JUDICIAL BEHAVIOR, IDEOLOGY, AND STATUTORY INTERPRETATION

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ABSTRACT

In modern America, the judicial system is commonly considered the most “unbiased” or nonpartisan branch of government. However, there has been a great deal of research and academic literature concerning the influence of personal ideology and internal biases on judicial behavior. Additionally, many leading legal scholars have researched different methods of statutory interpretation, or ways that judges interpret and apply laws, in order to determine the part that statutory interpretation plays in judicial decision making. Novel works about this topic attempt to determine whether particular methods of interpretation have inherent ideological leanings, judges manipulate methods of statutory interpretation in order to impart their ideology on case outcomes, or methods of interpretation constrain ideological judicial decision making. This paper conducts a thorough examination of the pertinent literature regarding judicial behavior modeling and some of the various methods of statutory interpretation in an attempt to study how the interaction of these two facets of the judiciary ultimately influence judicial decision making.

The judicial system is often regarded as the most "impartial" or nonpartisan branch of the American government. Supreme Court justices are normally viewed more highly and with less contempt than their congressional and presidential counterparts. This notion generally derives from the fact that judges are appointed, rather than politically elected, and swear to follow the nonpartisan principles outlined in the United States Constitution (Sabando). However, despite this common perception of the judiciary as impartial arbiters of common law, many scholars have argued that the ambiguous nature of judicial review provides opportunities for judges to exert their own ideological preferences in their decisions. This institutional ambiguity has even spawned an entire industry of judicial research and decision making modeling. Statutory interpretation, or the process where judges interpret and apply legislation, is another common target of this judicial criticism.

The relationship between statutory interpretation, judicial ideology and behavior is crucial to understanding the partiality of the judiciary. Scholars have investigated this relationship through multiple lenses: whether various methods of statutory interpretation have inherent ideological leanings, judges manipulate or choose a method of interpretation in order to exert their own ideological preferences, or both. In order to gain a better understanding of the subject, I first consulted literature that attempted to devise a model of judicial behavior. Then, I transitioned my review to works that specifically study various methods of statutory interpretation and their uses.

When investigating any decision making scheme, a natural starting point is attempting to understand the agent making the decisions. In this case, statutory interpretation inherently relies on judicial implementation and discretion. Hence, I first explored judicial behavior in the hopes that greater knowledge about the subject would later inform my understanding of judicial use of

different methods of statutory interpretation. During this review of judicial decision making, I discovered that a main focus of judicial behavior research is to establish a concrete model for judicial decision making. In fact, I found a diverse variety of competing models of judicial behavior from various leading scholars in the field during my personal research. I decided to take this as a queue that judicial decision making modeling is an apt and significant way of describing overall judicial behavior. Hence, my following discussion of the existing literature is rooted in the various models of judicial decision making that I found significant and their overall validity.

To explore judicial behavior, I read works by Jeffrey Segal, Harold Spaeth, Lee Epstein, Landes, Posner, Bailey, Maltzman, Clark, Enns and Wohlfarth, among others. These works were chosen as they develop differing models of judicial behavior with unique justifications for their arguments. For instance, Segal and Spaeth propose an attitudinal model of behavior where justices do not strictly rely on legalism when making decisions. Segal and Spaeth were revolutionary in introducing attitudinal tendencies into their model of judicial behavior. On a similar note, Epstein, Landes and Posner (hereafter referred to as Epstein et al.) as well as Bailey and Maltzman expand upon the attitudinal model proposed by Segal and Spaeth by adding new factors and influences into their own models. Some of these influences include an economic approach to and analysis of judicial behavior in addition to a more holistic perspective in general. Overall, these works share a few collective strengths and weaknesses. Generally speaking, the articles do an excellent job of expanding their models of behavior to include many dimensions outside of a merely legalist perspective. This holistic approach to describing judicial behavior not only makes intuitive sense (as justices are humans with many competing factors that go into their decisions) but also justifies the usage of more data (such as a justice's personal background, the political status of the other branches, and more) to mathematically analyze and interpret judicial

behavior. After all, more data enables political scientists to create a stronger, better-supported argument in favor of their model of behavior.

However, while these articles have collective strengths, they share some collective weaknesses as well. I will only focus on a main shared weakness here, which is these models' inability to easily expand into a general theory of judicial behavior. In other words, although the inclusion of new factors into these models is excellent when describing judicial behavior on an individual level, it becomes much more difficult to see universal patterns and therefore describe a general theory of judicial behavior with so many variables contained within the model. When only one justice is being described, it is not overly complicated to determine which dimensions of a holistic model have the most influence on the individual justice's decisions. Contrarily, when creating a theory of judicial behavior, it becomes an entirely different story—we are unable to precisely define which factors are decisive on a general level. In other words, while a particular dimension (such as personal background) may hold more—and therefore decisive—power for one justice, it may not for another. Clearly, although the holistic model can be viewed as a strength of these articles on an intuitive and individual level, it can also become a weakness when attempting to describe a universal theory of judicial behavior. While the articles share some aforementioned collective strengths and weaknesses, a more in-depth assessment of the specific benefits and disadvantages of the different approaches that some of these authors make to describing judicial behavior follow.

Segal and Spaeth provide multiple frameworks for analysis of judicial behavior in their 1996 article "The influence of stare decisis on the votes of United States Supreme Court justices." First, Segal and Spaeth address the traditional legal model, which argues that Supreme Court justices hold high regard for stare decisis, or the principle that precedent supersedes all

else, and subsequently weigh precedent heavily in their decision making (Segal and Spaeth 2). Ultimately, Segal and Spaeth reject this model in favor of the attitudinal perspective, which argues that since Supreme Court justices sit on the top of the judicial hierarchy and deal with legally ambiguous cases, they are in a position to have a greater disregard for precedent and rely more strongly on their personal policy preferences (Segal and Spaeth 2). The authors support this assumption by creating a clear definition of when precedent purposefully applies and attempting empirical data analysis of judicial decisions. They first explain that the best way to determine whether precedent had a real impact on a justice's decision is to analyze cases where the justice disagrees with the applicable precedent at hand, as precedent only matters if it "achieve[s] results that would not otherwise have been obtained" (Segal and Spaeth 3). In other words, Segal and Spaeth find stare decisis to be influential only when a justice changes their vote because of it. Subsequently, according to the authors, seeing former dissenters in a case move over to the majority opinion in a subsequent progeny case indicates either a clear impact of the precedent on their decision making or an external factor that causes a change in the justice's preferences.

In their rejection of the legal model, Segal and Spaeth develop a catalog of non-unanimous "landmark" Supreme Court cases from the Warren Court to the present that have significant progeny cases (which include original dissenters) to analyze. From this model, they statistically analyze the dissenters' votes in both original and progeny cases and determine that justices voted in line with their revealed preferences 90.8% of the time, while justices' votes aligned with precedent (and against their personal preferences) only 9.2% of the time (Segal and Spaeth 8). Furthermore, Segal and Spaeth use their data to support their claim that only justices Stewart and Powell displayed a consistent adherence to precedent, with every other justice following their personal preferences a minimum of 80% of the time (Segal and Spaeth 8).

