An Original Look at Originalism

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While the normative debate over originalism continues unabated (e.g., Scalia 1997; Whittington 1999), the systematic empirical validity of originalism lies relatively unexamined. Using data derived from briefs filed by litigants over eight years, we developed an initial systematic test of the influence of arguments about text and intent on the decisions of U.S. Supreme Court Justices. Typically, we find that Justices support textual or intentional arguments when they are made by liberal parties or when they are made by conservative parties, but not across the board. Multivariate analyses show that legal arguments as to text, and particularly intent, have little impact on the votes of even those Justices alleged to be originalists. Instead, ideology continues to explain their decisions.

I. Introduction

More than 40 years after Herbert Wechsler's (1959) search for neutral principles to guide constitutional interpretation, 30 years after Robert Bork's (1971) demand for the same, 15 years after Attorney General Edwin Meese's (1986) call for constitutional interpretation based on the narrow intent of the framers, and William Brennan's (1986) classic response, scholars (Whittington 1999) and judges (Scalia 1997) continue to debate the normative merits of what has been called interpretivism (Ely 1980), preservativism (Carter 1985), and now originalism (Symposium 1996).[1]

Our purpose in this article is not to try to answer whether the Justices of the Supreme Court *should* base their decisions on the original meaning of the text or the original intent of the framers. Instead, we would like to open systematic inquiry into the ques-

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[1] The originalism debate has shifted even further into original intent versus original meaning (Barnett 1999).

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tion of whether the Justices of the Supreme Court *do* base their decisions on the meaning of the text and the intent of the framers.

Needless to say, this question not only implicates normative theories of judicial decisionmaking but also empirical theories. Scholars commonly assert that Justices on the Supreme Court act like "single minded seekers of legal policy" (George & Epstein 1992:325), attempting to etch their policy preferences into law. Nevertheless, the extent to which Justices *choose* to act in such a manner and the extent to which they *can realize their goals* by acting in such a manner is the subject of much debate. As Gibson famously notes, "Judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (1983:7).

The extent to which Justices choose to follow their policy preferences continues to divide the fields of law, courts, and judicial politics. Team (Kornhauser 1995), constitutive (Kahn 1994), role-theoretic (Gibson 1991), and even rational-choice (Ferejohn & Weingast 1992) scholars argue that judges and Justices may be strongly influenced by legal factors. Typically, discussion about what Justices ought to do include evaluating legal rules, such as precedent or legislative intent, in a (non-mechanical) attempt to find the "correct" answer to cases before them (see, e.g., Dworkin 1986). Thus, in addition to preferences, various models suggest that legal influences should be useful in explaining Supreme Court decisions.

Similarly, rational-choice theorists question what it is feasible for Justices to do. Voting their sincere preferences may not, in many cases, further their policy goals. Because the Court does not make policy in isolation from the other branches of government, the Justices must temper their decisions by what they *can* do (Eskridge 1991; Epstein & Walker 1995; Ferejohn & Shipan 1990; Spiller & Gely 1992). Most importantly, a policy-minded Court must ensure that Congress does not overturn its statutory decisions.

These models can be usefully depicted according to the schematic in Table 1. Sources of influence include legislators and judges. When the Justices rely on the rulings of past judges, they are following precedent; but when Justices follow their own (present) preferences, they behave attitudinally. When Justices rely on the preferences of the legislative lawmakers of the statutes and constitutional provisions under consideration, they follow text and intent; but when they strategically defer to the constraints imposed by current legislative majorities, they behave

consistently with the rational-choice separation-of-powers (SoP) model.[2]

Table 1. A Typology of Supreme Court Decisionmaking Models on the Merits

		Temporal Influence	
		Past	Present
Source of Influence	Legislators	Text and Intent	Rational-Choice Model: Separation of Powers
	Judges	Precedent	Attitudinal Model

Unfortunately, while we have a good deal of evidence (whether definitive or not) about the influence of attitudes, precedent, and political pressure on the Justices' behavior, we have little systematic evidence as to the influence of originalist values, text, intent, and meaning. Thus, while scholars and Justices might assert that a Justice supports textual or original meaning arguments (Ball & Cooper 1992; see also Schultz & Smith 1996), such arguments have not been tested systematically.[3]

In this article we briefly review the systematic empirical evidence for the attitudinal, separation-of-powers, and precedential models. We then review claims that Justices rely on text and intent, while noting the lack of systematic tests of such claims. We propose a method for testing such claims and apply those tests to data derived from eight terms of the Burger and Rehnquist Courts.

II. Judicial Behavior

According to economic models of behavior, humans are utility maximizers. Though it is not necessarily the case that the goals that Justices will seek to maximize are policy goals, factors such as a lack of electoral accountability and a lack of ambition for higher office make it likely that policy goals will be at the forefront. Within policy-based models, the major dispute is over whether the Justices almost always vote their unconstrained preferences, as suggested by attitudinalists, or whether they must frequently engage in sophisticated behavior, as suggested by mainline rational choice theorists.

[2] Attitudinal preferences are part of the SoP model in those situations in which the Court is unconstrained by other political actors. Such preferences may also influence the Justices' sincere views of precedent and intent.

[3] See King et al. (1994) on making systematic scientific inferences with qualitative or quantitative data.

A. The Attitudinal Model

The attitudinal model holds that judges decide disputes in light of the facts of the case vis-à-vis the sincere ideological attitudes and values of the judges (Schubert 1965; Segal & Spaeth 1993, 2002).

The attitudinal model, whatever its limitations might be, has found strong support in the empirical literature. Research has demonstrated that the Justices' attitudes are strong predictors of their decisions. Segal and Cover (1989) found a correlation of 0.80 between their measure of the Justices' attitudes and their decisions in civil liberties cases. More recently, Segal, Epstein, Cameron, and Spaeth (1995) backdated the Segal and Cover work to cover the Vinson Court, and extended it to cover economic cases. Though their results are not as strong as the original Segal and Cover findings, attitudes still correlate fairly well with the votes of the Justices. Thus, while these works do not demonstrate that attitudes are all that influence Supreme Court decisions, they do demonstrate that attitudes are strong predictors of judicial decisions in the two areas that have made up the bulk of the Court's docket over the past 50 years: civil liberties and economics cases. Nevertheless, there are problems with the empirical tests: Epstein and Mershon (1996) find limits to the measures; systematic tests using independent measures of attitudes do not predate the Vinson Court; and areas other than civil liberties and economics have not been well tested (Baum 1995). Additionally, attitudinal factors have never been tested after controlling for legal factors, such as text and intent.

