

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

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*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, first, that judges not only have ideological preferences but also want to write plausible opinions. Second, I assume that every method of statutory or constitutional interpretation has a “most plausible point” along a spectrum of possible decisions in a given case. As a result, if a judge decides to use any particular interpretive method, that method will pull him towards its “most plausible point,” possibly making him deviate from his own ideal point.*

*When a judge can choose an interpretive method, he selects the one that (taking these deviations into account), among other things, allows him to stay as close as possible to his favored outcome. Thus, any given method is chosen only by judges whose ideal points, roughly speaking, are not too distant from that method’s most plausible point. This behavior creates a selection bias. An interpretive method’s political valence under a regime of free interpretive choice thus differs systematically from what it would look like if that method were mandatory. As a result, one might favor mandating an interpretive method even though one is politically closer to the current practitioners of a different method.*

*A judge can choose not only which interpretive method to use but also whether to use the same method from case to case. This Article argues that an individual judge’s choice of interpretive method does not usually substantially affect the methods that other judges use. Therefore, even though ideologically motivated*

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*judges (or litigation groups) might want to make the method they prefer in most cases mandatory for everyone, it can often be rational for these judges to deviate from that preferred method in instances where a different method would produce a more appealing outcome.*

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## INTRODUCTION

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

— Leigh Mercer<sup>1</sup>

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

One commonly stated reason for the association of textualism with limited regulation—voiced by both Frank Easterbrook, a textualist, and Marmor, an antitextualist—is that textualists let loopholes in regulatory statutes lie, choosing not to fill them in with broad readings that might make sense or that accord with the intent of the enacting legislature.<sup>7</sup> Eskridge suggests another, more long-term, reason: By forcing Congress to revise statutes to reflect new circumstances, rather

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<sup>1</sup> See DMITRI A. BORGMANN, *LANGUAGE ON VACATION: AN OLIO OF ORTHOGRAPHICAL ODDITIES* 59 (1965) (attributing phrase to palindromist Leigh Mercer); MICHAEL DONNER, *I LOVE ME, VOL. I: S. WORDROW'S PALINDROME ENCYCLOPEDIA* 104, 201 (1996) (speculatively attributing phrase to Mercer); *hear also* “WEIRD AL” YANKOVIC, *Bob*, on POODLE HAT (Volcano Entertainment 2003) (singing “‘Do nine men interpret?’ ‘Nine men,’ I nod,” in song made up entirely of palindromes).

<sup>2</sup> William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994); *see also* Daniel A. Farber, *Essay, Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1414 (2000) (citing Eskridge & Frickey, *supra*, at 77).

<sup>3</sup> William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991).

<sup>4</sup> Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2064 & n.3, 2066 (2005).

<sup>5</sup> 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).

<sup>6</sup> *Id.* at 1267. Mank is responding to the claims of Richard Lazarus and Claudia Newman, who argue to the contrary. *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).

<sup>7</sup> *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (“There is no presumption that every statute answers every question, if only we could find or invent the answer.”); Marmor, *supra* note 4, at 2066 (noting that textualism creates “a default rule, whereby unresolved interpretive issues ought to remain unresolved by judges”).

than allowing judges to do it themselves, textualists raise the cost of legislation. This—in accord with conservative antiregulatory sympathies—reduces the amount of legislation in the future.<sup>8</sup>

The conventional wisdom likewise holds that textualist opinions are more likely to be overridden by Congress.<sup>9</sup> Why? Because, Justice Stevens writes, textualists “ignore[ ] the available evidence of congressional purpose.”<sup>10</sup> 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.”<sup>11</sup> Or, says Daniel Bussel—taking a pragmatic approach—because of textualists’ “agnostic stance with respect to the practical consequences, purpose, and efficacy of a particular construction.”<sup>12</sup>

Finally, a considerable literature argues that textualism is more likely to make judges operating under the *Chevron* framework find that a statute has a “plain meaning” and thus deny deference to an administrative agency’s interpretation of the law.<sup>13</sup> 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.”<sup>14</sup> He has attributed his willingness to find plain meaning to his being “(for want of a better word) a ‘strict constructionist’ of statutes”<sup>15</sup>—a term that, though he later rejected it,<sup>16</sup> simply means textualist in

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<sup>8</sup> Eskridge, *supra* note 3, at 410.

<sup>9</sup> See, e.g., Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 911 (2000) (observing that overruled cases are disproportionately textualist in method).

<sup>10</sup> *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 113–15 (1991) (Stevens, J., dissenting).

<sup>11</sup> Eskridge, *supra* note 3, 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, 273–74 (1992) (discussing effect of Court’s interpretive method with respect to “relative weight accorded the enacting versus the standing legislature”).

<sup>12</sup> Bussel, *supra* note 9, at 897.

<sup>13</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First . . . is the question whether Congress has directly spoken to the precise question at issue. If [yes], that is the end of the matter; for the court, as well as the agency . . . .”); *infra* Part II.B.4.

<sup>14</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

<sup>15</sup> *Id.*

<sup>16</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 23 (Amy Gutmann ed., 1997).

that context.<sup>17</sup> Various empirical studies tend to confirm Scalia's intuition.<sup>18</sup>

Why might this be so? Most obviously, textualism might actually be more determinate.<sup>19</sup> Less charitably, some have suggested psychological explanations for why textualists might *think* that 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; intentionalists, by contrast, are more likely to find ambiguity because they approach their task as historical researchers uncovering pieces of evidence.<sup>20</sup>

In short, the statutory interpretation literature is teeming with claims about textualism—its supposed political bias, its tendency to produce congressional overrides, and its tendency to find plain meaning. These claims are largely based on “essentialist” explanations—that is, explanations resting upon the supposed nature of the textualist enterprise, which opposes closing loopholes, deemphasizes the intent of enacting (or current) Congresses, and treats interpretation as a logic game. But this conventional wisdom may be mistaken: It fails to take into account that the textualism we observe in written judicial opinions may be an unrepresentative sample of textualist analysis as a whole.

Suppose, as scholars of the “attitudinal model” have argued, that judges are primarily motivated by the desire to implement their ideo-

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<sup>17</sup> See Scalia, *supra* note 14, at 521 (contrasting a “strict constructionist” with “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”).

<sup>18</sup> See *infra* Part II.B.4.

<sup>19</sup> See Easterbrook, *supra* note 7, at 62, 65 (arguing that intent-based interpretation allows greater discretion); Scalia, *supra* note 16, at 36 (criticizing use of legislative history because it engenders greater discretion); cf. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (arguing that nontextualist forms of interpretation do not achieve desired goals of interpretation); Scalia, *supra* note 16, at 45 (suggesting that constitutional interpretation based on original meaning is more constraining than evolving interpretation). *But see id.* at 28 (describing indeterminacy within textualism); sources cited *infra* note 140 (questioning determinacy of textualism). I take no position here on whether textualism is more or less determinate than other methods. See *infra* note 140.

<sup>20</sup> See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354, 372 (1994) (describing how textualists' puzzle-solving approach often results in answers, while intentionalists' “archeological” excavation” style leads to less certainty); 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) (describing textualist interpretive process as analogous to solving puzzle); see also Mank, *supra* note 5, at 1257 (noting textualists' conviction and certainty about their method).

logical agenda.<sup>21</sup> In most of the attitudinal literature, methods of statutory interpretation are treated as irrelevant, as “mere rhetoric.”<sup>22</sup> But suppose, in addition, that judges need—or want—to justify their rulings by reference to a plausible interpretation of some statute. Then methods of interpretation can matter, at least to the extent that different methods make different results more or less plausible. Thus, the rulings of an ideologically motivated judge can 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, other things being equal, minimizes the extent to which they must deviate from their preferred outcomes. This self-selection effect can seriously mislead observers as to the nature of different interpretive methods.

To illustrate, suppose that textualism and intentionalism lead to almost identical ranges of possible policy results, with the textualism range being only slightly more conservative. If lawmakers adopted a Federal Rule of Statutory Interpretation mandating one method or another,<sup>23</sup> or if the Supreme Court took the advice of the House of Lords and mandated a method by judicial fiat,<sup>24</sup> the resulting distributions of judicial opinions would be nearly equivalent. But in a regime of free choice, conservatives would tend to choose textualism and liberals would tend to choose intentionalism. This would substantially exaggerate the political differences between the methods: We would observe only the most conservative possible textualist opinions and the most liberal possible intentionalist opinions.

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<sup>21</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL*, at xvi, 69 (1993) (describing influence of Justices' attitudes and outlooks on outcomes).

<sup>22</sup> See, e.g., Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 329 (2007) (ascribing this attitude to law and positive political theorists); Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 267, 270 (1990).

<sup>23</sup> See Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 807, 820–21 (1998) (advocating that Congress instruct courts on how to interpret and apply statutes); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2150–51 (2002) (suggesting that Congress pass law permitting or preventing use of legislative history in statutory interpretation).

<sup>24</sup> See *Pepper v. Hart*, [1993] A.C. 593, 630, 634 (H.L. 1992) (relaxing traditional rule against references to parliamentary material in statutory interpretation); see also *infra* text accompanying notes 164–71 (arguing that while both U.S. Congress and U.S. Supreme Court do already mandate some interpretive methods, judges generally do not consider big-picture methods, like textualism or intentionalism, binding).

Thus, observers may conclude that textualism has a substantial conservative bias, when in fact its bias may only be slight (or, as I explain later, possibly nonexistent).<sup>25</sup> 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 have been more often overridden by a relatively liberal legislature. They may conclude that textualism is more likely to find a plain meaning, when in fact it may be merely anti-agency conservatives who exploit the malleable step one of *Chevron* to strike down agency action. In short, many statements about *textualism* may really only be statements about *textualists*. Observed textualism under today's largely laissez-faire interpretive regime may be best explained by political factors. Essentialist explanations may be perfectly valid but may be better used to explain what the world would look like if textualism were mandated for everyone.

Statements about *textualism* are relevant for politicians, advocacy groups, and citizens mulling over whether to support an interpretive statute mandating textualism, as well as for judges considering whether to mandate textualism by judicial ruling. Statements about *textualists* are relevant for politicians, advocacy groups, and 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."

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In the first Part 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 II, in which I explain how the self-selection effect arises and how it drives a wedge between, on the one hand, the results an interpretive method would yield if practiced by everyone and, on the other hand, the *observed* decisions of judges who use that method under an optional interpretive regime.

The theory in Part I 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, a similar story could be told about originalism (a constitutional theory also widely thought of as conservative) and originalists (a growing

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<sup>25</sup> See *infra* Part II.B.

number of whom are liberal).<sup>26</sup> Or one could tell it about intentionalism and intentionalists, pragmatism and pragmatists, or any other method and its current, voluntary 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 one of the *Chevron* analysis—and offer alternative explanations. This Article is theoretical, not empirical, so definitively evaluating the conventional wisdom is a matter for future research. However, the theoretical discussion allows us to briefly speculate on alternative, non-essentialist explanations for these phenomena which take self-selection into account.

In addition to shedding light on current empirical debates, Parts I and II—unlike most of the judge-centered positive political theory on statutory interpretation<sup>27</sup>—discuss how rational, ideologically motivated laymen might think about interpretation if they are, for instance:

- A frequent litigator, whether a business or a public-interest litigation organization, exploring whether to push a particular interpretive method as part of its litigation strategy.
- A senator trying to decide whether to support a judge who is committed to a particular method.
- A legislator considering whether to vote for rules of statutory interpretation that would be binding on, or at least persuasive to, the whole judiciary.<sup>28</sup>

Finally, in Part III, I discuss another implication of the theory in Part I. 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?

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<sup>26</sup> See *infra* note 183 and accompanying text. *But cf. infra* text accompanying notes 343–45 (offering distinction between statutory and constitutional interpretation).

<sup>27</sup> See, e.g., SEGAL & SPAETH, *supra* note 21, at 69–72 (focusing only on Supreme Court Justices).

<sup>28</sup> In principle, the theory is also relevant if one is an advocate arguing a case, or a citizen wondering which side to support in a case (or whether to be happy that a particular side has won in a case).

If all cases could be neatly compartmentalized, one might wonder whether a rational, ideologically motivated judge would ever stick with a single theory from case to case. But as I argue in Part III, there is at least one reason to be consistent: The use of a theory in some cases increases the chance that other judges will use that theory 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 doing so strengthens the theory going forward.

I argue, however, that except in rare cases, this effect is probably fairly weak for the individual judge and even weaker for the individual litigation group. Even if a judge supports a particular interpretive method, and wants it to be mandated for everyone, it still would make sense for him to sometimes diverge from that method. The same goes for an advocacy organization, which may favor an interpretive method but not incorporate it into its long-term strategic litigation plan.

## I

### A THEORY OF INTERPRETATION FOR JUDGES

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

— Antonin Scalia<sup>29</sup>

#### A. *Legalism, Constraint, and Indeterminacy*

##### 1. *A Judge with an Agenda*

Suppose you are a judge trying to decide a particular case.<sup>30</sup> How should you think about statutory interpretation? Generally, you might favor or disfavor a method of statutory interpretation for many reasons. For instance, you might think that a particular method is mandated by a democratic theory like legislative supremacy<sup>31</sup> or separation of powers,<sup>32</sup> by your reading of the Constitution,<sup>33</sup> or by your

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<sup>29</sup> *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1553 (2007) (Scalia, J., dissenting).

<sup>30</sup> Assume that all you have before you is this single case, so that the question of whether to be consistent from case to case does not arise. In Part III, 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.

<sup>31</sup> See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92 (2006) (arguing that “legislative supremacy is most meaningfully served” by textualism).

<sup>32</sup> See, e.g., Farber, *supra* note 2, at 1412 (arguing that use of legislative histories as aid to statutory interpretation “weakens the separation of powers, because the President can veto only the language of the bill”).

conception of the rule of law.<sup>34</sup> You could also favor a theory of statutory interpretation on efficiency grounds, like the advantage of rules<sup>35</sup> or the burden of making arguments in a legislative history regime.<sup>36</sup>

But suppose you are unmoved by such considerations. Either you are unconcerned about these criteria, or you are agnostic about how any given theory of statutory interpretation performs under them. Or, perhaps you do care about them but find them relatively unimportant. What you definitely care about, however, is your substantive agenda. You may be an environmentalist, a libertarian, a socialist, a Catholic, or a representative of any number of viewpoints; your worldview has implications for the just and proper rule of law over a range of cases.<sup>37</sup>

One might find this assumption improperly results-oriented.<sup>38</sup> It is a common argument that views on statutory interpretation, constitutionalism, and democracy in general should be grounded in theories independent of one's views on policy, especially when one is a judge.<sup>39</sup>

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<sup>33</sup> See, e.g., Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839, 843–45 (1991) (arguing that any legitimate interpretation must stem from Constitution).

<sup>34</sup> See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in THE RULE OF LAW 265, 266–68 (Ian Shapiro ed., 1994) (describing how integrity of interpretive regime can enhance rule of law); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 571 (1992) (discussing how tension between democracy and rule of law concerns may lead to certain interpretive choices).

<sup>35</sup> Cf., e.g., Ferejohn & Weingast, *supra* note 34, at 568 (1992) (linking “rule of law” with “system of impartial public rules whose consequences can be foreseen and anticipated”).

<sup>36</sup> See Scalia, *supra* note 16, at 36–37 (arguing that reviewing legislative history is time-consuming and inconclusive).

<sup>37</sup> See Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2115 (2007) (reviewing BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006)) (describing “‘Consciously Ends-Oriented’ . . . judge [who] ‘strives to achieve ideologically preferred ends . . . and interprets . . . legal rules to the extent necessary to achieve the ends desired’” (quoting TAMANAHA, *supra*, at 241)); see also Eskridge & Frickey, *supra* note 2, at 33 (describing legal realists’ position that judges import their substantive preferences into decisions).

<sup>38</sup> See Eskridge & Frickey, *supra* note 2, at 29 (“To some lawyers . . . the notion that [judges] . . . engage[] in strategic behavior may be shocking.”).

<sup>39</sup> See *supra* notes 31–34 and accompanying text. In the constitutional context, see, for example, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 10–11 (1996), and Matthew J. Franck, *I’m Still Laughing, Jack*, BENCH MEMOS, Aug. 8, 2007, 22:26 <http://bench.nationalreview.com/post/?q=NGM4ZTIwMjk3ZmNINGQyM2Q5N2VhMWZmZWZmZWRjNzBhNjA=> (“[T]here is an astonishing results orientation to [Professor Balkin’s] arguments [that originalism supports a right to abortion.] . . . an intensity of focus on an evidently desired outcome that is the antithesis of . . . constitutional jurisprudence properly understood . . .”). *But cf.* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 539 (1999) (arguing that any constitutional theory must be justified partly based on substantive commitments).

Very well, then; we do not need to assume that it is proper for a judge to care about his substantive agenda. Nor need we assume that all judges are results-oriented or that judges who are like this are pursuing their policy agenda *consciously*.<sup>40</sup> All we have to do is recognize that such judges—whom Justice Scalia, following James Landis, calls “willful judges”<sup>41</sup>—do exist.<sup>42</sup>

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? Yes, there is, provided that different theories lead to different substantive results.<sup>43</sup>

Consider, for instance, the Individuals with Disabilities Education Act, which allows prevailing parents to recover “reasonable attorneys’ fees as part of the costs.”<sup>44</sup> According to the Second Circuit, the statutory text alone does not allow prevailing parents to recover *expert witness* fees.<sup>45</sup> However, this result would be reversed if you were to rely on legislative history, dicta in a previous Supreme Court opinion, and the purposes of the statute.<sup>46</sup>

Or consider the Clean Water Act, which defines “pollutant” to include “radioactive materials.”<sup>47</sup> Does this cover radioactive materials that are already regulated by the Atomic Energy Commission (AEC)?<sup>48</sup> The answer, considering only the statutory text, is yes, as both the Tenth Circuit and the Supreme Court recognized.<sup>49</sup> The legislative history apparently “speaks with force” in the other direction,

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<sup>40</sup> See *infra* notes 155, 327 and accompanying text.

<sup>41</sup> Scalia, *supra* note 16, at 35 (quoting Landis).

<sup>42</sup> See Letter from J. Skelly Wright, Judge, U.S. Court of Appeals for the D.C. Circuit, to Edward H. Rabin, Professor, University of California, Davis, School of Law (Oct. 14, 1982), reprinted in Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984) (describing how external events and sense of injustice influenced Judge Wright’s judicial decisions, in spite of precedent). However, given that judges do not have to be *consciously* driven by their ideology, I believe that this assumption characterizes a non-trivial proportion of judges.

<sup>43</sup> See, e.g., Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55, 66–85 (2004) (discussing textualist and intentionalist approaches to 28 U.S.C. § 1367 (2000)); Kozinski, *supra* note 23, at 811–12 (discussing conflict between textualism and intentionalism in interpretation of 28 U.S.C. § 1491(a)(3) (2000)).

<sup>44</sup> 20 U.S.C. § 1415(i)(3)(B) (2000 & Supp. V 2005).

<sup>45</sup> *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005), *rev’d*, 126 S. Ct. 2455 (2006).

<sup>46</sup> *Id.* at 336–38. No Justice on the Supreme Court disagreed with this assessment, though the Court split on the ultimate result. 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).

<sup>47</sup> 33 U.S.C. § 1362(6) (2000).

<sup>48</sup> *Train v. Colo. Pub. Int. Res. Group*, 426 U.S. 1, 3–4, 9 (1976).

<sup>49</sup> *Id.* at 9–10; *Colo. Pub. Int. Res. Group v. Train*, 507 F.2d 743, 747 (10th Cir. 1974).

however, and suggests strongly that radioactive materials regulated by the AEC are *not* covered by the Clean Water Act.<sup>50</sup>

Finally, consider Title II, Subtitle B of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, which created a special Chapter 12 of the Bankruptcy Code for family farmers.<sup>51</sup> The Act also provided that the provisions of Chapter 12 did not apply to bankruptcy cases “commenced . . . before the effective date of this Act.”<sup>52</sup> However, the legislative history said the opposite: Bankruptcy cases “pending at the time of enactment” (filed under Chapter 11 or 13) *could* be converted to Chapter 12 under the “sound discretion” of courts, “where it is equitable to do so,” and subject to a list of factors.<sup>53</sup>

In these cases, textualism seems to lead to one rule of law, while intentionalism and/or purposivism seems to lead to another.<sup>54</sup> Call these competing rules of law in a particular case *T* and *I*. Your own ideal point—what you would choose if you could make up the applicable law—is *J*.<sup>55</sup> If there are only two possible points (because *T* and *I* are the only two possible rules), *J* would have to equal either *T* or *I*. But more often, the choice of rules is not completely binary, and one can imagine intermediate rules: AEC-regulated radioactive materials

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<sup>50</sup> *Train*, 426 U.S. at 11–23. While Judge McWilliams of the Tenth Circuit “note[d] parenthetically that in [his] view the legislative history . . . is conflicting and inconclusive,” he did not explain how. *Colo. Pub. Int. Res. Group*, 507 F.2d at 748.

