *But see id.* at 28.

²¹ *See* Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 779 (1995); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U.L.Q. 351, 354, 372–73 (1994); *see also* Mank, *supra* note 6, at 1257.

In short, the statutory interpretation literature is teeming with claims about textualism—its political bias, its tendency to produce congressional overrides, and its tendency to find plain meaning—largely based on “essentialist” explanations, that is, on the supposed nature of the textualist enterprise, which opposes closing loopholes, doesn’t care what makes sense or what Congress thought or thinks, and treats interpretation as a logic game.

But this conventional wisdom may be mistaken, because it fails to take into account that the textualism we observe in written judicial opinions may be an unrepresentative sample of true textualism.

Suppose, as scholars of the “attitudinal model” have argued,²² judges are primarily motivated by the desire to implement their ideological agenda. In most of the attitudinal literature, methods of statutory interpretation are treated as irrelevant—essentially, as “cheap talk.”²³ But suppose, in addition, that judges must, or want to, justify their rulings by reference to a plausible interpretation of some statute. Then methods of interpretation can matter, to the extent different methods make different results more plausible. The rulings of an ideologically motivated judge will deviate from his own ideal point, in the direction of the “most plausible point” of the interpretive method he uses.

If this is so, then individual judges—who, today, have broad choice among interpretive methods—will tend to select the interpretive method that tends to minimize the extent to which they must deviate from their preferred outcomes. This self-selection effect can seriously mislead the unsophisticated observer as to the nature of different interpretive methods.

Suppose, for instance, that textualism and intentionalism are almost identical, with textualism being only slightly more conservative. If lawmakers took the advice of Nicholas Quinn Rosenkranz and adopted a Federal Rule of Statutory Interpretation mandating one method or another,²⁴ or if the Supreme Court took the advice of the House of Lords and mandated a method by judicial fiat,²⁵ the resulting distributions of judicial opinions would be nearly equivalent. But in a regime of free choice, conservatives will tend to choose textualism and liberals will

²² See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

²³ See Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 270 (special issue 1990).

²⁴ See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

²⁵ See *Pepper v. Hart*, [1993] A.C. 593, 630, 634 (H.L. 1992) (relaxing the traditional “general rule” against “references to Parliamentary material as an aid to statutory construction,” probably first stated in *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 217 (K.B.)).

tend to choose intentionalism, which will substantially exaggerate the political differences between the methods.

Thus, observers may conclude that textualism has a substantial conservative bias, when in fact its bias may be only slight (or, as I explain later, possibly non-existent).²⁶ They may conclude that textualist opinions are more likely to be overridden by Congress, when in fact it is merely opinions by relatively conservative judges (whatever their interpretive theory) that are more likely to be overridden by a relatively liberal Congress. They may conclude that textualism is more likely to find a plain meaning, when in fact it is merely conservatives who disagree with administrative agencies who use the malleable step 1 of *Chevron* to rule against the agency.

In short, many statements about *textualism* may really only be statements about *textualists*. Observed textualism may be best explained by political factors, while essentialist explanations may be best left to descriptions of “true textualism”—what the world would look like if textualism were mandated for everyone.

Statements about *textualism* are relevant for politicians, advocacy groups, or citizens mulling whether to support an interpretive statute mandating textualism, or for justices considering whether to mandate textualism by judicial ruling. Statements about *textualists* are relevant for politicians—chiefly senators and the president—advocacy groups, or citizens wondering whether to support a judge claiming to be a textualist.

There need be no connection between these two sorts of statements, and so it can be reasonable for someone to say: “I love textualism, and would favor mandating it for everyone. But I hate textualists, and will consistently vote against all textualist judges.”

* * *

In Part II of this Article, I lay out a general theory of how rational, ideologically motivated judges might decide cases and choose interpretive methods. This leads to Part III, where I explain how the self-selection effect arises and how it drives a wedge between the *true* nature of an interpretive method (or any other interpretive method) and *observed* decisions using that method.

This theory is applicable to any interpretive method, whether statutory or constitutional, and allows us to think more seriously about a wide range of interpretive questions. For instance, the story I have told could also be told about originalism (a constitutional theory also widely thought of as conservative) and originalists (a growing number of whom

²⁶ See section III.B *infra*.

are now liberal).²⁷ Or one could talk about intentionalism and intentionalists, pragmatism and pragmatists, or any other method and its practitioners.

As a particular application of this theoretical apparatus, I go on to explain the problems behind the conventional explanations of the three phenomena discussed above—textualism’s apparent conservative bias, its apparent tendency to be overridden by Congress, and its apparent tendency to stop at step 1 of *Chevron*—and offer alternative explanations.

In addition to shedding light on current empirical debates, this Part and the next—unlike most of the judge-centered positive political theory on statutory interpretation—discuss how rational, ideologically motivated laymen might think about interpretation, if they are, for instance:

- an advocate arguing a case;
- a citizen wondering which side to support in a case (or whether to be happy that a particular side has won in a case);
- a frequent litigator, whether a business or a public-interest litigation organization, exploring whether to push, say, textualism as part of its litigation strategy;
- a senator trying to decide whether to support a judge who is, say, a committed textualist; or
- a legislator considering whether to vote for rules of statutory interpretation that would be binding on, or at least persuasive to, the whole judiciary.

Finally, in Part IV, I discuss another implication of the theory in Part II. If a judge, or strategic litigation group, decides that a particular theory would lead to better results than any other single theory if applied over the whole range of cases, the question arises of what to do in an individual case where that theory is *not* optimal. Does the judge follow the theory he prefers overall, and rule against his preference in the individual case? Does the strategic litigation group argue the case on a theory that is less advantageous in that case (or not bring the case at all)? Or do they deviate from their theory to achieve their preferred result in that case?

If all cases could be neatly compartmentalized, there would be no reason for a rational, ideologically motivated judge to stick with a single theory from case to case. But, as I argue in Part IV, the use of a theory in some cases increases the chance that that theory will be used by other judges in future cases. Thus, judges and litigators may want to consider using a particular theory even in cases where the theory does not seem optimal, because by doing so they would be strengthening the theory for the future.

²⁷ See text accompanying notes 147, 293–295 *supra*.

But, I argue, except in rare cases, this effect is probably fairly weak for the individual judge, and even weaker for the individual litigation group. Therefore, even if a judge believed in a particular interpretive method, and wanted it to be mandated for everyone, it would make sense for him not to use that method consistently from case to case; and the same goes for an advocacy organization, which may favor an interpretive method but not incorporate it into its strategic litigation plan.

II. A THEORY OF INTERPRETATION FOR JUDGES

This case is not a scary math problem; it is a straightforward matter of statutory interpretation.

— Antonin Scalia²⁸

A. Legalism, Constraint, and Indeterminacy

1. A Judge with an Agenda

Suppose you are a judge trying to decide a particular case. In Part IV, I will consider a judge who thinks more long-term, trying to decide whether to commit himself to an interpretive theory or (if he is a Supreme Court Justice) trying to decide whether to vote to mandate, say, textualism as an interpretive rule for all lower courts.²⁹ But for the moment, assume that all you have before you is a single case, so the question whether to be consistent from case to case doesn't arise.

How, if you're trying to decide a particular case, should you think about statutory interpretation? In general, one might favor or disfavor a method of statutory interpretation for many reasons. For instance, one might think that a particular method is mandated by a democratic theory like legislative supremacy³⁰ or separation of powers,³¹ by one's reading of the Constitution,³² or by one's conception of the rule of law.³³ Or one could favor a theory of statutory interpretation on efficiency grounds,

²⁸ Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1553 (2007) (Scalia, J., dissenting).

²⁹ See text accompanying note 25 *supra*.

³⁰ See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76–77, 92, 108 (2006).

³¹ See, e.g., Farber, *supra* note 3, at 1412.

³² See, e.g., Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839, 843–45 (1991).

³³ See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in THE RULE OF LAW 265 (Nomos XXXVI, Ian Shapiro ed., 1994).

like the advantage of rules³⁴ or the burden of making arguments in a legislative history regime.³⁵

But suppose you are unmoved by such considerations. Either you don't care about these criteria, or you're agnostic about how any given theory of statutory interpretation performs under them, or you do care about them but you find them relatively unimportant.³⁶

What you definitely care about, however, is your substantive agenda. You may have an environmentalist, a libertarian, a socialist, a Catholic, or one of any number of other world views; and your world view has implications for the just and proper rule of law over a range of cases.

One might find this assumption improperly results-oriented. It is, after all, a common view that views on statutory interpretation, constitutionalism, and democracy generally, should be grounded in theories independent of one's views on policy, especially when one is a judge.³⁷ Very well, then; we do not need to assume that it is proper for a judge to care about his substantive agenda. Nor do we have to assume that all judges are like this. Nor do we have to assume that judges who are like this are pursuing their policy agenda *consciously*.³⁸ All we have to do, for now, is recognize that such judges—whom Justice Scalia, following James Landis, calls “willful judge[s]”³⁹—exist.

Suppose, then, that you are such a judge. Is there any reason why, for the sake of your substantive agenda, you would favor one theory over another?

Consider, for instance, § 615 of the Individuals with Disabilities Education Act, which allows prevailing parents to recover “reasonable attorneys’ fees as part of the costs.”⁴⁰ According to the Second Circuit, the statutory text alone does not allow prevailing parents to recover expert witness fees.⁴¹ However, this result is reversed if one relies on legislative history, dicta in a previous Supreme Court opinion, and the pur-

³⁴ See, e.g., John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 570–74.

³⁵ See Scalia, *supra* note 17, at 36–37.

³⁶ On the concept of “relative unimportance,” see text accompanying note 291 *infra*.

³⁷ In the constitutional context, see, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 10–11, 310 (1996); Matthew J. Franck, *I’m Still Laughing, Jack*, BENCH MEMOS, Aug. 8, 2007 (“there is an astonishing results orientation to [Balkin’s] arguments . . . an intensity of focus on an evidently desired outcome that is the antithesis of . . . constitutional jurisprudence properly understood”), available at <http://bench.nationalreview.com>; cf. RAWLS, *supra* note 124, § 31, at 196–97 (in Rawlsian thought experiment, “political forms” of society are determined before people know their own “conceptions of the good”).

³⁸ See text accompanying note 122 *infra*.

³⁹ Scalia, *supra* note 17, at 35 (quoting Landis); see also Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORN. L. REV. 517, 549 (1984).

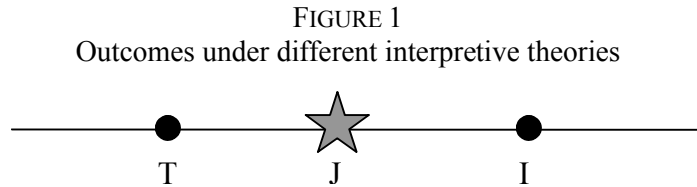
⁴⁰ 20 U.S.C. § 1415(i)(3)(B).

⁴¹ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005).

poses of the statute.⁴² (No justice on the Supreme Court disagreed with this assessment, though they split on the ultimate result.⁴³)

Or consider § 502 of the Clean Water Act, which defines “pollutant” to include “radioactive materials.”⁴⁴ Does this cover radioactive materials that are already regulated by the Atomic Energy Commission?⁴⁵ It is fairly obvious that the answer, considering only the statutory text, is yes, as both the Tenth Circuit and the Supreme Court recognized.⁴⁶ The legislative history apparently “speaks with force,” however, in the other direction, and suggests strongly that radioactive regulated by the Atomic Energy Commission materials are *not* covered by the Clean Water Act.⁴⁷

In these cases, textualism leads to one rule of law, while intentionalism and/or purposivism leads to another.⁴⁸ Call these two different rules of law T and I. Your own ideal point—what you would choose if you could make up the applicable law—is J. This is represented in Figure 1 below.⁴⁹



2. *Why Follow the Law?*

The most obvious option is to not bother with T and I, but simply implement J, since that is, after all, the point you prefer. Unfortunately for you, J isn’t guaranteed to be available, because it may have no legal basis. We live in a world where, due to current social understandings—

⁴² *Murphy*, 402 F.3d at 336–38.

⁴³ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459–61 (2006); *id.* at 2464–65 (Ginsburg, J., concurring in part and concurring in the judgment); *id.* at 2466 (Breyer, J., dissenting).

⁴⁴ 33 U.S.C. § 1362(6).

⁴⁵ *Train v. Colo. Pub. Int. Res. Group*, 426 U.S. 1, 4, 9 (1976).

⁴⁶ See *Train*, 426 U.S. at 9; *Colo. Pub. Int. Res. Group v. Train*, 507 F.2d 743, 748 (10th Cir. 1974).

⁴⁷ *Train*, 426 U.S. at 11–23. Judge McWilliams of the Tenth Circuit “note[d] parenthetically that in [his] view the legislative history . . . is conflicting and inconclusive.” *Colo. Pub. Int. Res. Group*, 507 F.2d at 748; cf. Scalia, *supra* note 17, at 36. But he did not explain how.

⁴⁸ See WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 219–56 (2d ed. 2006), for definitions of textualism, intentionalism, and other (“dynamic”) theories.

⁴⁹ I have only depicted two interpretive theories for simplicity, but I could also have drawn P (for purposivism) and any number of other points.

not everyone believes that democratic, constitutional, or procedural considerations are irrelevant—judges feel constrained to justify their results as being a “fair” interpretation of the statute, meaning there must be a theory of statutory interpretation underlying them.⁵⁰

There are a number of reasons why this might be so. Most conventionally, this could be a matter of judicial culture: Deciding “according to the law” is thought to be one of the role responsibilities of being a judge, and judges may be selected for, or may have internalized, these role responsibilities.⁵¹ Or, as long as enough people care about legality for its own sake, that may be enough to force legality on everyone else:⁵² If enough higher-court judges cared about legality, they would consistently reverse lower-court judges who ruled without reference to the law.⁵³

But suppose no one in the legal or political system cared about legality, but only cared about their own preferred policies. Would there be a role for ruling according to the law?

If everyone knew their ideal point already, perhaps not. Reasoned opinions would then be superfluous, and judges could confine themselves to stating the winner of the case or announcing the rule of law, knowing that higher-court judges or legislators would override the rule if they disagreed. Lower-court judges would choose rules that would not be overruled by higher-court panels, and higher courts would likewise rule so as not to be overridden by Congress.⁵⁴

But if higher courts and legislators have imperfect knowledge, there can still be a role for the law, even if this would require a judge to deviate from his preferred point. This is a theme that will recur throughout this Article. Everyone, and in particular legislators and reviewing judges, has limited time to correct decisions they disagree with. It is easy to see whether one sympathizes generically with the winner of a particular case. (“I’m pro-management, so I’m disappointed that the union won this labor case.”) But it’s more difficult to see whether one can come up with a better rule of law. (“Nonetheless, even under my ideal rule of law, unions would win sometimes”) And a higher-court judge or a legislator may not even know exactly what position they pre-

⁵⁰ See Mashaw, *supra* note 32, at 838–39.

⁵¹ See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 527 (1986); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEH. & ORG. 31, 32 n.2 (1994).

⁵² See Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT’L REV. L. & ECON. 284, 286 (1992) (legality as legitimacy-preserving).

⁵³ And if enough senators cared about legality, they could impeach judges who consistently ruled without reference to the law.

⁵⁴ See, e.g., Eskridge, *supra* note 4, at 377–87; Ferejohn & Weingast, *supra* note 12; Bussel, *supra* note 13, at 927.

fer, especially when the issue is complex. (“Should workers be on or off the clock when they’re donning and doffing their protective gear?”, one may ask, as one’s eyes glaze over.⁵⁵)

Under such conditions of imperfect information, an opinion will stand out more if it does not even purport to interpret any law—we do live in a world where *most* opinions purport to interpret the law—and, at least in the case of Congress, an opinion that purports to apply a law that Congress approved (perhaps recently) is less likely to be objectionable to members of Congress than one that merely purports to implement a judge’s preferences.

