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## Textualism Today: Scalia's Legacy and His Lasting Philosophy

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# Textualism Today: Scalia's Legacy and His Lasting Philosophy

CHASE WATHEN\*

*Appointed to the Supreme Court in 1986 by President Reagan, Justice Antonin Scalia redefined the philosophy of textualism. Although methods like the plain meaning rule had been around for over a century, the textualist philosophy of today was not mainstream. While Scalia's textualism is thought to be a conservative philosophy, Scalia consistently maintained that it was judicial restraint rather than conservatism at the heart of his method. The key tenant of Scalia's new textualism was an outright rejection of legislative history, which he often brought up in opinions only to mock and dismiss as irrelevant. Starting with the hypothesis that Scalia's textualism is alive and well, being used more frequently since his passing than the four years prior, this Article seeks to measure the lasting impact of his philosophy in the federal appellate courts. In particular, this paper measures how often courts of appeals cited to legislative history in the years before Scalia's passing and how often they have in the years since. The Article also seeks to measure the correlation between textualism and the political right-wing by sorting citations to legislative history by appointing President over the past three years. The tested hypothesis is that Bush and Clinton appointees are likely to be more moderate, citing legislative history more frequently than Trump and*

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\* I would like to thank my wonderful mother who has always believed in me and whose countless sacrifices throughout my childhood made this possible. I would also like to thank my father who taught me discipline, determination, and instilled in me an appreciation for excellence.

*Reagan appointees, but far less frequently than Obama appointees. Using a dataset that includes all published federal appellate court opinions between June 1, 2011, and November 30, 2020, for the first hypothesis the data revealed that Scalia’s new textualism is being used more frequently in the period after his death than in the period before. Of the thirteen federal circuits, eleven made fewer citations in the period after Scalia’s passing. For the second hypothesis, counting all published federal appellate opinions between December 1, 2017, and November 30, 2020, the data show that judges appointed by Republican presidents are far less likely to cite legislative history than Democrat appointees. As expected, judges appointed by President Trump were the least likely to cite to legislative history, but appointees of President Clinton and not President Obama were the most likely to cite to legislative history. Even if textualism may not reliably produce conservative outcomes, it does seem as though the conventional wisdom associating textualism with the Republican party is well-founded.*

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## INTRODUCTION

*Textualism means you are governed by the text. That is the only thing that is relevant to your decision, not whether the outcome is desirable, not whether legislative history says this or that. But the text of the statute.*

— Antonin Scalia<sup>1</sup>

There is little argument that the use of legislative history is a controversial topic in the field of statutory interpretation.<sup>2</sup> The battle between the plain meaning rule versus a more intentionalist approach had gone on for decades,<sup>3</sup> but was set on fire during the 1980's. With the appointment of then Judge Antonin Scalia to the Supreme Court, it became clear that this battle would not end anytime soon.<sup>4</sup>

Scalia brought to the Court what some have called “the new textualism,” its defining feature being the total rejection of legislative history as “irrelevant.”<sup>5</sup> The methodology gained momentum throughout the 1980's as Reagan appointees began to fill the benches.<sup>6</sup> By the late 1980's, the Supreme Court became much warmer to the idea of rejecting legislative history wholesale, due in no small part to Scalia.<sup>7</sup> His influence has been so strong that even a more liberal Justice like Elena Kagan recently said, “I think we're all textualists now in a way that just was not remotely true when

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<sup>1</sup> Fox News Sunday, *Supreme Court Justice Scalia Sits Down with Chris Wallace*, FOX NEWS, at 1:07 (July 29, 2012), <https://video.foxnews.com/v/1760716797001#sp=show-clips>.

<sup>2</sup> See Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign against Legislative History*, 105 CORNELL L. REV., 1023, 1026 (2020).

<sup>3</sup> William J. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1989–90).

<sup>4</sup> See *id.* at 623–24, 641.

<sup>5</sup> See *id.* at 623.

<sup>6</sup> See Benjamin & Renberg, *supra* note 2, at 1028 (where the authors use the Reagan era as a turning point in measuring the influence of textualism).

<sup>7</sup> Eskridge, *supra* note 3, at 625.

Justice Scalia joined the bench.”<sup>8</sup> Today, virtually all judges, regardless of their own approach to statutory interpretation, at least start with the text, even if they do not end with it.<sup>9</sup>

Although the Supreme Court had applied some version of the plain meaning rule for over a century,<sup>10</sup> prior to the rise of Scalia, conflicts between the plain meaning of the text and surrounding context were resolved by consulting the statute’s legislative history.<sup>11</sup> To put it mildly, Justice Scalia was no fan of this approach. Although likely drawing initial inspiration from the plain meaning rule, the “new textualism” of Scalia was far more constrained.<sup>12</sup> He was not shy, even in his early years on the Court, to write controversial opinions in adherence to his textualist philosophy.<sup>13</sup> In just his second year on the Court, he wrote a contentious concurrence in *Immigration and Naturalization Service v. Cardoza-Fonseca* where he agreed with the Court’s conclusion, but rejected all reliance on legislative history, making clear that he would not attempt to discern the intent of the legislature.<sup>14</sup>

Today, a war once fought primarily in judicial opinions and law review articles is now being waged in the pages of the *New York Times* and *Wall Street Journal*,<sup>15</sup> and each Senate confirmation hearing for Supreme Court nominees seemingly grows more hostile than

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<sup>8</sup> Harv. L. Today, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 7:58 (Nov. 17, 2015), [https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb\\_logo](https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_logo) [hereinafter Scalia Lecture].

<sup>9</sup> *Id.*

<sup>10</sup> See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 812 (1985).

<sup>11</sup> Eskridge, *supra* note 3, at 621.

<sup>12</sup> WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 499 (6th ed. 2020).

<sup>13</sup> See, e.g., *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (Scalia, J., concurring).

<sup>14</sup> *Id.* at 452–53.

<sup>15</sup> Emily Bazelon, *How Will Trump’s Supreme Court Remake America?*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html>; Editorial, *The Supreme Court’s Textualism Test*, WALL ST. J. (Nov. 21, 2019, 7:21 PM), <https://www.wsj.com/articles/the-supreme-courts-textualism-test-11574382080>.

the last.<sup>16</sup> While Scalia presented textualism as a politically neutral philosophy rooted in judicial restraint,<sup>17</sup> others have dedicated entire law review articles to its inherent immorality.<sup>18</sup> Textualism is widely regarded as a politically conservative approach to statutory interpretation.<sup>19</sup> Perhaps this is because textualism inherently narrows statutes in a way that other approaches do not, resulting in less government involvement.<sup>20</sup> Some contend that textualism's association with the conservative movement is due in part to historical happenstance.<sup>21</sup> As a reaction to the Warren and Burger courts issuing many intentionalist and purposivist decisions, which yielded results conservatives disliked, conservatives turned to textualism as a cure.<sup>22</sup> Whatever its true origins, there is virtually no debate that the textualist methodology is very closely tied to political conservatism—liberals regularly denounce it while Republican politicians pay lip-service to its virtues.<sup>23</sup>

This Article seeks to measure just how close the ties between conservatism and textualism really are, and whether Scalia's influence has waned more than four years since his passing in 2016.<sup>24</sup> Two hypotheses are tested: (1) whether federal appellate courts, broken down by circuit, are more or less likely to cite legislative history in the period since Scalia's death than in the period preceding it; and (2) whether willingness to cite legislative history varies by

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<sup>16</sup> Amelia Thomson-DeVeaux, *Why The Supreme Court's Reputation is at Stake*, FIVETHIRTYEIGHT (OCT. 12, 2020), <https://fivethirtyeight.com/features/why-the-supreme-courts-reputation-is-at-stake/>.

<sup>17</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16–17 (2012).

<sup>18</sup> See generally Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063 (2005).

<sup>19</sup> See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 18–19 (2004).

<sup>20</sup> Benjamin & Renberg, *supra* note 2, at 1044.

<sup>21</sup> See Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 850 (2013).

<sup>22</sup> *Id.*

<sup>23</sup> See generally Marmor, *supra* note 18; See Emily Czachor, *Ted Cruz Spars with Pete Buttigieg Over Meaning of Constitutional Originalism*, NEWSWEEK (Oct. 20, 2020), <https://www.newsweek.com/ted-cruz-spars-pete-buttigieg-over-meaning-constitutional-originalism-1540617>.

<sup>24</sup> Antonin Scalia, OYEZ, [https://www.oyez.org/justices/antonin\\_scalia](https://www.oyez.org/justices/antonin_scalia) (last visited Feb. 4, 2021).

appointing President. To measure the first hypothesis, the number of citations to legislative history in all published federal appellate court opinions between June 2011 and February 2016 were recorded and then compared to the frequency of citations between March 2016 and November 2020.<sup>25</sup> A much higher number of citations to legislative history in the second period will indicate that Scalia's influence is already fading while a similar or lower number than the first period will indicate a strong and continuing legacy. To test textualism's conservative reputation, the frequency of citations to legislative history will be used as a measure, but because citations are measured by appointing President, the period between December 2017 and November 2020 will be used to account for more recent appointees of former President Trump. The expectation is that Republican appointees as a whole will cite less frequently than their Democrat counterparts.<sup>26</sup>

For the first hypothesis, the data revealed that Scalia's disdain for legislative history is still influential in the thirteen Courts of Appeals, with all but two circuits citing less frequently in the four years since his passing.<sup>27</sup> For the second hypothesis, the data showed a clear ideological skew.<sup>28</sup> Republican appointees cite legislative history far less frequently than Democrat appointees.<sup>29</sup> Trump appointees were the least likely to cite to legislative history; in fact, they cited three times fewer than Clinton appointees, who cited most often.<sup>30</sup>

Part I of this article gives an overview of the history of textualism, walks through its evolution, and discusses why textualism has such close ties to the conservative movement. Part II lays out the hypotheses being tested and offers support for their validity. Part III outlines the data and measures used to test those hypotheses. Part IV presents the results of the study and their implications for the future.

