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Abstract:

The Supreme Court, a nine seat bench of unelected and lifetime tenured Justices, determines the constitutionality of dozens of cases each year. In this thesis, I research to what extent the political affiliation of the Justices affects the judicial decision making process and, ultimately, case outcomes. Using pattern matching, I evaluate due process opinions from Justice Breyer, Justice O'Connor, and Justice Scalia, all of whom have established constitutional analysis methods, in order to determine if they reasonably adhere to their established method. Due to the highly political nature of due process cases, variance between the expected (adherence to the Justices' established style) and the observed outcomes (the adherence to or lack of adherence to the established style) can suggest political influence on the Justice in order to get a preferred outcome. Ultimately, I find that there is a significant variance between the three Justices and their adherence to their established constitutional analysis method, suggesting that Justices' political affiliation can manipulate their decision making methods when it is necessary to achieve their preferred political outcome.

This is an excerpt from a full thesis, and access to the full thesis, resources, methodology, and data collected can be accessed by contacting the author, Julie Castle, at: julie.castle@law.gwu.edu.

I. Introduction:

The purpose of this research is to determine to what extent does the political affiliation of the Justices on the Supreme Court affect judicial decision making and, ultimately, case outcomes. In order to achieve this end goal, I researched what constitutional analysis methods Justices used and which indicators suggested one method in contrast to another. I then chose a group of Justices to analyze and a type of case to analyze.

From the literature surveyed, there are four main sources of meaning in the Constitution: 1) contemporaneous sources (i.e. the text of the Constitution, the structure of the government intended by the Constitution, and the history surrounding the Constitution's framing and ratification), 2) subsequent events (i.e. doctrinal precedents and legislative and executive practice under the Constitution), 3) non-interpretive considerations (i.e. arguments concerning the consequences of an interpretation of the Constitution, sound social policy, and considerations of politics), and 4) individual bias (i.e. doctrinal and party bias).[1] Scholars have determined four broad categories of constitutional methods of analysis: natural law, Holmesian, formalism, and instrumentalism.[2] Natural law Justices decide based on reasoned legal principles and emphasize precedent and stare decisis, but they also care about the purpose of a provision of the Constitution and the context in which it was made. Holmesian Justices rely heavily on deference to Congress and the executive branch, believing that it is not truly the Court's job to make policy decisions that are generally designated to either Congress or the executive branch. Formalist Justices emphasize the text of the Constitution, almost exclusively, and are strong defenders of separation of powers. Instrumentalist Justices believe that the judiciary is a co-equal branch of government and there is a responsibility to advance functional and pragmatic social policy through their decisions.[3] Each style of interpretation uses the four sources of meaning, but their importance and weight vary - this is what differentiates their analysis and makes a style distinct.

After researching, I chose three Justices: Justice O'Connor, Justice Scalia, and Justice Breyer. I chose them specifically because they each have a distinctive, and differing, constitutional analysis style – natural law, formalism, and instrumentalism, respectively. This is not to say that they do not engage

1. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Val. U. L. Rev. 121 (1994).
2. Id.
3. Id.

in other styles at times, but they are known for their use of these types of analysis, and they use them most frequently. I also chose them for their varied political beliefs. Justice O'Connor is considered a more moderate Republican, Justice Scalia was a staunch Republican, and Justice Breyer is a Democrat. This gives insight into varied political perspectives of Justices.

Finally, I had to choose what type of cases I would explore. Many cases that the Supreme Court adjudicates each year are routine and are not very controversial or produce widespread changes to our lives. Additionally, many cases are not likely to be influenced necessarily by politics - it is just a clarification of the law (it would not be impossible for politics to play a role, but it is less likely). Therefore, I needed to choose a type of case that 1) had enough data points for me to do substantial research on so I could reach a more meaningful conclusion and 2) was controversial and could be highly politicized. Due process cases satisfy these requirements. Both types of due process cases, substantive and procedural, are controversial and invite political opinion when they are on the docket. Substantive due process requires that the government's deprivation of a person's life, liberty, or property is justified by sufficient purpose, while procedural due process ensures that the government has followed the proper procedures when it deprives someone of their life, liberty, or property.[4] As Justices, they have a belief about what their role on the Supreme Court means, but they are ultimately humans with political beliefs that influence the way they see the world and how they want the world to look. A case that is inherently political is bound, more than others, to bring out influences of politics.

