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Khurram T. Dara

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Originalism, and its Effects on Judicial Decision-Making and the Attitudinal Model

by

Khurram T. Dara

Jeffrey K. Staton  
Adviser

Department of Political Science

Jeffrey K. Staton  
Adviser

William Shapiro  
Committee Member

Allison Burdette  
Committee Member

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Khurram T. Dara

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## Abstract

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For decades, an independent judiciary has been shown to have many empirical benefits to society. Impartiality has been shown to affect these benefits. Certainly, the way by which Supreme Court justices decide cases influences impartiality. The attitudinal model holds that U.S. Supreme Court justices decide cases based on ideological preferences. But what if certain methods of judicial interpretation influence the extent to which ideological preferences play a role in the judicial decision-making process? I argue that the use of originalism as a judicial interpretive method attenuates the relationship between a justice's preferences and their vote direction. Using a probability model, we study the affect of my unique "Originalism Score" on the attitudinal model.

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## Introduction

A considerable line of research in law and social science finds that the decisions of Supreme Court justices in constitutional cases are influenced by political ideology (Segal and Spaeth 1993). Of course, there is also considerable evidence that justices are guided by legal methods of interpretation when they consider constitutional questions (Ginsburg 2010). At least in a formal sense, constitutional review is different from routine political debate because interpretive approaches constrain the facts judges deem relevant, the rules they construct and the arguments they make in support of those rules. Critically, both legal scholars and the justices themselves claim that these methods bear on the connection between ideology and judicial decisions (Segal and Spaeth 1993). In this study, I evaluate the extent to which the use of one interpretive method, originalism, affects the relationship between Supreme Court justices' ideological preferences and their rulings. Using existing data on the ideology of Supreme Court justices and the political direction of their vote in specific cases dealing with constitutional issues, as well as a unique originalism score developed for this study, I run a statistical model estimating the probabilities of justices deciding cases based on their ideological preferences when originalism is used. If originalism induces greater impartiality, we should observe a weaker relationship between ideology and votes among the justices who use originalism.

Finding that originalism induces greater impartiality would have significant implications for judicial politics. The Founding Fathers of the United States sought to create a stable, lasting, and independent government that could protect its citizens from the injustices of the Monarch. In doing so they faced the demanding task of creating a government that was strong enough to protect its people, but limited enough to prevent abuses on its people (Madison, *Federalist 51*). The Constitution was created as a document that outlined the powers and proscriptions of the



federal government. While many areas of the Constitution are clear, some of the most salient rights delineated are unclear and ambiguous. Since *Marbury v. Madison* and the principle of judicial review, the Supreme Court has taken on the task of deciding what exactly this document means (*Marbury v. Madison*). What the founders did not leave for our judiciary, however, was any power to enforce their decisions. Without any means of enforcing their decisions, the Supreme Court must rely on perceptions of legitimacy to function effectively (Caldeira and Gibson 1992).

The nature of our constitutional system suggests that the judiciary should be independent of political influence, with justices being unelected and having life tenure. There exists a strand of ongoing research that has found empirical benefits from an independent judiciary, a judiciary that is neutral from political influence. Judicial independence has been shown to increase a government's credibility and stability (North and Weingast 1989). A judiciary that keeps the government in check will be in a better position to fulfill its duties to its citizens (North and Weingast 1989). A judiciary that is politically independent will grant that nation's government more credibility, as well (North and Weingast 1989). But all of this assumes the judiciary has some way of ensuring compliance of their decisions. Surely a judiciary, no matter how politically independent, would be worthless if it could not prevent government abuses. How does the Supreme Court garner any compliance without enforceability? Our compliance results from a perception of legitimacy that we have of the Supreme Court (Caldeira and Gibson 1992).

Legitimacy of the Court is crucial, as citizens are more likely to abide by judiciary decisions, if they feel that the judiciary is credible, fair and impartial (Abrahamson 2005). Aside from citizen compliance, this legitimacy has important implications on the degree to which a judiciary's decisions are binding insofar as it has been found to constrain legislators (Vanberg

2005). More precisely, it has been shown that legislators feel compelled to support the decisions of the judiciary, even if they disagree, because they are fearful if they do not, they will suffer electoral consequences, like being voted out of office (Vanberg 2005). These consequences are a function of public support, which typically demands our elected officials be bound by the decisions of the judiciary (Vanberg 2005). In fact, it has been shown that the courts do not even lose credibility from its citizens when they make decisions with which their citizens disagree (Gibson and Caldeira 1992).

But where does this legitimacy come from? A prominent argument is that it is a function of the actions on the part of judicial decision-makers (Gibson, Caldeira, Baird 1998). “Diffuse” support or goodwill built up from judicial behavior perceived as favorable, such as impartiality, increases the legitimacy (Gibson and Caldeira 1992). Staton (2010) studied the question of how individuals come to perceive this impartiality in Mexican judicial politics, and concluded that legitimacy is gauged through perceived transparency of case decisions. For example, the fact that the high courts publish opinions explaining why they chose to interpret the law one way or another, could contribute to increased beliefs in institutional legitimacy, depending on the favorability of the exposure to the public (Staton 2010). So if the Court can increase its perception of impartiality, this transparency will actually be beneficial and they can increase their legitimacy (Staton 2010). By increasing their legitimacy they are able to have more compliance with decisions. Having a legitimate, independent court with compliance, will result in the realization of empirical benefits such as increased overall government credibility.

The natural question is how can the Supreme Court increase perceptions of impartiality? As discussed earlier, Staton (2010) argues that transparency can improve legitimacy, if the political system people are exposed to promotes impartiality, for example. In such a system,

insofar as citizens are able to see and read an opinion from a high court, there will be increased perceptions of legitimacy. The Supreme Court already does this. Our justices interpret the Constitution through the cases they hear, and unlike legislators who are free to vote on laws without giving any justification, justices in the Supreme Court use opinions to explain why they chose to side with one party or another (Roberts 2011). In writing their opinions, justices consider a variety of factors, such as the facts of the case, case precedent, the purpose of the constitutional provision, the intentions of the framers, or the consequences for the future (Roberts 2011). Even though the Supreme Court is transparent inasmuch as we are all able to read the opinions authored by the Court, the justices' are not free from human biases (Segal and Spaeth 1993). Like any other individual, our Supreme Court justices may have their own biases or political preferences that affect how they choose to interpret the Constitution (Segal and Spaeth 1993). And these biases may cause them to be lose impartiality (Segal and Spaeth 1993). If people observe our justices making decisions as ideologues, not adjudicators, it could have long term ramifications on its legitimacy, given the transparency that exists in our judiciary (Staton 2010). Following the sequence above, if decreased impartiality takes away from the legitimacy of the institution, compliance with decisions would be diminished. All of this takes away from judicial independence and government credibility. If, however, the justices employ a process or method of interpretation that fundamentally promotes impartiality on their behalf, all of this could be prevented, and the result would be a way of interpreting the Constitution that is truly superior to others.