Scalia's influence is most strong with Trump appointees, and given that those judges are the most recent appointees as well as the

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<sup>25</sup> Each period being four years and nine months.

<sup>26</sup> See John Green, *The Ideology of Trump's Judges*, DEMAND JUSTICE (Jan. 2019), <https://demandjustice.org/reports/ideology-of-trump-judges/> (where a study measured the ideology of judicial appointments by President).

<sup>27</sup> See *infra* Part V.

<sup>28</sup> See *infra* Part V.

<sup>29</sup> See *infra* Part V.

<sup>30</sup> See *infra* Part V.

youngest in age, it seems unlikely that textualism will fade anytime soon. There is an obvious ideological component to textualism, however, Obama appointees were less likely to cite to legislative history than Clinton appointees even though President Obama is seen as further left politically than President Clinton.<sup>31</sup> This suggests that Scalia has had an impact that crosses political lines and that maybe, regardless of party, “we’re all textualists now.”<sup>32</sup>

## I. HISTORY AND CONTROVERSY OF THE NEW TEXTUALISM

### A. *The Rise of The New Textualism*

Traditionally, the Supreme Court attempted to interpret statutes in such a way that would give them an effect that was consistent with the original intent or purpose of the enacting Congress.<sup>33</sup> In pursuit of this goal, the Court would regularly consult the legislative record to try and discern just what Congress’s intent was.<sup>34</sup> Although the statutory text was important as evidence of intent, it was not dispositive.<sup>35</sup> Legislative history was almost always consulted to either affirm or rebut the plain meaning;<sup>36</sup> the end result being that the text itself was often defeated by legislative history that came into conflict with its ordinary meaning.<sup>37</sup>

The best illustration of this “soft plain meaning rule” comes from *Church of the Holy Trinity v. United States*.<sup>38</sup> In this case, the plain language of the statute clearly banned the importation of alien workers to come and work in the United States.<sup>39</sup> Although there were exceptions to this prohibition, the statute did not exempt clergy

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<sup>31</sup> Peter Beinart, *Why America is Moving Left*, ATLANTIC (Feb. 2016), <https://www.theatlantic.com/magazine/archive/2016/01/why-america-is-moving-left/419112/>.

<sup>32</sup> Scalia Lecture, *supra* note 8.

<sup>33</sup> Eskridge, *supra* note 3, at 626.

<sup>34</sup> *Id.*

<sup>35</sup> See Benjamin & Renberg, *supra* note 2, at 1028, 1032.

<sup>36</sup> Eskridge, *supra* note 3, at 626.

<sup>37</sup> See generally *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

<sup>38</sup> See *Holy Trinity*, 143 U.S. at 459.

<sup>39</sup> *Id.* at 458.



members.<sup>40</sup> When the church hired and paid for the transportation of an English clergyman to come work for it in the United States, the issue made it all the way up to the Supreme Court.<sup>41</sup> The Court held that although clergy members fell “within the letter of the statute” the overall spirit of the statute mandated their exemption from the prohibition.<sup>42</sup> For support, the Court relied heavily on a committee report that suggested the statute meant only to include manual labor.<sup>43</sup> This approach grew in popularity over time and nearly 100 years later became the most common methodology used by the Supreme Court in the early 1980’s.<sup>44</sup>

Another flavor of this methodology includes imaginative reconstruction.<sup>45</sup> This approach seeks to gather as much information about the history of the statute as possible, including all forms of legislative history, and tries to imagine what the enacting congress would have thought about the issue in the given case.<sup>46</sup> Sometimes, the Court even considers statements from individuals outside of the legislature, such as executive agencies and private lobbyist groups who often helped draft the legislation.<sup>47</sup> Although it did give more weight to certain forms of legislative history,<sup>48</sup> prior to the rise of the new textualism, the Court had no qualms about considering virtually anything in trying to figure out what the intent of the legislature was.<sup>49</sup> In one case, the Court went as far to say that because the legislative history was unclear, it now had to turn to the text of the statute to ascertain the legislative intent.<sup>50</sup> Even though the Court

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<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* at 459.

<sup>43</sup> *See id.* at 464.

<sup>44</sup> Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, The Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *YALE L.J.* 266, 269 (2013).

<sup>45</sup> Eskridge, *supra* note 3, at 630.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 632–33. Note that these theories are still used today, though less frequently. *Id.*

<sup>48</sup> *See O’Brien v. United States*, 391 U.S. 367, 385 (1968).

<sup>49</sup> Eskridge, *supra* note 3, at 626.

<sup>50</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971) (“The legislative history . . . is ambiguous . . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.”).

commonly practiced this methodology for decades, the frequency of citations to legislative history increased exponentially sometime around 1970.<sup>51</sup> By 1982, one article concluded that it was safe to “assume now, that the doubts and vacillations of the past in the adequate use of legislative history have vanished.”<sup>52</sup>

Beginning in the early 1980’s, the traditional theory<sup>53</sup> was brought into question and faced enormous criticism.<sup>54</sup> Skeptics began to question the underlying goal of the traditional approach itself.<sup>55</sup> Are judges actually supposed to try and figure out what the legislature intended? Some argued that the use of legislative history conflicted with the structure of the constitution itself.<sup>56</sup> Others contended that ascertaining a collective intent of a group of 535 legislators split into different houses is simply unrealistic.<sup>57</sup> Further degrading the theory’s credibility was the obvious reality that two judges often look at the same legislative history and reach different conclusions about its application to the facts of the given case.<sup>58</sup> Although Justice Scalia was not the first, nor the only one to reject the traditional methodology,<sup>59</sup> his appointment to the Supreme Court in 1986 certainly made him the most prominent.

First and foremost, Scalia objected to the use of legislative history on constitutional grounds.<sup>60</sup> He believed the Constitution prohibited the use of legislative history, and he argued that searching

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<sup>51</sup> Benjamin & Renberg, *supra* note 2, at 1030–31.

<sup>52</sup> *Id.* at 1031 (citing Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS 294, 296–97 (1982)).

<sup>53</sup> This method is widely known as the “Legal Process” theory. *See* Eskridge, *supra* note 12, at 424–31.

<sup>54</sup> Eskridge, *supra* note 3, at 641.

<sup>55</sup> *Id.* at 642–649.

<sup>56</sup> Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 375–76 (1987).

<sup>57</sup> Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”).

<sup>58</sup> Eskridge, *supra* note 3, at 646, 648.

<sup>59</sup> Benjamin & Renberg, *supra* note 2, at 1030–31.

<sup>60</sup> Eskridge, *supra* note 12, at 512 (summarizing portions of Scalia’s *A Matter of Interpretation*).

for legislative intent in the first place is “anti-democratic.”<sup>61</sup> According to Scalia, the Constitution charges the judicial branch with simply interpreting the laws with no mention of legislative intent.<sup>62</sup> In a democracy, “it is the law that governs, not the intent of the law-giver.”<sup>63</sup> Other advocates of this formalist critique maintained that Article I itself assumes that the text rather than the legislative intent governs, because Article I requires that any law be passed by both houses and then be presented to the President for signature.<sup>64</sup> This suggests that the use of legislative history violates that requirement by giving more weight to the “intent” of some legislators, and less to that of others.<sup>65</sup> Further, in cases where the statute was passed with the signature of the President, reliance on such legislative history fails to take into account the importance of the executive’s role in the lawmaking process.<sup>66</sup>

Scalia often wrote scathing concurrences and dissents that condemned and even scoffed at the majority’s various uses of legislative history.<sup>67</sup> Questions of statutory interpretation were often very technical, and he felt that few legislators voted with such “minute details” in mind.<sup>68</sup> In any case, he felt it impossible to determine the collective intent of such a large group because different legislators

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<sup>61</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION 9–14 (1997).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 17.

<sup>64</sup> U.S. DEP’T OF JUSTICE, OFF. OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 26 (1989); U.S. CONST. art. I § 7.

<sup>65</sup> Starr, *supra* note 56, at 376 (“In using legislative materials, the courts create winners and losers in the legislative process: elevating the views of some and denigrating or rejecting the views of others.”).

<sup>66</sup> *Id.* (“In carrying out his constitutionally ordained functions, the President passes upon legislation, and as a practical matter does so without the benefit of legislative history. In this regard, the President’s view of the statute may be different from that of the Congress, and from the subsequent interpretation rendered by the courts. Judicial interpolation of the statute based upon legislative materials thus has the potential to create a statute that the President would not have signed.”).

<sup>67</sup> See, e.g., *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (Scalia, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (“On that hypothesis, the fan-elected members of the baseball all-star teams are “representatives”—hardly a common, if even a permissible, usage.”).