B. The Separation-of-Powers Model

The question over the extent to which the Justices can impose their policy preferences on society derives from the rational-choice based separation-of-powers model (Marks 1988). These models hold that in order to prevent overrides that would make policy outcomes, from the Court's perspective, worse, the Court frequently must move policy toward congressional preferences.

Empirically, these models have been fairly well studied. Case studies have, not surprisingly, found examples that are consistent with the model. Nevertheless, more systematic studies have reached varying conclusions (cf. Eskridge 1991 and Spiller & Gely 1992 with Segal 1997). This is not the place to engage in the sort of detailed evaluation it would take to sort through the claims and counterclaims; suffice it to say that, at the very least, these models have received the attention they deserve.

C. Precedent

The rational-choice model is not without its critics. According to longstanding models within social and cognitive psychology, utility-maximizing models do not accurately represent how humans actually behave. For example, it is an article of faith among social psychologists that humans are incapable of the types of maximizing behavior posited by rational-choice theorists and economists. Instead, humans are thought to be boundedly rational (Iyengar & McGuire 1993, see esp. chs. 11–14). Thus, framing can readily influence preferences (see Iyengar & Kinder 1987), and losses appear to weigh more than gains (Kahneman & Tversky 1984). Moreover, humans may set goals that move beyond narrow conceptions of self-interest (Mansbridge 1990).[4] Of particular interest here is the extent to which Justices' policy goals are constrained by beliefs that they do what is normatively appropriate, such as the following of text, intent, and precedent.

Out of these three factors, precedent is the dominant one. For the briefs on the merits, previous decisions typically outweigh constitutional provisions, statutes, regulations, and all other sources combined in the Table of Authorities (Knight & Epstein 1996). Moreover, Justices frequently make appeals to precedent in their private conference discussions (Knight & Epstein 1996). Additionally, Justices more frequently cite precedents in their written opinions than any other source of information (Knight & Epstein 1996; Phelps & Gates 1991). For scholars, too, the long history of doctrinal research is largely based on the legal principles of stare decisis.

The question of whether stare decisis actually influences the decisions of the Supreme Court Justices or, rather, merely rationalizes their decisions, is a bit more complex, because although Justices in virtually every case *follow* one line of precedent or another, it is difficult to determine whether they were *influenced* by that line of precedent. "Influence" requires that the precedent lead them to a result that they would not otherwise have reached. As Judge Jerome Frank stated, "Stare decisis has no bite when it means merely that a court adheres to a precedent that it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unwise or unjust" (*United States ex rel. Fong Foo v. Shaughnessy* 1955:719).

Using this type of operational standard for the influence of stare decisis, Spaeth and Segal (1999) find little such influence throughout not only modern times but also throughout the his-

[4] Whether this contradicts rational-choice theory is subject to debate. Most rational-choice theorists contend that the theory contains no a priori limits on what goals scholars may posit. See, e.g., Riker 1990. Whether this then trivializes rational-choice theory is also subject to debate.

tory of the Court. They do, however, find some substantively meaningful levels of deference to stare decisis in the least salient of the Court's cases.[5]

Admittedly in many situations confronting the Supreme Court (or any other court) conflicting lines of precedent are the norm. For this and other reasons, judges in the late 20th century undoubtedly faced overdetermined legal outcomes. Stare decisis thus might not constrain Justices in these sorts of everyday decisions, where either fact-freedom or precedent-freedom abounds. Maybe its constraint is only felt in crisis, in the most extreme of circumstances, when Justices must confront overruling a previous decision. Nevertheless, Segal and Howard (2001) find that the Justices' treatment of stare decisis is conditional on their ideology: Liberals vote to uphold liberal but not conservative precedents; conservatives vote to uphold conservative but not liberal precedents.

D. Text and Intent: Original Intent and Original Meaning

While it might be fanciful to claim that Justices such as William O. Douglas or William Brennan were influenced by text and intent, the case for many other Justices is not so clear-cut. Although many legal theorists (see, e.g., Brest 1980; Powell 1988) skeptically examine judicial claims of originalism, other scholars claim that Justices such as Hugo Black, William Rehnquist, Antonin Scalia, or Clarence Thomas are influenced by such factors. Many Justices have proposed this view in their opinions, dissents, and writings.

Hugo Black, of course, is the exemplar of this approach: "In interpreting the Constitution (Black) followed the plain meaning of the words and the intent of the framers" (Davis 1989:23–24); "Hugo Black, with a 'near religious fervor' for most of his tenure on the Court, fought and argued to base his and the Court's constitutional interpretation on the literal text itself. . . . Always at war against judicial roaming in the murky 'natural law' ether of substantive rights . . . Black tried to interpret constitutional phrases in accordance with the intent of the Framers and the history of the clause or amendment" (Ball & Cooper 1992:318–19). More subtly, Goldstein (1991:41) argues that Black "utilized a moderately textualist jurisprudence . . . guided primarily by the wording of the constitutional text and its structure."

The Supreme Court and its most conservative Justices are similarly viewed by a variety of scholars. Although critically exam-

[5] Note, alternatively, that when Court of Appeals judges dissent from *en banc* rulings, they overwhelmingly tend to follow such rulings in future decisions. See Kahn 2000. We also note that the influence of precedent on lower court judges, who are subject to vertical stare decisis, has been well established.

ining the decisions of the *Lochner* Court, Gillman (1993:20) noted that one could argue that the *Lochner* Court was "to a large extent, giving voice to the founders' conception of appropriate and inappropriate policymaking." As for more recent justices, Davis (1989) states that Rehnquist's behavior on the Court cannot be explained by his conservative ideology. Instead, she claims, Rehnquist is a legal positivist, one who believes that "lawmaking is a prerogative of legislators rather than judges. . . . In an attempt to adhere to the law as an empirical fact, a positivist jurist limits his or her interpretation of the Constitution to the meaning of the words or the text or intent of its authors" (Davis 1989:23). According to Smith (1997:9) "Thomas seeks to base his opinions on the original intent of the Framers of the Constitution, Bill of Rights, and subsequent constitutional amendments. His opinions are replete with references to the primacy of the Framers' intentions. He treats these intentions as compelling directives that dictate the outcomes and reasoning in cases."