<sup>51</sup> Pub. L. No. 99-554 § 255, 100 Stat. 3088, 3105–14 (1986) (codified as amended at 11 U.S.C. §§ 1201–31 (2000 & Supp. V 2005)).

<sup>52</sup> § 302(c)(1), 100 Stat. at 3119 (codified at 28 U.S.C. § 581 note (2000)).

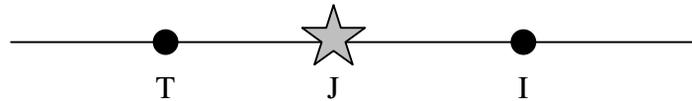
<sup>53</sup> H.R. REP. NO. 99-958, at 48–49 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5249–50; *see also In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir. 1989) (quoting statute and discussing conflict between statutory text and legislative history).

<sup>54</sup> *See* WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 219–56 (2d ed. 2006) (defining textualism, intentionalism, and other “dynamic” theories). That the judges involved in these cases did not seriously dispute that different interpretive theories led to different results is, of course, not dispositive: With enough imagination, perhaps one can do better than these judges. The point is that *more* imagination is required to come to the less intuitively obvious result, and what the more intuitively obvious result is can change depending on what materials one is allowed to consult. *See* the discussion of implausibility in Part I.B.2, *infra*.

<sup>55</sup> I do not impose any particular constraints on your preferred policy: It could grow out of a worldview based on a theory of political philosophy (e.g., “the government should not constrain people’s ability to make contracts,” or “the government should help discrete and insular minorities”), or it could be anything else, legitimate or illegitimate (e.g., “people should act according to Biblical precepts,” “white people should win,” or “the party with the alphabetically prior first name should win in each case”). Also, for the purposes of this paper, I treat rules of law as single points and ignore the important distinction between determinate doctrines (rules) and indeterminate doctrines (standards). *See* Jacobi & Tiller, *supra* note 22, at 326–27 (discussing determinate and indeterminate doctrines). To the extent that determinacy comes into this model, it does so through the concept of “implausibility costs,” but not in the definition of a policy point itself.

should *sometimes* be subject to the Clean Water Act, prevailing parents should *sometimes* be able to recover expert fees, and so on. If the content of the “sometimes” can be variously lax or stringent, *J* can be a third point, different from both *T* and *I*, on a policy continuum. Below, Figure 1 shows this continuous representation.<sup>56</sup>

FIGURE 1  
OUTCOMES UNDER DIFFERENT INTERPRETIVE THEORIES



## 2. Why Follow the Law?

The most obvious option, as a judge, is not to bother with *T* and *I*, but simply to implement *J*, since that is, after all, your preferred point. Unfortunately, *J* is not guaranteed to be available, because it may have no legal basis. Due to current social understandings—the widespread belief that democratic, constitutional, or procedural considerations are relevant—judges feel constrained to justify their decisions as being “fair” interpretations of the statute, meaning that there must be a theory of statutory interpretation underlying them.<sup>57</sup>

There are a number of reasons why this might be so.<sup>58</sup> Most commonly, this could be considered a matter of judicial culture: Deciding “according to the law” is thought to be one of a judge’s role responsibilities, and judges may be selected for, or may have internalized, these role responsibilities.<sup>59</sup> Or, as long as enough people care about legality for its own sake, that too may be enough to force legality on

<sup>56</sup> See *infra* note 108. I have only depicted two interpretive theories for simplicity, but I could also have drawn *P* (for purposivism) and any number of other points.

<sup>57</sup> See Mashaw, *supra* note 33, at 838–39 (arguing that authoritative interpreter “must be able to state why some particular approach” is legitimate).

<sup>58</sup> Some of the considerations listed here are similar to those in the discussion of why, given that a judge purports to interpret the law, he would want to do so “plausibly.” See *infra* Part I.B.2.

<sup>59</sup> See Jacobi & Tiller, *supra* note 22, at 327, 330 (arguing that professional norms and concerns for public legitimacy cause judges to obey legal doctrines); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 527 (1986) (stating that perceived public duty influences judges to make their decisions accord with law); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEH. & ORG. 31, 32 n.2 (1994) (suggesting that self-selection attracts self-restrained judges); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 751 (1992) (arguing that culture of legality “establishes limits on what properly-socialized judges do”); Vermeule, *supra* note 37, at 2132 (“[T]he internalized sense of legal rule-following by officials and the public . . . is part of what we call the ‘rule of law.’”).

everyone else:<sup>60</sup> If enough higher-court judges care about legality, they will consistently reverse lower-court judges who rule without reference to the law.<sup>61</sup>

But suppose no one in the legal or political system cared about legality and, instead, cared only about their own preferred policies. Would there be anything compelling judges to rule according to law?

Under simplified, stylized assumptions, perhaps not. Consider a thumbnail sketch of the “standard model” of legislative overrides of judicial opinions.<sup>62</sup> A judge issues a politically unpopular opinion. The political branches can override the opinion if three people unanimously agree to do so: the median senator, the median representative, and the President.<sup>63</sup> Each will agree to override the opinion if and only if doing so would move the policy position closer to his own ideal point. Consider further the “leftmost” and the “rightmost” of these three people (say, the median senator and the President, respectively, with the median representative being in between the two). As long as the judge writes an opinion establishing a policy position between the ideal points of these two people, his opinion is immune from being overridden. Any change that moves the law toward the President’s ideal point will move away from the median senator’s ideal point, and vice versa; there can be no unanimous decision to override the judge. Conversely, any opinion outside of that interval

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<sup>60</sup> See Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT’L REV. L. & ECON. 284, 287 (1992) (characterizing legality as legitimacy-preserving).

<sup>61</sup> The concern for public legitimacy may be insufficient motivation for a single judge, whose decisions do not significantly affect the legitimacy of the judiciary, but the Supreme Court—a high-profile, repeat player that may not want to needlessly antagonize the political branches—may care more. If enough senators care about legality, they can impeach judges who consistently rule without reference to the law.

<sup>62</sup> See, e.g., Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, LAW & CONTEMP. PROBS., Winter 1994, at 65, 68–70 (setting forth general model of sequential governmental action and using it to assess effects of *Chevron*); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 641–64 (1991) (describing game theory model of congressional response to judicial decisions); Ferejohn & Weingast, *supra* note 34, at 574–76 (modeling Congress’s and Courts’ decisionmaking dynamic in absence of agencies); McNollgast, *The Political Economy of Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1715–24 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (discussing positive political theory model of judicial decisionmaking); Brian Andrew Marks, A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell* 10–32 (May 1989) (unpublished Ph.D. dissertation, Washington University (St. Louis, Mo.)), available at ProQuest Digital Dissertations, Pub’n No. AAT 8924401 (describing legislative-judicial interaction through political model). On these sorts of spatial models, see generally Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 259 (1988) (discussing two classes of spatial models of legislative decisionmaking).

<sup>63</sup> I ignore the possibility of a veto override, as it does not significantly change the basic point.

can always be overridden in favor of some policy position within the interval because there is always a point within the interval that is preferable for all three parties whose consent is necessary for an override.

In this basic model, only the bottom-line policy position counts; reasoned opinions based on anything other than pure policy are superfluous. Knowing that higher-court judges or legislators will override their ruling if they disagree with it, judges may as well confine themselves simply to stating the winner of the case or to announcing the rule of law. Higher courts will choose policy positions that optimally implement their agenda as closely as they can without being overridden by Congress, while lower-court judges choose optimal rules that will not be overruled by higher-court panels.<sup>64</sup>

But we can complicate this model in ways that suggest a role for ruling according to the law. One obvious consideration is that all the actors, particularly legislators and reviewing judges, have limited time to correct decisions they disagree with. Anything marking an opinion as unusual may increase the chance that it will come to someone's attention, a necessary condition for its reversal or override. Because we live in a world where *most* opinions purport to interpret the law, an opinion that instead looks like a naked imposition of the judge's policy preferences will stand out—all the more so if the judge is on an appellate panel where a dissenting judge can act as a whistleblower.<sup>65</sup> Moreover, if most opinions did not purport to interpret the law, it might still make sense for legislators to spend more time punishing judges who do not at least pay lip service to statutes, since—assuming that statutes are at least somewhat constraining<sup>66</sup>—legislators have an institutional interest in making sure that judges pay attention to their work product.

When we relax the assumption that every judge knows his preferred policy position and can easily vote for it, judicial adherence to the rule of law becomes even more likely. Figuring out the relationship between a statute and a real-world result—or between a legal

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<sup>64</sup> See, e.g., Eskridge, *supra* note 3, at 377–87 (arguing that Court's mindfulness of congressional preferences explains relatively low rate of congressional overrides); Ferejohn & Weingast, *supra* note 11, at 263 (rejecting notion that judges have final say on statutory meaning).

<sup>65</sup> 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) (“[T]he 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.”).

<sup>66</sup> See *infra* Part I.A.3.

rule and a real-world result—can be a nontrivial exercise.<sup>67</sup> For instance, if one cares about the distribution of income across different social classes, it may still be hard to determine whether, say, a particular pro-union rule helps or hurts the poor.<sup>68</sup> And even if one is dissatisfied with the application of a particular rule—because the party one finds sympathetic, say the union, has lost—that does not mean one can easily come up with a better rule of law (since even one's preferred rule probably would not result in the union winning every single time regardless of the facts), especially when the issue is complex.<sup>69</sup>

In this context, if a judge claims to be interpreting the law, he will seem to be doing exactly what Congress wanted him to do when, against the background of the existing court system, it enacted the statute in question (unless the ideological composition of Congress has changed substantially in the interim). Even if legislators end up disagreeing with the ultimate result, the possibility of that result will at least have been part of their cost-benefit analysis when they enacted the law: The legislators knew what rule they preferred at the time of enactment and know that creating the law required a considerable expenditure of time and effort. They may be unwilling to spend that time and effort all over again to decide (1) whether the decision is wrong and (2) whether they can develop a better rule.<sup>70</sup> Thus, an opinion that purports to apply a law that Congress approved (perhaps recently) may be more palatable to members of Congress than one that merely purports to implement a judge's preferences.

Finally, these constraints on legislators' knowledge, derived from limited time and resources, also apply to judges themselves. Legal doctrine is a "decision heuristic that preserves precious time and limited resources of courts."<sup>71</sup> If—given the two interpretive theories on offer—*T* and *I* are the only policy options, it can be reasonable to

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<sup>67</sup> See Krehbiel, *supra* note 62, at 299–301 (citing David Austen-Smith & William H. Riker, *Asymmetric Information and the Coherence of Legislation*, 81 AM. POL. SCI. REV. 897 (1987)).

<sup>68</sup> See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 652–54 (2004) (noting that distributional effects of legal rules can be diffuse or attenuated in some contexts).

<sup>69</sup> See, e.g., *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005) (considering whether workers were on or off duty when donning and doffing their protective gear).

<sup>70</sup> The legislature could amend the law to change the single aspect the judge ruled on, but such a fix runs the risk of being so narrow that it is only useful in very few cases (and thus not worth the trouble of adopting) or so broad that it could have unintended consequences—consequences that can only be avoided by spending the time which, by hypothesis, the legislators do not have.

<sup>71</sup> Jacobi & Tiller, *supra* note 22, at 330 (citing H.W. PERRY, DECIDING TO DECIDE (1991)).

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 you closest to your ideal outcome in the case. Assuming that you care about legality in this sense, or that you feel constrained by other actors who care about legality, you will definitely bind yourself to the statute. For the reasons given above, you might do so even if no one cares about legality at all. And given that you will do so, you will choose whichever of *T* and *I* allows the result you prefer.

In the end, which explanation we adopt is of little consequence, since we observe that at least pretending to interpret the statute is the norm in modern American judicial discourse.

### 3. *Do Theories Constrain?*

Let us assume that you will only choose a decision point if it is supported by an interpretive theory. In this example, that leaves you a choice between *T* and *I*. Yet these are only separate points if theories of interpretation actually lead to different results, which is not always the case.

Consider, for instance, the Speedy Trial Act of 1974,<sup>72</sup> which “generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance.”<sup>73</sup> 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, it held that waiver does not fall within the list of permitted categories of delay<sup>74</sup>—but bolstering its interpretation by referring to the purposes of the Act and (except for Justice Scalia) to the legislative history.<sup>75</sup> Here, theories *T* and *I* reach the same result, 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.<sup>76</sup>

For all its unanimity and the supposed obviousness of the result, this decision was actually harder than average: The district court had

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<sup>72</sup> 18 U.S.C. §§ 3161–74 (2000).

<sup>73</sup> *Zedner v. United States*, 547 U.S. 489, 492 (2006) (citing § 3161(c)(1)).

<sup>74</sup> *Id.* at 500 (discussing § 3161(h)).

<sup>75</sup> *Id.* at 500–02; *id.* at 509–11 (Scalia, J., concurring in part and concurring in judgment).

<sup>76</sup> *Id.* at 509–11 (Scalia, J., concurring in part and concurring in judgment).

reached a different result using textual reasoning<sup>77</sup> and the Second Circuit had reached a different result using purposivist reasoning.<sup>78</sup>

Indeed, in the vast majority of cases, the result is “totally dictated by the law,” meaning that just about any judge looking at the statute—no matter what the interpretive theory—would agree on the resulting rule of law. In those cases, theories of statutory interpretation seem to make no difference, and the ability to choose a theory of interpretation is of no help to the agenda-pusher.<sup>79</sup>

Still, there are reasons to believe that interpretive theories sometimes make a difference. First, there are the cases discussed above, where textualism, intentionalism, and purposivism clearly lead to opposite results.<sup>80</sup> These are only the most obvious cases; in many others, interpretive theories, by changing the materials one is allowed to consult, can make one result more plausible than another.<sup>81</sup>

Second, there are non-unanimous cases where Justices on one side, whether in the majority or the dissent, admit that they prefer the opposite rule on policy grounds. Two obvious cases that fall into this category are *Griswold v. Connecticut*<sup>82</sup> and *Lawrence v. Texas*.<sup>83</sup> In each one, a dissenting Justice characterized the challenged statute as “uncommonly silly” but nonetheless constitutional.<sup>84</sup>

Less notable cases also feature the same dilemma. When the Supreme Court held that waste combustion ash generated by a municipal incinerator was subject to stringent hazardous waste regulation,<sup>85</sup> Justice Stevens dissented even though he granted that “[t]he

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<sup>77</sup> See *id.* at 502 (majority opinion).

<sup>78</sup> *United States v. Zedner*, 401 F.3d 36, 45 (2d Cir. 2005).

<sup>79</sup> 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) (“In the mass of cases that are filed . . . the law—not the judge—dominates the outcomes.”); Farber, *supra* note 2, at 1431 (noting that Posner’s and Easterbrook’s “starkly conflicting jurisprudential views” do not lead to different conclusions in most cases); Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1098 (2004) (arguing that in most cases judges agree on results regardless of ideologies). This is, of course, less true of cases that reach the Supreme Court, which generally seeks to resolve circuit splits or—even in the absence of a split—to correct a lower-court decision that the Justices think may be wrong. SUP. CT. R. 10.

<sup>80</sup> See *supra* notes 44–53 and accompanying text.

<sup>81</sup> See *infra* Part I.B.2.

<sup>82</sup> 381 U.S. 479, 485–86 (1965) (striking down ban on use of contraception).

<sup>83</sup> 539 U.S. 558, 578–79 (2003) (striking down ban on consensual sodomy).

<sup>84</sup> *Id.* at 605–06 (Thomas, J., dissenting); *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting); cf. *Supreme Court Justice Antonin Scalia Speaks at Iona*, INSIDE IONA (Iona C., New Rochelle, N.Y.), 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’ . . .”).

<sup>85</sup> *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 334 (1994).

majority's decision . . . may represent sound policy."<sup>86</sup> And, in the Individuals with Disabilities Education Act case mentioned above,<sup>87</sup> though Justice Ginsburg agreed that the attorneys' fees recoverable by prevailing parents did not include expert witness fees, she hinted that the opposite rule might have been wiser.<sup>88</sup>

Third, and relatedly, there are cases in which judges take positions that one might not expect given the common perception of their ideological preferences. Since Justice Scalia has publicly advocated particular interpretive methods that he claims are constraining,<sup>89</sup> finding cases in which he sides with liberal Justices is an easy way of tentatively identifying such cases.

For example, in *Pittston Coal Group v. Sebben*—where the dissent used legislative history to argue that the statute was ambiguous<sup>90</sup>—Scalia, for the majority, found 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 statute.<sup>91</sup> Scalia has also 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.<sup>92</sup> He joined four other Justices in holding that the Superfund statute clearly expresses an intent to hold states liable in federal court.<sup>93</sup>

In constitutional cases, originalist reasoning has led Scalia to reach pro-criminal-defendant results, contrary to some of his non-

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<sup>86</sup> *Id.* at 348 (Stevens, J., dissenting); cf. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 315 & n.62 (1990) (noting that judges sometimes feel compelled to make findings in discord with personal preferences).

<sup>87</sup> See *supra* notes 44–46 and accompanying text.

<sup>88</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2465 (2006) (Ginsburg, J., concurring in part and concurring in judgment) (“[W]e are not at liberty to rewrite ‘the statutory text adopted by both Houses of Congress and submitted to the President,’ to add several words Congress wisely might have included.” (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991))); cf. *Ali v. Fed. Bur. of Prisons*, 128 S. Ct. 831, 841 (2008) (Thomas, J., joined by, *inter alia*, Ginsburg, J.) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.”).

<sup>89</sup> See Scalia, *supra* note 16, at 36 (discussing his preference for interpretive methods that are less manipulable than legislative history).

<sup>90</sup> *Pittston Coal Group v. Sebben*, 488 U.S. 105, 124–25, 134–46 (1988) (Stevens, J., dissenting).

<sup>91</sup> See *id.* at 113–14 (majority opinion of Scalia, J., joined by Brennan, Marshall, Blackmun, and Kennedy, JJ.).

<sup>92</sup> *United States v. Johnson*, 481 U.S. 681, 692–93 (1987) (Scalia, J., dissenting).

<sup>93</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part) (concurring with decision of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.). Scalia also wrote separately in that case to disagree with the majority's finding that such liability was constitutional. *Id.* at 39–40.

originalist conservative colleagues:<sup>94</sup> A scan of the outside of a home with a thermal-imaging device is, in Scalia's view, a Fourth Amendment "search."<sup>95</sup> The use of testimonial hearsay violates the Confrontation Clause unless the declarant is unavailable and there has been a prior opportunity for cross-examination.<sup>96</sup> Facts that increase the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt.<sup>97</sup> A criminal defendant erroneously deprived of his counsel of choice is automatically entitled to reversal of his conviction.<sup>98</sup>

This last category of cases is not as convincing evidence as the previous categories for the claim that interpretive theories are constraining, since it requires us to crudely—and perhaps unfairly—guess at judges' true preferences, perhaps based on their public statements or on the political parties of the presidents who appointed them.<sup>99</sup> One can always come up with counter-stories in which Scalia actually agrees with the results in the cases mentioned above—rather than holding to a caricatured anti-worker, anti-tort-plaintiff, anti-environment, anti-criminal-defendant "conservative" philosophy—or in which he is in fact pursuing a broader strategic agenda. Therefore, such examples of judges taking "unexpected" legal positions should be considered with this caveat in mind.

#### 4. *Dealing with Indeterminacy*

It seems reasonable to believe that interpretive methods are at least somewhat constraining, such that at least sometimes *T* and *I* are separate points. However, this does not mean that each method leads to a single point, as in Figure 1.<sup>100</sup> Methods of statutory interpretation still often lead to a broad range of possible answers.

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

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<sup>94</sup> See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1071–75 (2006) (explaining how originalist reasoning often restrains judges from acting based on individual preferences).

<sup>95</sup> *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

<sup>96</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>97</sup> *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring).

<sup>98</sup> *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2566 (2006).

<sup>99</sup> See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect* 49 & n.141 (Ohio State Univ. Moritz Coll. of Law Ctr. for Interdisciplinary Law & Policy Working Paper Series, Paper No. 64, 2007), available at <http://ssrn.com/abstract=1008330> (discussing subconscious nature of judges' "individual values and policy preferences" and difficulty of weighing their centrality in judicial decisionmaking).

