

Practical Insights or Parlor Games? The Visibility of a Systemic Approach to Analyzing Modalities of Interpretation

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Abstract

Modalities of interpretation help us describe legal reasoning. Pervasive in the world of the law, they are usually taken only as tools to craft persuasive arguments. And with the exception of originalism, a variant of the historical modality, they have been used only in specific contexts. But, if there is a way to determine if patterns within and between the modalities used by judges exist, there could be significant applications. The goal of this study is to determine what patterns can be found within and between modalities and develop a method for examining them. Four Supreme Court justices were selected, and for each, four opinions were analyzed, two from the Supreme Court Database's economic activity issue area and two from the civil rights issue area. The opinions were then coded for which modalities were used, and the justices were compared to each other and themselves. Several patterns were observed, though they were not conclusive. However, they do provide preliminary hypotheses, each of which could be tested if this study is repeated on a bigger scale, with a larger sample size, more variables, and multiple coders to account for bias.

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Introduction

With the onset of the Biden administration, judges' roles will become increasingly prominent on public stage. Whether in the form of contentious nominations with tight confirmations or judges appointed by President Trump thwarting the goals of President Biden, the public is likely to realize just how consequential the decisions judges make every day can be. We have already seen this in a tempered form when a federal judge in Texas blocked an executive order on immigration just six days after President Biden took the helm.¹ When this inevitably happens on a larger scale in the form of a court declaring a law of Congress unconstitutional the coalition which supported the Biden legislative agenda will discover a reality to which most laypeople have been oblivious: judicial decisions have consequences too.

This raises many questions about the role of a judge and the process of judging, many of which have been aptly addressed by the academy. One particular question which has been addressed is: how do judges come to the decisions they do and what process or method do they use to reach the result? The answer is complex and has been answered, in part, through a taxonomic system known as judicial modalities. Indeed, modalities are pervasive at any educational institution that teaches constitutional law from law schools to undergraduate universities and in pieces of legal commentary. The most prominent taxonomy of judicial modalities was developed by Phillip Bobbitt in his seminal 1982 work, *Constitutional Fate*. Although these categories are common knowledge to anyone versed in the basic tenets of American constitutional law, they are largely used only to teach future lawyers how to craft persuasive arguments. Despite the

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1. Priscilla Alvarez, "Judge Temporarily Blocks Biden's Plan to Halt Deportations," CNN, Updated January 26, 2021, <https://www.cnn.com/2021/01/26/politics/deportation-biden/index.html>.

existence of a Supreme Court Database² listing information about almost every Supreme Court case, the modalities used by the justices in each opinion are conspicuously absent from that database and the public discourse. These categories have been scarcely worked with outside the confines of classrooms and chambers with the exception of a robust literature critiquing and in defense of originalism, a specific form of one of Bobbitt's modalities. This is likely a result of the fact that the literature has rarely spent the time trying to reason and examine whether this information is valuable for analytical purposes and worthy of cataloging, which is the task of the present preliminary study.

The Types of Modalities

What types of modalities are used in the context of the Constitution? What about when a statutory issue is presented? Bobbitt framed his work as a typology of constitutional arguments, and more specifically, methods of drawing meaning from a necessarily vague document which is collectively thought of as permissible.³ The text is fluid, unfixed, and subject to multiple interpretations. Bobbitt himself devoted half of *Constitutional Fate* to justifying a new type of constitutional argument called ethical argument. It should also be noted that these modalities do not dictate the result or provide a definitive outcome in every case. For example, in *Heller*⁴, the infamous case involving the Second Amendment and an individual's right to bear arms, both the majority opinion and dissent used historical arguments to reach opposite conclusions. The art of statutory interpretation can be different from Constitutional interpretation; though as will be evident, there are similarities. Since not all cases the courts face deal with interpreting the Constitution, there is also the question of the

2. Harold J. Spaeth et al. 2020. Supreme Court Database, Version 2020 Release 1. URL: <http://Supremecourtdatabase.org>.

3. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 3.

4. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

value in categorizing which modalities fit for statutory cases. Though the typology developed by Bobbitt was not specifically developed for statutory cases, they will be used for the purposes of this effort which ultimately includes statutory and constitutional cases. A final stipulation is that most arguments use multiple interpretations or mix them and, as we will see, can use reasoning that could be construed as belonging to more than one modality.

The first type of modality is textual, which is a fairly straight forward method. It involves looking at the plain meaning of the text and determining what it necessitates. This is easier said than done. How do you define the plain meaning? What if a word has multiple meanings or is vague? What if the word has changed meanings? These are all questions anyone using this method must grapple with. But as a textualist would tell you, if the text which people democratically adopted is not followed, then what is the point of a democracy? Most serious academics and practitioners start with the text, whether it is of the Constitution or a statute, because it is an important constraint and is what was adopted via democratic processes.⁵

The next modality is the doctrinal modality, which is what happens when a judge considers previous decisions in the context of the one before them to apply binding rules or principles that were determined in those previous cases. It is largely a result of our common law heritage where judges played a large part in determining the law. It also plays a large role in maintaining the rule of law because the law should be applied equally to everyone; if judges were to continuously produce different outcomes in cases with similar facts and circumstances, the system would be fundamentally unfair.⁶

Prudential modalities take many different forms but all involve considering the practical implications of the decision which will be made. Justice Louis Brandeis was famously practical in his decisions, as can be seen in his repeated reluctance for the Court to take on

5. Bobbitt, *Fate*, 25–38.

6. Bobbitt, 39–58.

constitutional cases when a party had no stake in the outcome.⁷ It can also be seen in the First Amendment reasoning, among other areas, of Justice Stephen Breyer, when he tries to discern the appropriateness of speech restrictions against speech-related benefits.⁸ Breyer has tried to discern what the best outcome would be given the facts of the case and therefore utilized the prudential modality.

Structural modalities are distinct because they are inferences about relationships that are formed because of the various constitutional provisions. They are not something that can be found explicitly in the text but are nevertheless important. The ideas of checks and balances and separation of powers, for example, are structural features that have been used in constitutional arguments. Nowhere in the Constitution does it state that there must be a separation of powers, but it did create three distinct branches of government and all are vested explicitly with powers that constrain the other two. Structural arguments have been applied since the founding and are helpful for analyzing all sorts of cases.⁹

The penultimate modality discussed is slightly controversial and was the subject of the second half of Bobbitt's work. It is known as the ethical argument. When the ethical argument is deployed, the decisions are derived from whether the outcome reached is consistent with the character or ethos of the American system. In *New York Times v. United States*,¹⁰ the case involving the Pentagon Papers, the Court applied a traditional First Amendment analysis despite the text of the amendment specifically referring to Congress and the president seeking to prevent the publishing of the papers. How could this be? While not explicitly stated, it was permissible because it would be "against the ethic" of the First Amendment for the president to be able

7. Bobbitt, *Fate* 59–73.

8. Paul Gerwitz, "The Pragmatic Passion of Stephen Breyer," *Yale Law Journal* 115 (2006): 1682.

9. Bobbitt, *Fate*, 74–92.

10. *New York Times Company v. United States*, 403 U.S. 713 (1971).

to restrict speech in a way that Congress could not.¹¹ While not often explicitly stated, all ethical arguments proceed this way, deciding whether a decision is compatible with the ethos or conscious of the American ideal.