Others view Justices as advocates of particular positions, without necessarily claiming direct causal connections. "The school of thought of which Chief Justice Rehnquist is the most prominent adherent would deny for the most part the validity of any tradition except that already frozen in the founding events"(Powell 1988:1703–4). To Schultz and Smith (1996:80) "Scalia's uniqueness stems from his notable role as the Court's most consistent, forceful advocate of constitutional interpretation according to the original meaning intended by the framers." Levinson (1996:501) calls Thomas's opinions in *U.S. v. Lopez* (1995) and *U.S. Term Limits v. Thornton* (1994) "the most uncompromising originalist opinions in decades."

To the extent that causal inferences are made, how do scholars reach these conclusions? Far too often, it is from nothing more than the official writings of the Justice in question (see, e.g., Karsten 1997; Kahn 1999). As Spaeth (1964) observed, Frankfurter was able to convince scholars that he was a restraintist, despite ample evidence that he was not, because he so often wrote about the need to defer in those cases in which he chose to do so. Similarly, the fact that Scalia talks the talk does not necessarily mean that he walks the walk. Even Brennan, after all, is willing to make use of textual and intentional arguments in his opinions (Phelps & Gates 1991).

Sometimes, though, these writings do in fact make plausible cases for reliance on text or intent. This is especially the case when the decisions appear to contradict the Justice's broad policy values. It is impossible to imagine that anything other than a lack of any constitutional command could have led Black to vote to uphold Connecticut's absurd birth control law. Similarly, Scalia's dedication to the confrontation clause (e.g., *Maryland v.*

Craig 1990) lends an air of plausibility to his self-proclaimed originalism (Scalia 1997).

Of course, for every example there are countless counterexamples. Recent legal analysis has been especially skeptical about the purported claims of originalism espoused by the Rehnquist Court Justices. Levinson, for example, finds Thomas's purported originalism to be based on his own political and moral preferences (1996:501). As one critic notes,

> That Justices Scalia and Thomas joined Chief Justice Rehnquist's avowedly nonoriginalist Eleventh Amendment opinion in *Seminole Tribe* is but one example of originalists abandoning originalism. Another is Scalia's own opinion striking down part of the Brady bill under a theory of "dual federalism" which nowhere appears in the Constitution and for which originalist evidence is, by his own admission, weak. . . . Such hypocrisies have led Justice Souter to question Scalia's intellectual honesty and to act as a purposeful check on Scalia's historical analyses. (Lazarus 1998:547)

Scholars have also noted the contradiction. For example, Zlotnick writes, "Scalia's public statements suggest that his constitutional methodology did not arise solely from an abstract contemplation of text, history and political theory, but rather is motivated in large part by his harsh assessment of modern judicial decision making" (1999:1385). Nichol argues that, in *Printz v. United States*, "Justice Scalia faced a powerful historical claim directly refuting his proffered rule. But rather than give in, he put his head down and pressed on—explaining at every turn why the lessons of the founding period have nothing to offer" (1999:969).

These analyses have done much to advance critical thinking on the purported use of originalism. We propose to build on these critical scholarly examinations by offering a method to systematically assess, through a priori measures and falsifiable tests, originalism as a potential explanation for the Justices' behavior. That is, we seek to determine in a systematic way whether a Justice supports originalist arguments because, as one scholar says, "I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor" (Rakove 1996:xv), or because the force of the text or meaning of the Constitution influenced the outcome, despite the ideological predisposition of the Justice.

Many scholars argue that this cannot be done. Graber, for example, declares "there is no neutral way of measuring whether a justice is following text or intent" (2000). Gillman (2001) similarly notes the refusal, on theoretical grounds, of post-positivist legalists to offer predictions about what legal behavior should

look like.[6] Nevertheless, we are convinced neither that the empirical problem is insurmountable nor that the strict post-positivist position—including its rejection of falsifiable tests—represents the only way to view law. In the following section, we propose a method of measuring text- and intent-based arguments a priori. From there, we develop falsifiable tests using standard techniques in judicial behavior.

III. Measures

As an empirical claim, originalism suggests that Supreme Court Justices decide cases in light of plain meaning of text and the intent of the framers. Consistent with a variety of legal-based theories, we do not argue that the Justices are bound by such factors; instead, we claim that they influence, or have a gravitational impact on, the Justices.

The fundamental problem in testing originalism consists of validly measuring these factors. For example, while measures of precedent have recently been created and tested, to date, measures of text and intent have not been. We propose that this can be accomplished by examining the briefs filed by petitioners and respondents in cases heard before the Court. Under the adversary system of justice, litigants are supposed to present the best possible set of arguments in their favor (see George & Epstein 1992; Epstein & Kobylka 1992; Kort 1963; Songer & Haire 1992).

We assume that if a plausible case can be made that a legal argument supports a party, that party will likely make that claim. If that claim is only questionably correct, then we should be able to rely on the opposing litigant to point that out. While counsel will certainly vary in quality and thus might miss some obvious claims, the doctrine of *sua sponte* largely limits the Justices to those claims that are made by counsel. Thus, for text or intent, the petitioner can make a claim or not make a claim. If the petitioner makes a claim, that claim can be disputed or not disputed by the respondent. Similarly, the respondent can make a claim or not make a claim for text or intent. The claim can be disputed or not disputed by the petitioner.

The basic framework we propose examines the Justices' support for the petitioner or respondent based on the legal arguments and counterarguments made by counsel in their briefs. We assume that an undisputed claim has, on average, more weight than a disputed claim; that a disputed claim has more weight, on average, than a non-claim; and, for our simplest tests, that claims by petitioners are, on average, equal in merit to

[6] See also the Law and Courts listserve, Digest 179, 7 June 1997, and Digest 180, 8 June 1997, questioning the ability to establish falsifiable tests of legal variables, as well as their need and desirability. Lawcourts-l@usc.edu.

claims by respondents.[7] That they may not be equal in particular cases, e.g., that the quality of legal representation varies from case to case, does not bias the results.