The remainder of this essay proceeds as follows. First I explain what originalism is, and the arguments for why it induces impartiality. Then I delve into other factors that influence judicial decision-making that may render originalism useless. Following this analysis I discuss a

“hybrid” interaction hypothesis between originalism and ideology. In the subsequent section I discuss my evaluation of the claim that originalism actually induces impartiality, with a test determining whether its presence weakens the influence of a justice’s ideological preferences, arguably one of the most dominant factors in judicial decision-making. Using a probability regression model, I estimate the strength of a justice’s ideology and their vote direction (liberal or conservative) with the presence of originalism.

## Theory

### *Originalism*

Interpretive methods can dictate what factors to use or what factors to place more emphasis on during the judicial decision making process (Volokh 2008). These methods are ways of interpreting the Constitution that a justice may choose to use (Volokh 2008). One interpretive method on the rise, is originalism (Ginsburg 2010). There are two types of this method; the first variation, known as original intent originalism, looks at the intentions of the Constitution’s framers when interpreting parts of the Constitution (Calabresi 2007). This often involves a historical analysis into primary sources like *The Federalist Papers*, notes on the constitutional conventions, or correspondence between our founding fathers (Calabresi 2007). If the part of the Constitution being interpreted is an amendment, original intent originalism calls on the justice to evaluate the intentions of the drafters of the amendment (Calabresi 2007). In similar fashion, a justice may look to transcripts of Congressional hearings on the amendment, the events leading up to passage of amendment, or legislators’ public comments on the amendment, in coming to their final interpretation (Calabresi 2007). The second type is known as original understanding originalism (Calabresi 2007). This variation looks to the original

understanding, or the public meaning of the Constitution at the time it was ratified (Calabresi 2007). This often necessitates an evaluation of what an average person would have taken the text to mean at the time of the Constitution's inception (Calabresi 2007). This method could involve looking at dictionary definitions at the time of the framing, or in some cases, looking at what was protected or unprotected at the time of the framing to deduce what should be protected or unprotected in the current case at issue (Scalia and Breyer 2010). If the section of the Constitution being interpreted is an amendment, then original understanding originalism asks the justice to look at the public meaning at the time the amendment was adopted (Calabresi 2007).

Why study originalism as way of interpreting the Constitution? Originalism is relatively new among legal interpretive methods (Ginsburg 2010). It does however, appear to be on the rise (Ginsburg 2010). Since 1974, the number of Supreme Court opinions citing primary sources of law and about on the law has doubled (Ginsburg 2010). This increased use of primary sources is an indication of the rise in the use of originalism, as this method requires the decision-maker to look at what the public meaning or original intent of the Constitution or amendment was at the time it was created (Calabresi 2007). But what is it about originalism that would lead impartiality? Why suspect that this approach to interpreting the Constitution is more impartial than any other approach?

Proponents of originalism assert that the method has led to clarity and consistency in answering several Constitutional questions (Ginsburg 2010). For example, proponents point to *Lemon v. Kurtzman* and the subsequent "Lemon" test that resulted to assess whether the state had violated the Establishment Clause, there were a series of inconsistent opinions on its application (Ginsburg 2010). In one of these cases, *Wallace v. Jaffree*, Justice Rehnquist's dissent relied on an originalist approach (Ginsburg 2010). In this dissent he searched for the historical

underpinnings of what the Establishment Clause was understood to protect at the time of the framing and found that it was only meant to prevent the state establishment of religion, or support of a specific religion over others (Ginsburg 2010). It did not mean the prevention of nondiscriminatory distribution of aid to religious groups or institutions (Ginsburg 2010). Since Rehnquist's originalist dissent, this interpretation of the Establishment Clause has prevailed in subsequent cases (Ginsburg 2010).

Advocates of originalism also maintain that Second Amendment jurisprudence has gained consensus as the result of originalism (Ginsburg 2010). Prior to *D.C. v. Heller*, there had been a series of inconsistent, diverging interpretations of the Second Amendment tracing back the *U.S. v. Miller* (Ginsburg 2010). These previous interpretations had not relied on a originalist approach, neither considering the original understanding, nor evaluating the framers' intent (Ginsburg 2010). In *D.C. v. Heller*, the majority opinion, authored by Scalia, cited the original meaning (Ginsburg 2010). This reasoning resulted in a unanimous court, with all justices agreeing that the Second Amendment guarantees an individual's right to possess and use a firearm for lawful purposes, regardless if their arm is being used in military or militia service (Ginsburg 2010).

With yet another amendment, originalists claim that the method helped expound a history of unclear interpretations of the Eleventh Amendment and its principle of Sovereign Immunity (Ginsburg 2010). The court found that Sovereign Immunity did not derive from the Eleventh Amendment specifically; rather it came from the structure of Constitution itself, which has since been the interpretation that, generally, has been accepted in judicial politics today (Ginsburg 2010).

Justice Scalia has also made several arguments as to why originalism is a preferred method of judicial interpretation (Scalia and Breyer 2010). Scalia has noted that if it is the case that originalism requires the justice to trace its public meaning, there is some level of historical analysis that is necessary (Scalia and Breyer 2010). As such, it is presumed that, if there exists a clear public meaning, the justice has little room to manipulate the meaning to fit an ideological preference of their own (Calabresi 2007). For example, take free speech and the First Amendment. In *Citizens United v. FEC*, Justice Kennedy looked at the original understanding of the First Amendment to see whether information outlets could have their speech restricted on political issues (*Citizens United v. FEC*). He found that at the time of the framing, the prevailing forms of media, mostly transcripts of debates, were highly political and were understood to be protected speech under the First Amendment. *Citizens United v. FEC* dealt with whether an interest group could air advertisements for a film criticizing Hillary Clinton's candidacy for the Presidency, despite McCain-Feingold restrictions (*Citizens United v. FEC*). If you use the original understanding framework there is limited area of flexibility as to whether this type of speech is protected, and the court found those restrictions in the Bipartisan Campaign Reform Act (McCain-Feingold) to be unconstitutional (*Citizens United v. FEC*).

Originalists also claim the method is more impartial because if they maintain it is a more objective approach (Calabresi 2007). This renders a subsequent interpretation to have a less likely chance of being hijacked by a justice's ideological views (Scalia and Breyer 2010). Methods, such as "progressivism," ask justices to apply contemporary standards to a "living" Constitution (Scalia and Breyer 2010). Originalists argue, however, that justices of the Supreme Court, as they are an unelected, often intellectually elite group, are not in the position to make assessments of what constitutes contemporary standards, or at least, not in as good a position as

an elected body of representatives, such as Congress, is (Calabresi 2007). To say nothing of the fact that allowing a justice to decide whether abortion, for example, reflects a our contemporary understanding of a right to privacy, is just asking for ideological bias. With originalism, proponents assert, at least a justice is looking at the public meaning or the documented intentions of the framers, and not decided cases on the subjective assessment of an unelected few (Calabresi 2007).

### *The Attitudinal Model and Ideology*

It seems entirely within reason to believe that originalism induces impartiality in the judicial decision-making process. But how can we be sure justices' actually follow this method? Perhaps there is some other factor that explains their behavior?