After all, if you claim to be interpreting the law, you will seem to be doing exactly what Congress wanted you to do when, against the background of the existing court system, it enacted the statute in question; and this will coincide with what many members of the current Congress want, unless legislators’ views or the composition of Congress has changed a lot since the enactment of the law. Ruling according to the law is thus a convenient way to avoid scrutiny.

So if T and I are the theories on offer, it’s reasonable to suppose that, instead of choosing J, you (as an agenda-driven judge) will follow the next most obvious approach: “Choose the method of interpretation that gets me closest to my ideal outcome in the case.” You will definitely bind yourself to the statute if you yourself care about legality or if you feel constrained by other actors who care about legality, but for the reasons given above, you might do so even if no one cares about legality. And given that you do so, you will choose whichever of T and I gives you the result you prefer.

3. *Do Theories Constrain?*

So let us assume you will only choose a point if it is supported by an interpretive theory. In this example, that leaves T and I. These are separate points if theories of interpretation really lead to different results. But this is not always true.

Consider, for instance, the Speedy Trial Act of 1974, which “generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance.”⁵⁶ May a defendant prospectively waive the application of the Act?

The Supreme Court unanimously said no, using a textual analysis based on the structure of the statute—essentially, waiver doesn’t fall

⁵⁵ See *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

⁵⁶ *Zedner v. United States*, 126 S. Ct. 1976, 1980 (2006) (citing 18 U.S.C. § 3161(c)(1)).

within the list of permitted categories of delay⁵⁷—but bolstering its interpretation with the purposes of the Act and (except for Justice Scalia) the legislative history.⁵⁸ Here, T and I are the same point, so the choice of interpretive theory would have made no difference—which is why the opinion of Justice Scalia, writing separately to disclaim any reliance on the legislative history, was a partial concurrence, not a dissent.⁵⁹

For all its unanimity and supposed obviousness using any theory, this is actually a harder case than average: The district court had, after all, reached a different result using textual reasoning⁶⁰ and the Second Circuit had reached a different result using purposivist reasoning.⁶¹ Indeed, it is unlikely that a case where every reasonable judge would agree would ever reach the Supreme Court, which generally seeks to resolve circuit splits or—even in the absence of a split—correct a lower-court decision that the justices think may well be wrong.⁶²

But in the vast majority of cases, the result is “totally dictated by the law,” meaning that just about any judges looking at the statute would agree on the resulting rule of law; in those cases, theories of statutory interpretation seem to make no difference, and so the ability to choose a theory of interpretation is of no help to the agenda-pusher.⁶³

Still, there are reasons to believe that interpretive theories make a difference sometimes. First, there are the cases discussed above, where textualism and intentionalism or purposivism clearly lead to opposite results.⁶⁴

Second, there are non-unanimous cases where justices on one side—whether the majority or the dissent—express a wish that they could have joined the other side. Thus, in the Individuals with Disabilities Education Act case, Justice Ginsburg agreed that the “attorneys’ fees” recoverable by prevailing parents did not include expert witness fees: “Given the constant meaning of the formulation ‘attorneys’ fees as part of the costs’ in federal legislation, *we are not at liberty* to rewrite ‘the statutory

⁵⁷ See *Zedner*, 126 S. Ct. at 1985; 18 U.S.C. § 3161(h).

⁵⁸ See *Zedner*, 126 S. Ct. at 1985–86; *id.* at 1990–91 (Scalia, J., concurring in part and concurring in the judgment).

⁵⁹ *Zedner*, 126 S. Ct. at 1990–91 (Scalia, J., concurring in part and concurring in the judgment).

⁶⁰ See *Zedner*, 126 S. Ct. at 1986.

⁶¹ See *United States v. Zedner*, 401 F.3d 36, 45 (2d Cir. 2005).

⁶² See SUP. CT. R. 10.

⁶³ See Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 264, 281 (1995); Farber, *supra* note 3, at 1431; Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1098 (2004).

⁶⁴ See text accompanying notes 40–47 *supra*.

text adopted by both Houses of Congress and submitted to the President,⁷ to add several words Congress wisely might have included.”⁶⁵

Similarly, when the Supreme Court held that waste combustion ash generated by a municipal incinerator was subject to stringent hazardous waste regulation,⁶⁶ Justice Stevens dissented even though he granted that “[t]he majority’s decision . . . may represent sound policy.”⁶⁷

Third, and relatedly, there are cases with unexpected lineups, where, whether or not anyone expresses regret, judges take positions that one wouldn’t expect based on what one suspects of their ideological preferences. Finding cases where Justice Scalia sides with liberal justices is an easy way of identifying such cases, since he has publicly advocated particular interpretive methods, for both statutory and constitutional cases, that he claims are constraining.⁶⁸

Thus, Scalia has ruled that Department of Labor regulations governing coal miners’ eligibility for black lung benefits were so strict as to violate the plain meaning of the relevant statute⁶⁹—where the dissent used legislative history to argue that the statute was ambiguous.⁷⁰ He has argued, in dissent, that members of the armed forces injured during an activity incident to their military service should be able to recover under the Federal Tort Claims Act.⁷¹ And he joined four other justices to hold that the Superfund statute clearly expresses an intent to hold states liable in federal court.⁷²

And in constitutional law, originalist reasoning has led Scalia to pro-criminal-defendant results, contrary to some of his non-originalist conservative colleagues.⁷³ A scan of the outside of a home with a thermal-

⁶⁵ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2465 (2006) (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991)) (emphasis added).

⁶⁶ *City of Chi. v. EDF*, 511 U.S. 328, 334–37 (1994).

⁶⁷ *City of Chi.*, 511 U.S. at 348 (Stevens, J., dissenting); see also Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 315 & n.62 (1990).

⁶⁸ See Scalia, *supra* note 17, at 36; see also *Supreme Court Justice Antonin Scalia Speaks at Iona*, INSIDE IONA, Jan. 24, 2007, <http://www.iona.edu/news/insideiona/archives/0607/012407.cfm> (“Every judge should be issued a rubber stamp that says ‘stupid but constitutional.’”); cf. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (statute is constitutional though “‘uncommonly silly’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting))).

⁶⁹ See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988).

⁷⁰ See *Pittston Coal Group*, 488 U.S. at 123, 124–25, 134–46 (Stevens, J., dissenting).

⁷¹ See *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting); 28 U.S.C. §§ 1346, 2671–2680.

⁷² See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7–13 (1989). Scalia also wrote separately in that case to argue that such liability was unconstitutional. See *id.* at 29, 35–42 (Scalia, J., concurring in part and dissenting in part). But he was in dissent on this point, and his fifth vote on the statutory question was necessary for ultimate liability in the case.

⁷³ See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1073–75 (2006).

imaging device is a Fourth Amendment “search.”⁷⁴ The use of testimonial hearsay violates the Confrontation Clause unless the declarant is unavailable and there has been a prior opportunity for cross-examination.⁷⁵ Facts that increase the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt.⁷⁶ And a criminal defendant erroneously deprived of his counsel of choice is automatically entitled to reversal of his conviction.⁷⁷

4. *Dealing with Indeterminacy*

So it seems reasonable to believe that interpretive methods are at least somewhat constraining. However, this does not mean that they each lead to single points T and I, as in Figure 1.⁷⁸ Methods of statutory interpretation still often lead to a range of possible answers—perhaps a wide range.

It is easy to see why: Legislative intent can be hard to reconstruct; collective “intent” may not even exist; and the system is easy to game.⁷⁹ Statutes almost never have a unique purpose, and purposes can be characterized differently.⁸⁰ Texts have a range of possible meanings, especially when one can choose which of several opposing canons to use.⁸¹ And one can play the same game in constitutional cases, as originalists have also been spotted disagreeing with each other.⁸²

⁷⁴ See *Kyllo v. United States*, 533 U.S. 27, 29, 40 (2001).

⁷⁵ See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

⁷⁶ See *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *id.* at 498–99 (Scalia, J., concurring).

⁷⁷ See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2566 (2006).

⁷⁸ See p. 10 *supra*.

⁷⁹ See, e.g., ESKRIDGE, *supra* note 48, at 221–28; Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 686–88 (1997).

⁸⁰ See, e.g., Easterbrook, *supra* note 20, at 68.

⁸¹ See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2536, 2547, 2582 (1992); Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 775, 780–83 (1987); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950); ESKRIDGE, *supra* note 48, ch. 7, at 257–94. That textualists adopt the standard of the “reasonable person,” see Scalia, *supra* note 17, at 17, or “reasonable diligent lawyer,” see Manning, *supra* note 79, at 675 n.8, shows that the meaning of a text can be at least as indeterminate as the range of “reasonableness.”

⁸² Compare *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in the judgment) (“the phrase ‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafletting”), with *id.* at 378 (Scalia, J., dissenting) (“the meaning of [the] constitutional text . . . ‘the freedom of speech’[] is unclear” as to whether it covers anonymous leafletting); compare *Gonzales v. Raich*, 545 U.S. 1, 39–42 (2005) (Scalia, J., concurring in the judgment), with *id.* at 59–66 (Thomas, J., dissenting).

Now that we have taken a turn into (at least partial) indeterminacy, saying that an interpretive method “leads to” a result is vague. Even when we observe that different opinions are associated with different theories of interpretation, these different positions are often correlated with different political views, which raises the possibility that the interpretive theories are just convenient rhetorics and aren’t doing any independent work.⁸³

To be able to say that some methods are “more likely” to yield certain points than others, we need a theory to explain how a judge, faced with the range of possible interpretations—perhaps a very wide range, if few outcomes are categorically excluded—chooses a particular one. If interpretive methods are neither fully window dressing nor fully constraining, the theory needs to explain simultaneously: (1) how theories can lead to different results, perhaps based on the judges’ political preferences, and (2) why a judge whose ideal point is J wouldn’t (provided J is within the feasible range of *some* theory) just choose to write an opinion establishing J , using whatever interpretive rhetoric will “get him there,” as the strong attitudinal model would suggest.

B. *The Costs of Decisionmaking*

1. *Agenda Costs*

In this section, I propose such a theory. As an initial matter, we have assumed that you, as an agenda-driven judge, would like to implement your preferred policy. As the policy deviates from your preferred point, you incur a cost—call it an “agenda cost.”⁸⁴ It is conventional to assume that this cost increases at a greater rate, the further the deviation from the ideal point. One example would be the quadratic form,⁸⁵ as pictured in Figure 2.⁸⁶ (I will assume throughout this Article that rules can be ar-

⁸³ Thus, Daniel Farber compares Richard Posner and Frank Easterbrook, two judges with presumably similar ideologies but opposite theories of statutory interpretation, and finds almost no difference between them. See Farber, *supra* note 3, at 1431 (“they are both white males, conservatives, former tenured members of the University of Chicago faculty, believers in law-and-economics, appointed to the bench by the same president, and so forth”); *id.* at 1411 (“This means either that their theoretical difference does not matter or that it is precisely offset by their similarities in other respects.”).

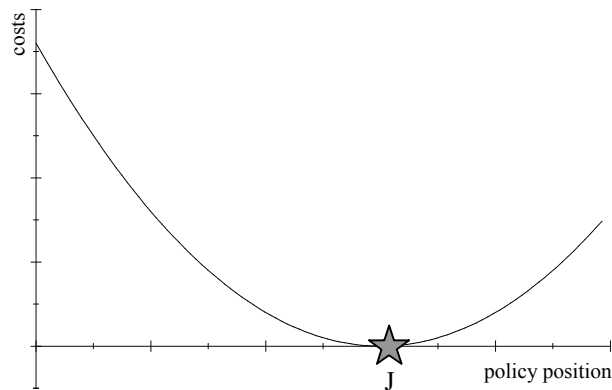
⁸⁴ Some call this the utility loss from “preference falsification,” or call the reverse of this the utility of “judicial discretion.” See Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980); Miceli & Cosgel, *supra* note 51, at 38, 40.

⁸⁵ While judges’ preferences are most naturally represented by a utility function of the form $U_j(x) = -x^2$, that is, reaching a peak at zero and negative everywhere else, it will be more convenient to refer to the converse of benefits—that is, to refer to minimizing the cost of deviating from the preferred point, where the cost is just $-U_j(x) = x^2$.

⁸⁶ Cf. ALBERTO ALESINA & HOWARD ROSENTHAL, PARTISAN POLITICS, DIVIDED GOVERNMENT, AND THE ECONOMY 19–20 (1995); NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND (continued next page)

ranged on a continuous one-dimensional spectrum, as I do below, though this is a simplification.⁸⁷⁾

FIGURE 2
A judge's agenda cost



2. Implausibility Costs

If agenda cost were all, you would just choose J. But you might also care whether the opinion is plausible under some theory of interpretation.

Why should you care about plausibility? Obviously, if “the various constituencies that will notice”⁸⁸ care about it—either as a good in itself, or as a proxy for “merit”—you might want to write plausible opinions.⁸⁹ These constituencies include the legislature, which might override you;⁹⁰ the executive, which might promote you;⁹¹ judges on reviewing courts, who might reverse you,⁹² and the legal community at large, which might criticize or not respect you.⁹³ The same applies if you yourself value

METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 189–90 (2005). *But see* Miceli & Cosgel, *supra* note 51, at 41 (assuming that agenda cost arises if the judge chooses a point different from his ideal, but that the cost does not depend on the distance from the ideal point).

⁸⁷ This is standard in the positive political theory literature. *See, e.g.*, Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 2 J.L. ECON. & ORG. 263, 268 (1990); Ferejohn & Weingast, *supra* note 12.

⁸⁸ Kennedy, *supra* note 51, at 528.

⁸⁹ *See* text accompanying note 51 *supra*.

⁹⁰ *See, e.g.*, Eskridge, *supra* note 4.

⁹¹ *See, e.g.*, Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 16, 27 (1992).

⁹² *See, e.g.*, Higgins & Rubin, *supra* note 84, at 130.

⁹³ *See* Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 135–36 (1991); Mark A. Cohen, *Explaining Judicial* (continued next page)

plausibility. But it turns out that plausibility can still matter even if you, along with everyone else, are completely results-oriented.

As noted above,⁹⁴ your constituencies just have limited time to find out about the law, and even deciding that one disagrees with an opinion can be difficult when the issue is complex. Instead of using logical consistency as a proxy for merit, they can use implausibility as a red flag that brings the case to their attention and helps them understand how they might disagree with the result. A reviewing judge or legislator who disagrees with another judge's decision but can't find obvious flaws in the opinion doesn't know at first whether he would have come to the same outcome (since most cases are "dictated by the law"⁹⁵). But a reviewing judge or legislator who disagrees with an implausible decision can more easily think up alternative ways of deciding the case.⁹⁶

Finally, the time and effort constraint also makes judge value plausibility. Posner calls this constraint the motive to not work hard, but one needn't conceptualize this as laziness or a preference for leisure. Rather, it could just represent the combination of all other competing demands, including the press of other cases and other judicial work. This motive looms large for Posner, who "assum[es] that trying to change the world plays no role" in the judicial utility function, and downplays the drive for popularity, prestige, avoiding reversal or criticism, reputation, and the power that comes from the system of following precedent.⁹⁷ In Posner's model, and in several others',⁹⁸ judges do value leisure (though Posner himself is not a great example of this!⁹⁹). Because writing a persuasive argument in support of a non-obvious proposition is hard and time-and-effort-intensive work,¹⁰⁰ it is not hard to see why resource-constrained or

Behavior or What's "Unconstitutional" About the Sentencing Commission?, 7 J.L. ECON. & ORG. 183, 186 (1991); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983); Miceli & Cosgel, *supra* note 51, at 35, 37; Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 172, 182 (1999); Ashenfelter et al., *supra* note 63, at 264; Scalia, *supra* note 17, at 36.

⁹⁴ See text accompanying note 55 *supra*.

⁹⁵ See text accompanying note 63 *supra*.