<sup>100</sup> See *supra* text accompanying notes 56–57.

game.<sup>101</sup> Statutes almost never have a unique purpose, and purposes can be characterized differently.<sup>102</sup> Texts have a range of possible meanings, especially when one can choose which of several opposing canons or dictionaries to use.<sup>103</sup> One can play the same game in constitutional cases, in which originalists also disagree with each other sometimes.<sup>104</sup>

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<sup>101</sup> See, e.g., ESKRIDGE, *supra* note 54, at 222–28 (describing trouble with applying intentionalist interpretive theories); Kozinski, *supra* note 23, at 818–19 (“The process of statutory interpretation has no fixed rules and no agreed-upon standards.”); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 686–88 (1997) (arguing that notion of singularly minded legislature is fiction); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (describing notion of “legislative intent” as “meaningless” and “fanciful”); Brudney & Ditslear, *supra* note 99, at 13 (noting frequent disagreement as to meaning of legislative history).

<sup>102</sup> Cf., e.g., Easterbrook, *supra* note 19, at 68 (“Legislation is compromise. Compromises have no spirit; they just are.”).

<sup>103</sup> See, e.g., ESKRIDGE, *supra* note 54, at 257–94 (discussing various rules of statutory interpretation and difficulty of using them uniformly); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 777–85 (1987) (discussing difficulty of arriving at uniform interpretation of any given text); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 95–102 (2005) (citing cases where both majority and dissent rely on language and substantive canons); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (“[S]ets of words do not possess intrinsic meanings and cannot be given them . . . .”); 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) (demonstrating that canons of construction often contradict each other); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2582 (1992) (defining interpretation of text as choice between number of possible meanings). The fact that textualists adopt the standard of the “reasonable person” or “reasonable diligent lawyer,” see Manning, *supra* note 101, at 675 & n.8, shows that the meaning of a text can be at least as indeterminate as the range of “reasonableness.”

<sup>104</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 162–63 (1990) (“[T]wo judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results . . . .”); Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing The Federalist, 1986–2007*, 31 SEATTLE U. L. REV. 75, 96–99 (2007) (discussing use of *The Federalist* by Justices to support competing arguments); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 591 (1991) (explaining that Justice Brennan’s and Justice Rehnquist’s uses of historical argument differed little in frequency). Compare *Gonzales v. Raich*, 545 U.S. 1, 39–42 (2005) (Scalia, J., concurring in judgment) (finding Controlled Substances Act proper use of congressional power under Commerce Clause), with *id.* at 59–66 (Thomas, J., dissenting) (finding opposite); compare *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in judgment) (“[T]he phrase ‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafletting.”), with *id.* at 378 (Scalia, J., dissenting) (finding meaning of “freedom of speech” to be “unclear” as to whether it covers anonymous leafletting); compare *Ollman v. Evans*, 750 F.2d 970, 995–96 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that current state of libel law threatens First Amendment rights), with *id.* at 1037–38 (Scalia, J., dissenting in part) (disagreeing with Bork).

Now that we have taken a turn toward (at least partial) indeterminacy, saying that an interpretive method “leads to” a given result is vague. Even though we observe that different theories of interpretation are associated with different policy positions, we do not know whether the interpretive method caused a shift in policy, whether judges of a particular policy persuasion tend to choose that interpretive method as a convenient (but substantively irrelevant) rhetoric, or whether there is some combination of these two possibilities.<sup>105</sup>

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 a range of possible interpretations—perhaps a very wide range, if few outcomes are categorically excluded—chooses a particular one. If interpretive methods are neither wholly meaningless nor wholly constraining, the theory needs to explain simultaneously (1) how an interpretive method can give rise to a range of results and (2) why a judge whose ideal point is *J* (provided that *J* is within the feasible range of *some* theory) would not just choose to write an opinion establishing *J*, using whatever interpretive rhetoric will “get him there,” as the strong attitudinal model would suggest. In the following Section, I propose such a theory.

## B. *The Costs of Decisionmaking*

### 1. *Agenda Costs*

As an initial matter, we have assumed that you, an agenda-driven judge, would like to implement your preferred policy as a rule of law. As the actual policy deviates from your ideal point, you incur a cost—call it an agenda cost.<sup>106</sup> It is conventional to assume that this cost increases at a greater rate as the deviation from the ideal point grows.

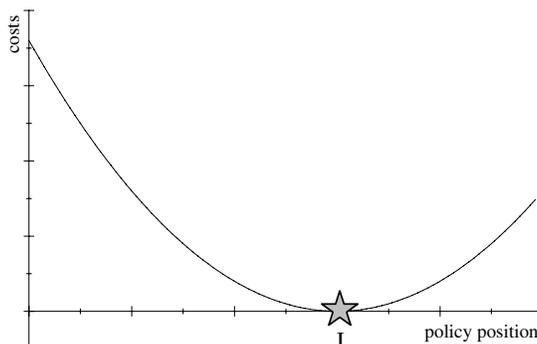
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<sup>105</sup> Daniel Farber compares Richard Posner and Frank Easterbrook, two judges with presumably similar ideologies but opposite theories of statutory interpretation, and finds almost no difference between their judicial outcomes. See Farber, *supra* note 2, at 1431 (“[T]hey 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.” (citation omitted)). According to Farber, “[t]his means either that their theoretical difference does not matter or that it is precisely offset by their similarities in other respects.” *Id.* at 1411.

<sup>106</sup> Some call this the utility loss from “preference falsification,” Miceli & Cosgel, *supra* note 59, at 38, 40, or call the reverse of this the utility of “judicial discretion.” Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980).

One example of such a function would be the quadratic form,<sup>107</sup> as pictured in Figure 2.<sup>108</sup>

FIGURE 2  
A JUDGE'S AGENDA COST



<sup>107</sup> 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 being 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  $-U_j(x) = x^2$ .

<sup>108</sup> Cf. ALBERTO ALESINA & HOWARD ROSENTHAL, *PARTISAN POLITICS, DIVIDED GOVERNMENT, AND THE ECONOMY* 19–20 (1995) (depicting distance from political party's "ideal point" as concave quadratic utility function); NICHOLAS L. GEORGAKOPOULOS, *PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING* 189–90 (2005) (proposing that graph approximating effect of speeding penalty on drivers' welfare resembles inverted U).

Not all economic models of judicial decisionmaking use a quadratic form. See Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeals*, 23 *J.L. ECON. & ORG.* 421, 428–35 (2007) (using nonquadratic form in his game-theoretic model of effect of panel composition in courts of appeals on lower courts' compliance); Miceli & Cosgel, *supra* note 59, at 41 (assuming that agenda cost arises if judge chooses point different from his ideal, but that cost does not depend on distance from ideal point).

I will assume throughout this Article that rules can be arranged on a continuous one-dimensional spectrum. Though this is a simplification, this assumption is standard in the positive political theory literature. See, e.g., Ferejohn & Weingast, *supra* note 11, at 271; Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 *J.L. ECON. & ORG.* 263, 268 (1990). The choice to use a continuous rather than a discrete spectrum is not important; the limitation to one dimension, however, is. In particular, this model assumes that the dimension along which opinions are more or less plausible is the same as the dimension that the judge cares about for his agenda costs. See *supra* text accompanying notes 54–56.

That spectrum can often, though not always, coincide with the standard "liberal-conservative" political spectrum. For instance, civil rights rules can favor or disfavor the civil rights claimant; labor rules can favor employees or corporations; criminal procedure can favor defendants or the government; and environmental rules can favor or disfavor industry. Thus, when it is claimed that textualism is "conservative," this should be understood as referring to the conventional colloquial sense. See William N. Eskridge, Jr. & Lauren E. Baer, *The Supreme Court's Deference Continuum, An Empirical Analysis (from Chevron to Hamdan)*, 96 *Geo. L.J.* 1083, 1153 n.191 (2008).

## 2. *Implausibility Costs*

If agenda cost were the sole consideration, as a judge you would just choose *J*. But you might also care that your opinion be plausible under some theory of interpretation.

Why should you care? For starters, if “the various constituencies that will notice”<sup>109</sup> care about it—either as a good in itself, or as a proxy for “merit”<sup>110</sup>—you might want to write plausible opinions. These constituencies include the legislature, which might override (or possibly impeach) you;<sup>111</sup> the executive, who might promote you;<sup>112</sup> judges on reviewing courts, who might reverse you;<sup>113</sup> and the legal community at large, which might criticize or fail to respect you.<sup>114</sup> The same analysis applies if you yourself value plausibility, for similar reasons to those given above for following the law at all.<sup>115</sup>

However, we can also speculate as to why a judge might want to write plausible opinions even if no one values plausibility as such.<sup>116</sup> As noted above, constituents have limited time to educate themselves about the law. They can use implausibility as a red flag that brings the case to their attention. But even supposing that legislators were

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<sup>109</sup> Kennedy, *supra* note 59, at 528.

<sup>110</sup> See *supra* notes 59–61 and accompanying text.

<sup>111</sup> See, e.g., Eskridge, *supra* note 3, at 335–53 (giving examples of congressional override of Supreme Court statutory decisions); Eskridge & Frickey, *supra* note 2, at 40 n.52 (noting that mere threat of congressional override can affect courts’ decisionmaking).

<sup>112</sup> See Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT’L REV. L. & ECON. 13, 16, 27 (1992) (arguing that prospect of promotion to higher court acts as restraint on judges).

<sup>113</sup> See Higgins & Rubin, *supra* note 106, at 129–30 (discussing reasons why judges fear reversal). *But see* Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 562 (2005) (noting that higher-court judges have limited means to discipline noncompliant lower-court judges).

<sup>114</sup> See Ashenfelter et al., *supra* note 79, at 264 (noting that published judicial decisions “can be read and criticized by legal scholars and the practicing bar”); Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 186 (1991) (noting that, all else being equal, judges prefer to rule in ways that ensure recognition within legal and judicial circles); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983) (hypothesizing that self-interested judges seek to enhance their prestige among lawyers and litigants); 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) (arguing that “justices prefer to minimize criticism of their decisions from important audiences” and may “want popularity and respect for their own sake”); Miceli & Cosgel, *supra* note 59, at 35, 37 (arguing that publishing written opinions can enhance judge’s reputation among judges, scholars, and students); Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 135–36 (1991) (discussing role of reputation and prestige in Supreme Court decisions with budgetary implications).

<sup>115</sup> See *supra* Part I.A.2.

<sup>116</sup> See *supra* text accompanying notes 65–66.

capable of considering every opinion written by the federal judiciary, the relationship between a legal rule and a desired outcome can be difficult to determine.<sup>117</sup> Thus, deciding that one disagrees with an opinion can be difficult when the issue is complex, to say nothing of figuring out what alternative rule would best fulfill one's goals.

Furthermore, if a legislator or reviewing judge wants to override a judge's opinion, he can do any of the following three things:

1. Change the legal rule entirely.
2. Keep the basic legal rule but clarify it somewhat, say by fine-tuning a statutory definition<sup>118</sup> or mandating the use of a particular dictionary<sup>119</sup> (if the opinion was textualist), or by disallowing certain sources of legislative history<sup>120</sup> (if the opinion was intentionalist).
3. Modify the set of allowable interpretive theories, by disallowing recourse to legislative history altogether (or mandating the use of legislative history in general)<sup>121</sup> or providing that the statute be interpreted with respect to a particular purpose.<sup>122</sup>

Option 1 seems the most difficult and is more likely to be used when both the opinion and the statute are badly out of line with the current preferences of the median members of the political branches. Option 3 is probably the easiest, though it will often be unavailable because in most cases every interpretive method leads to the same result.<sup>123</sup> Option 2 is of intermediate difficulty. Fine-tuning a statute in this way is easier, though, when the decision is less plausible: A legislator or reviewing judge who disagrees with a judge's decision but cannot find obvious flaws in the opinion may not be able to easily

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<sup>117</sup> See *supra* notes 67–68 and accompanying text.

<sup>118</sup> See, e.g., 1 U.S.C. §§ 1–8 (2000 & Supp. II 2002) (defining various terms as used in the U.S. Code).

<sup>119</sup> E.g., 42 U.S.C. § 3796ii-1(1)(A) (2000) (mandating use of “the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders”); see also *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–28 (1994) (disparaging Webster's Third); Rosenkranz, *supra* note 23, at 2104–05 (suggesting that Congress might mandate judicial reliance on particular dictionary).

<sup>120</sup> See Civil Rights Act of 1991 § 105(b), 42 U.S.C. § 1981 note (2000) (“No statements other than the interpretive memorandum . . . shall be considered legislative history of . . . this Act . . .”); see also Scalia, *supra* note 16, at 36 (disparaging use of legislative history altogether).

<sup>121</sup> See Rosenkranz, *supra* note 23, at 2150 (discussing legislative history controversy).

<sup>122</sup> See, e.g., 15 U.S.C. § 2403 (2000) (“[I]t is the continuing policy of the Federal Government . . . to stimulate a high rate of productivity growth. . . . The laws . . . of the United States shall be so interpreted as to give full force and effect to this policy.”).

<sup>123</sup> See *supra* note 79 and accompanying text.

formulate an alternative rule. When the implausibility is obvious, one can more readily develop alternative ways of deciding the case.<sup>124</sup>

Finally, time and effort constraints also make judges value plausibility. In our judicial culture, decisions have to be explained;<sup>125</sup> the ideal under the rule of law is to make the decision seem as though it is compelled by the law rather than the result of the judge's biases. A decision holding, for example, that a word means something that it does not obviously mean would require more effort than simply following a more plausible route and may, despite the effort, persuade fewer people.

Judge Posner formalizes this line of argument by including leisure in the judicial utility function,<sup>126</sup> but one need not 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 leisure motive looms large for Posner, who "assume[s] that trying to change the world plays no role" in the judicial utility function and who downplays the drive for popularity, prestige, or reputation, for avoiding reversal or criticism, and for the power that comes from the system of following precedent.<sup>127</sup> In Posner's model, and in several others, judges do value leisure<sup>128</sup> (though Posner himself is not a great example of this!<sup>129</sup>). Because writing a persuasive argument in support of a nonobvious proposition may not bring rewards proportional to the effort required,<sup>130</sup> one can imagine why judges would rather come down in favor of the more obvious position, even at the cost of deviating from their ideal points.

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<sup>124</sup> Plausibility is even more important when there is a dissenting judge on the appellate panel to act as a whistleblower. See Cross & Tiller, *supra* note 65, at 2172 ("[T]he 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."); Kastellec, *supra* note 108, at 425–48 (discussing effects of whistleblowing on panels). This may mean that implausibility costs vary depending on panel composition. However, I ignore such panel effects in this Article.

<sup>125</sup> See *supra* note 57 and accompanying text.

<sup>126</sup> Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 31 (1993).

<sup>127</sup> *Id.* at 3, 13–15.

<sup>128</sup> *Id.* at 31; see, e.g., Cohen, *supra* note 112, at 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) (arguing that judges with greater independence are more likely to increase leisure time).

<sup>129</sup> See Larissa MacFarquhar, *The Bench Burner*, NEW YORKER, Dec. 10, 2001, at 78 (discussing Posner's work habits).

<sup>130</sup> Kennedy, *supra* note 59, at 528.

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All of these considerations suggest how an interpretive theory can be partially constraining. One can imagine any theory as having some “most plausible point,” a point that is easiest to explain under that theory.<sup>131</sup> Points away from the most plausible point can be justified, but only at a cost. This cost is the combination of all the considerations listed above: one’s own desire for plausibility; one’s dislike of reversal, legislative override, or disrespect; and one’s reluctance to spend extra time and effort making a more counterintuitive position seem more plausible.

Consider again, for instance, the Individuals with Disabilities Education Act case discussed above.<sup>132</sup> Perhaps one could argue that the structure of the Act is so different from that of all other statutes involving attorneys’ fees that, in context, “attorneys’ fees” include expert witness fees. But explaining why this same term, used in many different statutes as a term of art, should have a different meaning in this one statute will, as an initial matter, be somewhat less convincing than explaining why “attorneys’ fees” are limited to actual attorneys. Therefore, the position will take more work to justify.

This may explain why neither Judge Katzmann on the Second Circuit nor Justice Breyer grounded his opinion in the statutory text, for it would probably have been implausible.<sup>133</sup> Instead, they employed intentionalist and purposivist reasoning to argue that the legislative history and purposes of the statute should trump its text, thus allowing the statute to cover expert witness fees. 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.<sup>134</sup>

We can call the cost of deviating from the most plausible point an “implausibility cost,” which increases as the distance from the most plausible point increases.<sup>135</sup> It is reasonable to think that the implausibility cost, like the agenda cost, increases at an increasing rate; indeed, the implausibility cost may be infinite outside of some range.

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<sup>131</sup> See, e.g., Cohen & Spitzer, *supra* note 62, at 72 (describing optimal point under theory of statutory interpretation as “Best Statutory Interpretation”).

<sup>132</sup> See *supra* notes 44–46 and accompanying text.

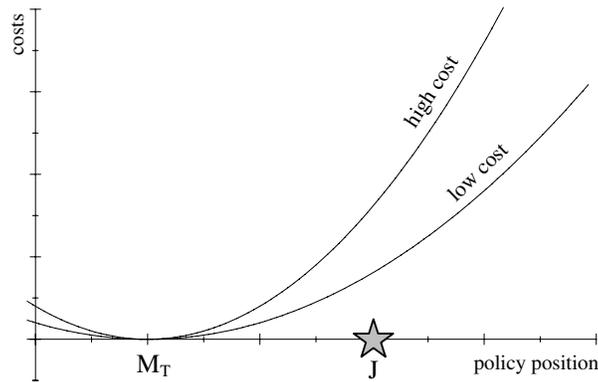
<sup>133</sup> See Cohen & Spitzer, *supra* note 62, at 82 (“Courts, we assert, try to avoid being laughingstocks.”).

<sup>134</sup> 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), *rev’d*, 126 S. Ct. 2455 (2006).

<sup>135</sup> Cf. Kennedy, *supra* note 59, at 528–30 (describing similar concept as “legitimacy cost”).

Below, Figure 3 shows two sample implausibility cost functions for method  $T$ , with the most plausible point labeled  $M_T$ . I have depicted two possible cost functions, depending on whether a given degree of implausibility is easy (“low cost”) or hard (“high cost”) to justify. They need not look as smooth as depicted below.<sup>136</sup> Indeed, as I noted above, if an opinion is “wrong enough,” it does not matter how plausible it is as an interpretation of the current statute.<sup>137</sup> The “standard model” takes over, and the relevant political actors will actually make the effort to create an alternative legal rule.<sup>138</sup> The curves in Figure 3 below are merely meant to be a simple illustrative example of what implausibility costs may look like in many cases.

FIGURE 3  
IMPLAUSIBILITY COSTS UNDER THEORY  $T$



For instance, textualism may be a method with a high implausibility cost if text tends to be determinate, or if Webster’s Second or the Oxford English Dictionary is the only acceptable dictionary.<sup>139</sup> Conversely, it may have a low implausibility cost if all dictionaries and

<sup>136</sup> For example, there could be a “plausibility range” around  $M_T$ , in which the implausibility cost is flat. The implausibility cost could be infinite outside the plausibility range or could even plateau at some maximum level of implausibility. The qualitative results derived here are consistent with all of these alternate forms. Concave functional forms will lead to different dynamics of judicial decisionmaking than described here, *see infra* note 146, but the main result regarding self-selection will still hold. *See infra* note 175.

<sup>137</sup> *See supra* text accompanying note 125.

<sup>138</sup> In this case—to the extent that one considers implausibility costs as primarily including the likelihood of reversal—implausibility costs may be unrelated to the “most plausible point.” Or one could say that Figure 3 still shows implausibility costs, but that “reversal costs” are a separate component of total costs for the judge. I do not model that component here.

<sup>139</sup> *Cf.* 42 U.S.C. § 3796ii-1(1)(A) (2000) (tying definition of “mental illness” to Diagnostic and Statistical Manual of Mental Disorders); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–28 (1994) (suggesting hierarchy of dictionaries).

canons (both textual and substantive) are fair game.<sup>140</sup> The same is true of intentionalism<sup>141</sup> and pragmatism,<sup>142</sup> among other methods.

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<sup>140</sup> See, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 297–300 (1998) (arguing that individual judges’ subjective choice of dictionaries “undermines any assertion that use of dictionaries produces an objective meaning”); Eskridge & Frickey, *supra* note 2, at 87 (concluding that vast array of interpretive approaches is “more like loose cannons than lucid canons”); Llewellyn, *supra* note 103, at 396 (stating that all twenty-six observed canons of statutory interpretation are “correct”); Pierce, *supra* note 20, at 778–79 (noting that even “hypertextualism” is manipulable through choice of dictionary); 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, 301 (1999) (arguing that “scattershot approach” to dictionaries used by Supreme Court has resulted in inconsistency).

