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# Jurisprudential Regimes in Supreme Court Decision Making

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**W**e theorize that if law matters in Supreme Court decision making, it matters not as a mechanistic force that dictates decisions, but as an institutional construct created by justices who possess political attitudes. Jurisprudential regimes identify relevant case factors and/or set the level of scrutiny or balancing the justices will use. These jurisprudential regimes have the potential to make a significant difference in the decisions of the justices. We identify a candidate jurisprudential regime, content-neutrality, which appears to govern the general area of free expression law. The Court applies the strictest standard of review to regulations of expression that target the content or viewpoint of expression. Relying on a series of statistical tests using logistic regression, we find that the justices take seriously this jurisprudential regime.

**D**oes law influence the justices of the U.S. Supreme Court as they decide cases? Some leading scholars of the Supreme Court assert that law makes little difference. According to the most extreme version of this position, justices largely follow their personal ideological preferences—a view that the Supreme Court itself did much to enhance in *Bush v. Gore* (2000). If this is true, then the Supreme Court differs from a small legislative body only in the selection and tenure of its members, its technical rules of procedure, and its inability, at least formally, to initiate issues to consider. Whether or not courts generally, and the Supreme Court specifically, differ from legislative bodies has major implications for how we think about the role of courts and analyze their processes and outputs.

We contend that courts, including the Supreme Court, are different, and that part of this difference is the role of law in decision making. In this article, we describe and test a new approach to incorporating law into statistical models of Supreme Court decision making. At the same time, we do not reject the importance, or even the dominance, of attitudinal influences on the Court's decisions. However, we argue that one must move beyond the images of the role of law as a mechanistic, autonomous force to arrive at a legal model that is relevant at the Supreme Court level.

Segal and Spaeth (1993, 1994; Spaeth and Segal 1999), the leading proponents of the attitudinal model of Supreme Court decision making, argue that justices of the Court are free to decide cases solely in line with their policy (attitudinal) preferences and almost always do so decide. According to this interpretation the justices' freedom to pursue their own policy goals is due to their specific institutional situation: They possess life tenure, sit at the pinnacle of the

judicial hierarchy, seldom have ambition for higher office, choose which cases they will decide, and have little fear of being overturned by the elected branches of government, particularly in constitutional interpretation cases (Spaeth and Segal 1999). We do not dispute that the Supreme Court's institutional setting frees justices from the kinds of constraints that are faced by lower court judges, elected officeholders, or appointees serving either fixed terms of office or at the pleasure of some other officeholder. However, freedom from review or electoral accountability does not prevent the justices themselves from erecting other constraints that shape their decision-making processes and/or outcomes (Gillman 2001; Knight and Epstein 1996).

Almost 40 years ago, Martin Shapiro proposed "political jurisprudence" as an organizing principle for the study of courts and judicial decision making. By combining "political" and "jurisprudence" Shapiro (1964, 1968) sought to convey both that courts must be understood as part of the political and governmental structure and that courts differ from other political institutions because of their unique relationship to law. Scholars have marshaled impressive evidence that the justices and lower court judges seek to advance their own policy preferences (Cross and Tiller 1998; Segal and Spaeth 1993) and that the justices are sensitive to both internal and external strategic concerns (Epstein and Knight 1998; Wahlbeck, Spriggs, and Maltzman 1998). Largely lost in these developments is the other half of Shapiro's concept: jurisprudence. Judges and justices are undoubtedly political, but are they also jurisprudential? Courts and judges are certainly part of the political world, but they are also part of a distinctive legal culture (Grossman et al. 1982).

We look for the influence of law in the form of "jurisprudential regimes." Jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors (i.e., weighting the influence of various factors). Justices then apply regimes in subsequent pertinent cases. After a new regime is established, we expect case factors to matter to the justices in a manner distinct from their influence in cases decided prior to the establishment of

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the regime. Leaving jurisprudence out of the analytic framework fails to recognize both the distinctive nature of courts and the theoretical point that ideas and institutions matter. Ideas can take on a life of their own and become institutionalized because they serve to frame how people think about political issues, how they evaluate the actions of others, and how they try to persuade others to their own perspective.

### MECHANISTIC LAW OR LAW AS INSTITUTIONAL CONSTRUCT?

Segal and Spaeth (see also Brenner and Spaeth 1995) rely upon an extreme model of legal constraint. In their most extensive writing on the subject, they limit their focus to precedent and measure the influence of law in terms of justices' willingness to defer to precedent when it directly conflicts with their policy preferences (Segal and Spaeth 1996; Spaeth and Segal 1999). Elsewhere, their discussions of the influence of law are similarly mechanistic, focusing on either the "plain meaning" of statutes or the "intention" of the legal drafters (Segal and Spaeth 1993, 33–53).

Earlier political scientists saw law's influence in a more nuanced way. As Shapiro (1968, 71) observed,

[Even if] *stare decisis* does not dictate automatic results, . . . [that] does not mean that legal decision making is a form of free play in which every judge can do exactly what he pleases. . . . [H]e is constrained by the previous state of the law insofar as it is clear. Because it is never entirely clear he always has some discretion. And he is likely to find the law less and less clear and exercise more and more discretion as he finds that the old law is giving the bad results.

Nor does Segal and Spaeth's characterization of the role of law bear much relationship to the way in which legal scholars consider the impact of Supreme Court decisions. Typically these scholars do not talk about the Court creating precedents that define or predict outcomes of future Supreme Court cases. Rather, scholars ranging from Tribe (1988) to Posner (1987) focus on how the decision structures created by the justices will affect future decisions, both at the Supreme Court level and in the courts below. Central to these discussions are the categories and levels of scrutiny or balancing that should guide decisions: "compelling interest," "market participant," "incitement of imminent illegal action," "strict scrutiny," and "undue burden." These are important because of the Court's institutional role in the polity. As appointed members of a branch of government that lacks the electoral support of other democratically elected political actors, the justices must provide reasons for their decisions. They employ the concepts of legal categories and levels of scrutiny to explain and justify their decisions (Carter 1994).

Political scientists of the institutionalist school recognize that the Supreme Court is centrally a political institution interacting with other institutions. Those other institutions seek to anticipate the Court's action, either by trying to predict based solely upon the justices' policy preferences or by also understanding the analytic framework the Court is applying. While in some areas

such as capital punishment, prediction based solely on justices' preferences as illuminated by key leading cases might be most efficacious, in many areas patterns and categories of analysis described by the justices must be combined with the justices' preferences (Shapiro 1964, 40–3). For example, if the Court is applying a "rational basis test," the other political actors understand that the Court will likely defer to other political decision makers. One can argue that the Court's decision to apply such a deferential standard is a reflection of policy preferences, but there are other basic explanations, such as justices' recognition of the Court's institutional role within the larger governmental structure (Sunstein 1999), the problematic nature of some areas of law for ongoing judicial scrutiny (Shapiro 1964), and the body of practice that provides the foundation for law generally and the Court more specifically (Brigham 1999).

Thus, the central role of law in Supreme Court decision making is not to be found in precedents that predict how justices will vote in future cases. Rather, law at the Supreme Court level is to be found in the structures the justices create to guide future decision making: their own, that of lower courts, and that of non-judicial political actors. Shapiro (1968, 39) stated this succinctly: "[T]he opinions themselves, not who won or lost, are the crucial form of political behavior by the appellate courts, since it is the opinions which provide the constraining directions to the public and private decision makers who determine the 99 percent of conduct that never reaches the courts." As they write the opinions that justify their decisions, judges and justices do not mechanistically follow rules. Rather, they engage in case analysis—the process of analogical reasoning that involves parsing the issues in a case and referring to prior cases for guidance on acceptable alternatives. Sunstein (1999, 43) argues that case analysis allows judges flexibility but does not lead to unconstrained decision making. Precedents remove "certain arguments from the legal repertoire [which] simplifies analysis. . . . Most of the important constraints on judicial discretion [in interpreting the Constitution] come not from constitutional text or history, but from the process of grappling with previous decisions" (Sunstein 1999, 42).

Advocates of the attitudinal model point out that the justices create the law that guides their own decision making, so the law is itself a reflection of the justices' attitudes. We do not deny this. However, as others writing in an institutional vein have argued (see, e.g., McCann 1999), this begs the question. With the exception of the strict natural law perspective, all jurisprudential understandings of law see it as a human construct, including theories ranging from originalism (Scalia 1997) to positivism (Hart 1961) to political and normative interpretations of law (Dworkin 1996). That is, law, as a "cognitive structure" (Smith 1988, 91), is itself a *political* institution, created by men and women to impose constraints on themselves and others. As Brigham (1999, 20) observes, "Institutions share a capacity to order social life because people act as if they exist, as if they matter." Thus, as with other human-made institutions, law is created to serve a purpose, and people go along with the institution if they see its

purpose as worthwhile or if they are otherwise constrained by the institution. If the adherents of a pure attitudinal model wish to reduce law to nothing more than attitudes formally stated, the attitudinal model becomes tautological; attitudes drive decisions because every decision is made on the basis of attitudes. Our position is that attitudes influence the development of law, but law can also affect the decisions of the Court, and these effects are not purely attitudinal.

