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Hierarchical Constraints and the Choices Judges Make: Judicial Decision-Making at the U.S. Courts of Appeals

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Abstract of the Dissertation

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The conventional wisdom is that judges at the U.S. Courts of Appeals are constrained decision-makers. Serving as the immediate subordinate to the U.S. Supreme Court, circuit court judges must adjudicate cases in a manner consistent with precedents and doctrines established by the justices. Thus, it is not surprising that previous research generally concludes that circuit court judges comply. Although previous research has done much to enhance the understanding of lower court compliance with the Supreme Court, two often missing components are examinations of the conditions under which judges are indeed constrained and the manner in which such constraint should be evinced.

I argue that compliance alone is insufficient to conclude that the Supreme Court, in setting doctrine and legal considerations, constrains the choices judges make. For hierarchical constraint to be present, lower court judges must adhere to the relevant legal considerations despite a preference for deciding a case in the opposite direction. Moreover, legal considerations must shift the overall behavior, but in doing so can also affect the role of ideology in the eventual vote choice. Previous examinations, empirically and sometimes theoretically, have ignored the possible interaction between legal doctrine and ideology. By accounting for hierarchical constraints and the mechanisms through which they affect judicial decision-making of abortion, free expression and religious free exercise cases at the U.S. Courts of Appeals, this dissertation seeks to clarify the role of ideology, legal considerations, and the impact on judicial behavior at the circuit courts.

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[1] All figures and tables appear at the end of their respective chapters, where all figures are presented first and are followed by tables.

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Acknowledgements

This dissertation represents the culmination of more than two years worth of work and sacrifices. It is also reflective of two decades of schooling and, specifically, the five years I have spent in the Political Science Department at Stony Brook University. It was trying at times. I do recall several moments where I doubted myself and whether the sacrifices were worth remaining in the program. If it were not for the love and support of my family, I would not have completed graduate school and, of course, this dissertation. I, first, must thank the two most important people in my life: my parents, Ringo and Nancy. They have always been there beside me encouraging me to follow my dreams, supporting me through success and my burdens or defeats, and offering unqualified and unwavering love and support. There really are not enough words to express my love and appreciation for all that they have and continue to do for me. I would also like to acknowledge several others for their love, friendship and support: Sean O'Neill, Jeanna Barbaste, Michael Blair, and of course my sister Michelle Mak.

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Chapter 1
Introduction

Given the hierarchical nature of the federal judiciary, the conventional wisdom is that judges at the U.S. Courts of Appeals are constrained decision-makers, operating as adjudicators of the law that the Supreme Court establishes. While the justices at the Supreme Court arguably are unconstrained to vote their policy preferences or ideologies (Segal and Spaeth 1993, 2002; cf. Epstein and Knight 1998), lower court judges do not enjoy the same institutional insulation as the justices serving at the nation's highest court. Although they, too, serve life tenures and have no direct electoral accountability,[1] judges at the Courts of Appeals do not have discretionary control of their dockets like the justices; they must hear appeals from the federal district courts as a matter of right, which increases the overall volume of (meritless as well as legitimate) cases and arguably decreases the amount of judges' discretion to vote ideologically. More importantly, for the purposes of this dissertation, circuit court judges are subject to Supreme Court review and possible reversal.

[1] Segal and Spaeth (1993, 2002) offer a lack of ambition for higher office as another reason for Supreme Court justices being able to vote their policy preferences. Serving at the court of last resort, the justices are at the peak of the legal profession. Especially for modern justices, the ambition for higher office is removed; therefore, there is no need, in general, for the justices to vote strategically in a systematic fashion. As for circuit court judges, there are two schools of thought with regards to higher ambition. Some suggest that lower court judges may want to serve on the Supreme Court and thus vote accordingly. In other words, they may vote strategically or in a sophisticated manner that may catch the eye of a nominating president. The other school opines that, while the ambition for a Supreme Court seat may be present, it should not have a systematic and significant effect on the choices judges make. The chances of any given judge being elevated to serve on the Supreme Court is so small that it should not serve as a major determinant of judicial decision-making at the Courts of Appeals (Posner 1993). Because of the opposing schools of thought regarding higher ambition, I have relegated this discussion to a footnote.