The attitudinal model suggests that all other legal models, which include methods like originalism, are irrelevant to understanding how a justices reaches his or her conclusions, insofar as these methods are superseded by that the influence of that justice's ideology (Segal and Spaeth 1993). Proponents of this model argue that even if methods like originalism are in play, their use is a product of ideology (Segal and Spaeth 1993). In the attitudinal model, ideology would explain the justice's decision *and* the method used. Proponents of the attitudinal model assert that because Supreme Court justices have no political accountability, short of being impeached, they have plenty of incentive to advance short-term political interests (Segal and Spaeth 2002). Advocates of this model also point to the process by which judges become Supreme Court justices as evidence of the influence of ideology on their decisions (Segal and Spaeth 2002). They note that it is the President and Senate who choose the nominee, so it is rare that the nominee will be out of line politically with the party that appoints them; if the Court does



not decide cases based on ideology, then why have such concern over who gets to nominate the next justice (Segal and Spaeth 2002)?

With respect to originalism, those who support the attitudinal model point to several flaws with the method that illustrate the improbability of originalism truly explaining how originalist justices come to their decisions (Segal and Spaeth 2002). They first note that there was not just one framer of the Constitution; there were many, and they, at times, had differing beliefs as to why certain provisions were included in the final document (Segal and Spaeth 2002). When this occurs, whose intentions are looked at? They also argue that originalists only support the method when its result is favorable to their ideology (Segal and Spaeth 2002). They use Edwin Meese, a self described originalist, as an example of this phenomenon, calling his stance against state affirmative action on the grounds that it denies equal protection to whites, evidence against originalism's objectivity, since the framers of the Fourteenth Amendment did not intend it to protect whites (Segal and Spaeth 2002). They further criticize originalism as a façade of a method because of all the instances in which an original intent or understanding may not exist (Segal and Spaeth 2002). They also point to known inaccuracies in the historical record, as evidence that originalism does not actually explain justices' decisions (Segal and Spaeth 2002). They assert that all we have, in terms of records from the drafting of the original Constitution, is a "carelessly kept" journal and James Madison's notes, which were edited over thirty years later (Segal and Spaeth 2002). In addition, it is well known that prior to a 1978 law, the record of the floor of the House and Senate could be edited by any Member at any time, without any verification or substantiation required (Segal and Spaeth 2002). With all these gaps in historical analysis, proponents of the attitudinal model argue that originalism, along with any other legal model method, cannot possibly explain the decisions of the Supreme Court.

We know ideology has influenced other areas of judicial politics, aside from Constitutional interpretation. Even when justices cite meanings of a particular statute, studies have found ideological preferences to be a factor (Volokh 2010). Of course, there are many benefits to looking at the meaning of statutes, and these meanings can be looked at through a number of interpretive methods (Volokh 2010). Sometimes, however, there are multiple statutory meanings (Volokh 2010). Similar to the attitudinal model, in cases where multiple meanings exist, judges tend to gravitate towards the interpretive method that would lead to the particular statutory meaning that was congruent with their ideological preferences (Volokh 2010).

In judicial politics, ideology had even permeated agency interpretations (Eskridge and Baer 2008). The Constitution does not expressly discuss the limitations of government agencies, thus federal statutes guide these agencies. An important case, *Chevron v. Natural Resources Defense Council*, held that courts should defer to the interpretations of administrative agency, so long as they are reasonable, when the federal statutes have unclear or indistinct intent (*Chevron v. Natural Resources Defense Council*). However, this decision did not bind the court (Eskridge and Baer 2008). The cases subsequent to what became known as the “Chevron doctrine” did not see consistent application of administrative agency deference (Eskridge and Baer 2008). In fact, justices appointed by republican presidents were more likely to side with a conservative interpretation, while justices appointed by democratic presidents were more likely to side with liberal interpretations, neither group showing deference to administrative agencies. (Eskridge and Baer 2008).

Despite the strong effects of ideology shown, it has been demonstrated that legal institutions may affect judicial choices, like judicial rules, even when controlling for ideology (Baldez, Epstein and Martin 2006). Judicial rules are standards of evaluation that justices use

(Baldez, Epstein and Martin 2006). The most well known rules are rational-basis review, intermediate scrutiny, and strict scrutiny (Baldez, Epstein and Martin 2006). Rational-basis review is the lowest standard and carries a presumption of constitutionality, strict scrutiny is the highest standard and carries a presumption of unconstitutionality, and intermediate falls in between with no presumption typically (Baldez, Epstein and Martin 2006). Different rules are used for different types of Constitutional questions. For example, strict scrutiny is applied to state action that discriminates based on race, whereas only rational-basis review is usually needed in actions where the state discriminates on age (Baldez, Epstein and Martin 2006). Baldez, Epstein and Martin (2006) sought to determine whether the presence of an Equal Rights Amendment in the U.S. Constitution would increase the number of cases ruled in favor of the petitioning party in gender discrimination cases. The idea was, if an ERA existed, it would cause justices to use a different standard, perhaps that of strict scrutiny, as opposed to the current standard of intermediate scrutiny. They expected the higher standard to increase the constraint of justices, and result in more favorable results for the party bringing the claim of gender discrimination. To study this empirically, they needed to look at individual U.S. states that had “ERA equivalents” in their state constitutions and compare them to states that did not have them. They found that the presence of an “ERA equivalent, led to the use of a higher standard in gender discrimination cases (Baldez, Epstein, Martin 2006). This use of a higher standard produced more liberal outcomes (Baldez, Epstein, Martin 2006).

### *“Hybrid” Interaction of Originalism and the Attitudinal Model*

So which is true? Does originalism induce impartiality as originalists suggest or is it merely a front for ideological expression as the attitudinal model holds? The public’s perception

of which model is used by judges has serious implications about the legitimacy of the judiciary. For example, if people believe that attitudinal model is at play, which lacks impartiality, as ideological preferences are the primary factor in judicial decision-making, they will lose faith in the legitimacy of the Supreme Court (Gibson Caldeira 1992). Even though justices would give justifications in their opinions, these justifications would not actually explain why they voted one way or another, as no justice ever writes an opinion explaining that they voted to overturn or uphold a law because they are a liberal or a conservative. Therefore, the opinions of justices would be disingenuous. Staton (2010) found transparency to promote legitimacy if, for example, impartiality existed (Staton 2010). But it has been argued that transparency may be detrimental to a high court's legitimacy, depending on the nature of the judiciary's exposure to the people (Staton 2010). If people observe the justices on the Supreme Court to be acting as ideologues, transparency could negatively affect legitimacy (Staton 2010).