The final type of modality is historical modality. Bobbitt notes that this entails the attempt to understand and adhere to the original intention of the framers of whatever is being interpreted. This is indeed true in some forms but does not have to be. At its core, a historical argument tries to understand what the practice or approach to each situation that presents itself. This can involve looking at historical sources, old dictionaries, legislative or drafting history, and anything that can tell us what has been done in the past to determine what should be done in the present.¹² Perhaps the most well-known variant of the historical argument is originalism, an approach that grew out of the response to the liberal Warren and early Burger Courts. It has been considerably controversial despite its pervasiveness and has garnered much scrutiny, which has often forced it to adapt. Because it is one of the only cases of a judicial modality drawing a considerable amount of attention, both in academia and the public sphere, it warrants a closer look.

The Case of Originalism

Originalism is a variant of the historical modality whose origins trace back the era of *Brown v. Board of Education*¹³ when conservatives needed to counter the liberal arguments which were being put forward.¹⁴ Richard Nixon, Robert Bork, and William Rehnquist all helped lay the groundwork to make originalism one of the signature positions of the Reagan Department of Justice. Under Raoul Berger, another important

11. Bobbitt, *Fate*, 93–105.

12. Bobbitt, 9–24.

13. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

14. Calvin TerBeek, “Clocks Must Always Be Turned Back’: *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism,” *American Political Science Review*, 2021, 1–14.

progenitor of originalism, and Robert Bork's theory, judges were bound by the text and history of the Constitution in addition to their fair implications when deciding cases. To achieve this, the theory of interpretation was based on the original intent of the founders. That, in their minds, was the only theory that could constrain the judiciary and negate the judicial power to revise the Constitution.¹⁵ Judicial constraint is particularly important to originalists because without it they cannot justify the ability of an unelected judiciary to strike down laws passed with the democratic mandate of Congress. Consequently, much of originalism focuses on finding a way to make judicial review permissible. Critiques started to pile on almost as soon as these ideas were presented by Bork, Berger, and others. One critique was that there is not always one singular intent, and that even if there was, it would be impossible to find. Others accused them of performing "law-office history," which was inadequate and incomplete. Ronald Dworkin responded by claiming the founders were intentionally vague in many areas involving rights, which meant that there was not an intent behind some of the most contested portions of the Constitution which originalism said it had an answer.¹⁶ As the critiques added up, it was clear that a new iteration of this theory was necessary.

Consequently, Antonin Scalia started hinting that the proper method of achieving this desired restraint was not by undertaking the impossible task of deriving the original intention of the framers, but by looking to the original public meaning of the words at issue at the time they were adopted. While this did frame the question differently, not a lot of outcomes changed.¹⁷ For Scalia, the divide was bigger between original public meaning and contemporary meaning than between original public meaning and original intent. He openly acknowledged not all originalists arrived at the same outcome but emphasized that they all had a guiding principle which the theory of

15. Eric J. Segall, *Originalism as Faith* (New York: Cambridge University Press, 2018), 56–7, 60–64.

16. Segall, *Faith*, 57–64.

17. Segall, 83–88.

living constitutionalism lacked. He also noted that even if living constitutionalism did have a discernible guiding principle, he would refrain from using that method because, according to him, it is not what the Constitution calls for.¹⁸ After Scalia, the idea continued to evolve into various forms in response to critiques which all to various extents followed the basic ideas of the Scalia variant of originalism. Still, for critics of originalism, two key aspects of the theory were troubling. The first was the pragmatic exception; this was a phrase coined by Scalia to describe when he would surrender his originalist arguments for the sake of doctrinal continuity and a sign of his “faint-hearted” brand of originalism.¹⁹ However, many saw this as too big an opening for other forces to act on a theory that was supposed to constrain judges. The same critique was applied to the so-called “construction zone,” an area specifically noted by originalists where judges have room to construct meanings when the text, original public meaning, or other limiting standards are not determinative. This is another place where critics assert originalists impose their own will under the guise of the blessing of the founders.²⁰ To many it is an intellectually dishonest practice because its practitioners are acting as though they are constrained but in reality are not. To others it is a good faith response to criticism regarding the indeterminate nature of the original public meaning.

Two specific, more sophisticated variants, one conservative and one liberal merit mentioning. The first variant was developed by Keith Whittington in his book *Constitutional Interpretation*. He felt there was a serious deficiency in the literature defending originalism and sought to describe certain concepts which were only implied and never explicitly stated by originalists. Taking a defensive position, the book responded to many of the criticisms of originalism but ultimately

18. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 20–23, 45–46.

19. Antonin Scalia, “Originalism: The Lesser Evil.” *Cincinnati Law Review* 57 (1989): 849–65.

20. Segall, *Faith*, 88–93.

remained faithful to it because Whittington believes it is necessitated by the existence of a written constitution and that originalism is the most compatible with the idea of popular sovereignty.²¹ The second variant which should be mentioned is Jack Balkin's, which was laid out in his subversive classic *Living Originalism*. While it is true his method has resulted in more traditionally liberal outcomes, it is more significant because it adopts what Balkin calls "framework originalism" as opposed to the traditional "skyscraper originalism."²² The key difference in these two variants is that most forms of conventional originalism follow the original expected application of the framers, which results in precedents and practices that cannot be discarded being built up over the years, like a skyscraper being built higher and higher. Balkin's version is different because it claims the framers established a framework which cannot be altered but the way in which it is filled can. In other words, he claims we are not bound in modern time by the original expected applications of the framers. Through his work he shows that originalism and living constitutionalism are two sides of the same coin.²³ Going further than Balkin and Whittington, Eric Segall uses his book *Originalism as Faith* to move away from the originalism theory altogether and criticizes the theory for intellectual dishonesty, points to the inconsistencies of Justices Thomas and Scalia's originalist approaches, and suggests the theory should be abandoned. Citing specifically the inconsistency of Justice Scalia, Segall demonstrates the lack of accountability for inconsistency from his own disciples, who were apostles of originalist methodology, and shows how originalism has become more of a faith than an intellectually sound theory of the Constitution.²⁴

21. Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999), 354–57.

22. Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011), 21–23.

23. Balkin, *Living*, 109–37.

24. Segall, *Faith*, 122–39, 183–91.

There are many reasons why that specific variant of the historical modality has garnered so much attention, but the main reason is one of the two major political parties has taken the modality as its mantle and has used it to create an entire ecosystem to support it because the party knows doing so will result in outcomes favorable to them. Other modalities do not receive this much attention or criticism, and it would be an interesting task, though too exhaustive, to examine why that particular modality was taken up by conservatives as an almost too convenient means to their end. But what about the other modalities: do they have any other applications that might help us understand more about the role and process of judging?

Beyond Originalism: Examining the Use of All Modalities

To answer this question, we must have data on the modalities employed by judges from case to case. We could then use this information to analyze how decisions are made from judge to judge and within the work of a single judge. But first, it must be determined whether we can find patterns in just a few judges and cases that can then be expanded. The rest of the paper will be devoted to such effort.

