5-2022

Constitutional Interpretation: Have the Methods Used by the Supreme Court Changed Over Time?

Morgan A. Matney
mmatney1@vols.utk.edu

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By: Morgan Matney

Advisor: Dr. Kirsten Widner

ABSTRACT

As important as the methods of constitutional interpretation are to the validity of laws in our nation, little research has been done regarding trends in how often different methods have been used by the United States Supreme Court over time. I have conducted research analyzing cases from various points in the Court's history to identify these trends and look for any changes in the methods used by the Court. My results concluded that the methods did not inherently change over time, but trends did appear showing that some approaches were more popular than others at certain points through history. Notably, stare decisis became and remained the most-prevalent method of interpretation after the first evaluated period. These results open doors for further analysis to be conducted throughout the Court's history and for deeper investigation into the causes behind these trends.

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INTRODUCTION

The Constitution is this country's political, judicial, and executive compass; it is the standard that must be upheld for the preservation of the nation. So, when the Supreme Court of the United States makes decisions on constitutional issues, it must evaluate what is said within and through the Constitution. This may sound like a straightforward and simple task, but there are many avenues that justices can take in interpreting the Constitution and its boundaries: they can use one interpretation method or a combination of multiple to evaluate the issue at hand.

Given the range of techniques that may be used by the justices, I believe it would be valuable to understand the timeline of these methods and their popularity throughout different periods of the Court. Specifically, do the methods used by the Court change over time? Do trends exist demonstrating that some methods were more prevalent at different points through the Court's history? Through this paper, I will explain my research in searching for trends and changes in the methods used, and I will begin with what is already offered in the related academic field.

LITERATURE REVIEW

The methods I refer to throughout this project are identified by Lee Epstein and Thomas G. Walker in their book, *Constitutional Law for a Changing America: Institutional Power and Constraints*: "Original intent", "Original meaning", "Textualism", "Structural analysis", "Stare decisis", "Pragmatism", and "Polling other jurisdictions" (Epstein and Walker 23-24). The first two approaches have a similar objective; the document is viewed in the context of its origin (Epstein and Walker 24). So, "the intent of the Constitution's framers" is the goal of the first method (Epstein and Walker 24). The mission of the second method can be summarized as identifying "how the framers defined their own words" (Epstein and Walker 26). The third,

textualism, is simply a technique in which the document's language itself is evaluated (Epstein and Walker 27-28). When the fourth method of structural analysis is exercised, concepts such as "federalism, the separation of powers, and the democratic process" are often used as guides to determine whether "overarching structures or governing principles" coincide with the analysis at hand (Epstein and Walker 29). Next, decisions that have already been made by the Court guide interpretation and judgement for the fifth method of stare decisis (Epstein and Walker 30). The sixth, pragmatism, seeks the option where the analysis has the least problematic outcome, and the decision is made based on that option (Epstein and Walker 32). Finally, the last method looks to how certain issues were handled by others either recently or in "English traditions or early colonial or state practices" (Epstein and Walker 32). With this foundation of what the various techniques entail, we can now move on to the scholarly work which has been conducted in this field that provides insight into what might be seen in my own research.

To begin, James Ryan, throughout his article entitled "Laying Claim to the Constitution: The Promise of New Textualism", provides insight into the fluctuation of viewpoints on originalism and textualism. His argument is not focused wholly on the Supreme Court and its justices, but it does at times mention trends which are applicable to this present research (Ryan). Specifically, he emphasizes the guiding role of "Justice Antonin Scalia" in the transitioning to a concentration on "original meaning" rather than "original intent" by "conservative lawyers and academics" (Ryan 1532). However, Ryan also mentions that the transition was not as extreme "in practice" as it was in philosophy (1533). This suggests the possibility that trends will be found in the present research with a rise in popularity of original meaning and a fall in original intent. However, if these trends do appear, they may not be substantial.