Additionally, one of the statistics they provided that I found most compelling is that only two of the 54 landmark decisions (3.7%) from Segal and Spaeth's data set created 45.7% of the pro-precedential votes, further emphasizing how rarely justices follow precedent over their own preferences when the two are not in agreement (Segal and Spaeth 8).

Therefore, it is clear to see that Segal and Spaeth would support the notion that Supreme Court justices' decision making can best be described by the attitudinal model, where justices mainly follow their own personal preferences and disregard precedent. In light of this, I would argue that Segal and Spaeth would categorize justices' behavior as relatively relaxed—and definitely more relaxed than that of elected politicians, such as members of Congress. This is because the justice behaves under the attitudinal model—and therefore has a higher tendency to enact their own policy preferences—while a Congressperson has to account for the policy preferences of their constituents, fellow legislators and many other external interests when making decisions as an elected official of a legislative body. Thus, members of Congress are heavily reliant on others in order to perform their duties and retain their position, which incentivizes them to take external preferences into account more often than a Supreme Court justice would.

However, while I find Segal and Spaeth's analysis generally compelling, I have a few issues with their argument that are generally left unaddressed. First, they simply state that there could be alternative reasons why a justice might change their vote besides precedent and disregard them as having an inconsequential impact on their results if that is the case. I would have liked to see a more in-depth analysis as to why alternate reasons for changed opinions do not matter in the scheme of their argument. For example, non-precedential factors such as a justice's personal experiences or preferences shifting their opinions on a topic, ever-changing

public opinion, technological or informational advancements and changes in the Court's makeup could all play significant roles in altering justices' votes and therefore case outcomes. Therefore, Segal and Spaeth's dismissal of these and other non-precedential factors as too insignificant to be accounted for—and with little explanation—is a weakness in their argument that must be addressed. Also, I find Segal and Spaeth's requirement that progeny cases must include dissenters from the original case in order to be included in their data set not entirely compelling. While analyzing votes from the original justices involved might more easily demonstrate how precedent affects their individual voting patterns, it would be interesting to delve into how precedent affects progeny cases with different sets of justices than those originally involved (and therefore those who have less of a personal connection to the original case). Further, I believe that a justice who lacks a personal connection to a specific outcome in the precedential case may be less inclined to follow their individual preferences as their inexperience in precedential cases would also lessen their prior influences (if any) on the case subject. Another issue I have with Segal and Spaeth's results is that they are only applicable to the cases within their own set; that is, their conclusions cannot be further generalized or applied to non-modern justices who worked under different conditions on the Court or entire lower court systems at all, such as Appellate and District Courts (Segal and Spaeth 9). The authors admit this as a shortcoming of this work, but it is still disappointing to see. After all, the purpose of Segal and Spaeth's analysis is to characterize whether precedent impacts the decision making of Supreme Court justices as a whole—not just within the set of cases that they chose to directly analyze in depth. Further, this is particularly disappointing for the purposes of this paper, as the Supreme Court is an incredibly small and arguably unrepresentative sample to draw conclusions about general judicial behavior from.

Therefore, while Segal and Spaeth craft a compelling argument in favor of the attitudinal model of judicial behavior, these and other holes in their argument cause it to fall short of holistically describing a theory of judicial behavior. Subsequently, we now move on to an analysis of "The Behavior of Federal Judges" by Lee Epstein et al.

In "The Behavior of Federal Judges," Epstein et al. provide a more holistic yet theoretical perspective of judicial behavior than that of Segal and Spaeth. Generally speaking, Epstein et al. argue that federal judicial behavior can be described by an economic model where the judge acts as a worker in a labor market. Therefore, according to Epstein et al., judicial behavior is the same as the self-interested behavior of any worker in a labor market setting. Applying this model, it is easy to see that since the judicial system and the questions it provokes can be relatively ambiguous, judges are able to exercise more of a legislative or policy-making role, making discretionary judgments that are influenced by personal political preferences (Epstein et al. 27). Clearly, Epstein et al.'s theory of judicial behavior includes the personal ideology that is central to Segal and Spaeth's attitudinal model of behavior. However, this is where the theories begin to differ. Unlike Segal and Spaeth's model, Epstein et al. further argue that judges are subject to principal-agent tensions brought on by external institutions and influences. These tensions are catalysts for outwardly confounding judicial behavior. For instance, although the worker-judge desires wholly self-interested behavior, they are agents that must be attentive to the preferences of their collective principal—including appointing authorities, judicial superiors, colleagues, members of the legislative and executive branches and the public (Epstein et al. 33-34). Evidently, these members of the federal judge's collective principal are outside of their realm of influence, forcing judges to acknowledge perspectives and interests that they likely do not agree with. By including principal-agent tensions in their model, Epstein et al. take a step beyond Segal

and Spaeth's perspective in recognizing the powerful influence that some external parties hold over federal judges and the rulings they decide. After all, judges rely on others to implement and enforce their decisions, appoint fellow members to their bench and join their coalition to form majorities on cases—not to mention their constant risk of impeachment if they do not serve under "good behavior." Overall, Epstein et al.'s inclusion of principal-agent theory in their model of judicial behavior acknowledges federal judges' reliance on others (and subsequent attentiveness to those extrinsic parties) at a basic level which helps to describe how judges cannot decide cases based merely on their personal ideological preferences.

One more example of this is discussed later in "The Behavior of Federal Judges" where the authors explain how some judges alter their behavior (and case outcomes) to "audition" for promotion up the federal judicial ladder. In fact, their data and subsequent analysis show that these "auditioners" are more likely to reverse when the government is the petitioner in a case and impose harsher penalties on street-crime (Epstein et al. 371). This distinct pattern further demonstrates how judges will alter their behavior to appease their collective principal and therefore increase their chances of promotion. Overall, Epstein et al. argue that federal judges—especially those who desire higher offices—must be attentive to the political and ideological preferences of external parties under the "worker-judge" model of judicial behavior.

Following this train of thought, I believe Epstein et al. would describe judicial behavior as self-interested yet constrained. They would liken the judiciary's inherent ambiguity to a catalyst for justices' ability to decide cases based on personal preferences rather than a legalist model of behavior. However, Epstein et al. would also use principal-agent theory to explain that these personal preferences are just a jumping-off point of how justices decide cases beyond

legalist means. Epstein et al.'s application of principal-agent theory would explicate how justices are somewhat constrained in their rulings in order to acknowledge the preferences of their collective principal—much like members of Congress or any legislator who relies on their constituents, colleagues and superiors in order to be successful. While this relationship is not as visibly apparent for federal judges as it is for legislators, the principal-agent theory proposed by Epstein et al. underscores the fact that this judicial constraint is there. As a brief remark, it is worthy to note that although Epstein et al., Segal and Spaeth all observe the same institution of the federal judiciary, Epstein et al.'s more theoretical and holistic analysis leads them to a very different answer to the question of how to model judicial behavior than that of Segal and Spaeth.