⁹⁶ Plausibility is even more important when there is a dissenting judge on the appellate panel, who acts as a whistleblower. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2172–74 (1998) ("the presence of a whistleblower makes it almost twice as likely that doctrine will be followed when doctrine works against the partisan policy preferences of the court majority"). But see Bussel, *supra* note 13, at 927 (no statistically significant relationship between separate writing and congressional overrides in sample of bankruptcy cases).

⁹⁷ See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 3, 13–15, 18, 23, 31 (1993).

⁹⁸ See, e.g., Cohen, *supra* note 91, at 14, 16; Harold W. Elder, *Property Rights Structures and Criminal Courts: An Analysis of State Criminal Courts*, 7 INT'L REV. L. & ECON. 21, 24 (1987); Miceli & Cosgel, *supra* note 51, at 34.

⁹⁹ See Larissa MacFarquhar, *The Bench Burner*, NEW YORKER, Dec. 10, 2001, at 78.

¹⁰⁰ See Kennedy, *supra* note 51, at 522, 528.

work-averse judges would rather come down in favor of the more obvious position, even at the cost of deviating from their ideal point.

These considerations suggest how an interpretive theory can be partly constraining. Any theory has some “most plausible point,” a point that is easiest to explain under that theory. Points away from the most plausible point can be justified, but only at a cost. What is this cost? In our judicial culture, decisions have to be explained;¹⁰¹ the ideal, in a rule-of-law system, is to make the decision seem as though it was compelled by the law rather than resulting from the judge’s biases. A decision holding that a word means something that it doesn’t obviously mean requires expending more effort and coming up with more persuasive arguments, and may still, in the end, persuade fewer people.

Consider again, for instance, the Individuals with Disabilities Education Act case discussed above.¹⁰² Perhaps one could have argued that the structure of the Act was so different from that of all other statutes involving “attorneys’ fees” that, in context, “attorneys’ fees” include expert witness fees. Perhaps. But explaining why the same term, used in many different statutes as a term of art, should have a different meaning in this one statute will be somewhat more laughable than explaining why “attorneys’ fees” are limited to attorneys. Therefore, the position will take more work to justify.

This may be why neither Judge Katzmann on the Second Circuit nor Justice Breyer wrote an opinion relying on the statutory text, which would probably have been implausible. Instead, they argued, within an intentionalist and purposivist framework, that the legislative history and purposes of the statute should trump the text. Rather than using an unsympathetic rhetoric that would have amounted to “X means not-X,” they were able to make the more sympathetic argument that the unambiguously expressed intent of Congress, consistent with the plain purpose of the Act, should control.¹⁰³

We can call the cost of deviating from a most plausible point an “implausibility cost,” which increases as the distance from the most plausible point increases.¹⁰⁴ It’s reasonable to think that the implausibility cost, like the agenda cost, increases at an increasing rate (and, indeed, implausibility cost may be infinite outside of some range).

Figure 3 below shows some sample implausibility cost functions for method T, with the most plausible point labeled M_T . I have depicted two

¹⁰¹ See text accompanying note 50 *supra*.

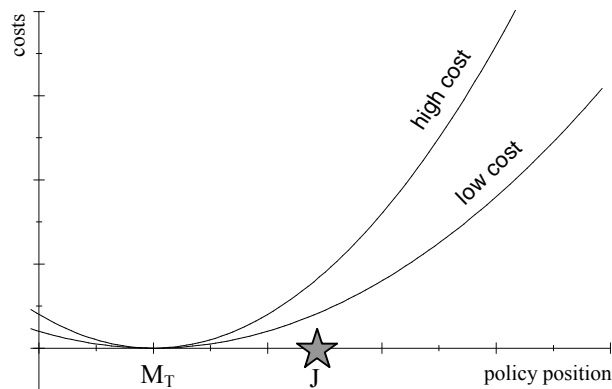
¹⁰² See text accompanying notes 40–43 *supra*.

¹⁰³ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2466 (2006) (Breyer, J., dissenting); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336–37 (2d Cir. 2005).

¹⁰⁴ Cf. Kennedy, *supra* note 51, at 528 (“legitimacy cost”).

possible cost functions, depending on whether degrees of implausibility are easy (“low cost”) or hard (“high cost”) to justify.¹⁰⁵

FIGURE 3
Implausibility costs under theory T



For instance, textualism may be a “high implausibility cost” method if text tends to be determinate, or if Webster’s Second or the Oxford English Dictionary were the only acceptable dictionary,¹⁰⁶ but it may be a “low implausibility cost” method if all dictionaries, and all canons (both textual and substantive), are fair game.¹⁰⁷ (Whether textualism is in fact more determinate, as its proponents argue,¹⁰⁸ or less determinate, as its detractors claim,¹⁰⁹ is beyond the scope of this Article.)

¹⁰⁵ Cf. BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 28 (Macmillan Publishing Co., Inc. 1962) (“So convenient a thing it is to be a *reasonable* creature, since it enables one to find or make a reason for every thing one has a mind to do.”). Other forms of the implausibility cost function are conceivable. The function needn’t be smooth; there could be a “plausibility range” around M_T , in which implausibility cost is flat; implausibility cost could be infinite outside the plausibility range; and implausibility cost could even plateau at some maximum level of implausibility. The qualitative results I derive here are consistent with all these alternate forms.

¹⁰⁶ See, e.g., Rosenkranz, *supra* note 24, at 2105, 2147; 42 U.S.C. § 3796ii-1(1); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 225–28 & n.3 (1994).

¹⁰⁷ See, e.g., Llewellyn, *supra* note 81; Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 297–300 (1998); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999).

¹⁰⁸ See sources cited *supra* note 20.

¹⁰⁹ See, e.g., Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 654 (1999); Daniel R. Ortiz, *The Self-Limitation of Legislative History: An Intrainstitutional Perspective*, 12 INT’L REV. L. & ECON. 232, 233–34 (1992); Bussel, *supra* note 13, at 898 n.40; Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 207, 215 (1999); Pierce, *supra* note 21, at 778–79; Merrill, *supra* note 21, at 354, 366–70.

Similarly, intentionalism could be more determinate to the extent that legislative history sheds light on the case at hand, but less determinate to the extent that more materials increase the probability that some of those materials will conflict with others.

And pragmatism can be determinate to the extent that we all agree on what problem the statute is solving, and how to solve it; but it's almost certain that, given *both* the wide variation among people in what problems they see in the world *and* pragmatism's willingness to use any other interpretive theory as it seems appropriate, pragmatism must be a very low-cost interpretive method.¹¹⁰

3. Putting Agenda and Implausibility Costs Together

To illustrate how one would decide a case using a particular interpretive method, suppose there is only one interpretive method around. (We will see later how you choose an interpretive method when there are several to choose from.¹¹¹) When your ideal point is J but the most plausible point of theory T is M_T , any choice of legal rule will be somewhat costly (unless J and M_T happen to coincide). A maximally plausible opinion will be too far from your ideal point; but an opinion at your ideal point may be too implausible. Minimizing total cost, you might prefer to adopt some intermediate point, trading off some pleasure in implementing your agenda for some pleasure in being perceived as more plausible.

Suppose you put a certain weight on your agenda and a certain weight on plausibility. Let us assume a particular functional form for total costs, where the cost of deviating from your preferred agenda increases quadratically as depicted in Figure 2,¹¹² and the cost of deviating from M_T increases quadratically as depicted in Figure 3.¹¹³

One can then show that the outcome of the case will be a weighted average of your ideal point and M_T .¹¹⁴ In other words, the interpretive method exerts a "pull" on you, which is stronger as the implausibility costs are higher or as you put more weight on plausibility. For example, for certain weights and costs, you would follow the simple rule of "splitting the difference" between J and M_T . This is shown in Figure 4 below,

¹¹⁰ See Farber, *supra* note 3, at 1414–15.

¹¹¹ See section III.A *infra*.

¹¹² See p. 17 *supra*.

¹¹³ See p. 20 *supra*. A utility function that corresponds to this would be $u(x) = -\delta(x-j)^2 - (1-\delta)c(x-b)^2$, where j is your own agenda, b is the most plausible point of a given statutory interpretation method, c is the implausibility cost of deviating from the most plausible point, and δ (between 0 and 1) is the weight you put on your own agenda (so $1-\delta$ is the weight you put on your plausibility).

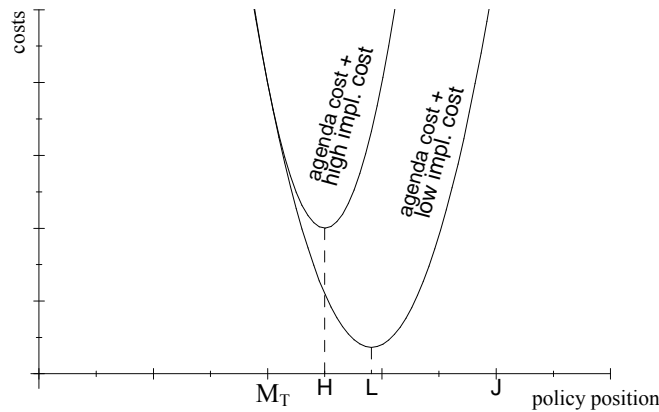
¹¹⁴ You choose x to maximize $u(x)$. The derivative is $u'(x) = -(2\delta + 2(1-\delta)c)x - 2\delta j - 2(1-\delta)cb$. Setting this to 0, we get $x^* = \delta/(\delta+(1-\delta)c)j + (1-\delta)c/(\delta+(1-\delta)c)b$, or $x^* = \eta j + (1-\eta)b$, where $\eta = \delta/(\delta+(1-\delta)c)$. x^* is thus a weighted average of j and b .

where the “high” and “low” curves are just the sum of your agenda costs (Figure 2¹¹⁵) and the high and low implausibility costs of theory T (Figure 3¹¹⁶).

As shown in Figure 4, a more determinate interpretive theory—that is, one with higher costs of deviating from the most plausible point—will exert a greater pull.¹¹⁷ A low-implausibility-cost theory only makes you deviate to L; a high-implausibility-cost theory makes you deviate all the way to H.

Similarly, the more weight you put on plausibility, the closer you move toward M_T . The two curves in Figure 4 could be interpreted as differing not in whether implausibility cost is high or low, but in whether you put high or low weight on plausibility.

FIGURE 4
A theory with higher implausibility costs exerts greater pull
(Total cost = agenda cost (Figure 2) + implausibility cost (Figure 3))¹¹⁸



This leads to the following intuitive results:

- If an interpretive method’s most plausible point happens to coincide with the judge’s ideal point, we have a situation of *perfect congruence*.¹¹⁹
- If the judge puts all the weight on his own agenda (and none on plausibility), we have a situation of *perfect bias*.¹²⁰ The judge

¹¹⁵ See p. 17 *supra*.

¹¹⁶ See p. 20 *supra*.

¹¹⁷ In Figure 4, I have assumed that you weight agenda cost and implausibility cost equally; thus, $\delta = \frac{1}{2}$.

¹¹⁸ See pp. 17, 20 *supra*.

¹¹⁹ If $j = b$, then $x^* = j = b$.

¹²⁰ If $\delta = 1$ or $c = 0$, then $\eta = 1$ and thus $x^* = j$.

doesn't care how implausible his opinion is, as long as he comes out the way his agenda dictates. The same happens if deviating from a method's most plausible point is costless—that is, if the method of statutory interpretation is completely indeterminate.

- If the judge puts all the weight on plausibility (and none on his own agenda), or alternatively, if deviating from a method's most plausible point is infinitely costly (that is, if the method of statutory interpretation is completely determinate), we have a situation of *perfect constraint*.¹²¹ This corresponds to the ideal judge who, umpire-like, rules according to the law.¹²²

The story I have told sounds like one of a judge who rules in bad faith. Though you believe in J , and though the “best answer under the law” (under some views¹²³) may be M_T , you cynically manipulate the law to reach a result as close to your biases as you can get away with.

This interpretation is consistent with the story I have told, but it is not the only one. You may be acting entirely in good faith; your “compromise” between J and M_T may be your honest view of what theory T requires, subconsciously skewed toward J .¹²⁴ Indeed, since the “correct” answer is not necessarily the most plausible one, your honest view may even be the correct one. We cannot say objectively that *your* ultimate outcome is “incorrect” merely by observing that all judges' outcomes are correlated with their ideology—*someone* could be correct, even if only by accident.

4. *Aggregating over All Judges*

This was all the story of a single judge. But you are one judge out of many. Every judge has his own substantive biases—that is, his own ideal point J . The distribution of J may look like Figure 5 below, which is somewhat skewed to the right side of the spectrum.¹²⁵ (“Left” and “right,” here, bear no relation to the political left and right.)

¹²¹ If $\delta = 0$ or $c = \infty$, then $\eta = 0$ and thus $x^* = b$.

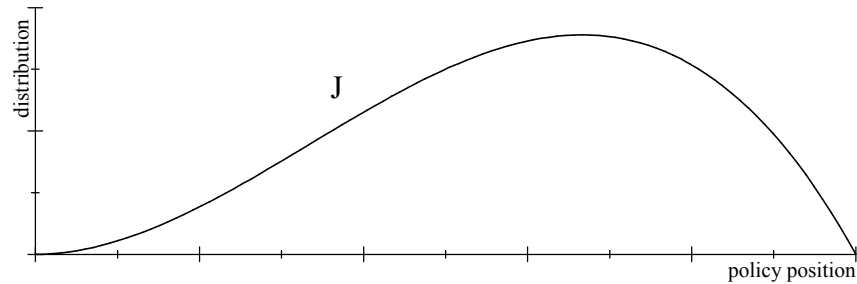
¹²² See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005).

¹²³ M_T is not necessarily the best answer, even if we all agreed that theory T was the proper theory to use. It is only the most plausible one, where plausibility is defined sociologically, as the position that would raise the fewest eyebrows. I do not define the “correct” answer in this Article, but whatever it is, it may well be nonobvious, unless one takes correctness to be defined in some measure by sociological acceptance.

¹²⁴ This compromise may, for instance, be reached by an iterative process by which your preferences are tested against your view of what the law requires, and your view of what the law requires is tested against your preferences, so the resulting compromise has the flavor of Rawls's “reflective equilibrium.” See JOHN RAWLS, *A THEORY OF JUSTICE* § 4, at 20 (1971).

¹²⁵ The picture is of a beta distribution with parameters (6,2). See, e.g., JOHN A. RICE, *MATHEMATICAL STATISTICS AND DATA ANALYSIS* 535–39, 553 (1988); PAUL G. HOEL ET AL., *INTRODUCTION TO PROBABILITY THEORY* 148–49 (1971).

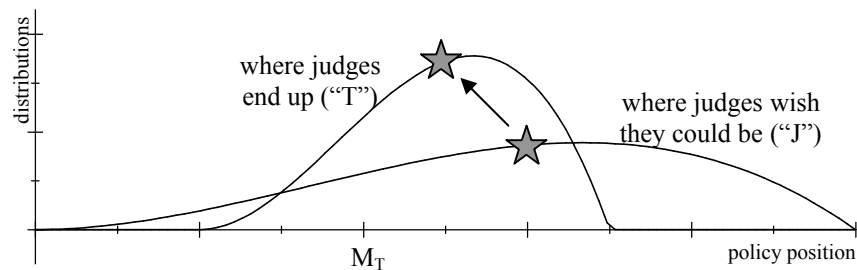
FIGURE 5
Distribution of judges' substantive biases ("J")



I have noted above that one need not assume that *all* judges play the game I have describe.¹²⁶ However, suppose for a moment that this model *does* describe everyone. Suppose every one of these judges puts equal weight on agenda and plausibility; and suppose the implausibility costs under method T are such that each judge follows the same rule of splitting the difference between his own J and M_T .¹²⁷

Then the distribution of political preferences from Figure 5 becomes a distribution of outcomes under theory T as depicted in Figure 6 below. The right-hand star in Figure 6 is your value of J, which we have been using all along. Theory T skews your result from the right-hand star to the left-hand star; but every other J also experiences a similar skew. The entire distribution of J is squeezed toward M_T .