Whether textualism is in fact more determinate than other methods, as some argue, or less determinate, as others claim, is beyond the scope of this Article. Compare sources cited *supra* note 19 (arguing that textualism is more determinate), with, e.g., Bussel, *supra* note 9, at 898 n.40 (describing debate over whether textualism limits judicial discretion), Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 207 (1999) (questioning whether Justice Scalia’s textualism has increased predictability and certainty), Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 3, 10–13 (1998) (describing “political model” in which judges’ decisions are determined by political ideology), Merrill, *supra* note 20, at 366–70 (stating that empirical evidence of use of legislative history undermines textualists’ claims to greater objectivity), Pierce, *supra* note 20, at 778–79 (noting that even “hypertextualism” is manipulable through choice of dictionary), and Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 654 (1999) (noting that “text may cause a lot of confusion”).

<sup>141</sup> Compare, e.g., *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 23–24 (1982) (rejecting indeterminate textualist approach in favor of legislative history), *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1015 (9th Cir. 2006) (same), William N. Eskridge, Jr., *Cycling Legislative Intent*, 12 INT’L REV. L. & ECON. 260, 261 (1992) (describing formal, functional, and policy values of intentionalism), Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 991 (1992) (arguing that shift from textualism to intentionalism does not always reduce—but can increase—deference to Congress), Merrill, *supra* note 20, at 366–70 (arguing that textualism “may lead to . . . more creative, less deferential style of judging” than intentionalism), and Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 120 (1994) (“Reliance on the text alone provides less material from which . . . to resolve statutory ambiguity.”), with Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 n.143 (1983) (“It sometimes seems that citing legislative history is still . . . akin to ‘looking over a crowded room and picking out your friends.’” (attributing phrase to Harold Leventhal)).

<sup>142</sup> See Farber, *supra* note 2, at 1414–15 (discussing Posner’s argument for pragmatism); cf. Fallon, *supra* note 39, at 566 (arguing that originalism is more determinate than methodological pragmatism).

### 3. Putting Agenda and Implausibility Costs Together

To illustrate how you would decide a case using a particular interpretive method, suppose that there is only one interpretive method.<sup>143</sup> 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. Otherwise, a maximally plausible opinion will not be at your ideal point, and an opinion at your ideal point will not be maximally plausible. Minimizing total cost, you might prefer to adopt some intermediate point, trading off some benefit in writing an opinion consistent with your agenda in exchange for the alternative benefit of 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 both the cost of deviating from your preferred agenda and the cost of deviating from  $M_T$  increase quadratically as depicted in the Figures above.<sup>144</sup> One can then show that the outcome of the case will be a weighted average of your ideal point and  $M_T$ .<sup>145</sup> In other words, the interpretive method exerts a “pull” that becomes stronger as the implausibility costs grow higher or as more weight is placed on plausibility. For example, for certain weights and costs, you would follow the simple rule of “splitting the difference” between  $J$  and  $M_T$ .<sup>146</sup> This is shown in Figure 4 below, where the “high” and “low” curves are just the sum of your agenda costs and the high and low implausibility costs of theory  $T$ .<sup>147</sup>

As shown below, a more determinate interpretive theory—that is, one imposing higher costs for deviating from the most plausible

<sup>143</sup> We will see later how to choose an interpretive method when there are several to choose from. See *infra* Part II.A.1.

<sup>144</sup> See *supra* Figures 2, 3. 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  $\delta$  (between 0 and 1) is the weight you put on your own agenda (so  $1-\delta$  is the weight you put on your plausibility).

<sup>145</sup> 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, you get  $x^* = j\delta/(\delta+(1-\delta)c) + b(1-\delta)c/(\delta+(1-\delta)c)$ , or  $x^* = \eta j + (1-\eta)b$ , where  $\eta = \delta/(\delta+(1-\delta)c)$ .  $x^*$  is thus a weighted average of  $j$  and  $b$ .

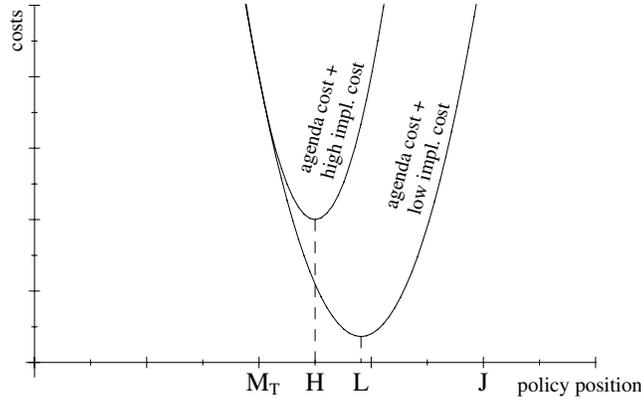
<sup>146</sup> Concave cost curves imply quite different judicial behavior. Suppose agenda costs increase as one gets farther away from  $J$ , but at a *decreasing* rate, and suppose implausibility costs likewise increase with distance from  $M_T$  at a decreasing rate. Then a judge would either write a fully “biased” decision at  $J$  or a fully “compliant” decision at  $M_T$ , depending on which costs are greater. However, the qualitative bottom line is still the same: A judge is more likely to deviate from his ideal point, that is, to write a “compliant” opinion at  $M_T$ , when the implausibility costs are high. The self-selection result also holds. See *infra* note 175.

<sup>147</sup> See *supra* Figures 2, 3.

point—will exert a greater pull.<sup>148</sup> With a low-implausibility-cost theory, you only deviate to  $L$ ; with a high-implausibility-cost theory, you deviate all the way to  $H$ .

Similarly, given a method of a particular determinacy, a judge will move closer to  $M_T$  if he puts more weight on plausibility. The two curves below could thus 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 + IMPLAUSIBILITY COST)<sup>149</sup>



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*.<sup>150</sup>
- If the judge puts all the weight on his own agenda (and none on plausibility), we have a situation of *perfect bias*:<sup>151</sup> The judge 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

<sup>148</sup> In Figure 4, I have assumed that you weight agenda cost and implausibility cost equally; thus,  $\delta = 0.5$ .

<sup>149</sup> See *supra* Figures 2, 3.

<sup>150</sup> If  $j = b$ , then  $x^* = j = b$ .

<sup>151</sup> If  $\delta = 1$  or  $c = 0$ , then  $\eta = 1$  and thus  $x^* = j$ .

statutory interpretation is completely determinate), we have a situation of *perfect constraint*.<sup>152</sup> This corresponds to the ideal judge who—umpire-like—rules according to the law.<sup>153</sup>

The story I have told makes you out to be a judge who rules in bad faith. Though you believe in *J*, and though the “best answer under the law,” according to some,<sup>154</sup> 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 this Article tells, 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*.<sup>155</sup> 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 ideologies—*someone* could be correct, even if only by accident.

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<sup>152</sup> If  $\delta = 0$  or  $c = \infty$ , then  $\eta = 0$  and thus  $x^* = b$ .

<sup>153</sup> 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) (statement of John G. Roberts) (describing judge’s role as similar to umpire).

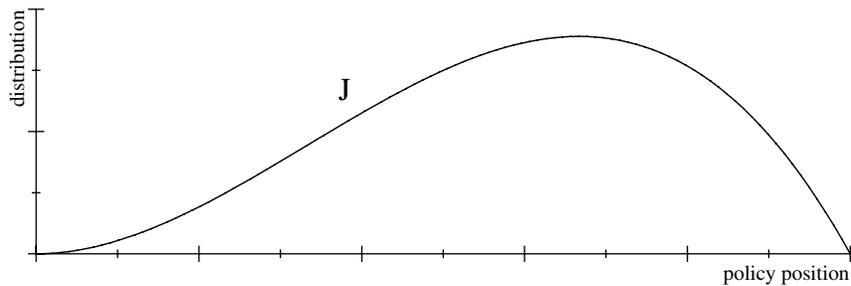
<sup>154</sup>  $M_T$  is not necessarily the best answer, even if we all agreed that theory *T* was the proper theory to use. It is only the most plausible one, where plausibility is defined sociologically as the position that would raise the fewest eyebrows. I do not define the “correct” answer in this Article, but whatever it is, it may well be nonobvious unless one takes correctness to be defined by this sort of sociological acceptance.

<sup>155</sup> This compromise may, for instance, be reached through 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 that the resulting compromise has the flavor of Rawls’s “reflective equilibrium.” See JOHN RAWLS, *A THEORY OF JUSTICE* § 4, at 20 (1971). Or it could be a simpler process: “[W]e know from social psychology that the ability to convince oneself of the propriety of what one prefers to believe—motivated reasoning—psychologically approximates the human reflex.” Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 *LAW & SOC’Y REV.* 113, 133 (2002) (citing Roy F. Baumeister & Leonard S. Newman, *Self-Regulation of Cognitive Interference and Decision Processes*, 20 *PERSONALITY & SOC. PSYCHOL. BULL.* 3, 3 (1994); Ziva Kunda, *The Case for Motivated Reasoning*, 108 *PSYCHOL. BULL.* 480, 480 (1990)); see also Paul Brest, *Who Decides?*, 58 *S. CAL. L. REV.* 661, 661 (1985) (describing “the ‘hermeneutic insight’” as “the view that . . . ‘a sharp distinction cannot be drawn between understanding the text in its own terms and reading the interpreter’s concerns into it’” (quoting David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 *S. CAL. L. REV.* 136, 137 (1985))); cf. BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 88 (Leonard W. Labaree et al. eds., 2d ed., Yale Univ. Press, 2003) (1868) (“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.”).

#### 4. Aggregating over All Judges

The story told thus far was about 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 skewed somewhat to the right side of the spectrum.<sup>156</sup>

FIGURE 5  
DISTRIBUTION OF JUDGES' SUBSTANTIVE BIASES ( $J$ )



I have noted above that one need not assume that *all* judges play the game that has been described.<sup>157</sup> But suppose for a moment that this model *does* describe every judge. Suppose that every one of these judges puts equal weight on agenda and plausibility, and suppose further that the implausibility costs under method  $T$  are such that each judge follows the same rule of splitting the difference between his own  $J$  and  $M_T$ .<sup>158</sup>

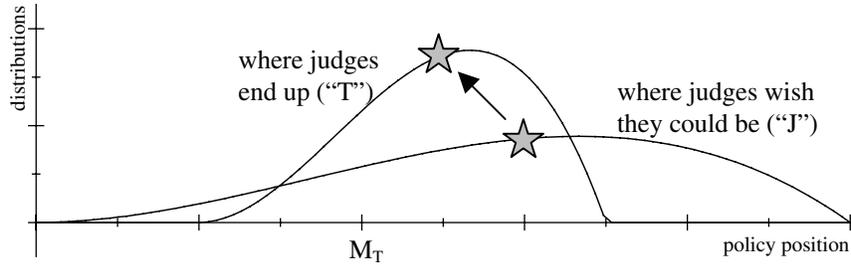
The distribution of political preferences depicted above then leads to the distribution of outcomes under theory  $T$  depicted below. The right-hand star in Figure 6 is your value of  $J$ , which we have been using all along. Theory  $T$  skews your result from the right-hand star to the left-hand star,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

<sup>156</sup> The skew is just to illustrate that the distribution need not be centered. Also, note that the left and right sides of the graph bear no necessary relation to the political left and right. The resulting picture is of a beta distribution with parameters (6,2). See, e.g., PAUL G. HOEL ET AL., *INTRODUCTION TO PROBABILITY THEORY* 148–49 (1971); JOHN A. RICE, *MATHEMATICAL STATISTICS AND DATA ANALYSIS* 592–97 (2d ed. 1995).

<sup>157</sup> See *supra* text accompanying note 40.

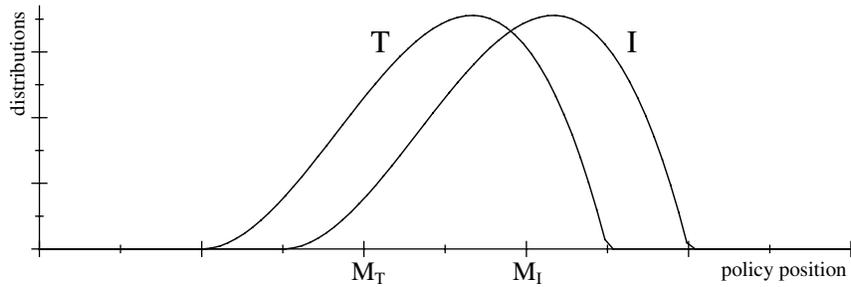
<sup>158</sup> See *supra* text accompanying notes 145–47.

FIGURE 6  
HOW THEORY *T* WOULD SKEW JUDGES’  
SUBSTANTIVE BIASES



All this has assumed a single interpretive method, *T*. But the same analysis applies to any interpretive method. Figure 7 below shows a similar distribution for another interpretive method, *I* (assuming equal implausibility costs for each method).<sup>159</sup>

FIGURE 7  
DISTRIBUTION OF OUTCOMES UNDER DIFFERENT  
INTERPRETIVE THEORIES



These distributions illustrate how judges (taking their distributions of substantive biases<sup>160</sup> as given) could rule differently if they were 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*). He would not write an opinion at *J*, even if *J* is achievable under either of these theories, because under either theory, *J* is insufficiently plausible for his taste.<sup>161</sup>

<sup>159</sup> The picture in Figure 7 shows the density functions of random variables that are combinations of the judges’ bias variable shown in Figure 5, *supra*, and the “most plausible points” of 0.4 for textualism and 0.6 for intentionalism. The weights correspond to  $\delta = 0.5$  and  $c = I$ , which implies  $\eta = 0.5$ .

<sup>160</sup> See *supra* Figure 5.

<sup>161</sup> Though I have assumed for the purposes of Figure 7 that the implausibility cost of each method was the same, different methods could have different costs. See *supra* text

In sum, this Part has described how a judge chooses the result in a case based both on his ideal point and on the implausibility cost 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 such that, if all judges use that theory, the full distribution of biases<sup>162</sup> is skewed in the direction of the most plausible point of the theory. This gives us a distribution of outcomes as in Figure 7.

Yet we do not observe such a distribution in real life, nor would we even if all judges were purely results oriented. The following Part explains why.

## II

### SELF-SELECTION BIAS MISLEADS THE NAÏVE OBSERVER

GULDENSTERN: [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 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?

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

— Tom Stoppard<sup>163</sup>

This Part explains why, in real life, we do not observe the distributions of outcomes depicted above in Figure 7. Admittedly, Part I proceeded under the assumption that all judges were results oriented, which may not hold in reality. But even if it did, we still would not observe these neat distributions.

This is because the previous Part proceeded under the additional assumption that *all* judges were using a single interpretive theory. This assumption does not hold in our current judicial culture, where no one enforces adherence to a particular theory. A variety of approaches is available to judges today.<sup>164</sup> Some interpretive rules are

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accompanying notes 139–42. A high-cost method—that is, one that is more determinate—has a more compressed distribution. Imagine every judge moving three-quarters of the way toward  $M_T$  instead of only halfway.

<sup>162</sup> See *supra* Figure 5.

<sup>163</sup> TOM STOPPARD, *ROSENCRANTZ AND GULDENSTERN ARE DEAD*, act 2, at 58 (1967).

<sup>164</sup> See Rosenkranz, *supra* note 23, at 2088 (“The interpretive status quo is cacophonous. Every judge and scholar has his own theory . . .”); Scalia, *supra* note 16, at 14 (noting that judges lack single intelligible theory of statutory interpretation); *cf.* Fallon, *supra* note 39, at 577 (“Amid the flux of current practice, the choice of a constitutional theory has what

mandated by statute<sup>165</sup> and others—from the *Charming Betsy* canon<sup>166</sup> to the rule of lenity<sup>167</sup> to the *Chevron* doctrine<sup>168</sup>—have been mandated by the Supreme Court and are binding on lower courts. But by and large, there is little indication that lower-court judges consider themselves bound to use any grand theory like textualism, intentionalism, or purposivism,<sup>169</sup> perhaps because there is little indication that the Supreme Court considers its use of these methods binding either upon lower courts<sup>170</sup> or upon itself.<sup>171</sup>

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Ronald Dworkin characterizes as an irreducibly ‘protestant’ aspect. . . . [E]ach person must decide for herself which [theory is best].” (quoting RONALD DWORKIN, *LAW’S EMPIRE* 413 (1986)). The discussion in this paragraph in the text is based on Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 *GEO. L.J.* (forthcoming Aug. 2008), available at <http://www.law.harvard.edu/faculty/workshops/climlenko/FosterPaper.pdf>. According to Foster, there is some evidence that the Supreme Court may consider interpretive theories precedential—for instance, opinions cite precedent when invoking principles of statutory construction, and principles of statutory construction tend to be consistent over time. *Id.* at 12–13. But the balance of the evidence, Foster concludes, cuts the other way. *Id.* at 14–28.

<sup>165</sup> See, e.g., *supra* note 118 and accompanying text; sources cited *supra* notes 119, 122.

<sup>166</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

<sup>167</sup> *Ladner v. United States*, 358 U.S. 169, 178 (1958) (explaining that ambiguities in criminal statutes are to be resolved in defendant’s favor).

<sup>168</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining when to defer to agency interpretation and when to give independent effect to congressional intent).

<sup>169</sup> Judge Easterbrook’s opinion in *In re Sinclair*, which concerns whether a Chapter 11 bankruptcy filer can convert to Chapter 12, is a rare case of a lower-court judge trying to decide what, if anything, Supreme Court doctrine commands when the text and legislative history conflict. 870 F.2d 1340, 1341–42 (7th Cir. 1989). Easterbrook, noting that the Supreme Court’s advice on the subject was discordant, listed at least three different views in tension with one another: (1) legislative history should not be used when the text is clear; (2) legislative history may clarify the meaning of apparently clear words; and (3) an extraordinary showing of contrary legislative intent can overcome plain meaning. *Id.* These were not even the only options available: Easterbrook also cited *Church of the Holy Trinity v. United States*, where an ordinary (not extraordinary) showing of contrary legislative intent was used to overcome what the Court conceded was the plain meaning of the act. 143 U.S. 457, 465 (1892) (ignoring statute’s plain meaning and deriving legislative intent from act’s title, surrounding circumstances, and committee reports). In the end, Easterbrook decided *Sinclair* on plain meaning alone, after listing his arguments against the use of legislative history and arguably ignoring some of the Supreme Court’s more pro-legislative history pronouncements. See *In re Sinclair* at 1342–44.

<sup>170</sup> I am not aware of any case in which the Supreme Court has criticized a lower court for using the wrong “grand theory,” regardless of whether it agreed with the lower court’s result. *Cf.* *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (arguing that canons “are not mandatory rules” but “guides that need not be conclusive” (internal quotation marks omitted)); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (arguing that canons are “no more than rules of thumb that help courts determine the meaning of legislation”). *But see* *Ali v. Fed. Bur. of Prisons*, 128 S. Ct. 831, 841 (2008) (Kennedy, J., dissenting) (“[T]he analytic framework . . . the Court now employs become[s] binding on the

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

The first Section describes how our familiar results-oriented judge chooses a theory when he has several to choose from. The main conclusion 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; this 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*.

The second Section 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? Third, does textualism lead a judge to find that a statute has a plain meaning at step one of the *Chevron* inquiry? In all three cases, I find that commentators may have been led astray, insofar as they have been trying to explain observed results—facts about *textualists*, which may well be political in origin—using “essentialist” theories about *textualism*.

### A. How Selection Bias Arises

#### 1. Choosing Between Two Theories

Suppose your ideal point  $J$  happens to coincide with  $M_T$ , the most plausible point of theory  $T$ . This is a convenient position for you: You have a theory that most naturally leads to exactly where you want to go. Your total costs will be minimized by writing a completely plau-

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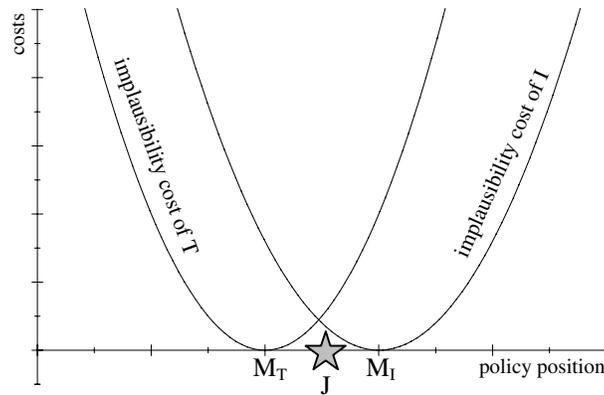
federal courts, which will confront other cases in which a series of words operate in a clause similar to the one we consider today.”).

<sup>171</sup> The Court uses different methods of statutory interpretation depending on who is writing the opinion. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting) (“In recent years the Court has vacillated between [textualism] and an approach that seeks guidance from . . . legislative history [and other factors] . . .”). When the Court switches interpretive methods, it does so without discussing the traditional factors that it has said should be considered when deciding whether to overturn precedent. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (“[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”); see also Frickey, *supra* note 140, at 219 (arguing that Court considers both formalist and antiformalist factors when interpreting statutes); Rosenkranz, *supra* note 23, at 2144–45, 2145 n.267 (arguing that interpretive methodology is not binding part of Supreme Court holdings).

sible opinion using  $T$ . More precisely, at  $M_T (=J)$ , both your agenda cost and the implausibility cost of an opinion using  $T$  will be zero, 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. You are no longer perfectly served by either theory; using either theory will require *some* deviation from your ideal point.