Law can be changed if the views of those charged with creating it change. This potential for change is true of all human-created institutions, but institutions differ in the ability of those possessing the power of change to make actual changes. The Supreme Court may have more freedom to make changes than many other institutions, but that does not mean that members of the Court persistently fail to abide by the institutional structures that define the Court's role and its range of potential action and decision making. This point reflects the fundamental insight of neoinstitutionalism: Political actors create institutions based on their policy goals, but those institutions then structure and constrain the behavior of the very political actors who created them.

## WHY DO JUSTICES USE THE LAW?

As we have argued, justices see the law that they make as providing guidance to other institutions in society. For that guidance to be effective, they must rely upon that same law as guidance to themselves in order to treat like cases consistently. The justices commonly hold consistent treatment of like cases as a goal, although they may differ in their individual treatment of this goal. They attempt to make their decision fit within the relevant analytic framework. They can generalize from the particular factors of the case at hand to the more general, consistent analytic framework that has applied to similar cases. Justices want to treat like cases alike based not simply on the results of previous cases, but on the principles that justify those results. Thus Dworkin (1978, 113) suggests that the "gravitational force" of precedent is explained by the "fairness of treating like cases alike." The justices are engaged in a process of reasoning about their judgments. As they do so, they make arguments that are based on more than personal policy preferences. They strive to reason in a generalizable manner that takes into account the points of view of other justices and other political actors, as well as their own views. They must reason in a way that makes sense to others; they cannot merely offer reflexive, first-personal rationalizations of their decisions (Nagel 1997). They engage in bargaining and accommodation with respect to the content of opinions, so the reasons they offer in opinions matter to the other justices (Wahlbeck, Spriggs, and Maltzman 1998). Appeals to law are means of achieving this goal. An additional reason for following the law is that competency in the language of the law is a prerequisite for making plausible arguments (Brigham 1978).

Because the justices use law to decide new cases that almost invariably differ from prior cases, they need to think of law as defining and refining decision structures rather than as creating rules in the form of "if  $X$ , then decide  $Y$ ." In its simplest form, a decision structure could be expressed as a regression-like equation:

$$\text{Decide } Y \text{ if } (b_1 X_1 + b_2 X_2 + b_3 X_3 + \text{etc.}) > k,$$

where this reads, decide  $Y$  if the weighted combination of factors 1, 2, 3, etc., exceeds some threshold. The decision structure is the definition of the relevant factors ( $X$ s), how they should be weighted ( $b$ s), and whether they exceed the threshold. For example, whereas the attitudinalist view of the analysis in *Shaw v. Reno* (1993) would be that it was only a rationalization for the conservative preferences of the majority, Bybee (1999, 221) argues that *Shaw* "did not merely provide a rationalization for political opposition to race-conscious redistricting." Rather, *Shaw* "offered a new set of terms in which the problem of minority representation could be understood. The resulting framework made a difference in how representative institutions were conceptualized and structured." More importantly, the framework guides not only those drawing district lines, but also the courts, including the Supreme Court itself, in assessing the constitutionality of districting plans.

Decision structures reflect the attitudes of the justices who create them and can be changed by justices who find them problematic, but they also structure *how* justices go about deciding cases even if they do not directly constrain the votes of justices. Decision structures reflect core understandings of the bases on which cases should be decided, the interests or goals to which deference should be shown in situations of conflict, and the relevant roles of governmental institutions. A broad concept that captures the role of decision structures and the idea that they change is that of "regime," or as we label it for our purpose, "jurisprudential regime."<sup>1</sup>

## JURISPRUDENTIAL REGIMES

### The Concept of Regime

In common parlance, the term "regime" is typically associated with a particular governing elite or, possibly, with a particular system of rule or government. Political scientists, in contrast, normally use the term in connection with institutional forms.

For example, in the literature of American political development, a regime defines a period marked by a combination of political content and the particular ways in which federalism and separation of powers operate in practice (Orren and Skowronek 1998–99, 690).

<sup>1</sup> In previous papers, we have employed the label "legal regime" rather than "jurisprudential regime." "Legal regime" has been widely used, with varying implied or explicit definitions; our search of the Westlaw journals and law review database produced more than 6,000 hits on the term "legal regime." The term "jurisprudential regime" has a much narrower (and less frequent—only 15 hits in the Westlaw database) usage.

It is the regime that “infus[es] institutions with meaning, purpose, and direction” (Orren and Skowronek 1998–99, 694), reflecting a combination of intellectual, political, and institutional forces (Polsky 1997, 153–4). More specifically, in recent work on the New Deal period,

Political regimes...appear as working arrangements among institutions fashioned by new governing cadres to elaborate their particular political commitments. As regimes transform new ideas about the purposes of government into governing routines, they carry on the reformer’s central contention as the political common sense of a new era, a set of base assumptions shared (or at least accepted) by all the major actors in this period. In this way, political regimes come to exercise an overarching influence over the affairs of state. (Orren and Skowronek 1998–99, 694)

Such regimes are not mechanistic forces. This neoinstitutional conceptualization of regimes integrates human agency with institutional explanations. Individuals create regimes, and regimes are vulnerable to changes at both the elite and the mass level.

Some scholars focusing on U.S. constitutional history have explicitly or implicitly applied a construct of regime to understanding broad patterns of Supreme Court decisions. Ackerman (1991, 59), for example, explores “constitutional regimes:” the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life. He argues that American history has been marked by three distinct constitutional regimes: the initial founding regime; the “Middle Regime,” which began with Reconstruction; and the “Modern Regime,” which began with the “switch in time that saved nine” in the 1930s and was epitomized by footnote 4 in *U.S. v. Carolene Products* (1938). This and other work makes it clear that the Court not only functions within constitutional regimes but also is central in creating those regimes (see, e.g., Smith 1997 and Whittington 1999). Similarly, Clayton and May (1999, 234) have called for application of the neoinstitutional concept of “political regimes” to the study of legal decision making. “The approach suggests that judicial attitudes and strategies in decision making are both constrained and constituted by the broader context within which the Court operates.”

The regime concept is also used extensively in the literature of international relations (Krasner 1983a; Hasenclever, Mayer, and Rittberger 1997). In that context, regime, or more specifically “international regime,” is customarily defined as “principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue area” (Krasner 1983b, 2). The core argument of international regime theory scholars is that nations must consider both policy goals and the regimes that govern particular sets of issues. Decision makers take into account national interest and national power in dealing with issues, but also assess the principles, norms, rules, and procedures that govern decision making on those issues. In the absence of anything like a regime, nations would simply pursue their own interests in whatever

way each believed appropriate. Furthermore, regimes are established by the states, particularly the more powerful states, which are then constrained by those very same regimes; the effect of the regimes is to overcome what would otherwise be major coordination problems (Young 1983).

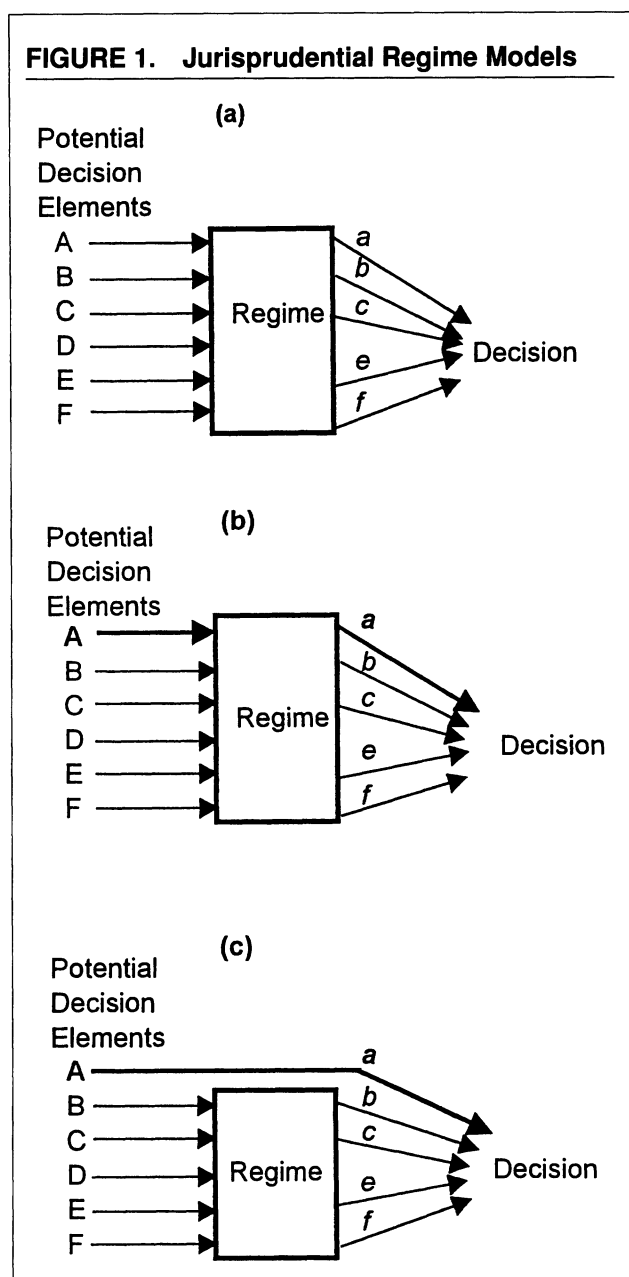
## Conceptualizing Jurisprudential Regimes