I theorize that Justice Breyer and Justice O'Connor, representing instrumentalism and natural law styles of constitutional analysis respectively, will adhere to their methods to a reasonable degree, while Justice Scalia, representing formalism, will not adhere to his methods to a reasonable degree. Ultimately, I argue that political affiliation will manipulate the decision making methods of a Justice when it is necessary to achieve their preferred political outcome. I also analyze other potential ramifications based on the observed trends.

II. Methods:

In order to test my hypothesis, I will use pattern matching. Pattern matching is a research methodology where a researcher compares an observed theory to data and evaluates whether the theory is applicable or accurate.[5] One type of pattern matching is rival explanations as patterns. This involves creating multiple rival theoretical propositions that could be the appropriate pattern to match the data.[6] With this method, "The important characteristic of these rival explanations is that each involves a pattern of independent variables that is mutually exclusive: If one explanation is to be valid, the others cannot be."[7] I will engage with rival explanations as patterns to determine if Justices are manipulating their established constitutional analysis style in order to get an outcome more in line with their political beliefs, or if they are consistent in their style of analysis and judgment. Each type of constitutional analysis is a rival theory, and I have chosen variables that align solely with one type of constitutional analysis – meaning that an indicator's presence only suggests one theory and two cannot simultaneously be true. The indicators for natural law are an appeal to a general enlightenment principle or Christian principles, strong advocacy of precedent, and originalism. The indicators for Holmesian are extreme deference to the legislature or administrative agencies. The indicators for formalism are textualism, strong advocacy of state's rights, specific abstraction, and an appeal to traditional values. The indicators for instrumentalism are social policy analysis, community consensus, legislative history, and broad based historical investigation.

After reading ten cases per Justice and analyzing the contents by using the indicators, I will use the raw data to create percentages of how often a Justice

4. Edwin Chemerinsky, Substantive Due Process, Remarks at the Practicing Law Program on the Supreme Court (Nov. 1998) in TOURO L. REV., 1999, at 1502; Ronald Ryan Smith, *Procedural Due Process: The Distinctions Between America and Abroad*, 22 Willamette J. Of Int'l L. & Disp. Resol. 199 (2014).
5. Robert K. Yin, Analyzing Case Study Evidence in Case Study Research And Applications 103 (1994).
6. Id.
7. Id.

used each respective style of analysis. This will determine if the Justice is adhering to their established style, the observed pattern, to a reasonable degree. I define a reasonable degree to mean the Justice is using their established style of analysis at least 65% of the time.

If a Justice does consistently adhere, to a reasonable degree, to their established style, this could indicate consistency and stability in their decision making process - probably indicating that the Justice does not allow their political beliefs to alter the way that they analyze constitutional issues. If a Justice does not consistently adhere, to a reasonable degree, to their established style, there could be many explanations, but because of the nature of the cases (highly controversial and politicized), it is more likely than not that there is some influence of politics at play.

III. Data Analysis:

I have used two types of data analysis. The first is the percentage of time using the established constitutional analysis method in each individual opinion of a Justice. From this, each Justice will have a number of opinions that meet the threshold of 65% adherence to their established method out of 10 opinions. This is the micro-level of analysis. The second data analysis will be aggregating all distinct instances in all opinions of a Justice (throughout all 10 opinions assessed) and finding the percentage of time a Justice uses their established constitutional analysis method overall. This is the macro-level of analysis.