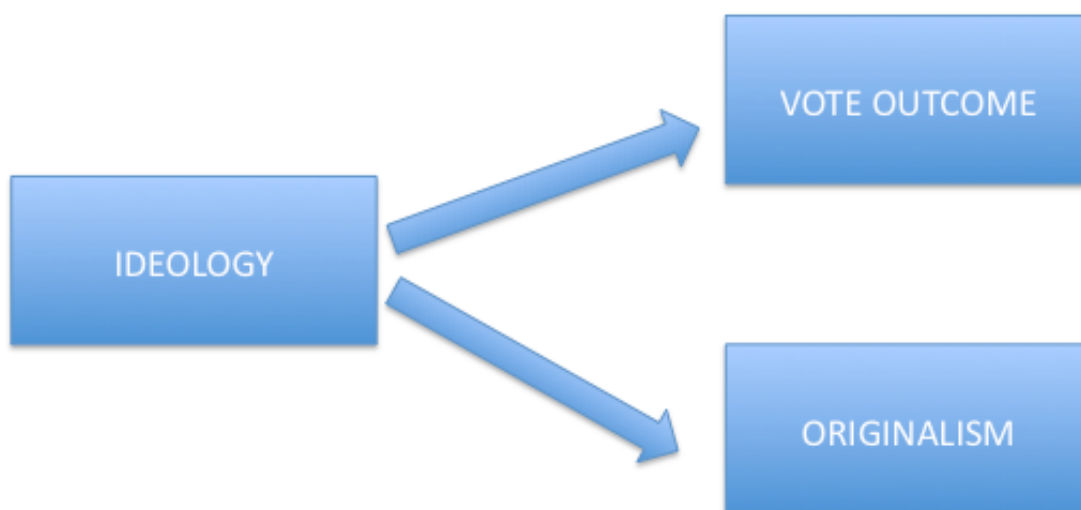
I propose that there exists far too much evidence of at least some effect of political preference on judicial decision-making to assume that there is no influence of ideology in the process (Segal and Spaeth 1993). The effect of bias may even be implicit or subconscious; after all, judicial interpretation is a human activity, and is therefore subject to potential subconscious biases (Graham 2009). If this is true, impartiality is conceded. If impartiality is conceded, how can we possibly save the legitimacy of the court?

Perhaps, there is no process or method out there that will be able to prevent a justice's political ideology from entering the judicial decision making process. But, what if there was an approach or method that weakened the influence that a justice's ideology had? Then method would not be irrelevant. The consistency associated with originalism (Ginsburg 2010) and the limited room for ideological influence (Scalia and Breyer 2010), is argued by its proponents to

induce impartiality. If originalism is the method that can weaken the influence asserted in the attitudinal model, we should observe that its presence would make a justices less likely to simply decide a case in favor of his or her ideology, and its absence would make a justice more likely to decide a case in favor of his or her ideology (see FLOW CHART 1 & 2).

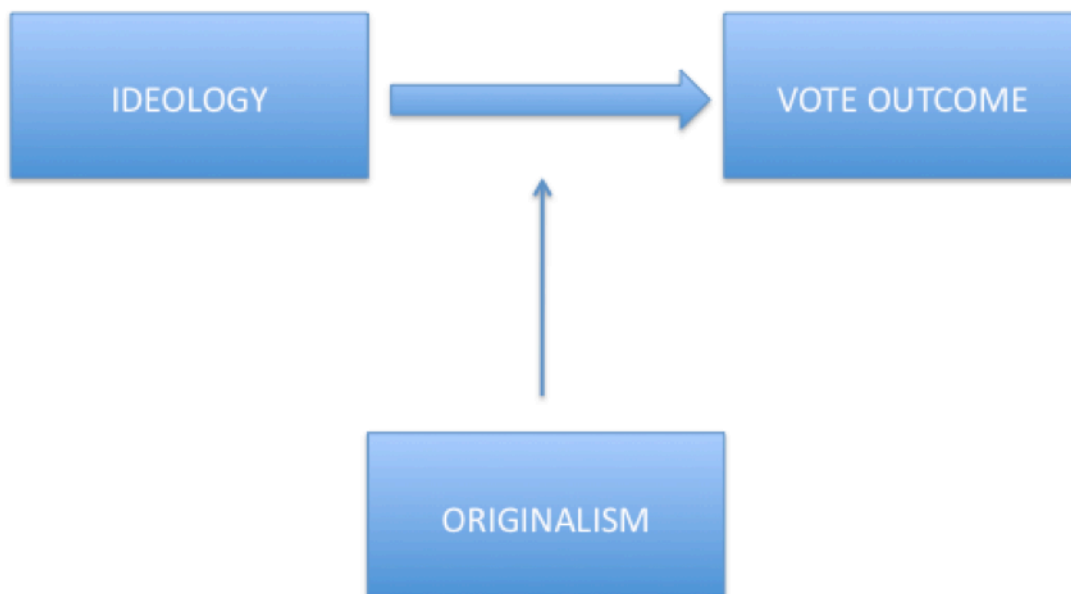
FLOW CHART 1

## ATTITUDINAL MODEL



FLOW CHART 2

## PROPOSED HYBRID MODEL



This type of “hybrid” proposition is not uncommon, in fact, it parallels the Baldez et. al. study (2006). The primary relationship in that study was between a justice’s preferences and their choice of what judicial rule or standard to apply in gender discrimination cases. Similarly we assume that the attitudinal model is partially correct and that there is a relationship between a justice’s preferences and their decision in a case. Just as Baldez et. al. looked for the affect the states’ ERA had on the a justice’s choice of standard, I test the affect originalism has on a justice’s choice of whether to vote for the liberal or conservative outcome, hypothesizing that if

it were an impartial method it would attenuate that influence (Baldez, Epstein and Martin 2006). Most recently this “hybrid” framework was applied to study the affect of judicial rules had on the attitudinal model (Bartels 2009). Similar to Baldez et. al., Bartels called into question the comprehensiveness of the attitudinal model (Bartels 2009). Looking at rational-basis review, intermediate scrutiny, and strict-scrutiny Bartels proposed two hypotheses about the interactive effects these rules had on the extent to which ideology influenced a justice’s decision (Bartels 2009). His “Legal Presumptions Model” hypothesized that rules with presumptions, like rational-basis review (presumption of constitutionality) and strict-scrutiny (presumption of unconstitutionality) attenuated the degree of ideological discretion a justice had (Bartels 2009). His “Rights Protectiveness Model” posited that more restrictive rules attenuated the magnitude of ideological discretion a justice had (Bartels 2009). Similarly, if the claim that originalism is more impartial because of its consistency (Ginsburg 2010) and limited judicial discretion (Scalia and Breyer 2010) is true, I hypothesize that the presence of originalism would attenuate the effects of the attitudinal model.

## **Research Design and Hypotheses**

If my argument that this method results in more consistent, politically neutral interpretations of the Constitution is correct, I would expect justices who use originalism not to interpret the Constitution favorably to their political views as often as justices who do not use originalism. To test this claim using a probability model we need several pieces of information about our Supreme Court justices. First, we need their ideology, either liberal or conservative, and the extent to which they may be one or the other. Next, we need to know whether they voted for the liberal or conservative position in constitutional cases. Finally, we need to know the

extent which each justice uses originalism. With this information we are able to empirically test the claim that originalism produces more neutral results in the Supreme Court.