While I generally agree with Epstein et al.'s model of judicial behavior, I am again disappointed with some aspects of their argument that go relatively unsupported. For example, there are parts of Epstein et al.'s analysis that make claims such as "the Supreme Court is more likely to grant cert if there is a dissent at the Court of Appeals," but do not clearly explain how this proposition is a result of causation over mere correlation. If this is purely correlation, then Epstein et al.'s analysis of this phenomenon goes relatively unsubstantiated. In fact, it would make sense that the Supreme Court grants cert to controversial or difficult cases that they intend to clarify or resolve—and those are the exact types of cases that would also warrant a dissent at the Court of Appeals level. Clearly, it is easy to imagine ways in which this pattern of behavior is a result of more than just causation—and that is precisely why Epstein et al.'s assumed implication is relatively weak. Furthermore, in aspects of the authors' argument they make passing comments such as some data is "not in an analyzable form," prompting its exclusion from their analysis (Epstein et al. 311). I would have liked to see a more in-depth explanation of why certain data sets were included (or excluded) from their statistical analysis. While there

could be many logical explanations for Epstein et al. to select particular data for their analysis, this lack of transparency for data selection made it seem like the authors were brushing any potential issues in their argument under the rug by excluding unwieldy data from their set. Evidently, this made their argument feel weaker on an elementary level. Generally speaking, these and other issues that I found with Epstein et al.'s work suggested a more theoretical rather than methodological analysis of judicial behavior. When juxtaposed with Segal and Spaeth's analysis, Epstein et al. just do not utilize as much data to support their theory. So, while Epstein et al.'s model encompassed more dimensions of judicial behavior and factors that influence judges, which I enjoyed, the lack of hard data weakened their argument in my eyes. Now, let us turn to an assessment of Bailey and Maltzman's description of judicial behavior based on their work "The Constrained Court."

In their book "The Constrained Court," Bailey and Maltzman further expand upon the ideas discussed by Segal, Spaeth and Epstein et al. However, while Segal and Spaeth place great emphasis on the attitudinal model and Epstein et al. utilizes a theoretical, holistic perspective, Bailey and Maltzman examine a few different models and dimensions of judicial decision making in their analysis including law versus policy preferences and cross-institutional comparisons and constraints. In general, Bailey and Maltzman's analysis can best be described as a holistic, multidimensional model which incorporates more facets of judicial decision making than previously discussed articles by Segal, Spaeth and Epstein et al. For example, Bailey and Maltzman acknowledge the attitudinal, legal and separation of powers models of judicial behavior in their work and contend that they all hold some merit on a basic level. In fact, the authors elaborate that the attitudinal model supported by Segal and Spaeth creates two general predictions about the judicial system; (1) laws—or rather legal values—do not matter to justices

and (2) justices are not influenced by external parties in their decision making (Bailey and Maltzman 5). While Bailey and Maltzman contend that the attitudinal model holds some merit, they criticize using it as one's only method of behavioral analysis as there are clear examples throughout history of both of the attitudinal model predictions being proven wrong through judicial behavior. As for the legal model, Bailey and Maltzman acknowledge the merits of viewing justices as constrained by legal principles such as stare decisis, judicial restraint and strict constructionism. Generally speaking, the legalist would argue that justices value legal principles and values enough to further constrain their own behavior and decisions beyond the relative freedom of the attitudinal model (Bailey and Maltzman 7). However, the authors criticize this model as being quite individualistic among justices—which we will expand upon in this brief aside. In later chapters of "The Constrained Court," Bailey and Maltzman describe the multidimensionality of justices' ideology and behavior. For example, rather than the traditional conception of justices falling along a one-dimensional ideological (or spatial) line (i.e., from liberal to conservative, etc.), Bailey and Maltzman include "law" in their analysis and widen this line to a multidimensional plane. In other words, they not only include the traditional notion of a justice's ideology with regard to policy in this plane but also incorporate their personal valuation of the law. Generally speaking, this inclusion of both policy and legal values in their model enables Bailey and Maltzman to explain case outcomes where justices seemingly voted "against" their ideological preferences due to their possession of high (or low, depending on the case) legal values (Bailey and Maltzman 50). As a whole, the authors' self-described "law and policy model" adds another dimension to their description of judicial behavior, strengthening their argument—especially for data where justices seemingly (and inexplicably) "switched their votes" to the other side of the policy-ideology spectrum. Lastly, returning to the authors'

explanations of models of judicial behavior, Bailey and Maltzman elaborate that the separation of powers model assumes that justices' decisions are shaped by the preferences of the other two branches of government—the legislature and executive. The authors further detail that this model makes rational sense given the structure of the federal government and how the Supreme Court relies on both the legislature and executive to not only run as an institution but also implement and enforce their decisions (Bailey and Maltzman 14). Nevertheless, they condemn this model as it somewhat relies on the idea that the three branches of government coexist on a single ideological spectrum, enabling justices to clearly determine where the other two branches would fall relative to the ideological split of a particular case outcome. In other words, Bailey and Maltzman recognize that the separation of powers model inherently assumes that justices know how the other two branches would want them to vote on particular cases, which is not always the case due to the complexity of ideological differences across institutions. The authors propose a method of approaching this issue in the following analysis.

As mentioned above, Bailey and Maltzman strive to define and categorize judicial ideological preferences across time and compare them to other institutions such as Congress and the executive. To do this, they first use a cutpoint method of ideological categorization. This method utilizes a demarcation line, or cutpoint, along a judicial ideological spectrum to indicate the point that separates voting for the defendant from voting in favor of the plaintiff in a case (Bailey and Maltzman 20). The cutpoint method can be further extrapolated to institutions such as Congress as well, and the authors provide examples of this throughout their analysis where the cutpoint is whether or not to vote in favor of a piece of legislation rather than a defendant or plaintiff. They also use "bridge observations" in their method of cross-institutional analysis, which are instances where individuals make public comments or take stances on an

issue within another branch. For example, a bridge observation could be a Congressman's public criticism of a Supreme Court decision or an influx of amicus curiae briefs filed by members of Congress in a Supreme Court case, such as *D.C. v. Heller* (2008) (Bailey and Maltzman 27). The authors use these bridge observations to line up the ideological cutpoints across institutions and subsequently compare them. After all, if one knows the separate ideological spectrums for two institutions—say, Congress and the Supreme Court—and a member of one institutional spectrum indicates their ideological location on the other spectrum, then both spectrums can be aligned according to that single datum (i.e., legislator/judge/etc.) that exists on both.

With the above in mind, I feel that Bailey and Maltzman have a few key points in their model of describing judicial behavior. First, seeing that the authors place great time and emphasis on cross-institutional comparisons between the Supreme Court, Congress and the executive in their work, I believe they would argue that at a fundamental level, judicial behavior is essentially the same as that of congressional behavior. While some face-value elements of the judiciary may differ from that of Congress, there are many internal aspects that the Court and Congress share. For example, Bailey and Maltzman would liken the intra-institutional legal principles that constrain the Court (for example, stare decisis, judicial constraint, strict constructionism) with procedural factors that constrain legislative decision making such as the committee system, seniority and the overall complexity of the lawmaking process that is designed to make it difficult to pass laws. Another comparison Bailey and Maltzman would draw is how the Supreme Court's reliance on the general public to retain legitimacy as an institution is also a fundamental aspect of the legislature—after all, congressmen rely on their constituents for reelection. At an even deeper level, Bailey and Maltzman would equate many factors that justices account for while making decisions to similar influences on legislative behavior and

decision making. The authors would likely describe the Court's constraint due to separation of powers (otherwise known as checks and balances) as a two-way street, as Congress is constrained by the other branches of the federal government as well—just in different ways. For example, Congress is constrained by the executive veto power, while the executive constrains the Court through a potential lack of implementation and enforcement of their decisions. Additionally, Congress and the Court respectively constrain each other through the constant threat of constitutional amendments and the declaration of congressional laws as unconstitutional. Furthermore, Bailey and Maltzman would argue that the aforementioned law versus policy tradeoff the justices utilize on the Court is essentially the same as a congressperson's valuation of how strongly to represent their constituents in Congress (i.e., if they view their role as a representative or a delegate through their lawmaking). After all, legislators have their own personal policy preferences just as Supreme Court justices do, and it can be tempting for those in positions of power to follow their own ideological preferences over all else. Clearly, Bailey and Maltzman would likely draw upon the multidimensional aspects of their model of judicial behavior to conclude that there are many factors that both justices and congresspeople consider when making decisions and that at a fundamental level, justices and members of Congress follow the same model of decision making.