In defining the concept of jurisprudential regime, we step down one level from the broad notions of constitutional and political regimes used by Ackerman and by Clayton and May. Whereas constitutional and political regimes define expansive patterns of decision making and institutional interrelationships, jurisprudential regimes focus on more specific areas of Supreme Court activity. We draw upon one standard definition of jurisprudence: “a system or body of law; *especially* a body of law dealing with a specific issue or area” (*Merriam-Webster’s Dictionary of Law* 1996). Specifically, we conceptualize a jurisprudential regime referring to a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area. The decisions enunciating these key precedents serve to demarcate jurisprudential regimes that are established for a particular period of time. Fundamentally, jurisprudential regimes function as intervening variables between factors influencing justices’ decisions and the decisions themselves, much as international regimes function as intervening variables in the actions of nation-state actors (see Krasner 1983b).

The construct of jurisprudential regime fits squarely within the neoinstitutionalist perspective on politics generally and within recent institutionalist approaches to the study of the Supreme Court (see Clayton and Gillman 1999 and Epstein and Knight 1998). A jurisprudential regime is a social institution in the sense that law more generally is a human construct. As such, jurisprudential regimes rely upon, even as they structure, the actions of the legal decision makers. There is nothing about a jurisprudential regime that prevents a justice from ignoring it if the justice is so motivated. That is, unlike the physical law of action–reaction governing physical machines (i.e., an action *mandates* a reaction), human decision making generally, and legal decision making specifically, can and often does deviate from social and institutional constraints. This is why attitudes matter. However, justices need something like jurisprudential regimes to overcome what might otherwise be major coordination problems if each justice simply sought to advance his or her own policy preferences. Thus, law can be thought of as serving this coordination function, while at the same time the justices are deciding cases based primarily, but not solely, on their own policy goals.

Figure 1 represents jurisprudential regimes graphically. A justice’s decision involves inputs that we label “potential decision elements;” these include policy attitudes, factual elements, and strategic implications for other actors. One can think of these potential decision

**FIGURE 1. Jurisprudential Regime Models**



elements as unweighted as they are initially identified and defined. In Figure 1, the unweighted nature of the potential decision elements is indicated by the absence of any coefficients in the arrows going into the jurisprudential regime. Figure 1a shows the jurisprudential regime filtering these potential decision elements and transforming them into actual decision elements carrying some specific weight in influencing the justice's vote. In the end, not all potential decision elements actually affect the decision; this is indicated by the absence of one possible arrow emerging from the jurisprudential regime. That is, some of the potential decision elements do not emerge from the regime because they are deemed irrelevant. The weighting of the elements by the jurisprudential regime is reflected in the coefficients (italicized lowercase letters) attached to each of

the arrows leading finally to the decision. (The missing arrow could also be thought of as having a coefficient equal to zero.) If one were to place two jurisprudential regimes for a given area of decision making side by side, they would differ in which arrows emerged out of the regimes and/or in the weights associated with each.

We do not in any way reject the possibility that justices are influenced significantly, perhaps even primarily, by attitudes. For example, potential decision element A in Figure 1 could well be the justice's attitude, and one could redraw the model so that it emphasizes the heavy contribution of that element (as in Figure 1b). Furthermore, there is nothing that necessarily restricts the potential decision elements, whether or not attitudinal, to policy questions (e.g., criminal justice, economic policy, civil liberties policy). The factors might include "legal policy" goals (Baum 1997, 4) and "role attitudes" (Gibson 1978). Nor is anything in this framework inconsistent with the view that justices are constrained by institutional and strategic concerns such as the need to obtain agreement from four additional colleagues to secure a majority in favor of the justice's position (Epstein and Knight 1998; Murphy 1964) or the desire to avoid overturning of decisions by acts of Congress (Marks 1989; but see Segal 1997). While Figures 1a and b have all potential decision elements filtered through the jurisprudential regime, this need not be the case. Some potential decision elements might influence the decision directly, without any mediation by the jurisprudential regime. Judicial attitudes might be one such element; the position of the Solicitor General as a party or *amicus* might be another. Figure 1c shows a further modification of the jurisprudential regime model that allows for decision elements unmediated by the jurisprudential regime.

The key to validating the existence of jurisprudential regimes is change by the Supreme Court in basic factors associated with decision making in a particular legal area. Typically such changes become the focus of discussion in commentary on the Court's decisions, and one can rely upon such commentary to identify "candidate regimes" (i.e., hypotheses about precedents constituting regimes for certain periods). One can then use these candidate regimes to test whether the kinds of changes in decision making the regimes model would lead one to expect do happen. Such tests should be straightforward: The influences of case elements on the justices' decisions should vary across regimes, and the factors influencing justices' decisions should change consistently with regime breaks.

What the regimes approach allows that other institutionalist approaches have not succeeded in doing is incorporating a role for law in testable models of the justices' votes. This is not to suggest by any means that institutionalist analyses have neglected the role of law; quite the opposite is the case, as reflected in work such as that by Gillman (1993) and Smith (1988). However, attitudinalists would likely dismiss this work as lacking rigor. And as Segal and Spaeth (1993) point out, even statistical models of Supreme Court decision making that have utilized case characteristics that might

be deemed to have a legal basis to predict Supreme Court decision making (see George and Epstein 1992 and Segal 1984) are not satisfactory. Such variables are not unambiguously legal; they may also matter for attitudinal reasons. For example, George and Epstein (1992) find that Supreme Court justices' votes in capital punishment cases are shaped in part by the case characteristic of whether the punishment is proportional to the crime, a characteristic based on Supreme Court precedent. However, a justice's attitudinal disposition could also influence whether this factor mattered. With the exception of some work on the U.S. Courts of Appeals (Songer and Haire 1992) and state supreme courts (Traut and Emmert 1998), scholars have failed to assess how precedents can condition the influence of case characteristics over time; our approach is able to overcome the shortcomings of prior case characteristic or fact pattern analyses of the Supreme Court by doing just this.

## OPERATIONALIZING JURISPRUDENTIAL REGIMES

Freedom of expression law is an area where the justices have established a coherent legal framework for decision making, and this is the area in which we test our theory.

### Why Select Freedom of Expression Cases?

Free expression cases constitute a fair test of jurisprudential regimes for several reasons. Free expression law is an area that allows room for attitudes to operate. The great diversity of speaker identities in free expression cases increases the potential for the attitudes of particular justices to matter. Free expression law covers criminal, civil, labor, and regulatory law. It also covers private suits, government denials of benefits or opportunities to speak, and cases where the government fires employees or disciplines lawyers. This breadth of cases avoids the problem of testing only criminal cases, for example. Limiting analysis to one type of cases may skew the likelihood that the justices vote consistently with a legal or attitudinal explanation.

The trend toward a more conservative Court membership begins around the time that the speech-protective (i.e., liberal) content-neutrality regime was established in the 1972 companion cases *Chicago Police Department v. Mosley* and *Grayned v. Rockford*. Testing a liberal regime that is instituted as the Court is becoming more conservative provides an even more challenging test for regime theory than if we were to test a conservative regime established at this time.

### Identifying Content-Neutrality as a Candidate Regime

To identify a candidate jurisprudential regime for freedom of expression law, we looked for key precedents that established which case factors are relevant for free expression decision making and/or set the level of

scrutiny or balancing that the justices are to employ in assessing those case factors.<sup>2</sup> The relevant case factors frequently require interpretation; *Grayned* and *Mosley* ask whether the law at issue regulates the content of expression.<sup>3</sup> The separate question of whether the regime was influential, rather than merely the subject of scholarly commentary, we sought to answer through statistical analysis. We also required that the candidate regime should have been adopted by at least a five-member majority of the Court.<sup>4</sup> To help identify candidate regimes, we relied on four constitutional casebooks with a variety of political perspectives (Kmiec and Presser 1998; Shiffrin and Choper 1996; Smolla 1994; Tribe 1988) that cover free expression law in detail. Such commentary is particularly useful because it is external to the Court. All four recognized the content-neutrality jurisprudence as identifying relevant case factors and setting the level of scrutiny in free expression law, and three of the four casebooks specifically linked *Grayned* and/or *Mosley* to the content-neutrality regime.