Though we've seen arguments proposing benefits to using originalism Ginsburg (2010), Scalia and Breyer (2010), these claims have yet to be empirically tested. The central question is whether originalism attenuates the extent to which ideology can affect the decisions of judges. From a testing standpoint the key is to measure the relationship between a justice's ideology and whether they interpret the constitutional provision in question liberally or conservatively, and then also see if the presence of originalism, as an interacting independent variable, affects that relationship. But what do we mean when we say ideology, vote outcome, and originalism?

Vote outcome or vote direction, is the dependent variable. Here we are talking about how a justice voted in a particular case. As mentioned earlier, the justices on the Supreme Court will cast votes to determine which party of the case will prevail. When they cast these votes, they are voting for an outcome that can be characterized as liberal or conservative. For example, in *D.C. v.*

*Heller*, the two possible outcomes were that either the Washington, D.C. ban on personal arms was constitutional or not. Voting in favor of upholding the ban would be the "liberal" outcome, and supporting the application of Second Amendment rights to personal arms would be the "conservative" outcome. To operationalize this variable for testing, I use a dichotomous measurement, such that each Supreme Court case outcome is characterized as either liberal or conservative, using the Supreme Court Database from Harold J. Spaeth. This variable is coded as "direction" in the database.

TABLE 1

<b>Segal-Cover Score</b>	
<b>Justice</b>	<b>Score</b>
Scalia	0
Alito	0.1
Roberts	0.12
Thomas	0.16
Souter	0.325
Kennedy	0.365
O'Connor	0.415
Breyer	0.475
Ginsburg	0.68



Next we have our first independent variable, the ideology of the justice. This variable looks at the individual political preferences of the justices. To operationalize this variable for purposes of testing I relied on an existing measurement known as the “Segal-Cover Score” (Segal and Cover 2005). The measurement is continuous, and ranges from 0 to 1, with 0 being the most conservative, and 1 being the most liberal (Segal and Cover 2005). These scores were created by content-analysis of editorials from specific newspapers in the months and weeks leading up to the justices’ confirmation hearings (Segal and Cover 2005).

Our second independent variable is originalism. Prior to my research, there was no numerical “score” or measurement that existed for originalism. Because empirically testing originalism’s effect on the judicial decision-making process requires some sort of measure, I created an “Originalism Score.” The score was created for each of the current nine justices, replacing Kagan and Sotomayor, for O’Connor. This was done because Kagan and Sotomayor had authored too few opinions to develop a meaningful score. The score was formulated by reviewing the justices’ opinions from 1995-Present. However, we only scored opinions dealing with constitutional review. This was done because our research of interpretive methods was concerned with how Supreme Court justices interpreted the Constitution, not federal statutes or other laws.

Several potential approaches were considered in determining how to score the justices. The possibility of analyzing the justices’ confirmation hearings was looked at. However, there was risk that justices may purposely try to downplay their use of one method over another. Moreover, many of these hearings focused on their past rulings, not necessarily the methods they used in coming to those rulings. Using an approach similar to the “Segal-Cover Score,” which conducted content-analysis on editorials written about the justices leading up to their

confirmation hearings, was also considered. Again, there was little information in these editorials about the method justice's chose to use. The most viable option was to perform an analysis of their individual opinions.

For each of the aforementioned justices, every opinion on constitutional issues, in which they were the majority opinion writer from 1995 to the present, was individually coded. Majority opinions were used instead of dissenting opinions because there were too few dissents (in some cases 0) for several of the justices. Given the youth of this method, going further back to code different justices would not provide me with a significant sample of justices using originalism.

The scores for each justice range from 0%-100% and reflect the proportion of their "justifications" that are originalist in nature. A "justification" for purposes of the unique score, is a reason a justice uses in his or her opinion a specific legal conclusion he or she makes. To score, each opinion was read through, one at a time and also had a keyword search ran on terms associated with originalism such as framer(s), intent, intended, original, understanding, understood, meant, means. Founder(s), founding, searching for "originalist justification(s)." An "originalist justification" for purposes of the unique score is any justification that refers to the original understanding of the Constitution at the time of the framing, the public meaning of the Constitution at the time of the framing, the original understanding of the Constitutional Amendment in question at the time of its passage, the public meaning of the Constitutional Amendment at the time of its passage, the intentions of the framers of the Constitution, or the intentions of those who drafted the Constitutional Amendment in question. If there were one or more originalist justifications, I went back to the opinion and counted every justification in the opinion, taking note of which justifications were originalist in nature. The proportion of

originalist justifications to non-originalist justifications was then determined. If there were no originalist justifications, that justice received a score of 0 for that particular opinion. After repeating this for each opinion authored by each justice, the proportions were summed, divided by the number of opinions scored and multiplied by 100 to get each justices score.

The formula is as follows:

$$z = [(x_1 + x_2 + x_3 \dots x_n) / n] * 100$$

Where:

$z$  = Originalism Score (between 0 and 1)

$x_n$  = Proportion of originalism used in the opinion

$n$  = Number of opinions scored

(For a more detailed description of coding criteria, see Appendix 1 “Codebook for Originalism Score”)

TABLE 2

Justice	Originalism Score	
	Opinions Scored	Score
Thomas	4	15
Roberts	3	11.24
Kennedy	8	10.89
Breyer	13	9.95
Scalia	13	9.62
Ginsburg	5	8.02
Souter	8	3.1
Alito	3	0
O'Connor	8	0

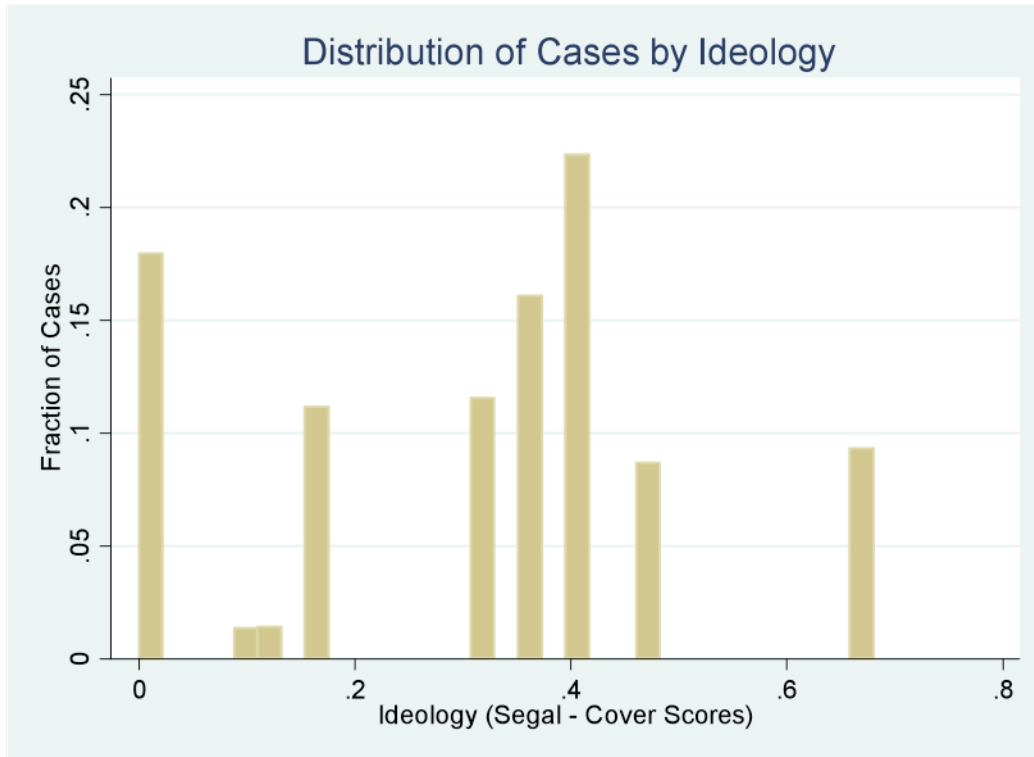
The “Originalism Score” used for this research yielded some very interesting results. Surprisingly, the most outspoken proponent of originalism, Scalia, was not among the highest scores, ranking fifth out of the nine justices scored. Thomas and Roberts had high scores, but were joined by Kennedy and Breyer, both of whom have openly criticized originalism (see TABLE 2). There are several reasons that may account for some of these surprises with our

