Jurisprudential Regimes in Supreme Court Decision Making

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ABSTRACT

We 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.
INTRODUCTION

Is law a useful construct for understanding patterns of Supreme Court decision making? We test a new approach to incorporating law into statistical models of Supreme Court decision making. In positing a new model of law's influence, we do not reject the importance, or even the dominance, of attitudinal influences on the Court's justices. 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, 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 in fact almost always do so decide. In their most extreme statement of their position, Segal and Spaeth (1994, 11) contend that the "the attitudinal model is a complete and adequate model of the Supreme Court's decisions on the merits" and "attitudinal factors are all that systematically explain the votes of the justices" (emphasis in original). In a somewhat latter analysis, Spaeth and Segal concede that justices might defer to law over their policy preferences on some occasions, but that "the overall levels of precedential behavior are so low that only ... preferential models ... appear to be in the right ballpark " (Spaeth and Segal 1999, 288). Segal and Spaeth forcefully argue that the justices' freedom to pursue their policy goals is due to the justices' specific institutional situation on the Court: justices 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 (ibid., 18-19).

We do not dispute that the Supreme Court's institutional setting produces a situation where justices are freed from the kinds of constraints faced by lower court judges or the constraints faced by 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. At the simplest level, the justices may see some constitutional mandates as so clear that even where their own preferences are otherwise, they would feel compelled to decide a case in a particular way. For example, does anyone doubt that an explicit establishment of religion by a local government would be struck down by a unanimous Court even drawing the votes of those most committed to states' rights? If the town of Kiryas Joel were to pass an ordinance restricting property ownership and voting to members of the Satmar Hasidic sect, does anyone doubt the outcome? Or, to take a similar hypothetical raised by Ackerman in his book We the People (1991, 14), presume that as part of a worldwide fundamentalist revival early in the 21st Century, a new amendment to the Constitution, specifically overriding the establishment clause of the first amendment, is passed by Congress and ratified by the states:

Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden.

Does anyone doubt that justices of the Court would feel compelled to enforce such an amendment regardless of their own views on the matter, and if they felt unable to do so would have only the option of resignation in protest?

The idea that Supreme Court decision making is unconstrained and justices simply pursue their policy preferences leave many analysts shaking their heads (Brenner and Stier 1996; Brisbin 1996; Gillman 2001; Knight and Epstein 1996; Lawrence 1994; Songer and Lindquist 1996). The critics do not question the position that attitudes are important; as Smith comments (in his contribution to Lawrence 1994, 8), "if our task is predicting judicial votes, and the choice is between the 'legal model' Segal and Spaeth describe and models of ideological attitudes, then I, along with virtually all other political scientists, am firmly on the side of the Segal and Spaeth." Rather, the critics argue that Segal and Spaeth
have created a "strawman" image of the role of law in Supreme Court decision making, an image that is bound to fail; as Rosenberg (in his contribution to the Lawrence symposium, 7) observes, "practically no judge or scholar believes" the legal model of Segal and Spaeth.

Instead, we look for the influence of law in the form of what we label "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. Regimes are then applied to subsequent cases in the relevant area of the regime. Empirically, we expect after that the regime is established, these case factors should matter to the justices in a statistically significant, observable manner as compared to their influence in earlier cases. Before we elaborate our specific theory, operationalization and methodology, we address several key questions. Why view law as an institutional construct? Does the law matter merely as a rationalization for conclusions generated by the justices' policy preferences? How does the concept of jurisprudential regime relate to the other conceptualizations of regime used in the political science literature?

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 by examining justices' willingness to defer to precedent when that precedent 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 either on 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. For example, over 30 years ago, Shapiro (1968, 71) wrote:

(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 (sic) 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 that legal scholars consider the impact of the decisions of the Supreme Court. 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 impact future court 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," or "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. The justices employ the concepts of legal categories and levels of scrutiny to explain and justify their decisions (Carter 1994).

Political scientists of the new (and old) 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, and this can be done 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, 40-43). For example, if the Court is applying a "rational basis test" to a particular area of constitutional jurisprudence, the other political actors understand that the Court will likely defer to other political decision makers. While one can argue that the Court's decision to apply such a deferential standard is a reflection of policy preferences, 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, 143-173), or the body of practice that provides the foundation for law generally and the Court more specifically (Brigham 1999, 24-25).