<sup>68</sup> See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., Concurrence).

may have voted on the bill for different reasons.<sup>69</sup> Even if one wanted to discern legislative intent, things like conference and committee reports are poor guides because they come out of small legislative subgroups and are often polluted by interest groups, in the end failing to represent any true collective intent.<sup>70</sup> Moreover, as the judicial use of legislative history became more common over time, legislators often mischievously added things to the record knowing that at some point, a court may rely on it and produce a result in line with the legislator's own policy goals.<sup>71</sup> In short, Scalia thought that legislative history is unreliable and unreflective of the intent of the legislature as a whole or even in part.<sup>72</sup> The only way to know what both houses and the President actually agreed on is to look at the ordinary meaning of the text.<sup>73</sup> It is not the job of a judge to interpret the "unexpressed intent" of the legislature, and "if they meant up when they said down, that is their problem."<sup>74</sup>

Perhaps Justice Scalia's most staunch critique was that the old method was a justification for judges to simply remake the statute in their own preferred image.<sup>75</sup> This has the effect of distorting the proper separation of powers between the branches because it is the legislature who is charged with making decisions about public

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<sup>69</sup> See Hoover Inst., *Uncommon Knowledge: Antonin Scalia*, YOUTUBE, at 17:25 (Oct. 30, 2012), <https://www.youtube.com/watch?v=DaoLMW5AF4Y>.

<sup>70</sup> See *Hirschey v. FERC*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985) (Scalia, Circuit J., concurring) (citing a committee report in which the chair of the committee himself admitted he did not read the report).

<sup>71</sup> SCALIA, *supra* note 61, at 34. Scalia stated:

Some representatives would find it in their interest to plant misleading evidence. . . . Nowadays, however, when it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of 'legislative intent,' affecting the courts rather than informing the Congress has become the primary purpose of the exercise . . . .Indeed, the more courts have relied on legislative history, the less reliable it has become!

*Id.* at 34.

<sup>72</sup> Hoover Inst., *supra* note 69, at 17:20.

<sup>73</sup> See *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., Concurrency).

<sup>74</sup> Hoover Inst., *supra* note 69, at 17:18.

<sup>75</sup> ANTONIN SCALIA: MEMORIAL TRIBUTES IN THE CONGRESS OF THE UNITED STATES, S. Doc. No. 114-12, at 14 (2017).

policy, not the judiciary.<sup>76</sup> Selective use of a law's legislative history, however, allows judges to find support for what they want the statute to say.<sup>77</sup> Scalia reasoned that "your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that that the law means what you think it ought to mean."<sup>78</sup> In the words of another judge, looking to legislative history is like "looking over a crowd and picking out your friends."<sup>79</sup> Sometimes the legislative history points in two directions, leaving judges in the position of determining whose intent to elevate over another and inviting them to choose their own preferred outcome.<sup>80</sup>

One such example is found in the case of *Chisom v. Roemer*.<sup>81</sup> The case dealt with the application of the 1982 amendments to Section Two of the Voting Rights Act on judicial elections.<sup>82</sup> The fight turned on the meaning of the phrase: "to participate in the political process and to elect representatives of their choice."<sup>83</sup> This was a change from the original language adopted in 1965 that clearly included all elections.<sup>84</sup> Justice Stevens, in writing for the majority, looked at the larger policy goal of the statute and determined that the use of the term "representatives" could not be construed to exclude judicial elections, and that, in context, the word describes the winners of popular elections.<sup>85</sup> Under this construction, judicial elections fell within the purview of the statute.<sup>86</sup> Stevens looked to the evolution of the statute over time and noted that although the language had changed, nothing in the legislative history suggested that Congress wanted to exclude judicial elections in its latest update.<sup>87</sup> Considering the legislative history as a whole, Stevens drew

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<sup>76</sup> Eskridge, *supra* note 3, at 648.

<sup>77</sup> See SCALIA, *supra* note 61, at 18.

<sup>78</sup> *Id.*

<sup>79</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

<sup>80</sup> Eskridge, *supra* note 3, at 642.

<sup>81</sup> *Chisom v. Roemer*, 501 U.S. 380, 410 (1991).

<sup>82</sup> *Id.* at 384.

<sup>83</sup> *Id.* at 388–89.

<sup>84</sup> *Id.* at 390.

<sup>85</sup> *Id.* at 403–04.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 396. "If Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or

from it a belief that Congress intended to broaden the scope of the statute.<sup>88</sup> Scalia dissented, arguing, “[w]e are here to apply the statute, not legislative history, and certainly not the absence of legislative history.”<sup>89</sup> Acknowledging that it was possible to interpret “representatives” to include judges, the ordinary meaning obviously did not go so broad.<sup>90</sup> Never one to suppress his feelings in arcane or abstruse language, Scalia overtly accused the majority of starting with its own assumption that Congress could not have meant to exclude judicial elections. Justice Stevens then simply found a way to interpret the statute to reaffirm that assumption through consideration of legislative history.<sup>91</sup>

Scalia’s textualist approach offered an alternative to decisions like *Chisom*. By restraining the analysis to only the text, judges would be limited in their ability to avoid its clear mandates, while at the same time making the process simpler and less expensive.<sup>92</sup> Offering his own analysis of *Holy Trinity*, Scalia said that “the act was within the letter of the statute, and was therefore within the statute: end of case.”<sup>93</sup> In his *Chisom* dissent, Scalia contended that a judge’s primary responsibility in the area of statutory interpretation is to maintain consistency so that Congress is able to effectively draft legislation to implement the will of their constituents.<sup>94</sup> The best way to fulfill that responsibility is to interpret the terms in the text in accordance with their ordinary meaning.<sup>95</sup> Interpreting a text in accordance with its ordinary meaning does not mean strict construction, although, Scalia was often caricatured as a strict

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mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.” *Id.* This phenomenon is commonly likened to a Sherlock Holmes novel in which Holmes solved a case by noticing that a dog did not bark. Courts have often concluded that legislative silence on something that would constitute a major change indicates that it had no intention of making such a change. *See id.* at 396 n.23.

<sup>88</sup> *Id.* at 404.

<sup>89</sup> *Id.* at 406 (referring again to the Sherlock Holmes theory of the dog that did not bark).

<sup>90</sup> *Id.* at 410.

<sup>91</sup> *See id.* at 405.

<sup>92</sup> Eskridge, *supra* note 3, at 656.

<sup>93</sup> SCALIA, *supra* note 61, at 20.

<sup>94</sup> *Chisom v. Roemer*, 501 U.S. 380, 417 (1991).

<sup>95</sup> *See id.*

constructionist.<sup>96</sup> The text should be construed reasonably.<sup>97</sup> Accordingly, Scalia made use of many judicial canons of construction.<sup>98</sup> He acknowledged that his method was not perfect and did not offer an easy solution to every case, but contended that it was however, the least imperfect.<sup>99</sup>

After nearly thirty years of Scalia being on the Court, his philosophy became very popular and its use became common in the federal judiciary.<sup>100</sup> Due to his slot on the Supreme Court, Scalia remained textualism's ideological leader up until the time of his death, and as Justice Kagan observed in the earlier quote, his impact is hard to overstate.<sup>101</sup> At the same time, few have questioned or opined about what Scalia's death means going forward in the area of statutory interpretation. Of the few who have, there is disagreement on what his continuing influence will look like. Some predict that the influence of Scalia will fade and textualism will slowly recede into the shadows.<sup>102</sup> Others do not see the sun setting on textualism anytime soon due to Scalia's influence on the legal profession and the thousands of lawyers who received their legal education at the height of his popularity.<sup>103</sup> Given that there is no methodological *stare decisis* in the federal court system,<sup>104</sup> an empirical analysis of the federal Courts of Appeals use of legislative history over the past decade will provide some proxy for the ongoing influence Scalia continues to have on the profession.<sup>105</sup>

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<sup>96</sup> SCALIA, *supra* note 61, at 23 (“Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into dispute.”).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 28–29.

<sup>99</sup> See Hoover Inst., *supra* note 69, at 38:15.

<sup>100</sup> See J.T. Hutchens, *A New Textualism: Why Textualists Should not be Originalists*, 16 KAN. J.L. & PUB. POL’Y 108 (2007).

<sup>101</sup> See Scalia Lecture, *supra* note 8.

<sup>102</sup> See, e.g., Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 915 (2017).

<sup>103</sup> See, e.g., William H. Pryor, Jr., *Textualism after Antonin Scalia: A Tribute to the Late Great Justice*, 8 FAULKNER L. REV. 29, 46–47 (2016).

<sup>104</sup> Lemos, *supra* note 21, at 856, 905.

<sup>105</sup> See *infra* Part V.

### B. *Textualism and the Conservative Movement*

Justice Antonin Scalia was nominated and confirmed to the United States Supreme Court by the Senate with a unanimous vote in 1986.<sup>106</sup> Since that time, the confirmation process has radically changed. Beginning in 1988 with the hearings of Judge Robert Bork, a Reagan nominee who the Senate confirmed unanimously to the Court of Appeals for the District of Columbia less than six years earlier,<sup>107</sup> a trend began where the confirmation process grew increasingly hostile to judges viewed as ideologically conservative.<sup>108</sup> Although some may dispute the claim that ideology was at the center of what became an absolute spectacle in the cases of Judge Bork and later Justices Clarence Thomas and Brett Kavanaugh, it is worth recognizing that all three are perceived to be right-wing.<sup>109</sup> Closely associated with Justices Thomas and Kavanaugh is the philosophy of textualism.<sup>110</sup> Even in the more recent hearings to confirm Justice Amy Coney Barrett, her judicial philosophy was at the center of a controversy.<sup>111</sup> It is important to note the distinction between Constitutional and statutory interpretation, and that many quarrels with

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<sup>106</sup> UNITED STATES SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Dec. 21, 2020).

<sup>107</sup> Ilya Shapiro, *The Original Sin of Robert Bork*, CATO INST. (Sep. 9, 2020), <https://www.cato.org/publications/commentary/original-sin-robert-bork>.