Thus, we hypothesize that the jurisprudential regime that currently applies to most cases that raise a free expression claim is based on the principle of content-neutrality. Tribe's (1988) two-track interpretation of the general free expression regime suggests that the Court asks whether the regulation in question is content-based (aimed at the communicative impact or viewpoint of the expression) or content-neutral. According to the Court, content-based regulations merit the most rigorous scrutiny and are unlikely to be sustained, because they are at odds with a core principle of the First Amendment as it pertains to freedom of expression. Content-based, or track one, regulations are subject to strict scrutiny: they must be narrowly tailored to serve a compelling government interest. A challenged regulation is not narrowly tailored if the government could have used a less restrictive regulation that would have achieved the government interest. Expression governed by content-neutral (track two) incidental, time, place, or manner regulations receives less constitutional protection.<sup>5</sup> These regulations are assessed according to intermediate scrutiny: They must be narrowly tailored to serve significant government

<sup>2</sup> See Appendix A for a discussion of how to identify a candidate regime.

<sup>3</sup> We use the term "case factors" rather than the label "case facts," which is commonly used in statistical models of decision making, because we acknowledge the interpretive aspect of these factors. See Gillman 1999 on interpretive neoinstitutional approaches to Supreme Court decision making.

<sup>4</sup> As an initial step, we traced the evolution of a potential regime back to the earliest precedent in which the regime received the support of five justices. This involved immersion in the casebooks written by scholars in the free expression area to get a sense of the content of the regime and the names of key cases that follow it. We then used Findlaw's collection of Supreme Court case law with hyperlinked citations (Findlaw.com 2001) to trace the evolution of the regime backward in time to the foundational precedent.

<sup>5</sup> Incidental regulations are regulations of behavior or conduct rather than expression but have incidental effects on expression. Time and place regulations concentrate on the circumstances in which expression occurs. Manner regulations deal with the mode of expression, such as limits on decibel levels.

interests. This standard of review is quite protective of expression, but not as protective as the track one standard. The Court formally established the two-track regime in the *Mosley* and *Grayned* 1972 companion cases, striking down attempts to prohibit all picketing outside of schools except for labor picketing as content-based regulations that were not narrowly tailored. However, the Court also upheld a regulation of noisy picketing outside of schools during school hours as narrowly tailored and content-neutral. The vote in each case was nine-zero, with three concurring votes.

Identifying which cases are the regime-defining cases is a fairly interpretive process. To give readers a better sense of how we identify the cases that define the start of the regime, we engage in the following discussion of why these cases stand out from other ones. In several important decisions prior to *Mosley* and *Grayned* the Court started to use the categories and concepts that it developed more fully in *Mosley* and *Grayned*. As early as 1941, in *Cox v. New Hampshire*, the Court mentioned the time, place, and manner categories. At that point, however, those categories were not clearly linked to a standard of review. In *N.A.A.C.P. v. Button* (1963), the Court applied a stringent standard of review to laws that abridged the First Amendment, requiring that such laws be justified by a compelling government interest and be written precisely to minimize intrusion upon First Amendment freedoms. However, the Court did not elaborate whether content-neutral regulations should be treated differently. In the first of two *Cox v. Louisiana* (1965a) decisions, the Court overturned a civil rights leader's convictions for disturbing the peace and obstructing a public passageway, because those convictions discriminated against him based on the content of his expression. However, the Court did not apply a standard of review. In the second *Cox v. Louisiana* (1965b) decision, announced the same day, the Court rejected the argument that a law that prohibits picketing near courthouses is unconstitutional on its face. Although this case would have been a suitable vehicle for explaining the different treatment of a content-neutral place regulation compared to a content-based regulation, the Court did not use it as such.

Not until the *Mosley* and *Grayned* decisions did the Court more fully develop the content-neutrality regime. Several key points emerged from *Mosley* and *Grayned*. First, a regulation that appears to be a time, place, or manner regulation is not necessarily content-neutral, such as the ordinance banning all protests except labor protests outside schools; the Court will scrutinize time, place, and manner regulations to be certain that they are content-neutral. Second, content-based restrictions of expression are more likely to be unconstitutional than content-neutral regulations. Finally, even if the state regulates in a content-neutral manner, it must also do so in a precise manner, so that the regulation does not restrict more speech than is necessary to achieve the government interest. We hypothesize that after the *Grayned* regime was established, expression that is governed by both content-based and content-neutral laws was more protected than before, although expression regulated in a content-neutral

manner should not have been as well protected as expression restricted by content-based regulations.

There are two important exceptions to the two-track regime. First, cases must meet the threshold of First Amendment protection. Cases in which free expression is not abridged or there is no government action do not invoke the protection of the First Amendment. The other exception is that certain regulations of expression receive less rigorous scrutiny because the Court has recognized specific justifications for regulating these types of expression that limit the applicability of the two-track regime.<sup>6</sup> These less protected categories include commercial speech (*Central Hudson Gas & Electric Corp. v. Public Service Commission* 1980), obscenity (*Miller v. California* 1973), broadcast media expression (*Federal Communications Commission v. League of Women Voters of California* 1984), expression in non-public forums (*Perry Education Association v. Perry Local Educators' Association* 1983), expression in schools (*Hazelwood v. Kuhlmeier* 1988), picketing of secondary sites by labor unions (*Longshoremen v. Allied International* 1982), speech in a private forum against the will of the owner of the property (*Hudgens v. National Labor Relations Board* 1976), and libel against private figures (*Gertz v. Robert Welch, Inc.* 1974).

Identifying a candidate regime is merely the first step toward assessing the claim that the justices take the regime seriously. To assess whether the regime is influential, we test a series of logistic regression models.

## ANALYTIC STRATEGY AND STATISTICAL METHOD

The core hypothesis derived from the jurisprudential regime model is that the factors that influence justices' decisions for a particular area should vary across jurisprudential regimes. The results of statistical models predicting decisions before and after the establishment of a two-track regime should differ in significant and meaningful ways. Testing the two-track regime involved the following steps.

1. We first identified and coded, or extracted from existing data sets, the variables that were expected to account for decision making. These variables include the justices' *attitudes*, the *identity* of the speaker, the *party* acting against the speaker, and the type of *action* taken against the speaker. In addition, jurisprudential factors (*jurisprudence*) were coded, such as whether the regulation of expression was *content-based* or *content-neutral*.
2. Next, we estimated statistical models across, before, and after the regime changes and compared the results to ascertain whether they support the core hypothesis. The key statistical test of regime-based change is a variant of the well-known Chow test (Hanushek and Jackson 1977) of differences in regression results across sets of data. Our analysis uses

<sup>6</sup> We are not claiming that the Court never strikes down content-based laws in these areas. Rather, the Court applies less speech-protective standards of review to regulations in these areas than it does to typical content-based laws.



logistic regression, and the computation of the test of change is consequently based on features of logistic regression.<sup>7</sup>

3. The next step involved estimating additional models to rule out the major alternative explanation, that change over time can be explained entirely by personnel (and hence attitudinal) change (Baum 1992). This involved reestimating the models while limiting the justices included to those who were on the Court at the time of the regime change.
4. One important test of our argument is whether the influence of variables specifically associated with the regime (“jurisprudential variables”) changes as regimes change. To test for changes in the influence of these variables (content-based, content-neutral, and *threshold not met*), we estimated a model including all variables plus interaction terms with the regime dummy variable for nonjurisprudential variables; we then added interaction terms for the jurisprudential variables to the model and determined whether these interactions as a set were statistically significant. We then repeated this “jurisprudential variables test” limiting our analysis to those justices on the Court at the time of the hypothesized regime change.
5. Finally, we performed a sensitivity analysis by trying alternative annual time breaks. If the chi-square statistic for the regime break was high relative to the other annual breakpoints, we would have strong confirmation of a regime that shaped the influence of the jurisprudential variables. This sensitivity analysis was also reestimated while controlling for change in personnel.