Ryan also suggests throughout his article that interpretation can be correlated with political affiliation and values; he regularly refers to philosophies in terms of where the believers fall on the ideological scale (Ryan). For example, he recognizes that "[c]onservatives were often unwilling to follow this refined version of originalism when it would lead to liberal outcomes by the courts" (Ryan 1533). This political affiliation could aid in explaining any trends found in the current research as personal beliefs of the justices could influence the methods of interpretation that are more commonly used at certain points in time.

Next, an article written by Cody Moon, "Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?" discusses several nations' judicial branches and how they implement judgements from the courts in other countries. The article determines that "[t]he United States Supreme Court is currently not an active participant in the comparative constitutional analysis dialogue" and suggests that partially participating would be most beneficial for the country (Moon 246). This work does not specifically mention the polling other jurisdictions method of constitutional interpretation: it's focus is on something more committed than simply investigating what is done elsewhere. It explains, "Once fully immersed in the dialogue for comparative constitutional analysis, however, it is no longer possible to have a court of last resort because no country wants to subordinate its constitutional court to that of some other country" (Moon 245). However, this article provides proof of the Court being more willing to use polling other jurisdictions at certain times than others. Moon recognizes that some justices from the U.S. Supreme Court have been supporters of "incorporating ideas from other constitutional courts" while other justices have not (Moon 240). Based on this, it seems that some justices may be more willing to use the polling other jurisdictions method and a trend may appear in the current research dependent upon the Court's makeup.

Frederick Schauer, in the "Stare Decisis – Rhetoric and Reality in the Supreme Court" article, says that "stare decisis is a relatively recent invention in the history of common law" (125). Given this, it is possible that my research may demonstrate a rise in the use of this method because of its relative newness. The article also mentions that "Justices who refer explicitly to stare decisis as a justification are Justices who did or would have agreed with the earlier decision" which is often seen (Schauer 133). However, there are a few cases where this correlation is not true which are described in the article (Schauer 133). For my purposes, this suggests that the use of stare decisis and any related trends seen through my own research may be dependent upon the cases and issues at hand as well as the positions of the justices.

Based on these academic works, I have a few presumptions for what may be found within the results of the present research. First, I expect to see a general increase in the use of original meaning and a general decrease in the use of original intent over the Court's history. Second, I expect to also see a rise in the use of stare decisis through the years. Third, it is possible that trends may appear in polling other jurisdictions, though I have not determined a likely direction from the prior work. Finally, it is reasonable to believe that trends may be found in any of the remaining methods. Now, my project makes a valuable contribution by productively adding to the academic conversation as little comprehensive research has been done thus far regarding trends in the methods through history. For the remainder of the paper, I will focus on the methodology, outcomes, and implications of my research.

METHODS

SELECTION OF CHIEF JUSTICES AND TERMS

To investigate the constitutional interpretation trends throughout the Supreme Court's history, I first had to identify time frames from which I could draw cases to analyze. Because of the scope of my research, it was important that I chose periods across the Court's history: they needed to provide comprehensive insight. The expansive catalogue of Supreme Court cases led me to find a method where I could narrow the case selection pool and still fit my requirement for comprehensive insight. I decided to choose four chief justices where one could represent the Court's early years, two the middle years, and a fourth the more recent years. So, I selected John Marshall, Edward Douglass White, Earl Warren, and John G. Roberts, Jr. These four specifically were chosen for where they fall within the Court's timeline; they were not selected in any specific pattern, but they do provide the opportunity to evaluate the different periods.

With these justices to focus on, I used the "Justices by Court" page on *Oyez* to locate years within the service of each chief justice where there was no turnover on the Court ("Justices by Court"). This stipulation allowed for consistency among those using the methods and making the decisions in each period. I narrowed down my case selection pool by choosing the three median years from the selected terms, all of which are shown in Table 1 below.