For the purposes of this article, the raw data and in-depth specific evaluations of each Justice is omitted, but I will provide a brief summary of my results and how this aligns with my hypothesis. I theorized that Justice Breyer and Justice O'Connor, representing instrumentalism and natural law styles of constitutional analysis respectively, would adhere to their methods to a reasonable degree, while Justice Scalia, representing formalism, would not adhere to his methods to a reasonable degree. After analyzing the data, there is a gradient of adherence. For Justice Breyer, he utilized instrumentalist constitutional analysis methods more than 65% of the time in 5 of the 10 cases I evaluated. Throughout all the cases and throughout all the distinct instances of constitutional analysis indicators, Justice Breyer used an instrumentalist constitutional analysis method 74% of the time. For Justice O'Connor, she utilized natural law constitutional analysis methods more than 65% of the time in 2 of the 10 cases I evaluated. Throughout all the cases and throughout all the distinct instances of constitutional analysis indicators, Justice O'Connor used a natural law constitutional analysis method 45% of the time. For Justice Scalia, he utilized formalist constitutional analysis methods more than 65% of the time in 0 of the 10 cases I evaluated. Throughout all the cases and throughout all the distinct instances of constitutional analysis indicators, Justice Scalia used a formalist constitutional analysis method 20% of the time. Based on these statistics, my hypothesis was partially correct. My reasoning is threefold: 1) Depending how you present the data, Justice Breyer can be seen as adhering to instrumentalism 65% of the time or not. This ambiguity is not lost on me, but under the metrics I imposed, of all the distinct instances, he did employ instrumentalism 74% of the time, which is by and far greater than the adherence observed in either Justice O'Connor or Justice Scalia. This suggests consistency and reliability to me in Justice Breyer's constitutional analysis methods. This was as I hypothesized. 2) Justice O'Connor did not adhere to natural law 65% of the time, no matter how you present the data. This was not as I hypothesized. 3) Justice Scalia did not adhere to formalism 65% of the time, no matter how you present the data. This was as I hypothesized. Among the many explanations for the wide disparity in adherence, politics is a very reasonable, and I believe persuasive, rationale.

IV. Data Analysis and the Intersection of the Outcomes and Politics:

The overall purpose for this research is to determine to what extent the political affiliation of the Justices on the Supreme Court affects judicial decision making and, ultimately, outcomes. From the research, there is a large variance between Justice Breyer, Justice O'Connor, and Justice Scalia. As a result, I suggest that my overall thesis is accurate, and political affiliation does manipulate the decision making methods of a Justice when it is necessary to achieve their preferred political outcome.

Justice O'Connor and Justice Scalia did not reasonably adhere to their established style. Each of them, but in particular Justice Scalia, has claimed to use a certain kind of constitutional analysis. But, the observed data did not match the expected outcomes. The question, of course, is why. The answer, as this

paper posits, is politics. Justices are humans, and they have their own ideas, preferences, and political affiliations, as everyone does. They are also appointed by the president, who will choose to appoint a Justice that they believe will interpret the law in ways that benefit the political party of the president or fall in line with the beliefs of the political party of the president. An issue arises when a Justice thinks about the law in a particular way but that analysis style does not lead to outcomes that align with what they are "supposed to do." In the situation at hand, Justice O'Connor and Justice Scalia, chosen to represent natural law and formalism respectively, have been observed barely using their established styles to a reasonable degree in opinions (on the micro-level of analysis) and also to be using instrumentalism the majority of the time overall (on the macro-level of analysis specifically). Instrumentalism is a contentious constitutional analysis method. The method is accused of legitimizing biases in analysis, allowing Justices to do whatever they want to do with the law, and of being judicial activists, which, in its derogatory interpretation, is legislating from the bench. While this is applicable to both Justice O'Connor and Justice Scalia, the two Justices must be analyzed separately because there is a variation between the two of them that is significantly different. I will begin with Justice O'Connor.

Justice O'Connor claims to be a natural law Justice, while she is observed to be just as much an instrumentalist. On the micro-level of analysis, Justice O'Connor meets 65% of natural law in 2 of the 10 opinions and 65% of instrumentalism in 2 of the 10 opinions. On the macro-level of analysis, she uses natural law 45% of the time and instrumentalism 49% of the time. There is no significant difference between how Justice O'Connor used the two constitutional analysis methods. This is still indicative of her using politics to get the outcomes that she wants. As mentioned previously, instrumentalism is known for having a bad name, in general. Justice O'Connor does not claim to be an instrumentalist, but there is just as much evidence to support her being an instrumentalist as her being a natural law Justice. I suggest that she proclaims to be a natural law Justice in order to avoid the negative connotation of judicial activism. However, this creates a disparity between what we expect and what we observe. Justice O'Connor does not want to appear to be political by being an instrumentalist, but when she adheres just as much to instrumentalism as natural law, she appears to be even more political than she originally would, seeming to switch between the two in an effort to manipulate the outcomes of her decisions. While some may argue that this is political, it is tangential. This supports my overall thesis, but it is weaker than the relationship between the observed research on Justice Scalia and politics.