We coded all cases from 1953 to 1998 that presented a free press, free expression, or free speech issue, according to the U.S. Supreme Court Judicial Database (Spaeth 1999) and Westlaw. A case that raised a free expression issue was included even if a majority of the Court failed to decide the free expression issue; otherwise, the Court’s refusal to address controversial First Amendment issues could bias the data set to cases for which jurisprudential regimes were more likely to matter. We selected all orally argued cases for which the Court issued written opinions, including *per curiam* opinions. We excluded cases with tie votes. We mainly used U.S. Supreme Court opinions, but we supplemented these data with lower court opinions in *per curiam* cases.<sup>8</sup>

## MODEL SPECIFICATION AND RESULTS

Our statistical model of the *Grayned* regime includes five types of variables: the attitudes of the justices, jurisprudential factors, and other factual elements (i.e., the type of action taken against the speaker, the party acting against the speaker, and the identity of the

speaker). To address validity and reliability concerns, in Appendix B we provide examples of coding rules and information on intercoder reliability and validity. We include the attitude variable to assess the merits of the dominant explanation of Supreme Court decision making, the attitudinal model. We include four jurisprudential variables that represent the basic parameters of a free expression regime: whether a regulation of expression is content-based, content-neutral, a regulation of a less protected category, or a regulation that does not invoke the protection of the First Amendment due to a lack of state action or because expression is not abridged (threshold not met). We consider the insight of the strategic model that the justices sometimes take into account the preferences of other political institutions. Given the strategic influence of Congress and the Solicitor General, the federal government should generally fare better before the Court than other parties (Epstein and Knight 1998; McGuire 1990). To test this hypothesis, we take into account the party acting against the speaker (e.g., *federal government*, *state government*, *local government*, party involved in *education*, *private party*, or *other*). We also consider the type of action taken against the speaker (e.g., *civil action*, *criminal action*, *disciplinary action* against a lawyer, causing a speaker to *lose employment*, administrative denial of benefits [*deny benefit*] or an opportunity for expression [*deny expression*], or another type of *regulation*). The justices may be less sympathetic to criminal prosecutions of speakers and denials of opportunities for expression than they would be to taking away government benefits or employment. There are not strong justifications for why these factors would influence the justices, but they are worth evaluating to discount alternative explanations for voting change.

We also include speaker identity variables (e.g., *politician*, *racial minority*, *alleged communist*, *military protester*, member of *business*, member of *religious group*, *print media*, *broadcast media*, or *other*). The policy goals of the justices may influence their attitudes about particular groups of speakers and individual speakers and may influence the willingness of the justices to protect civil liberties.<sup>9</sup>

Table 1 shows results for models involving the votes of all justices in all cases, cases decided before *Grayned*, and cases decided after *Grayned*.<sup>10</sup> Table 1 also shows

<sup>9</sup> Three distinct groups of scholars support this theoretical point. First, public opinion scholars have defined political tolerance as “a willingness to permit the expression of those ideas or interests that one opposes” based on the observation that people are inconsistent in their willingness to protect the civil liberties of members of different groups (Sullivan, Piereson, and Marcus 1979, 784). Second, some Critical Legal Studies scholars suggest that the attitudes of Supreme Court justices regarding whether to support the free expression rights of dissidents such as communists and war protesters vary from justice to justice and waver according to historical events, shifts in societal consciousness, and shifts in power relations (Kairys 1990). Finally, some Critical Race Theorists submit that racial attitudes may also influence free expression decision making (Matsuda, Lawrence, and Delgado 1993).

<sup>10</sup> SPSS 9.0 commands and the data are available on the World Wide Web at <http://www4.gvsu.edu/richardm/>. We excluded the *Grayned* and *Mosley* cases from all statistical models.

<sup>7</sup> See Appendix C for specification of how we performed the Chow test.

<sup>8</sup> See Appendix B for information on the validity of coding Supreme Court opinions.

**TABLE 1. *Grayned* Content-Neutrality Regime and Supreme Court Free Expression Votes**

Predictor	All justices			<i>Grayned</i> justices		
	All	Before	After	All	Before	After
Attitudes of justices	-1.07** (0.06)	-1.21** (0.13)	-1.06*** (0.07)	-1.15** (0.06)	-1.39** (0.18)	-1.15*** (0.07)
<i>Grayned</i>	-0.35*** (0.09)			0.06 (0.12)		
Jurisprudence (Less protected—base)						
Threshold not met	1.30** (0.23)	3.47** (0.76)	0.70** (0.26)	0.85** (0.26)	3.42** (0.88)	0.48 (0.28)
Content-based	-0.74** (0.09)	-0.06 (0.18)	-1.03*** (0.11)	-0.94** (0.11)	-0.27 (0.29)	-1.16*** (0.13)
Content-neutral	0.44** (0.14)	1.93** (0.35)	0.05 (0.16)	0.40* (0.18)	1.69** (0.52)	0.16 (0.20)
Action (Civil—base)						
Criminal	-0.38** (0.11)	-0.22 (0.21)	-0.51*** (0.14)	-0.61** (0.15)	-0.38 (0.34)	-0.65*** (0.17)
Deny expression	-0.39** (0.12)	-0.62* (0.30)	-0.58*** (0.14)	-0.57** (0.16)	-0.64 (0.45)	-0.77*** (0.17)
Deny benefit	0.61** (0.15)	0.69** (0.26)	0.56** (0.19)	0.46* (0.19)	0.63 (0.42)	0.32 (0.22)
Disciplinary	-0.82** (0.24)	-0.01 (0.60)	-1.12*** (0.26)	-1.14** (0.29)	-5.72 (7.62)	-1.18*** (0.31)
Lose employment	0.33* (0.17)	0.31 (0.27)	0.45 (0.24)	0.06 (0.22)	-0.31 (0.47)	0.18 (0.27)
Regulation	0.05 (0.19)	0.28 (0.37)	-0.24 (0.23)	-0.25 (0.23)	1.26* (0.58)	-0.72** (0.25)
Government (State—base)						
Other	0.17 (0.48)	-3.37 (13.50)	0.47 (0.50)	0.12 (0.54)	-3.98 (22.24)	0.47 (0.56)
Private	0.31 (0.16)	-0.29 (0.32)	0.54*** (0.20)	0.20 (0.20)	-0.45 (0.52)	0.35 (0.24)
Education	-0.11 (0.19)	0.00 (0.35)	-0.25 (0.23)	-0.38 (0.24)	-0.05 (0.54)	-0.51 (0.28)
Local	-0.01 (0.10)	0.00 (0.18)	0.03 (0.12)	-0.08 (0.13)	-0.46 (0.30)	0.03 (0.15)
Federal	0.47** (0.08)	0.82** (0.15)	0.28** (0.11)	0.51** (0.11)	0.78** (0.25)	0.37** (0.14)
Identity (Other—base)						
Politician	0.10 (0.30)	— <sup>a</sup>	0.10 (0.31)	0.03 (0.33)	— <sup>a</sup>	0.09 (0.34)
Racial minority	-0.60** (0.15)	-0.26 (0.20)	-0.70* (0.29)	-0.65** (0.22)	0.03 (0.32)	-1.10** (0.36)
Alleged communist	-0.12 (0.13)	-0.25 (0.17)	-1.49* (0.67)	-0.27 (0.20)	-0.23 (0.29)	-2.79** (1.06)
Military protester	0.54* (0.21)	0.68* (0.28)	0.24 (0.34)	0.53* (0.27)	0.81* (0.41)	0.48 (0.40)
Business	-0.33** (0.10)	0.24 (0.22)	-0.66*** (0.13)	-0.53** (0.13)	-0.14 (0.35)	-0.84*** (0.15)
Religious	-0.69** (0.19)	-1.36** (0.38)	-0.66** (0.24)	-0.68* (0.29)	-1.43 (0.74)	-0.50 (0.34)
Print media	-0.36** (0.12)	-0.81** (0.27)	-0.34* (0.15)	-0.71** (0.15)	-2.06** (0.53)	-0.63*** (0.17)
Broadcast media	-0.03 (0.14)	1.44** (0.41)	-0.19 (0.15)	-0.36* (0.18)	1.27* (0.57)	-0.45 (0.19)
Constant	0.42** (0.16)	-0.34 (0.27)	0.53** (0.18)	0.51* (0.21)	-0.18 (0.41)	0.90*** (0.21)
$\chi^2$ (df)	877.22** 24	344.34** 22	572.26*** 23	753.78** 24	214.76** 22	538.23*** 23

(continued)

TABLE 1. (Continued).

Predictor	All justices			Grayned justices		
	All	Before	After	All	Before	After
$R^2$	0.13	0.14	0.14	0.18	0.21	0.18
% correctly predicted	68	73	68	72	77	71
% reduction in error	24	21	32	34	17	39
$N$	4,986	1,991	2,995	3,056	878	2,178
Chow test $\chi^2$	124.68,*** 21 df			113.16,*** 21 df		

Note: Vote is coded so that 1 = anti-expression rights and 0 = pro-expression rights. Entries are unstandardized logistic regression maximum-likelihood coefficients. Standard errors are in parentheses. \* $p < 0.05$ , \*\* $p < 0.01$ , \*\*\* $p < 0.001$  (two-tailed).  
<sup>a</sup>Parameter could not be estimated due to lack of variation.

results for these three models with only the votes of those justices on the Court at the time of *Grayned*.<sup>11</sup> In all of the models presented in Table 1, including those that control for personnel change, the attitudes of the justices are highly significant. The more liberal a justice is, the more likely he or she was to vote for the rights of speakers.