Table 1: Term Years

Chief Justice	*Periods Selected with No Turnover**	*Terms Chosen for Case-Selection Pool*
John Marshall	1812 – 1823	1816 – 1818[1]
Edward Douglass White	1916 – 1921	1917 – 1919
Earl Warren	1958 – 1962	1959 – 1961
John G. Roberts, Jr.	2010 – 2016	2012 – 2014

**Dates taken from Oyez ("Justices by Court")*

SELECTION OF CASES

For a comprehensive list of all Supreme Court cases, I used both the "MODERN Database" and the "LEGACY Database" provided by the Washington University School of Law through their "Supreme Court Database" (Spaeth et al.) Looking at these, I noted which cases fell within my selected term years; then, I used Google's Random Number Generator to randomly select cases for each chief justice.[2] For the cases to be applicable to my research, they needed to demonstrate constitutional interpretation in some capacity. They also needed to be cases where the Court spoke with one voice: either through majority or *per curiam* opinions. So, cases that did not meet these requirements were re-selected, and this process continued until there were eight usable cases for each chief justice, with one exception being those under Chief Justice John Marshall.

[1] These years created the pool for the database; however, an exception had to be made for this era which extended the years from which the cases were selected; this is explained further in the "Selection of Cases" section.

[2] https://www.google.com/search?q=google+random+number+generator&client=safari&rls=en&ei=bytxYuuvAu-i_QbTyJiwBw&ved=0ahUKEwiro_yntcP3AhVvUd8KHVMkBnYQ4dUDCA4&uact=5&oq=google+random+number+generator&gs_lcp=Cgdnd3Mtd2l6EAMyBwgAEEcQsAMyBwgAEEcQsAMyBwgAEEcQsAMyBwgAEEcQsAMyBwgAEEcQsAMyBwgAEEcQsAMyBwgAELADEEMyBwgAELADEENKBAhBGABKBAhGGABQAFgAYP8CaAFwAXgAgAEAiAEAkgEAmAEAyAEKwAEB&sclient=gws-wiz

The cases in the John Marshall era were significantly more difficult to find as many of them did not deal with constitutional issues and/or interpret the Constitution in Court opinions. According to the fourth chapter of *Judicial Decision-Making: A Coursebook*, "the Court's appellate jurisdiction was mandatory" throughout the first century which prevented its ability to choose which of these cases came before them (Friedman et al. 301). This is no longer an issue as the Court now "can be extraordinarily choosy about which cases to decide" (Friedman et al. 302). This explains the difficulty I encountered in finding constitutional cases through the earliest period evaluated and the ease in those that followed.

After randomly selecting all cases in the database that fell within the 1816 – 1818 terms, I decided to select the remaining cases using a different method. There are cases listed on *Wikipedia's* "Marshall Court" page under the "Rulings of the Court" section ("Marshall Court"). Using this list, I selected cases which (1) were not chosen through the previous method and (2) were closest to the term years which I had already elected to use. Therefore, the cases analyzed from the period of Chief Justice John Marshall were spread over a larger period than initially intended. This may take away from the consistency of the case selection, but it should not impact any analysis or conclusions drawn from the research. A full list of all the analyzed cases, along with their term years, can be found under Appendix A.

CASE ANALYSIS

For this research, I analyzed the Supreme Court's majority, or *per curium*, opinion for each case. I chose to focus only on these opinions because they speak as the voice of the Court. Using the interpretation methods mentioned previously, I assigned a code to each to ease both the analysis process and collection of results: (1) Original Intent, (2) Original Meaning, (3)

Textualism, (4) Structural Analysis, (5) Stare Decisis, (6) Pragmatism, and (7) Polling Other Jurisdictions.

The first step in conducting the analyses was reading each case and identifying which methods were being used by the Court; then, I assigned the appropriate numbers to each case. Because it is possible for multiple methods to be used in each opinion, multiple numbers could be assigned to each case. For example, if a case used both stare decisis and pragmatism, it would be assigned both numbers 5 and 6 for the purposes of this research. The results were obtained by tallying the number of cases in which each code was used under each chief justice; then, the code(s) used most were identified as the most popular within that period. This made it possible to identify any trends and/or changes over time.