<sup>108</sup> The same could happen to future nominees perceived as further left as the country grows more partisan. However, to this point, there have certainly been no confirmation hearings for a Democrat nominee to the Supreme Court handled as egregiously as the hearings of Judges Bork, Thomas, or Kavanaugh.

<sup>109</sup> *The Political Leanings of the Supreme Court Justices*, AXIOS (Jun. 1, 2019), <https://www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html>; Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html>; *but see* Grace Panetta, *Here's What Happened the Last Time a Supreme Court Nominee was Accused of Sexual Misconduct, and How it Compares to Now*, BUS. INSIDER (Sept. 27, 2018), <https://www.businessinsider.com/anita-hill-christine-blasey-ford-comparison-brett-kavanaugh-clarence-thomas-2018-9> (describing the allegations of sexual misconduct at the center of the hearings of Justices Thomas and Kavanaugh).

<sup>110</sup> Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668 (2019).

<sup>111</sup> *See* Simon Lazarus, *The Dishonesty of Amy Coney Barrett's "Textualist" Pose*, NEW REPUBLIC (Oct. 16, 2020), <https://newrepublic.com/article/159810/amy-coney-barrett-obamacare>.



Senators in past hearings have been over Constitutional questions. Interestingly, in the case of Justice Barrett, opposition to her textualist philosophy drove sitting Senators to bring in pictures of sick children to use as tools to suggest that a vote to confirm Judge Barrett was the equivalent of voting against the child's health.<sup>112</sup> What is the nexus between textualism and conservatism, and why is it so uniquely controversial in the field of judicial philosophy? After all, one is hard-pressed to find any example of an intentionalist facing similar scrutiny.

Before further discussion, it would be important to define the word "conservative." As referred to in this paper, the word conservative is used to describe political conservatism and the *general* preference for small government. This idea is often associated with the Republican party and in fact, all of the so called "conservative" Justices in the Supreme Court's recent history were appointed by Republican Presidents.<sup>113</sup> The issue becomes whether textualism in and of itself is a conservative methodology or whether it just so happens that conservative judges have chosen to adopt it.

The most common theory as to why textualism and conservatism are so closely linked is that textualism tends to narrow statutes and acts to limit the reach of government authority.<sup>114</sup> Critics have argued that textualism has an inherent anti-regulatory bias, and that confining a judge's analysis strictly to the text "means that the statute will only apply in those instances that Congress explicitly passes

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<sup>112</sup> See Robin Givhan, *Supreme Court Nominee Amy Coney Barrett has Seven Kids. And Don't you Dare Forget it*, WASH. POST (Oct. 12, 2020), <https://www.washingtonpost.com/nation/2020/10/12/supreme-court-nominee-amy-coney-barrett-has-seven-kids-dont-you-dare-forget-it/>; Senator Richard Blumenthal (@SenBlumenthal), Twitter (Oct. 12, 2020, 11:46AM), [https://twitter.com/SenBlumenthal/status/1315680214274453508?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1315680214274453508%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fwww.courant.com%2Fpolitics%2Fhc-pol-blumenthal-obamacare-barrett-hearings-20201012-sh57h72mlngqrh2akcmtp77xu-story.html](https://twitter.com/SenBlumenthal/status/1315680214274453508?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1315680214274453508%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.courant.com%2Fpolitics%2Fhc-pol-blumenthal-obamacare-barrett-hearings-20201012-sh57h72mlngqrh2akcmtp77xu-story.html).

<sup>113</sup> UNITED STATES SENATE, *supra* note 106 (Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett were all appointed by Republican Presidents).

<sup>114</sup> Lemos, *supra* note 21, at 849.

upon.”<sup>115</sup> In fact, the most famous in this line of critiques is distinguished scholar and federal appellate Judge Richard Posner:<sup>116</sup>

A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute’s aim but is not a good fit with its text. Ignoring the limitations of foresight, and also the fact that a statute is a collective product that often leaves many questions of interpretation to be answered by the courts because the legislators cannot agree on the answers, the textual originalist demands that the legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. In this way, textualism hobbles legislation-and thereby tilts toward “small government” and away from “big government,” which in modern America is a conservative preference.<sup>117</sup>

This suggests that it is not the judge but the methodology itself that naturally produces conservative outcomes.<sup>118</sup> Does this stand to reason? It seems it would depend on the statute at issue and the underlying policy goals it sought to achieve.<sup>119</sup> Consider *City of Chicago v. Environmental Defense Fund*, in which Justice Scalia gave the term “hazardous waste” a broader reading which included toxic ash generated by an energy facility.<sup>120</sup> He did so over the objections

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<sup>115</sup> Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 68 (1991).

<sup>116</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Sept. 13, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.

<sup>117</sup> *Id.*

<sup>118</sup> *See Id.*

<sup>119</sup> *See Lemos, supra* note 21, at 865–66.

<sup>120</sup> *City of Chicago v. Env’t Def. Fund*, 511 U.S. 328, 334–335 (1994). This case used a very technical and text centered reading of the statute had the effect of extending the statute’s reach. *See id.* “The provision quite clearly does *not* contain any exclusion for the *ash itself*. Indeed, the waste the facility produces (as opposed to that which it receives) is not even mentioned. There is thus no express support for petitioners’ claim of a waste-stream exemption.” *Id.* (alteration in original).

of his dissenting colleagues who argued that the legislative history indicated that Congress did not intend for the statute to extend to a facility of that sort.<sup>121</sup> In this case, the textualist philosophy gave the statute a wider scope and extended the reach of government regulation in the area of environmental protection where conservatives generally prefer less regulation.<sup>122</sup> To the same extent, consider once again the case of *Holy Trinity*.<sup>123</sup> The Court's purposivist analysis led to a narrowing of the statute to not reach members of the clergy.<sup>124</sup> Scalia himself said that his textualist philosophy would have done the opposite.<sup>125</sup> Again, textualism would have extended the reach of government and in that case to prohibit the importation of a religious leader.<sup>126</sup> It seems unlikely that a traditional small government conservative would be fond of a regulation that has the effect of restricting a church's ability to choose its leaders.<sup>127</sup> In conclusion, Judge Posner's explanation for textualism's association with political conservatives does not tell the full story.

Though the previous section went into some detail about how textualism came to be and what it was a reaction to, the focus centered more on the role of a judge in the American Constitutional system and not on why conservatives would prefer textualism over the other competing methods. To truly understand why textualism is associated with conservatism, it is important to understand its *political* origins. In 1953, Earl Warren became the Chief Justice of the Supreme Court and held that position until 1969.<sup>128</sup> Many perceived the Court to have moved in a very liberal direction throughout this period.<sup>129</sup> Then came Chief Justice Warren Burger in 1969 who

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<sup>121</sup> *Id.* at 343–45 (Stevens, J., dissenting).

<sup>122</sup> See Haley Davie, *More Republicans say Stricter Environmental Regulations are 'Worth the Cost,'* PEW (Feb. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/02/07/more-republicans-say-stricter-environmental-regulations-are-worth-the-cost/>.

<sup>123</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

<sup>124</sup> *Id.* at 472.

<sup>125</sup> SCALIA, *supra* note 61, at 20.

<sup>126</sup> See *Holy Trinity*, 143 U.S. at 459.

<sup>127</sup> See generally, *Religious Freedom*, HERITAGE FOUND. (Dec. 1, 2018), <https://www.heritage.org/religious-freedom>.

<sup>128</sup> SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/> (last visited Feb. 3, 2021).

<sup>129</sup> Russell W. Galloway Jr., *The Third Period of the Warren Court: Liberal Dominance (1962–69)*, 20 SANTA CLARA L. REV. 773 (1980) (An empirical piece

served until 1986.<sup>130</sup> Although appointed by a Republican,<sup>131</sup> Burger was not viewed as a particularly conservative Justice.<sup>132</sup> While he served as Chief Justice, the Court handed down many controversial cases that were perceived as being left leaning,<sup>133</sup> with the decisions requiring interpretation of a statute often relying on an

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that measured voting records to come to the conclusion that “liberal activists exercised almost complete control over the Court’s decisions.”).

<sup>130</sup> SUPREME COURT OF THE UNITED STATES, *supra* note 128.

<sup>131</sup> *Id.* Chief Justice Burger was appointed by President Richard Nixon. *Id.*

<sup>132</sup> Warren E. Burger, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Warren-E-Burger> (last visited Dec. 21, 2020) (“Contrary to some popular expectations, Burger and his three fellow Nixon appointed justices did not try to reverse the ride of activist decision making on civil-rights issues and criminal law that was the Warren court’s chief legacy.”); *See Roe v. Wade*, 410 U.S. 113, 207 (1973) (Burger, C.J., concurring) (Burger concurred with the majority opinion that created a Constitutional right to abortion under the controversial doctrine of substantive due process).