Because of limited resources, four judges, all justices of the Supreme Court, were selected. They were chosen from a single time period: the second half of the era between Reconstruction and the New Deal before the so-called “switch in time,” the rights revolution of the Warren Court, and the eventual emergence of originalism.²⁵ If

25. Two cases, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 and *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 were decided in 1938 after the “switch in time that saved nine” which occurred in 1937 with the case *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Both were included for consistency of issue area. *Missouri ex rel. Gaines* is a dissent by Justice McReynolds which is still reflective of the pre-New Deal jurisprudence which this study is trying to examine. *Kellogg* was a majority written by Justice Brandeis and while it is coded in the issue area of economic activity it did not involve a provision of the New Deal. Additionally, the decision was 7–2 and is still reflective of the

further analyzing modalities can be of any value, it must be viable in any particular time period. To further ensure the value of the findings, two of the selected justices are known today as having been “liberals,” Justices Oliver Wendell Holmes and Louis Brandeis, and the other two are “conservatives,” Justices George Sutherland and James Clark McReynolds.²⁶ While in the ideal world all the cases decided by the justices would be examined, only four per justice were used. The four chosen for each justice were used based on their issue area coding in the Supreme Court Database. Two were coded “Economic Activity” and two were coded “Civil Rights.” This decision was made to adhere strictly to these labels to achieve a constant because in the case of some justices other factors were necessarily inconsistent. For example, some of the available opinions in each category were dissents. While it is true that there are a myriad of factors which can affect the writing of an opinion because it is a dissent and not an opinion of the Court, it was decided that it was more important to have consistent issue areas because it is possible that some people might approach a case differently in fundamental ways. Some people may also prefer a different modality from issue area to issue area, which in some cases could correspond to different areas of the law.²⁷ Because of the impeccable work of those working on the Supreme Court Database, it is possible that there is a different category or multiple categories that might have been more prudent to use as an organizing constant. But this being an introductory study with considerably less resources than

modalities which would have been held by Justice Brandeis before *West Coast Hotel Co.*

26. These labels are generalizations meant in the colloquial sense; they are necessary as a control variable for the organization of the research design.

27. The same qualification, though necessary to a lesser extent, applies to the only concurring opinion: that of Justice Holmes in *United States v. Reynolds* 235 U.S. 133 (1914).

most researchers, the decision was made to sort and select the cases by issue area.²⁸

Another factor was affected by the decision to organize strictly by issue area: some cases involve a statutory issue rather than a constitutional one. Again, this was partially a result of limited resources which are necessary to scour the U.S. Reports for constitutional cases that are coded in either category. It also could be the case that due to several factors, some of the justices never had the opportunity to write opinions dealing with those issues. However, there is still value that can be found in these cases. Bobbitt's categories were explicitly created for the use of constitutional interpretation, but all are also applicable to methods of statutory interpretation. For example, the textual method happens the same way in both instances. In fact, in most statutory cases, that is where judges start. Looking at legislative history is in some ways analogous to a historical argument and prudential arguments sometimes slide their way into statutory cases when a judge aims to construe a statute so that it is consistent with other statutes. While not every type of modality is perfectly analogous, such as ethical arguments, at the end of the day judges do not exclusively hear constitutional cases. To get a better understanding of how they function, we must analyze the arguments used in all the cases that they hear.²⁹

Each case was read and then coded to reflect which modality, or modalities, did the bulk of the work in the decision. If future studies are warranted, it would be necessary to have multiple coders for each case to eliminate biases or discrepancies. This is especially crucial since not all the cases correspond perfectly to a particular modality, which is a hallmark of how these arguments function in practice: messy. In this limited study alone, decisions ranged from having just one type of

28. Appendix A, located at the end of this article, lists each case along with basic information and identifying information in the Supreme Court Database.

29. Further adjustments can and should be made in subsequent studies to better account for statutory cases.

argument employed to having a mixture of two or three to having multiple arguments presented separately. This necessitates a certain caution for presenting findings, especially when comparing the approaches of different justices to each other. Care will be taken to present the data in a way that clearly delineates when and how exactly a modality was used by a justice. Though it is likely that patterns will present themselves in some form, their size, scope, and potential to serve as substantive analytical tools if confirmed upon further research remains unknown. Each justice will be presented as a case study which will include a description of the cases studies and an individual analysis. A comparative analysis will follow along with conclusions.

Case #1: Justice Sutherland

The first set of decisions analyzed are those of Justice Sutherland, a conservative and one of the “four horsemen” of the New Deal. The first opinion, in the category of economic activity, is *Village of Euclid v. Ambler Realty Co.* (1926).³⁰ The case was a challenge to a zoning ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The plaintiff claimed that the ordinance unduly reduced the value of the land which destroyed the land’s marketability. Justice Sutherland stated that if this was indeed within the power of the state to do, it rested in the police power. The concept of police power being reserved for the states is itself, without other context, a structural argument. The structure of the Constitution prevents the federal government from exercising police power because the Tenth Amendment states that all powers not given to the federal government are reserved to the states; thus, the police power was a power granted to the states. At the time the opinion was written, (since the time of Chief Justice Marshall as exemplified in *Gibbons*³¹), the principal was well established, which means that the reasoning could also have been interpreted as doctrinal. Still, Sutherland cited no specific case. Thus, the argument can be made that this assumption of

30. *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

31. *Gibbons v. Ogden*, 22. U.S. 1 (1824).

police power is tacitly structural, doctrinal, or even ethical if one were to view it as Sutherland taking for granted that police power remaining with the states and not the federal government is an ingrained part of the ethos of the American polity. With this background, the question therefore centered on if the ordinance was “unreasonable and confiscatory” under the state’s police power. From here, the justice explained that while zoning ordinances were of relatively modern origin, and because of the complex necessities of the day, the ordinances were needed and therefore permissible. Next, he needed to determine whether the scope of the ordinances was appropriate, especially regarding residential areas because that is where the plaintiffs claimed to be most harmed. For guidance on the question, he looked to the previous decisions of state courts. The practice of looking at state court decisions, which are non-binding on the Supreme Court, is fairly common and is a type of prudential (though in some sense also doctrinal) argument. It could also be considered a type of historical argument depending on when the cases were decided, though not under Bobbitt’s definition involving original intention. However, Sutherland also mentioned that the reports of commissions made up of experts which state that the zoning had many positive, tangible effects such as controlling development and providing fire-fighting services, which is an unmistakably blatant use of prudentialism. Finally, he stated that should be enough to prove that the ordinance is sound policy and therefore permissible and added that even if the ordinance was found by some not to be sound policy, enough doubt was cast to obligate the Court to defer to the legislature. And because it was these concerns rooted in a practical argument that convinced the Court to defer, the modality used by Sutherland in this case was also prudentialism.

In *Zahn v. Board of Public Works of the City of Los Angeles* (1927),³² a similar case was at issue also involving economic activity. This short opinion used an entirely doctrinal argument to rule in favor of the City

32. *Zahn et al. v. Board of Public Works of City of Los Angeles*, 274 U.S. 325 (1927).

of Los Angeles and their use of zoning ordinances. Citing *Euclid*, Justice Sutherland again upheld the constitutionality of the city's regulation. All that was necessary, and all that he did, was state the facts and apply to the holding for a result that is the textbook definition of doctrinal argument.

The notorious case *Adkins v. Children's Hospital* (1923),³³ for which Justice Sutherland wrote the majority opinion, is the first opinion in the category of civil rights issues. Congress had passed a minimum wage law regulating women and children and the Washington D.C. Children's Hospital challenged the statute under the Due Process Clause of the Fifth Amendment alleging a violation of the freedom to enter contract because it employed mostly women and did not want to pay the higher required wage. The Court sided with the hospital and cited the *Lochner* line of cases heavily to establish that there was such a thing as freedom of contract. In this sense, the opinion is doctrinal because it applied a previously found holding to this new situation. However, there are also some prudential aspects which were considered because Sutherland is extending the freedom of contract to cover minimum wage laws. He listed exceptions to the freedom of contract (since the freedom was not absolute) and went through each exception systematically to conclude that it would not make sense for minimum wage laws to fall under an exception. The call is tough because this sort of thing does happen in doctrinal cases often because no two sets of facts are exactly alike. However, no standard would ever get expanded if doctrinal cases used doctrinal reasoning exclusively and therefore this modality in this case can be called doctrinal prudentialism.

The final opinion examined is *Powell v. Alabama* (1932),³⁴ which is also within the civil rights issue area. Three young black males were tried and convicted of raping a white woman. Multiple claims under the Fourteenth Amendment were brought but the Court only chose to

33. *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923).