“Originalism Score.” First, the scoring only looked at majority opinions authored by the justice. Because of the nature of the court and the decision process, the majority opinion may not directly reflect the views of the author, and may reflect some degree of compromise with the other justices in the majority. Dissents, though they would have been better reflections of the justice’s true feelings on a particular case, were too few to code. Also, the “Originalism Score” did not differentiate between the textualist, original understanding, and original intent factions of originalism. This may very well explain the high scores of Kennedy and Breyer, who used primarily framers’ intent justifications in cases where they used originalism.

No other variables were used to test this claim. The choice was made not to include any control variables. While it is true that there may exist some intervening variables or endogeneity with our original relationship between a justice’s ideology and his or her vote direction, given that we are primarily interested in an intervening variable, these controls would not be appropriate. Take, for example, some of the typical control variables used in this type of research relating to judicial politics, such as whether the solicitor general participated in oral arguments or whether there were amicus briefs filed by interest groups. With these control variables there is no predisposition to a particular ideology, typically, and the more likely scenario is that justices may be more or less inclined to side with the SG or a specific interest group. This information would not tell us anything about whether the use of originalism attenuates the relationship between a justice’s ideology and their vote direction.

From all of our measurements, we use a probit regression tests for differences in ideology across the range of originalism scores. Using data from the Supreme Court database, we run the test on all constitutional cases, in which our scored justices voted, from 1995 to the present. The distribution of cases by ideology from this sample is fairly even (see FIGURE 1)

FIGURE 1



The equation for the test in the probit model is:

$$\Pr(Y_i=1) = \Phi(\beta_1 x + \beta_2 z + \beta_3 xz) + \epsilon$$

Where:

$\Pr(Y_i=1)$  = Probability of a liberal vote

$\Phi$  = Cumulative Density Function

$\beta_1$  = Coefficient of x

x = Ideology of Justice (Independent Variable)

$\beta_2$  = Coefficient of z

z = Originalism Score

$\beta_3$  = Coefficient Ideology\*Originalism (x\*z)

xz = Originalism\*Ideology

$\epsilon$  = Error Term

In running our probit regression analysis, one adjustment is made to our data and measurements. For the “Originalism Score,” each score is increased by 1.0% and then put through the natural logarithmic function. The natural logarithmic function is used to help standardize the data and the increase of 1.0% is necessary for those justices that scored 0%, as the natural logarithmic function cannot be used with zero.

## Results

Using a preliminary method, creating a table of our sample, we can see that the conservative justices (lower ideology scores), more often voted for the conservative outcome, and vice versa for the liberal justices (see TABLE 3A). This is more pronounced when the justices are grouped into the four most conservative and five most liberal and the differential between conservative and liberal vote is observed (see TABLE 3B). There appears to be some correlation with ideology and vote outcome, but what can we say about this relationship statistically? And what can we say about the effects of originalism?

TABLE 3A

<b>Segal-Cover Scores and Vote Outcome</b>			
<b>Ideology</b>	<b>Conservative Vote</b>	<b>Liberal Vote</b>	<b>Difference</b>
0	68%	32%	36%
0.1	76%	24%	52%
0.12	68%	32%	36%
0.16	79%	21%	58%
0.325	45%	55%	-10%
0.365	59%	41%	18%
0.415	65%	35%	30%
0.475	42%	58%	-16%
0.68	43%	57%	-14%

TABLE 3B

<b>Segal-Cover Scores and Vote Outcome</b>			
<b>Ideology</b>	<b>Conservative Vote</b>	<b>Liberal Vote</b>	<b>Difference</b>
Conservative	72%	28%	44%
Liberal	54%	46%	8%

The first coefficients in Table 4 are useful in some ways, but they do not report the information necessary to evaluate my hypotheses appropriately. In the first place, the coefficients are not easily interpretable with respect to the quantity that we care about — the probability of a liberal vote. More importantly, because the model is interactive, the key effect, the conditional effect of ideology for given values of originalism, is simply not in the table. To evaluate the hypotheses I have described, I need to consider changes in the predicted probability of a liberal vote as ideology changes, but critically, I need to know how these changes are influenced by originalism. Using the method described in Brambor, Clark and Golder (2002), Figure 2, shows the effect of a one standard deviation change in the Segal-Cover score on the probability of a liberal vote, across the complete range of my originalism indicator. It also shows the 95% confidence interval around that effect.