Nevertheless, we do realize that these are not ideal measures. First, we recognize a potential bias in the type of litigant who presents originalist arguments. It is an empirical fact that the foremost contemporary judicial proponents of originalism are conservative (e.g., Bork, Scalia, and Thomas). If originalism is in essence a conservative doctrine, then we might plausibly expect conservative litigants to make more, and perhaps even better, originalist arguments. We doubt, though, that originalist interpretation of a document that declares that Congress shall pass *no* law respecting an establishment of religion or abridging the freedom of speech and that prohibits the states from denying equal protection of the laws or abridging the privileges or immunities of citizens of the United States, is necessarily conservative. Simply put, originalism and liberalism are not antithetical (see, e.g., Dworkin 1997, Gerber 1995, Farber 1989, and Barnett 1999).[8] Phelps and Gates (1991) demonstrate that liberal and conservative Justices are equally capable of presenting originalist arguments, and our data reveal few systematic differences in the ideological type of litigant offering such arguments. Moreover, we can and will control for ideology.

Second, we do not offer any method to assess the centrality of originalist arguments to litigants nor to match the originalist arguments to specific legal arguments. We assume litigants will try to advance as many plausible arguments as possible to support their position in the hope that the Court will adopt at least one of their arguments. Parties may stress one argument over another or believe one is stronger than others are. We, of course, do not know which arguments litigants believe to be their strongest, nor do we have an objective way of categorizing such a variable. Alternatively, we can and do measure the *presence* of the argument. This presence in turn provides the Justice with an opportunity to use text and intent arguments as a basis for voting for or against the party.

At the very least, this approach allows a first cut at a scientific approach to these important measures. Table 2 reports the coding of our key variables of text and intent.

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[7] This assumption need not hold if the types of legal arguments made by petitioners are similar to the types of legal arguments made by respondents, e.g., if petitioners are no more likely to use arguments based on text than are respondents.

[8] Whether defining a difference between "semantic originalism" and "expectation originalism" (Dworkin 1997), or between "liberal originalism" and "conservative liberalism" (Gerber 1995), or between original meaning and original intent (Farber 1989; Barnett 1999), these scholars have shown that so-called liberal constitutional positions and originalism are not inconsistent.

Table 2. Coding of Text and Intent Variables

Text:

2: An undisputed claim by petitioner that the plain meaning of the text, i.e., the statute or constitutional clause under consideration, supports the petitioner;

1: A disputed claim by petitioner that the plain meaning of the text supports petitioner; respondent does not claim that plain meaning supports respondent;

0: Neither or both parties claim that their side is supported by plain meaning;

-1: A disputed claim by petitioner that the plain meaning of the text supports respondent; petitioner does not claim that plain meaning supports petitioner;

-2: An undisputed claim by respondent that the plain meaning of text supports respondent.

Intent:

2: Undisputed claim by petitioner that the intent of the framers supports the petitioner;

1: Respondent disputes claim by petitioner that the intent of the framers supports the petitioner; respondent does not claim that the intent of the framers supports the respondent;

0: Neither or both parties claim that their side is supported by the intent of the framers;

-1: Petitioner disputes claim by the respondent that the intent of the framers supports the respondent; petitioner does not claim that the intent of the framers supports the petitioner;

-2: Undisputed claim by respondent that intent of the framers supports the respondent.

IV. Data

Our data consist of all briefs on the merits filed by petitioners and respondents for eight terms: 1979, 1980, 1985, 1986, 1991, 1992, 1993, and 1994. We read each brief focusing on actual statements regarding both text and intent. In most cases, each side filed one brief although on occasion, the petitioner would then file a reply brief; and on rare occasions, the respondent would then file a reply. Apart from these examples, there were no other instances of multiple briefs. If there was a reply brief, we coded any text and intent statement in either the original or reply brief as a one instance of text or intent arguments.

For text-based arguments we looked for statements indicating explicit textual support. Most often this took the form of phrases such as "plain meaning," or "plain language," or simply "the language," and usually this was easily ascertainable. The respondent or petitioner brief would say the "plain meaning" or the "plain language" of the law or legislation supports their position. Thus, for example, in *Presley v. Etowah County Commissioners* (1992) a case that involved Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c), the Solicitor General in an amicus brief argued that "the plain language of the statute makes the preclearance requirement applicable to any change with respect to voting, no

matter how small or minor"(Solicitor General brief:20); and in *Michael M. v. Sonoma County Superior Court, California* (1981) a case involving statutory rape, in which both parties were underage, the State of California argued that "the language of Section 261.5 and the policy and intent of the California legislature evinced in other legislation demonstrate that the prevention of pregnancy and the prevention of physical harm to female minors are the primary purposes underlying Section 261.5"(Respondent Brief:54).

If the opposing party disagreed with such an assertion, we looked for where the opposing brief openly expressed the disagreement, such as declaring that the plain meaning, or plain language, does not support the petitioner. Thus in *Presley*, the respondent argued, "Such a rule, however, is justified neither by the statutory language nor by the governing case law" (Respondent brief:63). Of course, many times both parties would claim that the plain meaning supported their position, and, on occasion, one party asserted that the plain meaning supported their position while the opposing party ignored the argument altogether.

Although seeking assertions of framers' intent was not quite so straightforward, we used a similar process. For framer support we looked both for references to legislative history and any argument for original intent of the framers or original meaning of the Constitution. Hence, we searched for statements arguing for the support of legislative history or references to same, or statements regarding intent or support of the framers of the Constitution. Thus, in a case involving a claim for workers' compensation entitled *Potomac Electric Power Company v. Director, Office of Workers' Compensation* (1980), the respondent Terry Cross argued, "The case law and legislative history reflect that the first method, referred to as the scheduled loss benefits, was designed to compensate employees for the permanent physical loss which they incurred regardless of whether the injury caused any permanent economic loss" (Respondent Terry Cross brief:5). In this case, the petitioner also referred to the legislative history, arguing that "the legislative history underlying the Act, which shows that the Congress, both at the time of the original enactment and again at the time of the extensive 1972 amendments to the Act, made a conscious decision to restrict compensation for scheduled disabilities to the periods specified, and not on the basis of an individual's impaired earning capacity" (Petitioner's brief:6). Again, similar to our examination of disputes over textual support, we looked for explicit statements arguing against legislative history or intent of framer support. That is, we examined the briefs to see if the opposing party explicitly argued against a claim that the legislative history supported the respondent or petitioner. We present examples of text and intent references that we in-

cluded, and examples of references that we excluded, in Table 3.[9]

Table 3. Examples of Included and Excluded Text and Intent References

Included References	Excluded References
"The language of the statute supports respondent."	"Policy considerations support respondent's position."
"The plain meaning of the statute supports petitioner."	"Rules of statutory construction favor petitioner."
"The writing supports petitioner's position."	"Public goals will be advanced by petitioner's position."
"Congress explicitly approved such action in the statute."	"Public policy dictates that the Court find for the respondent."
"A review of the legislative history supports respondent."	"The Court's precedent supports petitioner."
"A clear reading of the statute reveals Congress has determined."	"Past decisions support the interpretation of the respondent."
"There is no legislative support for respondent's position."	"Some support exists for this position."
"Statutory history is applicable."	"Language and history are ambiguous."
"Congress expressly grants such authority."	"Evidence of congressional guidelines."
"The intent of the framers."	"Congress must have intended this result."