34. *Powell v. Alabama*, 287 U.S. 45 (1932).

hear the denial of counsel claim. Justice Sutherland, after quoting the record at great length to convey just how unfairly the boys had been treated, proceeded to try and determine whether or not it was acceptable. He first engaged in the practice of looking at what state courts had determined constituted denial of counsel, a practice we have already decided to be prudential. He then looked at the right to counsel, which was often denied, in the context of English common law, which is itself doctrinal, and how there was a distinct change in practice in the nascent United States; he found that twelve out of the original thirteen states rejected the common law rule in some form. After then considering through a historical lens what a hearing has looked like in the United States, Sutherland proceeded to conclude that the case did not rest on the Sixth Amendment and distinguished the case from *Hurtado v. California*,³⁵ which stated that the Sixth Amendment did not require a grand jury indictment in order for the state to prosecute someone for murder by citing cases that came after and were examples of exceptions to the broad rule established in *Hurtado*. At the end of the opinion, he returned in a broader way to examine what a hearing has and ought to look like in the United States. Though a variety of methods were present in the reasoning described above, the case actually turned on the use of ethical argument. It does not rest on the Sixth Amendment, or any other text or case, nor does it try to discern the original intent of the founding generation. Every method used was trying to show what a hearing characteristic of the ideals of the United States looks like and is not predicated on a singular specific claim about practice, history, or text. Therefore, Sutherland used ethical argument.

In trying to make sense of Justice Sutherland's use of modalities, the first important quality to point out is that there was no use of the textual or historical modalities.³⁶ Given that multiple

35. *Hurtado v. California*, 110 U.S. 516 (1884).

36. The same could be said for the structural modality, but it was not included here because the argument could be made that Sutherland was using a structural argument, assuming the police power granted

modalities were used in three of the four opinions one would have thought that there would, at the very least, be only one modality that is not employed. There certainly is a textual argument to be made in *Powell* seeing as the Sixth Amendment explicitly states that in criminal contexts all defendants “shall enjoy the right... to have the Assistance of Counsel for... defense”³⁷ but Sutherland did not use it. If further study were undertaken it would be important to note the usage of textual³⁸ or historical arguments. Other than this, we can note that the two modalities which were most present across both issue areas were doctrinalism and prudentialism. Notably, the only direct though non-explicit³⁹ use of ethical argument was in *Powell*. It would also be informative to look at all cases in which he used this type of argument and compare if the argument was used merely because the facts of that particular case were so compelling and fundamentally unfair, or if there were some other trait that predisposed the deployment of ethical argument for the justice. Looking for these sorts of patterns with the other modalities could provide insights to how Sutherland approached judging and if he consistently applied his methods from case to case, issue to issue, and in other categories.

Case #2: Justice Brandeis

The second set of opinions analyzed are those of Justice Louis Brandeis. Famous for his concise practicality, Brandeis is considered a liberal. The first opinion, coded as economic activity, is a statutory case

to the states discussed in *Euclid* was derived from doctrine but his own analysis of the relevant provisions in the Constitution.

37. U.S. Const. amend. VI.

38. No statutory cases were selected for Sutherland to stay in the selected issue areas so it is possible, and probably likely, that this pattern would not be replicated in a larger study.

39. Bobbitt implies that all ethical arguments are non-explicit in that no judge ever outright claims that they are appealing to the ethos of the American polity. This contrasts with how a judge might directly say that textual argument, for instance, should and will be used.

called *United States v. Union Pacific Railroad Company* (1919).⁴⁰ It concerned an act of Congress which exempted the military from paying full rates for the transportation of “troops of the United States” via railroads. However, the status of several groups, including discharged soldiers, discharged military prisoners, rejected and accepted applicants of enlistment in the Army, retired soldiers, and furloughed soldiers were disputed. For Brandeis, the case turned on the meaning of the term “troops.” To determine this, the justice looked at the legislative history of statute at issue, the meaning of the term in other federal statutes, and examined how the term “troops” had a fixed meaning since 1850. With all of this as context, he examined each group to determine if they are indeed troops of the United States and found that none of them are. In doing this, he used a prudential approach to consider whether the transportation of each category falls within the requirements of the state for paying the reduced rate. Therefore, the opinion utilized prudential textualism because Brandeis constantly referred to the text (a common practice when deciding a question presented by a statute), looked at each category, and decided whether it would make sense given the legislative history and fixed meaning of the text, to consider the groups as “troops of the United States” for the purposes of transportation.

Kellogg Company v. National Biscuit Company (1938)⁴¹ is the second economic activity opinion and it resolved a statutory case dealing with the trademark of the term “shredded wheat.” The justice did reference the relevant statutes passively and in footnotes but relied mostly on prior decisions of the Court and the practical considerations about whether unfair competition was really occurring because of another company’s use of the term. Brandeis decided that it was not and that no company had exclusive rights to the name or the form of a pillow-shaped biscuit. He explained that the two variants of biscuits were

40. *United States v. Union Pacific Railroad Company*, 249 U.S. 354 (1919).

41. *Kellogg Company v. National Biscuit Company*, 305 U.S. 111 (1938).

significantly different from each other that they could be distinguished in hotels or restaurants, even when served without their cartons as they were in only one instance. His reasoning centered around the doctrinal definition of unfair competition and these practical differences between the two kinds of shredded wheat which resulted in an opinion using doctrinalism and the statutory version of the prudential modality.

In the issue area of civil rights, the next opinion is in *Chaloner v. Sherman* (1917).⁴² The plaintiff in the case claimed that they were denied their “securities and moneys” by the defendant, who had been appointed by the Supreme Court of New York to manage his affairs because of incompetence. In addition to a jurisdictional challenge, the plaintiff challenged the appointment because he claimed that he had been denied due process under the federal Constitution. On the jurisdictional question, Brandeis decided that the New York courts had acted properly since the defendant received due process and he and his property were in New York and not Virginia, where the plaintiff claimed he was unfairly lured from. The question of due process was decided based on the treatment the plaintiff received throughout the process leading up to his committal to a mental hospital and the defendant’s acquiring of control of his affairs, which was laid out by Brandeis and demonstrated to be fair. The reason was because the plaintiff had been given adequate notice of the motions which triggered the proceedings and that, though the plaintiff was not in attendance at the proceedings, evidence was presented that signaled his attendance would be “detrimental” to his mental health. Because the decision that the New York courts acted appropriately rested in part on the determination that the due process requirement was met, it is fair to say that the entire decision rested on the constitutional due process question. This question was reached via the prudential modality with some doctrinalism because Justice Brandeis decided to reach the conclusion by looking at standards from past cases in addition to establishing that the practical needs of due process were met.

42. *Chaloner v. Sherman*, 242 U.S. 455 (1917).

The final opinion for Justice Brandeis is his majority opinion in *Yarborough v. Yarborough* (1933),⁴³ a case also in the civil rights issue area. It concerned the Full Faith and Credit Clause of the Constitution and involved the payment of child support, alimony, and divorce settlements. The father resided in Georgia while the mother and child resided in South Carolina; there were disputes about alimony payments and a South Carolina court ruled contradictory to a prior decision of a prior court. Several prudential concerns were addressed throughout the opinion, but ultimately the decision was entirely doctrinal. The case *Sistare v. Sistare*⁴⁴ established that the Full Faith and Credit Clause applied to an unalterable decree of alimony for a divorced wife and Brandeis expanded this principle to an unalterable decree of alimony for a minor child. By applying the *Sistare* principle to *Yarborough*, the Justice used a textbook definition of doctrinal argument.