FIGURE 6
How theory T would skew judges' substantive biases

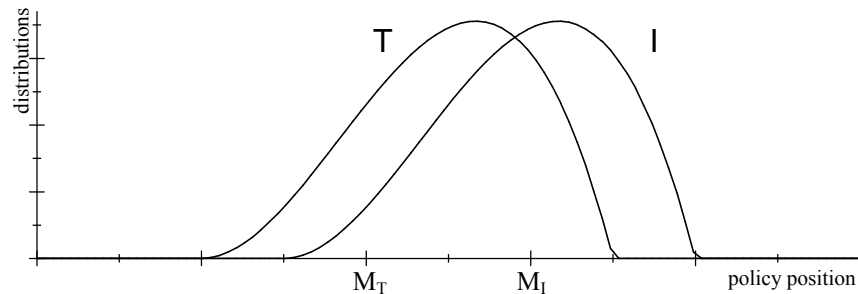


¹²⁶ See text accompanying note 38 *supra*.

¹²⁷ See text accompanying notes 114–116 *supra*.

All this has assumed a single interpretive method, T. But the same could be done with any interpretive method. Figure 7 below shows a similar distribution for another interpretive method, I (assuming equal implausibility costs for each method).¹²⁸

FIGURE 7
Distribution of outcomes under different interpretive theories



These distributions illustrate how judges (taking their distributions of substantive biases in Figure 5¹²⁹ as given) can rule differently if they are forced to use different interpretive methods. Thus, a judge whose J was at the peak of the distribution of preferences in Figure 5 would deviate to the peak of the T curve in Figure 7 if he were using T, or to the peak of the I curve if he were using I, even though J is achievable under either of these theories.

Though I assumed for the purposes of Figure 7 that the implausibility cost of each method was the same, different methods could have different costs.¹³⁰ A high-cost method, that is, one that is more determinate, thus has a more compressed distribution: Imagine if every judge moved $\frac{3}{4}$ of the way toward M_T instead of only halfway.

III. SELF-SELECTION BIAS MISLEADS THE NAIVE OBSERVER

Guildenstern: *[I]f we came from down there (front) and it is morning, the sun would be up there (his left), and if it is actually over there (his right) and it's still morning, we must have come from up there (behind him), and if that is southerly (his left) and the sun is really*

¹²⁸ The picture in Figure 7 shows the density functions of random variables that are combinations of the judges' bias variable shown in Figure 5, see p. 24 *supra*, and "most plausible points" that are 0.4 for textualism and 0.6 for intentionalism. The weights correspond to $\delta = \frac{1}{2}$ and $c = 1$, which implies $\eta = \frac{1}{2}$.

¹²⁹ See p. 24 *supra*.

¹³⁰ See text accompanying notes 106–110 *supra*.

over there (front), then it's the afternoon. However, if none of these is the case—

Rosencrantz: *Why don't you go and have a look?*

Guildenstern: *Pragmatism?!—is that all you have to offer?*

— Tom Stoppard¹³¹

The previous section has described how a judge chooses the result in a case based on his ideal point and the implausibility costs of the theory he is using. The interpretive theory is not fully constraining, nor is it purely window dressing. An interpretive theory exerts a “pull” on the judge, so that, if all judges use that theory, the full distribution of biases in Figure 5¹³² is skewed in the direction of the most plausible point of the theory. This gives us a distribution of outcomes as in Figure 7.¹³³

Note, though, that we don't observe that distribution in real life. The assumption behind that exercise—that *all* judges were using a single theory—is violated in our judicial culture, where no one is enforcing any theory. A variety of approaches is available to judges today.¹³⁴

Therefore, to get the distribution of outcomes that we actually observe, we must take into account that judges can choose their method. One might imagine that judges choose interpretive methods because they have like certain theories for their own sake, but I continue the “realist” approach of the previous sections.

Section A describes how our familiar results-oriented judge chooses a theory when he has several to choose from. The main result of the section is that the ability to choose the theory that gets you closest to the result you want produces a self-selection bias. Conservatives will tend to choose one theory, and liberals will tend to choose another, which can make each theory look more extreme than it really is. Therefore, observing, say, textualist decisions in the world may tell us more about *textualists* than it tells us about *textualism*.

Section B applies this insight to various empirical questions of statutory interpretation. First, is textualism a conservative theory? Second, does textualism lead to decisions that are more likely to be overridden by Congress? And third, does textualism lead a judge to find that a statute has a plain meaning at step 1 of the *Chevron* inquiry? In all three cases, I find that commentators may have been led astray, to the extent they have

¹³¹ TOM STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD*, act 2, at 41 (1967).

¹³² See p. 24 *supra*.

¹³³ See p. 25 *supra*.

¹³⁴ See Scalia, *supra* note 17, at 14; Rosenkranz, *supra* note 24, at 2088.

been trying to explain observed results—facts about *textualists*, which may well be political in origin—using “essentialist” theories—theories about *textualism*.

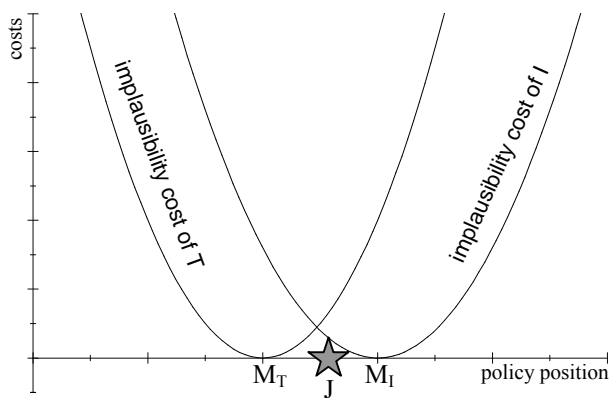
A. How Selection Bias Arises

1. Choosing Between Two Theories

Suppose your ideal point J happens to coincide with, say, M_T , the most plausible point of theory T . It should be clear that your total costs will be minimized by writing a completely plausible opinion using T . More precisely, at $M_T (= J)$, both your agenda cost and the implausibility cost of a T opinion will be 0, which is as low as they can go.

Now imagine that your J moves in the direction of M_I , so that you are situated as in Figure 8 below.

FIGURE 8
Implausibility costs of alternate theories

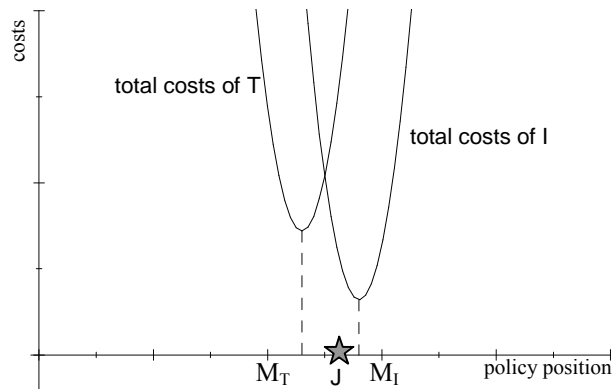


As J moves away from M_T and toward M_I , the total costs of using textualism rise, since the need to not be too implausible makes you deviate further from your J than you used to. (In particular, there is no longer any point with zero costs, since any position comes with either agenda costs, implausibility costs, or, usually, both.) And the total costs of using intentionalism fall, since your deviations from J to M_I are less than they used to be.

Eventually, J gets close enough to M_I that you are indifferent between theory T and theory I . For any J further right, you strictly prefer theory I . The total cost curves—adding the implausibility cost from

Figure 8 with your agenda cost, which we recall from Figure 2¹³⁵—look as they do in Figure 9 below. At that level of J , you would prefer to deviate toward theory I because the minimum of the “total costs of I” curve is now lower than the minimum of the “total costs of T” curve.

FIGURE 9
Total cost of alternate theories, for a particular J
(Total cost = agenda cost (Figure 2) + implausibility cost (Figure 8))¹³⁶



So, if all judges (though they differ politically) weight their agenda and their plausibility equally, there is a cutoff—call it J^* —to the left of which judges choose T and to the right of which they choose I.¹³⁷ Figure 10 below shows how the distribution of political preferences is transformed into the distribution of outcomes under different interpretive theories. This is essentially the same story as in Figure 6,¹³⁸ only here we see the effect of having two different theories to choose from.

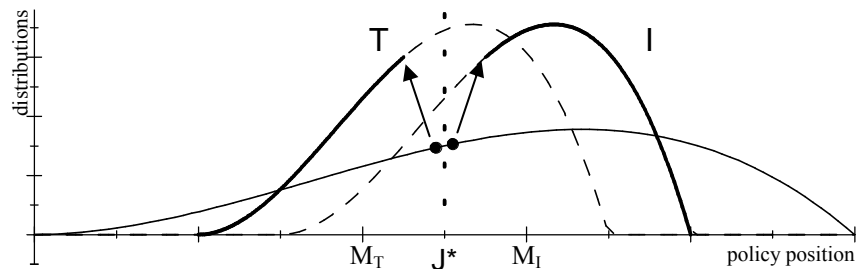
¹³⁵ See p. 17 *supra*.

¹³⁶ See pp. 17, 27 *supra*.

¹³⁷ If different judges weight their agenda and their plausibility differently, then each judge still has a cutoff to the left of which he chooses T and to the right of which he chooses I, but this cutoff will differ from judge to judge. As a result, the observed T curve and the observed I curve will not necessarily be as distinct as Figure 11 makes them out to be, and in fact, there may be some overlap.

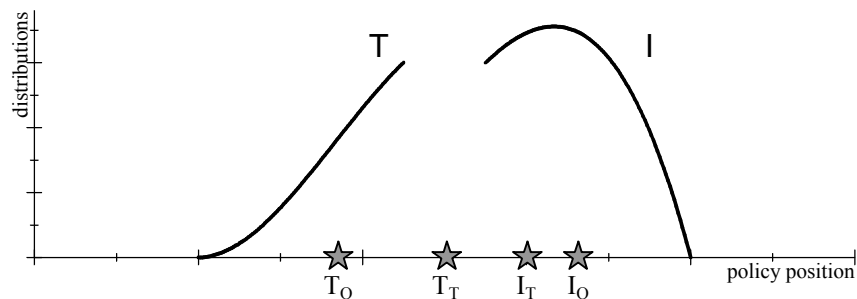
¹³⁸ See p. 24 *supra*.

FIGURE 10
Judges' selection of interpretive methods



The lower curve in Figure 10 is the distribution of political preferences, as shown in Figure 5.¹³⁹ Observe the two circles on that lower curve, falling on opposite sides of J^* , which represent two judges on either side of the cutoff. The left-hand circle—like everyone to its left—deviates toward theory T, splitting the difference between its position and M_T . The right-hand circle—like everyone to its right—deviates toward theory I, splitting the difference between its position and M_I . The result (erasing all of Figure 10 except for the solid lines) is observed distributions of outcomes that look as pictured in Figure 11 below.

FIGURE 11
The observed distribution of outcomes
when judges can choose their interpretive methods
(T_T and I_T are true means; T_O and I_O are observed means)



¹³⁹ See p. 24 *supra*.

2. What Does This Tell Us About Interpretive Theories?

The main result is obvious: *Both T and I can look more extreme than they actually are.*

The *true* distributions of T and I—what results would look like if everyone were constrained to use a single method—are shown in Figure 7¹⁴⁰ (or the dashed lines in Figure 10). The true distributions are not too distant from each other—the true means are shown as T_T and I_T in Figure 11—and in fact substantially overlap. But the *observed* distributions are completely distinct and, in fact, are separated by a gap (the result of two adjacent points above moving in opposite directions because they were on opposite sides of the T–I cutoff). The observed means are shown as T_O and I_O in Figure 11. Thus, self-selection exaggerates the political bias of interpretive methods: $T_O < T_T$, and $I_O > I_T$.¹⁴¹

Anyone trying to make general statements about theories T or I “in general” is likely to be misled if all he can see are the observed T or I opinions. For instance, consider the following statement, which claims to be based on the “essence” of textualism: “Textualists are more likely to be overridden by Congress because textualism doesn’t care whether the result makes sense or whether it conforms to the intent of the enacting Congress.” Properly speaking, this is a statement about the *full* distribution in Figure 7,¹⁴² not about the censored distribution in Figure 11. But is the premise of the theory true? Are textualist opinions in fact more likely to be overridden by Congress? Perhaps this is true of observed textualist opinions; but perhaps that only tells us about the political biases of those judges who choose textualism.

In other words, this may be a statement not about *textualism*, but about *textualists*. As a statement about textualism as such—that is, as a prediction about what would happen if we enacted a Federal Rule of Statutory Interpretation mandating textualism—it may be simply incorrect when we take into account the unobserved textualist opinions that are now getting written under some other theory.¹⁴³

Some other results also emerge from this model:

¹⁴⁰ See p. 25 *supra*.

¹⁴¹ In Figure 11, T_T is 0.4 and I_T is 0.6. T_O is to the left of T_T , at 0.38, and I_O is to the right of I_T , at 0.65. The difference between the true means, T_T (0.5) and I_T (0.6), is only 0.1, while the difference between the observed means, T_O (0.38) and I_O (0.65), is 0.27, more than double the original difference.

¹⁴² See p. 25 *supra*.

¹⁴³ See Ashenfelter et al., *supra* note 63, at 259 (on procedures necessary to correct for selection bias stemming from the absence of settled cases from samples of opinions); *id.* at 263 (because of selection bias stemming from settlement, most studies, which look for ideological influence in published appellate decisions, “may be seeking legal realism’s effect in the wrong place”).

- The observed distribution of decisions using a particular interpretive method (when judges can choose their method) can be “tighter” than the true distribution (if all judges were forced to use that method). In other words, the bold “T” line in Figure 10¹⁴⁴ and Figure 11¹⁴⁵ covers a narrower domain than the true “T” curve in Figure 2.¹⁴⁶ Thus, self-selection gives a misleading picture of the determinacy of interpretive methods; both T and I look more determinate than they really are. One should therefore take claims about the determinacy of an interpretive method—if such claims are based on the observed spread of decisions in the world—with a grain of salt. For instance, in the constitutional field, originalism may seem like a “conservative” theory today, but things would look different if the originalist field were also occupied by judges applying the liberal originalist theories of Bruce Ackerman, Akhil Amar, and Jack Balkin.¹⁴⁷
- The complete observed distribution of decisions, using any interpretive method, can be wider than the full (true) distribution using any single interpretive method. That is, the range spanned by the observed T and I curves in Figure 11¹⁴⁸ is greater than the range spanned by either the true T curve or the true I curve individually in Figure 7.¹⁴⁹ Thus, a risk-averse actor may well prefer that *some* method (perhaps not even his favorite one, but one not *too* distant from his views) be dominant rather than allow judges to choose their own preferred method.
- The complete observed distribution of decisions, using any interpretive method, could be either broader or narrower than the initial distribution of judges’ biases. In the figures above, the initial distribution of political preferences in Figure 5¹⁵⁰ happened to span the entire range; and Figure 10 shows how the need to move toward M_T or M_I ended up moving many judges toward the center (though the judges between M_T and M_I moved away from the center). Legalism, therefore, exerted a moderating effect. But suppose that the distribution of J were mostly between

¹⁴⁴ See p. 29 *supra*.

¹⁴⁵ See p. 29 *supra*.

¹⁴⁶ See p. 17 *supra*.

¹⁴⁷ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617–20 (1999); Jack M. Balkin, *Abortion and Original Meaning*, Yale Law Sch. Res. Paper No. 128 (unpublished draft, Aug. 28, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925558, at 3; Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 65 (1994); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489 (2004).

¹⁴⁸ See p. 29 *supra*.