Our main concern is how the parameters are conditioned by the *Grayned* regime.<sup>12</sup> For the models that included the votes of all justices, there are significant differences in the influence of both jurisprudential variables and other variables depending on whether the cases were decided before or after *Grayned* ( $\chi^2 = 124.68$ , 21 df,  $p < 0.001$ ). To control for personnel changes, we restricted the analysis to justices sitting on the Court at the time of the *Grayned* decision. The test statistic continues to be consistent with the idea that *Grayned* is an influential jurisprudential regime ( $\chi^2 = 113.16$ , 21 df,  $p < 0.001$ ). It is very unlikely that the differences in the before and after models are a result of the change in the membership of the Court. More specifically, the significance and direction of the coefficients of some nonjurisprudential variables change before and after *Grayned*.<sup>13</sup> For example, racial minorities, alleged communists, and businesses were likely to fare better after *Grayned*.

In the next step we considered whether *Grayned* significantly conditioned the influence of the jurisprudential variables. Using the jurisprudential variables test described above, the chi-square (46.71, 3 df) for the interaction of the jurisprudential variables with the *Grayned* dummy is significant at  $p < 0.001$ . Even after controlling for personnel changes, we observe a chi-square (21.82, 3 df) that is significant at  $p < 0.001$ . As for the individual jurisprudential variables, one of the most striking results is that the coefficient for content-based regulations is insignificant before and significant

after *Grayned*. This indicates that after the adoption of the speech-protective part of the regime that applies to content-based regulations, the justices were likely to be more supportive of speakers who were regulated based on the content of their speech relative to speakers whose expression fell within the less protected categories.<sup>14</sup> In addition, the content-neutral coefficient is significant before, but insignificant after, *Grayned*. The speech-protective part of the regime that applies to content-neutral regulations made it harder for the government to regulate such expression after it was adopted and made it less probable that the justices would vote for the government in track two cases. As expected, however, the justices were more likely to uphold content-neutral than content-based regulations. The models that control for change in personnel confirm all of these observations.

Our final step was the sensitivity analysis, which considered the strength of the chi-square statistic in the jurisprudential variables test relative to the chi-squares generated by a series of alternative annual breakpoints before and after the regime breakpoint.<sup>15</sup> The results of the sensitivity analysis are shown in Figure 2. The chi-square associated with the *Grayned* regime breakpoint is quite high (46.71, 3 df,  $p < 0.001$ ) and is the fourth highest of 32 splits tested. Although it is not the highest, the chi-squares that are higher than that for *Grayned* (those associated with the breakpoints for the Court's 1967, 1968, and 1972 terms) are clustered around the time of *Grayned*, which was decided during the 1971 term. In addition, the general trend in the data provides reasonably strong confirmation that *Grayned* is an influential regime, as the chi-squares are the highest in the late 1960s and early 1970s and are significantly lower in the early 1960s, late 1970s, and 1980s. Performing the sensitivity analysis based on a model that includes only

<sup>11</sup> These justices are Burger, Douglas, Stewart, Marshall, Brennan, White, Blackmun, Powell, and Rehnquist.

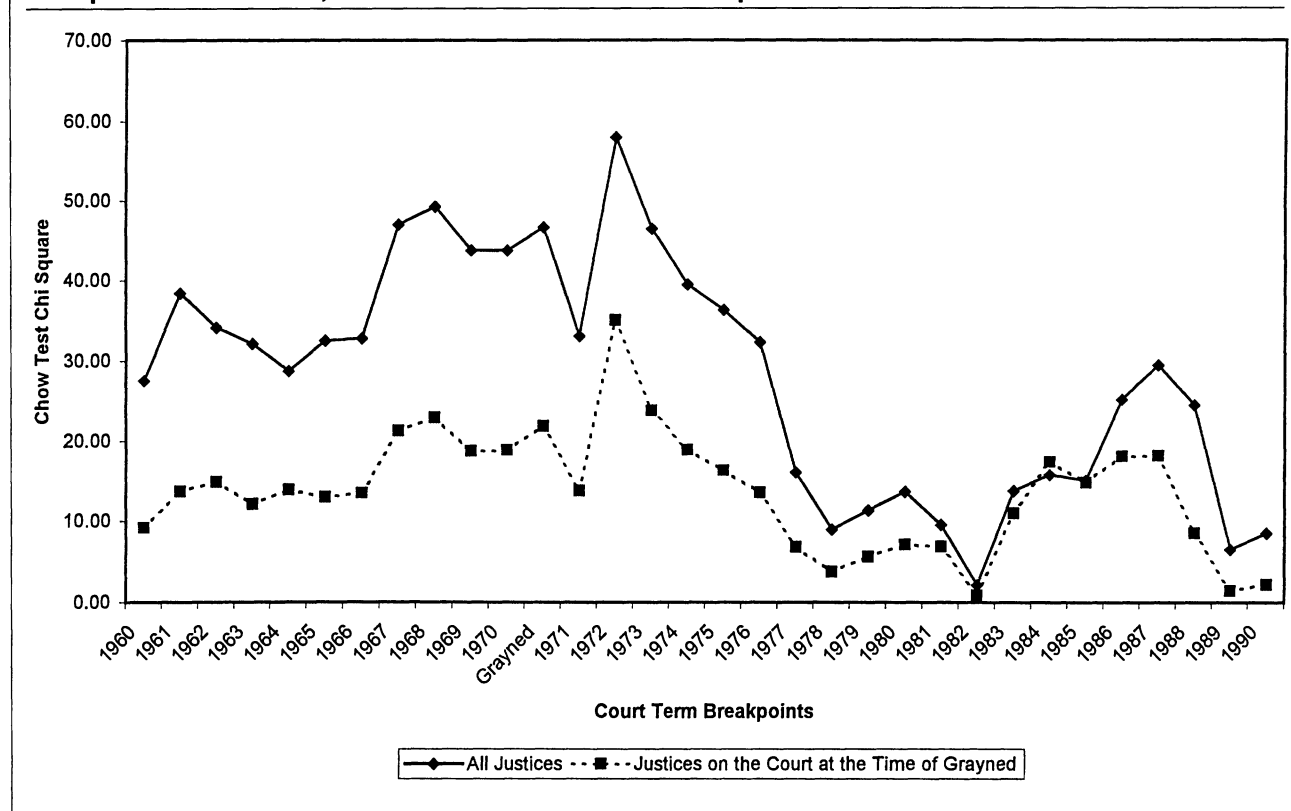
<sup>12</sup> We present separate models for cases decided before and after *Grayned*, rather than presenting models with interaction terms for *Grayned* and the other variables, to provide clearer interpretations of how the influence of the individual variables changes over time. However, we used the multiplicative interaction approach to generate the Chow test chi-squares for Figure 2, as we explain in Appendix C.

<sup>13</sup> Testing for change in nonjurisprudential factors over time also enables control for sources of change over time that are alternative explanations for change in the influence of jurisprudential factors.

<sup>14</sup> To ascertain that these results for the jurisprudential variables were not an artifact of a shift in the base category of less protected types of expression before and after *Grayned*, we tested the jurisprudential variables as individual, rather than categorical, variables. In other words, we tested them relative to the constant rather than the base category. This analysis produced virtually no perceptible differences in the results for the jurisprudential variables. The influence of the base category, the less protected cases, is fairly stable over time.

<sup>15</sup> The jurisprudential variable tests were performed by creating 31 alternative breakpoints designating the Court's 1960–90 terms.

**FIGURE 2. Influence of *Grayned* Content-Neutrality Regime on Justices' Evaluations of Jurisprudential Factors, versus Influence of Other Breakpoints**



the justices on the Court at the time of the *Grayned* decision produced very similar results.<sup>16</sup>

Overall, these results constitute robust evidence regarding the claim that *Grayned* is an influential jurisprudential regime. Not only does the content-neutrality regime condition the influence of particular case factors, but also it conditions the influence of specifically jurisprudential factors. In addition, the changes in the influence of jurisprudential variables shaped by whether a case is decided before or after *Grayned* stand out in comparison to changes generated by a series of alternative annual breakpoints in the data. After controlling for changes in the membership of the Court, the data analysis still confirms that *Grayned* is an influential regime.

### CONCLUSION

The Supreme Court is not simply a small legislature. Law matters in Supreme Court decision making in

ways that are specifically jurisprudential. Specifically, jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny the justices are to employ in assessing case factors. Our jurisprudential regime construct moves beyond the dominant model of Supreme Court decision making, the attitudinal model, which posits that legal considerations make little difference in the way the justices vote. We theorize and observe that both the justices' policy goals and legal considerations matter in Supreme Court decision making. Although this point may be seen as an unorthodox challenge to the hegemony of the attitudinal model, our approach brings back the "jurisprudence" of Shapiro's pioneering but recently neglected "political jurisprudence" approach. Although Shapiro anticipated the political insights of attitudinal and strategic scholars of judicial politics, he never lost sight of the jurisprudential side of political jurisprudence. Our approach is also consistent with the neoinstitutional insight that political actors create institutions and institutions that in turn structure the actions of political agents. This insight is widely accepted in subfields such as American political development and international relations and is strongly advocated by some students of judicial politics (see the essays in Clayton and Gillman 1999 and Gillman and Clayton 1999). In addition, our findings parallel the conclusions of international regime theory that ideas matter as they become imbedded in institutional frameworks.