In our 895 cases, petitioners made 191 claims that legislative or constitutional text clearly supported their positions. Of those 191 claims, 105 went undisputed by respondents, 50 were denied by respondents, and 36 more were met by counterclaims that the text supported the respondents. Alternatively, respondents made 136 claims that the text clearly supported their positions. Sixty-four of those claims went undisputed, 36 were denied by petitioners, and 36 were counterclaimed by petitioners. As for intent, petitioners made 325 claims that legislative intent favored its position. Seventy-two of those claims were left undisputed, 74 were disputed, and 179 resulted in counterclaims that intent actually supported the respondent. Respondents made 304 claims that intent favored them. Seventy-four of these were left undisputed, 51 were disputed, and 179 resulted in counterclaims that intent ac-

[9] The briefs were coded by one of the authors, an attorney as well as a political scientist. The other author, who does not have a law degree, did not engage in the primary coding of any of the data from the briefs.

Quite often the coding was clear, as indicated by the examples given in Table 3. We took a conservative approach to coding. Hence, if there was a lack of clear language, we would not code that brief as providing an example of text and intent. Of course sometimes this proved difficult. For example, sometimes a party would argue that public policy considerations would support their position and that Congress would support its interpretation of public policy. We did not code such arguments as based on text or intent. Other times the party would use the words "text" or "intent," or similar language, but would provide no other evidence or statements to this effect. Approximately 25% of the cases had such ambiguous language and were the most difficult to code. We would discuss these cases, and, under our conservative coding guidelines, would usually code them as lacking text or intent references.

tually favored the petitioners. As can be seen, litigants make a fair number of arguments about text and intent, but such arguments are often not relevant to modern questions, such as whether a mobile home is a car or a home within the meaning of the Fourth Amendment (*California* v. *Carney* 1985).

We then combined these data with data from Harold Spaeth's U.S. Supreme Court Judicial Database, which provides information on dozens of variables about each case. From the database we readily derived the ideological position of each party.[10]

V. Results

We begin our analysis using the research strategy first used by Spaeth (1964) to test for judicial restraint nearly 40 years ago. Spaeth first noted that while Justices frequently cast votes that could be classified as "restrained," e.g., supporting state economic regulations or upholding the decisions of federal regulatory commissions, such support was conditional on the ideological direction of the agency decision. For example, Justice Frankfurter, the purported paragon of judicial restraint, voted to uphold 60% of National Labor Relations Board (NLRB) decisions during the first seven terms of the Warren Court. Breaking the data down by ideological direction of the agency's decision, however, reveals that while Frankfurter upheld 88% of the agency's anti-union decisions, he upheld only 29% of the agency's pro-union decisions. Thus Spaeth (correctly) concludes that Frankfurter's voting behavior was consistent with economic conservatism, not judicial restraint.

Similarly, as a first test of our hypotheses, to conclude that a Justice generally upholds text or intent, we submit that she must generally support originalist arguments when the more liberal side makes such arguments and when the conservative side makes such arguments. To analyze these first results, we take our text and intent variables, which we merged with the Spaeth database, and determine whether either the liberal or the conservative side made an argument that the plain meaning of the text or the intent of the framers supported its side.[11] We present

[10] Liberal parties typically include defendants in criminal cases and women and minorities in civil rights cases; individuals against the government in First Amendment, due process, and privacy cases; attorneys in attorney's fees and bar membership cases; unions in union cases; the government in economic cases; and the federal government in federalism and federal taxation cases. See Spaeth and Segal (2000) for a fuller discussion of the database.

[11] For these first tests, if there was no claim or a balanced claim, neither text nor intent supports either side, so such data are excluded. We did not categorize whether the other party ignored the claim or opposed it on nonlegal grounds, such as policy considerations. Further, to run the simple crosstabs required by the Spaeth test, we simply examined claims about text and intent, ignoring for now disputes over those claims. We will use the full range of data in the logit tests that follow.

the results in Table 4. We include estimates of the statistical probability of these associations obtained from χ^2 tests of significance.

Table 4. Percentage of Support for Side Making Textual and Intent Based Claims, by Ideological Side

	Text Argument Made by Which Side		Intent Argument Made by Which Side	
Justice	Conservative	Liberal	Conservative	Liberal
Blackmun	44.8 (116)	63.4 (112)*	43.0 (121)	66.7 (120)*
Brennan	27.6 (87)	76.3 (80)*	24.7 (77)	80.5 (82)*
Breyer	60.0 (5)	50.0 (14)	20.0 (10)	38.5 (13)
Burger	74.0 (73)	43.1 (65)*	64.5 (62)	42.9 (63)*
Ginsburg	50.0 (12)	50.0 (22)	40.9 (22)	48.0 (25)
Kennedy	54.3 (35)	53.2 (47)	50.9 (57)	40.4 (52)
Marshall	22.9 (83)	78.0 (82)*	26.7 (75)	79.0 (81)*
O'Connor	52.2 (67)	38.8 (80)†	54.4 (90)	37.6 (85)*
Powell	63.5 (85)	35.8 (81)*	58.7 (75)	43.8 (80)*
Rehnquist	73.0 (122)	28.7 (129)*	65.9 (132)	28.8 (132)*
Scalia	54.2 (48)	45.3 (64)*	55.6 (72)	33.8 (71)
Souter	40.0 (35)	59.6 (47)*	39.3 (56)	61.5 (52)*
Stevens	40.5 (121)	57.0 (128)*	41.0 (134)	59.0 (134)*
Stewart	66.0 (53)	51.0 (49)	58.1 (43)	45.8 (48)
Thomas	60.6 (33)	47.6 (42)*	61.1 (54)	30.0 (50)
White	60.0 (110)	53.3 (107)	49.1 (112)	54.2 (107)

NOTE: Total N (i.e., total textual or intentional arguments made by liberal or conservative side) in parentheses. Significance levels represent significant differences between supporting liberal side when it presents textual (intentional) arguments and the conservative side when it does the same.
*$p < 0.05$; †$p < 0.10$.