Overall, while Bailey and Maltzman do an excellent job of adding new factors to their general analysis of judicial behavior beyond the scope of previous models, there are some issues within their argument that must be addressed. First, the authors' model places a lot of weight on the individual variations between justices such as law valuation versus ideology. While these factors are certainly useful in analyzing why certain justices make the decisions and cast the votes that they do, they are not as useful in developing a general theory of judicial behavior. In

fact, Bailey and Maltzman do not directly address this issue within their argument, instead implying that these individual variations can and should be used to support their theory. In my opinion, the authors' lack of acknowledgment of this issue clearly weakens their argument. On another note, Bailey and Maltzman's lack of hard data analysis in "The Constrained Court" also weakens their argument. Much like Epstein et al.'s previously discussed holistic-theoretical analysis, Bailey and Maltzman mostly rely on general qualitative arguments rather than quantitative data to support their theory. In fact, the authors mostly use their data to either demonstrate how other models of behavior are incomplete (Bailey and Maltzman 17-18) or give minute examples of their model through data sets on individual justices or Supreme Court terms (Bailey and Maltzman 82-83). In this first issue, the authors' use of data to discredit others' models does nothing to support their own theory; in reality, all this does is merely demonstrate that the other model is incomplete. The logic that one can generate support for their own theory by disproving another's alternative theory is a logical fallacy and doesn't truly strengthen one's argument. As for Bailey and Maltzman's statistical analysis of singular justices or Court terms, this issue is an extrapolation of their aforementioned emphasis on judicial decision making at an individual level. Again, an attempt at a universal theory through analysis of individual actors—or even a small data set in general—is not a great way to support one's argument. Subsequently, although Bailey and Maltzman's theory of judicial behavior makes intuitive sense, their reliance on individual behaviors and lack of a widespread data set weaken their argument.

We have seen three different approaches to describing judicial behavior that have wildly different answers to describing judicial behavior; Segal and Spaeth argue that justices are essentially unconstrained in their decisions, Epstein et al. propose that justices follow self-interested yet constrained behavior and Bailey and Maltzman contend that justices are even more

constrained than Segal, Spaeth or Epstein et al. had argued. Clearly, there is no easy method of describing a general theory of judicial behavior.

Moreover, the many shared weaknesses between these theories and noted difficulties of expanding them from an individual level to a universal theory suggest that there simply is no general theory of judicial behavior. After all, judicial work is subjective; justices are merely people and people do not always make rational, equitable or predictable decisions. That is just the way that humans are. One could argue that it is a fundamental weakness of the judiciary that there is no general theory of how judges make decisions. However, while this lack of a general theory may seem to be an inherent flaw of the judiciary as it is commonly viewed as a methodical, rational and consistent institution, there is an argument to be made that this is actually a valuable aspect of the Court. In essence, having a judiciary composed of people who occasionally deviate from their established patterns of behavior enables the United States to not only have some flexibility in their lawmaking process but also experiment with unusual or unpopular policies from time to time. Although this idea may not seem strong on paper, there are plenty of historical examples where the Court has deviated from established practice, the principle of stare decisis or even public opinion in a case and was later commended for their decision. Some examples of this idea include *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973), where the Court ruled somewhat controversially at the time but was applauded for it later on. Evidently, the argument that there is no method of modeling judicial behavior does have some historical merit.

At the end of the day, drafting a general theory of judicial behavior is no simple task. While many authors have attempted this feat, there are inherent shared weaknesses in their arguments which suggest that no universal theory of judicial behavior even exists. On the other

hand, many propositions noted above in the authors' models do hold valuable merit in explaining judicial decision making despite some flaws or a lack of demonstrated statistical analysis. Although we are currently nowhere near a comprehensive model of judicial behavior, the works of Segal, Spaeth, Epstein et al., Bailey, Maltzman and others have provided excellent starting points. In fact, Segal, Spaeth, Epstein et al., Bailey and Maltzman nearly cover all possibilities of judicial behavior through their arguments, ranging from totally unconstrained to heavily constrained. With some modifications to their analyses, it may be possible to generate an overall theory of judicial decision making—and if not, the principle that there is no method of modeling judicial behavior is truly a sound argument in and of itself.

While my review of judicial behavior modeling did not provide a clear answer as to how one can describe the judicial decision making process, it did leave us with a variety of factors to consider when looking at how judges make their decisions—such as external influences (e.g., the legislative or executive branches), self-interest (much like principal-agent theory), public opinion, intra-institution legal principles (such as stare decisis or strict constructionism) and more.

In the context of judicial decision making, a key element of the process is statutory interpretation, or the method by which a judge interprets and applies the law in a given case. Statutory interpretation is arguably one of the most well-documented and fundamental aspects of judicial decision making throughout the history of the American court system. Multiple methods of statutory interpretation are commonly utilized in majority opinions, making it a foundation for countless case outcomes. Thus, statutory interpretation and judicial decision making are inherently linked, and our established knowledge of the complex factors that go into judicial

decision making described above will aid our upcoming analysis of various methods of statutory interpretation.

After my somewhat unresolved literature review of modeling judicial behavior, I reviewed works by Frank B. Cross and William N. Eskridge Jr. et al. which discussed the role of statutory interpretation in judicial proceedings. The overall goal of this portion of the literature review was to determine whether various methods of statutory interpretation are associated with specific ideological case outcomes—whether that be due to the methods themselves having inherent ideological leanings, their susceptibility to judicial manipulation or otherwise. This is a critical question due to the sheer widespread use of prominent methods of statutory interpretation in the judiciary; if these methodologies are inherently partisan or ideological, that can greatly affect the nature of the judicial branch and the influence that judges have on common law.

Frank B. Cross excellently describes common methods of statutory interpretation—textualism, legislative history or intent, pluralism, canons of interpretation and pragmatism—and their involvement in judicial decision making in *The Theory and Practice of Statutory Interpretation*. Further, he empirically breaks down the Rehnquist Court's (1986-2005) collective and individual usage of these methods of interpretation in order to determine whether popular notions of their patterns of employment are in line with reality.