RESULTS

Figure 1

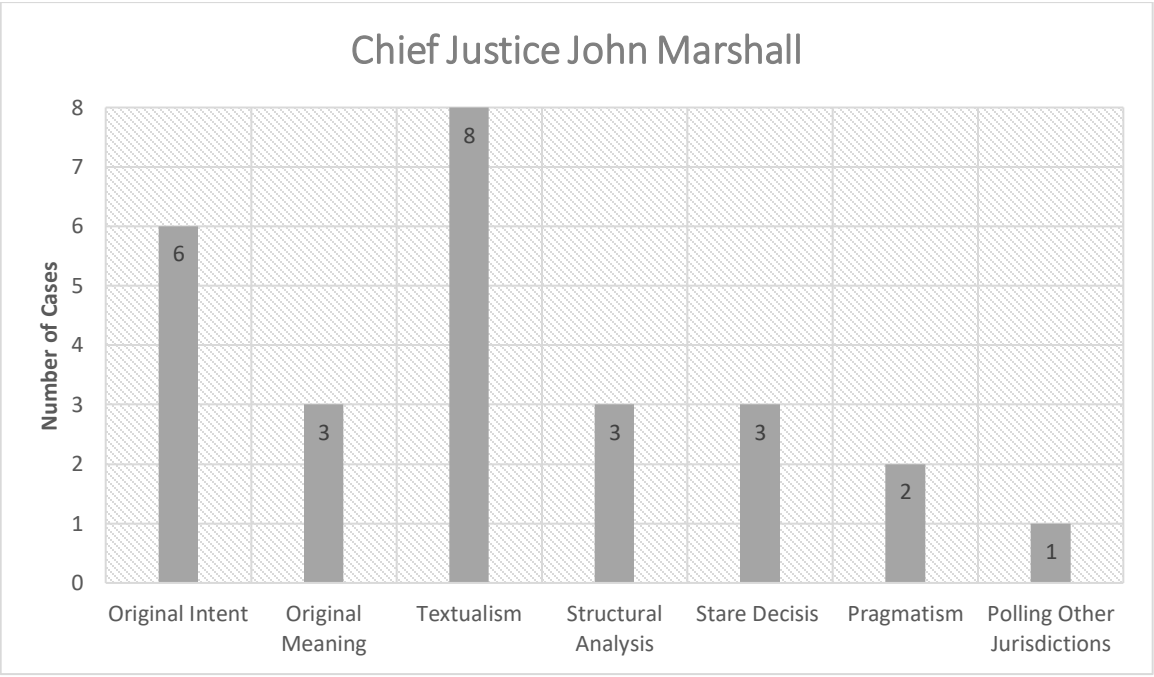
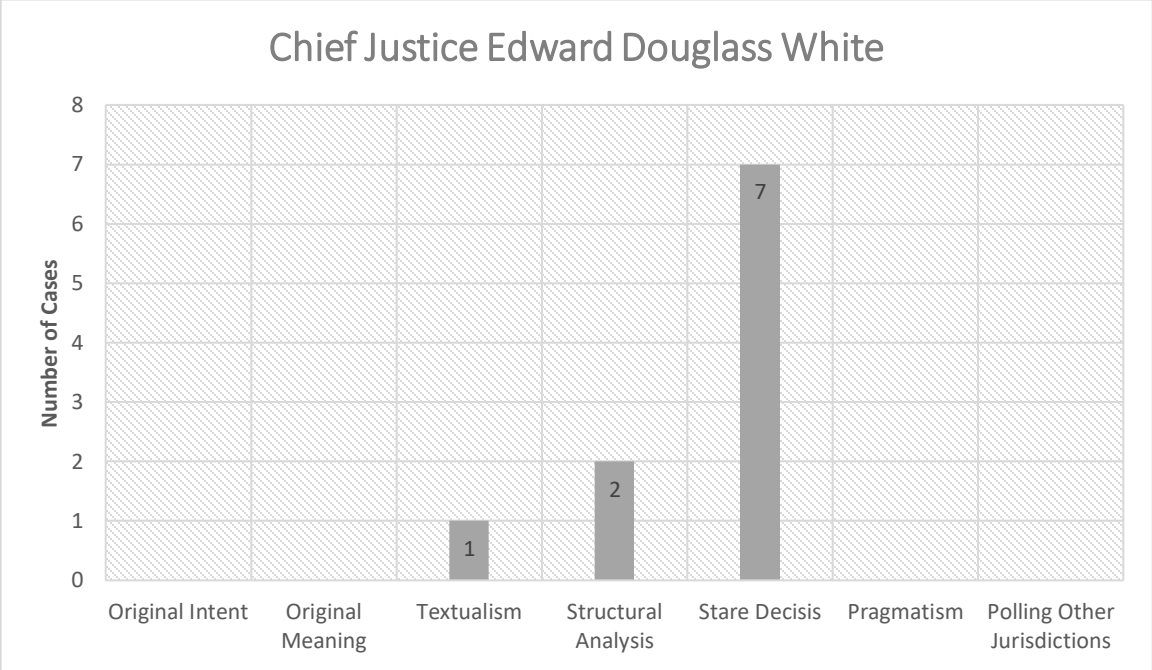