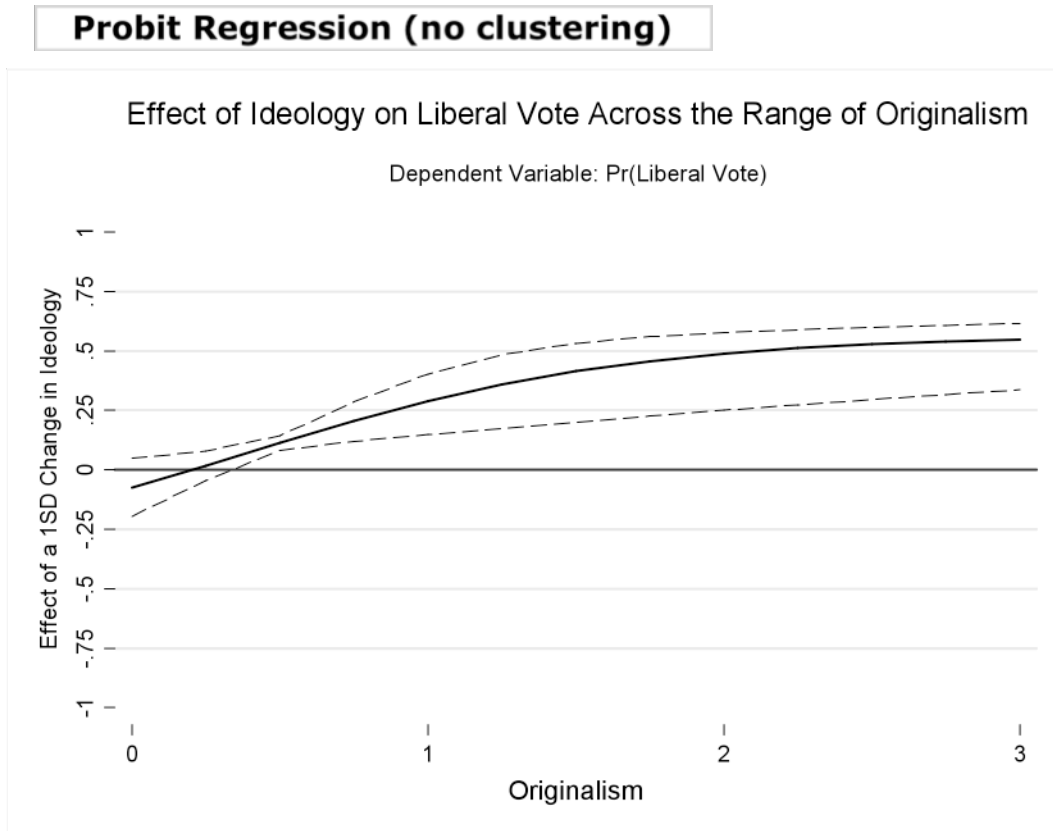
In our first probit regression, we find a negative, but statistically insignificant relationship with ideology (x), with a coefficient of -0.983. This is fairly surprising given that we would expect there to be at least some statistically significant relationships between justices ideology (x) and the direction of their vote (y). The originalism score (z) had a slightly negative, and statistically significant, relationships with vote outcome meaning justices with higher originalism scores have lower estimated probabilities of voting liberal. This is not very surprising given the propensity for conservative justices to advocate for such a method, generally. What we were primarily interested in, however, was the effect of the interaction of originalism on the relationship between a justice's ideology and his or her probability of voting liberal. We found a positive, statistically significant relationship, with a coefficient of 0.96. This means as justices' become more originalist the interactive effect is actually positive, resulting not in attenuation (which we would expect only if the interactive effect were negative), but in fact, augmentation of the existing effect of ideology. The use of originalism actually appears to allow ideology to have a stronger influence.

TABLE 4

<b><u>Probit Regression (No Clustering of Standard Deviations)</u></b>		
<b>Ind. Variable</b>	<b>Beta Coefficient</b>	<b>Standard Error</b>
<b>Ideology</b>	-0.98*	0.83
<b>Originalism</b>	-0.30	0.14
<b>Interaction (Orig*Ideo)</b>	0.96	0.35
<b>Constant</b>	0.09*	0.33
Pseudo-R <sup>2</sup>	0.0269	
* - no statistical significance		



FIGURE 2



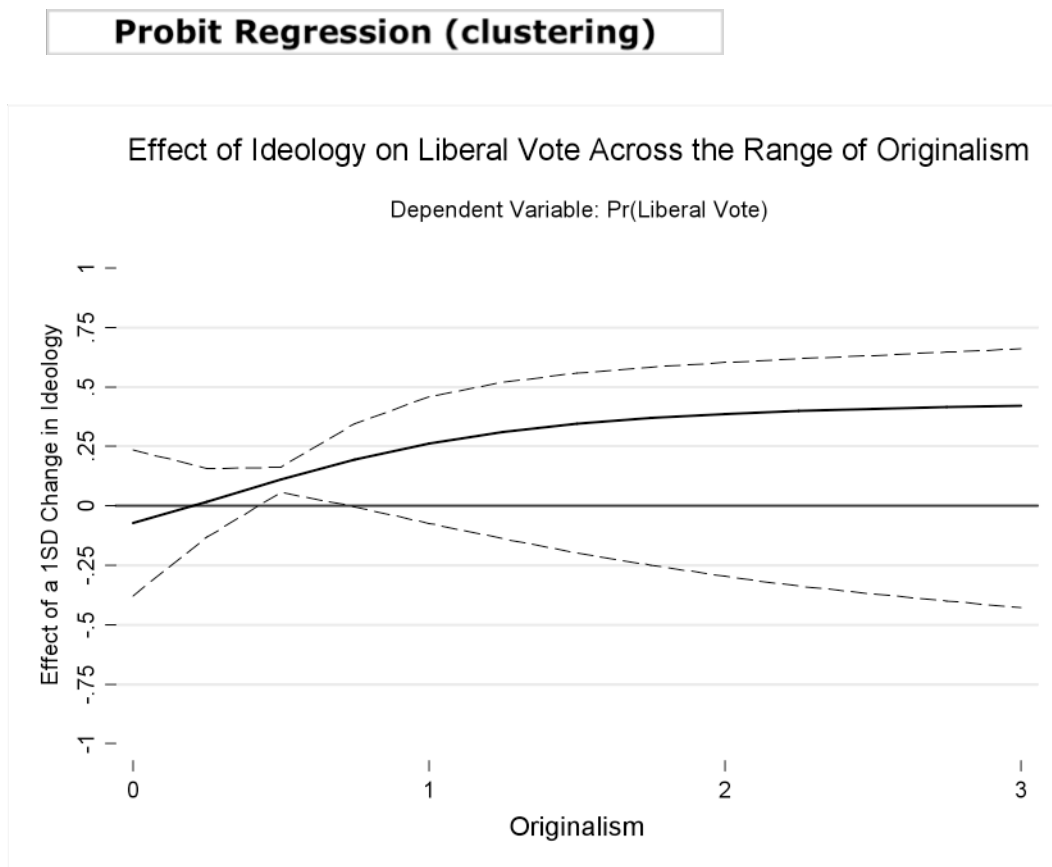
There are, however, several issues with this analysis. First, as noted above in exhibits 6 and 7, this probit regression analysis does not cluster the standard deviations of each individual justice. Thus, each individual case is treated the same, meaning differences in a particular case for Justice Thomas are treated exactly the same as Justice O'Connor. In practical terms this is not the case, so a more accurate analysis would cluster the individual standard deviations by justice. Also, there is a very low pseudo- $R^2$  of the regression, at 0.0269 means this regression analysis can only account for roughly 2.7% of our data.

We run the same probit regression analysis, but cluster the standard deviations by justice. As shown in figure 5a, the standard errors and confidence intervals are more wide ranging, and none of the relationships are found to be statistically significant.