According to Cross, textualism is a method of statutory interpretation rooted in the plain meaning of the words in a statute. Judges often utilize a variety of self-selected resources to derive the meaning of given words, from dictionary definitions to everyday conceptions of terms. Justice Antonin Scalia was a huge proponent of textualism, refusing to author Court rulings that even partially relied on legislative history and rarely deviating from text-based methods of interpretation. He felt that textualism was the most constraining method of interpreting the law,

as it required justices to work within the confines of the words within a given statute. However, Justice Scalia has been criticized as a "fallen textualist" who failed to practice textualism "sincerely and consistently" due to his aggressive use of formalized canons that led him to conclusions far beyond the plain meaning that an ordinary person, or at times a member of Congress, would discern from a given statute (Cross 140). Evidently, the relationship between a textualist's personally identified basis for interpreting the meaning of terms in a statute—whether those are canons, certain dictionary definitions or otherwise—and their own ideological biases is difficult to discern and key to understanding the level to which textualism truly constrains judicial opinion.

In previous literature, it is commonly believed that textualism is the overwhelmingly popular method of statutory interpretation in the modern era. Cross studies the Rehnquist Court both collectively and at an individual level through empirical analysis to see if this notion is reflected in case decisions. In order to do so, Cross assigned scores to each opinion based on references to textualism or textualist methods of interpretation, with the unit of analysis being justice votes. For instance, if a case was decided unanimously with the plain meaning rule referenced in the majority opinion, the case would receive nine measures for textualism. Then, he examined the frequencies of various scores for textualism in order to determine its relative popularity compared to other methods of statutory interpretation. Cross found that the Rehnquist Court generally used textualism to render a substantial number of decisions, but nowhere near an overwhelming majority as expected by the existing literature. Furthermore, Cross found a significant minority of opinions that either did not mention textualist theories (receiving a score of zero) *or* negatively referenced them (constituting a negative score). Hence, it is evident that textualism is not a monolithic theory of statutory interpretation, at least not during the Rehnquist

Court, as believed by many scholars. In a similar fashion, Cross assigned scores to each justice for each general category of statutory interpretation, including textualism. Surprisingly, with error taken into account, Cross did not find significant variance between justices on the Rehnquist Court with regard to their personal utilization of textualism in their opinions despite their variance in public opinions for or against the practice.

Next, Cross dives into the utilization of legislative history as a method of statutory interpretation. He remarks that the main tenet of legislative history is "intentionalism," or taking the intent of the enacting legislature into account when interpreting a given law. This consideration requires what Cross describes as "imaginative reconstruction" at times, where justices attempt to "step into the shoes" of enacting legislators in order to better understand the context, intent and desires underlying the origin of the statute in question (Cross 59). Pieces of legislative history that are typically used to inform judicial decisions include conference committee reports, presidential signing statements, subcommittee drafts and more.

Despite the markedly noble intent behind legislative history as a method of statutory interpretation, assessing the reliability and validity of legislative history can be incredibly difficult in practice. In terms of validity, Cross argues that it can be hard to determine legislative intent, as legislatures are composed of a multitude of diverse members with different opinions, values and beliefs. With so much disharmony between legislators, it becomes difficult for judges to discern the intent of the overall legislature that produced any given statute. Similarly, since there is no concrete methodology for determining legislative intent, it also becomes difficult to assess the validity of using legislative history to aid in statutory interpretation. In essence, one cannot compare a justice's conclusions about the legislative intent of a law against an objective truth of what the legislature "really meant." In terms of reliability, reviewing legislative history

as guidance for statutory interpretation could pose problems. As discussed above, judges typically review external legislative documents—particularly committee reports—to aid in their understanding of the legislative intent behind the law in question. However, this process has inherent reliability issues. First, external legislative documents may reflect positions that did not make it into the exact statutory text *for a reason*, including trivial arguments, unpopular opinions and extremist language. Further, legislative staff can and has historically manipulated or even wholly manufactured falsified legislative documents in order to support unpopular interpretations of legislation. Clearly, legislative history as a framework for statutory interpretation is subject to severe reliability issues.

Selection of legislative history is also subject to ideological biases. According to Cross, legislative history as a tool for statutory interpretation is often criticized as camouflage for ideological rulings. In other words, judges are able to pick and choose from incredibly diverse legislative backgrounds in order to find a piece of legislation that supports their ideological viewpoint in a ruling. In order to study this philosophy, Cross performed the same analysis of the Rehnquist Court's references to legislative history as that of textualism described above. Cross found that legislative history is a significantly cited source of statutory interpretation in the Supreme Court, as a majority of cases in his data set positively referenced some form of legislative intent and about 42% of cases referenced legislative history. However, he notes that the *type* of legislative history cited by the Court may be contrary to the literature or have evolved over time. In fact, previous studies of legislative history as a method of statutory interpretation during the most prevalent era of its usage by the Court found that the two most commonly cited legislative histories were committee reports (comprising about half of legislative history) and verbal arguments (roughly 20% of citations) ("The U.S. Supreme Court and the Use of

Legislative Histories"). However, Cross's analysis of the Rehnquist Court found that some form of legislative history was cited in 42% of justice opinions and only 23% of those opinions referenced committee reports (Cross 145). This inconsistent use of legislative history over time has prompted several theories among political scientists. Some theorize that legislative history as a whole is no longer in alignment with judicial ideological opinions, prompting less usage in more recent Courts. Alternatively, others argue that recent questions about legislative history's validity and reliability have caused justices to steer clear of the method of statutory interpretation. Finally, some political scientists theorize that legislative history is less politically or socially favorable in the present regardless of its merit, dissuading justices from using historical arguments to support their opinions. Even with this historically inconsistent usage of legislative history to inform statutory interpretation, another issue with legislative history that Cross discusses is the aforementioned quality of different types of legislative history and their susceptibility to manipulation or irrelevance to a given statute.

Clearly, legislative history as a source of statutory interpretation is difficult to both define and quantify as a constraint on judicial interpretation. It is hard to even define legislative history due to the sheer breadth of articles and sources of documentation that support legislation. For instance, should one consider floor debates or a legislative intern's notes about a particular bill to be legislative history? There exists a plethora of external documents and comments about nearly every piece of legislation. Therefore, drawing the line between legislative history and other documentation can easily become incredibly difficult. Even if one is able to establish a concrete definition of what falls under legislative history, issues of salience and importance may arise as well. If we assume that both staffer notes and floor debates are considered legislative history, should floor debates be designated higher historical "quality" or importance than a legislative

staffer's notes about a given bill? Are they to carry the same weight in the courtroom? These and other questions are integral to the merit of legislative history as a constraining method of statutory interpretation.

Cross dives into individual justices' use of legislative history as a method of statutory interpretation as well. Interestingly, unlike textualism, he does find statistically significant differences between some pairs of justices' usage of legislative intent to inform statutory interpretation. The most prevalent example is that of Justice Antonin Scalia. A staunch critic of legislative history as a source of statutory interpretation, Justice Scalia never authored an opinion that relied on legislative history and rarely joined opinions that referenced the method. With that said, he had a very low individual legislative history rating on Cross's scale which fell far below that of other Rehnquist Court justices like Justices Breyer, Ginsburg, Souter or Stevens. Hence, one sees that the use of legislative history does vary from justice to justice—perhaps even demonstrating that the method of interpretation is more frequently used by justices whose ideological preferences are more closely supported by legislative history.