A constant in all four of opinions is the use of prudential argument in some form, even if the decision of the case is not ultimately decided solely on those concerns. This is not unexpected as Justice Brandeis' reputation as a restrained, prudential judge precedes him.⁴⁵ Still, it would provide more insight if all of his opinions were examined, and we could pinpoint precisely how and when he prefers to employ this modality. It would also be advised to look at his opinions in the issue area of economic activity that are not statutory as it is likely to provide insight to his judicial approach. The sample of cases contained so much prudentialism that it is possible it did not capture his use of other modalities, though there were notable uses of the statutory analogues to historical and textual argument in the railroad case. Doctrinalism was also largely present in the cases

43. *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

44. *Sistare v. Sistare*, 218 U.S. 1 (1910).

45. Edward A. Purcell Jr., "The Judicial Legacy of Louis Brandeis and the Nature of American Constitutionalism," *Touro Law Review* 33 (2017): 5–50.

examined. Though none of the results from Justice Brandeis were unexpected, they probably do not show as complete a picture as the others since two cases in the same issue area were both statutory. Nevertheless, the findings are still valuable because they provide preliminary confirmation of our suspicion that Brandeis is favorable to pragmatic approaches and they show what would need to be accounted for in further rounds of study.

Case #3: Justice McReynolds

The next justice, the second and final conservative, is Justice James Clark McReynolds. He was also considered to be one of the “four horsemen” of the pre-New Deal Court. The first opinion which will be examined is from a statutory case in the issue area of economic activity, *Federal Trade Commission v. Gratz* (1920),⁴⁶ which decided what constitutes “unfair methods of competition in commerce.” The respondents, Gratz and two others, were merchants who had a complaint filed against them by the Federal Trade Commission for unfair methods of competition because, among other things, they refused to sell a certain product without compelling a customer to also buy another product. The phrase at issue was not defined by the statute and the meaning was contested. Writing for the Court, McReynolds reasoned that the actions of the respondents were reasonable for several reasons. First, he claimed that the language is not clearly applicable to practices which had been, up until that time, not considered to be unfair. Next, he claimed it was not possible that the words could have been intended to “fetter free and fair competition” as it had commonly been understood to bolster his previous point. And finally, after examining what the Commission claimed the merchants did, McReynolds concluded that they did nothing that “would justify the conclusion that the public suffered injury or that the competitors had reasonable ground for complaint.”⁴⁷ This process of

46. *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920).

47. Reading the opinion, it is not always clear how or where Justice McReynolds lays out the reasons for his conclusions. To the modern

decision-making is made up largely of two modalities: textualism and prudentialism. It is textual in nature because McReynolds is resting his argument on the meaning of words in the statute. Whether this is simply because the nature of the case, statutory, and complaint involved, which cited a specific portion of the statute creating the Commission, or is a preferred method is not clear. Regardless, when he claims that the merchants really did not do anything that caused the public to suffer, he is using a prudential argument because he is considering the effects of the actions of the respondents in a practical sense.

The next economic activity opinion is Justice McReynolds' dissent in *Nebbia v. New York* (1934)⁴⁸ in which the Court upheld a New York commission's practice of setting minimum milk prices. The justice disagreed with the Court's decision for multiple reasons. He began by citing several cases, including *Ex parte Milligan*,⁴⁹ *Schlesinger v. Wisconsin*,⁵⁰ and *Near v. Minnesota*⁵¹ among others, which emphasized, though often through dicta, that the government has generally not been allowed to interfere in the rights of business owners under the guise of an emergency. By citing *Adkins* and others, McReynolds noted that even in cases where businesses provided public goods like the one at issue, the Court did not interfere with their constitutional freedoms (presumably the Fourteenth Amendment freedom of contract) because of an emergency. Next, Justice McReynolds noted that because the powers were predicated on the existence of an actual emergency, they were perhaps once permissible. But because he

eye, some of his claims are highly contestable. However, because he rested his opinion of those arguments and we are focusing on the use of modalities, we need not put much emphasis on this point.

48. *Nebbia v. New York*, 291 U.S. 502 (1934).

49. *Ex parte Milligan*, 71 U.S. 2 (1866).

50. *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926).

51. *Near v. Minnesota ex re. Olson*, 283 U.S. 697 (1931).

Interestingly, Justice McReynolds dissented in this case but nonetheless cited the majority's principle in *Nebbia*.

doubted that an emergency existed at that point, the requirement was arbitrary legislative overreach. He pointed out that the expansion of this exception of government noninterference and the standard the majority put forward could have disastrous consequences for the freedom of contract, and stated that the majority's view contradicts views about Constitutional rights "since the beginning." Further, McReynolds considered how the minimum price could affect families who did not have the money to pay it and will be left without an essential product. Because of his reliance on previous cases to establish the concept of freedom of contract and its exceptions embedded in the Fourteenth Amendment and his examination of practical effects, such as whether there was actually an emergency and how the regulation would affect families unable to pay the minimum milk price, his reasoning is a form of doctrinal prudentialism.

The first case in the civil rights issue area for Justice McReynolds is his majority opinion in *Olin v. Kitzmiller* (1922).⁵² The case involved a Russian national seeking citizenship in the United States who asked a court to issue an injunction for Oregon to issue him a fishing license. He argued that Oregon's law which prevented non-citizens from obtaining the license was a breach of a compact formed between the states of Washington and Oregon, under the Constitution's Interstate Compact Clause, which was approved by Congress, and allowed for licenses to be given to citizens and those who declared their intent to become citizens. The Russian national claimed that the Oregon law was improper because the state did not receive the permission of Washington to deprive non-citizens who intend to become citizens of the ability to have a fishing license. Justice McReynolds stated that the issue of whether Oregon needed the permission of Washington to deprive non-citizens of the ability to obtain fishing licenses under the Interstate Compact Clause was the issue on which the case rested because all other questions were voided if it was found that Oregon did not need Washington's permission. He found that Washington's permission was not needed. By looking at the

52. *Olin v. Kitzmiller*, 259 U.S. 260 (1922).

“object and nature” of the agreement and the two state laws that enforced it, he determined that the purpose was to limit the class of persons who can obtain a license that the state cannot cross. The state could, however, make that limitation narrower without the need to consult the other state, which is what Oregon did in denying the license to the non-citizen. Because he positioned this question as determinative of the case as a whole, the rest of the claims brought were not considered.

It is somewhat difficult to determine which modality was most relied upon in this case because the opinion is short⁵³ and the reasoning given could be explained in multiple ways. One possible answer is that textualism is used; the text of the state laws and the agreement are quoted, albeit without much context, and McReynolds concluded that they do not preclude either state from limiting the status of persons eligible for a license just that they cannot expand it. An argument could also be made that McReynolds is employing a historical approach in part because he does refer to the intent of the laws and agreement, but this is a weaker argument because he does not cite any sort of legislative history relating to the compact or laws and refrains from using any sort of drafting history of the Interstate Compact Clause of the Constitution. Additionally, a structural interpretation of his argument could be made if we view McReynolds usage of the word “intend” in a different manner. He considers the “object and nature” of the provisions at issue and says that it is not possible that they could intend for the Russian national’s claim to be valid. If by object in nature the justice was citing the way in which the provisions of the compact interact with each other and the state laws, then he could have claimed that because of the way they are structured, the provisions and ways in which they interact could not allow a framework for the claim to be valid. As a matter of personal opinion, it seems that the structural claim

53. After stating the posture, facts, and citing the agreement and state laws, McReynolds used only two paragraphs to explain his decision which was primarily declaratory and not particularly explanatory.

is most likely, but it is important to note other plausible arguments do exist.