FIGURE 8  
IMPLAUSIBILITY COSTS OF ALTERNATE THEORIES

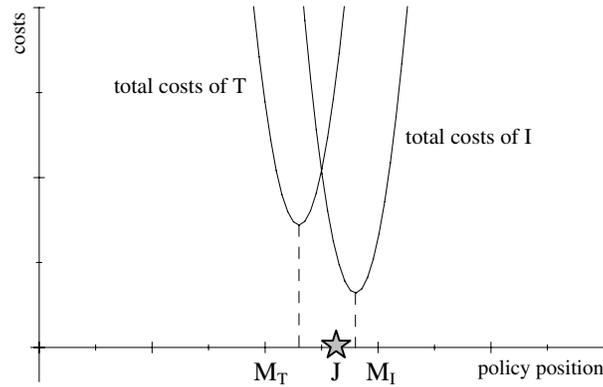


As  $J$  moves away from  $M_T$  and toward  $M_I$ , the total costs of using theory  $T$  rise, since  $T$ 's implausibility costs make you deviate farther from your ideal point  $J$  than before. (In particular, there is no longer any point with zero costs, since any position comes with either agenda costs, implausibility costs, or, usually, both.) The total costs of using theory  $I$  then fall, since your deviations from  $J$  to  $M_I$  are less than they used to be.

There is a point somewhere between  $M_T$  and  $M_I$  such that, if your  $J$  is at that point, you are indifferent between using theory  $T$  and using theory  $I$ . For any  $J$  to the left of that threshold, you strictly prefer theory  $T$ . For any  $J$  farther right, you strictly prefer theory  $I$ . In Figure 8 above,  $J$  has been depicted somewhat closer to  $I$ . At that  $J$ , the total costs of using the different theories look as they do in Figure 9 below. The total cost curve for each theory incorporates both the judge's agenda costs<sup>172</sup> and the implausibility costs of the theory from the Figure above, but the minimal cost of using  $I$  is lower than the minimal cost of using  $T$ . Thus, you prefer to deviate toward theory  $I$ .

<sup>172</sup> See *supra* Figure 2.

FIGURE 9  
 TOTAL COST OF ALTERNATE THEORIES, FOR A PARTICULAR  $J$   
 (TOTAL COST = AGENDA COST (FIGURE 2) +  
 IMPLAUSIBILITY COST (FIGURE 8))



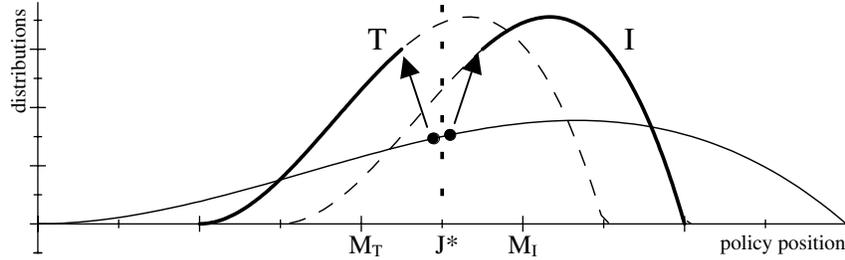
Intuitively, this should be clear: If, say,  $T$  and  $I$  are identical except that  $T$ 's most plausible point is slightly more conservative than  $I$ 's, more conservative judges will prefer to use  $T$  and more liberal judges will prefer to use  $I$ . There will also be a threshold at which a judge is indifferent between using either method: call that threshold  $J^*$ .<sup>173</sup>

The existence of this threshold introduces new dynamics. Because only judges on one side of the spectrum choose either theory, we will observe a biased part of the distribution. Observe, for instance, Figure 10 below, which shows how the distribution of political preferences is transformed into distributions of outcomes under different theories. This is essentially the same story as in Figures 6 and 7. The lower curve is the same distribution of political preferences we have seen before;<sup>174</sup> the upper curves are the resulting distributions of outcomes under  $T$  and  $I$ , as the distribution of biases is squeezed in the direction of  $M_T$  and  $M_I$ , respectively.

<sup>173</sup> That threshold is well defined if all judges weight their agenda and implausibility costs equally. If different judges weight these costs 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, *infra*, makes them out to be, and in fact, there may be some overlap.

<sup>174</sup> See *supra* Figure 5.

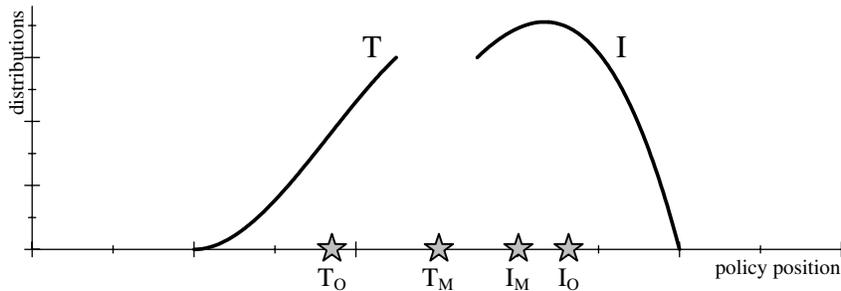
FIGURE 10  
JUDGES' SELECTION OF INTERPRETIVE METHODS



Now let us introduce the new interpretive-choice dynamics into this familiar story. Observe the two circles on that lower curve, falling on opposite sides of  $J^*$ . These represent two judges whose ideal points fall 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  $M_I$ . As a result, even though we would observe the full  $T$  curve if everyone were using theory  $T$ , in fact we only observe that part of the  $T$  curve chosen by judges on one side of  $J^*$ . Similarly, we only observe that part of the  $I$  curve chosen by judges on the other side of  $J^*$ .

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  
( $T_M$  AND  $I_M$  ARE “MANDATORY” MEANS;  
 $T_O$  AND  $I_O$  ARE “OPTIONAL” MEANS)



The difference between the full distribution seen in Figure 7 (and in Figure 10) above and the partial distributions seen in Figure 11 is the fundamental distribution between “mandatory” (or “universal”) and “optional” (or “censored”) distributions, which we will be discussing for the rest of this Article.<sup>175</sup>

## 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 mandatory (or universal) distributions of  $T$  and  $I$ —what results would look like if everyone were constrained to use a single method—are shown by Figure 7 (or by the upper curves in Figure 10). These mandatory distributions are not too distant from each other—the mandatory means are shown as  $T_M$  and  $I_M$  in Figure 11—and in fact overlap substantially. But the optional distributions—what we observe when judges can choose their method—are completely distinct and are separated by a sizeable gap (the result of the two adjacent points above moving in opposite directions because they were on opposite sides of the  $T$ - $I$  cutoff). These optional means are shown as  $T_O$  and  $I_O$  in Figure 11. Thus, self-selection exaggerates the political bias of interpretive methods:  $T_O < T_M$ , and  $I_O > I_M$ .<sup>176</sup>

Anyone trying to make general statements about theories  $T$  or  $I$  is likely to be misled if all he can see are the observed  $T$  or  $I$  opinions under an optional regime. 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 does not care whether the result makes sense or whether it conforms to the intent of the enacting Congress.” Properly speaking,

<sup>175</sup> A similar result can occur with concave cost curves. See *supra* note 136. Suppose agenda costs and implausibility costs are as described above. See *supra* note 146. Suppose, moreover, that  $T$  is an indeterminate theory (low implausibility costs),  $I$  is a determinate theory (high implausibility costs), and the magnitude of agency costs is indeterminate between the magnitudes of  $T$ 's and  $I$ 's implausibility costs. Thus, if all judges used  $T$ , they would all write fully “biased” opinions (each at his personal  $J$ ), while if all judges used  $I$ , they would all write fully “compliant” opinions (all at  $M_I$ ). Thus, the mandatory distribution of  $T$  merely replicates the distribution of  $J$ , while the mandatory distribution of  $I$  is a single mass point at  $M_I$ . But if judges are allowed to choose their methods, there would be a threshold  $J^*$  on one side of which all judges would choose  $T$  and on the other side of which all judges would choose  $I$ . Thus, we again have selection bias: The optional distribution of  $T$  would be only that part of the  $J$  distribution on one side of  $J^*$ . (However, self-selection would not bias the distribution of  $I$ —both the mandatory and the optional distributions of  $I$  would be a mass point at  $M_I$ .)

<sup>176</sup> In Figure 11,  $T_M = 0.5$  and  $I_M = 0.6$ .  $T_O$  is to the left of  $T_M$ , at 0.38, and  $I_O$  is to the right of  $I_M$ , at 0.65. The difference between the mandatory means,  $T_M$  and  $I_M$ , is only 0.1, while the difference between the optional means,  $T_O$  and  $I_O$ , is 0.27, more than double the original difference.

this is either a statement about the “Platonic ideal” of  $T$ —the most plausible point and implausibility cost function<sup>177</sup>—or a statement about the mandatory distribution.<sup>178</sup> It is not a statement about the optional distribution in Figure 11, which we can think of as a “censored” distribution since some potential opinions under each method are suppressed by virtue of not being chosen.

So do we even know whether the premise of the statement is 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 itself—say, 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 being written under some other theory.<sup>179</sup>

This model shows the pitfalls of drawing conclusions about the determinacy of a method by reading opinions. The observed distribution of decisions using a particular interpretive method, when judges can choose their method, can be “tighter” than the true distribution would be if the method were mandatory. In other words, the optional  $T$  curve<sup>180</sup> covers a narrower domain within the spectrum than the mandatory  $T$  curve.<sup>181</sup> Thus, self-selection gives a misleading picture of the determinacy of interpretive methods; both  $T$  and  $I$  look more determinate than they actually are.<sup>182</sup> One should therefore take

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<sup>177</sup> See *supra* Figure 3. I use the shorthand of “Platonic ideals” to refer to the methods’ most plausible points and implausibility costs, though this term can be misleading insofar as it might lead one to fail to appreciate the extent to which plausibility is socially constructed. See, e.g., *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) (“Of course the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.”); Eskridge & Baer, *supra* note 108, at 1152 (discussing “cocktail-party textualism”).

<sup>178</sup> See *supra* Figure 7.

<sup>179</sup> Cf. Ashenfelter et al., *supra* note 79, at 259 (discussing procedures necessary to correct for selection bias caused by absence of settled cases from samples of opinions); *id.* at 263 (noting that because of selection bias, most studies, which look for ideological influence in published appellate decisions, “may be seeking legal realism’s effect in the wrong place”).

<sup>180</sup> See *supra* Figures 10, 11.

<sup>181</sup> See *supra* Figures 6, 7.

<sup>182</sup> This phenomenon is already well known among labor economists as the Roy model. See A.D. Roy, *Some Thoughts on the Distribution of Earnings*, 3 OX. ECON. PAPERS (N.S.) 135, 135 (1951) (“[T]hose persons engaged in a particular occupation [are not randomly selected from the working population as a whole, but] tend to be selected in a purposive

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 Akhil Amar, Jack Balkin, and others.<sup>183</sup>

This model also has implications for optimal strategies for legislators or anyone else who is in a position to advocate interpretive methods. The complete optional distribution of decisions, using all interpretive methods, can be wider than the mandatory distribution using any single interpretive method. That is, the range spanned by the optional *T* and *I* curves<sup>184</sup> together is greater than the range individually spanned by either of the mandatory curves.<sup>185</sup> Thus, a risk-

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manner . . .”). Briefly, the intuition is as follows: Suppose that, on average, one can make the same amount of money being a hunter or a fisherman, but hunting and fishing skills vary among people, with good hunters being bad fisherman and vice versa. The half of the population that are the best hunters will become hunters and the half that are the best fishermen will become fisherman; we will only observe the top half of the potential earning distribution in each occupation. This would thus be an unreliable guide as to how much a random person would earn if he were to become a hunter or a fisherman. *See also, e.g.,* James J. Heckman & Bo E. Honoré, *The Empirical Content of the Roy Model*, 58 *ECONOMETRICA* 1121, 1122 (1990) (“[I]n an economy described by a Roy model, self-selection leads to *reduced* inequality in earnings compared to an economy in which individuals are randomly assigned to jobs.”); Derek Neal & Sherwin Rosen, *Theories of the Distribution of Earnings*, in 1 *HANDBOOK OF INCOME DISTRIBUTION* 379, 421 (A.B. Atkinson & F. Bourginion eds., 2000) (noting that “earnings distributions are always skewed” with right tail being much longer than left one). George Borjas has applied the Roy model in analyzing the economic effects of immigration. *See* George J. Borjas, *The Economics of Immigration*, 32 *J. ECON. LIT.* 1667, 1687–92 (1994); George J. Borjas, *Self-Selection and the Earnings of Immigrants*, 77 *AM. ECON. REV.* 531, 532 & nn.2, 4 (1987). For a discussion of how self-selection may bias results in the analysis of public defender effectiveness, see Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 *OHIO ST. J. CRIM. L.* 223, 230, 245–47 (2005), which suggests that public defenders’ lower success rates may be due to their guiltier client pool.

<sup>183</sup> *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 470 (2005) (“I reckon myself a constitutional textualist . . .”); Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* (forthcoming 2007) (manuscript at 101–04), available at <http://ssrn.com/abstract=925558> (presenting originalist argument for abortion right); *see also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 617–20 (1999) (discussing academic and “progressive” versions of originalism); Howard & Segal, *supra* note 155, at 122, 133 & n.18 (noting that originalism and liberalism are not antithetical); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 *HARV. J.L. & PUB. POL’Y* 489, 491–93 (2004) (discussing “liberal originalist project”); *cf.* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 *B.U. L. REV.* 25, 65 (1994) (arguing that textualism leads to different results depending on each Justice’s political and personal judgments).

<sup>184</sup> *See supra* Figures 10, 11.

<sup>185</sup> *See supra* Figures 6, 7.

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.<sup>186</sup>

Furthermore, the complete optional distribution of decisions, using all interpretive methods, could be either broader or narrower than the initial distribution of judges' biases. In the Figures above, the initial distribution of political preferences<sup>187</sup> happened to span the entire range; Figure 10 shows how the need to move toward  $M_T$  or  $M_I$  ended up moving many extremist judges toward the center (though the moderate judges between  $M_T$  and  $M_I$  moved away from the center). "Legalism," therefore, exerted a moderating effect. But suppose that the distribution of  $J$  fell mostly between  $M_T$  and  $M_I$ , or that  $M_T$  and  $M_I$  were more extreme. Then the need to be plausible would push more moderate judges toward the extremes, as judges near the center moved toward  $M_T$  or  $M_I$ . Whether the demands of plausibility, on balance, polarize judges or moderate them is an empirical question.

Of course, this is a highly caricatured picture. In reality, the observed distributions are not quite so neat. First, judges may not always choose an interpretive method in order to achieve optimality in each individual case. Instead, they might choose a single theory that is best over the whole range of cases they decide. Some judges might then choose  $T$  in a case even if  $T$  seems worse for their preferred result in that case than  $I$ . I explore later why judges might be consistent across cases when I discuss strategic consistency.<sup>188</sup>

Second, I have assumed (purely for ease of illustration) that all judges have equal agenda costs and weight these equally with implausibility costs.<sup>189</sup> Of course, in reality, judges may differ in the magnitude of their agenda costs (i.e., the intensity of their preferences) and the relative weight they place on implausibility costs.<sup>190</sup> For instance, I have mentioned that there can be "rule of law" judges<sup>191</sup> who put

<sup>186</sup> See Rosenkranz, *supra* note 23, at 2153–57 (arguing that adoption of single rule of interpretation is in interest of political actors).

<sup>187</sup> See *supra* Figure 5.

<sup>188</sup> See *infra* Part III.

<sup>189</sup> See *supra* text accompanying note 158.

<sup>190</sup> Mathematically, these are equivalent. Consider the utility function of a judge:  $u(x) = -\delta(x-j)^2 - (1-\delta)c(x-b)^2$ . See *supra* note 144. Now alter his utility function by doubling his agenda costs ( $\delta$ ); his new utility function is  $v(x) = -2\delta(x-j)^2 - (1-\delta)c(x-b)^2$ . Now instead alter  $u(x)$  by changing the weight  $\delta$  to a weight  $2\delta/(1+\delta)$ ; this new utility function is  $w(x) = -[2\delta/(1+\delta)](x-j)^2 - [(1-\delta)/(1+\delta)]c(x-b)^2$ . It is clear that  $w(x) = v(x)/(1+\delta)$ , so  $v(x)$  and  $w(x)$  actually express the same preferences. Thus, a scaling up of agenda costs is mathematically equivalent to a change in the weights put on agenda costs and implausibility costs.

<sup>191</sup> See *supra* text accompanying notes 152–53.

zero percent weight on their agenda and one-hundred percent weight on their plausibility.

Third, I have assumed that all judges choose their methods opportunistically; in fact, some judges may favor a theory on democratic or constitutional grounds even if their own substantive position is quite far from that theory's most plausible point. Then the results will not be as stark as they appear above and the observed distributions will tend to overlap somewhat.

Fourth, the implausibility costs (or determinacy) of different methods may not be equal. For instance, in Figure 8, 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.<sup>192</sup>

Fifth, agenda and implausibility costs may not have the neat convex shapes that I assume here purely for illustrative ease. Cost functions with different shapes could lead to more complicated behavior; however, the basic point of the model remains.<sup>193</sup>

Overall, the self-selection problem means that forming a preference for an interpretive theory is not straightforward. If you want to decide which is your "favorite theory," you should just compare your expected utility under each theory. That is, you should favor the theory that, in expected utility terms, gets you "closest" to your ideal point.<sup>194</sup> If you are risk-averse, you would, other things being equal, 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 mandatory (universal) distributions or the optional (censored) ones?<sup>195</sup>

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<sup>192</sup> See *infra* Part II.A.3.

<sup>193</sup> See *supra* notes 136, 146, 175 (discussing dynamics of concave cost functions).

<sup>194</sup> Cf. Fallon, *supra* note 39, at 566–67 (arguing that "the character of those who are likely to occupy judicial office" is important variable in choosing interpretive theory). Fallon's analysis implies that theories must ultimately, in part, be judged using some distribution derived from the distribution of  $J$  in Figure 5, *supra*.

<sup>195</sup> See *supra* Figures 7, 11.

This choice depends on 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 the mandatory distributions.<sup>196</sup> 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 the optional distributions.<sup>197</sup>

For example, suppose your ideal point is slightly left of the left end of the observed  $I$  interval in Figure 11. Looking at the optional distributions (which are all you can observe in an optional regime), you may think that theory  $I$  is the best alternative.<sup>198</sup> But this is just a reflection of the biases of judges who choose that theory. If a judge expresses belief in theory  $I$ , this is a signal that his substantive biases accord with your own. But we see from Figure 10 that your ideal position is actually close to the mean of the mandatory  $T$  interval,  $T_M$ .<sup>199</sup> You might then actually prefer to mandate that all judges use textualism. Somewhat paradoxically, this implies that one can favor an interpretive method but nonetheless oppose judges who tend to use that method.<sup>200</sup> One 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.”

These insights will inform the following discussion, which explores whether textualism has a conservative bias. I conclude that, theoretically, a conservative bias observed under optional textualism does not necessarily mean that mandatory textualism would be 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 one of *Chevron*. Actually answering these questions requires empirical work—a task beyond the scope of this Article. But the self-selection

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<sup>196</sup> See *supra* Figure 7.

<sup>197</sup> See *supra* Figure 11.

<sup>198</sup> In Figure 11, *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  $I_O = 0.65$ ).

<sup>199</sup> The mandatory mean of  $T$  is  $T_M = 0.5$ , while the mandatory mean of  $I$  is  $I_M = 0.6$ . Thus someone whose  $J$  is, say, 0.54 is closer to the mandatory mean of  $T$  but appears to be closer to  $I$  (since the observed optional mean of  $I_O = 0.65$ , is 0.11 away, while the observed optional mean of  $T$ ,  $T_O = 0.38$ , is 0.16 away).

<sup>200</sup> 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 consistently have, from your perspective, the “wrong politics.”

model should cast doubt on the conventional wisdom surrounding these questions as well.