¹⁴⁹ See p. 25 *supra*.

¹⁵⁰ See p. 24 *supra*.

M_T and M_I , or that M_T and M_I were more extreme. Then legalism would push judges toward the extremes as the ones near the center moved toward M_T or M_I . Whether legalism, on balance, moderates judges or polarizes them is an empirical question.

Of course, this is a highly caricatured picture. In reality, the observed distributions aren't quite so neat:

- First, judges may not choose their interpretive methods anew from case to case; instead, they might choose a single theory and stick to it, so some judges might choose T in a case even if T seems worse for their preferred result in that case than I. I explore why they might be consistent across cases below, in the discussion of strategic consistency.¹⁵¹
- Second, not all judges are acting in the way I describe, that is, choosing interpretive methods by trading off agenda and implausibility costs. “Rule of law” judges are fully consistent with this model¹⁵²—these are just judges who put 0% weight on their agenda and 100% weight on their plausibility.¹⁵³ However, for purposes of clarity in the figures, I have assumed not only that all judges put the same (nonzero) weight on their agenda,¹⁵⁴ but also that they choose interpretive methods opportunistically. But suppose some judges favor a theory on democratic or constitutional grounds, even if their substantive position is quite far from that theory's most plausible point. Then the results are not as stark as they appear above, and the observed distributions will tend to overlap somewhat.
- Third, the implausibility costs (or determinacy) of different methods may not be equal. For instance, in Figure 8,¹⁵⁵ if theory I is very high-cost (highly determinate) and theory T is very low-cost (highly indeterminate), some points *even to the right of M_I* might also choose theory T. Thus, a very indeterminate theory T would be chosen not only by judges whose biases are close to M_T , but also by some very distant judges whose biases seem closer to other theories (but who find those theories too constraining). I will return to this point below, in the discussion of whether textualism is truly conservative.¹⁵⁶

¹⁵¹ See Part IV *infra*.

¹⁵² See text accompanying notes 121–122 *supra*.

¹⁵³ Later, I assumed that all judges put equal weights on their agenda and their plausibility, *see* text accompanying note 126 *supra*, but that was only to make it easier to draw the pictures.

¹⁵⁴ See text accompanying note 138 *supra*.

¹⁵⁵ See p. 27 *supra*.

¹⁵⁶ See section III.B *infra*.

The self-selection problem means that forming a preference over interpretive theories is not straightforward. If you wanted to decide which is your favorite theory, you would just compare your expected utility under each theory. That is, you would favor the theory which, in expected utility terms, gets you “closest” to your ideal point. (Also, if you’re risk-averse, you would tend to prefer a method of statutory interpretation that has a distribution with less variance.)

But before calculating your expected utility under different theories, you need to know the relevant probability distributions of the outcomes under those theories. Do you use the full distributions from Figure 7¹⁵⁷ or the truncated ones from Figure 11?¹⁵⁸

It depends why you need to have a “favorite theory.” If, as a legislator, lobbyist, or concerned citizen, you want to decide whether to support a Federal Rule of Statutory Interpretation mandating textualism, you should use Figure 7.¹⁵⁹ But if—again, as a legislator, lobbyist, or concerned citizen—you want to decide whether to support judges who call themselves “textualists,” you should use Figure 11.¹⁶⁰

For example, suppose you’re at slightly left of the left end of the observed I interval in Figure 11.¹⁶¹ Looking at the observed distributions, you may think intentionalism is the best alternative.¹⁶² But this is just a reflection of the biases of judges who choose intentionalism. If a judge tells you he is an intentionalist, this is a signal that his substantive biases accord with your own. But, from Figure 10,¹⁶³ we see that you’re actually close to the mean of the *true* T interval.¹⁶⁴ So you might actually prefer to constrain all judges to use textualism.

Somewhat paradoxically, this implies that one can favor an interpretive method but nonetheless oppose judges who tend to use that method.¹⁶⁵ You can say, “I like textualism, but I hate textualists (i.e., those who choose textualism when they are free to choose). So I would mandate textualism, but I will oppose textualist judges.”

¹⁵⁷ See p. 25 *supra*.

¹⁵⁸ See p. 29 *supra*.

¹⁵⁹ See p. 25 *supra*.

¹⁶⁰ See p. 29 *supra*.

¹⁶¹ See p. 29 *supra*.

¹⁶² In Figure 11, see p. 29 *supra*, the T interval runs from 0.2 to 0.45 (with an observed mean of $T_o = 0.38$), while the I interval runs from 0.55 to 0.8 (with an observed mean of $I_o = 0.65$).

¹⁶³ See p. 29 *supra*.

¹⁶⁴ The true mean of T is $T_T = 0.5$, while the true mean of I is $I_T = 0.6$. Thus someone whose J is, say, 0.54 is thus closer to the true mean of T, but appears to be closer to I (since the observed mean of I, 0.65, is 0.11 away, while the observed mean of T, 0.38, is 0.16 away).

¹⁶⁵ Nor would you necessarily assume that a textualist decision came to the right outcome—as a legislator, you may vote for a Federal Rule of Statutory Interpretation mandating textualism, but you may still be systematically more likely to override a textualist decision if textualist judges systematically have the “wrong politics” from your perspective.

These insights will inform the following discussion, which explores whether textualism has a conservative bias. I conclude that, theoretically, a conservative *observed* textualism does not necessarily mean that *true* textualism is conservative.

Later, I also discuss whether textualist decisions are more likely to be overridden by Congress, and whether textualist decisions are more likely to find that a statute has a plain meaning at step 1 of *Chevron*. Actually answering these questions requires empirical work—a task beyond the scope of this Article. But the self-selection model should likewise make us doubt some of the conventional wisdom surrounding these questions.

3. *Textualism: A Conservative Method?*

As I have illustrated earlier, it is a common view that textualism is conservative or has a small-government bias.¹⁶⁶ Though this view is often stated in essentialist terms,¹⁶⁷ some commentators who hold this view justify it by reference to observed textualism, that is, the views, or rulings, of prominent (or “most”) textualists.¹⁶⁸ And as illustrated in the last section, *true* textualism can have a wider distribution of outcomes than *observed* textualism. Thus, one must be careful before drawing firm conclusions based on the observed cases. Relying on statements by judges who currently select textualism¹⁶⁹—or even relying on their practice¹⁷⁰—is problematic, as these judges may be merely illustrating their own biases.

Theoretically—in the model presented above—does a conservative “observed textualism” distribution indicate that true textualism is also conservative? It may, or it may not. As an initial matter, we see that in Figure 10¹⁷¹ and Figure 11,¹⁷² the self-selection effect magnified the existing bias of the different methods.¹⁷³ Working backwards, if observed textualism is much more conservative than observed intentionalism, then true textualism may be at least *slightly* more conservative than true intentionalism.

¹⁶⁶ See text accompanying notes 2–8 *supra*.

¹⁶⁷ See text accompanying notes 9–10 *supra*.

¹⁶⁸ See, e.g., Mank, *supra* note 6, at 1233, 1248.

¹⁶⁹ See text accompanying note 9 *supra*.

¹⁷⁰ See Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527 (1998).

¹⁷¹ See p. 29 *supra*.

¹⁷² See p. 29 *supra*.

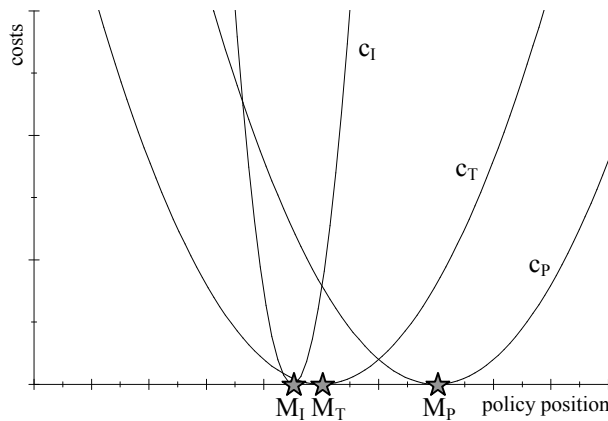
¹⁷³ See also text accompanying note 141 *supra*.

But observed textualism can look more conservative even if true textualism has no conservative bias at all. Indeed, observed textualism can look like the most conservative method even if some other method is in fact more conservative. I will illustrate this surprising result in the following three figures.

Consider an array of interpretive methods—T, I, and a third theory P (think “purposivism”)—whose implausibility costs are drawn in Figure 12 below. (As in the previous figures, the costs, and the locations of the most plausible points, are not meant to be realistic. The figures here are merely made up to illustrate how a theory that is *not in fact* conservative can be made to *appear* conservative through self-selection.)

In Figure 12, I is the theory that is furthest left, T is slightly further right, and P is the furthest on the right.¹⁷⁴ However, I is a “high implausibility cost” method¹⁷⁵ (meaning that it is highly determinate), while T and P are both less determinate.

FIGURE 12
Textualism as moderate but relatively indeterminate
(i.e., having lower implausibility cost)



The true distributions are as shown in Figure 13 below. Recall that true distributions are obtained by squeezing the distribution of J—this is in Figure 5 above¹⁷⁶—in the direction of M_I , M_T , or M_P , as appropriate.¹⁷⁷

¹⁷⁴ M_I is 0.45, M_T is 0.5, and M_P is 0.7. Recall that “left” and “right” on the figures have nothing to do with the modern political concepts of “left” and “right.” I has implausibility cost $2(x-0.45)^2$, T has implausibility cost $0.2(x-0.5)^2$, and P has implausibility cost $0.2(x-0.7)^2$. This means that judges who use I go $\frac{3}{4}$ of the way from their J to M_I , judges who use T go $\frac{5}{6}$ of the way from their J to M_T , and judges who use P likewise go $\frac{5}{6}$ of the way from their J to M_P .

¹⁷⁵ See Figure 3, p. 20 *supra*; text accompanying notes 106–110 *supra*.

¹⁷⁶ See p. 24 *supra*.

¹⁷⁷ See section II.B.4 *supra*.

Because I is a more determinate method, its distribution is more compressed in the direction of M_I . The distributions of the less determinate T and P are more spread out. They are also quite close to each other (and close to the underlying distribution of J), because an indeterminate theory does not impose high costs for deviating from its most plausible point, and so both T and P allow judges to get away with ruling very close to their own personal ideal points. And the observed distributions are as shown in Figure 14 below.

FIGURE 13
The resulting true distributions

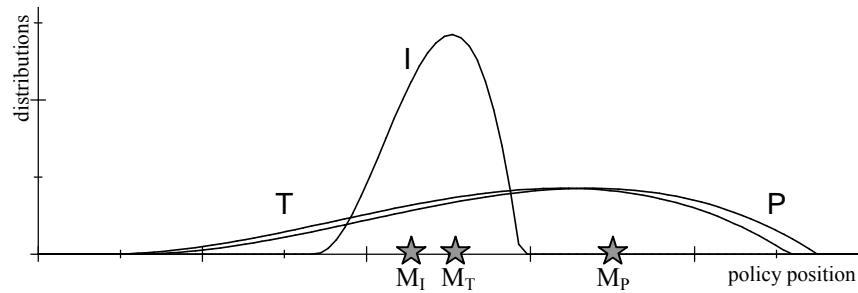
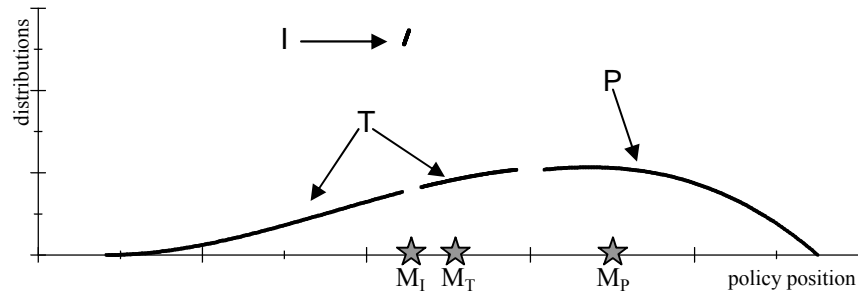


FIGURE 14
The resulting observed distributions



The first result is stark: Because I is such a determinate method, it is chosen only by a tiny minority of judges around M_I . Judges a bit further away from M_I prefer to use T, because it is less determinate—even judges who are “on the wrong side,” that is, judges whose ideal points

are closer to M_I . (No one on that side of the spectrum prefers to use P, because M_P is further away and it is just as determinate as T.)¹⁷⁸

The tiny sliver of I shown in Figure 14 dramatically illustrates the effect pointed out above:¹⁷⁹ Self-selection makes methods look more determinate than they actually are. It's clear from Figure 13 that I is a more determinate method than the others—but it's not *that* determinate!

This is actually an intuitive result. In the extreme case, where one theory is fully determinate—leading to a single point—while another theory is almost totally indeterminate, only people whose ideal is very close to that single point will use the fully determinate theory. Everyone else will use the indeterminate theory, even if they are very far from its most plausible point, simply because a very indeterminate theory requires very little deviation from their ideal point.

The second result is less obvious, but flows directly from the first. Because almost everyone on the left side of the diagram chooses T over I, even though they are closer to M_I than to M_T , the observed means of T and I have switched places relative to the true means.¹⁸⁰ If we take the left side of the diagram as being “conservative,” this means that *T is a slightly more liberal method than I, but observed T is slightly more conservative than observed I.*

In this way, observed textualism can seem like the most conservative method even if true textualism is in fact more liberal (but less determinate) than some other methods. (Granted, textualists do not typically claim that textualism is indeterminate,¹⁸¹ but others do,¹⁸² and I take no position in that controversy.)

For these reasons, an *observed* textualism that is conservative has no necessary connection with whether *true* textualism is conservative. True textualism may be *slightly* more conservative than other methods, and appear much more conservative through self-selection; but true textualism may also be *less* conservative than some other methods, and may be chosen by conservatives only because it is less determinate (while liberals choose more liberal, relatively indeterminate methods).

¹⁷⁸ I is chosen by judges between 0.433 and 0.460, yielding results between 0.446 and 0.452. T is chosen by judges between 0 and 0.433 and by judges between 0.460 and 0.6, yielding results between 0.083 and 0.444 and between 0.467 and 0.583. P is chosen by judges between 0.6 and 1, yielding results between 0.617 and 0.95.

¹⁷⁹ See text accompanying notes 144–147 *supra*.

¹⁸⁰ The true means of I and T are 0.487 and 0.583, respectively. However, the observed means of I and T are 0.449 and 0.436, respectively. Thus, the true mean of T is further right in the diagram while the observed mean of T is further left.

¹⁸¹ See sources cited *supra* note 20.

¹⁸² See sources cited *supra* note 109.

B. *The Inadequacy of Essentialist Explanations*

This Article is theoretical, not empirical. My goal so far has been to show how self-selection—a product of judges’ freedom to choose interpretive methods—makes it hard to discern the reality behind different methods.

The previous section has given one example of how mere observation of reality, in the presence of self-selection, can mislead the naive observer. Commentators have observed conservatives tending to use textualism, and have thus concluded that textualism is conservative. Working backwards from this empirical observation, they have come up with reasons why this conservative bias might exist. These reasons, as described above, purport to be based on the *essence* of textualism.¹⁸³

But these reasons might simply be false, since, as the previous section has shown that self-selection can either (1) magnify a small ideological difference and make it seem large, or (2) create the impression that an interpretive method is extreme when in fact it is moderate. They may be purporting to explain a phenomenon that does not actually exist.

The difference between Figure 7¹⁸⁴ and Figure 11¹⁸⁵ suggests that these essentialist explanations are appropriate, if at all, to explain the difference between *true* distributions. The difference between *observed* distributions, on the other hand, is perhaps better explained by *political*, not essentialist, considerations.

And—for purposes of choosing promising essentialist explanations—we can’t just intuit the difference between the true distributions from the difference between the observed distributions. For instance, we can’t assume that textualism is really more conservative just because observed textualist decisions are more conservative.