The final opinion for Justice McReynolds will be his dissent in the civil rights area case *Missouri ex rel. Gaines v. Canada* (1938).⁵⁴ The case involved a black student who attended an all-black undergraduate institution that did not have a law school. Consequently, the student applied to the University of Missouri Law School and was denied admission because of his race. The majority found that he was deprived of his rights under the Fourteenth Amendment; the justice, again, disagreed. He reasoned that it was unwise to disrupt settled state legislative policy, in this case segregation, and referred to several cases affirming a large amount of state authority in the realm of education. One of those referred cases specifically stated that federal intervention in education is only warranted when absolutely necessary. Because Missouri had for so long determined that educating races separately was beneficial, McReynolds thought it particularly unwise that the Court involved itself and took away the ability of the school to do what is best for the students. According to this logic, the only recourse for the law school is to shut down the school, which would disadvantage its current white students or break their long-held beliefs. (These abhorrent views are not surprising coming from McReynolds, a noted racist and anti-Semite.⁵⁵) He also points to the fact that the state offered to pay for a legal education out of state, which according to him indicated that the rights of black students were in fact considered. Though he acknowledged that the situation presented hard practical problems, he believed that because the state and school made a reasonably sufficient effort to allow the black student to obtain a legal

54. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

55. Lawrence S. Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach* (New York: Oxford University Press, 2008), 109. During oral argument for this case, the justice turned his chair backwards so he would not have to see the brilliant civil rights lawyer Charles Hamilton Houston argue for the black student that was denied admission.

education, the school should not be unduly burdened. Justice McReynolds predicated his decision on the principle that in the realm of education, the federal government should not insert itself unless absolutely necessary. He derived this principle using a doctrinal modality by citing previous cases supporting this and the rest of the opinion used the prudential modality to show that it really was not necessary in this case. This portion of the opinion was prudential because he placed much weight on the fact that the state had offered to pay for a legal education in another state, among other factors, which to Reynolds signaled that it was not necessary for the government to intervene.

The case of Justice McReynolds provides several valuable insights. First, *Olin* shows that this task is an inexact science. The determination of modality is often subjective and when analyzing a short opinion with minimal context, the task can become almost impossible. Justice McReynolds is not the only justice throughout the history of the Supreme Court who has written short opinions. It is true that with multiple coders in an expanded effort this problem may be less defined because multiple people can work together to decide and justify a particular label. Still, this is one factor to consider when exploring what value can be gained by studying modalities. Despite this pitfall, there are several patterns to be noted in the Justice's choice of modality. In three of the four cases, he used one modality to produce a question. In *Gratz*, the text was used to determine if what the merchants did was within the meaning of the relevant text as decided by the Court. In *Nebbia*, he used the doctrinal method to derive the freedom of contract and its exception which left him to decide whether the minimum price fell within an exception to that freedom. In *Gaines* he used the doctrinal modality again to state that the federal government should not be involved in education unless absolutely necessary and proceeded to explain whether or not it was necessary. Even in *Olin*, where the modalities were less clear, he still used the same framework for his argument: distilling the case to a question on which every argument depends and following that up by answering the question in the affirmative or negative. It is also worth noting that in

all the cases other than *Olin* the modality used to answer the question was prudentialism. If this pattern, derived from his use of modalities, is consistent in many of his other opinions it could prove an incredibly insightful lens for studying his approach to the law. But before we can adopt this technique as useful, a more comprehensive evaluation of his opinions will be needed, a process that could very well find that this preliminary pattern is not indicative of the complete body of Justice McReynolds' work.

Case #4: Justice Holmes

The final justice examined is the revered Justice Oliver Wendell Holmes. The first opinion in the economic activity issue area and is the justice's dissent in *Northern Securities Co. v. United States* (1904).⁵⁶ The case, simplified, involved two corporations which joined together to buy enough stock to take over another company and form what was essentially a monopoly. A suit was brought against this new entity and it was ultimately ordered to dissolve under an anti-trust statute by the majority. Holmes, joined by four of his colleagues, did not agree based on his reading of the statute. He explained that the case rested on him finding the meaning of some "not very difficult words" in the statute. Further, he noted that judges must only read English when interpreting statutes and only consider the consequences when the meaning of the words at issue are open to reasonable doubt. In this case, Holmes thought that the words did have a plain meaning and that there was not sufficient doubt to consider the consequences of the corporate action which would result in what is essentially a monopoly. The law does not say anything about competition, only that it could not be stifled with "contract" and "combinations," which is not what happened. This is a classic use of the textual modality and Holmes is explicit about this since it is a statutory matter at issue. While he did refer to the *E.C. Knight* case⁵⁷ and common law practices to bolster his

56. *Northern Securities Company v. United States*, 193 U.S. 197 (1904).

57. *United States v. E.C. Knight Company*, 156 U.S. 1 (1895).

conclusion in addition to pontificating on the nature of great cases making bad law, which are uses of non-textual modalities, the decision squarely rested on textualism.

The next opinion, also coded as economic activity, is Holmes' famous *Lochner* dissent.⁵⁸ The majority opinion held that a New York law regulating the maximum hours that someone could work in certain contexts violated the freedom of contract found in the Due Process Clause of the Fourteenth Amendment. Holmes did not agree with this assessment; he started by claiming that the opinion was based on an economic theory not accepted by a large part of the country and that it was not his role to decide if he agreed with it or not. According to him, his position on the issue has nothing to do with the majority's right, which he believed they lacked to "embody" their opinion in law. It is settled by the Court, in his opinion, what state constitutions and laws may regulate life in ways that people might think are "injurious" or "tyrannical" and which interfere with the freedom of contract at least as much as the provision at issue in the case. These examples may or may not be in line with "convictions" or "prejudices" of judges, but it is not the place of a judge to impose their preferred economic theory on the entire country, according to Holmes. He continued to say that the Constitution is "made for people of fundamentally differing views" and that something that one person finds "novel" or "shocking" should not and cannot affect judgment about whether a state adopting a certain position is inconsistent with the Constitution. Further, in his view, "liberty" as described in the Fourteenth Amendment would be perverted if it prevented the natural outcome of an opinion that is in the majority, unless a "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."⁵⁹ That last line in particular is indicative of ethical argument. Though Holmes referred passingly to concepts which could be considered textual, prudential, or even historical, the opinion as a

58. *Lochner v. New York*, 198 U.S. 45 (1905).

59. *Lochner v. New York*, 198 U.S. 45 (1905) at 76.

whole tried to appeal to the ethos of what the Constitution and American democracy stands for, what our “fundamental principles” are, and how they have come to be understood through our collective lived experience. Therefore, his decision rested on ethical argument.

The next opinion is Justice Holmes’ concurring opinion in *United States v. Reynolds* (1914),⁶⁰ a first civil rights issue area case. The dispute involved an Alabama law which allowed for the release of those sentenced to pay fines or costs but could avoid doing so if they agreed to work under a contract to pay off what was owed. However, a breach of that contract created another liability for which there could be separate punishment. The majority struck down this system under the Thirteenth Amendment and a statute passed by Congress to enforce the Amendment because it created a system of peonage that was impermissible. Holmes concurred in the judgement but wrote separately because he did not think that anything in the Thirteenth Amendment itself made the system that was set up unconstitutional. However, he agreed that under statute, which he thought Congress was authorized to pass under the Thirteenth Amendment, the system was not viable because the successive contracts and subsequent breaches were inevitable and that that outcome must have been intended by the laws. This process, taken together with the intentional outcome, is exactly what the statute forbids according to Holmes. Though the opinion is short, it is fairly reasonable to say that Holmes’ reasoning relied on a textual argument. He claimed that the Thirteenth Amendment said nothing about the system that was created and he read no more into it. However, the statute passed by Congress did and that was why he could not join the majority. It also should be noted that in considering the intended outcome of the system, Holmes flirted with using the prudential modality but never quite did because he was relating this outcome back to what was acceptable given the text of the statute.