### 3. *What Do Conservative Textualist Opinions Tell Us?*

As we have seen, it is a common view that textualism is conservative or has a small-government bias.<sup>201</sup> This view, often stated in essentialist terms,<sup>202</sup> is sometimes justified by reference to observed optional textualism—that is, the views or rulings of prominent textualists in today’s laissez-faire interpretive regime.<sup>203</sup> The evidence for this proposition is mixed. For instance, James Brudney and Corey Ditslear find, in a survey of workplace law cases, that use of substantive and linguistic canons is not particularly liberal or conservative.<sup>204</sup>

Yet Brudney and Ditslear’s result seems to mask considerable variability. First, their set of canons includes substantive canons like the conservative-leaning “clear-statement rule” for abrogating state sovereign immunity and the liberal-leaning canon against federal preemption.<sup>205</sup> But the status of substantive canons as part of “textualism” is disputed.<sup>206</sup> Thus, a finding about canons in general is not the same as a finding about textualism. Second, Brudney and Ditslear also identify discrete classes of cases in which canons do have a conservative valence.<sup>207</sup>

Let us suppose, then, that an exhaustive analysis of the cases would indeed show that observed textualism today is conservative. This is not conclusive: As illustrated in the last section, mandatory textualism could have a wider distribution of outcomes than optional textualism. Thus, one must be careful before drawing firm conclusions about either the determinacy of a method<sup>208</sup> or its political bias based on the observed cases. Relying on statements by judges who currently select textualism<sup>209</sup>—or even relying on their practice<sup>210</sup>—is

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<sup>201</sup> See *supra* notes 2–6 and accompanying text.

<sup>202</sup> See *supra* notes 7–8 and accompanying text.

<sup>203</sup> See, e.g., Mank, *supra* note 5, at 1233, 1247–48 (arguing that textualism leads to conservative results by referring to practice of conservative Supreme Court Justices).

<sup>204</sup> Brudney & Ditslear, *supra* note 103, at 4, 55–60 (“There was no significant relationship between decisional outcome and majority reliance on language canons or substantive canons in either [the Burger or Rehnquist Courts.]”); see also Brudney & Ditslear, *supra* note 99, at 4, 23, 26 (“[F]or . . . eight liberal[ Justices], the relationship between pro-employee outcomes and legislative history usage is not significant.”).

<sup>205</sup> Brudney & Ditslear, *supra* note 103, at 56–57.

<sup>206</sup> See Scalia, *supra* note 16, at 27–29 (questioning canons as “dice-loading rules” that “add[ ], on one or the other side of the balance, a thumb of indeterminate weight”).

<sup>207</sup> See Brudney & Ditslear, *supra* note 103, at 60–63 (discussing conservatives’ use of canons in close cases).

<sup>208</sup> See *supra* text accompanying notes 180–83.

<sup>209</sup> See *supra* note 7 and accompanying text.

problematic, as these judges may merely be illustrating their own biases.

Theoretically—according to the model presented above—does a conservative “optional textualism” distribution indicate that mandatory textualism is also conservative? It may, or it may not. As an initial matter, we saw that the self-selection effect could magnify the existing bias of the different methods.<sup>211</sup> Working backwards, if observed optional textualism is much more conservative than observed optional intentionalism, then mandatory textualism may be at least *slightly* more conservative than mandatory intentionalism.

However, optional textualism can look more conservative even if mandatory 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—that is, even if another method would be more conservative if mandated for everyone. 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.<sup>212</sup> In Figure 12, *I* is the most extreme theory in one direction, *P* is the most extreme in the other direction, and *T* is in between.<sup>213</sup> However, *I* is a “high implausibility cost” method,<sup>214</sup> meaning that it is highly determinate, while *T* and *P* are both less determinate.

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<sup>210</sup> 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) (discussing use of canons by textualists).

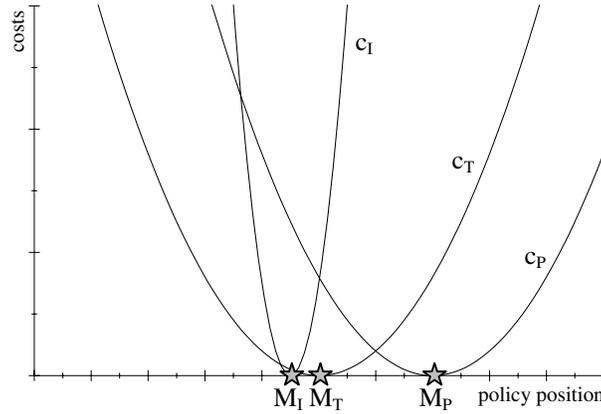
<sup>211</sup> See *supra* Figures 10, 11; *supra* note 176 and accompanying text.

<sup>212</sup> 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.

<sup>213</sup> Recall that “left” and “right” on the Figures have nothing to do with the modern political concepts of “left” and “right.” See *supra* note 156.  $M_I = 0.45$ ,  $M_T = 0.5$ , and  $M_P = 0.7$ . *I* has an implausibility cost curve  $3(x-0.45)^2$ , *T* has an implausibility cost curve  $0.2(x-0.5)^2$ , and *P* has an implausibility cost curve  $0.2(x-0.7)^2$ . Given an equal weighting of agenda cost and plausibility cost ( $\bar{a} = 0.5$ ), this means that judges who use *I* go 3/4 of the way from their *J* to  $M_I$ , judges who use *T* go 1/6 of the way from their *J* to  $M_T$ , and judges who use *P* likewise go 1/6 of the way from their *J* to  $M_P$ . See *supra* notes 144–45.

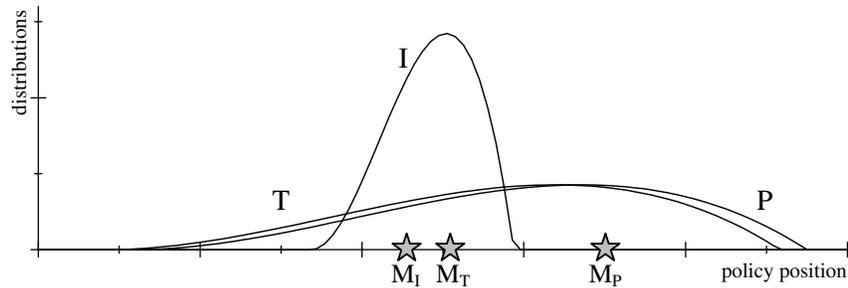
<sup>214</sup> See *supra* Figure 3; see also *supra* text accompanying notes 139–40.

FIGURE 12  
 TEXTUALISM AS MODERATE BUT RELATIVELY  
 INDETERMINATE (I.E., HAVING LOWER  
 IMPLAUSIBILITY COST)



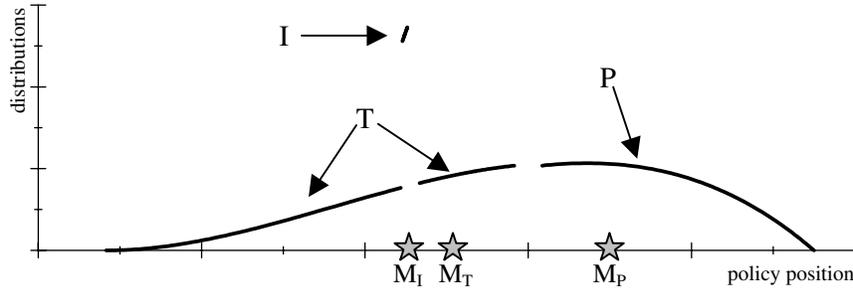
The mandatory distributions are as shown in Figure 13 below. Recall from Figure 5 above that true distributions are obtained by squeezing the distribution of  $J$  in the direction of  $M_I$  or  $M_T$  (or  $M_P$ ) as appropriate.<sup>215</sup> Because  $I$  is a more determinate method, its distribution 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 a fairly indeterminate theory does not impose high costs on deviating from its most plausible point. Thus, both  $T$  and  $P$  allow judges to choose rulings that are close to their own personal ideal points.

FIGURE 13  
 THE RESULTING TRUE DISTRIBUTIONS



<sup>215</sup> See *supra* notes 156–58 and accompanying text.

FIGURE 14  
THE RESULTING OBSERVED DISTRIBUTIONS



The optional distributions are shown in Figure 14 above. 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 farther away from  $M_I$  prefer to use *T*, because it is less determinate. This is true even for judges who are “on the wrong side,” that is, judges whose ideal points are to the left of  $M_I$ . No one on that side of the spectrum prefers to use *P*;  $M_P$  is farther away and is just as determinate as *T*, so it absorbs all of the judges with biases on that side of the spectrum.<sup>216</sup>

The tiny sliver of *I* shown above dramatically illustrates the effect:<sup>217</sup> Self-selection can make methods look more determinate than they actually are. Figure 13 clearly shows that *I* is a more determinate method than the others—but *I* is not *that* determinate!

This first result is actually intuitive. Take 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 extremely close to that single point will use the fully determinate theory. Everyone else will use the indeterminate theory, even if they are quite far from its most plausible point, simply because a highly indeterminate theory requires 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 their ideal points are closer to  $M_I$  than to  $M_T$ , the observed means of *T* and *I* have switched places relative to the true

<sup>216</sup> *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.

<sup>217</sup> See *supra* text accompanying notes 180–83.

means.<sup>218</sup> 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 (optional) *T* is slightly more conservative than observed (optional) *I*. In this way, textualism can seem like the most conservative method because we only observe optional textualism, even if mandatory textualism is more liberal (but less determinate) than some other methods.<sup>219</sup>

For these reasons, an observed optional textualism that is conservative has no necessary connection with whether mandatory textualism would be conservative. Mandatory textualism may be only *slightly* more conservative than other methods and appear much more conservative through self-selection. But it may also be *less* conservative than some other methods and chosen by conservatives only because it is less determinate.

### B. *The Inadequacy of Essentialist Explanations*

As noted in the Introduction, 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 typical observer. Commentators have observed that conservatives tend 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.<sup>220</sup>

But these reasons might simply be false, since, as the previous Section has shown, self-selection can either (1) magnify an essentially small ideological difference, or (2) create the impression that an interpretive method is extreme when it is actually moderate. These commentators may be trying to explain a phenomenon that does not actually exist.

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<sup>218</sup> 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 farther right in the diagram while the observed mean of *T* is farther left.

<sup>219</sup> Granted, textualists do not typically claim that textualism is indeterminate, *see* sources cited *supra* note 19, but others do, *see* sources cited *supra* note 140, and I take no position in that controversy.

<sup>220</sup> *See supra* text accompanying notes 7–8, 202.

The difference between the mandatory and optional distributions<sup>221</sup> suggests that these essentialist explanations are only appropriate, if at all, to explain either the difference between *mandatory* distributions or the difference between the Platonic ideals of different methods.<sup>222</sup> The difference between *optional* distributions, on the other hand, is perhaps better explained by *political*, not essentialist, considerations.

For purposes of choosing promising essentialist explanations, we cannot just intuit the difference between the mandatory distributions, or between the Platonic ideals, from the difference between the optional distributions. That is, we cannot assume that textualism (for instance) is really more conservative just because observed textualist decisions are more conservative.

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

### 1. *Direct Effects of Textualism*

First, let us examine the first piece of conventional wisdom about textualism that I highlighted in the Introduction: Textualism is conservative. Above, however, I have shown how true textualism may have either a moderate conservative bias, magnified by self-selection, or no particular political bias at all, with an apparent conservative bias emerging as an accidental byproduct.<sup>223</sup>

So what *is* the true nature of textualism—that is, what would textualism look like if mandated for everyone? Though the common essentialist view is that textualists let loopholes in regulatory statutes lie rather than filling them in with sensible regulation,<sup>224</sup> there is little reason to think that textualism in general has a small-government bias. As a case study, consider the field of regulation of environmental, health, and safety risks.

To the extent that interpretive theories make a difference, it is plausible to suspect that static theories (like textualism and intentionalism)—that is, ones that only use materials contemporary to the enactment of the statute—tend to favor the views of members of the enacting Congress. Dynamic theories (like pragmatism)—that is, ones that invite judges to use the statute to solve problems that arise subse-

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<sup>221</sup> See *supra* Figures 7, 11.

<sup>222</sup> See *supra* note 177 and accompanying text.

<sup>223</sup> See *supra* Part II.A.3.

<sup>224</sup> See *supra* text accompanying note 7.

quently—would correspondingly tend to give more play to the views of the interpreting judges.<sup>225</sup>

Therefore, it is plausible that a static interpretive method would please those who distrust contemporary judges and who generally agree with the enacting Congresses<sup>226</sup>—an apt description of many environmentalists. Mainstream environmentalists, who are associated with the political left, tend to oppose current judges<sup>227</sup> who, given 20 years of appointments by Presidents Reagan, George H.W. Bush, and George W. Bush, are as a whole more conservative than the judges sitting when the major environmental statutes were enacted in the 1970s.<sup>228</sup> Moreover, environmentalists tend to agree with the Congresses that enacted those statutes, which reflected the period's great environmental consciousness<sup>229</sup> and which were filled with strict deadlines,<sup>230</sup> technology-forcing mandates,<sup>231</sup> and private enforcement and right-to-know provisions.<sup>232</sup>

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.<sup>233</sup> For instance, as I have discussed above, waste-combustion ash generated by a municipal incinerator is

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<sup>225</sup> See Barkow, *supra* note 94, at 1074–75 (describing how pragmatism allows conservative judges to rule against criminal defendants).

<sup>226</sup> This is complicated by the issue of *Chevron* deference to agencies. See *infra* Part II.B.4.

<sup>227</sup> See, e.g., SHARON BUCCINO ET AL., NATURAL RES. DEF. COUNCIL, HOSTILE ENVIRONMENT: HOW ACTIVIST JUDGES THREATEN OUR AIR, WATER, AND LAND 1 (2001), available at <http://www.nrdc.org/legislation/hostile/hostile.pdf> (discussing challenge to environmental protections arising from federal courts); Judging the Environment: Fair Courts for a Healthy Planet, About Us, <http://www.judgingtheenvironment.org/about/index.html> (last visited Feb. 27, 2008) (describing project's purpose as education of public and environmental community on importance of federal judicial nominees).

<sup>228</sup> See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 9–10 (2005) (documenting increased conservatism in federal judiciary).

<sup>229</sup> This was the era, after all, of *Silent Spring*, the seminal work that defined a generation of environmentalists. See RACHEL CARSON, SILENT SPRING (1962); see also, e.g., Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 89–90 (2002) (noting that 1969 Cuyahoga River Fire “was seared into the nation's emerging environmental consciousness”).

<sup>230</sup> John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 237–38 (1990); James D. Fine & Dave Owen, *Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 909–10 (2005); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 323–28.

<sup>231</sup> Fine & Owen, *supra* note 230, at 910.

<sup>232</sup> *Id.* at 917; Lazarus, *supra* note 230, at 334.

<sup>233</sup> See Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation & the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. (forthcoming 2008) (manuscript at 34), available at <http://ssrn.com/abstract=996955> (“Not surprisingly, more liberal judges find environmental statutes textually clear because the

subject to stringent hazardous waste regulation under the Resource Conservation and Recovery Act.<sup>234</sup>

There are many more cases with such textualist reasoning:

- The Endangered Species Act permits the Secretary of the Interior to define “harm” to an endangered species to include habitat modification.<sup>235</sup>
- The Endangered Species Act also requires that a major dam be halted to save the snail darter.<sup>236</sup>
- Greenhouse gases are “pollutants” under the Clean Air Act.<sup>237</sup>
- The Clean Air Act also forbids the EPA from weighing costs and benefits in setting national ambient air quality standards.<sup>238</sup>
- Similarly, the Supreme Court held that 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’” rules out the use of cost-benefit analysis in setting the standards.<sup>239</sup>
- The Federal Insecticide, Fungicide, and Rodenticide Act does not preempt local regulation of pesticide use—even though, at least in Justice Scalia’s view, the legislative history cuts clearly in favor of preemption.<sup>240</sup>
- The Clean Water Act allows states to impose minimum stream flow requirements on dams.<sup>241</sup>

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statutes intrinsically contain pro-environmental language (a type of environmental textualism) . . .”).

<sup>234</sup> See *supra* note 85 and accompanying text.

<sup>235</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–704 (1995).

<sup>236</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173–74 (1978).

<sup>237</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459–62 (2007).

<sup>238</sup> *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 (2000), rather than the looser standards of Subpart 1, §§ 7501–7509a. See 531 U.S. at 481–86.

<sup>239</sup> *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508–13 (1981) (quoting 29 U.S.C. § 655(b)(5) (2000)). The dissent’s strongest argument to the contrary was based on legislative history. See *id.* at 545–46 (Rehnquist, J., dissenting).

<sup>240</sup> *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 606–10 (1991); *id.* at 616–21 (Scalia, J., concurring in the judgment).

<sup>241</sup> *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 713–15 (1994).

- A dissent argued that tobacco should be able to be regulated by the FDA because it falls within the literal definition of “drug” in the Food, Drug, and Cosmetic Act.<sup>242</sup>

For textualist interpretation that is *clearly* proregulation and intentionalist interpretation that *clearly* goes the other way, the prime example is *Train v. Colorado Public Interest Research Group*.<sup>243</sup> In that case, a unanimous Supreme Court—based on the legislative history, and in direct conflict with the plain meaning of the text—held that radioactive material already regulated by the Atomic Energy Commission is not a “pollutant” under the Clean Water Act.<sup>244</sup>

Of course, these cases by themselves prove little, and clear-cut cases like *Train* are rare.<sup>245</sup> I only cite them for a modest proposition: Textualism is fully capable of generating proregulatory results. The view that textualism is inherently antiregulatory should not be accepted casually. Perhaps, in light of opinions like Scalia’s dissent in *Massachusetts v. EPA*<sup>246</sup> and his plurality in *Rapanos v. United States*,<sup>247</sup> environmentalists are right to be suspicious of *textualists*.<sup>248</sup> Perhaps, however, Lazarus and Newman are also right that environmentalists should be more open to *textualism*<sup>249</sup> if we understand it both as a fruitful source of legal arguments and as a general strategy that can be mandated across the board.

## 2. *Dynamic Effects of Textualism*

The conventional wisdom has an answer to the previous subsection’s argument: Even if textualism does not necessarily lead to a con-

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<sup>242</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161–64 (2000) (Breyer, J., dissenting).

<sup>243</sup> 426 U.S. 1 (1976).

<sup>244</sup> *Id.* at 23–25; *see also supra* text accompanying notes 47–50. 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. Mank, *supra* note 5, at 1277–78.

<sup>245</sup> Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 55 (1989); *see also* Czarnezki, *supra* note 233, at 10 (“Invocations of legislative history can lead to outcomes that both permit and prohibit expansive regulation of environmental and public health, and the same claim can be made regarding invocations of the plain meaning rule and a literal interpretation of the statutory text.” (citation omitted)).

<sup>246</sup> *See* 127 S. Ct. 1438, 1471–78 (2007) (Scalia, J., dissenting) (disagreeing with majority’s broad definition of “air pollutant”).

<sup>247</sup> *See* 547 U.S. 715, 733 (2006) (plurality opinion) (Scalia, J.) (arguing that “transitory puddles” and “ephemeral flows of water” are not within scope of Clean Water Act).

<sup>248</sup> *Cf.* Mank, *supra* note 5 (arguing that textualist interpretation is not best way to approach environmental issues).

<sup>249</sup> Lazarus & Newman, *supra* note 6, at 23.

servative result in any individual case, it still has long-term conservative effects. On this view, textualism has the long-term effect of reducing the quantity of regulation, because it raises the costs to Congress of passing statutes.<sup>250</sup> But this is not necessarily true.

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

1. Do nothing.<sup>251</sup>
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.<sup>252</sup>

If textualists, as Eskridge claims, interpret commands rigidly rather than flexibly even when circumstances have changed, Option 2 may become less attractive to legislators. But the result is not necessarily to make Congress move in the direction of Option 1, which is what an antiregulatory bias would imply. The use of textualism could also lead to an increase in the use of Options 3, 4, and 5.<sup>253</sup>

Moreover, the concern that a textualist judiciary raises the costs of legislation assumes that Congress *prefers* that the judiciary update its statutes. Of course, members of Congress most likely prefer agents who think like they do. But given judges as they are and not as one might wish they were,<sup>254</sup> legislators might well prefer to have rigidity,

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<sup>250</sup> See *supra* text accompanying note 8.

<sup>251</sup> Cf. A.A. MILNE, *THE HOUSE AT POOH CORNER* 80 (Dutton Children's Books 1988) (1928) ("What did you do?" "Nothing." "The best thing," said Owl wisely.").

<sup>252</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989) (discussing Sherman Act and 42 U.S.C. § 1983 as examples of statutes that delegate lawmaking power to courts).

<sup>253</sup> Manning, *supra* note 101, 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; still, textualism would seem to have less of an effect on those than on Option 2.