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 nonjudicial political actors. Shapiro (1968, 39) stated this succinctly regarding appellate courts generally: "(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 per cent of conduct that never reaches the courts." This reflects the nature of legal reasoning in the U.S. system. Sunstein (1999, 43) distinguishes between "rule following" and "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. He argues that while case analysis allows judges flexibility, it does not lead to unconstrained decision making because precedents provide a "backdrop" that "removes certain arguments from the legal repertoire" which in turn "much simplifies analysis," and that "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 (emphasis added) with previous decisions" (ibid, 42).

Attitudinalists might critique this portrayal of the role of law by pointing 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 many others writing in an institutional vein have argued (see for example Brigham 1999; McCann 1999), this begs the question. With the exception of those scholars who hold a strict natural law perspective as underlying all law, all jurisprudential understandings of law see it as a human construct, including theorists ranging from originalists (e.g., Scalia 1997) to positivists (e.g., Hart 1961) to advocates of political and normative interpretations of law (e.g., Dworkin 1996). That is, law, as a "cognitive structure" (Smith 1988, 91), is itself an institution, 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. People defer to law even when there is no enforcement mechanism (perhaps the classic example being waiting at a red light at 2 a.m. in the morning at a totally deserted street corner). People will defer to an institution either by voluntary decision or because of some other constraint. They are more likely to go along voluntarily if they had a significant role in creating or operating the institution, but as the red light example shows, deference to the law is a powerful social construct, and there is no reason that this should not apply to the Supreme Court as well as to the 2 a.m. driver. If the adherents of a pure attitudinal model wish to reduce law down 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 more complex; attitudes influence the development of law, but law can also have effects on 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. However, this potential for change is true of all human-created institutions. What differs across institutions is the ability of those possessing the power of change to make actual changes. The Supreme Court may have more freedom to make changes than is true of many other institutions, but that does not mean that members of the Court
systematically fail to abide by the institutional structures that define the Court's role and its range of potential action and decision making. This 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 the institutions.

WHY DO JUSTICES USE THE LAW?

As we have argued above, justices see the law that they make as providing guidance to other institutions in society. For that guidance to be at all 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. The justices attempt to make their decision fit within the analytic framework that is relevant to the case. 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. This idea of promoting consistency by using legal reason in judgment to treat like cases similarly is expressed by Dworkin (1978, 113), who 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 judgment, in which they reason about their decisions. As they reason about their decisions, the justices make arguments that are based on more than personal policy preferences. The justices 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. Here, we draw upon Nagel's (1997) philosophical treatment of reason. The justices must reason in a way that makes sense to others; justices cannot merely offer reflexive, first-personal rationalizations of their decisions. The justices engage in bargaining and accommodation with respect to the content of opinions, so there is evidence that the reasons justices 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. Competency in legal language is a fundamental condition for judicial decision making. If the justices are not competent users of legal language, they will be unable to make plausible legal arguments (Brigham 1978). Somewhat related to these two reasons is the idea that legal concepts work as heuristics that help to organize and categorize decision making.

Given that the justices use law to decide new cases which will almost invariably differ from prior cases, justices need to think in terms 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:

Decide Y if \((b_1X_1 + b_2X_2 + b_3X_3 + \text{etc.}) > k\)

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) and how they should be weighted (b's). A recent essay on race-conscious redistricting speaks in terms of "legal framing" but reflects the concept that we label "jurisprudential regime."

Specifically, considering the implications of Shaw v. Reno (1993), Bybee (1999, 221) argues that Shaw "did not merely provide a rationalization for political opposition to race-conscious redistricting;" the attitudinalist view of the analysis in Shaw would be that it was only a rationalization for the conservative preferences of the majority. 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 provides a structure to guide not only those drawing district lines, but also for the courts, including the Supreme Court itself, to assess the constitutionality of districting plans.\footnote{In the Court’s most recent redistricting decision, \textit{Easley v. Cromartie} (2001), the majority upheld a long-contested North Carolina congressional district. Justice Breyer's majority opinion was able to capture Justice O'Connor's vote, as it consisted largely of a recitation of past opinions and a focus on how the principles of those opinions related to the evidence of the instant case (Greenhouse 2001).}