Cross also studies the legal canons of interpretation as a method of statutory interpretation in *The Theory and Practice of Statutory Interpretation.* Put simply, Cross and other scholars define the canons as judge-created guidelines for interpreting laws, which can either be used in conjunction with other methods of interpretation (such as textualism, legislative history or pragmatism) or independently of them (Cross 85).

Cross groups the canons into either linguistic or substantive categories. Linguistic canons are similar to grammatical rules, as laws are assumed to follow the same rules as the overall English language. For example, a period at the end of a sentence in a statute is considered to be the end of a declarative statement—just as it is in the English language. Substantive canons are

different from linguistic canons as they establish a "thumb on the scale" or benchmark for resolving ambiguities in legal language (Cross 88). A substantive canon that is a foundation for fundamental statutory interpretation is the notion that judicial interpretation should be consistent with preexisting common law. This is a somewhat pragmatic canon, as it effectively assumes that the legislature does not intend to alter existing common law unless it explicitly states so in a given statute. Both linguistic and substantive canons form a set of standard "rules" for judicial interpretation, helping inform decision making both in conjunction with and independently from other methods of statutory interpretation.

The canons of interpretation have been subject to several criticisms and debate over time. One of the most prominent arguments against the use of the canons, the indeterminacy critique, was made by legal scholar Karl Lllewellyn. He argued that the canons are in reality incredibly indeterminate and can be arbitrarily chosen to support whatever result a judge desired. To support his argument, Llewellyn categorized the canons into "thrusts" and "parries," demonstrating that every canon of interpretation had its own counterpoint. Under this theory, the canons do not truly constrain judicial discretion. Instead, judges are able to select either a "thrust" or "parry" in a given situation that aligns with their ideological preferences.

There is also a logical critique of the canons. In essence, scholars have argued that in some cases, the canons of interpretation defy common logic. A popular example is the application of the *expressio unius* canon. Under the *expressio unius* canon, "the express mention of one thing excludes all others" (Cross 92). For instance, Cross describes a situation where a parent tells their son "not to hit or kick your sister" (Cross 92). The *expressio unius* canon implies that it would be acceptable for the son to bite or choke his sister instead, as those actions are not explicitly mentioned by the parent. Clearly, this interpretation of the parent's directive

seems both egregious and inappropriate. Examples such as this are common ammunition for scholars' logical critique of the canons of statutory interpretation.

Lastly, the substantive canons of interpretation are subject to their own particular criticisms. First, many substantive canons are thought to have their own inherent ideological leanings. After all, it is reasonable to assume that a "thumb on the [judicial] scale" is likely to prefer a certain ideological interpretation of cases (Cross 96). Individual canons have their own critiques as well. For example, the aforementioned canon that new laws should not be interpreted so as to derogate existing common law is thought by some legal scholars to be both confounding and inherently ideological. In their arguments, opponents of this canon posit that new laws are naturally created to alter or override existing laws—in essence, if preexisting laws were perfectly acceptable, then there would be no need for new statutes. The "preference for existing laws" canon is also thought to be inherently conservative as it is commonly a roadblock for institutional and statutory change.

However, supporters of the canons have posited that they can be useful by providing neutral, nonideological tools in many circumstances. Further, legislators draft statutes with preexisting knowledge of judicial interpretation and an understanding of most canons of interpretation. With that said, the canons of interpretation provide an "off the rack" set of guidelines to inform legislators while drafting legislation (Eskridge and Frickey). Thus, supporters of the canons have pointed to their prevalence as a tool for lawmakers in order to argue that they are nonideological tools for both legislation drafting and statutory interpretation.

Although it is true that legislators are aware of many canons of interpretation while drafting legislation, Llewellyn's aforementioned argument against the canons carries some weight in this instance. Llewellyn argues that each canon has a "thrust" and "parry," or main

point and counterpoint, that judges are able to freely choose when making case decisions. While a legislator may know about a particular canon of interpretation that could apply to the legislation that they are drafting, they have no way of knowing whether a judge that reviews the statute in the future will choose to use a "thrust" or "parry" of that canon to interpret the statute. This indeterminacy stunts the usefulness of the given canon for the lawmaker, as they cannot fully address both versions of a canon in their legislation and are forced to accept some ambiguity in their statutes. Hence, while the canons can and do provide some framework for legislators to draft and judges to interpret laws, they are likely not as informative for lawmakers as their supporters may argue that they are.

Given the indeterminate nature of the canons of interpretation, Cross also performed the same analysis of the Rehnquist Court's references to statutory canons in their opinions as that of legislative history and textualism. He found that usage of the canons is relatively rare—the rule of lenity was the most commonly used canon, yet it appeared in only 3.5% of the justice opinions in Cross's data set. Further, there was a proportionally high number of opinions where references to the canons of interpretation were negative. These results, especially when considered together, demonstrate that the canons of interpretation are not a leading form of statutory interpretation (at least during the Rehnquist Court). Cross further argues that the canons are typically used in conjunction with or implicitly as a part of other methods of statutory interpretation such as textualism.

Cross acknowledges that many legal scholars have argued that ideology and statutory interpretation are intrinsically linked—either through methods of statutory interpretation being malleable enough for judges to impart their own ideological preferences in spite of their limiting nature or because the methods themselves are inherently ideological in nature. In order to study

this, Cross performs a quantitative analysis on the Rehnquist Court data, using cases concerning constitutional civil liberties as a benchmark, since those cases comprise most of the evidence for ideological decision making by the Supreme Court. Cross directly compared each individual justice's percentage of conservative votes in constitutional civil liberties cases to the percentage of their conservative votes in cases where they evoked a particular method of statutory interpretation. For example, he found through this process that the plain meaning rule was ideologically malleable and did not limit justices from following their own ideological preferences in their decisions, as each individual justice's percentage of conservative votes in civil liberties cases and cases where they cited the plain meaning rule were incredibly similar across all justices in the data set (Cross 165-166). Cross also discovers that the canons of interpretation are manipulable, with liberal justices reaching liberal outcomes and conservative justices coming to conservative decisions in their use of the canons. Interestingly, Cross does find evidence that textualism as a method of statutory interpretation is *not* conservative in nature, a common argument among other legal scholars. Additionally, unlike the common theory that legislative intent is an incredibly malleable method of statutory interpretation that is subject to manipulation, Cross finds that legislative history has a relatively liberal effect on all justices in his data set.

While Cross does contribute many novel and well-supported arguments to the field of studying statutory interpretation in *The Theory and Practice of Statutory Interpretation*, I do find some issues with his analysis. First and foremost, his conclusions are drawn from a data set that only includes one particular segment of the Supreme Court's history. This creates an issue of generalizability. Cross is unable to concretely generalize his results to lower courts or time periods in the Court's history due to his limited data. Since Cross draws conclusions from an

unrepresentative sample of American judges (that is, only Supreme Court justices from a particular time period in the Court's history), he is unable to concretely generalize his results to lower courts or time periods in the Court's history. I would have liked to see more attempts by Cross to make his evidence broader in scope and more representative of all American judges regardless of court system or time period. Another issue that I have with Cross's analysis is his comprehensive definition of "usage" of different methods of statutory interpretation. The methods of measuring usage of certain methods of statutory interpretation vary widely, in part due to the diversity of these tools of interpretation. I would have liked to see Cross create more concrete definitions of interpretation method usage and break down his analysis into the more detailed types of methodology that justices use to make decisions. However, I do applaud Cross for his inclusion of negative references to methods of statutory interpretation in his analysis—in addition to other notable insights—which were novel and important inclusions.