Figure 1 above displays the results from the Chief Justice John Marshall period. Essentially, all eight cases within this era use textualism which indicates that it was the most popular method during this time frame. Six of the cases use original intent, so this is the second most-popular method. Then, the next three methods being original meaning, structural analysis, and stare decisis are all used in three cases each. Finally, two cases use pragmatism, and only one case uses the polling other jurisdictions method.

Figure 2



The Chief Justice Edward Douglass White era results are displayed in Figure 2 above. Of the cases evaluated from this time frame, seven of them use stare decisis. Two use structural analysis, and one uses textualism. Given these results, stare decisis is the method that appears the most. Structural analysis is second, and textualism comes last.

It is necessary to note an observation from this data: only three of the seven methods appear in the evaluated cases. This must be taken into consideration when assessing these results; if additional cases from this period were analyzed, it is possible (even likely) that other methods

would also appear and could impact the hierarchy of popularity amongst those represented above.

Figure 3

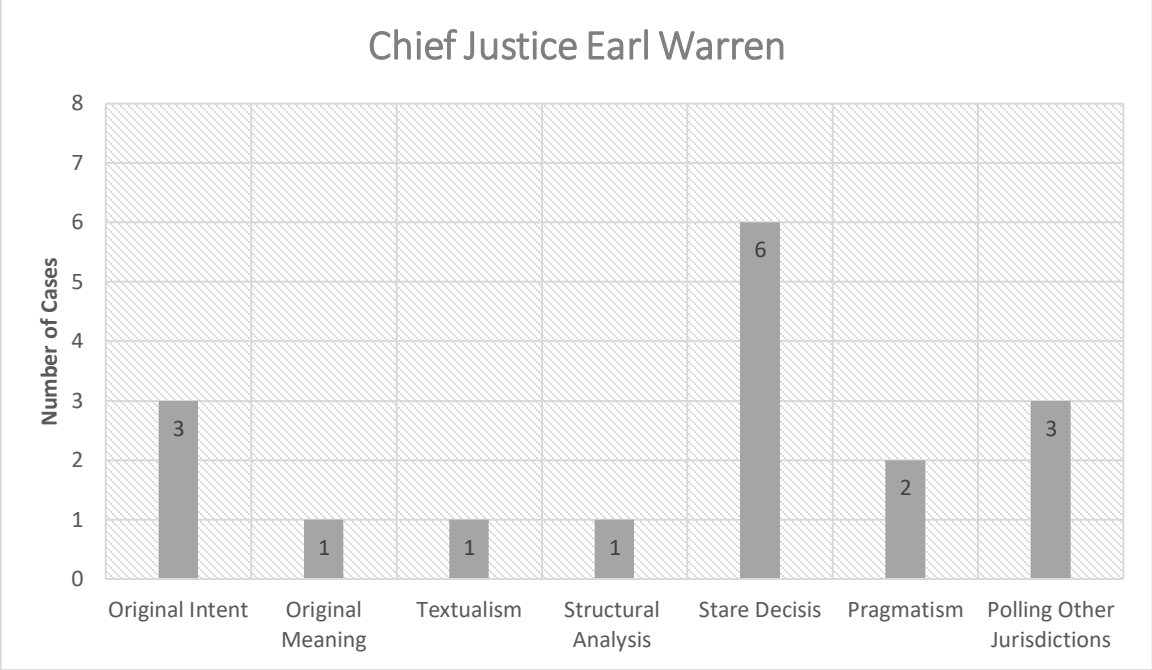
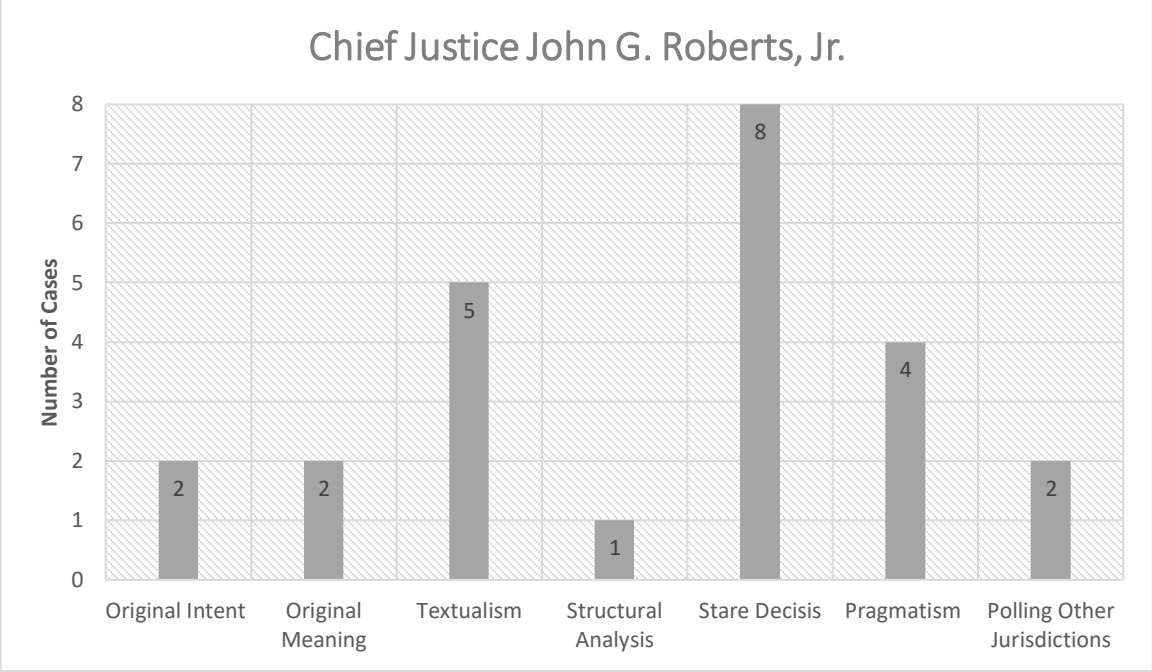


Figure 3 above demonstrates the results for the cases under Chief Justice Earl Warren. Of the eight evaluated cases, six of them use stare decisis. Both polling other jurisdictions and original intent are used in three cases each while two cases use pragmatism. Finally, the remaining three methods are used in only one case each. Given this distribution, stare decisis is the most frequently used method during this period of the Court's history. Both original intent and polling other jurisdictions follow behind and tie as the second-most prevalent.

Figure 4



Results from the Chief Justice John G. Roberts, Jr. era, are shown in Figure 4 above. Of the cases analyzed, all eight employ stare decisis. Textualism is used in five cases, and pragmatism is found in four. Polling other jurisdictions, original intent and original meaning all appear in two cases each; finally, structural analysis is only used in one case. These results indicate that stare decisis was the most frequently used method during this era of the Court. Textualism followed as the second-most popular, and pragmatism is the third.