Before analyzing the results, we first provide an example of what the data in the table mean. During the eight terms that we studied, Blackmun decided 116 cases in which the conservative side in the case made an argument that the plain meaning of the text under construction supported its side and no such claim was made by the liberal side. Of those 116 cases, Blackmun supported the conservative side 44.8% of the time. Alternatively, Blackmun decided 112 cases in which the liberal side in the case made an argument that the plain meaning of the text under construction supported its side, and no such claim was made by the conservative side. Of those 112 cases, Blackmun supported the liberal side 63.4% of the time.[12] Thus, we conclude that Blackmun supports the side making textual arguments when that side supports the liberal position in a case, but not when that side supports the conservative position. By the Spaeth test, Blackmun cannot be considered a consistent supporter of textual arguments.

Overall, we find that only three justices, Kennedy, Stewart, and White support the side making textual arguments a majority of the time, regardless of whether that side takes the liberal or

[12] This difference is significant at $p < 0.05$.

the conservative position. Two other Justices are on the border, with 50% support for one side or the other. Rehnquist, like most of the other Justices, behaves as an ideologue, supporting textual claims when made by the conservative side but consistently voting against such claims when made by liberal parties. As for Scalia and Thomas, though both support liberal textual claims less than half the time (45.3% and 47.6%, respectively), these numbers are higher than their support for liberal parties that do not make textual claims. Alternatively, they support conservative parties that make textual claims at a rate lower (54.2% and 60.6%, respectively) than they generally support conservative parties. The data thus suggest an extremely conditional argument about text: that conservative Justices are more likely to support liberal litigants when those litigants make text-based claims than they ordinarily would. Multivariate tests suggest the plausibility of this hypothesis in that the conditional effects of liberal text-based claims for Scalia and Burger would be significant at $p < 0.10$, one tailed, while the effect for Thomas would be significant at $p < 0.05$, one tailed, if we had generated these hypotheses a priori. No other Justices show this effect. Because we did not conceive of this specific test until the data suggested it, corroboration of the hypothesis requires testing on an independent sample of data.

As for intent, these first analyses present even less evidence that the Justices are influenced by such claims. Fifteen out of the 16 Justices support intentional claims when made by the liberal side or when made by the conservative side, but not both. The 16th Justice, Ginsburg, fails to support either liberals or conservatives when they make intentional arguments.

While these crosstabular analyses are illuminating, they do not account for the fact that Justices treat petitioners and respondents differently or for other important factors influencing judicial decisionmaking (Ulmer 1972; Brenner & Krol 1989; Boucher & Segal 1995). We control for this by running a multivariate analysis, consisting of two sets of logistic regressions, both using the Justices' probability of voting with the petitioner as the dependent variable. In the first model, we simply include our two text and intent variables, as defined in Table 2. We present our results from this first model in Table 5. That is, in Table 5 we present results that show, absent ideological considerations, the increase in the likelihood of a Justice voting for the petitioner (respondent) when the petitioner (respondent) presents originalist arguments.

More specifically, the constant returns the Justices' log likelihood of voting for the petitioner when textual and intentional arguments are at zero, which represents a state of balance between the petitioner's and the respondent's arguments. The coefficients for text and intent show the increase in the likelihood

Table 5. Logit Analysis of Probability of Supporting Petitioner Based on Legal Arguments

Justice	Text	Intent	Constant	*N*
Blackmun	0.07 (0.08)	0.10 (0.07)	0.20 (0.07)*	792
Brennan	0.03 (0.09)	0.05 (0.10)	−0.15 (0.09)	501
Breyer	0.32 (0.38)	−0.75 (0.40)	0.40 (0.25)	77
Burger	0.18 (0.10)*	0.03 (0.11)	0.45 (0.11)*	356
Ginsburg	−0.02 (0.26)	−0.12 (0.21)	0.12 (0.16)	166
Kennedy	0.05 (0.14)	−0.10 (0.13)	0.36 (0.10)*	378
Marshall	0.03 (0.09)	0.07 (0.10)	−0.25 (0.09)*	493
O'Connor	−0.09 (0.10)	−0.09 (0.09)	0.29 (0.08)*	624
Powell	−0.03 (0.09)	0.01 (0.10)	0.47 (0.09)*	493
Rehnquist	−0.00 (0.08)	−0.06 (0.08)	0.32 (0.07)*	876
Scalia	−0.07 (0.12)	−0.15 (0.11)	0.26 (0.09)*	519
Souter	−0.03 (0.14)	0.01 (0.13)	0.34 (0.10)*	377
Stevens	−0.04 (0.08)	0.01 (0.08)	0.04 (0.07)	879
Stewart	0.14 (0.12)	−0.00 (0.14)	0.51 (0.14)*	247
Thomas	0.09 (0.15)	−0.10 (0.13)	0.20 (0.11)*	361
White	0.09 (0.08)	−0.02 (0.09)	0.46 (0.08)*	711

*$p < 0.05$

of voting for the petitioner as textual and intentional arguments move from least-favorable to the petitioner (an undisputed claim by the respondent) to most-favorable (an undisputed claim by the petitioner).

This initial multivariate analysis, without any ideology variable, presents a different picture than the crosstabular results. While the crosstabular analyses provide meager support for textual influence, such influence can barely be found in the multivariate analyses. In Table 5, only Burger's coefficient for text is significant at $p < 0.05$. Almost all of the other coefficients are smaller than their standard errors. Similarly, none of the coefficients for intent is significant. Alternatively, we do see that the constant is positive and significant for most of the Justices, meaning that controlling for legal arguments, these Justices are more likely to vote for the petitioner than the respondent. Not surprisingly, this finding does not hold for the Court's outlying Justices: Brennan and Marshall. The moderately conservative Justices who controlled the Court during this period undoubtedly voted certiorari most often in those cases in which conservative parties lost.[13] It is natural, then, that Brennan and Marshall would be more likely to support respondents in these cases, and they do.