While decision structures reflect the attitudes of the justices who create them, and can be changed by justices who either disagree with them or find them to have problems, they do serve to 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 government and 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."\footnote{In previous papers, we have employed the label “legal regime” rather than “jurisprudential regime;” we have adopted "jurisprudential regime" because we have come to see it as better capturing what it is we are describing. “Legal regime” as a term has been widely used with varying implied or explicit definitions (a search of the Westlaw journals and law review database produced 6,646 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 that comports with the way we are using it.}

\section*{JURISPRUDENTIAL REGIMES}

\subsection*{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 American political development, a regime defines a period of American political history marked by a combination of substantive political content and the particular ways in which federalism and separation of powers operate in practice (Orren and Skowronek 1998-99, 690). It is the regime that "infus(es) institutions with meaning, purpose, and direction (ibid., 694)," and this reflects a combination of intellectual, political and institutional elements (Polsky 1997a, 153-154; see also, Polsky 1997b). More specifically, in recent work on the New Deal period,

(P)olitical 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 both at the elite and the mass level.

The other subfield that has used the regime concept extensively is international relations (Krasner 1983a; Kratochwil and Ruggie 1986). 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 concept evolved in large part as an
answer to the realist perspective that nations pursued their own policy goals, checked only by the resources and power of nations with conflicting goals. The core argument of regime theory scholars is that nations must consider both policy goals and the regimes that govern particular sets of international issues. International 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 international decision making on those issues. In the absence of anything like a regime, nations would simply pursue their own interests in whatever way each nation 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). Regimes structure the anarchic, Hobbesian world of the realists. Without regimes, the only governing principles of the international system are power and interest

Of course, there are different perspectives on whether regimes are effective, the factors that make them effective, and how regimes relate to power and interest. Neoliberal theories of regimes, which are interest-based and represent the mainstream approach, contend that regimes help states to achieve common interests and avoid collectively sub-optimal outcomes. These theories contend that states want to maximize only their own absolute gains (Hasenclever, Mayer, and Rittberger 1997, 4). By contrast, some realists suggest that regimes are not influential enough to warrant serious consideration. Other realists consider regimes to be influential, but offer power-based rather than interest-based theories (ibid., 3). Cognitivists offer knowledge-based theories of regimes, which contend that regimes can transform interests. The cognitivists view states from a sociological rather than a rational choice lens, and suggest that states are more like role-players than utility-maximizers (ibid., 5-6).

Regimes, Law, and Supreme Court Decision Making

The linkage between regimes and law has been clearly recognized by international relations scholars. The field of international law has experienced a rebirth as a part of international relations largely because scholars have come to recognize that international law and international regimes are closely related, with international law constituting one form of an international regime (see Burley 1993; Kratochwil 1989).

In recent years, 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. In We the People, Ackerman explicitly looks at what he terms "constitutional regimes:" "the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life" (Ackerman 1991, 59); Ackerman 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" beginning with the "switch in time that saved nine" and epitomized by footnote four in U.S. v. Carolene Products (1938). This and other work make it clear that the Court not only functions within constitutional regimes but is also central in creating those regimes (see, for example, Smith 1997; Whittington 1999). Similarly, Clayton and May have called for application of the neoinstitutional concept of "political regimes" to the study of the 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" (1999, 234).

Conceptualizing Jurisprudential Regimes

In defining the concept of jurisprudential regime, we step down one level from the broad notions of constitutinal and political regimes. Where constitutional and political regimes define expansive patterns of decision making and institutional interrelationships, jurisprudential regimes focus on more
specific areas of Supreme Court activity. In a sense, 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, which serve to structure the way 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, and regimes are established for a particular period of time. The way that jurisprudential regimes structure Supreme Court decision making is 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. Regimes are then applied to subsequent cases in the relevant area of law. Empirically, we expect that after the regime is established, these case factors should matter to the justices in a statistically significant, observable manner as compared to their influence in earlier cases. Fundamentally, jurisprudential regimes function as intervening variables between factors influencing justices' decisions and the decisions themselves much making generally, and legal decision making specifically, can and often does deviate from social and institutional constraints such as those created by law generally and jurisprudential regimes more specifically. This is the reason that attitudes matter. However, even though there is nothing superior to the Supreme Court in the political system (i.e., the justices are secure through life tenure and there is no appellate body above the Court), 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.