Table 2: Comparing Results

Chief Justice	***Most Used Method***	***Least Used Method(s)***
John Marshall	Textualism	Polling Other Jurisdictions
Edward Douglass White	Stare Decisis	Textualism[3]
Earl Warren	Stare Decisis	Original Meaning, Textualism, and Structural Analysis
John G. Roberts, Jr.	Stare Decisis	Structural Analysis

As is shown in Table 2, these results collectively reveal that stare decisis was most popular in the three most recent time periods. Textualism's popularity seems to have dipped and then risen again throughout the Court's history as it begins in the most prevalent position and ends in the middle of the two extremes. Structural analysis entered the "Least Used Method(s)" category in the third period and remained there in the fourth, so it appears that it became less prevalent over time. Original meaning is not used in the second period and is employed little in the third; based on the number of cases from Figures 1 through 4 as well, it can be determined that original meaning declined in its prevalence over the Court's history. It can also be determined that original intent lost popularity as well: while not a consistent decline, the figures demonstrate that it is used in fewer cases in the last period than in the first period. Additionally, the four figures demonstrate that pragmatism has become more popular over time, though it is not used in the cases from the Chief Justice White era. Finally, polling other jurisdictions' prevalence generally rose over the years.

[3] This is disregarding the methods that didn't appear in any case. To consider those instead, replace textualism with original intent, original meaning, pragmatism, and polling other jurisdictions.

DISCUSSION

In the early years of the Court, there was less precedent to rely upon: many issues coming before the Court were more likely to be new questions that required deeper investigation and consideration. Therefore, I did not find it surprising that textualism and original intent were the most popular methods used during the Chief Justice John Marshall timeframe. It is expected that much interpretation would rely upon the words and phrases of the Constitution. With textualism, the Court would not need to rely upon anything other than language, so previous judicial experience with the issue at hand was not necessary in coming to a conclusion. In fact, the justices in the early years were actually building the foundation of stare decisis that appears consistently through the remainder of the Court's history.

As time moves forward, stare decisis becomes the technique most used. This trend appears in the second era and continues through the end of the collected data; this outcome is consistent with the expectations explained in the literature review. Much of this is likely caused by the increased availability of precedent. Why should the Court essentially revisit the same case and rationale each time it comes to be heard? Instead, it can simply refer to a similar decision and invoke stare decisis in the present. This may also account for the decline in the use of textualism after the first period. Though it did rise again in the cases under Chief Justice John G. Roberts, Jr. Its increase in use in the latest period demonstrates the remaining relevance of the technique as the Court may discover or consider new ways of understanding a phrase; it indicates that the Court still finds reason to evaluate what the Constitution is expressing.

Over the course of the data, there is a decline in the usage of both original intent and original meaning. This is somewhat consistent with the prediction made in the literature review; the use of original intent did decrease as expected, but the use of original meaning did not rise as

anticipated. Both may have fallen because of the increased use of other methods such as stare decisis. However, there could also be other causes for this decline such as changes in beliefs regarding the method which is discussed in scholarly work such as that by James Ryan, mentioned in the literature review above.

As predicted earlier, a trend in the use of polling other jurisdictions is seen. The increase in the use of this method can be explained by the passing of time. As time moves forward, other courts or jurisdictions may encounter an issue before the United States does, and their experience may be valuable to our own decision making. So, there are more possibilities for external evaluation in interpretation over time.

The results also show that pragmatism has increased in the number of times it is used throughout the periods evaluated. Comparing one's options is a natural response to making a decision. Therefore, it is expected that the Court should use this technique, and the rise may simply be in that the Court has begun to include this comparison in its written opinions more so than it did at the beginning.