In predicting the likelihood of supporting the petitioner, Table 6 adds the ideological direction that the petitioner took (1 = liberal; 0 = conservative). That is, in the second model, we add a dummy variable representing whether the petitioner favored the liberal position or not. The coefficient for this variable represents each Justice's predisposition for supporting the liberal or the conservative side, controlling for the nature of the legal argu-

[13] We do not have the certiorari votes for these Justices, but that inference is consistent with every study done where cert votes are available.

ments made. Thus, the coefficient for "Ideology" in this model is not the impact of the Justice's ideology on the Justice's decision,[14] but the impact of the petitioner's ideology. These coefficients thus give an interesting view at the size and direction of each Justice's predisposition to supporting the petitioner based solely on the ideological direction that the party represents in the case, even with the presence of originalist arguments. We present these results in Table 6.

Table 6. Logit Analysis of Probability of Supporting Petitioner Based on Legal Arguments and Ideology

Justice	Text	Intent	Ideology	Constant	*N*
Blackmun	0.08 (0.08)	0.11 (0.08)	0.89 (0.14)*	−0.21 (0.10)*	792
Brennan	0.03 (0.10)	0.07 (0.11)	2.06 (0.21)*	−1.02 (0.13)*	501
Breyer	0.30 (0.39)	−0.75 (0.40)	0.10 (0.49)	0.39 (0.34)	77
Burger	0.17 (0.11)	0.03 (0.12)	−1.25 (0.23)*	1.05 (0.16)*	356
Ginsburg	−0.06 (0.26)	−0.12 (0.21)	0.47 (0.32)	0.47 (0.32)	166
Kennedy	0.07 (0.14)	−0.11 (0.13)	−0.58 (0.21)*	0.69 (0.16)*	378
Marshall	0.01 (0.11)	0.09 (0.12)	2.27 (0.21)*	−1.25 (0.14)*	493
O'Connor	−0.09 (0.10)	−0.10 (0.10)	−0.72 (0.17)*	0.65 (0.12)*	624
Powell	−0.04 (0.10)	0.02 (0.10)	−0.66 (0.19)*	0.77 (0.13)*	493
Rehnquist	0.00 (0.08)	−0.07 (0.09)	−1.67 (0.15)*	1.16 (0.11)*	876
Scalia	0.03 (0.12)	−.16 (0.11)	−1.06 (0.18)*	0.80 (0.13)*	519
Souter	−0.05 (0.14)	0.01 (0.13)	0.42 (0.21)*	0.12 (0.15)	377
Stevens	−0.05 (0.08)	0.02 (0.08)	0.87 (0.14)*	−0.36 (0.09)*	879
Stewart	0.14 (0.12)	0.00 (0.14)	−0.27 (0.27)	0.63 (0.18)	247
Thomas	0.13 (0.16)	−0.13 (0.14)	−1.42 (0.23)	1.00 (0.18)	361
White	0.09 (0.08)	−0.03 (0.09)	−0.31 (0.16)*	0.61 (0.10)*	711

*$p < 0.05$

As can be seen, Brennan and Marshall are *much* more likely to support the petitioner when he or she is on the liberal side than when on the conservative side. Controlling for legal arguments based on text and intent, Brennan's probability of supporting the petitioner is 0.26 when the petitioner takes the conservative position but 0.74 when the petitioner takes the liberal position. Marshall's probabilities are 0.22 and 0.74, respectively. The predispositions of the Court's most conservative Justices, Rehnquist, Scalia, and Thomas, are not as large as the liberals', but they are still rather substantial. Controlling for legal arguments, Rehnquist's probability of supporting a conservative petitioner is 0.79, while his probability of supporting a liberal petitioner is 0.38. Scalia's probabilities are 0.69 and 0.44 respectively, while Thomas's are 0.73 and 0.40. Alternatively, once the ideological position of the petitioner is controlled for, neither textual

[14] The only independent measure of the Justices' ideology, the Segal-Cover score (Segal & Cover 1989), is constant for each Justice and thus cannot be included in an equation predicting that Justice's voting behavior. They can be used in pooled models, which we will do later.

nor intentional arguments appear to have any significant impact on any of the Justices.[15]

Finally, in our last two tables we pool the votes of the Justices. This allows us to examine simultaneously the impact of legal arguments, the ideology of the parties, and the ideology of the Justices. We present two different versions of our pooled model. In the first version, we continue the coding scheme of Table 2, coding zero when neither or both parties claim that their side is supported by plain meaning or text. We present these first results in Table 7 as models 1 and 2.

Table 7. Pooled Model Logit Analysis of Probability of Supporting Petitioner Based on Legal Arguments and Ideology

Variable	Model 1	Model 2
Text	0.03 (0.03)	0.03 (0.03)
Intent	−0.02 (0.03)	−0.02 (0.03)
Petitioner Ideology		0.34 (0.05)*
Justice Ideology		−0.75 (0.05)*
Ideology Interaction		1.30 (0.08)*
Constant	0.23 (0.03)*	0.05 (0.04)
N	7,850	7,850

*$p < 0.001$

Model 1 is simply a pooled version of Table 5. Neither textual nor intentional arguments are close to significant. In Model 2 we add ideology to the picture through a basic interactive model. Petitioner Ideology, as before, is a dummy variable coded as one if the petitioner takes the liberal side, zero otherwise. Justice Ideology is each Justice's Segal-Cover score (Segal & Cover 1989).[16]

[15] Under our coding scheme, the text and intent variables in these tables were coded zero when either *no* party made a text or intent argument, or when *both* parties made offsetting text or intent arguments. Our assumption is that the failure of both parties to make text or intent arguments, or both parties making text or intent arguments, has the same influence on the probability of the Justice voting for the petitioner. We recognize, however, the possibility that the failure to make an argument could have a different influence than offsetting arguments. Accordingly, we reran the analyses in Tables 5 and 6 omitting the cases where both sides failed to make text or intent arguments, leaving only a zero where both sides made an argument. We found no substantive change for any Justice in either Table 5 or Table 6 in reference to the text and intent variables. While there were some small changes for many of the Justices in the size of either the coefficients or the standard errors, none resulted in any change in probability.