The structuring attributed to a jurisprudential regime establishes which case factors are relevant for decision making in a particular area of law, and/or sets the level of scrutiny or balancing the justices are to employ in assessing case factors. Figure 1 represents this model graphically. A justice's decision involves inputs that we label "potential decision elements"; these include things such as policy attitudes, factual elements, and strategic implications for other actors. One can think of these potential decision elements as unweighted as they are initially identified and defined. In the figure, the unweighted nature of the potential decision elements is indicated by the absence of any coefficients in the arrows going into the jurisprudential regime. What Figure 1 shows is that it is the jurisprudential regime that filters these potential decision elements and transforms them into actual decision elements carrying some specific weight in influencing the justice's vote. In the end, not all potential decision elements actually impact the decision; this is indicated by the absence of some possible arrows emerging from the jurisprudential regime. That is, some of the potential decision elements do not emerge from the regime because the regime deems them irrelevant (note the missing arrow in for Potential Decision Element D in Figure 1). The weighting of the elements by the jurisprudential regime is reflected in the coefficients (lower case letters) attached to each of the arrows leading finally to the decision. (The missing arrows could also be thought of as having coefficients equal to zero.) If one were to place two jurisprudential regimes for a given area of decision making side-by-side, the differences would be found in which arrows emerged out of the regime, and in the weights (lower case letters in the figure) associated with those areas.

By advancing the construct of jurisprudential regime we do not in any way reject the argument 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 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; 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 the regime 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 that it emphasizes that the heavy contribution of that element (as we have done in Figure 2a).

Furthermore, there is nothing that necessarily restricts the potential decision elements, whether attitudinal or something different, to focusing on policy questions (e.g., criminal justice, economic policy, civil liberties policy). This would allow factors other than policy attitudes, whether they be what Baum (1997, 4) labels "legal policy" goals or what have traditionally been labeled "role attitudes" (Becker 1964; Gibson 1978; Glick 1971; Howard 1977). We should also note that nothing in this framework is 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, 37-90) or the desire to avoid overturning of decisions by acts of Congress (Eskridge 1991; Marks 1989; Melnick 1995; Murphy 1964, 156-175; but see Segal 1997). While Figures 1 and 2a 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 variable; the position of the Solicitor General as a party or amicus might be another. Figure 2b 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 construct tests to determine whether or not the kinds of changes in decision making the regimes model would lead one to expect do in fact happen. Such tests should be straightforward: the influences of case elements on the justices' decisions should vary across regimes, and statistical analyses should show that the factors influencing justices' decisions change consistently with regime breaks.
What the regimes approach allows that other institutionalist approaches have not succeeded in doing is to incorporate a role for law in empirically 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 Brigham (1987), Epstein and Koblka (1992), Gillman (1993),
Lawrence (1990), Kahn (1994), Perry (1991), and Smith (1988). However, attitudinalists would likely dismiss this work as lacking statistical rigor. And as Segal and Spaeth (1993) point out, even statistical models of Supreme Court decision making that have utilized case characteristics such as legal variables to predict Supreme Court decision making (see George and Epstein 1992, and Segal 1984) are not satisfactory. Legal 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 legal case characteristic of whether the punishment is proportional to the crime, a characteristic that is 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 (Emmert and Glick 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 analyses of Supreme Court decision making by doing just this. The specific framework proposed here goes brings together prior institutionalist legal analyses and statistical approaches to incorporate law in an empirically testable fashion into a model of Supreme Court justices' voting decisions. Jurisprudential regimes provide a construct that allows us to build law into social science models of Supreme Court decision making without losing the accepted view that justices act based on their policy goals. Not only are we able to build law into a model of decision making using the jurisprudential regimes construct, but the approach we use also allows us to test empirically whether law does matter.

OPERATIONALIZING JURISPRUDENTIAL REGIMES

We do not claim that every area of Supreme Court decision making is influenced by a jurisprudential regime. However, 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 a number of reasons. Free expression law is an area of law that allows room for attitudes to operate. There is a great diversity of speaker identities in the free expression cases, which 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 the case selection to one type of cases such criminal cases may skew the likelihood that the justices vote consistently with a legal or attitudinal explanation.