<sup>133</sup> Warren E. Burger, OYEZ, [https://www.oyez.org/justices/warren\\_e\\_burger](https://www.oyez.org/justices/warren_e_burger) (last visited Dec. 21, 2020). “Although Burger was a lifelong Republican, many of the landmark decisions issued during his tenure represented clear liberal victories. For example, in *Swann v. Charlotte-Mecklenberg Board of Education* (1971), the Court issued a unanimous ruling supporting busing as a pragmatic approach to reduce *de facto* racial segregation in schools.” *Id.* It is important to note that many of the controversial decisions during this era were constitutional ones. *See id.* Although not exactly the same, cases involving the doctrine of substantive due process and the living constitution approach were perceived as judicial overreach in the same way by conservatives as intentionalist statutory decisions. *See Starr, supra* note 56, at 378.

intentionalist approach.<sup>134</sup> At the heart of several of these decisions was the reliance on legislative history.<sup>135</sup>

A prime example of intentionalism in action during the Burger Court is *United Steelworkers of America v. Weber*.<sup>136</sup> This 1979 Supreme Court case involved the contested political issue of affirmative action.<sup>137</sup> Because the issue breaks down along party lines,<sup>138</sup> the case is particularly insightful and may act as an illustration of the broader point about the direction the Court was perceived to have gone. The case involved a manufacturing company and a union who had entered into a collective bargaining agreement that included an affirmative action plan with the goal of increasing racial diversity in certain departments of the company, namely craftworkers.<sup>139</sup> At a plant in Louisiana, thirty-nine percent of the employees were black, yet less than two percent of all craftworkers were black.<sup>140</sup> To set this affirmative action plan into motion, the plant established a training program whereby employees were trained to become craftworkers, and half of all openings in the program were designated for

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<sup>134</sup> See, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). In this case, a private university had its tax-exempt status taken away over racially discriminatory admissions standards it contended served a religious purpose. *Id.* Many conservatives viewed this as judicial activism and inappropriate interference with regard to religious freedom. See Eskridge, *supra* note 12, at 344. Chief Justice Burger, writing for the majority, said “a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute . . . .” *Bob Jones*, 461 U.S. at 586. He then went on to write about congressional purposes and cite legislative history in an attempt to discern the congressional intent. *Id.* at 586. Justice Rehnquist dissented. *Id.* at 591 (Rehnquist, J., dissenting). After noting his own abhorrence for racial discrimination, Rehnquist said “regardless of our view on the propriety of Congress’ failure to legislate we are not constitutionally empowered to act for them . . . for there is nothing in the language of §501(c)(3) that supports the result obtained by the court.” *Id.*

<sup>135</sup> See *Bob Jones*, 461 U.S. at 586; see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 199 (1979).

<sup>136</sup> *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

<sup>137</sup> *Id.*

<sup>138</sup> *Race, Immigration, and Discrimination*, PEW RESEARCH CENTER, (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/4-race-immigration-and-discrimination/>.

<sup>139</sup> *Weber*, 443 U.S. at 193, 198–99.

<sup>140</sup> *Id.*

black workers.<sup>141</sup> The controversy arose when a white employee who did not gain admission into the program complained that he and others were denied access into the program despite having more seniority than even the most senior black employee in the program.<sup>142</sup>

The white employee, Brian Weber, sued the company and the labor union for violating Title VII's prohibition on discrimination on the basis of race.<sup>143</sup> After winning in the lower courts, the Supreme Court took up the issue.<sup>144</sup> Writing for the majority, Justice Brennan cited *Holy Trinity* and held that although the act was within the letter of the statute it was not within its spirit.<sup>145</sup> He emphasized that the statute must be read against the background of the legislative history.<sup>146</sup> In doing so, Justice Brennan reached the conclusion that construing the statute to forbid race-conscious affirmative action programs would "bring about an end completely at variance with the purpose of the statute."<sup>147</sup> Political conservatives were no doubt enraged by this decision,<sup>148</sup> and Ronald Reagan's Justice Department adopted a policy soon after that set out to eliminate all racial preferences, no doubt in response to *Weber*.<sup>149</sup> At the center of this decision and others was a purpose and intent based approach.

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 201–02 (citing *Holy Trinity*).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* Note again that in this case, the majority approach relying on extensive legislative history actually led to the government upholding a private agreement between two parties, whereas a textualist approach would have given the statute a wider scope and would have prohibited the practice, interfering with a conservative sacrament, the freedom to contract; *See Conservative and Libertarian Legal Scholarship: Contracts*, FED. SOC. (Jun. 19, 2014), <https://fedsoc.org/commentary/publications/conservative-libertarian-legal-scholarship-contracts> (Thus, it does not necessarily follow that textualism will lead to a conservative outcome or less government).

<sup>148</sup> *See* PEW RESEARCH CENTER, *supra* note 138.

<sup>149</sup> Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 2964, 2985–86 (2014) (stating that Reagan swore to eliminate these programs and appointed others in the executive branch who shared his view, including William Bradford Reynolds to the head of the Department of Justice's Civil Rights Division.). *See also* *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 673 (1987) (Scalia, J., dissenting) (in which Justice Scalia himself criticized Weber, stating "Third,

Although *Weber* is just one example, it is against this backdrop that the new textualism grew. The intentionalist approach was used time and time again throughout the 1970's and early 1980's to reach conclusions that were seen as far-reaching and politically left.<sup>150</sup> Although championed by conservatives in the wake of these cases, textualism was actually presented as a way to separate law and politics by curbing judicial activism, as it still is today.<sup>151</sup> Its proponents argue that the approach is more methodical than others, with the law leading a judge to a particular conclusion regardless of his or her own policy preferences on the matter.<sup>152</sup> In fact, Justice Scalia himself once said, "The judge who always likes the results he reaches is a bad judge."<sup>153</sup> Although textualism as a methodology may be politically neutral, it was surely marketed in the 1980's and thereafter as a conservative alternative to avoid results like those in *Weber*.<sup>154</sup> In fact, textualism and judicial restraint were a part of the Republican party platform in every year but one between 1984 and 2013,

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*Weber* . . . has provided little guidance . . . beyond the proposition that Title VII does not mean what it says. *Weber* should be overruled.").

<sup>150</sup> See discussion, *infra* Part II. It is once again important to draw the distinction between statutory and constitutional cases. However, although constitutional cases do not involve the use of legislative history, the abstract purpose-driven analysis was used in many cases to reach results perceived as left-leaning. See Lemos, *supra* note 21, at 891. It was this that drove conservatives to want to establish some constraint on judges, which textualism allowed them to do. *Id.* at 886.

<sup>151</sup> SCALIA & GARNER, *supra* note 17, at 16–17.

<sup>152</sup> *Id.*

<sup>153</sup> Katie Glueck, *Scalia: The Constitution is 'dead'*, POLITICO (JAN. 29, 2013, 8:26 AM), <https://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853>; see also *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States, Before the S. Comm. on the Judiciary*, 115th Cong. 115-208 (2017) (statement of Hon. Neil M. Gorsuch, "for a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for policy results he prefers rather than those the law compels."); *Read Amy Coney Barrett's opening statement to the Senate Judiciary Committee*, WASH. POST (OCT. 11, 2020, 10:12 AM), <https://www.washingtonpost.com/context/read-amy-coney-barrett-s-opening-statement-to-the-senate-judiciary-committee/cf9813f9-0fb5-4e00-a736-9763c5ac2042/> (Where then Judge Barrett touted a similar mantra: "A judge must apply the laws as written, not as the judge wishes it were . . . .In every case, I have . . . done my utmost to reach the result required by the law, whatever my own preferences might be.").

<sup>154</sup> Lemos, *supra* note 21, at 895–97.

and remains so today.<sup>155</sup> Moreover, textualism gave conservatives a feeling of enhanced credibility in arguing that such cases were wrongly decided, citing the text of the statute and the role of a judge more generally as their justification rather than their own subjective preferences.<sup>156</sup>

With the election of Ronald Reagan in 1980, Republicans gained control of the mechanism for stacking the judiciary. Wishing to avoid outcomes like the one in *Weber*, Reagan began to nominate textualist judges, including Kenneth Starr, Frank Easterbrook, and Antonin Scalia.<sup>157</sup> As these judges were already personally viewed as political conservatives before their appointments, any textualist conclusion they reached in a case which tended to favor Republicans, seemed to re-enforce the growing perception that the philosophy was a right-leaning one.<sup>158</sup>

In conclusion, textualism's association with the political right does not seem to be due to, or at least fully explained by, its inherent qualities. In fact, the empirical evidence to show that it reliably produces conservative outcomes is scant at best.<sup>159</sup> The association likely has more to do with the historical circumstances surrounding its rise to popularity, as well as the fact that it is often conservative judges who choose to employ it in the first place.<sup>160</sup> Although it may provide a great deal of judicial restraint when followed properly, textualism is not a perfect step-by-step process and does leave room for a conservative judge to insert his or her own preferences into the

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<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 901.

<sup>157</sup> Biographical Directory of Article III Federal Judges, 1789-present, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Dec. 22, 2020).

<sup>158</sup> *See Lemos, supra* note 21, at 901.

<sup>159</sup> *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 117 (2008) (finding that the use of legislative history in employment law cases led to more pro-employer results than decisions using textualism); *see also* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1726–27 (2010) (measuring not only citations to legislative history, but also to whether the case was cited it positively, finding “no statistically significant relationship between whether an opinion cited legislative history and whether the opinion arrived at a liberal or conservative result”).

<sup>160</sup> *See Lemos, supra* note 21, at 849–50, 862–63.



statute.<sup>161</sup> Whatever the actual reason for the broad conservative preference of textualism, the Republican party's open support for it along with the fact that Republican Presidents have nominated the bulk of the judges who purport to employ it, has left little room for argument about whether or not textualism is perceived as right-leaning. Part IV will examine the actual data to see if perception matches reality in the federal appellate courts today.