Figuring out the difference between true distributions requires serious data gathering and empirical work, which is beyond the scope of this Article. But the rest of this section suggests why we should doubt the current essentialist conventional wisdom about textualism.

1. *Direct Effects of Textualism*

Though the common essentialist view is that textualists let loopholes in regulatory statutes lie rather than filling them in with sensible regulation,¹⁸⁶ there is little reason to think that textualism in general has a

¹⁸³ See text accompanying notes 9–10, 167 *supra*.

¹⁸⁴ See p. 25 *supra*.

¹⁸⁵ See p. 29 *supra*.

¹⁸⁶ See text accompanying note 9 *supra*.

small-government bias. As one case study, consider the field of regulation of environmental, health, and safety risks.

Static theories of statutory interpretation—that is, ones that only use materials contemporary to the enactment of the statute (like textualism and intentionalism)—tend to favor the views of members of the enacting Congress. Dynamic theories—that is, ones that invite judges to use the statute to solve problems that arise today (like pragmatism)—tend to give more play to the biases of judges.¹⁸⁷

Therefore, it is plausible that a static interpretive method would please those who distrust contemporary judges and generally agree with the enacting Congresses¹⁸⁸—an apt description of many environmentalists. Mainstream environmentalists, who are associated with the political left, oppose current judges, who are as a whole more conservative than judges of the 1970s, when the major environmental statutes were enacted.¹⁸⁹ And they tend to agree with the Congresses that enacted the major environmental statutes. These statutes were enacted at a time of great environmental consciousness¹⁹⁰ and were filled with strict deadlines,¹⁹¹ technology-forcing mandates,¹⁹² and private enforcement and right-to-know provisions, justified by the belief that the agency would be easily captured.¹⁹³

In light of this history, and the resulting content of the statutes, it is perhaps not surprising that textualism has supported the side of stricter regulation in many cases. For instance, as I have discussed above,¹⁹⁴ waste combustion ash generated by a municipal incinerator is subject to stringent hazardous waste regulation under the Resource Conservation and Recovery Act.¹⁹⁵

And there are many more such cases:

¹⁸⁷ Cf. Barkow, *supra* note 73, at 1074–75 (pragmatism as allowing conservative judges to rule against criminal defendants).

¹⁸⁸ This is complicated by the issue of *Chevron* deference to agencies. See section III.B.4 *infra* for a discussion of this issue.

¹⁸⁹ See, e.g., SHARON BUCCINO ET AL., NAT. RES. DEFENSE COUNCIL, HOSTILE ENVIRONMENT: HOW ACTIVIST JUDGES THREATEN OUR AIR, WATER, AND LAND (2001), <http://www.nrdc.org/legislation/hostile/hostile.pdf>; Judging the Environment: Fair Courts for a Healthy Planet, <http://www.judgingtheenvironment.org/>.

¹⁹⁰ See, e.g., RACHEL CARSON, SILENT SPRING (1962); Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 89–90 (1992).

¹⁹¹ See, e.g., Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 323; John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 238 (1990); James D. Fine & Dave Owen, *Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 908–09 (2005).

¹⁹² See Fine & Owen, *supra* note 191, at 910.

¹⁹³ See Fine & Owen, *supra* note 191, at 917; Lazarus, *supra* note 191, at 323.

¹⁹⁴ See text accompanying notes 66–67 *supra*.

¹⁹⁵ See *City of Chi. v. EDF*, 511 U.S. 328, 334–37 (1994).

- The Endangered Species Act permits the Secretary of the Interior to define “harm” to an endangered species to include habitat modification.¹⁹⁶
- The Endangered Species Act also required that a major dam be halted to save the snail darter.¹⁹⁷
- Greenhouse gases are “pollutants” under the Clean Air Act.¹⁹⁸
- Also under the Clean Air Act, the EPA is forbidden from weighing costs and benefits in setting national ambient air quality standards.¹⁹⁹
- Similarly, the Supreme Court held, the Occupational Safety and Health Act’s call for standards that “most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health”²⁰⁰ rules out consideration of costs.²⁰¹ The dissent’s strongest argument to the contrary was based on legislative history.²⁰²
- The Federal Insecticide, Fungicide, and Rodenticide Act doesn’t preempt local regulation of pesticide use—even though, at least in Justice Scalia’s view, the legislative history cut clearly in favor of preemption.²⁰³
- The Clean Water Act allows states to impose minimum stream flow requirements on dams.²⁰⁴
- And (argued a dissent), tobacco can be regulated by the FDA because it falls within the literal definition of “drug”²⁰⁵ in the Food, Drug, and Cosmetic Act.²⁰⁶

And, of course, for textualist interpretation that is *clearly* pro-regulation and intentionalist interpretation that *clearly* goes the other way, the prime example is *Train v. Colorado Public Interest Research*

¹⁹⁶ See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697–704 (1995).

¹⁹⁷ See *TVA v. Hill*, 437 U.S. 153, 173 (1978).

¹⁹⁸ See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459–62 (2007).

¹⁹⁹ See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 464–71 (2001). The textualist opinion in this case also held that the implementation of the revised ozone standards was governed by the stricter standards of Subpart 2 of Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7511–7511f, rather than the looser standards of Subpart 1, *id.* §§ 7501–7509a. See *Am. Trucking Ass’ns*, 531 U.S. at 476, 481–86.

²⁰⁰ 29 U.S.C. § 655(b)(5).

²⁰¹ See *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508–13 (1981).

²⁰² See *Am. Textile Mfrs. Inst.*, 452 U.S. at 545–46 (Rehnquist, J., dissenting).

²⁰³ See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 609–10 (1991); *id.* at 616–21 (Scalia, J., concurring in the judgment).

²⁰⁴ See *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711–23 (1994).

²⁰⁵ 21 U.S.C. § 321(g)(1)(C).

²⁰⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161–92 (2000) (Breyer, J., dissenting).

Group.²⁰⁷ In that case, discussed above,²⁰⁸ a unanimous Supreme Court held that radioactive material already regulated by the Atomic Energy Commission is not a “pollutant” under the Clean Water Act—based on the legislative history, and in direct conflict with the plain meaning of the text.²⁰⁹

Of course, these cases by themselves prove very little, and cases like *Train* are rare.²¹⁰ I only cite them for a modest proposition: that textualism is fully capable of generating pro-regulatory results. The view that textualism is inherently anti-regulatory should not be accepted casually. Perhaps, in light of opinions like Scalia’s dissent in *Massachusetts v. EPA*²¹¹ and his plurality in *Rapanos v. United States*,²¹² environmentalists are right to be suspicious of *textualists*,²¹³ but perhaps Lazarus and Newman are also right that environmentalists should be more open to *textualism*,²¹⁴ as a general strategy that can be mandated across the board.

2. *Dynamic Effects of Textualism*

Now consider the dynamic effects of textualism. The essentialist conventional wisdom is that textualism reduces regulation, because it raises the costs to Congress of passing statutes.²¹⁵ But this is also not necessarily true.

Faced with a problem, Congress could do any of the following:

1. Do nothing.²¹⁶
2. Pass a statute with rigid commands.
3. Pass a statute with dynamic commands, explaining how its requirements should evolve as various identified factors change.
4. Pass a statute delegating lawmaking power to the agency.
5. Pass a statute delegating lawmaking power to the judiciary.

When textualism works as Eskridge claims—interpreting a command rigidly rather than flexibly, in light of changed circumstances—option 2

²⁰⁷ 426 U.S. 1 (1976).

²⁰⁸ See text accompanying notes 44–47 *supra*.

²⁰⁹ Mank, who opposes textualism, argues that the Court’s intentionalist reading more accurately implemented congressional intent, but nonetheless grants that the result “may have been an unsound policy choice” because the AEC is less likely to be pro-environmental than the EPA. See Mank, *supra* note 6, at 1278.

²¹⁰ See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 55 (1989).

²¹¹ 127 S. Ct. 1438, 1471–78 (Scalia, J., dissenting).

²¹² 126 S. Ct. 2208, 2221 (2006) (Scalia, J.).

²¹³ See, e.g., Mank, *supra* note 6.

²¹⁴ See Lazarus & Newman, *supra* note 7, at 23.

²¹⁵ See text accompanying note 10 *supra*.

²¹⁶ Cf. A.A. MILNE, *THE HOUSE AT POOH CORNER*, ch. 5, in *THE COMPLETE TALES & POEMS OF WINNIE-THE-POOH* 244 (Dutton Children’s Books 2001) (1928) (“‘What did you do?’ ‘Nothing.’ ‘The best thing,’ said Owl wisely.”).

becomes less attractive to legislators. But the result is not necessarily to move in the direction of option 1. Textualism could also lead to an increase in the use of options 3, 4, and 5.²¹⁷

Moreover, this assumes that Congress *prefers* that the judiciary update its statutes. Of course, members of Congress would prefer agents who think like them. But given judges as they are, not as one might wish they were²¹⁸—that is, with all their imperfections and biases—legislators may well prefer to have rigidity, which at least maintains the original legislative bargain,²¹⁹ rather than dynamic updates that are as likely as not to get it wrong (whether accidentally or on purpose).

There is thus good reason to doubt the essentialist wisdom that textualism has a long-term anti-regulatory effect.

3. *Does Textualism Lead to Congressional Overrides?*

As noted in the Introduction, there is a widespread view that textualist opinions are disproportionately overridden by Congress.²²⁰ The most comprehensive study of congressional overrides is William Eskridge's.²²¹ Eskridge, like Justice Stevens²²² and Daniel Bussel,²²³ concludes: "Congress is much more likely to override 'plain meaning' decisions than any other type of Supreme Court statutory decision," and "rarely appears to override those interpretations grounded on statutory 'purpose.'"²²⁴ And he offers the same explanation: "The formalist group on the Court is not interested in the preferences of the current Congress. . . . Not surprisingly, Congress is more likely to override Supreme Court statutory decisions following such a formalist approach."²²⁵

²¹⁷ Manning, *supra* note 79, at 728–31. Textualism could, admittedly, still undermine Congress's goals with respect to options 3 or 4, because the dynamic factors themselves can be interpreted too rigidly, as can the threshold conditions under which the agency has lawmaking power; but textualism would seem to have less of an effect on those than on option 2.

²¹⁸ Cf. J.J. ROUSSEAU, DU CONTRAT SOCIAL, OU PRINCIPES DU DROIT POLITIQUE bk. 1, at 3 (Rouen 1772), <http://galenet.galegroup.com/servlet/MOME?af=RN&ae=U102433140&srcthp=a&ste=14> ("Je veux chercher si dans l'ordre civil il peut y avoir quelque regle d'administration légitime et sûre, en prenant les hommes tels qu'ils sont, et les loix telles qu'elles peuvent être" ("I wish to seek whether, in the civil order, there can be any sure and legitimate rule of administration, taking men as they are and laws as they could be")); Eric Schmitt, *Troops' Queries Leave Rumsfeld on the Defensive*, N.Y. TIMES, Dec. 9, 2004, at A1 ("You go to war with the Army you have, not the Army you might want or wish to have at a later time.").

²¹⁹ See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 887 (1975).

²²⁰ See text accompanying notes 11–12 *supra*.

²²¹ Eskridge, *supra* note 4.

²²² See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112–15 (1991) (Stevens, J., dissenting).

²²³ See Bussel, *supra* note 13, at 889, 909 tbl.1, 910.

²²⁴ Eskridge, *supra* note 4, at 348.

²²⁵ Eskridge, *supra* note 4, at 406.

But it is not theoretically clear why textualist opinions should be more likely to be overridden by Congress. For instance, if, even assuming intentionalist premises, legislative history is an unreliable guide to the “intent” of Congress,²²⁶ there may be little reason to believe that judges who use legislative history are more likely to avoid a congressional response.

The same goes for purposivism: If the purpose of a statute can be characterized in so many different ways that it is hard to tell which of many purposes is the one that members of the enacting Congress had in mind, there may likewise be little reason to believe that purposivists have any special access into the minds of the enacting members, much less into the minds of current members of Congress.²²⁷

And, more generally, perhaps “the powerful natural advantages of hindsight”²²⁸—which, in the minds of some, makes courts uniquely able to remedy Congress’s oversights—is just a hindsight bias²²⁹ that’s as likely as not to drive courts astray.

If all this is true, then—even though some textualists are apparently insouciant to congressional overrides (or even welcome them on democratic grounds)²³⁰—textualism may be no worse at avoiding overrides than other methods. The observed frequency of overrides of textualist opinions may simply indicate that textualist decisions tend to be more conservative and therefore less likely to appeal to a more liberal Congress.

Some of the authors in this literature have suggested this political explanation.²³¹ But none of these authors has investigated whether textualism has any explanatory power *after controlling for the difference between the political ideology of the decision and the political ideology of Congress*. Figuring out whether this more parsimonious explanation holds up is a fruitful topic for future empirical research.

²²⁶ See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1885–95 (1998).

²²⁷ Thus, Michael Solimine and James Walker also found a greater tendency of textualist opinions to be overridden, though they had expected—based on a contrary essentialist reasoning—that non-textualist decisions would be overridden more often, “because cases which engage in more vague reliance on policy goals or interest-balancing are more apt to trigger reaction by attentive publics.” Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 442 (1992).

²²⁸ Bussel, *supra* note 13, at 899.

²²⁹ See generally Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

²³⁰ See, e.g., Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 442 (1983) (quoting W.O. Douglas, *Judges and Legislators*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 291–92 (M.G. Paulsen ed., 1959)).

²³¹ Solimine & Walker, *supra* note 227, at 435 (citing William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 616–17 (1991); Eskridge, *supra* note 4, at 377–89); *id.* at 448 (citing Eskridge, *supra* note 4, at 405–06; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646–50 (1990)); Mank, *supra* note 6, at 1273 & n.226; Bussel, *supra* note 13, at 907.

4. *Does Textualism Lead to Less Chevron Deference?*

All this—in particular, the distributions in Figure 7²³² and Figure 11²³³—assumes that the judges are deciding the rule of law on their own. But for regulatory statutes, in a post-*Chevron* world, judges decide the rule of law only if, at step 1 of the *Chevron* inquiry, they find the statute unambiguous.²³⁴ The *Chevron* framework has been widely described as having an indeterminacy all its own, potentially allowing judges to rule against agencies whose interpretations they disagree with by “finding” a contrary plain meaning.²³⁵

Five years after *Chevron*, Justice Scalia famously claimed in a *Duke Law Journal* article that, being a textualist, he was more likely to find that a statute had a plain meaning at step 1 of *Chevron*.²³⁶ Some empirical studies (though not all) have tended to confirm Scalia’s intuition.²³⁷ But the self-selection model might make us doubt this conventional wisdom.

Theoretically, there is no clear reason for textualists to necessarily be more likely to find that a statute has a plain meaning. Textualism may in fact turn out to be more determinate, but it might not.²³⁸ The legislative history could, in theory, lead to a more determinate outcome by speaking to an issue not covered in the text.²³⁹ The purpose of the statute might likewise be plain, even though the language of the statute is ambiguous.

²³² See p. 25 *supra*.

²³³ See p. 29 *supra*.

²³⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). In principle, judges can also decide the rule of law negatively, by holding at step 2 that an agency’s interpretation of the statute is unreasonable, but this happens rarely. See Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat From Chevron Principles in United States v. Mead*, 107 DICK L. REV. 289, 298 (2002); Mark Seidenfeld, *A Synco-pated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994).

²³⁵ See Cross & Tiller, *supra* note 96, at 2164 (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 992 (1992); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1069–70 (1995)); *id.* at 2166–67 (citing Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65; Shapiro & Levy, *supra*).

²³⁶ Scalia, *supra* note 15, at 521; see also Lazarus & Newman, *supra* note 7, at 22; Mashaw, *supra* note 32, at 833.