<sup>254</sup> Cf. J.J. ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE* [THE SOCIAL CONTRACT] (1762), in *ŒUVRES POLITIQUES* 249, 249 (Jean Roussel ed., Classiques Garnier 1989) ("Je veux chercher si, dans l'ordre civil, il peut y avoir quelque règle d'administration légitime et sûre en prenant les hommes tels qu'ils sont, et les loix telles qu'elles peuvent être." ("I wish to inquire whether, in the civil order, there can be some legitimate and sure rule of administration, taking men as they are and laws as they might be.")) (translation by author)); 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." (quoting Defense Secretary Donald Rumsfeld)).

thereby maintaining the original legislative bargain,<sup>255</sup> rather than a dynamism that would create an opportunity for courts to get it wrong. Lawmakers' preferences may also differ as between the statutes that *they* pass (for which they may prefer a static strategy) and the statutes that *previous* Congresses have passed (for which they may prefer a dynamic strategy).<sup>256</sup>

The essentialist wisdom that textualism has a long-term antiregulatory effect is thus questionable.

### 3. *Does Textualism Lead to Congressional Overrides?*

The previous two subsections examined the first piece of conventional wisdom about textualism: its conservative slant, either in direct effect or long-term effect. Now I will briefly discuss the second piece of conventional wisdom noted in the Introduction: Textualist opinions are disproportionately overridden by Congress.<sup>257</sup>

The most comprehensive study of congressional overrides has been done by William Eskridge.<sup>258</sup> Like Justice Stevens<sup>259</sup> and Daniel Bussel,<sup>260</sup> Eskridge concludes that "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.'"<sup>261</sup> He also offers the same explanation as Stevens and Bussel: "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."<sup>262</sup>

However, it is not theoretically clear why textualist opinions should be more likely to be overridden by Congress. For example, even assuming intentionalist premises, suppose that legislative history is an unreliable guide to the "intent" of the enacting Congress.<sup>263</sup>

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<sup>255</sup> See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (arguing that preserving legislative bargains gives participants incentives to invest in legislative process).

<sup>256</sup> See Eskridge & Frickey, *supra* note 2, at 56 (considering how current Congress's desire for courts to respect wishes of enacting Congress varies with age of statute).

<sup>257</sup> See *supra* text accompanying note 9.

<sup>258</sup> Eskridge, *supra* note 3.

<sup>259</sup> See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112–15 (1991) (Stevens, J., dissenting) (listing cases where Congress has repudiated Supreme Court for its literal reading of statutes).

<sup>260</sup> See Bussel, *supra* note 9, at 889, 909 tbl.1, 910 (presenting data showing that textualist decisions are more likely than pragmatic ones to be overridden by Congress).

<sup>261</sup> Eskridge, *supra* note 3, at 348.

<sup>262</sup> *Id.* at 406.

<sup>263</sup> See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 74–75, 129–39 (2000) [hereinafter Vermeule, *Interpretive Choice*] (finding that legislative history is unreli-

There may then be little reason to believe that judges who use legislative history are more likely than textualists to avoid a congressional response. Moreover, even if an approach does successfully identify the intent of the enacting Congress (if it exists), whether that approach is also a good guide to the intent of the current Congress (which is the only intent that matters for congressional overrides) depends on how much the preferences of members of Congress and of the President have changed since enactment.

The same goes for purposivism. Suppose 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 then be little reason to believe that purposivists have any special insight into the minds of either the enacting members or the current members of Congress.<sup>264</sup>

More generally, perhaps “the powerful natural advantages of hindsight”<sup>265</sup>—which, in the minds of some, make courts uniquely able to remedy Congress’s oversights—is just a hindsight bias<sup>266</sup> that is as likely as not to drive courts astray.

If all this is true, then—even though some textualists are apparently insouciant to the threat of congressional overrides (or even welcome them on democratic grounds)<sup>267</sup>—textualism may be no worse at avoiding overrides than other methods. For instance, the observed frequency of overrides of textualist opinions may simply indicate—if there is any truth to the observed (i.e., optional) association of textualism with conservatives—that because textualist decisions tend to be more conservative, they are therefore less likely to appeal to a more liberal Congress. In other words, an observed increase in congres-

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able evidence of intent); 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) (arguing that legislative history should be excluded as evidence of legislative intent).

<sup>264</sup> This is similar to the initial view of Michael Solimine and James Walker, who expected that “cases which engage in more vague reliance on policy goals or interest-balancing [would be] 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). Solimine and Walker did not find empirical support for this hypothesis—on the contrary, they found that textualist decisions were reversed more often. But, as this Section explains, that result can be explained by self-selection considerations (which they did not consider). Thus, their initial intuition may yet be sound.

<sup>265</sup> Bussel, *supra* note 9, at 899.

<sup>266</sup> See generally Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571 (1998) (describing hindsight bias in legal system).

<sup>267</sup> See, e.g., W.O. Douglas, *Legal Institutions in America*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW: THE CENTENNIAL CONFERENCE VOLUME OF THE COLUMBIA LAW SCHOOL* 291–92 (M.G. Paulsen ed., 1959) (“[C]onstant legislative reappraisal of statutes as construed by the courts . . . is a healthy practice.”).

sional overrides could just be a product of data sets taken from a period in which the judiciary was more conservative than Congress.<sup>268</sup>

Some of the authors in this literature have suggested this political explanation.<sup>269</sup> However, they apparently have not 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.

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

Finally, we proceed to a brief discussion of the third piece of conventional wisdom about textualism: It increases the likelihood of finding that a statute has a clear meaning and thus decreases deference to a federal agency under step one of *Chevron*.

The previous discussion—in particular, the depictions of the mandatory and optional distributions<sup>270</sup>—has assumed that judges are deciding the rule of law on their own. However, for regulatory statutes, judges decide the rule of law only if they find the statute unambiguous at step one of the *Chevron* inquiry.<sup>271</sup> The *Chevron* framework has been widely described as having an indeterminacy all its own, potentially allowing judges to rule against agencies whose

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<sup>268</sup> As Adrian Vermeule puts it, one cannot use “data about rates of congressional override of textualist decisions in a world in which there are *both* textualist *and* nontextualist decisions” and then “extrapolate[ ] from those data to evaluate the textualist proposal that judges ought to move to a world in which *all* decisions are textualist.” Vermeule, *Interpretive Choice*, *supra* note 263, at 105. However, Vermeule offers a different reason than I do as to why the extrapolation is wrong: Congress may actually act differently if it knows that all judges are textualist. *Id.*

<sup>269</sup> See, e.g., Bussel, *supra* note 9, at 901 (“Statutory overruling indicates that the law as interpreted does not meet present political and policy goals . . . .”); Mank, *supra* note 5, at 1273 (noting “Professor Eskridge’s thesis” that overrides resulted “from conflict between a conservative president and Supreme Court on one hand and an increasingly liberal Congress on the other” (citing Eskridge, *supra* note 3, at 395–96; Eskridge, *supra* note 62, at 616–17)). For a discussion of how the political divergence between the Supreme Court and Congress resulted in a series of legislative overrides, see Solimine & Walker, *supra* note 264, at 435 (citing Eskridge, *supra* note 3, at 377–89; Eskridge, *supra* note 62, at 616–17). For a discussion of how textualism is equated with formalist and conservative political theory, see Eskridge, *supra* note 3, at 405–06, and William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646–50 (1990).

<sup>270</sup> See *supra* Figures 7, 11.

<sup>271</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). In principle, judges can also decide the rule of law negatively, by holding at step two that an agency’s interpretation of the statute is unreasonable, but this rarely happens. Seidenfeld, *supra* note 141, at 96; 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).

interpretations they disagree with by “finding” a contrary plain meaning.<sup>272</sup>

Five years after *Chevron*, Justice Scalia famously wrote that, as a textualist, he was more likely than an intentionalist to find that a statute had a plain meaning at step one of *Chevron*.<sup>273</sup> Some scholars (though not all) have tended to confirm Scalia’s intuition.<sup>274</sup> But the self-selection model might make us doubt this conventional wisdom.

Theoretically, there is no clear reason why textualists should be more likely than practitioners of other methods to find that a statute has a plain meaning. Textualism may in fact turn out to be more determinate, but it also might not.<sup>275</sup> For instance, the legislative history could, in theory, lead to a more determinate outcome by speaking to an issue not covered in the text.<sup>276</sup> The purpose of the statute

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<sup>272</sup> Cross & Tiller, *supra* note 65, at 2164 (citing Merrill, *supra* note 141, at 992; Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1069–70 (1995)). For a discussion of *Chevron*’s effect on appellate court decisions, see *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, 991; Shapiro & Levy, *supra*, at 1070–71), Czarnezki, *supra* note 233, at 8–9 (citing *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995), as case where both sides of Court thought statute was unambiguous but reached opposite conclusions), and Kerr, *supra* note 140, at 10–13. In practice, agency action is rarely struck down as unreasonable under the deferential step two. Czarnezki, *supra* note 233, at 10–11.

<sup>273</sup> See *supra* notes 14–17 and accompanying text; see also Mashaw, *supra* note 33, at 833 (noting Justice Scalia’s firm attachment to plain-meaning approach in *Chevron* cases); cf. Lazarus & Newman, *supra* note 6, at 22 (suggesting that Justice Breyer’s receptivity to legislative history makes him less inclined to find “plain meaning”).

<sup>274</sup> See, e.g., Kerr, *supra* note 140, at 14 n.70 (citing authors who agree with Justice Scalia’s conclusion that textualist judges defer to executive interpretations less often than others); Mank, *supra* note 5, at 1266, 1275 & n.235 (finding that textualists believe they seldom need to defer to agency interpretations because they usually find clear meaning in the text); Pierce, *supra* note 20, at 754–63 (considering cases where courts used “plain meaning” to ignore evidence of different congressional intent). As noted above, some scholars disagree with Scalia’s contention. See, e.g., Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 393–95 (1996) (discussing scholarly debate over whether textualism leads to more deference or less); Mank, *supra* note 5, at 1275 & n.236 (citing authors who claim that legislative history is more likely than text to address specific issues); see also ESKRIDGE, *supra* note 54, at 329 n.78 (citing authors who find that post-*Chevron* Supreme Court has not deferred enough). For a mixed view, see Merrill, *supra* note 20, who argues that while textualism was on the rise as of 1994, *Chevron* was on the wane. *Id.* at 363. However, among *Chevron* cases, more were being decided at step two and fewer at step one. *Id.* at 361.

<sup>275</sup> See *supra* notes 19, 139–40 and accompanying text.

<sup>276</sup> See sources cited *supra* note 141. Indeed, Thomas Merrill describes how the shift from a free-wheeling inquiry into congressional intent at step one in the early *Chevron* era to a textualist search for “plain meaning” in *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988), resulted in less deference to agencies. He notes that, by itself, such a shift to textualism could have resulted in “even greater deference . . . because Congress has undoubtedly

might likewise be plain, even though the language of the statute is ambiguous.

As noted above, there is also 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.<sup>277</sup> However, there is no theoretical reason for this to be true either: Historical researchers might well view their task as a puzzle, marshaling evidence to find the true intent of Congress, while textualists could view their task as linguistic research, reconstructing the textured, nuanced, and often contradictory meanings of texts by drawing on different pieces of semantic evidence.

If one is to adopt a theoretical reason for supposing that textualism is more likely than other approaches to find a plain meaning, it must be because that reason explains the facts on the ground—that textualist opinions in fact find a plain meaning more often. 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 accepting that some judges select interpretive methods at least partly by ideology—a plausible theory explaining the apparent determinacy of textualism is that textualist judges, who are on average more conservative, have systematically disagreed more often with agency interpretations, and have therefore found a plain meaning in order to substitute their more conservative understanding of the statute for the agency's.<sup>278</sup> This phenomenon, being a product of self-selection, might disappear if all judges were forced to use textualism.

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'spoken to' fewer issues in text than it has through some combination of textual and nontextual sources." Merrill, *supra* note 141, at 991.

<sup>277</sup> See *supra* note 20 and accompanying text.

<sup>278</sup> Pierce, *supra* note 20, at 773–76, 779–81 (arguing that Supreme Court used textualism to implement conservative agenda); *cf.* Frickey, *supra* note 140, at 214–15 (stating that judges who do not like plain meaning of text find ways to say that text is ambiguous). Cohen and Spitzer propose a more complicated story, though theirs does not explicitly incorporate theories of statutory interpretation: The Supreme Court adopted *Chevron* in 1984 because both it and the administrative agencies had become more conservative than the appellate courts. However, by 1988 (when, according to Merrill, *supra* note 141, at 992, the textualist shift to antideference occurred) the appellate courts had become more conservative, so it was safe to unleash greater judicial review. Cohen & Spitzer, *supra* note 62, at 68. Cohen and Spitzer (in 1994) predicted reduced deference to Clinton-era agencies, *id.* at 108–09, a prediction that seems to have been borne out.

### III 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 scatter-brained nature-boy with no sense of form.

— Friedrich Dürrenmatt<sup>279</sup>

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, given this model, to adopt a consistent interpretive method from case to case. Obviously, if you, or others in the judicial system, have preferences about interpretive methods<sup>280</sup> or believe in consistency for a non-pragmatic reason,<sup>281</sup> that could be enough to make you consistent across all cases. However, if you care solely about pushing an agenda, you should instead 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.

This methodless method may actually be the same as “pragmatic” statutory interpretation, since pragmatism explicitly advocates using whatever method seems most appropriate in each case.<sup>282</sup> The model presented thus far may then explain the popularity of today's leading method of statutory interpretation.<sup>283</sup> 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.

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<sup>279</sup> 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.”) (translation by author).

<sup>280</sup> See, e.g., Ferejohn & Weingast, *supra* note 11, at 265–66 (noting that judges may prefer either procedurally based or substantively based jurisprudence); Ferejohn & Weingast, *supra* note 34, at 567 (investigating choice of judicial review strategies within political model).

<sup>281</sup> See Fallon, *supra* note 39, at 573 (“The ideal of judicial reason, as distinct from power or will, implies an obligation of methodological integrity.”).

<sup>282</sup> See Schanck, *supra* note 103, at 2589–90 (describing legal pragmatism).

<sup>283</sup> See Eskridge & Frickey, *supra* note 2, at 57 (noting that Supreme Court traditionally takes pragmatist approach to statutory interpretation); see also Merrill, *supra* note 20, at 351 (“For most of our history, American judges have been pragmatists . . .”).

At first glance, this seems plausible: Many interpretive methods, at least the big-picture ones, seem to have no precedential effect.<sup>284</sup> But if the use of a method today makes it more likely that the method will be used in the future (either by you or by other judges), we could say that the use of interpretive methods has a “soft” precedential effect.<sup>285</sup>

In the presence of such soft precedent, case-by-case opportunism may be insufficiently strategic.<sup>286</sup> If you really could alter other judges’ behavior, you would want to take that into account in deciding cases. Rather than being a “myopic opportunist,”<sup>287</sup> you may prefer to bind yourself to a single theory that you *usually* like<sup>288</sup> so that you can consequently bind *other judges*—who do not necessarily share your ideological views—to use that theory.<sup>289</sup> In fact, you may especially put a premium on the determinacy of the method if you do not trust other judges.

Conversely, if your use of a method ends up somehow binding *you* in future cases, you may still prefer to bind yourself to a single theory that you usually like; however, you may prefer that the theory be as *indeterminate* as possible, so as to keep your options open for the future. The use of a method may have both effects—it may bind both you and other judges—in which case these two considerations will compete with each other.<sup>290</sup>

The following Part conveys “good news” and “bad news.” The good news, presented in Section A, is that there may be some reason

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<sup>284</sup> See *supra* notes 164–71 and accompanying text.

<sup>285</sup> See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949) (noting that legal reasoning is about reasoning by example); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992) (discussing process of “reasoning by example”); Miceli & Cosgel, *supra* note 59, at 33 (arguing that judges are constrained by existence of judicial community and applicable precedents).

<sup>286</sup> See Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 607–08, 611, 614–16, 627 (2005) (distinguishing “maximizing,” “optimizing,” and “satisficing” strategies).

<sup>287</sup> This is what Vermeule calls “maximizing.” See *id.* at 607–08.

<sup>288</sup> I assume here that your own preferences are stable over time. However, individual preference change is potentially important. See Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the US Supreme Court*, 23 J.L. ECON. & ORG. 365, 366 (2007) (demonstrating by empirical analysis that revealed preferences of Supreme Court Justices vary over time).

<sup>289</sup> If you are risk averse, you would even prefer binding everyone to a theory that is not your absolute favorite rather than sticking with the high-variance, free-interpretive-choice status quo, as long as that theory is not *too* bad for you. See *supra* text accompanying notes 184–86.

<sup>290</sup> All this is, of course, true a fortiori for interpretive methods that really are considered precedential, like certain canons, the rule of lenity, or the *Chevron* doctrine. See *supra* notes 166–68 and accompanying text.

to believe that interpretive methods can be self-entrenching in this way. Other things being equal, the use of a method today makes it more likely that the method will be used in the future.

The bad news, presented in Section B, is that, except in exceptional cases, this effect is probably rather 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 does not suit them, there is little reason for them not to deviate from textualism in those cases. 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 the imposition of a single interpretive method but nonetheless to choose not to 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 will be used more widely in the future? Most obviously, other judges could tend to perpetuate methods from previous cases because they believe in the common law ideal of reasoning based on analogy.<sup>291</sup> 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 listeners become more confident that the statement is true, whether or not it actually is.<sup>292</sup> This “illusory truth effect” has been confirmed repeatedly.<sup>293</sup> In addition,

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<sup>291</sup> See, e.g., LEVI, *supra* note 285, at 1–2.

<sup>292</sup> Lynn Hasher et al., *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAVIOR 107, 108 (1977); cf. LEWIS CARROLL, *THE HUNTING OF THE SNARK* 3 (Martin Gardner ed., W.W. Norton & Co. 2006) (1876) (“Just the place for a Snark! I have said it thrice: What I tell you three times is true.”).

<sup>293</sup> E.g., Ian Maynard Begg et al., *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCHOL.: GEN. 446, 446 (1992); 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, 801 (2005); Kimberlee Weaver et al., *Inferring the Popularity of an Opinion from Its Familiarity: A Repetitive Voice Can Sound Like a Chorus*, 92 J. PERSONALITY & SOC. PSYCHOL. 821, 827 (2007).

repeated use of an interpretive method by prominent jurists may increase its use by future jurists because of the “source credibility effect.”<sup>294</sup>

Thus, to the extent that textualism is in the ascendancy, it may be because of the influence—and persistence—of prominent textualist advocates like Scalia and Easterbrook.<sup>295</sup> When they advocate textualism in a law review article or use it in a case, they make it more available to readers of the case, who are then more likely to see it as a plausible method;<sup>296</sup> they also educate their readers about how to use the method. As noted above, these phenomena may be even more important in the judicial process—which expressly venerates reasoning by analogy and example—than in other spheres.

Even without appealing to explanations based on psychological biases or the nature of the common law, we can speculate on whether one can explain the self-entrenching character of interpretive methods by reference to the rational-choice model of judges’ preferences discussed earlier.<sup>297</sup> For instance, if judges dislike being reversed, they will be more likely to use a more common method, because a common method may attract less attention and is therefore more likely to withstand appellate review and congressional scrutiny. They will be willing to adopt positions that diverge, to some extent, from their own preferences, in order to reduce the probability of being reversed or overridden.

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.<sup>298</sup> Judges, argues Duncan Kennedy, strive for an opinion that is “neat[ ]” or “elegant[ ],” meaning that it is written “at a minimum expenditure of . . . something.”<sup>299</sup> That “something” is their “legal and political credibility,” or their “stock of legitimacy,” which is more at stake whenever they

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<sup>294</sup> See Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635, 647, 650 (1951) (subjects of experiment altered opinions to conform to those expressed by “trustworthy” but not “untrustworthy” sources).

<sup>295</sup> See Bussel, *supra* note 9, at 893; Nathan Oman, *Statutory Interpretation in Econotopia*, 25 PACE L. REV. 49, 70 (2004); Merrill, *supra* note 20, at 363, 365.

<sup>296</sup> This tendency of the use of a method to foster its use in the future by making it more acceptable is 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).

<sup>297</sup> See *supra* Part I.

<sup>298</sup> See Schanck, *supra* note 103, at 2587–88 (citing Kennedy, *supra* note 59, at 527); cf. Note, *Originality*, 115 HARV. L. REV. 1988, 2002–04 (2002) (noting premium placed on “unoriginality” in opinion writing).