<sup>16</sup> The jurisprudential variables test chi-square for *Grayned*, 21.82 (3 df,  $p < 0.001$ ), is again the fourth highest of the 32 chi-squares. The higher chi-squares (1968, 1972, 1973) are again clustered around the time of *Grayned*. Skeptics may wonder whether these results may still be caused by personnel change because Justices Powell and Rehnquist had so few votes before *Grayned*. After controlling for this possibility by excluding Powell and Rehnquist as well, the results remain remarkably parallel, with the *Grayned* chi-square remaining the fourth highest and the higher chi-squares clustering around the time of *Grayned*.

We contend that the justices must consider both policy goals and jurisprudential regimes; similarly, international regime scholars argue that nations must consider national interest and the principles, norms, rules, and procedures that comprise regimes.

The jurisprudential regime approach not only incorporates the attitudinal insight that the justices' policy goals shape their votes, but also provides a new empirical method for assessing whether law matters. To date, researchers have had difficulty finding statistical support for legal models, due in part to a focus on law as mechanistically dictating outcomes. Another difficulty researchers have faced is that legal variables are not unambiguously legal; such factors may also matter for attitudinal reasons. Our method overcomes these limitations by recognizing that law is a human construct and by looking at variation over time. We test whether the case factors that the justices consider vary significantly after jurisprudential regimes are created and assess the strength of these regime-based changes relative to that of other annual changes in the influence of case factors. We find that the justices take seriously the *Grayned* content-neutrality jurisprudential regime. The changes that we observe after the regime is established are not due to changes in the membership of the Court and are strong relative to other annual changes.

Attitudinalists may criticize our approach by suggesting that jurisprudential regimes are created on the basis of the justices' attitudes, so regimes are solely attitudinal (although this argument renders the pure attitudinal model tautological). Advocates of the strategic model may claim that jurisprudential regimes are purely strategic; regimes matter because the justices need to persuade their colleagues, and regimes constitute a framework for making persuasive arguments.

These critiques misconstrue our theory. We do not view law as a mechanistic constraint on decision making outcomes. Rather, law is a construct created by justices with political values and policy goals, and jurisprudential regimes matter in part because they constitute means of persuading other justices. We do not contest these insights of the attitudinal and strategic models; rather, we incorporate them. However, reducing decision making to purely attitudinal or strategic factors creates an incomplete explanation of Supreme Court decision making. Decision making involves more than rationalizations of conclusions that are reflexively generated by a justice's policy preferences. Justices share the goal of treating like cases consistently. As the justices reason about how the case at hand fits with the relevant jurisprudential regime, they are able to offer generalizable reasons that make sense to other justices.

We have tested our jurisprudential regime construct in the context of freedom of expression cases. The next step is to extend the analysis to other areas of Supreme Court decision making. Good candidates for analysis include Establishment Clause cases, Free Exercise cases, administrative law cases, confession cases, search and seizure cases, and specific areas of free speech such as obscenity and commercial speech. We do not believe that all substantive policy areas are necessarily suitable because a given policy area may raise very different

legal or jurisprudential concerns. Another possible issue for analysis is the question of unanimous versus nonunanimous cases. Can jurisprudential regimes help us understand what leads the justices to unanimous decisions in cases that would, on their face, lead us to expect a divided Court given our understanding of the justices' policy preferences? We do not have an answer to this question, but we believe that further analysis might be fruitful.

Finally, it is interesting to speculate on what might account for regime changes. We can identify at least three possible causes of regime change. First, regime changes may simply reflect changing personnel on the Court; this is something that many observers argue has been taking place in the area of federalism. However, our controls for personnel change rule this out as an explanation of the content-neutrality regime. Second, changes in economic, social, or political conditions challenge the core principles of a regime (Ackerman 1991); essentially, this is the argument that Gillman (1993) advances to account for the demise of the *laissez-faire* framework that dominated Supreme Court decision making vis-à-vis economic regulation early in the twentieth century. Finally, as with any kind of organizing framework, the anomalies and contradictions of a regime may become increasingly apparent, leading the justices to seek out a different approach to dealing with cases in a given area (compare to Kuhn 1963); *Miller* might be seen as representing such a shift in the area of pornography, and much of the dissatisfaction over the so-called *Lemon* test in Establishment Clause jurisprudence may be leading to a regime break in that area (*Lemon v. Kurtzman* 1971). The reason(s) for regime change is an important area for inquiry, but it is an issue that we must leave for future research.

## APPENDIX A: IDENTIFYING CANDIDATE JURISPRUDENTIAL REGIMES

To identify a candidate jurisprudential regime for an area of law, one first refers to casebooks and treatises in that area to understand the key case factors and the level of scrutiny or balancing the justices are to employ in assessing those case factors. Next, using Findlaw, one traces the case law back in time to the first precedent that gained the support of the majority of the Court, identified the relevant case factors, and indicated the level of scrutiny or how those factors should be balanced. Finally, one uses several casebooks representing a variety of political perspectives in the area of law to examine whether they identify this precedent with the candidate regime.

## APPENDIX B: CODING

Table A1 shows the results of our analysis of the reliability and validity of the coding. Richards did all of the initial coding. Subsequently, we used SPSS to select randomly approximately 10% of the Court decisions. Another scholar then recoded these cases to assess reliability. The retest method is appropriate for reliability assessment if there are no concerns about reactivity or changes over time in the phenomena being observed (Carmines and Zeller 1979). Based on 3,836 items coded in common, the rate of agreement for the two coders

**TABLE A1. Rates of Agreement for Reliability and Validity of Variables Used in Analysis**

Variable	Reliability	Validity
Jurisprudence	87%	100%
Action	92%	100%
Government	93%	99%
Identity	98%	99%
All variables coded	93%	99%
All jurisprudential variables coded	93%	99%
<i>N</i> (items coded)	3,836	3,515
<i>N</i> (court decisions)	54	50

*Note:* Entries are simple percentages indicating rate of agreement. "Jurisprudence" refers to the jurisprudential variables used in the analysis. In contrast, "all jurisprudential variables coded" includes all jurisprudential variables coded but not necessarily used in the analysis. Likewise, "all variables coded" includes all variables coded but not necessarily used in the analysis. For a description of the procedures used to assess reliability and validity, please refer to Appendix B.

is 93%. Among the sets of independent variables used in our analysis, the highest rate of agreement is 98% for the speaker identity variables (labeled *identity* in Table A1), and the lowest rate of agreement is 87% for the jurisprudential variables (labeled *jurisprudence*); this rate of agreement is fairly high, especially considering the interpretive nature of the coding for these factors. As a comparison, we looked at the reliability analysis James Gibson conducted as part of the Supreme Court Database Project. Several of the variables he coded were judgmental, and the level of reliability he found varied from 80 to 100% depending on the specific variable; the highest reliability was for whether the "value of church and state was implicated in the opinion" and the lowest was for whether the "value of government power is implicated in the decision" (Gibson 1997).

A second issue is whether Supreme Court opinions provide valid measures of the independent variables. One could argue that these variables are not independent of the Court's decision and could be influenced by law. To the extent that the concern is that the variables would be influenced by law, this would be even more true if we coded primarily from lower court opinions, so we chose Supreme Court opinions as our primary source.<sup>17</sup> However, we recognize the validity concern, and to assess validity we used SPSS to select randomly approximately 10% of the Court decisions. Richards recoded these cases after a five-month interim using as the data source the written opinion of the highest court below the Supreme Court that issued a written opinion. We then compared the rate of agreement for the variables coded from the Supreme Court and the lower court opinions. The rate of agreement for the jurisprudential variables used in the analysis (labeled *jurisprudence* in Table A1) is 100%. The lowest rate of agreement is 99% for the identity and government variables. Based on 3,515 items coded in common from Supreme Court and lower court opinions, the overall rate of agreement is 99%, and the rate of agreement for all jurisprudential variables that were coded but not necessarily used in the analysis is also 99%. This leads us to the conclusion that coding solely from lower court opinions would

not have significantly improved the validity of the variables. This analysis excluded Supreme Court *per curiam* opinions, because as part of the basic coding scheme we had already decided to use lower court opinions as the source when the Supreme Court wrote a *per curiam* opinion. For this analysis, obviously we also had to exclude lower court opinions that were not reported.

We include codebook instructions for the jurisprudential regime variables shown in the tables to show how they were coded. Note that in the statistical models, the coded variables are arranged in categorical sets. We have also specified the attitudes, identity, government, and action variables and the dependent variable. The coding was not done by deference to the majority opinion, which would bias the results, but rather according to the rules and examples delineated below after reading all majority, plurality, concurring, and dissenting opinions in each case.