## II. HYPOTHESES

### A. *Scalia's Continuing Legacy*

My first hypothesis regarding Justice Scalia's ongoing influence at the federal appellate court level is that it is just as strong now as it was at the time of his death. Studies have shown that the interpretation methods used by the Supreme Court have a measurable impact on the methods courts of appeals choose.<sup>162</sup> As the Supreme Court moves in one direction, lower courts tend to follow along.<sup>163</sup> These studies show that the D.C. Circuit tends to follow the Supreme Court most closely, though this could be due in part to the circuit handling more cases that deal with administrative law and other issues of statutory interpretation more generally.<sup>164</sup>

This phenomenon may be explained at least in part by lower court judges keeping a close eye on the Supreme Court in an attempt to be aware of what may be persuasive should one of their own cases reach the Supreme Court.<sup>165</sup> It has often been said that judges despise being reversed on appeal.<sup>166</sup> This may account for some of the trend. Another suggestion is that the impact of a Justice's judicial

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<sup>161</sup> SCALIA, *supra* note 61, at 29.

<sup>162</sup> See Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 483, 540–41 (2015); Glenn Bridgman, *One of These Things Is Not Like the Others: Legislative History in the U.S. Courts of Appeal*, YALE STUDENT PRIZE PAPERS 1 (2012).

<sup>163</sup> *Id.* at 540–41.

<sup>164</sup> See Bridgman, *supra* note 162, at 25–26.

<sup>165</sup> See Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28 (2006).

<sup>166</sup> *Id.* at 28.

philosophy is likely to become most evident in later generations, due to the example the Justice may set for younger attorneys who learn about the philosophy before they have fully formulated their own views of proper jurisprudence.<sup>167</sup> Though this observed trend in which lower courts follow the example of the Supreme Court may represent correlation, it has not been significant enough to represent any causal connection.<sup>168</sup> There is no methodological stare decisis in the federal court system and each judge is free to use legislative history in the manner that he or she finds appropriate.<sup>169</sup>

Having noted Justice Scalia's impact in the field of statutory interpretation earlier in this article, it is no surprise that courts of appeals have trended toward his rejection of legislative history over the past thirty years.<sup>170</sup> In support of the hypothesis that this trend has continued, note that at the time of Justice Scalia's passing there were only three textualists remaining on the Court.<sup>171</sup> This number has now grown to six.<sup>172</sup> All three newly appointed Justices are self-proclaimed textualists and have each suggested that they have great admiration for Justice Scalia.<sup>173</sup> Although each may differ their level

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<sup>167</sup> Benjamin & Renberg, *supra* note 2, at 1055.

<sup>168</sup> See Bruhl, *supra* note 162, at 526.

<sup>169</sup> See Lemos, *supra* note 21, at 856, 905 (noting that one state, Oregon, has adopted a methodological stare decisis whereby the methodological framework of the state supreme court has been treated as binding precedent).

<sup>170</sup> See Frank B. Cross, *The Theory and Practice of Statutory Interpretation* 188–89 (2008).

<sup>171</sup> The remaining textualists on the Court were Justices Thomas, Alito, and Chief Justice Roberts. See Supreme Court of the United States, *supra* note 126.

<sup>172</sup> Since Scalia's passing, the Court's three new members, Justices Gorsuch, Kavanaugh, and Barrett all are considered textualists.

<sup>173</sup> See *Here's Judge Gorsuch's Full Opening Statement*, NBC NEWS, <https://www.nbcnews.com/news/us-news/here-s-judge-gorsuch-s-full-opening-statement-n735961> (Mar. 20, 2017). Gorsuch said "Scalia was a mentor too. He reminded us that words matter—that the judge's job is to follow the words that are in the law—not replace them with words that aren't." *Id.*; see also *Trump's Supreme Court Pick Calls Antonin Scalia a Role Model and a Judicial Hero*, CNN POLITICS, <https://www.cnn.com/2018/08/13/politics/brett-kavanaugh-antonin-scalia-role-model-supreme-court/index.html> (Aug. 13, 2018) (Kavanaugh calling Scalia's philosophy "simple but profound"); *Antonin Scalia's Legacy Looms over the Amy Coney Barrett Hearings*, CNN POLITICS, <https://www.cnn.com/2020/10/12/politics/scalia-barrett-supreme-court-hearing/index.html> (Oct. 13, 2020) (Barret said "It was the content of Justice Scalia's reasoning that shaped me . . . .A judge must apply the law as written, not as the judge wishes it were.").

of disdain for the use of legislative history, the current textualist dominance of the Supreme Court is likely to have an ongoing impact on the federal courts of appeals.<sup>174</sup> Further, when President Obama left office, he left an unusual number of vacancies open on the federal courts; those seats were been filled by a Republican President, Donald Trump.<sup>175</sup> Assuming that Republican appointees are more likely to employ textualism, this militates in the direction of an observable continuing influence. In fact, former President Trump has been praised by conservative leaders and media outlets on multiple occasions for appointing textualists to the bench.<sup>176</sup> Many of his nominees are members of the conservative Federalist Society.<sup>177</sup> This would seem to have an obvious impact on textualism's continued use at the federal appellate court level in a manner consistent with continuing influence of the late Justice.

#### B. *The Variance of Textualism by Appointing President*

The initial expectation with regard to how the use of textualism is likely to break down by presidential appointee is that Republican-appointed judges as a whole are more likely than their Democrat-appointed counterparts to reject legislative history. If the conventional wisdom that suggests close ties between textualism and conservatism is correct, the data is likely to reflect this connection. If the perception is that conservatism is closely associated with textualism, it would follow that the more conservative the President, the

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<sup>174</sup> See Cross, *supra* note 170, at 188.

<sup>175</sup> See Matt Gregory, *Verify: President Obama Didn't Leave 128 Federal Judge Vacancies, But It was Still a Large Number*, WUSA9, <https://www.wusa9.com/article/news/verify/president-trump-obama-federal-judge-vacancies-verify/65-86c98010-7fc4-4bd7-a356-0de7e137c0c4> (Oct. 16, 2020) (There were 112 vacancies when President Trump took office compared to just 53 for President Obama).

<sup>176</sup> See Deanna Paul, *Keep Those Judges Coming: Conservatives Praise Trump's Success in Filling the Courts*, WASH. POST, <https://www.washingtonpost.com/politics/2018/11/16/keep-those-judges-coming-conservatives-praise-trumps-success-filling-courts/> (Nov. 16, 2018) (noting that many of Trump's nominees are members of the Federalist Society, an organization that advocates textualism); see Mitch McConnell, <https://www.republicanleader.senate.gov/newsroom/research/200-judges> (Jun. 24, 2020) (calling Trump's nominees a victory for the rule of law).

<sup>177</sup> *Id.* (“83 percent of Trump's nominees confirmed as circuit judges are members of the Federalist Society”).

more likely he would be to have chosen judges that employ textualism in their approach to statutory interpretation. There is a strong public perception, and some data to back it up, that former President Trump has appointed very conservative judges to the federal courts.<sup>178</sup> As mentioned earlier, he has been often praised by the right-wing for doing so.<sup>179</sup>

Although it is very difficult to find data or consensus regarding how conservative or liberal each recent President himself has been, there is one study that sheds light on how conservative or liberal their judicial nominees are.<sup>180</sup> The study used public campaign contribution records that reveal which political candidates and parties each judge gave to prior to his or her appointment.<sup>181</sup> Though the study only rated judges who had been nominated as of January 2019, its findings were consistent with the hypothesis.<sup>182</sup> Further, it is seemingly the only relevant study that has been conducted in this area. This study found that President Trump's appointees have been the most conservative of any President in modern American history.<sup>183</sup> As for the other Presidents, it found that President Obama's appointments were the farthest left, President Clinton and George H.W. Bush's more moderate, with Ronald Reagan and George W. Bush's farther right.<sup>184</sup> Once again, insofar as conservatism is related to textualism, the results of judicial use of legislative history are expected to come out somewhat similarly. The empirical analysis of Part IV will act to test this theory.

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<sup>178</sup> See generally Tom McCarthy, *Trump's Judges: A Revolution to Create a New Conservative America*, GUARDIAN, (Apr. 28, 2020), <https://www.theguardian.com/us-news/2020/apr/28/donald-trump-judges-create-new-conservative-america-republicans>; Green, *supra* note 26.

<sup>179</sup> See Paul, *supra* note 176.

<sup>180</sup> Green, *supra* note 26. (noting that this study only measured judicial appointments as of October 2018, and was done by an organization advocating for the expansion of the number of Supreme Court Justices).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

### III. DATA AND MEASURES

The opinions used were gathered from Lexis and Westlaw. To get the sought-after data from each opinion, the advanced search tool was used to measure citations to legislative history, many variations of possible citation formats to different forms of legislative history were also used. This included formats from the Legal Bluebook as well as other nonstandard references.<sup>185</sup> For example, when searching for a citation to the congressional record, the Bluebook format of “Cong. Rec.” is used as well as “Congressional Record” and “Cong. Record,” among others.

Searches performed in Lexis were replicated in Westlaw to ensure the most accurate results possible. As suggested by the Benjamin and Renberg study, these searches are done using a rather long string-matching pattern to identify whether an opinion cites to legislative history or not.<sup>186</sup> If the search in Lexis yielded far different results from the number in Westlaw, it would indicate that the search terms did not accurately measure the number of citations to legislative history.<sup>187</sup> In each database, the same search terms were used within the same date ranges, and the results were nearly identical.<sup>188</sup> For every search performed, the results were cross-checked in each database to make sure all citations were recorded and that each opinion contained an actual citation to legislative history.<sup>189</sup> As in the study by Benjamin and Renberg, the analysis was limited to whether there was a citation to legislative history or not.<sup>190</sup> The actual frequency within each opinion was not measured. This is the appropriate metric because the textualism of Justice Scalia’s clear distinguishing factor was his rejection of legislative history, so the proper

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<sup>185</sup> See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20<sup>th</sup> ed. 2020). Although every form, both standard and nonstandard, was used to search for references to legislative history in a given opinion, as the Benjamin and Renberg study noted as well, there cannot be complete confidence that this captured all of the possible citations to legislative history within the data set.