²³⁷ See, e.g., Mank, *supra* note 6, at 1248–49 nn.85–90 (citing Merrill, *supra* note 235, at 991; Merrill, *supra* note 21, at 353–54; Pierce, *supra* note 21, at 754–63); *id.* at 1266, 1275 & n.235. But see Mank, *supra* note 6, at 1248 n.85 (citing Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 459–60); *id.* at 1250 n.92 (citing Cohen & Spitzer, *supra* note 235, at 91–92); *id.* at 1275 & n.236 (citing sources); see also ESKRIDGE, *supra* note 48, at 329 n.78.

²³⁸ See text accompanying notes 20 and 109 *supra*.

²³⁹ See, e.g., *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 23–24 (1982); *Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1015 (9th Cir. (continued next page)

As noted above, there is the psychological explanation that textualists are more likely to think there is a plain meaning because they approach statutory interpretation as a puzzle while intentionalists approach it as historical researchers.²⁴⁰ But there is no theoretical reason for this to be true either: Why couldn't historical researchers view their task as a puzzle, marshaling evidence to find the true intent of Congress, while textualists view their task as linguistic research, reconstructing the textured, nuanced, and often contradictory meanings (in the plural) of texts by drawing on different pieces of semantic evidence?

If one is to believe some theoretical reason for thinking that textualism is more likely to find a plain meaning, it must be because that reason explains the facts on the ground—that textualist opinions in fact more often find a plain meaning. But even if the empirical evidence were clear on that score, that would only be evidence of the tendencies of *observed* textualism, that is, of *textualists*.

Seen in this light—and if one accepts the hypothesis of this Article that judges' selection of methods is driven by ideology—the most plausible theory to explain the apparent determinacy of textualism is that textualist judges, being on average more conservative, have systematically disagreed more often with agency interpretations and therefore found a plain meaning in order to rule against them.²⁴¹ This phenomenon would disappear if all judges were forced to use textualism.

IV. COLLECTIVE ACTION PROBLEMS DISCOURAGE CONSISTENCY

I too have a theory of art—what doesn't one do for fun?—but I keep it to myself as my personal opinion (otherwise I'd actually have to follow it) and prefer to be considered a somewhat scatterbrained nature-boy with no sense of form.

— Friedrich Dürrenmatt²⁴²

2006); William N. Eskridge, Jr., *Cycling Legislative Intent*, 12 INT'L REV. L. & ECON. 260, 261 (1992).

²⁴⁰ See text accompanying note 21 *supra*.

²⁴¹ See Pierce, *supra* note 21, at 776, 779–81; Jason J. Czamezki, An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation & the *Chevron* Doctrine in Environmental Law (Marquette Univ. Law Sch. Legal Stud. Res. Paper No. 07-05, June 2007) (liberal judges more likely to reverse at step 1 in 2003–05); cf. Frickey, *supra* note 109, at 214–15.

²⁴² FRIEDRICH DÜRRENMATT, *Anmerkung*, in DER BESUCH DER ALTEN DAME 101–02 (1956) (“[A]uch ich habe eine Kunsttheorie, was macht einem nicht alles Spaß, doch halte ich sie als meine private Meinung zurück [ich müßte mich sonst gar nach ihr richten] und gelte lieber als ein etwas verwirrter Naturbursche mit mangelndem Formwillen.”).

So far, all I have described is how you—a judge concerned with a substantive agenda—would go about statutory interpretation in a single case, ignoring all other cases. There has been no reason to adopt a consistent interpretive method from case to case. Obviously, if you, or others in the judicial system, have preferences over interpretive methods,²⁴³ that could be enough to make you consistent across all your cases. But if you just want to push an agenda, perhaps you don't need to choose a method, but should rather decide each case using whatever method achieves the desired result in that case. You can use textualism today and intentionalism tomorrow, depending on which method is most advantageous that day, and no one will stop you. And this methodless method may actually be the same as “pragmatic” statutory interpretation, since pragmatism explicitly advocates not sticking to any single method but using whatever seems most appropriate in each case.²⁴⁴

Going case by case is optimal for you if each case is fully compartmentalizable—that is, if your decision in one case has no effect on other cases. At first glance, this seems plausible: Interpretive methods have no precedential effect.²⁴⁵ But what if the use of a method today somehow made it more likely that the method would be used in the future? If that were so, we could say that the use of interpretive methods has a “soft” precedential effect.²⁴⁶

And in the presence of such soft precedent, case-by-case opportunism may be insufficiently strategic.²⁴⁷ If you really could alter other judges' behavior, you'd want to take that into account in deciding cases. Rather than being a “myopic opportunist,”²⁴⁸ you may prefer to bind yourself to a single theory you *usually* like—even if you'd rather not use it all the time—if as a result you could bind *other judges*, who don't share your views, to use that theory.²⁴⁹

²⁴³ See, e.g., Hausegger & Baum, *supra* note 93 (citing Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996)); Ferejohn & Weingast, *supra* note 34; Ferejohn & Weingast, *supra* note 12.

²⁴⁴ See Schanck, *supra* note 81, at 2589–90; Merrill, *supra* note 21, at 351.

²⁴⁵ See text accompanying notes 24–25 *supra*; Rosenkranz, *supra* note 24, at 2144–45 & n.267; *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting); Frickey, *supra* note 109, at 219.

²⁴⁶ See Miceli & Cosgel, *supra* note 51, at 33; Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992); EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

²⁴⁷ See Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 607–08, 611, 614–16, 627 & n.46 (2005).

²⁴⁸ Vermeule, *supra* note 247 (calling this view “maximizing,” as opposed to “optimizing” or “satisficing”).

²⁴⁹ If you're risk averse, you'd even prefer binding everyone to a theory that isn't your absolute favorite rather than sticking with the high-variance, free-interpretive-choice status quo, as long as that theory isn't *too* bad for you. See text accompanying note 148–149 *supra*.

The following Part conveys “good news” and “bad news.” The good news, presented in section A, is that there is some reason to believe that interpretive methods can be self-entrenching in this way. Other things equal, the use of a method today makes it more likely that the method is used in the future.

The bad news, presented in section B, is that, except in exceptional cases, this effect is quite small. This means that most judges, most of the time, would not benefit from following a particular method consistently, even if they wanted to entrench that method among judges at large. This is so even if a great many judges wanted to entrench the same method: Perhaps, if all textualist judges could write a binding contract forcing each other to follow textualism *all the time*—not just when it suited them—they would succeed in “imposing” textualism on everyone else. But because they cannot commit to using textualism when it doesn’t suit them, there is little reason for them not to deviate from textualism in those cases. And, as I explain below, this is also true (if not more so) of frequent litigators.

Therefore, it makes sense for judges or litigators to favor imposing a single interpretive method but nonetheless not follow it consistently in their own practice.

A. *The Value of Consistency*

1. *The Constraining Effect of Interpretive Methods*

How might one’s use of a method change the probability that it’s used in the future? Most obviously, other judges could tend to perpetuate methods from previous cases because of the reasoning based on analogy characteristic of the common law.²⁵⁰ But we can also explain the spread of interpretive methods even if all judges are equally agenda-driven.

One way that an interpretive method can spread is by mere repetition. Experimental psychologists have found that, after one repeats a plausible statement a few times, one’s hearers become more confident that the statement was true—regardless whether the statement was actually true or false.²⁵¹ This “illusory truth effect” has been confirmed repeatedly.²⁵² In addition, repeated use of an interpretive method by

²⁵⁰ See, e.g., LEVI, *supra* note 246.

²⁵¹ See Lynn Hasher et al., *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAVIOR 107 (1977); cf. LEWIS CARROLL, *THE HUNTING OF THE SNARK* 3 (photo. reprint 2006) (1876).

²⁵² See, e.g., Ian Maynard Begg et al., *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCH.: GEN’L 446 (1992); Kimberlee Weaver et al., *Inferring the Popularity of an Opinion from Its Familiarity: A Repetitive* (continued next page)

prominent jurists may increase its use by future jurists because of the “source credibility effect.”²⁵³

Thus, to the extent textualism is in the ascendancy, it may be because of the influence—and persistence—of prominent textualist advocates like Scalia and Easterbrook.²⁵⁴ When they advocate it in a law review article or use it in a case, they make textualism more available to readers of the case, who are more likely to see it as a plausible method;²⁵⁵ and they also educate their readers in how to use the method. As noted above, these phenomena may be even more important in the judicial process, which is expressly described as involving reasoning by analogy and example.²⁵⁶

But even without appealing to explanations based on psychological biases or the nature of the common law, we can explain the self-entrenching character of interpretive methods by reference to the rational-choice model of judges’ preferences discussed earlier.²⁵⁷

For instance, if judges dislike being reversed, they will be more likely to use a more common method, because a common method attracts less attention and is therefore more likely to be approved by reviewing courts (or not overridden by Congress).²⁵⁸ They will be willing to adopt positions that diverge, to some extent, from their own preferences, to reduce the probability of being reversed or overridden.

In addition, recall the discussion of judges’ work aversion—or, more charitably, their time and effort constraints.²⁵⁹ In Posner’s terms, the desire not to work hard,²⁶⁰ or “an aversion to any sort of ‘hassle,’”²⁶¹ makes judges want to avoid responsibility by insisting that “their decisions are coerced by ‘the law.’”²⁶² Because work-averse judges don’t like to “consider[] every case afresh,” relying on previously used methods lets them

Voice Can Sound Like a Chorus, 92 J. PERSONALITY & SOC. PSYCH. 821, 827 (2007); Jason P. Mitchell et al., *fMRI Evidence for the Role of Recollection in Suppressing Misattribution Errors: The Illusory Truth Effect*, 17 J. COGNITIVE NEUROSCIENCE 800, 800 (2005).

²⁵³ See Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635 (1951–52).

²⁵⁴ See Nathan Oman, *Statutory Interpretation in Econotopia*, 25 PACE L. REV. 49, 70 (2004); Bussel, *supra* note 13, at 893; Merrill, *supra* note 21, at 363, 365.

²⁵⁵ The tendency of the use of a method to foster the use of the method in the future is thus an example of an “attitude-altering slippery slope.” See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1077–82 (2003).

²⁵⁶ See text accompanying note 250 *supra*.

²⁵⁷ See section II.B *supra*.

²⁵⁸ See, e.g., Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 562 & n.19 (2005) (citing Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 496–99 (1988)).

²⁵⁹ See text accompanying notes 97–100 *supra*.

²⁶⁰ See Cohen, *supra* note 93, at 187.

²⁶¹ See Posner, *supra* note 97, at 20.

²⁶² Posner, *supra* note 97, at 20; see also *id.* at 39.

work less and shift blame to earlier judges.²⁶³ And there's no reason why reliance on the past should be restricted to elements of past cases that are, in the strict sense, precedential. A work-averse judge will be more likely to interpret a statute using a particular method if it—or similar statutes—has already been interpreted that way.²⁶⁴

Critical legal scholars have expressed a similar point in a different rhetoric. Judges use consistency with past practice as a rhetorical device to mute opposition to their opinions.²⁶⁵ The judge strives for an opinion that is “neat” or “elegant,” meaning that it is written “at a minimum expenditure of . . . something.”²⁶⁶ That “something” is their “legal and political credibility” or their “stock of legitimacy,” which is more “at stake” whenever they do something unusual—whether it is making a ruling with a dubious legal foundation or overruling precedents with impunity.²⁶⁷

Arguments based on more conventional legal theories are thus “not much work”; “[g]oing along [is] costless in terms of legitimacy.”²⁶⁸ In fact, judges may go along with the obvious legal answer by an “opportunistic interest in avoiding controversy.”²⁶⁹ Crafting arguments that seem to cut against the grain, on the other hand, is “hard, scary, and time-consuming.”²⁷⁰

Thus, the fact that an interpretive method was used in a similar case before can exert pressure on a (possibly different) judge to follow the same method in his own case.

2. *What This Implies for Strategic Judges and Litigators*

The more strongly present methods constrain future cases, the more long-term is your thinking about interpretive methods, whether you are a judge choosing which method to use or a strategic litigator choosing which method to push in your brief.

In the extreme case—where the method you use now will establish an interpretive methodology once and for all, at least for a particular class of cases—it only makes sense to think in terms of outcomes in the whole class of cases. You don't compare the utility of different interpre-

²⁶³ See Posner, *supra* note 97, at 22.

²⁶⁴ The tendency of the use of a method to foster the use of the method in the future is thus an example of a “cost-lowering slippery slope.” See Volokh, *supra* note 255, at 1039–48.

²⁶⁵ See Note, *Originality*, 115 HARV. L. REV. 1988, 2002–04 (2002); Schanck, *supra* note 81, at 2587–88 (citing Kennedy, *supra* note 51, at 527).

²⁶⁶ Kennedy, *supra* note 51, at 544.

²⁶⁷ See Kennedy, *supra* note 51, at 528–29, 537.

²⁶⁸ Kennedy, *supra* note 51, at 529.

²⁶⁹ Kennedy, *supra* note 51, at 555; see also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 264 (1986).

²⁷⁰ Kennedy, *supra* note 51, at 528.

tive methods in this case alone; you compare the utility of different methods over all cases simultaneously. The current case has no particular significance.

This super-long-term view might tend to make it hard to choose a “favorite interpretive method” on substantive policy grounds. If textualism is best in some cases while intentionalism is best in others and pragmatism in still others—and considering that the set of statutes to be interpreted, the political parties in power, and the biases of judges will change over time—perhaps determining which theory best serves your agenda is just too difficult. Ex ante, any theory may then be just as good as any other.²⁷¹

But this is not necessarily so, because there can still be systematic differences among methods, especially in a particular substantive field (say, environmental policy).²⁷² Static interpretive methods, like textualism and intentionalism, tend to implement the views of members of the enacting Congresses, and therefore may well make a difference if a particular field is characterized by statutes with a common flavor and enacted in the same general period. Similarly, dynamic interpretive methods tend to implement the views of the current crop of judges, so if judges tend to have particular biases, a dynamic strategy may tend to enshrine those views.

Granted, statutes change—for instance, the next generation’s environmental statutes may be more likely to enshrine cost-benefit analysis. But major statutes change slowly. So does the composition of the judiciary. In any event, it might be worthwhile today to have an interpretive method that’s desirable for this generation, and let the next generation’s citizens and judges struggle later to establish a method more appropriate for their desires.

In short, the effect that today’s methods have on later cases should, at the margin, make you more likely to abandon the strategy that is optimal for the individual case in favor of the strategy that is optimal over the whole class of cases you’re interested in.

²⁷¹ See Pierce, *supra* note 21, at 781.

²⁷² See, e.g., section III.B.1 *supra*. Many methods that seem neutral, because they depend on facts that vary widely across fields and over time, are in fact not so neutral. For instance, pragmatic constitutional interpretation can systematically harm criminal defendants, see Barkow, *supra* note 73, at 1074–75; cost-benefit analysis can systematically downplay the importance of non-monetizable factors, see FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2005); the interest-balancing approach in Article I tribunal cases can systematically disfavor the speculative-seeming importance of structural separation-of-powers concerns, see CFTC v. Schor, 478 U.S. 833, 863–64 (Brennan, J., dissenting); advocacy of government programs on their merits can systematically ignore the relatively invisible costs of raising the money required to fund the programs, see FRÉDÉRIC BASTIAT, CE QU’ON VOIT ET CE QU’ON NE VOIT PAS (1863); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

This is not an all-or-nothing proposition. You only *have* to think in terms of theories in the extreme case where today's method *completely* constrains tomorrow's cases. If today's methods don't affect tomorrow's at all, strategic opportunism just collapses into myopic opportunism; you're best served by just choosing methods a single case at a time. In the intermediate case, where today's method constrains tomorrow's cases to a certain extent, you can choose in each case whether to deviate from the overall optimal theory by comparing the gain you would enjoy in that case to the loss from weakening the overall optimal theory for the future. So myopia can be justified for very important cases. The "very important" threshold is defined based on how strong the theory-reinforcing effect is.²⁷³

B. *Strategic Consistency and the Collective Action Problem*

1. *For the Judge*

Nonetheless, the extent to which today's methods constrain judges in future cases is probably quite weak from the perspective of the individual judge. There are enough judges that an individual judge's interpretive method has very little effect on what other judges do, even if one aggregates the work of their entire career. Therefore, it will almost always be optimal for the agenda-driven judge to use the theory that is optimal for him in that case.