Justice Scalia, arguably, is the most outspoken about his judicial decision making and what constitutional analysis methods should be used. He has said that formalism is the proper method to use, because in order to eliminate bias, laws should focus on hard, fast rules that can be mechanically applied.[8] Additionally, Justice Scalia has forcefully denounced judicial activism, stating that Justices are unelected and should never co-opt the powers of the legislature.[9] He also believes that substantive due process should not exist because the Court should not be able to "create" new rights.[10] Despite how vocal Justice Scalia is about how constitutional analysis should be done and the role of the Court, his actions do not align with his words. On the micro-level of analysis, Justice Scalia did not exceed 65% for formalism in a single opinion. On the macro-level of analysis, Justice Scalia only employed formalism 20% of the time. It is relevant to note that Justice Scalia also employed instrumentalism 53% of the time. This suggests one of two things: 1) formalism is not feasible to use as the entire basis of an argument or 2) Justice Scalia cannot achieve the outcomes he desires through formalism. He wants to achieve a certain outcome based on his political affiliations and formalism does not allow the flexibility and subjectivity that he requires. Nowhere is this seen more than in

8. Clint Bolick, The Case for Legal Textualism, Hoover Institution (Feb. 27, 2018), https://www.hoover.org/research/case-legal-textualism.

9. Id.

10. Kenji Yoshini, *Not Whether But How: Discerning New Constitutional Freedoms*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701#not-whether-but-how-discerning-new-constitutional-freedoms, (last visited Dec. 22, 2021).

Justice Scalia's *District of Columbia v. Heller* majority opinion. Justice Scalia has repeatedly said that new substantive due process rights cannot and should not be "created" by the Court. This, of course, applies to the fundamental right to marry, the fundamental right to abortion, and many more. However, when the substantive due process right, like the individual right to keep and bear arms, aligns with his political opinion, the way that he decides cases changes and it is constitutionally appropriate to "create" a new right. Justice Scalia has openly criticized instrumentalism, but *District of Columbia v. Heller*, and the other cases surveyed, show that he will still use the method to reach the outcome he desires. His opinion of instrumentalism and his simultaneous use of it reveal how his actions match his accusations.

Finally, I want to acknowledge the place that Justice Breyer has in this discussion. Justice Breyer is the only Justice in this research that reasonably adhered to his established constitutional analysis method. However, instrumentalism, as discussed in relation to Justice O'Connor and Justice Scalia, is known to be more political, more biased, and framed as judicial activism. Does this make every opinion Justice Breyer writes, when based on instrumentalism, inherently political? This is an impossible question to answer. Ultimately, what we do know for sure is that Justice Breyer proclaims to be an instrumentalist. Through my research, he has shown to be exactly that. He does not change his analysis style to reach a particular outcome. This does not mean I am foreclosing the idea that politics can influence Justice Breyer's decisions, but the way that he decides to craft his opinions and in turn write his opinions is not changed by the outcome he wishes to achieve.

V. Trends and Comparison between Justices:

Now that I have reviewed each of the Justices individually, I will identify general trends/similarities in constitutional analysis methods on the Supreme Court as a collective. The chart below has combined the number of distinct instances of indicators by what constitutional analysis method they indicate and then shows the percentage of the total number of indicators for a particular constitutional analysis method over the total number of all instances in all 30 opinions evaluated for a particular constitutional analysis method over the total number of all instances in all 30 opinions evaluated.

Summary of Constitutional Analysis Methods in All 30 Opinions

Constitutional Analysis Method	Total Distinct Instances of All Indicators for the Constitutional Analysis Method in All 30 Opinions	% of All Distinct Instances for the Constitutional Analysis Method in All 30 Opinions
Natural Law	319	28%
Holmesian	37	3%
Formalism	121	11%
Instrumentalism	660	58%
Totals	1137	100%