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

Identifying Content-neutrality as a Candidate Regime

To identify candidate jurisprudential regime for freedom of expression law, we looked for key precedents that establish which case factors are relevant for free expression decision making and/or set
the level of scrutiny or balancing the justices are to employ in assessing those case factors. The relevant case factors frequently require interpretation; Grayned and Mosley ask whether the law at issue regulates the content of expression. The separate question of whether the regime was in fact 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 nine-member Court. To help us identify candidate free expression 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 linked Grayned and/or Mosley to the content-neutrality regime.

Thus, we hypothesize that the jurisprudential regime that currently applies to nearly every case that raises a free expression claim is based on the principle of content-neutrality. Tribe's (1988) interpretation of the general free expression regime, his two-track analysis, suggests that the Court asks whether the regulation in question is a content-based regulation aimed at the communicative impact or viewpoint of the expression, or a content-neutral regulation. According to the Court, content-based regulations merit the most rigorous scrutiny and are unlikely to be sustained as constitutional, because they are at odds with the core principle of the first amendment as it pertains to freedom of expression: the government should not make regulations based on the content or viewpoint of people's 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 there is another regulation the government could have used which would have been less restrictive of expression than the challenged regulation and would have achieved the government interest.

Expression governed by content-neutral (track two) incidental, time, place or manner regulations receives less constitutional protection than expression regulated by content-based regulations. These regulations are assessed according to intermediate scrutiny: they must be narrowly tailored to serve significant government 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, where the Court struck down an attempt to prohibit all picketing outside of schools except for labor picketing as a content-based regulation which was not narrowly

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3 See Appendix A for instructions on how to replicate the identification of a candidate regime.

4 We use the term "case factors" rather than the label "case facts" that 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.

5 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 backwards in time to the foundational precedent.

6 Incidental regulations are regulations that focus on behavior or conduct, rather than expression, but which have incidental effects on expression. Time and place regulations concentrate on the time and place, respectively, at which expression occurs. Manner regulations deal with the manner of expression, such as limits on decibel levels.
tailed. However, the Court also uphold a regulation of noisy picketing outside of schools during school hours as a narrowly tailored content-neutral regulation. The vote in both cases was 9-0, with three concurring votes.

There are a number of important decisions prior to Mosley and Grayned in which 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 which abridged the first amendment; the Court required that such laws be justified by a compelling government interest, and be written precisely to minimize the 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 good vehicle for explaining the different treatment of a content-neutral place regulation as compared to a content-based regulation, the Court did not do so.

It was not until the Mosley and Grayned decisions that the Court more fully developed Tribe's two-track analysis or what we call the content-neutrality regime. There are several key points that emerge from Mosley and Grayned. First, a regulation which 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. Secondly, 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, in order that the regulation does not restrict more speech than is necessary to achieve the government interest. We hypothesize that after the Grayned regime is established, expression that is governed by both content-based and content-neutral laws will be more protected than before, although expression regulated in a content-neutral should not be 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 actually 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 that there are specific justifications for regulating these types of expression that limit the applicability of the two-track regime. 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

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Identifying which cases are the regime-defining cases is a fairly interpretive process. To give the reader interested in replication 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.

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 utilize a number of rigorous statistical tests using 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 should vary across jurisprudential regimes for a particular area. For example, the establishment of the two-track, content-neutrality regime should not only condition the influence of jurisprudential variables, but also speaker identity variables. The results of statistical models predicting decisions before and after the establishment of 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 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 statistical results to ascertain whether the statistical results support the hypothesis of change in the influence of case factors across regimes. The key statistical test of regime-based change is a variant of the well-known Chow test (*Hanushek and Jackson* 1977) for testing for differences in regression results across sets of data. Our analysis uses logistic regression, and the computation of the test of change is consequently based on features of logistic regression.8

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. This involved reestimating the models while limiting the justices included to those who were on the Court at the time of the regime change. If the regime change was evident when personnel were held constant, that would support the argument that the change in decision calculus does not simply reflect changes in personnel. If the Chow test chi square statistics were significant in the models that controlled and did not control for personnel change, we would have tentative confirmation of an influential regime.

4. One important test of our argument is whether or not the influence of variables specifically associated with the regime, variables we refer to as "jurisprudential variables," change as regimes change. For the content-neutrality regime these variables are content-based, content-neutral and *Threshold not met*. To test for changes in the influence of these variables, we estimated a model including the main effects of 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.