Some judges may have a disproportionate influence on other judges: Justice Scalia, for instance, by claiming to refuse to consider non-textualist evidence, forces lawyers to make textualist arguments—both in the cases that come before him and in the lower court cases that *may* come before him—which nontrivially increases the chance that an opinion will end up relying solely on textual evidence, since judges usually only use the arguments that are made in the briefs.²⁷⁴ (In any event, lower-court judges may not want to lose Scalia's sympathy unnecessarily, nor do Scalia's colleagues want Scalia to dissent from part of their

²⁷³ Moreover, certain fields might be compartmentalizable to some extent. Interpretive methods used in environmental cases may have a big effect on future environmental cases but not on future tax cases, where the clarity of statutes, deference to agencies, and the degree to which interpretation is thought to be common law-making, are different. One method may be best for environmental cases, another method for civil rights cases, and a third for tax cases. See Sunstein, *supra* note 109, at 669; J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 880 (1993) (citing Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 819–20 (1993)). Then whether you should seek different methods in those fields depends on how compartmentalizable the fields are, which is an empirical question dependent on how judges actually go about deciding those cases.

²⁷⁴ See Oman, *supra* note 254, at 70.

opinion.²⁷⁵) Other judges, such as Easterbrook, may also have a disproportionate effect because they are high-profile and have a talent for popularizing their views.²⁷⁶

One can also tell other stories about why judges might want to stick to a consistent strategy that don't rely on establishing their interpretive method for judges in future cases: A judge might want to signal his intellectual honesty to other judges, which may make them more willing to go along with his opinions. A judge may want to enhance his promotion prospects through consistency, since his potential promoters will have a better sense of what sort of judge he will be. (Though consistently showing a particular political bias is also an effective promotion strategy!²⁷⁷)

But overall, the incentives for a judge to have a consistent interpretive theory seem fairly weak. Most judges thus have little to gain, if they are pursuing a substantive agenda, by ruling contrary to the way they want to rule in an individual case for the sake of strengthening their favorite interpretive method.

This is true even if very many judges favor textualism as an overall strategy. Perhaps, if they all got together, they could write a binding contract forcing themselves to use textualism all the time; and perhaps this consistent practice, by the mechanisms described in the previous section, would “force” textualism on everyone else. But because these textualist judges cannot enforce the use of textualism, they cannot credibly commit to using textualism in cases where it isn't to their immediate advantage; and so no judge suffers from deviating from textualism in cases where textualism doesn't advance his agenda.

Because of this collective action problem, it makes sense for a judge to favor textualism, and to be willing to mandate it by judicial fiat if the issue comes up, but (until that happens) to not follow textualism consistently in the cases that come before him.²⁷⁸

2. *For the Litigator*

The collective action problem also affects how you act on your favorite interpretive method if you're a litigator. Because methods that

²⁷⁵ See Pierce, *supra* note 21, at 752, 762; Merrill, *supra* note 21, at 365.

²⁷⁶ See, e.g., Easterbrook, *supra* note 9; Easterbrook, *supra* note 20; Easterbrook, *supra* note 81; Easterbrook, *supra* note 52; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990). See also Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998). But see note 278 *infra*.

²⁷⁷ See Cohen, *supra* note 93, at 190.

²⁷⁸ Compare, e.g., Kozinski, *supra* note 276, at 812 (“a number of federal judges—I among them—have foresworn the use of legislative history as an interpretive tool”), with *Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1015 (9th Cir. 2006) (Kozinski, J.) (“[B]oth readings of the statute are plausible. . . . To resolve this ambiguity, we turn to the legislative history . . .”).

prevail in cases today affect what methods will be used in cases tomorrow, you might consider adopting a presumptive position in favor of, say, textualism in particular cases (if that's the method that would help you the most over your whole agenda), though you would be willing to deviate from it in "important enough" cases, as described above for judges.²⁷⁹

But because your effect on future judges will likely be very slight, your presumptive position in favor of your favorite theory will also be quite slight. You will thus almost always be willing to deviate from your favorite theory in a case where a different theory would work better, even if you're a frequent and strategic litigator.²⁸⁰

This is all the more true for litigators given that, if you turn down a case because it would require a bad theory, someone else may take it. This is part of a more general collective action problem, where individual litigators can undermine the strategic plans of ideological litigators; indeed, professional ideological litigation groups often complain about the loose cannons on their side.²⁸¹

So even though a judge may be willing to argue for a judicially imposed, or statutory, rule of interpretation mandating a particular interpretive method, it makes sense for him not to feel bound to use that method consistently. A litigator can also support a method as optimal over the whole class of cases he is interested in, while not incorporating it into his litigation strategy. There is thus no necessary connection between the positions one takes with respect to a particular interpretive strategy when one is acting in different roles.

²⁷⁹ See text accompanying note 273 *supra*.

²⁸⁰ People might not be willing to lose cases in service of this strategically because of "the distorting force of particulars," i.e., salience bias. See Vermeule, *supra* note 247, at 627–28 & n.47 (citing sources on salience heuristic).

²⁸¹ See, e.g., Phil LaPadula, *Gay Groups Ask Court to Toss Out Marriage Lawsuit*, WASH. BLADE, Jan. 27, 2006, <http://www.washblade.com/2006/1-27/news/national/lawsuit.cfm>; Dave Kopel, *Secret Weapon*, NAT'L REV. ONLINE, Sept. 22, 2003, <http://www.nationalreview.com/kopel/kopel200309221255.asp> ("Some 2nd Amendment lawyers help the gun-ban side."); Dave Kopel, *The Silveira Threat*, Sept. 23, 2003, <http://www.nationalreview.com/kopel/kopel200309230925.asp> (charging that a pro-Second-Amendment litigator is "seriously harm[ing] Second Amendment rights").

V. CONCLUSION

Having removed every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence

— Justinian²⁸²

Throughout this Article, I have assumed a strategic actor interested in pursuing his agenda: first, an ideologically motivated judge opportunistically choosing interpretive methods in individual cases (or over a range of cases); and second, an ideologically motivated judge, legislator, or organization deciding whether to mandate a particular interpretive method. As I have intimated above,²⁸³ one might find it improperly results-oriented to mix one’s views on policy with one’s views on statutory interpretation, constitutionalism, or democracy, at least if one is a judge.

Fair enough. I have been making no normative claim here. It does not matter to my model whether judges, or anyone else, would be *right* to take their own agenda into account when thinking about interpretation; all that matters is that judges, and others, do. (Moreover, recall that this model does not assume that judges act this way consciously or in bad faith.²⁸⁴)

Still, there is reason to doubt this widespread intuition that substantive neutrality is required. Let us assume that judging according to one’s own agenda violates the rule of law—a reasonable proposition, if “law” is taken in the normative, impersonal sense implicit in the phrase “a government of laws and not of men”²⁸⁵ (and not in Holmes’s merely descriptive sense of “the prophecies of what the courts will do in fact”²⁸⁶). Even then, it is not obvious that the rule of law is the ultimate value.

Abolitionist judges in the days of the fugitive slave laws in the United States, liberally minded judges in Nazi Germany, anti-war judges facing draft evaders, anti-abortion judges having to sentence nonviolent abortion protesters, and judges of a variety of persuasions having to mete out draconian sentences under mandatory minimum laws and insuffi-

²⁸² J. INST. prooemium 2 (J.B. Moyle trans.).

²⁸³ See text accompanying note 37 *supra*.

²⁸⁴ See text accompanying note 124 *supra*.

²⁸⁵ *E.g.*, John Adams, *Novanglus Papers*, No. 7, in 4 THE WORKS OF JOHN ADAMS 106 (Charles Francis Adams ed., 1851); MASS. CONST. pt. 1, art. XXX; see also JAMES HARRINGTON, THE OCEANA AND OTHER WORKS 37, 46, 56 (London 1747); ARISTOTLE, POLITICS 3.11.1287a17–19, at 262–65 (H. Rackman trans., rev. ed. 1944) (“Therefore it is preferable for the law to rule rather than any one of the citizens”).

²⁸⁶ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

ciently flexible sentencing guidelines—all have had to come to terms with the conflict between their views of justice and the rule of law.²⁸⁷ Some applied the law that they felt was unjust; some found “legitimate” ways to avoid the application of the unjust law; some resigned; and some—to put it bluntly—lied.²⁸⁸

I cannot do justice here to the philosophical arguments surrounding this debate, but it should be clear that the moral issue is, at the very least, controversial. For an excellent recent treatment of the subject, I refer the reader to Paul Butler’s recent article on “When Judges Lie (and When They Should).”²⁸⁹

But—to repeat myself—this Article is positive, not normative. Even if one believes that judges (or anyone else) should not choose interpretive methods based on their substantive political agenda, the conclusions of this Article still hold as long as at least some judges in fact do so.

* * *

This Article has aimed to contribute to the existing literature on statutory interpretation in two ways.

First, many positive political theory articles have assumed that judges simply want to rule a particular way—either because of their biases or because of a taste for a theory of interpretation—and would do so if they didn’t fear congressional overrides. This Article, by contrast, describes how a self-interested judge neither chooses a theory in the abstract nor rules according to his pure bias, but is rather drawn in different directions by different theories of statutory interpretation. Theory and rhetoric are neither irrelevant nor determinative.

Second, most normative arguments about statutory interpretation assume that a “good” theory is good for all people and for all purposes—whether one is an individual judge deciding a case; a legislator, scholar, or advocate evaluating judges; or a legislator, scholar, or advocate (or even a judge) deciding on policy for the whole judiciary. Many of these articles are judge-centered and ignore everyone else’s choice of theories, but to the extent they advance normative arguments for some interpretive theory, they seem to at least implicitly assume that the theory that is best

²⁸⁷ See generally Paul Butler, *When Judges Lie (And When They Should)*, 91 MINN. L. REV. 1785 (2007); Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1006 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (New York 1856)); LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 150 (Boston 1860); *United States v. Lynch*, 952 F. Supp. 167, 168, 171 (S.D.N.Y. 1997); Kozinski, *supra* note 63.

²⁸⁸ See generally Butler, *supra* note 287.

²⁸⁹ Butler, *supra* note 287.

to use in judging individual cases should also be preferred in evaluating judges or in setting policy for the judiciary.

This Article unbundles that package, explaining how different theories can be “best” for different people and different purposes. In particular, whether one likes a theory, and would want to impose it on the whole judiciary, needn’t bear any relation to whether one should support practitioners of the theory today—because, in a world of free methodological choice, those practitioners may just be showing their political biases. And whether one likes a theory similarly needn’t bear any relation to whether one would consistently use that theory in individual cases, either as a judge or as a litigator.

Actually determining which theory one “likes” is, admittedly, hard to do. To determine the true substantive bias of different interpretive strategies, one has to take a great many doctrinal areas into account, and the facts that bias an interpretive method in one direction or another vary over time, as members of Congress and the judiciary change. Drawing out the full consequences of adopting a method—and thus choosing a method that’s best for one’s substantive agenda—may therefore sometimes be impossible. One response to our ignorance would be to decide that it’s all a wash and ignore the whole enterprise of choosing interpretive methods on substantive grounds (though abandoning the whole exercise might be an excessive response, as different methods may still systematically differ in important ways).²⁹⁰ One might then choose no method at all, or commit oneself to a method on some other ground, like democratic or constitutional theory.²⁹¹

But assuming that one can determine which method one likes on substantive grounds, this Article seeks to discipline that inquiry by showing how the answer depends on who one is and what one is trying to do. To those who have assumed that the result of the inquiry should be the same for all actors and all purposes, this Article may suggest that they consider rethinking their consistency. I do not suggest that a foolish consistency is the hobgoblin of little minds, but, as an economist, I suggest that an unexamined consistency may be individually suboptimal.

* * *

Many of the examples in this Article have concerned textualism, simply because textualism is at the center of a number of current empirical controversies: Does textualism have a conservative bias? Does tex-

²⁹⁰ See text accompanying notes 271–272 *supra*.

²⁹¹ I had assumed that these considerations were “relatively unimportant,” see text accompanying note 36 *supra*, but deciding that the substantive issues are a wash would allow them to come to the fore.

tualism lead to more congressional overrides? Does textualism lead to less *Chevron* deference? I have not proposed any firm answers to these controversies, but I have suggested that the conventional “essentialist” theories may be a bad fit for explaining the characteristics of *observed* textualism. Rather, essentialist theories may be most promising in explaining what *true* textualism (and other theories) may look like, which will be useful in discussing the merits of proposed alternate Federal Rules of Statutory Interpretation.

Nonetheless, the self-selection model presented here is general, and applies to any positive issue of interpretation. Thus, much of what I have said here applies not only to statutory but also to constitutional interpretation.²⁹² For instance, just as textualism might, surprisingly, be better than is commonly assumed for a pro-regulatory agenda, originalism may be better for (non-capital) criminal defendants.²⁹³

There are two main differences between how this theory applies to statutes and how it may apply to the Constitution: First, the “enacting Congress” in the case of the Constitution (the enacting We-the-People) usually doesn’t vary that much across different constitutional provisions; the relevant enactors are predominantly people in 1787, 1791, or 1868, and (judging from the historical record) new and important amendments are unlikely in our lifetimes.²⁹⁴ This tends to increase the substantive bias of static strategies of constitutional interpretation, like originalism. Second, constitutional interpretation leaves less scope for congressional overrides, though Congress can still react to decisions in ways short of overriding them.²⁹⁵

While this Article does not resolve the thorniest *normative* issues surrounding statutory and constitutional interpretation, the theory presented here does imply a research agenda for future *positive* research. Suppose I am right that essentialist theories are inappropriate for explaining the *observed* pattern of decisions using a particular interpretive approach. Suppose that the observed distribution of results using a particular theory emerges from the interaction between (1) judges’ political preferences, (2) the most plausible point of a theory, and (3) the implausibility costs of deviating from that point. The essence of the theory does, therefore, play some role, though not a simple one.

Gathering the data and running the empirical tests required to explain how much of, say, observed textualist decisionmaking is attributable to textualism and how much to textualists, is a fruitful topic for further re-

²⁹² Cf. Scalia, *supra* note 17, at 37 (“the usual principles are being applied to an unusual text”).

²⁹³ See Barkow, *supra* note 73, at 1044–48, 1072.

²⁹⁴ See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

²⁹⁵ See Vermeule, *supra* note 258, at 573; Solimine & Walker, *supra* note 227, at 426–27.

search. Similarly, one should investigate empirically how much of Congress's propensity to override judicial decisions stems from the judge's politics and what residual may be explained by the interpretive theory itself. And the same goes for judicial review of agency decisionmaking under the *Chevron* test: How much of a judge's propensity to find a contrary plain meaning under step 1 of *Chevron* stems from the difference between the agency's position and the judge's politics, and how much remains to be explained by the interpretive method?

So much for explaining observed results. But explaining the true nature of an interpretive theory is also necessary if one is to sensibly debate the merits of a Federal Rule of Statutory Interpretation imposing that theory. Freed from the presumption that the decisional universe under a rule of mandatory textualism must look like the universe of observed textualist opinions, future commentators will be able to estimate the effect of mandating methods more accurately. This, too, will involve detailed analysis of many cases—not just to observe how they were in fact decided, but to speculate how they *would* have been decided if the judge who looked at legislative history had been forced to ignore it.

While I have not attempted such an empirical examination here, I hope that future work explores these questions.