As seen above, in all opinions, the constitutional analysis method used the most often is instrumentalism. When looking at the observed percentages of instrumentalism by the Justices, this holds true as well, with it being the most used method despite the established style of the Justice (Justice Breyer at 74%, Justice O'Connor at 49%, and Justice Scalia at 53%). Within instrumentalism, social policy analysis is used the most often at 43% of all distinct instances. When we consider what instrumentalism and social policy analysis aims to do, it makes sense that it is the most used method and tool. The purpose is to see how functional and pragmatic a law or regulation is and how that in turn affects the people it applies to, rather than a hard, fast reliance on how things have always been (natural law), deference to experts in a field or Congress (Holmesian), or sole reliance on the words of a text without respect to how it benefits or harms people (formalism). While other constitutional analysis methods have their places and their own appropriate times to be applied, every single case evaluated employed at least one tool of instrumentalism, indicating to me that it is a necessary and authoritative method of constitutional analysis. If we are not concerned with how laws and regulations affect people, then what is the point of governance? It seems as though the Justices, whether they claim instrumentalism or not, see the value in a workable, fair, and just system, which is what instrumentalism aims to achieve through judicial decision making.

Another important trend to take note of is the utilization of natural law. Natural law is the second most used constitutional analysis method at 28% and has the second most used tool, strong advocacy of precedent, at 21%. Within the three Justices' opinions,

natural law was always the second most used constitutional analysis method (Justice Breyer at 12%, Justice O'Connor at 45%, and Justice Scalia at 26%). An important aspect of the judiciary is consistency. Regularly and faithfully applying and relying on precedent is essential to creating that consistency and also credibility. If courts constantly overruled previous precedents, there would be little stability and it would undermine the authority of each court, leading to an overall distrust of their decisions. But, as we can see through my research, no matter what a Justice establishes as their constitutional analysis method, natural law—particularly advocacy of precedent—has a strong hold on what they will decide. This is an important and promising trend, even with such a small sample size.

Conclusion:

While, due to the nature of my analysis and my method, I cannot prove that politics is the reason that Justice O'Connor and Justice Scalia did not adhere to their established constitutional analysis methods, I suggest that politics is the most reasonable assumption to be made, especially because of the cases I chose to analyze. Politics is relevant at the least, superseding at the most. Apolitical is not an accurate representation of the Supreme Court. Another outcome, which was unexpected, was learning how controversial instrumentalism is as a constitutional analysis method while simultaneously learning precisely how important instrumentalism is to the judiciary. Not many Justices, or members of the judiciary in general, admit their penchant for instrumentalism because of this contentiousness. Justice Breyer is an outlier in this situation. But, my research demonstrates its importance to the judicial decision making process. Instrumentalism is fundamentally a human based analysis method. It emphasizes the real effect of the Constitution and legislation, as well as functionality and pragmatism over a mechanical application of the law. These are not misguided metrics. Even those that object to instrumentalism being used, such as Justice Scalia, consistently use it. This reveals a judicial and societal contradiction. We, like the Justices, have a distaste for bias and subjectivity, unless, of course, it swings the pendulum in our favor. It is not erroneous to base judicial decisions on how those decisions affect people, even if this introduces a level of bias into the process. It is clear to me while the term apolitical may be misappropriated, this is not necessarily a deficiency within our judicial system. If introducing biases also means introducing compassion and realism, I argue that those biases are much more beneficial than detrimental.

From here, I suggest further research of a larger scale. Right now, my results are limited to the scope I was capable of casting. I investigated three Justices and thirty cases. I am confident that if this research were replicated on a larger scale that the outcomes would confirm my findings that politics do manipulate a Justice's constitutional analysis method when necessary to reach a particular outcome. I also encourage those researchers to reconsider the collective assumption that politics and biases are always morally inferior to the alternative. We must remember how much social progress would be designated as judicial activism and political decisions and ask ourselves if these were illogical or unsound decision making processes.

In conclusion, Justices do manipulate their constitutional analysis methods in order to reach their preferred outcomes, and I do believe that politics plays a considerable role in that decision making process. I also believe that nuance is necessary when we continue to investigate my findings. Politics in the judiciary can lead to both positive and negative outcomes. The law is black and white, but humans are gray. It is decidedly true that it is the Supreme Court's province and duty to say what the law is, but we must also consider the human aspect of the judiciary's actions.[11] We must also consider the distinct possibilities of what the law *should* be.

11. Marbury v. Madison, 5 U.S. 137 (1803).