For the petitioner ideology variable we introduced in Table 6, we found a substantive change for one and only one justice—White. Justice White's ideology coefficient dropped from −0.31 ($p < 0.05$) to −0.19, while the standard error increased from 0.16 to 0.17. Thus, in this new analysis, this coefficient failed to achieve statistical significance at the generally accepted level of 0.05. The results for the ideology variable for the other Justices were similar to the results for the text and intent variables. That is, although there were some small changes, none resulted in any meaningful change in probabilities. The results from these analyses are available from the authors upon request.

[16] Segal and Cover derived ideological scores for Justices through a content analysis of four newspapers—the *New York Times*, the *Chicago Tribune*, the *Washington Post*, and the *Los Angeles Times*—at the time of the appointment of each new Justice. The scores range from −1.0 to +1.0, as the ideology is calculated from the most conservative to the most liberal. The coding starts with the appointment of Earl Warren and ranges from a −1.0 for

Ideology Interaction is an interaction between Petitioner Ideology and Justice Ideology. This necessary step allows the impact of the Segal-Cover score on the probability of voting for the petitioner to vary according to whether the petitioner takes the liberal position or the conservative position. Thus, when the petitioner is liberal (Petitioner Ideology = 1), the impact of a one-unit change on the Segal-Cover scores on the log likelihood of voting for the petitioner is (1.30 - 0.75 =) 0.55. When the petitioner is conservative, the impact is –0.75. All ideology variables are significant at $p < 0.001$. But once again, textual and intentional arguments fail to have an impact.

In Table 8 we change our coding scheme. In this table, we merged the intent and plain meaning arguments. This change allows an intent-based argument to be neutralized if the other side makes a plain-meaning argument and a plain-meaning argument to be neutralized if the other side makes an intent-based argument. We present these results as models 3 and 4 in Table 8. In both models presented in this table, our results are the same as our results in Table 7. The merged text and intent variable fails to have an impact.

Table 8. Pooled Model Logit Analysis of Probability of Supporting Petitioner Based on *Merged Legal Arguments* and Ideology

Variable	Model 3	Model 4
Text and intent	0.02 (0.02)	0.02 (0.02)
Petitioner Ideology		–0.75 (0.05)*
Justice Ideology		1.28 (0.08)*
Ideology Interaction		0.34 (0.05)*
Constant	0.23 (0.03)	0.04 (0.04)
N	7,850	7,850

*$p < 0.001$

VI. Conclusions

The role of text and intent in judicial decisions is very important. First, a generation after Edwin Meese's (1986) shrill originalism made headlines, normative scholars continue vigorously to debate the topic (Goldstein 1991; Symposium 1996; Whittington 1999). Second, while many legal scholars have critically examined originalist arguments, some scholars continue to make empirical claims that some Justices, at least, do in fact respond positively to textual and intentional arguments. Third, the impact of text and intent, like the impact of precedent, implicates role-theoretic, constitutive, and other legal-based models, as well as the attitudinal and rational-choice models of judicial

Scalia to a +1.0 for Justices Brennan and Marshall. A complete listing can be found in the Supreme Court Compendium (Epstein et. al. 1996).

decisionmaking. Fourth, unlike the other leading models of Supreme Court decisionmaking (see Table 1), there has been no systematic evidence as to the impact of text and intent.

The systematic evidence presented here suggests that the legal scholars who have critically examined the Justices' claims of originalism are by and large right. Anomalies aside, Justices might speak about following an "originalist" jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer.

This is not, per se, a critique of the Court, as originalists hold no monopoly on how the Court should decide cases. For those who are normatively wedded to originalism, however, the results, if accepted, are in fact a problem.

We recognize that there are at least three responses to our arguments. First, our findings do not necessarily detract from certain theories of originalism. Consider, for example, a melding of a post-positivist approach to originalism with basic theories from social psychology. As explained by Gillman (2001:486), post-positivist legalists

> make claims, not about the predictable behavior of judges, but about their state of mind—whether they are basing their decisions on honest judgments about the meaning of law. What is post-positivist about this version is the assumption that a legal state of mind does not necessarily mean obedience to conspicuous rules; instead, it means a sense of obligation to make the best decision possible in light of one's general training and sense of professional obligation. On this view, decisions are considered legally motivated if they represent a judge's sincere belief that their decision represents their best understanding of what the law requires. Burton has persuasively argued that this notion of "judging in good faith" is all we can expect of judges.

Whatever the virtues of this approach,[17] we 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 (Baumeister & Newman 1994; Kunda 1990). This is particularly true when plausible arguments support one's position. Since originalism is not inherently conservative,[18] our findings do not necessarily discredit the notion that Justices sincerely believe they are following originalist principles. Nevertheless, our results do suggest, to no one's surprise we hope, that originalist dreams of a neutral method of

[17] We are skeptical of any approach that rejects falsifiability as a criterion for social research. See, again, Gillman 2001.

[18] Dworkin's (1997) response to Scalia, for example, posits that originalism may be semantic originalism or expectational originalism. A liberal Justice might prefer an expectational originalism method; a conservative Justice might prefer semantic originalism. Other scholars and Justices now prefer to seek original meaning rather than original intent. Liberal and conservative Justices might sincerely differ on the original meaning of a term. Thus, our results might still hold, while at the same time a Justice might be quite faithful to originalism.

constitutional interpretation that can remove judicial bias remain illusory. Instead, the results show that ideological predispositions to vote a particular way overwhelm Supreme Court decisionmaking, regardless of whether or not one premises it on an originalist interpretive method or on some vague notion of justice.

Second, some may continue to claim that it is impossible to measure text and intent in any sort of neutral, a priori, fashion. This argument proves too much, however, for if these factors are unmeasurable, then empirical claims about originalism are unfalsifiable and thus have no scientific validity.

Finally, others may suggest better measures of text and intent. We wish them well. Just as measures of judicial attitudes have improved over time, we hope and expect that others will improve on our measures. Needless to say, this first attempt at measuring these variables will not be the last. For now, though, and in full acknowledgement of the provisional nature of scientific conclusions (King et al. 1994), we find, by our measures, no impact of intent and little impact of text on the decisions of U.S. Supreme Court Justices.

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