While some of these techniques have proven to be more popular at certain times throughout the Court's history, it is important to note that none of them have lost their significance and applicability. Given the Constitution's position as the founding document of the United States, I believe there will always be a place for the Court to look at the language itself and to reference how the document originated: what it meant and why it was written. I also expect in the future that stare decisis will continue to be prevalent amongst the methods used by the Court in interpreting the Constitution. This is not to say that overruling precedent isn't possible, but I would consider it more likely for the Court to continue to follow its previous interpretations in most cases. Additionally, polling other jurisdictions will remain applicable as

many other authorities are constantly setting examples that can be used along with those from the past. Finally, as discussed earlier, I see pragmatism as a natural response to making a decision so it is unlikely that this technique will become irrelevant any time soon.

CONCLUSION

Looking back at the questions which initiated and directed this research: Do the methods used by the Court change over time? Do trends exist demonstrating that some methods were more prevalent at different points through the Court's history? The results do not suggest that the methods used by the Court have necessarily changed over time. Each era evaluated in this research reveals the use of all methods, with the exception of the Chief Justice Edward Douglass White time frame. However, further analysis of additional cases under Douglass may prove that the other approaches were in fact used during that period of the Court's history. On the other hand, the results do insinuate that the Court will use some methods more than others at different points in time. There are several possibilities that may account for these trends: (1) The rise in popularity of some methods may cause others to be used less. For example, the rise in stare decisis may have contributed to the neglect of several other techniques in opinions. (2) It is possible that the justices simply have their own preferences for which techniques to use in interpretation and this can vary with turnover on the Court or personal preference change. (3) Changes in academics surrounding the methods may lead to the employment of some methods more than others over time. Now with this research as a foundation, more can be done to explore, examine, and prove why these trends occur.

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Appendix A

Chief Justice	*Case Name*	*Term Year*
John Marshall	1. McCulloch v. State of Maryland et al.	1819
	2. Gibbons, Appellant v. Ogden, Respondent	1824
	3. United States v. Palmer et al.	1818
	4. The United States v. Bevans	1818
	5. Gelston, et al. v. Hoyt	1818
	6. Martin, Heir at law and devisee of Fairfax, v. Hunter's Lessee	1816
	7. Trustees of Dartmouth College v. Woodward	1819
	8. Fletcher v. Peck	1810
Edward Douglass White	1. Armour & Company v. Commonwealth of Virginia	1917
	2. Central of Georgia Railway Company v. Wright, Comptroller General of the State of Georgia	1918
	3. Crew Levick Company v. Commonwealth of Pennsylvania	1917
	4. Hardin-Wyandot Lighting Company v. Village of Upper Sandusky	1919
	5. Locomobile Company of America v. Commonwealth of Massachusetts	1917
	6. Northwestern Mutual Life Insurance Company v. State of Wisconsin	1917
	7. Withnell v. Rueking Construction Company	1918
	8. St. Louis Southwestern Railway Company et al. v. United States and Interstate Commerce Commission	1917
Earl Warren	1. Elkins et al. v. United States.	1959
	2. McElroy, Secretary of Defense, et al. v. United States ex rel. Guagliardo	1959
	3. Hannah et al. v. Larche et al.	1959
	4. Abel, Alias Mark, Alias Collins, Alias Goldfus, v. United States	1959
	5. Bailey et al. v. Patterson et al.	1961
	6. Armstrong et al. v. United States	1959
	7. McGowan et al. v. Maryland	1960
	8. Hoyt v. Florida	1961
John G. Roberts, Jr.	1. Florida, Petitioner, v. Joelis Jardines	2012
	2. Arkansas Game and Fish Commission, Petitioner v. United States	2012
	3. Town of Greece, New York, Petitioner v. Susan Galloway et al.	2013
	4. Torrey Dale Grady v. North Carolina	2014
	5. Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, Petitioner v. John Kerry, Secretary of State	2014
	6. Walter Fernandez, Petitioner v. California	2013
	7. Nevada, et al., Petitioners v. Calvin O'Neil Jackson	2012
	8. Richard E. Glossip, et al., Petitioners v. Kevin J. Gross, et al.	2014