<sup>186</sup> Benjamin & Renberg, *supra* note 2, at 1060.

<sup>187</sup> *Id.* at 1059.

<sup>188</sup> In more than 300 searches, no search produced results that differed by more than ten opinions.

<sup>189</sup> Every search was fully compared in Westlaw and in Lexis and any variances were accounted for. Every citation to legislative history was inspected to ensure that no false positives were recorded.

<sup>190</sup> Benjamin & Renberg, *supra* note 2, at 1059-60.

line is between citation and non-citation.<sup>191</sup> Therefore, if a judge cites legislative history, he is not following Scalia's approach.<sup>192</sup> Additionally, measuring citation versus non-citation prevents the data from being skewed due to some opinions containing several citations to legislative history within them.<sup>193</sup>

The first hypothesis regarding the ongoing influence of Justice Scalia is tested using a data set of all reported federal appellate court opinions between June 1, 2011, and November 30, 2020. This is broken down by circuit and represented in the charts below.<sup>194</sup> The second hypothesis is measured in a similar manner as the first. However, only opinions between December 1, 2017, and November 30, 2020, are used. This was done to account for judges appointed more recently by President Trump and thus give a more accurate picture of how often each Presidential cohort is currently citing legislative history. First, the Federal Judicial Center was used to gather the names of judges and to document the President who appointed each of them.<sup>195</sup> Then, having broken down all of the appellate judges by President, individual searches of each judge were done in Lexis and Westlaw using the same search terms for legislative history as for the first hypothesis. The number of citations were measured both as a raw number and as a percentage of the total. To provide context, and to make an educated guess about the future, the makeup of the federal appellate circuits as a whole is represented as well in a chart showing the percentages of appointees of the various Presidents.

Table 1 outlines the search terms used to search for reported opinions that cite to the various forms of legislative history.<sup>196</sup>

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<sup>191</sup> Eskridge, *supra* note 3, at 623–24.

<sup>192</sup> Benjamin & Renberg, *supra* note 2, at 1059.

<sup>193</sup> *Id.*

<sup>194</sup> *See infra* Part V.

<sup>195</sup> FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Dec. 22, 2020).

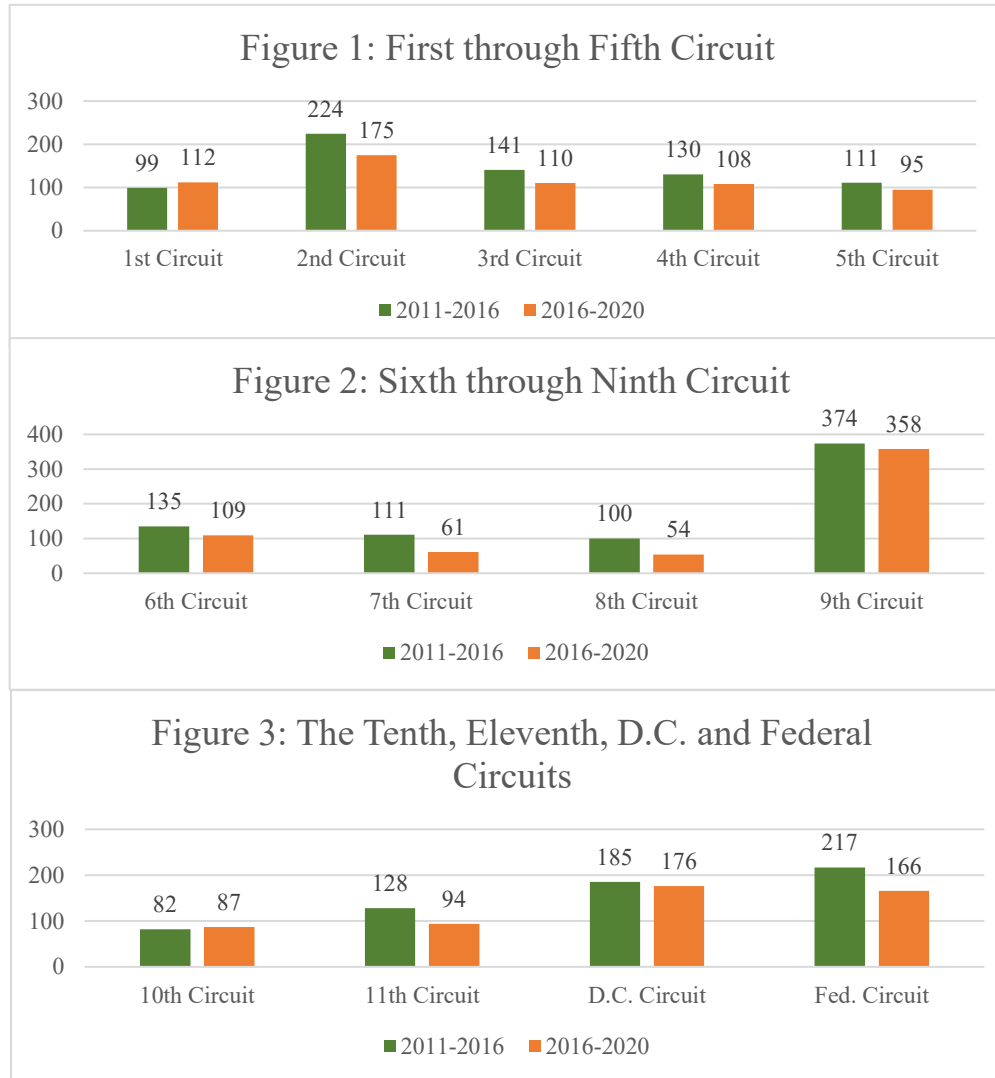
<sup>196</sup> Many of the search terms used are the same as the ones used in the study done by Benjamin and Renberg. That study had compiled a long list of possible citations and different variations and it was advantageous to use many of the same terms to pick up the greatest number of citations. However, they did not include the citations to resolutions or documents, and this Article covers a more recent time frame than that study.

TABLE 1: SEARCHES OF LEGISLATIVE HISTORY WITHIN REPORTED  
FEDERAL APPELLATE MAJORITY OPINIONS

| <b>Search Terms</b>   |
|---|
| <p>“H.R.J.” OR “H. Comm.” OR “Cong. Rec.” OR “S. Comm.” OR “H.R. Res.” OR “House Res.” OR “S.REP” OR “Sen. Res.” OR “H.R. Con. Res.” OR “S. Con. Res.” OR “H.R.J. Res.” OR “S.J. Res.” OR “S. Exec. Res.” OR “H.R.Doc. No.” OR “H.R. Misc. Doc. No.” OR “S. Doc. No.” OR “S. Exec. Doc. No.” OR “S. Treaty Doc. No.” OR “S. treaty doc. no.” OR “S. treaty” OR “H.R. Rep. No.” OR “H.R.REP” OR “cong. rec” OR “congressional rec” OR “cong. record” OR “cong. globe” OR “statement of rep” OR “statement by Rep” OR “statement of sen” OR “statement by sen” OR “statement of chair” OR “statement by chair” OR “statement of hon” OR “statement by hon” OR “statement of representative” OR “statement by representative” OR “statement of senator” OR “statement by senator” OR “statement of honorable” OR “statement by honorable” OR “remarks of rep” OR “remarks by Rep” OR “remarks of sen” OR “remarks by sen” OR “remarks of chair” OR “remarks by chair” OR “remarks of hon” OR “remarks by hon” OR “remarks of representative” OR “remarks by representative” OR “remarks of senator” OR “remarks by senator” OR “remarks of honorable” OR “remarks by honorable” OR “comments of rep” OR “comments by Rep” OR “comments of sen” OR “comments by sen” OR “comments of chair” OR “comments by chair” OR “comments of hon” OR “comments by hon” OR “comments of representative” OR “comments by representative” OR “comments of senator” OR “comments by senator” OR “comments of honorable” OR “comments by honorable” OR “hearing before the committee” OR “hearing before the comm” OR “hearing before the subcommittee” OR “hearing before the subcomm” OR “hearing on h.r” OR “hearing on s.” OR “hearing before the h” OR “comm. hearing” OR “hearing before the s” OR “comm. hearing” OR “conf. rep” OR “conf. report” OR “h.r. rep” OR “s. rep” OR “h. rep” OR “conference rep” OR “senate rep” OR “house rep” OR “h.r. report” OR “committee report” OR “committee rep” OR “comm. rep” OR “comm. report” OR “subcommittee rep” OR “subcommittee report” OR “subcomm. rep.” OR “subcomm. report”</p> |

## IV. RESULTS

## A. Continuing Influence by Circuit



The results gathered from the various circuits confirmed the initial first hypothesis.<sup>197</sup> In all but two of the thirteen circuits,

<sup>197</sup> See discussion *supra* Part II.



citations to legislative history went down, and in some cases dramatically. Figure Two above shows that the Seventh and Eighth Circuits nearly cut the number of citations in half. The initial hypothesis stated that even a slight decrease in citations to legislative history among the courts would indicate ongoing influence. The fact that citations went down as a whole indicate that the influence is very strong, and that textualism will be around for many years to come.