60. *United States v. Reynolds*, 235 U.S. 133 (1914).

The final civil rights area opinion is the Holmes majority opinion in *Buck v. Bell* (1927).⁶¹ Writing for the Court, Holmes found that Virginia's forced sterilization of Carrie Buck, who the state claimed was mentally feeble, was constitutional. The procedure was challenged on the basis that it denied Buck her due process and equal protection under the Fourteenth Amendment. Holmes ruled that because the selection process was adequate, an opportunity for appeal was presented and the underlying action for which the due process was necessary was within the state's power the requirements of the Due Process Clause had been met. As for the Equal Protection Clause, its requirements were met because everyone living at the colony where Buck resided could have been subject to sterilization. For the equal protection claim, Holmes also cited a case finding compulsory vaccination allowable in certain contexts. He ended the opinion with the infamous phrase, "Three generations of imbeciles are enough."⁶² For the due process claim, Holmes used two modalities. First, he used a textual approach in finding that the term "due process" only constitute procedure. From there, Holmes described all of the procedural steps involved in the process of sterilization and implied that Buck received adequate process; because Holmes considered the practical elements of what occurred, he employed prudential argument.⁶³ Regarding the equal protection objection, he spent more

61. *Buck v. Bell*, 274 U.S. 200, (1927).

62. Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* (New York: Penguin Random House, LLC., 2016), 270. Not only is the line unnecessarily mocking and condescending, but it also is inaccurate (which is a trait not often attributed to the justice's writing). At the time, the word "imbecile" carried a specific meaning in a larger system of precise classification. Carrie Buck was in fact classified as a "Middle grade Moron" and not an imbecile.

63. There is also the possibility that Holmes is tacitly implying an ethical argument, assuming he is equating the procedure Carrie Buck received to what due process ought to look like in the United States.

words putting emphasis on the fact that equal protection was afforded because everyone at the colony was subjected to sterilization, which would be a prudential textualist argument because he relied on the fact that all at the colony received equal treatment. However, it seems that Holmes relied primarily on extending the principle found in the compulsory vaccination case, *Jacobson v. Massachusetts* (1905),⁶⁴ almost as if he were unsure whether the prudential reasoning was strong enough and needed bolstering through doctrinal argument.

It is clear Holmes was in favor of the textual modality as the argument of first resort, especially in statutory cases. Even in non-statutory cases, the justice often used textual argument in some form when applicable. And despite his confessed avoidance of prudentialism in statutory cases except when the text is unclear, he used this modality often and mostly in places where he reinforced his argument with other modalities, as in *Buck*. This would seem to square with his judicial philosophy which he espoused and evolved over multiple writings throughout his life.⁶⁵ He also has made the most use of Bobbitt's ethical argument of the four justices included in the study. This also makes sense in the context of his many writings and academic activities. A noted absence is the structural modality; this would be one observation to note in further study. If the structural modality is used sparingly in the opinions of Holmes, that could help us gain an additional understanding of how he operated on the bench.

Comparing the Justices to Each Other

After examining each justice individually, we now turn our attention to what, if any, patterns exist between the justices. To best demonstrate

However, since he does not directly cite what this ideal procedure would look like it is not included in the analysis above.

64. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

65. Morton Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), 109–44.

this, visual representations are necessary.⁶⁶ Figure A begins by showing which modalities were present in the opinions of each justice and how many different modalities were used by each.⁶⁷

<i>Justice (Ideology)</i>	Textual? (Y/N)	Structural? (Y/N)	Doctrinal? (Y/N)	Prudential? (Y/N)	Historical? (Y/N)	Ethical? (Y/N)	Total # of Modalities Used
Holmes (Liberal)	Yes	No	Yes	Yes	No	Yes	4
Brandeis (Liberal)	Yes	No	Yes	Yes	No	No	3
Sutherland (Conservative)	No	Yes	Yes	Yes	No	Yes	4
McReynolds (Conservative)	Yes	Yes	Yes	Yes	No	No	4

Figure A. Modalities used in the opinions of the cases examined.

66. There are multiple ways in which the use or lack of use of a particular modality by each justice and in each opinion could have been tallied. As shown, it is often the case that multiple modalities are used and sometimes one carried more weight than the others.

Though this method may need to be refined if completed on a larger scale, for the purposes of these preliminary findings if a modality was used at all whether alone or in conjunction with others, it is included. For cases where the determination of which modality was used could be disputed, my own view of the best way to characterize the modality is used with the understanding that a more comprehensive further study would require multiple coders.

67. The coding for each opinion is included in its description within each case study. For clarity, Appendix B, which shows the modality or modalities assigned to each opinion, is included at the end of this article.

The first notable pattern is that all the justices have either three or four modalities that they seemingly prefer to use. This could suggest a lot, but if replicated on a larger scale, would prove empirically that judges gravitate towards certain modalities. Another notable observation is the lack of use of the historical modality, but this is most likely because of the limited sample size and because the era studied is in a time before the prevalence of originalism. Still, it is almost certain that there are examples of the use of the historical modality from this era; if a larger study showed that it was rare, or at least less prevalent, this could have serious implications for originalists' claims that their approach has been used throughout the history of the Supreme Court. Studying the use of modalities on a larger scale could also provide us with context on what types of arguments were most prevalent during certain eras. In this instance, with cases ranging from 1904 to 1938, the two modalities which were most utilized were doctrinal and prudential. Because the principle of stare decisis is so fundamental to most judges, it is probably to be expected that the doctrinal modality will be used by almost every justice if the prevalence of prudentialism turns out to be vindicated in a larger study; that would certainly be an interesting lens with which to view decisions form around this time.

Other observations worthy of mention are that only conservatives used the structural modality and exactly one liberal and one conservative used the ethical argument. Is this a result of the sample selected, or is there another thread not considered here that ties together the views of Sutherland and Holmes on making ethical arguments? Similarly, were all liberals, or even the ones examined, adverse to the use of structural argument, or is this too a product of case selection?

The next visual, figure B, is a cross tabulation depicting how much each modality is used within each ideology. The total number of times a modality was used in the four opinions written by the liberals was fourteen and for the conservatives was fifteen. Therefore, each modality's percentage shows how many times it was used out of the total number of times any modality was used.

Liberal (Brandies, Holmes)

Textual	Ethical	Prudential	Doctrinal	Structural	Historical
4 of 14*	1 of 14	5 of 14	4 of 14	0 of 14	0 of 14
28.57%**	7.14%	35.71%	28.57%	0.00%	0.00%

* 14 is the total number of times one of the modalities were used throughout the eight opinions analyzed which were written by liberals

** All percentages are rounded

Conservative (McReynolds, Sutherland)

Textual	Ethical	Prudential	Doctrinal	Structural	Historical
2 of 15*	1 of 15	5 of 15	5 of 15	2 of 15	0 of 15
13.33%**	6.67%	33.33%	33.33%	13.33%	0.00%

* 15 is the total number of times one of the modalities were used throughout the eight opinions analyzed which were written by conservatives

** All percentages are rounded

Figure B. Number of times each modality was used in the opinions examined.

The charts from figure B are most useful when comparing the justices of like-ideologies to each other because each ideology has a different underlying denominator. The liberals use prudential reasoning in their arguments much more than any other modality: 35.71 percent of the types of modalities used were prudential. Another famously practical justice, Justice Stephen Breyer, is also considered to be a liberal. The connection between the use of prudentialism and those thought of as having a liberal ideology is another possible correlation that could be

further investigated though also could be the result of Brandeis' famously practical style being overrepresented. On the conservative side, both prudentialism and doctrinalism were used a third of the time, with the last third consisting of textual and structural modalities and one ethical argument. The two conservatives used five different modalities while the two liberals only used four. Though this potential pattern could have value, caution must be taken since the one that put them over the threshold of four to five was Justice Sutherland's ethical argument which was not replicated by Justice McReynolds.