With the aforementioned review of judicial behavior and statutory interpretation in mind, we turn to a discussion of what we now know after this exploration—and if we have greater insight into how judges utilize statutory interpretation.

Clearly, it is incredibly difficult—or perhaps even impossible—to describe judicial decision making. Segal, Spaeth, Epstein et al., Bailey, Maltzman and other scholars have come to wildly different conclusions about how to model judicial behavior, leaving readers relatively unsure of how to summarize the judicial decision making process.

Furthermore, there is an incredible amount of indeterminacy over whether or not various methods of statutory interpretation constrain judicial decision making. For example, according to Cross's findings, textualism may not be the hefty check on judicial discretion that its advocates like Justice Scalia believe it to be. In theory, textualism should constrain ideological judicial

decision making, as it literally restricts judicial decisions to those justified by the concrete, determinate terms in a given statute. However, Cross argues that this constraining effect of textualism is unproven. Language is much more indeterminate and imprecise in reality, creating room for justices to impose their ideological preferences within the so-called "confines" of term definitions and meanings. A classic example of this would be a judge selecting a specific dictionary definition of a term—out of countless options—in order to adequately support their reasoning in a case. This further explains why Cross found little variance in textualism usage between justices of varying ideological dispositions; if textualism does not constrain any particular ideology, then it would not dissuade justices with certain ideological leanings from implementing it. Thus, while textualism is commonly believed to be a popular method of statutory interpretation that successfully constrains ideological decision making, Cross's analysis demonstrates otherwise.

There is also a significant amount of ambiguity when it comes to determining the degree to which legislative history as a method of statutory interpretation constrains judicial opinion. There is a great distinction between justices forming ideological opinions on a case *and then* cherry-picking legislation to support their predispositions and justices consulting legislative history as an aid *before* formulating case opinions. This difference is the key factor as to whether or not legislative history truly acts as a constraint on judicial opinion. If justices merely use history to support their ideological preferences, then legislative history does not constrain judicial decision making. However, if justices form opinions based on legislative history, then the method does constrain judicial decisions. Unfortunately, it is incredibly difficult (and sometimes impossible) to tell whether justices follow the former or latter method of utilizing legislative history in case opinions. If an existing piece of legislative history is cited in a

decision, it could have been selected to support the author's beliefs or been an original source for the ideas that reference it. Hence, since the two substantially different uses of legislative history are nearly impossible to discern through reading case opinions at their face value, scholars are unable to determine the extent to which legislative history constrains judicial opinion.

Hence, the contribution of various methods of statutory interpretation to judicial restraint is incredibly indeterminate, at least through the existing literature. Although this can be discouraging, this review of methods of statutory interpretation has helped us learn to identify some common pitfalls of their usage (such as a judge's ability to cherry-pick the dictionary they use to justify their "textualist" decision) and become better-informed observers of the judiciary. For example, while we may never know what really went on behind the scenes when Justice Scalia rendered an ideologically-conservative, textualist-based decision (e.g., whether textualism is inherently conservative, Justice Scalia chose a textualist argument because it best supported his conservative ideology in the case, or the correlation between textualism's usage and ideologically conservative outcomes is a mere coincidence), we are now able to use our knowledge of statutory interpretation and factors that influence judicial behavior to at the very least better understand how he arrived at his decision.

Even with this expanded knowledge of various methods of statutory interpretation in mind, we must again remind ourselves that there is no current holistic approach to describing judicial decision making. While scholars have argued back and forth over whether textualism, legislative history or other methods of interpretation constrain judicial decisions, it becomes incredibly difficult to distinguish between statutory interpretation itself as a check on judicial autonomy and external factors that constrain (or do not constrain) justices, such as inter-governmental checks and balances, public opinion or judicial self-interest. Yes, a given method

of statutory interpretation may be cited as justification for a judicial opinion, but it is incredibly common for many factors beyond statutory interpretation to contribute to judicial behavior. Most judicial decisions cite multiple methods of statutory interpretation in different parts of the majority opinion in addition to other references, including but not limited to public opinion, political considerations, judges' personal perspectives and other factors discussed in preceding sections of this paper. Clearly, both statutory interpretation and other critical factors contribute to overall judicial behavior—so, although we are better equipped to analyze judicial decisions with our improved understanding of both methods of statutory interpretation and models of judicial behavior, we are far from an objective theory of how statutory interpretation (and other factors) influence ideological judicial decision making.

Although there has been much emphasis on the importance of ideology in judicial decision making (and how ideology can poison the integrity of judicial decisions), one could argue that ideological decisions are not necessarily as malicious as some believe them to be. As mentioned above, the Supreme Court has deviated from stare decisis (and, arguably, leaned into their own ideological preferences) in some landmark cases such as *Brown v. Board of Education* and *Roe v. Wade*. These decisions were somewhat controversial at the time but were later applauded by most Americans. Therefore, one could argue that decisions such as *Brown* and *Roe* are examples of instances where ideological judicial decision making can produce favorable outcomes.

However, the definition of a "favorable" case outcome is difficult to identify. Is a court decision "favorable" if a simple majority of Americans agree with the ruling? Would a decision that stands the test of time (e.g., is not found unconstitutional by later courts nor overruled by future legislation) considered "favorable"? Without an objective marker of what defines a

"favorable" case outcome, favorability becomes a much weaker justification for ideological judicial behavior.

Further, discussion of "favorable" outcomes inherently brings a fundamental question of the American judiciary's purpose to mind; are the Courts intended to generate publicly favorable outcomes or to appropriately interpret and apply the Constitution? When popularity and the Constitution are at odds, this becomes a critical question. If public opinion trumps all, then favorability (if one is able to quantify it, as discussed above) suggests that ideology could aid in delivering popular outcomes. However, public opinion is notoriously erratic, and heavy reliance on popularity when shaping our country's laws could lead to inconsistency and additional obstacles. Hence, "favorable" outcomes could be appropriately used to justify ideological case decisions—in careful moderation.

When one looks into the fundamental aspects of Court decisions, it becomes difficult to even differentiate an "ideological" decision from a "non-ideological" one. Everyone has their own inherent biases and perspectives that shape their thoughts, opinions and decisions—including judges. With that said, what delineates an ideological decision from a non-ideological one if judges inform their decisions using their own predispositions in both cases? What degree of "ideological justification" in a decision merits classification of a case outcome as ideological? Even if there was a specific amount of ideological influence that could be used to deem a decision ideological, judges are known for masking (or at the very least thought to mask, as demonstrated by the current literature) their personal opinions in case outcomes behind more "legitimate" methods of statutory interpretation, as discussed above. If one is to argue that ideological decision making is bad for democracy, they must at the very least acknowledge the dilemma of how difficult it is to even classify decisions as "ideological."