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8 See Appendix C for specification of how we perform the Chow test.
Finally, we performed a sensitivity analysis by trying alternative annual time breaks around the hypothesized break to see if the chi square statistic for the regime break was large relative to the other annual breakpoints in models that controlled and did not control for personnel change. If so, we would have strong confirmation of a regime that shaped the influence of the jurisprudential variables. This analysis involved reestimating the jurisprudential variables test for regime change, but used a series of alternative annual breakpoints before and after the regime breakpoint. 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 Lexis. A case which raised a free expression issue would be 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 dataset to cases for which jurisprudential regimes are more likely to matter. We selected all orally argued cases for which the Court issued a written opinion, including per curiam opinions. We excluded cases with tie votes. This research mainly used U.S. Supreme Court opinions, but we supplemented this data with lower court opinions in per curiam cases.9

MODEL SPECIFICATION AND RESULTS

In our statistical model of the Gray regime, we include five types of variables: the attitudes of the justices, jurisprudential factors, the type of action taken against the speaker, the party acting against the speaker, and the identity of the speaker.10 We include the attitudes 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 free expression regime: whether a regulation of expression is content-based, content-neutral, a regulation of a less protected category, or a regulation which 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 or an opportunity for 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 in order 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 the justices’ attitudes about particular groups of

9 We checked a subset of the Supreme Court data against lower court opinions in order to evaluate whether there are significant differences between U.S. Supreme Court and lower court opinions as data sources. The analysis of these data failed to identify any significant advantages from using lower court opinions to supplement Supreme Court opinions, except in six Supreme Court per curiam cases where the Court's opinion said next to nothing. Thus, in all per curiam cases, we used the available opinion of the highest lower court that heard the case before the Supreme Court to supplement the information.

10 See Appendix B for examples of coding rules and information on intercoder reliability.
speakers and individual speakers, and may influence the willingness of the justices to protect their civil liberties. 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). Secondly, 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 waver according to historical events, shifts in societal consciousness and power relations, and vary from justice to justice (Kairys 1990). Finally, some Critical Race Theorists submit that racial attitudes may also influence free expression decision making (Matsuda, Lawrence, and Delgado 1993).

Table 1 shows results for three models involving the votes of all justices: a model that considers all cases; a model for cases decided before the two-track \textit{Grayned} regime is established; and a model for only included the votes of those justices on the Court at the time that the \textit{Grayned} regime was cases decided after \textit{Grayned}.\footnote{We used SPSS 9.0 for Windows. For replication, SPSS commands and the data are available on the World Wide Web at http://www4.gvsu.edu/richardm/. We excluded the \textit{Grayned} and \textit{Mosley} cases from all statistical models. In the models presented in Table 1, there are 4,986 total votes, with 1991 before \textit{Grayned} and 2995 after.} Table 1 also shows results for these three models based on analysis that created; this controls for change in personnel.\footnote{These justices are Burger, Douglas, Stewart, Marshall, Brennan, White, Blackmun, Powell and Rehnquist. In these models, there are 3,056 total votes, with 878 before \textit{Grayned}, and 2178 after.}

In all of the models presented in Table 1, including those models that control for personnel change, the attitudes of the justices are highly significant and in the expected direction. The more liberal a justice is, the more likely he or she is to vote for the rights of speakers.