TABLE 5

<b><u>Probit Regression (Clustering of Standard Deviations)</u></b>		
<b>Ind. Variable</b>	<b>Beta Coefficient</b>	<b>Standard Error</b>
<b>Ideology</b>	-0.98*	2.07
<b>Originalism</b>	-0.30*	0.37
<b>Interaction (Orig*Ideo)</b>	0.96*	0.91
<b>Constant</b>	0.09*	0.86
Pseudo-R <sup>2</sup>	0.0269	
* - no statistical significance		

FIGURE 3

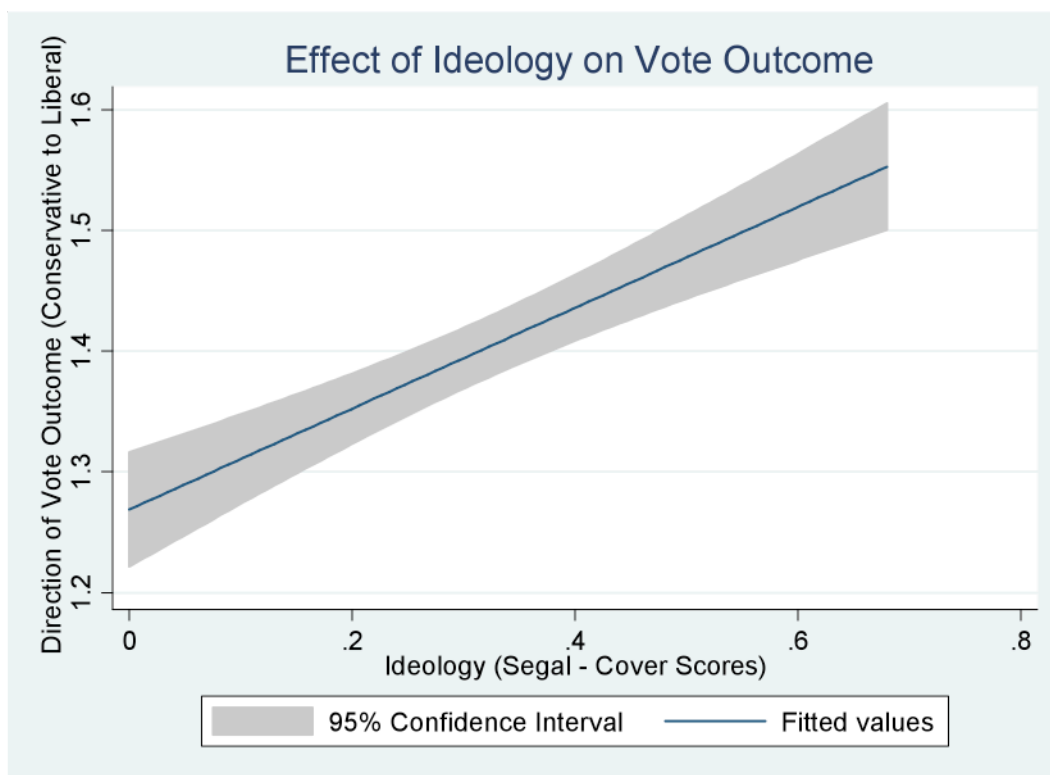


To be sure our findings were the result of the no interaction, as opposed to sampling issues, we regress vote direction and ideology. We find a statistically significant relationship (see TABLE 6 and FIGURE 4).

TABLE 6

<b><u>Linear Regression (Direction and Ideology)</u></b>		
<b>Ind. Variable</b>	<b>Beta Coefficient</b>	<b>Standard Error</b>
<b>Ideology</b>	0.42	0.06
<b>Constant</b>	1.27	0.02
Adj-R <sup>2</sup>	0.0278	

FIGURE 4



We observe that as we move across the range of liberalism, justices are more likely to vote for the liberal outcome in a case.

## Conclusions

Given the analyses, it appears we are unable to see an effect of attenuation with respect to justices' ideological preferences and their voting decisions when originalism is used. If anything, there is some evidence to support the opposite, augmentation of the effect of ideology on vote direction. Moreover, my primary research also is unable to show a statistically significant relationship between our first relationship, that of a justice's ideology and their vote direction, in an interactive model. Subsequently, our two hypotheses from the interactive model appear to be false.

Despite this, there are many aspects of our research and analysis that could be modified to improve the depth of our conclusions. First and foremost, we could have coded more opinions for our "Originalism Score," as well as considered more justices than included in this research (albeit the advent of originalism is relatively new in judicial politics) (Ginsburg 2010). The depth of cases chosen is likely to have a significant affect on the findings in this area, especially considering literature exists showing a strong relationship between ideology and vote direction, which our research did not show (Segal and Spaeth 1993).

There is also the possibility that our “Originalism Score” has some validity issues. The nature of the scoring criteria, though well defined, is inherently subjective. The score is naturally subject to human error, however, every opinion in this particular research was coded by one individual, thus it is likely that the error, if any, was consistent across cases, or at least more consistent than it would have been had multiple individuals coded parts of the sample. Of course, if multiple researchers all scored the entire sample, not just parts of the sample, the validity would improve.

Moreover, because the originalism score included all types of originalism, it is not necessarily true that Scalia’s originalism, for example, does not induce impartiality. Scalia adheres to a textualist, original understanding approach and seems to be the only member of the court to do so (Calabresi 2007). Studying the effects of other methods of interpretation or even dividing our scoring of originalism into its various strands, such as original intent versus understanding would be intriguing areas of related study. Some other interesting changes that could be made to this study include accounting for the justices’ dissents or justices’ rulings in other jurisdictions such as U.S. Circuit Courts in our “Originalism Score.”

There are many intriguing areas of study that could branch from this research. Developing a unique score for several other interpretive methods, and conducting a similar analysis would be very interesting in assessing the extent to which some other method may affect vote outcome. For example, scoring for a method like “strict constructionism” could allow for a larger sample because of its prevalence throughout judicial history.

Explaining the decisions made by U.S. Supreme Court justices has always been difficult. This research suggests that even seeking to explain the decisions in relative terms, looking to see

if one factor explains a justice's propensity to vote consistent with their ideology, is just as puzzling.

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## APPENDIX 1:

### Codebook

#### A. Structure

**1. Terms:** The following is a list of terms that will likely be repeated

**i) Justification:** A reason the justice uses in his or her opinion to support a specific legal conclusion he or she makes.

**ii) Originalist Justification:** An originalist justification is any justification that refers to the original understanding of the law when it was adopted, the public meaning at the time of adoption, the intentions of the framers, or the intentions of those who drafted the Constitutional Amendment, if applicable.

#### B. Work Flow

##### 1. Infrastructure

**a)** Directory of Supreme Court Majority Opinions from 1995-Present, dealing only with Constitutional issues for the following Justices: Sandra Day O'Connor, David Souter, Anthony Kennedy, Antonin Scalia, Ruth Bader Ginsburg, John Roberts, Samuel Alito, Steven Breyer, and Clarence Thomas (Supreme Court Database, Spaeth).

**2. Process:** There are three main steps to be undertaken and these are detailed below:

**Step 1: Read Original Decision:** Read through the entire majority opinion first.

**Step 2: Search for keywords:** After reading the opinion, do a keyword search for the following terms: framer(s), intent, intended, original, understanding, understood, meant, means. Founder(s), founding.

##### IF THERE ARE:

**A) No "originalist justifications":** Then the majority opinion is scored a 0%.

**B) One or more "originalist justifications":** You must complete two additional steps.

i) You must re-read the opinion and note or highlight every "justification."

ii) You will divide the number of "originalist justifications" by the number of total "justifications" and the score for that opinion will be the quotient of this proportion.

**Step 3:** Repeat for each opinion and each justice's majority opinions.

**3. Score:** The score for each justice will be the sum of his or her individual percentage scores divided by the total number of opinions coded.