Intriguingly, although the increase in citations was very small, the Tenth Circuit is composed of only a third of Democrat appointees,<sup>198</sup> who are more likely to cite to legislative history than their Republican counterparts. The Ninth Circuit, although widely seen as the most politically left of all the circuits,<sup>199</sup> saw a slight decrease as well.<sup>200</sup> This could be due to the addition of ten new Trump appointees.<sup>201</sup> As a whole, most of the circuits showed stability in the willingness to cite legislative history during the two periods. The slight overall decline among the circuits is likely best explained by the vacancies that were left open by the Obama Administration,<sup>202</sup> as well as the retirement of some older judges and the subsequent addition of many new Trump appointees who, as shown in Figure Five, are the least likely of all cohorts to cite to legislative history.<sup>203</sup>

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<sup>198</sup> See FED. JUD. CTR., *supra* note 195.

<sup>199</sup> *Circuit Court Map*, VISUAL FIRST AMENDMENT, <http://visualfa.org/circuit-court-map/> (last visited Apr. 26, 2022). This website ranks the circuits from most conservative to most liberal based on quantitative and qualitative factors associated with rulings on the First Amendment. *Id.* The ninth circuit is by far regarded as the most liberal. *Id.*

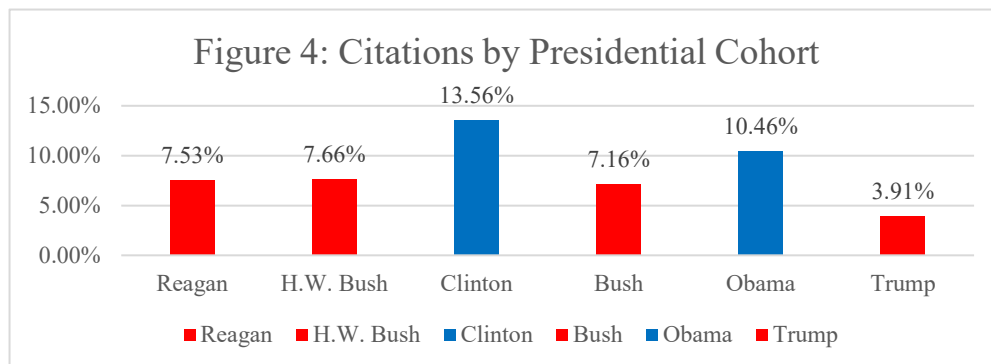
<sup>200</sup> The reason for such high numbers of citations in the Ninth Circuit is not explained fully by it being perceived as left-wing. It handles the most cases of all circuits and the charts above show only raw numbers of citations.

<sup>201</sup> FED. JUD. CTR., *supra* note 195.

<sup>202</sup> See Matt Gregory, *supra* note 175.

<sup>203</sup> See Figure Five.

## B. Citations by Presidential Cohort



The data shows a clear ideological correlation between the party of the appointing president and the use of textualism. Whatever the initial reasons for its association with the Republican party and whether it reliably produces conservative outcomes, in today's federal appellate courts the willingness to cite legislative history follows obvious party-lines.

The data gathered on the variance in citation frequency based on appointing President both confirms in part and denies in part the second hypothesis. Republican appointees as a whole are statistically less likely to rely on legislative history than their Democrat counterparts,<sup>204</sup> but the predictions with regard to how it would breakdown by President were slightly off. As Figure Four shows above, Trump appointees were the least likely to cite legislative history by a rather significant margin—more than three percent less likely than the next cohort.<sup>205</sup> However, the data disproved the hypothesis that Obama appointees would be the most likely to cite legislative history. Clinton appointees were roughly three percent more likely than Obama appointees to cite it.

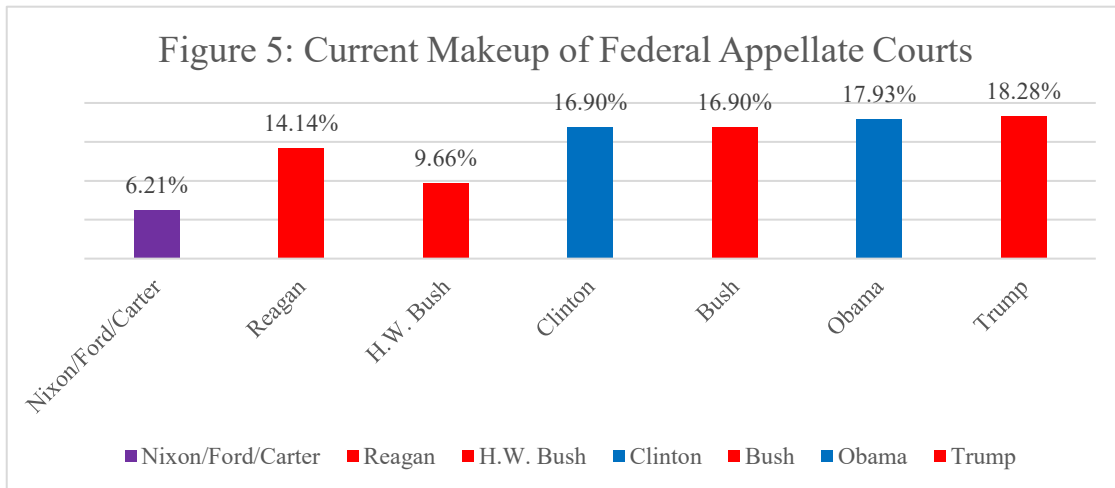
The unexpected result could possibly be explained by a theory mentioned earlier in this Article. The Benjamin and Renberg study posited that a judge's influence may be felt most strongly in the next generation of judges because those judges were able to read the judge's opinions while still in law school and before developing

<sup>204</sup> See Figure 4, *supra* Part IV.

<sup>205</sup> Three percent sounds like a very small margin, but the highest percentage being only thirteen and a half, it is substantial.

their own views of statutory interpretation.<sup>206</sup> This would account for the fact that Obama appointees, although further left politically according to the one study,<sup>207</sup> were less likely to cite to legislative history than Clinton appointees. In fact, Obama appointees were marginally closer to the Reagan and H.W. Bush appointees.<sup>208</sup> This makes sense considering that Clinton appointees are closer in age to Scalia and most were already practicing attorneys or judges by the time Scalia ascended to the Supreme Court. Further, although Republican appointees as a whole were less likely to cite to legislative history, the two most recent Republican Presidential cohorts were less likely to do so than their predecessors. The most recent cohort, those appointed by President Trump, was far less likely to cite legislative history. The judges appointed more recently may have been just as liberal or conservative as the cohorts in the past, but the profession as a whole moved in the direction of textualism.

### C. *What This Means Going Forward*



Although not broken down by individual circuit, the chart above shows the current makeup of the federal appellate courts by Presidential cohort.<sup>209</sup> At present, Trump appointees make up a razor-thin

<sup>206</sup> Benjamin & Renberg, *supra* note 2, at 1055.

<sup>207</sup> See Green, *supra* note 26.

<sup>208</sup> See Figure 4, *supra* Part IV.

<sup>209</sup> See Figure 5, *supra* Part IV.

plurality that is likely to grow in the coming years as older judges retire.<sup>210</sup> Given that Trump appointees were the least likely to cite legislative history,<sup>211</sup> appellate courts will likely continue to have a strong textualist presence in the coming years. However, roughly twenty-five percent of the total seats are currently held by the more textualist Reagan and H.W. Bush judges.<sup>212</sup> Therefore, many of the vacancies that will likely open up over the next four years will be from those cohorts. If these seats are filled by more liberal judges, there may actually be an observable change in the opposite direction with courts being more willing to cite legislative history going forward. Still, if the next cohort of Democrat-appointed judges follow in the Obama cohort's footsteps, and are more textualist than their predecessor, the change may not be significant.<sup>213</sup> Although its long-term popularity is uncertain, with the presence of a large number of Bush and Trump appointees likely to continue serving for some time, it is clear that textualism will not "recede in influence" anytime soon.<sup>214</sup>

## V. CONCLUSION

"If you would not be forgotten as soon as you're dead, either write something worth reading or do something worth writing."<sup>215</sup> In his lifetime, Scalia did both. Although often controversial, it cannot be denied that Scalia left an impact few other judges will.<sup>216</sup> Justice Kagan herself noted that a century from now when many other Justices are forgotten, Scalia will live on.<sup>217</sup> The data shows that

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<sup>210</sup> President Biden may very well appoint a significant number of judges during his time in office. However, the weight of those appointments is unlikely to be felt until a few years into his Presidency given the time it takes to confirm the judges, and the fact that a sitting judge must retire or pass away for there to be a vacancy.

<sup>211</sup> See Figure 4, *supra* Part IV.

<sup>212</sup> See Figure 5, *supra* Part IV.

<sup>213</sup> If the next Democrat-appointed cohort were less likely to cite legislative history than the Obama cohort, this would indicate clear Scalia influence on the profession as a whole and not only on the right-wing.

<sup>214</sup> Siegel, *supra* note 102, at 861.

<sup>215</sup> POOR RICHARDS ALMANAC, PETER PAUPER PRESS (1988).

<sup>216</sup> Scalia Lecture, *supra* note 8.

<sup>217</sup> *Id.*

Scalia's textualist ideal is still closely associated with the Republican party, but as noted above, it may have crossed political lines to some degree.<sup>218</sup> In the future, it would not be surprising if the popularity of textualism grows as a whole and it breaks away from the conservative label. Most law schools teach the philosophy directly, and Scalia's opinions are unavoidable in course curriculums. Although only time will tell whether Scalia's textualism remains strong.

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<sup>218</sup> See discussion *supra* Part IV.