<sup>299</sup> Kennedy, *supra* note 59, at 544.

do something unusual, whether it is ruling on the basis of a dubious legal foundation or overruling precedents with impunity.<sup>300</sup>

Arguments based on more conventional legal theories are thus “not much work”; “[g]oing along [is] costless in terms of legitimacy.”<sup>301</sup> In fact, judges may go along with the obvious legal answer because of an “opportunistic interest in avoiding controversy.”<sup>302</sup> Crafting arguments that seem to cut against the grain, on the other hand, is “hard, scary, and time-consuming.”<sup>303</sup>

Kennedy’s invocation of “hard” and “time-consuming” work recalls the earlier discussion of judges’ work-aversion, or, more charitably, constraints on their time and effort.<sup>304</sup> In Posner’s terms, an “aversion to any sort of ‘hassle,’”<sup>305</sup> or the desire not to work hard,<sup>306</sup> makes judges want to avoid responsibility by insisting that “their decisions are coerced by ‘the law.’”<sup>307</sup> Because work-averse judges would prefer to avoid having to “consider[ ] every case afresh,” relying on previously used methods allows them to work less and to shift blame to earlier judges.<sup>308</sup> I have noted that judges can use legal doctrine as a “decision heuristic that preserves precious time and limited resources of courts.”<sup>309</sup> But there is no reason why this effect 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 statutes similar to it have already been interpreted that way.<sup>310</sup> Thus, the fact that an interpretive method was used previously in a similar case can exert pressure on a judge to follow the same method in his own case.

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<sup>300</sup> *Id.* at 528–29, 537.

<sup>301</sup> *Id.* at 528–29.

<sup>302</sup> *Id.* 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) (noting that invoking canons of construction provides “cloak of legitimacy” and appearance of neutral decision).

<sup>303</sup> Kennedy, *supra* note 59, at 528.

<sup>304</sup> See *supra* text accompanying notes 126–30.

<sup>305</sup> Posner, *supra* note 126, at 20.

<sup>306</sup> Cohen, *supra* note 114, at 187.

<sup>307</sup> Posner, *supra* note 126, at 20; see also *id.* at 39 (listing hassle-reduction measures taken by Justices).

<sup>308</sup> See *id.* at 22.

<sup>309</sup> Jacobi & Tiller, *supra* note 22, at 330 (citing H.W. PERRY, *DECIDING TO DECIDE* (1991)); *supra* text accompanying note 71.

<sup>310</sup> This tendency of the use of a method to foster its use in the future by making the method less burdensome is an example of a “cost-lowering slippery slope.” See Volokh, *supra* note 296, at 1039–48. A cost-lowering slippery slope differs from an attitude-altering slippery slope, see *supra* note 296: In the first, repeated use makes people choose a method because it is easier to use, even if their attitudes have not changed at all; however, in the latter, repeated use makes people choose a method because they actually believe it is better to use.

Even if a judge does not believe his own rhetoric, he might “learn by doing” and thus become more expert at using the methods he has used in the past. Moreover, if people notice that he usually uses one method, his use of another method—even one that is widespread—might attract unwanted attention.

Judges might also achieve direct benefits from following a consistent strategy: A judge might want to signal his intellectual honesty to other judges, which may make them more willing to go along with his opinions. Consistency may enhance his promotion prospects as his potential promoters will have a better sense of his judicial style and perspective. I mention these hypotheses only briefly; though they may be empirically significant, I am not certain whether they can also be made to work in a fully results-oriented rational-choice model.<sup>311</sup>

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

The more that present methods constrain future cases, the more long-term your thinking about interpretive methods is likely to be. This is the case whether you are a strategic 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 would not compare the utility of different interpretive methods in this case alone; rather, you would compare the utility of different methods over all cases simultaneously. The current case has no particular significance except insofar as the current case is happening now, and because of time preference, you weight current results more strongly than future results.

This 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 purposivism best in still others, perhaps determining which theory best serves your agenda is just too difficult—especially considering that the set of statutes to be interpreted, the political parties in power, and the biases of judges will change over time. Ex ante, then, any theory may be just as good as any other.<sup>312</sup>

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<sup>311</sup> For instance, it is not clear whether showing consistent methodological tendencies is really an effective promotion strategy, compared to simply showing a particular political bias. See Cohen, *supra* note 114, at 190 (noting that judges whose ideologies are known are more likely to be promoted).

<sup>312</sup> See Pierce, *supra* note 20, at 781 (implying that hypertextualism is unlikely to further any substantive ideological agenda over time); Vermeule, *Interpretive Choice*, *supra* note

But this is not necessarily so, because there can still be systematic differences among methods, especially in a particular substantive field—say, environmental policy.<sup>313</sup> Static interpretive methods, like textualism and intentionalism, may tend to implement the views of members of the enacting Congresses, and therefore may 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 that if judges tend to have particular biases, a dynamic strategy may tend to enshrine those views.<sup>314</sup>

Granted, statutes change—for instance, the next generation's environmental statutes may be more likely to enshrine cost-benefit analysis. Thus, the strategically optimal interpretive method may vary over time.<sup>315</sup> But major statutes change slowly. So does the composition of the judiciary. In any event, given the difficulty of predicting too far in advance, and given judges' time preferences, it might be worthwhile today to have an interpretive method that is desirable for this generation while letting the next generation's citizens and judges struggle 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 are interested in. This is not an all-or-nothing proposition. Only in the extreme case—where today's method completely constrains tomorrow's cases—do you have

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263, at 77 (“The critical questions are in many instances trans-scientific (meaning that they are empirical but intractable) . . .”); *id.* at 79 (arguing that uncertainty cuts in favor of formalist strategies); *id.* at 105–07 (noting that judges must choose interpretive methods in conditions of empirical uncertainty about effects of interpretive choice).

<sup>313</sup> See, e.g., *supra* Part II.B.1. 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, Barkow, *supra* note 94, at 1074–75, cost-benefit analysis can systematically downplay the importance of nonmonetizable factors, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 40 (2004), the interest-balancing approach in Article I tribunal cases can systematically disfavor the speculative-seeming importance of structural separation-of-powers concerns, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 863–64 (1986) (Brennan, J., dissenting), and 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* [What Is Seen and What Is Not Seen] (1850), translated in SELECTED ESSAYS ON POLITICAL ECONOMY 1 (George B. de Huszar ed., Seymour Cain trans., Van Nostrand Co. 1964).

<sup>314</sup> See *supra* note 225 and accompanying text.

<sup>315</sup> Cf. Fallon, *supra* note 39, at 568–70 (“As changes occur, the constitutional theory that would work best to satisfy the relevant criteria in one era may not work best in another.”).

to think in terms of theories. If today's methods fail to affect tomorrow's at all, strategic opportunism collapses into myopic opportunism: You are best served by just choosing methods one 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 particular case to the loss from weakening the overall optimal theory for the future. So myopia can be justified for very important cases, where the gain from achieving your preferred result is large. The "very important" threshold is defined by how strong the theory-reinforcing effect is.<sup>316</sup>

### B. Strategic Consistency and the Collective Action Problem

#### 1. For the Judge

Nonetheless, the extent to which an individual judge's methods constrain other judges in future cases is probably relatively weak, even if one aggregates the work of his entire career. Therefore, it will almost always be optimal for the agenda-driven judge to use the theory that is optimal for him in any given case.

Some judges may have a disproportionate influence on other judges. Justice Scalia, for instance, by claiming to refuse to consider nontextualist 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.<sup>317</sup> Since judges usually use only the argu-

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<sup>316</sup> 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. Cf. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 880 (1993) ("[A hypothetical rules committee] might decide that different sets of rules [for judicial behavior] would apply to different periods." (citing Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 819–20 (1993))); Sunstein, *supra* note 140, at 669 ("Formalism may be good for the judiciary but bad for the administrative state . . ."). Whether you should seek different methods in those fields then depends on how compartmentalizable the fields are; that is an empirical question dependent on how judges actually go about deciding those cases.

<sup>317</sup> See Frickey, *supra* note 140, at 203 ("[Even a] practitioner in the lower federal courts [is] likely to encounter a fair number of judges who [find] Scalia's [interpretive] arguments persuasive, and a greater number who [pay] heed to them, if only to avoid being reversed."); Pierce, *supra* note 20, at 752, 762. In any event, lower-court judges may not want to lose Scalia's sympathy unnecessarily, nor do Scalia's colleagues want him to dissent from part of their opinion. Brudney and Ditslear have described this as the "Scalia effect." Brudney & Ditslear, *supra* note 99, at 56–63. *But see id.* at 63–65 (explaining that Scalia may give a free ride to conservative colleagues who use legislative history to respond to use of legislative history by liberals).

ments that are made in the briefs, this nontrivially increases the chance that an opinion will end up relying solely on textual evidence. Other judges who are high-profile and have a talent for popularizing their views may also have a disproportionate effect.<sup>318</sup>

Overall, the incentives for a judge to have a constraining 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. Maybe 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 is not to their immediate advantage.<sup>319</sup> Thus, no judge suffers for deviating from textualism in cases where it fails to 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 were to come up—but (until that happens) not to follow textualism consistently in the cases that come before him.<sup>320</sup> A judge may still be pushed to adopt *some* theory, to the extent that his methods constrain *him* in future cases. However, it is unclear whether judges suffer to any significant extent because of methodological inconsistency. To the degree that a judge feels any constraint at all on this score, he can easily adopt a minimally constraining theory—a pragmatic approach that allows him to deviate as little as possible from the results he likes without facing the charge of inconsistency.<sup>321</sup>

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<sup>318</sup> Two judges who have had a particularly large impact are Frank Easterbrook of the Seventh Circuit and Alex Kozinski of the Ninth Circuit. For representative publications, see Easterbrook, *supra* note 7, Easterbrook, *supra* note 19, Easterbrook, *supra* note 60, Easterbrook, *supra* note 103, Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990), and Kozinski, *supra* note 23.

<sup>319</sup> See Vermeule, *supra* note 113, at 552 (“That a given approach would be best for the whole court or judiciary does not entail that it would be best for any given judge taken alone.”).

<sup>320</sup> Compare, e.g., Kozinski, *supra* note 23, 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. Court*, 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 . . .”).

<sup>321</sup> See *supra* text accompanying notes 282–83.

## 2. For the Litigator

The collective action problem also affects how you act according to your favorite interpretive method if you are a litigator. Because methods that 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 is the method most helpful to your whole agenda). You would be willing, though, to deviate from it in “important enough” cases, as described above for judges.<sup>322</sup>

However, because your effect on future judges will likely be slight, your presumptive position in favor of your favorite theory will also be 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 are a frequent and strategic litigator.<sup>323</sup> To the extent that people care if you, as a litigator, are inconsistent from case to case, this could put pressure on you to adopt a theory of some sort. But, as described above for judges, you could satisfy this pressure by adopting a minimally constraining one.

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.<sup>324</sup>

Thus, even though a judge may be willing to argue for a judicially imposed or statutory rule of interpretation mandating a particular restrictive interpretive method, it makes sense for him not to feel bound to use that method consistently. Similarly, a litigator can support a method as optimal over the whole class of cases he is interested in, while not incorporating it into a particular litigation strategy. There is thus no necessary connection between the positions taken

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<sup>322</sup> See *supra* text accompanying note 316.

<sup>323</sup> People might not be willing to lose cases strategically in service of their theory because of “the distorting force of particulars,” i.e., salience bias. See Vermeule, *supra* note 286, at 627–28.

<sup>324</sup> See, e.g., Phil LaPadula, *Gay Groups Ask Court To Toss Out Marriage Lawsuit*, WASH. BLADE, Jan. 27, 2006, at 23, available at <http://www.washblade.com/2006/1-27/news/national/lawsuit.cfm> (“Gay rights lawyers . . . fear the case [brought by a gay couple seeking the right to marry] could bolster efforts to add a gay marriage ban to the U.S. Constitution.”); 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*, NAT’L REV. ONLINE, Sept. 23, 2003, <http://www.nationalreview.com/kopel/kopel200309230925.asp> (charging that pro-Second Amendment litigator has “seriously harmed Second Amendment rights”).

with respect to a particular interpretive strategy when one is acting in different roles.

### 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 . . . .

—Justinian<sup>325</sup>

Throughout this Article, I have assumed a strategic actor interested in pursuing his agenda: in some cases, an ideologically motivated judge opportunistically choosing interpretive methods in individual cases (or over a range of cases), and in other cases, an ideologically motivated judge, legislator, or organization deciding whether to mandate (or advocate) a particular interpretive method. As I have intimated above, 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.<sup>326</sup>

This may be a valid concern. But I have made 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,<sup>327</sup> so this results-based orientation not only probably describes many judges but also (on some views) may even be morally neutral.

Still, there is reason to doubt the widespread intuition that a judge should be substantively neutral. 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,”<sup>328</sup> and not in Holmes's merely descriptive sense of “[t]he prophecies of what

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<sup>325</sup> J. INST. prooemium 2 (J.B. Moyle trans.).

<sup>326</sup> See *supra* notes 38–39 and accompanying text.

<sup>327</sup> See *supra* note 155 and accompanying text.

<sup>328</sup> MASS. CONST. pt. 1, art. XXX; John Adams, *Novanglus* No. 7, in 4 THE WORKS OF JOHN ADAMS 99, 106 (photo. reprint, Books for Libraries Press 1969) (Charles Francis Adams ed., 1851); see also ARISTOTLE, POLITICS 3.11.1287a17–19, at 262–65 (H. Rackman trans., rev. ed. 1944) (“τὸν ἄρα νόμον ἄρχειν αἰρετώτερον μᾶλλον ἢ τῶν πολιτῶν ἕνα τινά.” (“Therefore it is preferable for the law to rule rather than any one of the citizens.”)); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (1656), reprinted in THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 35 (J.G.A. Pocock ed., Cambridge Univ. Press 1992).

the courts will do in fact.”<sup>329</sup> 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,<sup>330</sup> liberal-minded judges in Nazi Germany,<sup>331</sup> antiwar judges facing draft evaders,<sup>332</sup> anti-abortion judges having to sentence nonviolent abortion protesters,<sup>333</sup> and judges of a variety of persuasions having to mete out draconian sentences under mandatory minimum laws and insufficiently flexible sentencing guidelines<sup>334</sup> have all had to come to terms with the conflict between their views of justice and the rule of law. Some of these judges applied laws that they felt were unjust; some found “legitimate” ways to avoid the application of the unjust law; some resigned; and some—to put it bluntly—lied.<sup>335</sup> 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.<sup>336</sup>

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

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<sup>329</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); see also Eskridge & Frickey, *supra* note 2, at 30 (“[L]aw is a prediction of the rules that interacting government institutions will apply.”).

<sup>330</sup> See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 147–51 (1860), reprinted in 4 *THE COLLECTED WORKS OF LYSANDER SPOONER* (photo. reprint) (Charles Shively ed., 1971) (arguing that even judge “who has sworn to support an unjust constitution . . . is bound to retain and use [the office] for [the] defence [of people’s rights]”); Paul Butler, *When Judges Lie (And When They Should)*, 91 MINN. L. REV. 1785, 1787–90 (2007) (exploring “the dilemma of abolitionist judges forced to interpret the law of slavery”).

<sup>331</sup> See Kozinski, *supra* note 79, at 1102 (noting that “the German judges who enforced the Nuremberg laws” claimed that they were “simply applying the law”).

<sup>332</sup> See Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1005–06 (1968) (bemoaning that, as of 1968, federal judiciary had “remained faithful” to “immoral law” with respect to draft resisters).

<sup>333</sup> See *United States v. Lynch*, 952 F. Supp. 167, 171 (S.D.N.Y. 1997) (exercising “the prerogative of leniency” for religiously motivated, peaceful protesters charged with criminal contempt for blocking access to abortion clinic).

<sup>334</sup> See Joanna Shepherd, *Blakely’s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 558–60 (2007) (suggesting that judges often circumvent federal sentencing guidelines when mandated range “seems inadequate or too harsh”).

<sup>335</sup> See, e.g., Butler, *supra* note 330, at 1788 (“[Justice Joseph] Story was an abolitionist, but in *Prigg v. Pennsylvania* he wrote an opinion invalidating a Pennsylvania law that established procedural protections for people who had been kidnapped by slave-catchers.”); *id.* at 1791–92 (describing as “creative judging” district court judge’s refusal to credit, for sentencing purposes, some of defendant’s prior convictions, which judge believed resulted from racial profiling); *id.* at 1796 (“Commentators have used the [O.J.] Simpson suppression hearing as an example of the willingness of judges to subvert the law in criminal cases in order to thwart application of the exclusionary rule.”).

<sup>336</sup> For an excellent recent treatment of the subject, see Butler, *supra* note 330, at 1817–27 (proposing, and justifying, “a moral theory of subversion”).

conclusions of this Article still hold as long as at least some judges in fact do so.

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This Article has aimed to contribute to the existing literature on 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 their taste for a specific theory of interpretation—and would do so if they did not 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 seem to 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 judge) deciding on policy for the whole judiciary. Many of the articles making such arguments are judge-centered and ignore everyone else’s choice of theories,<sup>337</sup> but to the extent that they advance normative arguments for some interpretive theory without explicitly distinguishing between the different contexts in which these arguments can be made, they seem to assume that the best theory for 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, need not bear any relation to whether one should support practitioners of the theory today. In a world of free methodological choice, those practitioners may just be showing their political biases. Similarly, whether one likes a theory need not 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 many doctrinal areas into account.

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<sup>337</sup> See, e.g., Manning, *supra* note 31 (discussing textualism and purposivism in context of judicial interpretation).

Further, 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 best suits one’s substantive agenda—may therefore 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).<sup>338</sup> One might then choose no method at all, or commit oneself to a method on some other ground, like democratic or constitutional theory.<sup>339</sup>

But assuming that it is possible to 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 reconsider their consistency. I do not suggest that a foolish consistency is the hobgoblin of little minds, but, as an economist, I suggest (less eloquently) that an unexamined consistency may be individually suboptimal.

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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 textualism 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, optional textualism. Rather, essentialist theories may be most promising in explaining what *mandated* textualism (and other theories) could look like. Such exploration will be useful in discussing the merits of proposed alternate Federal Rules of Statutory Interpretation or in explaining the Platonic ideal of textualism, that is, its most plausible point and implausibility costs.<sup>340</sup>

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<sup>338</sup> See *supra* notes 312–14 and accompanying text.

<sup>339</sup> I had assumed that these considerations were “relatively unimportant,” but deciding that the substantive issues are a wash would allow them to come to the fore. See *supra* text accompanying note 37.

<sup>340</sup> See *supra* note 177 and accompanying text.

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.<sup>341</sup> For instance, just as textualism might, surprisingly, be better than is commonly assumed for a proregulatory agenda, originalism may be better for (non-capital) criminal defendants.<sup>342</sup>

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 does not 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.<sup>343</sup> 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.<sup>344</sup>

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.

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<sup>341</sup> Cf. Scalia, *supra* note 16, at 37 (“[T]he usual principles are being applied to an unusual text.”).

<sup>342</sup> Barkow, *supra* note 94, at 1072.

<sup>343</sup> See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001) (“[T]hrough most of our history, the amendment process has not been an important means of constitutional change.”); see also Vermeule, *supra* note 113, at 573 (arguing that because “amendments are rare events . . . adopting interpretive doctrines with a view to their deliberation-forcing effects on constitutional drafters would be pointless”).

<sup>344</sup> See Solimine & Walker, *supra* note 264, at 427 n.3 (providing examples of congressional responses to constitutional interpretation by Supreme Court); Vermeule, *supra* note 113, at 573–74 (suggesting that Supreme Court may decide cases in ways that “encourage congressional factfinding, and perhaps even deliberation of a certain kind and quality”).

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 research. Similarly, one should investigate empirically how much of Congress's propensity to override judicial decisions stems from the judge's politics and what residual effect may be explained by the interpretive theory itself. 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 one 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?<sup>345</sup>

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 as to how they

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<sup>345</sup> Such empirical testing may be non-trivial. Heckman and Honoré, for instance, point out the pitfalls of trying to identify true relationships in the Roy model, the self-selection model of wage distribution discussed above. Heckman & Honoré, *supra* note 182, at 1122–23, 1133–34; *see supra* note 182. There are also other ways to determine true relationships in the presence of self-selection, for instance by using propensity scores, *see* Paul R. Rosenbaum & Donald B. Rubin, *The Central Role of the Propensity Score in Observational Studies for Causal Effects*, 70 *BIOMETRIKA* 41 (1983), but the bottom line is that empirically correcting for selection bias can be difficult. *See generally* James Heckman, *Varieties of Selection Bias*, 80 *AM. ECON. REV.* 313 (1990). Another empirical method would be to observe decisions before and after a change from an optional regime to a mandatory one, and vice versa—for example, before and after the announcement of either the *Chevron* rule, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), or the clear-statement rule for abrogating states' sovereign immunity, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). However, even if there is enough data, such studies also run into a case-selection problem. After the rule is announced, different cases appear to be worth litigating, so different cases are brought. *Cf. Cohen & Spitzer, supra* note 62, at 91 (suggesting that “administrative agencies may adjust their behavior by bringing different cases” after Supreme Court “adjusts deference with a *Chevron*-type doctrine”). This case-selection bias could be substantial. The problem may be partly alleviated by limiting one's attention to cases that had already been filed when the rule was announced, though that significantly limits the amount of data at one's disposal.

*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.