Our main concern is how the parameters are conditioned by the \textit{Grayned} regime; we now consider the results of the before and after \textit{Grayned} conditional models in Table 1.\footnote{We presented separate models for cases decided before and after \textit{Grayned}, rather than presenting models with interaction terms for \textit{Grayned} and the other variables, in order 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 3, as we explain in Appendix C.} For the models which included the votes of all justices, the Chow test shows that there are significant differences in the justices' interpretations of case factors that are conditioned by whether the cases were decided before or after \textit{Grayned} (chi square 124.68, 21 d.f., p<0.001). Change in the membership of the Court has been proffered as another explanation for change in voting patterns (Baum 1992). If the Chow test results that we observed were due to change in Court personnel, then the justices' attitudes would be the best explanation. To control for personnel, we restricted the Chow test analysis to only those justices sitting on the Court at the time of the \textit{Grayned} decision. The Chow test provides tentative confirmation that \textit{Grayned} is an influential jurisprudential regime (chi square 113.16, 21 d.f., 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 non-jurisprudential variables such as speaker identity variables change before and after \textit{Grayned}.\footnote{Testing for change in non-jurisprudential factors over time also enables control for sources of change over time that are alternative explanations for change in the influence of jurisprudential factors.} \textit{Grayned} requires content-neutrality, which helps to explain why the justices shifted to a more speech protective view of
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<tr>
<td>Religious</td>
<td>-.69 ***</td>
<td>-1.36 ***</td>
<td>-.66 **</td>
<td>-.68 *</td>
<td>-1.43</td>
<td>-.50</td>
</tr>
<tr>
<td></td>
<td>(.19)</td>
<td>(.38)</td>
<td>(.24)</td>
<td>(.29)</td>
<td>(.74)</td>
<td>(.34)</td>
</tr>
<tr>
<td>Print media</td>
<td>-.36 **</td>
<td>-.81 **</td>
<td>-.34 *</td>
<td>-.71 ***</td>
<td>-2.06 ***</td>
<td>-.63 ***</td>
</tr>
<tr>
<td></td>
<td>(.12)</td>
<td>(.27)</td>
<td>(.15)</td>
<td>(.15)</td>
<td>(.53)</td>
<td>(.17)</td>
</tr>
<tr>
<td>Broadcast media</td>
<td>-.03</td>
<td>1.44 ***</td>
<td>-.19</td>
<td>-.36 *</td>
<td>1.27 *</td>
<td>-.45</td>
</tr>
<tr>
<td></td>
<td>(.14)</td>
<td>(.41)</td>
<td>(.15)</td>
<td>(.18)</td>
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<td>(.19)</td>
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<tr>
<td>Constant</td>
<td>.42 **</td>
<td>-.34</td>
<td>.53 **</td>
<td>.51 *</td>
<td>-.18</td>
<td>.90 ***</td>
</tr>
<tr>
<td></td>
<td>(.16)</td>
<td>(.27)</td>
<td>(.18)</td>
<td>(.21)</td>
<td>(.41)</td>
<td>(.21)</td>
</tr>
</tbody>
</table>

| Chi square               | 877.22 ***| 344.34 ***| 572.26 ***| 753.78 ***| 214.76 ***| 538.23 ***|
| 24 d.f.                  |          |         |         |          |         |         |
| R²                       | .13      | .14     | .14     | .18      | .21      | .18     |
| % Correctly Predicted    | 68       | 73      | 68      | 72       | 77       | 71      |
| % Reduction in Error     | 24       | 21      | 32      | 34       | 17       | 39      |
| N                        | 4986     | 1991    | 2995    | 3056     | 878      | 2178    |
| Chow Test Chi Square     | 124.68 **, 21 d.f. |         |         |          |         | 113.16 **, 21 d.f. |

*p<.05, **p<.01, ***p<.001, two-tailed.
Notes: Vote is coded so that 1=pro-government and 0=pro-expression rights.
Table entries are unstandardized logistic regression maximum likelihood coefficients.
Standard errors are in parentheses
a Parameter could not be estimated due to lack of variation.

several different types of speakers after Grayned. The racial minority, alleged communist, and business identity coefficients are significant and in the expected direction in the after models, but insignificant prior.
In the next step we considered whether Grayned significantly conditioned the influence of the jurisprudential variables. Using the jurisprudential variables test described in the methodology section, the chi square for the interaction of the jurisprudential variables interact with the Grayned dummy is significant at the p<0.001 level (46.71, 3 d.f.). Even after controlling for personnel by restricting the analysis to the justices on the Court at the time of the Grayned decision, we observe a chi square that is significant at the p<0.001 level (21.82, 3 d.f.). The adoption of the Grayned regime conditioned the influence of the jurisprudential variables as we hypothesized. Looking at the coefficients of the individual jurisprudential variables, one of the most striking results is that the coefficient for content-based regulations is insignificant before and significant and in the expected direction 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 the speakers who were regulated based on the content of their speech, relative to speakers whose expression fell within the less protected categories.\footnote{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.} In addition, the content-neutral coefficient is significant and in the expected direction before and 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 using a series of alternative
FIGURE 3: Influence of *Grayned* Content-neutrality Regime on Justices' Evaluations of Jurisprudential Factors, Versus Influence of Other Breakpoints
annual breakpoints before and after the regime breakpoint. The results of the sensitivity analysis are shown in Figure 3. The chi square associated with the Grayned regime breakpoint is quite large (46.71, 3 d.f., p<.001), and is the fourth largest of 32 splits tested. Although it is not the largest, the chi squares which are stronger than Grayned, the chi squares 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 largest in the late 1960s and early 1970s, and a significantly lower in the early 1960s, late 1970s, and 1980s. Performing the sensitivity analysis based on a model that includes only the justices on the Court at the time of the Grayned decision produced remarkably parallel results and confirmed that these results were not an artifact of changing Court personnel.