With all of that said, while there is definite merit in dampening the influence of non-representative, personal preferences in judicial decisions, the possibility of judges relying on their own ideology to inform their behavior does not appear to be the end of democracy as we know it. After all, there is a prominent historical practice of using ideology to inform judicial decisions—and for the most part, it has been effective. The aforementioned decision in *Brown v. Board of Education* (1954) was arguably ideological in nature yet a successful case outcome that has stood the test of time. Further, even if ideology leads to unmerited, unsuccessful or unpopular decisions, there are institutional processes built into our government that are designed to correct judicial errors—including but not limited to new legislation passed by the legislature, executive branch orders, decisions or implementation of policy and future court rulings that can amend, overrule or even void previous decisions. With so many checks on judicial power in place, the potential negative consequences of ideological decision making can be kept at arm's length—if not avoided altogether.

Additionally, while this may not be a popular opinion, one could view a judge as a type of political figure or representative of the people that they govern. Although they are not elected representatives, judges create law through their decisions much like legislators do and are generally thought to have the people's best interests in mind. Appointed members of the executive branch, such as members of the Presidential Cabinet, are in effect very similar to judges. They are typically viewed as indirect representatives of the people, interpreting and impacting policy through implementation while often balancing presidential directives with the common good of the country. If one views judges as policy makers or representatives of the American people, utilization of ideology to inform their decisions feels somewhat natural, much like the work of legislators or stereotypical politicians. Legislators are thought to reflect the

ideological preferences of their constituents in their decisions. It could be argued that judges do the same when using partisan ideology and/or public opinion to inform their decisions. If that sort of methodology is thought to be effective in the legislative realm, why should its use by the judiciary be chastised if both decision makers are merely representing the people that they govern? Further, the scholars who studied judicial behavior above—particularly, Bailey and Maltzman—describe judicial behavior as incredibly similar to that of elected officials such as legislators. This perspective again supports the notion that judges can and are viewed as politicians by at least some portion of the American electorate—and that the use of ideology in judicial decisions is not necessarily an abominable venture.

However, judicial transparency is paramount to the integrity of the institution. American confidence in the judiciary has waned in recent years. According to a 2022 Gallup poll, only 25% of Americans have "a great deal" or "quite a lot" of confidence in the Supreme Court, the lowest percentage in the past fifty years of this survey's implementation (Jones). A reason for this is likely the judiciary's general lack of transparency in their decisions and processes. The behind-the-scenes processes that develop case decisions, majority opinions and overall outcomes, in addition to heavy public suspicion of ideological decision making by the Court, has led many Americans to believe that the judiciary is a deceptive institution—resulting in low approval ratings and high levels of distrust.

A recent example of this phenomenon is the overturning of the landmark *Roe v. Wade* case in *Dobbs v. Jackson Women's Health Organization* (2022) and the justices that were on the Supreme Court for that case. Former President Donald J. Trump was able to appoint an uncharacteristically high three justices to the Supreme Court—Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett—during his four years in office. These three appointment

and confirmation processes were riddled with political strife and partisanship, with each appointee called into Congress to testify that they would follow nonpartisan principles in upholding the law while on the Supreme Court. However, the hearings stirred political controversy. For instance, Kavanaugh refused to comment on issues that may come before the Court, including *Roe v. Wade*, semi-automatic rifle possession, or the president's ability to pardon themself (a phenomenon that President Trump had flirted with at the time due to the pending federal investigations against him) despite his documented history of conservative preferences in previous cases concerning those issues. Similarly, Barrett possessed a documented history of conservative opinions as a District Court judge (decisions that aligned with her Catholic faith) yet stated in her Congressional hearing that "it's never appropriate for a judge to impose that judge's personal convictions, whether they arise from faith or anywhere else, on the law" (Gerstein). Clearly, the discrepancy between these appointees' definitive histories of ideological preferences and their inability to admit bias is a cause for public distrust of the judiciary.

Therefore, I find it imperative for the judiciary to become more transparent about their ideological influences and overall decision making processes. Americans' faith in the judicial system is an integral component of law and order in this country. Without it, society could devolve into chaos and uncertainty—as demonstrated by mass protests in reaction to the 2020 murder of George Floyd, the 2017 feminist Women's March, and the March For Our Lives, a pro-gun control protest that took place in 2018. I firmly believe that Americans' fears of ideology poisoning the judicial system are rooted in the lack of transparency that has historically shielded the courts from the public eye. Although there is some merit to the discretion that justices have comfortably enjoyed, action should be taken to increase the judiciary's clarity.

First, judges should be more open about their ideological preferences and personal biases. Further, there should be greater promotion of leading legal research such as the works of Segal, Spaeth, Cross, Bailey, Maltzman, Epstein et al. who aim to model judicial behavior and decision making. If more Americans were better informed about the inner workings of the judiciary, that may ease tensions and lead to greater trust of the courts by the public. Finally, I feel there should be greater observation of the judiciary by the media and members of the general public, especially with regard to internal processes and individual judicial personalities, dispositions and ideological preferences. This type of public attention should clear up some misconceptions about the judicial system's proceedings, particularly its "deceptive" nature, and replace those negative feelings with public confidence.

Overall, while it is difficult to determine both how to describe judicial behavior and whether or not different methods of statutory interpretation have ideological inclinations, this practice has demonstrated the value of judicial transparency. Furthermore, I posit that common fears of an ideological judiciary are not necessarily as detrimental as they may seem. After all, if one views a judge as a public representative, then ideological decision making in the judicial realm is not very different from the decisions of legislators. With this perspective in mind, the key to an effective and just ideologically-rooted judiciary is the development of trust through public transparency.

Works Cited

Bailey, Michael A., and Forrest Maltzman. "The Constrained Court." 2011, https://doi.org/10.23943/princeton/9780691151045.001.0001.

Cross, Frank B. *Decision Making in the U.S. Courts of Appeals*. Stanford University Press, 2007.

Cross, Frank B. *Theory and Practice of Statutory Interpretation*. Stanford University Press, 2009.

Epstein, Lee, et al. "The Behavior of Federal Judges." 2012, https://doi.org/10.4159/harvard.9780674067325.

Eskridge, William N., et al. *Legislation and Statutory Interpretation*. Foundation Press, 2006.

Eskridge, William N., and Philip P. Frickey. "The Supreme Court, 1993 Term Foreword: Law As Equilibrium," 108 *Harvard Law Review* 26, 66-69 (1994).

Gerstein, Josh. "Senators Take Fire over Questions for Catholic Judicial Nominee." *POLITICO*, https://www.politico.com/blogs/under-the-radar/2017/09/11/amy-barrett-judicial-nominee-religion-242550.

Jones, Jeffrey M. "Confidence in U.S. Supreme Court Sinks to Historic Low." *Gallup.com*, Gallup, 21 Sept. 2022, https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

Sabando, Joel. "The Illusion of Nonpartisanship in the Supreme Court." *Harvard Political Review*, 13 Nov. 2020, https://harvardpolitics.com/illusion-nonpartisanship-court/#:~:text=Traditionally%2C%20the%20judiciary%2C%20and%20the,faithfully%20abide%20by%20the%20Constitution.

Segal, Jeffrey A., and Harold J. Spaeth. “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices.” American Journal of Political Science, vol. 40, no. 4, 1996, p. 971., https://doi.org/10.2307/2111738.

“The U.S. Supreme Court and the Use of Legislative Histories,” *supra* note 14, at 294, 304.