One factor that could have skewed these percentages is the number of statutory cases analyzed, since textual arguments are often found in these situations. The conservative percentages, if they turned out to be representative of the whole, indicate that textual arguments and structural arguments are used around the same number of times. This may or may not be true, but to get a better understanding of how textual arguments are used, it would be beneficial for a subsequent study to be more deliberate with choosing equal amounts of statutory and constitutional cases.⁶⁸

Figure C shows that all of the modalities, except the historical modality since it was not used at all, were used in each issue area. If not a phenomenon produced by the sample selection, this could signal that issue areas, or at least the issue areas selected, do not affect which modality is used by a justice. A future study would not only need to expand the number of issue areas and opinions examined but also be less strict with them to see if another factor, such as whether a case involving a constitutional or statutory issue influences the choice of modality more than the issue area.

68. This variable may have to be reworked if the method is applied to non-justices of the Supreme Court.

<i>Issue Area</i>	Textual? (Y/N)	Ethical? (Y/N)	Prudential? (Y/N)	Doctrinal? (Y/N)	Structural? (Y/N)	Historical? (Y/N)
Economic Activity	Yes	Yes	Yes	Yes	Yes	No
Civil Rights	Yes	Yes	Yes	Yes	Yes	No

Figure C. Modalities used in the issue areas examined.

Another way to examine the data would be to see if there was a particular modality or modalities used by either liberals or conservatives when writing in a certain issue area. However, none of the findings in this study are conclusive because the number of modalities used by each category of ideology in each issue area was so small, thus, looking at which modalities the justices chose does not provide us even with a pattern distinct enough to present observations for further study. In order to explore whether these patterns exist or could be a useful analytical tool, a larger sample size must be analyzed.

Conclusion

It is clear that the study of modalities allows us to find some patterns which have the potential to speak to how a justice approaches a case before them and how those approaches compare to one another by a number of metrics. However, because of the small scale of this study, the usefulness of these patterns is open to question. The next step would be to conduct an intermediate study which would not be comprehensive but would be able to test if these patterns, now preliminary hypotheses, can be found on a larger scale and if they remain the same or differ from the ones found here. With more resources and time, this study should span more than one area, be more deliberate about analyzing statutory and constitutional cases, and sample from more of the Supreme Court Database's issue areas. It

could also use some of the Database's other factors such as the type of law or whether the case altered precedents as variables.

If the findings found here and in the intermediate study are not able to be replicated on a larger scale, then they are merely interesting bits of information only relevant to the small scale produced here. But if the findings can be replicated they could have a variety of uses. Analyzing the use of modalities of living judges still on the bench and empirically discovering, through more sophisticated methods than used in this article, which ones those judges prefer could give advocates who go before the judges a significant advantage by guiding advocates in how to frame their arguments (in terms of modalities) for each judge they might be arguing to. But more than this the ability to define patterns in the jurisprudence of a judge is particularly useful because, given this information, we can observe when judges deviate from that pattern. This possibility could open a host of other new opportunities for study and critique, which could be used in lots of different settings.⁶⁹ However, for the moment this is only speculation. If it turns out that these patterns cannot be replicated on a larger scale, it may be that this entire exercise is a parlor game with peripheral intellectual benefits.

69. For instance, the patterns and exceptions of modalities used by justices could be another way of attacking the question presented by the attitudinal model, without trying to find a scientifically sound way to read the minds of judges absent the ability to do just that.

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<i>Case</i>	<i>Author</i>	<i>Type of Opinion</i>	<i>SCDB* Case ID</i>	<i>SCBD Issue Area</i>
<i>Village of Euclid v. Ambler Realty Co.</i> (1926)	Sutherland	Majority	16683	(8) Economic Activity
<i>Zahn v. Board of Public Works</i> (1927)	Sutherland	Majority	16713	(8) Economic Activity
<i>Adkins v. Children's Hospital</i> (1923)	Sutherland	Majority	15897	(2) Civil Rights
<i>Powell v. Alabama</i> (1932)	Sutherland	Majority	17630	(2) Civil Rights
<i>United States v. Union Pacific Railroad Co.</i> (1919)	Brandeis	Majority	15078	(8) Economic Activity
<i>Kellogg Co. v. National Biscuit Co.</i> (1938)	Brandeis	Majority	18616	(8) Economic Activity
<i>Chaloner v. Sherman</i> (1918)	Brandeis	Majority	14710	(2) Civil Rights
<i>Yarborough v. Yarborough</i> (1933)	Brandeis	Majority	17794	(2) Civil Rights
<i>Federal Trade Commission v. Gratz</i> (1920)	McReynolds	Majority	15207	(8) Economic Activity
<i>Nebbia v. New York</i> (1934)	McReynolds	Dissent	17918	(8) Economic Activity
<i>Olin v. Kitzmiller</i> (1922)	McReynolds	Majority	15727	(2) Civil Rights

<i>Missouri ex rel. Gaines v. Canada</i> (1938)	McReynolds	Separate (Dissent)	18625	(2) Civil Rights
<i>Northern Securities Co. v. United States</i> (1904)	Holmes	Dissent	11820	(8) Economic Activity
<i>Lochner v. New York</i> (1905)	Holmes	Dissent	11956	(8) Economic Activity
<i>United States v. Reynolds</i> (1914)	Holmes	Concurrence	13984	(2) Civil Rights
<i>Buck v. Bell</i> (1927)	Holmes	Majority	16701	(2) Civil Rights

Appendix A. Cases Examined in this Study

*Supreme Court Database (Spaeth et al. 2020)

<i>Justice (Ideology)</i>	<i>Case</i>	<i>Modalities Used</i>
Sutherland (Conservative)	<i>Village of Euclid v. Ambler Realty Co.</i> (1926)	Doctrinal, Prudential, Structural
Sutherland (Conservative)	<i>Zahn v. Board of Public Works</i> (1927)	Doctrinal
Sutherland (Conservative)	<i>Adkins v. Children's Hospital</i> (1923)	Doctrinal, Prudential
Sutherland (Conservative)	<i>Powell v. Alabama</i> (1932)	Ethical
Brandeis (Liberal)	<i>United States v. Union Pacific Railroad Co.</i> (1919)	Prudential, Textual

Brandeis (Liberal)	<i>Kellogg Co. v. National Biscuit Co.</i> (1938)	Doctrinal, Prudential
Brandeis (Liberal)	<i>Chaloner v. Sherman</i> (1918)	Doctrinal, Prudential
Brandeis (Liberal)	<i>Yarborough v. Yarborough</i> (1933)	Doctrinal
McReynolds (Conservative)	<i>Federal Trade Commission v. Gratz</i> (1920)	Prudential, Textual
McReynolds (Conservative)	<i>Nebbia v. New York</i> (1934)	Doctrinal, Prudential
McReynolds (Conservative)	<i>Olin v. Kitzmiller</i> (1922)	Structural, Textual
McReynolds (Conservative)	<i>Missouri ex rel. Gaines v. Canada</i> (1938)	Doctrinal, Prudential
Holmes (Liberal)	<i>Northern Securities Co. v. United States</i> (1904)	Textual
Holmes (Liberal)	<i>Lochner v. New York</i> (1905)	Ethical
Holmes (Liberal)	<i>United States v. Reynolds</i> (1914)	Prudential, Textual
Holmes (Liberal)	<i>Buck v. Bell</i> (1927)	Doctrinal, Prudential, Textual

Appendix B. Modalities Assigned to Each Case Examined in this Study