Overall, the evidence regarding the claim that Grayned is an influential jurisprudential regime is quite robust. The results of a series of increasingly rigorous analytic tests confirm the influential status of the regime. Not only does the content-neutrality regime condition the justices' interpretations of case factors generally, but it also conditions their interpretations of jurisprudential factors. In addition, the sensitivity analysis indicates that 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

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 theoretically and empirically 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 is consistent with the neoinstitutional insight that political actors create institutions and institutions structure the actions of political agents. This theoretical insight has been accepted in subfields such as American political development and international relations, and is strongly advocated by a number of scholars studying judicial politics (see the essays in Clayton and Gillman 1999; Gillman and Clayton 1999).

The jurisprudential regime approach not only incorporates the attitudinal insight that the justices' policy goals shape their votes, but also provides an empirical method for assessing whether law matters. To date, researchers have had difficulty finding empirical 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 empirical

16 A series of jurisprudential variable tests are performed by creating 31 alternative breakpoints based on the Court's 1960-1990 terms.

17 The jurisprudential variables test chi square for Grayned, 21.82 (3 d.f., p<.001), is again the fourth strongest of the 32 chi squares. The stronger 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 strongest and the stronger chi squares clustered around the time of Grayned.
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 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 are not applicable because they misconstrue our theory. We do not theorize that law is 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, 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 first-personal rationalizations of conclusions that are reflexively generated by a justice's policy preferences. The 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.

Judicial politics scholars have long debated different models of Supreme Court decision making. Our jurisprudential regime approach provides a theoretical and empirical framework for incorporating insights from models that have often been seen as incompatible, and in doing so, moves us closer to explaining the puzzle of judicial behavior (Baum 1997).

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; that is, the justices may seek to incorporate a different perspective into a judicial area, something that many observers argue has been taking place in the area of federalism. Second, changes in economic, social, or political conditions may be such that an existing regime no longer suffices as an organizing framework for judicial decision making (Ackerman 1991); essentially, this is the argument that Gillman (1993) advances to account for the demise of the police powers framework that dominated Supreme Court decision making vis-à-vis economic regulation into the first two decades of 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 must be left for future research.

APPENDIX A: IDENTIFYING CANDIDATE JURISPRUDENTIAL REGIMES

To identify a candidate jurisprudential regime for an area of law, first refer 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, trace 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, use three to four
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

Although Richards coded all of the cases himself, 54 of the cases were recoded by another scholar in order to assess reliability. (There are over 600 potential free expression cases in the dataset). 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 3836 items coded in common, the rate of agreement for the two coders is 93 percent. Among the sets of independent variables, the highest rate of agreement is 98 percent for the speaker identity variables. The lowest rate of agreement is 86 percent for the jurisprudential variables. However, this rate of agreement is fairly high, especially considering the interpretive nature of the coding for these factors.

We include codebook instructions for the jurisprudential regime variables shown in the tables in order 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.

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 pro-government vote. A pro-expression rights vote supports the right of the speaker over the government. An anti-expression rights vote indicates support for the government 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.

The set of variables labeled jurisprudence consider 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 non-public 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 as 1 if a case fails to reach the threshold of first amendment protection, 0 if 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 as 1; 0 if otherwise. 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, civil rights protesters for example, then the regulation is content-based. Content-based is a 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, pp. 15-16). 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; otherwise 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 would be 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 would be 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 include 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 reporters (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; otherwise 0. This is the baseline category. The less protected categories include:

- 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 non-public forums; (Examples of non-public forums include military bases, jails, prisons, and specific forums not open to the public at large such as candidate debates. The non-public forum category does not include private forums, traditional public forums such as streets, sidewalks or parks, or forums that the government has designated as 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.

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 which does not fall into the above categories, the value is 1; otherwise it is 0.

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 county, 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 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.

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. Then estimate two separate logistic regressions, one before and after the regime. Subtracting the sum of -2 log likelihood of the before and after regressions from -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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