**Votes:** For our dependent variable, we used individual justices' votes on all free speech cases from 1953 to 1998: 0 corresponds to a pro-expression rights vote; 1 corresponds to an anti-expression rights or progovernment vote. A pro-expression rights vote supports the right of the speaker over the government or private party attempting to limit the expression. An anti-expression rights vote indicates support for the government or private party seeking to limit expression over the speaker.

**Attitudes:** To estimate the influence of the attitudes of the justices, the standard measures based on content analysis of newspaper editorials about nominees at the time of nomination are used (Segal and Cover 1989; Segal et al. 1995).

**Grayned:** This variable captures whether a case was decided before or after *Grayned* and *Mosley*. Votes in the *Grayned* and *Mosley* companion cases are excluded from the analysis.

**Jurisprudence:** The set of variables labeled *jurisprudence* considers the basic components of the *Grayned* content-neutrality regime.

**Threshold not met:** This variable indicates whether a case reached the threshold of First Amendment protection. Cases in which there is no government action or there is no abridgment of speech do not invoke the protection of the First Amendment. For example, the First Amendment does not forbid nonpublic unions (acting not under statutory authority but rather independently) from limiting a union candidate's receipt of outside money for a union election, because there is no government action. This variable is coded 1 if a case fails to reach the threshold of First Amendment protection and 0 otherwise.

**Content-based:** Is the regulation of expression justified by or focused on the communicative impact of the expression? Communicative impact means the content or substance of the act of speech or expression. Content-based regulations are coded 1; others, 0. One type of content-based regulation, viewpoint discrimination, is relatively easy to identify. When the regulation targets the speech of a specific individual or group, for example, civil rights protesters, then the regulation is content-based. Content-based is broader category than viewpoint discrimination. Some cases involve content-based, but not viewpoint-based, regulations. One example of a dispute over content-based but viewpoint-neutral legislation is *Simon & Schuster, Inc. v. New York State Crime Victims Board* (1991). The New York legislature passed a law that required that income derived from works describing the crime of an accused or convicted criminal be made available to the victims of a crime. Although the law did not burden a particular viewpoint, the Court unanimously noted that it was content-based. The law "imposed a financial burden on speakers because of the content of their speech" (508; Smolla 1994, ch. 3,

<sup>17</sup> The exception is that in six Supreme Court *per curiam* cases where the Court's opinion said next to nothing, we used the available opinion of the highest lower court that heard the case before the Supreme Court to supplement the information.

pp. 15–6). In coding for content-based regulations, evidence relating to the government's motive should be considered, in addition to the language of the regulation or statute and how it was applied (Tribe 1988).

**Content-neutral:** The content-neutral category covers four types of content-neutral regulations: time, place, manner, and incidental regulations (see examples and rules below). Content-neutral regulations do not focus on, and are not justified by, the content or communicative impact of expression. If a regulation is content-based, it cannot be content-neutral, even if it is a time, place, manner, or incidental regulation. Content-neutral regulations receive a value of 1; others, 0.

**Content-neutral time regulations:** The time category asks whether a regulation of expression limited the time of expression in a content-neutral manner. One example is an ordinance that prohibits noisy demonstrations immediately outside schools *during school hours*.

**Content-neutral place regulations:** The place category asks whether a regulation of expression limited the place of expression in a content-neutral manner. One example is an ordinance that prohibits noisy demonstrations *immediately outside schools* during school hours.

**Content-neutral manner regulations:** The manner category tests whether a content-neutral regulation attempts to cover the way in which an act of expression is presented. Some examples of manner regulations are limits on the number of participants in a demonstration, limits on the size or number of signs used, requirements for silent protest only, and bans on the use of amplification devices.

**Content-neutral incidental regulations:** This category asks whether a regulation is content-neutral but has incidental effects on speech. For example, a law against trespassing is not targeted at the content or viewpoint of speech, nor is it a time, place, or manner regulation. Despite its content-neutral character, when applied to protestors in a private location, the trespassing law has incidental effects on speech (*Hudgens v. National Labor Relations Board* 1976). Similarly, when a government requires all citizens to respond to grand jury subpoenas, this requirement has incidental implications for freedom of expression when applied to newspaper reporter (*Branzburg v. Hayes* 1972).

**Less protected:** This variable indicates whether the regulation in question is a regulation of expression that falls into one of the eight less protected categories. Less protected expression receives a value of 1; other expression, 0. This is the baseline category. The less protected categories are as follows.

Regulation of expression in a private forum against the will of the owner of that forum.

Regulations of expression that is obscene or alleged to be obscene.

Libel suits by private figures not suing for presumed or punitive damages.

Content-based, but not viewpoint-based regulations of speech in nonpublic forums. Examples of nonpublic forums include military bases, jails, prisons, and specific forums not open to the public at large such as candidate debates. The nonpublic forum category does not include private forums, traditional public forums such as streets, sidewalks, or parks, or forums that the government has designated public forums.

Regulation of commercial expression. Commercial expression is expression that concerns lawful commercial activity. Commercial activity is the interchange of goods and services among individuals and corporations.

Content-based regulations of the broadcast media. The broadcast media includes television and radio. This category does not include cable television. Examples include requirements for public access to such media.

Regulations of expression in schools. Schools include elementary through high schools.

Regulations of picketing of secondary sites by labor unions.

**Action:** The *action* variables consider the type of action taken against the speaker.

**Criminal:** When the action taken against the speaker is based on a criminal law, the value is 1; otherwise it is 0.

**Deny expression:** When the action taken against the speaker is to deny the speaker's opportunity for expression, the value is 1; otherwise it is 0.

**Deny benefit:** When the action taken against the speaker is to deny the speaker a tangible government benefit, the value is 1; otherwise it is 0.

**Disciplinary:** When the action taken against the speaker is to discipline the speaker, such as a bar association disciplinary committee's public reprimand of a lawyer, the value is 1; otherwise it is 0.

**Lose employment:** When the action taken against the speaker is to cause the speaker to lose government employment, the value is 1; otherwise it is 0.

**Civil:** When the action taken against the speaker is a civil suit or a judge's civil order such as an injunction, the value is 1; otherwise it is 0. This is the baseline category.

**Regulation:** When the action taken against the speaker is a regulation without a clearly specified civil or criminal penalty that does not fall into the above categories, the value is 1; otherwise it is 0.

**Government:** The *government* variables consider the level of government acting against the speaker.

**Private:** When the case involves a private lawsuit against the speaker, the value is 1; otherwise it is 0.

**Education:** When the level of government is a school, school board, university, or college, the value is 1; otherwise it is 0.

**Local:** When the government is below the state level, for example, a town, city, or country, the value is 1; otherwise it is 0.

**Federal:** When the federal government is acting against the speaker, the value is 1; otherwise it is 0.

**State:** When the level of government is a state, the value is 1; otherwise it is 0. This is the baseline category.

**Other:** When none of the above categories are applicable (for example, Puerto Rico), the value is 1; otherwise it is 0.

**Identity:** The *identity* variables consider the identity of the speaking party.

**Politician:** When the speaker is an office-holding politician, the value is 1; otherwise it is 0.

**Racial minority:** When the speaker is speaking as a racial minority, the value is 1; otherwise it is 0.

**Alleged communist:** When the speaker is speaking as a communist, the value is 1; otherwise it is 0.

**Military protester:** When the speaker is speaking as a war or military protester, the value is 1; otherwise it is 0.

**Business:** When the speaker is speaking as a member of, or for, a corporation or business, the value is 1; otherwise it is 0.

**Religious:** When the speaker is speaking as a member of a religion, the value is 1; otherwise it is 0.

**Print media:** When the speaker is print media, the value is 1; otherwise it is 0.

**Broadcast media:** When the speaker is broadcast media, the value is 1; otherwise it is 0.

**Other:** When all of the above identity variables equal 0, the value is 1; otherwise it is 0. This is the baseline category.

We also coded for broadcast media, politicians, candidates, feminists, racists, and members and supporters of labor unions, but these variables were not close to being significant estimators.

## APPENDIX C: CHOW TEST

Our version of the Chow test compares the  $-2$  log likelihood of the regression including all cases to the  $-2$  log likelihood for a model introducing interaction between a dummy variable representing whether a case was decided before or after the regime was established (regime dummy) and the other independent variables. This produces a chi-square test for change in the parameters across the two time periods before and after the regime change.

Alternatively, one may proceed as follows. First, estimate the logistic regression equation across all cases including a dummy variable representing the regime change. Next, estimate two separate logistic regressions, one before and after the regime. Subtracting the sum of the  $-2$  log likelihood of the before and after regressions from the  $-2$  log likelihood of the regression including all cases provides a chi-square statistic. The latter approach provides separate parameter estimates for the different periods, and it was used where such estimates were desired.

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