Serving on the court of last resort, the justices hand down doctrines, guiding principles and precedents for lower courts to apply; circuit court judges can choose to defy, but they weigh doing so at the peril of being sanctioned in the form of a reversal that establishes the weight of national precedent. This institutional set-up, where lower court judges are subject to review and possible reversal by the Supreme Court, establishes an institutional, hierarchical constraint on the choices judges make. The ability for circuit court judges to vote their policy preferences should be constrained by the fact that virtually all decisions handed down at the Courts of Appeals theoretically are within the Supreme Court's appellate jurisdiction to oversee.

This intuition and recognition of a hierarchical constraint (and the inherent problems of inducing compliance) within the federal judiciary is supported by applications of principal-agent theory to the federal judiciary (e.g., Songer, Segal and Cameron 1994; Cameron, Segal and Songer 2000; Benesh 2002; Brent 1999, 2003). While the application of a theory mainly used to explain compliance and adherence in economic firms and federal bureaucracies seems controversial, the mere usage of the principal-agent framework to examine the federal judiciary suggests that the "least dangerous" branch contains several key aspects of the agency problem. Mainly, the Supreme Court, acting as the principal, sits atop of this hierarchy and is assumed to want to see the realization of its policy preferences in the form of the decisions handed down by its agents (lower court judges).

[Insert Figure 1.1 about here.]

As the number of cases handled at the circuit courts continues to grow and the Supreme Court caseload appears ever more anemic in comparison, it becomes more

important that the justices sitting atop the judicial hierarchy can constrain the choices judges make. Figure 1.1 compares the caseloads of both the Supreme Court and the Courts of Appeals.[2] As depicted, there is clearly a negative correlation between the two courts and the number of cases handled. Looking only at the 2004 term, over 60,000 cases were reviewed by the United States Courts of Appeals (Administrative Office of the U.S. Courts 2006); of those cases, the Supreme Court only reviewed 65 the following term, eventually reversing the circuit court decision in 41 of those cases. Obviously, this leaves a large percentage of cases decided at the Courts of Appeals final. With so many cases escaping review, is it the case that the lower courts comply with Supreme Court jurisprudence? Or, are the justices simply incapable of overseeing the federal judiciary?

Despite the large number of circuit court cases handled and the low number of cases receiving High Court review, previous research suggests and, generally, concludes that the lower courts comply with Supreme Court decision-making. In other words, compliance at the U.S. Courts of Appeals is the norm rather than the exception (e.g., Songer and Haire 1992; Songer and Sheehan 1990; Songer et al. 1994). Moreover, two common and significant predictors of judicial behavior are judges' ideologies and the relevant legal consideration (i.e., the relevant precedent and/or distinguishing case fact). In these examinations, both hierarchical constraints and ideology are theoretically and/or empirically modeled as independent effects on judicial vote choice. Although previous research has done much to enhance the understanding of lower court compliance with the

[2] Supreme Court cases were counted via Spaeth Supreme Court Database; included were all orally argued cases by docket number (where *analu* equals 0 or 1 and *dec_type* equals to 1, 6, or 7). For U.S. Courts of Appeals cases, various Annual Reports of the Director from the Administrative Office of the U.S. Courts were used to compile case numbers. Prior to 1980, data was gathered at 5 year intervals from Songer, Sheehan, and Haire (2003).

Supreme Court, two often missing components are examinations of the conditions under which judges are indeed constrained and the manner in which such constraint should be evinced.

I argue that compliance alone is insufficient to conclude that the Supreme Court can significantly and meaningfully influence the choices judges make. Circuit court adherence/compliance and hierarchical constraint are two different facets of the choices judges make. Constrained decision-making does indeed imply and yield an outcome of compliance, but the reverse is not true; adherence to the Supreme Court can occur in the absence of constrained behavior. Where hierarchical constraints (legal considerations) and a given judge's ideology indicate similar outcomes, the legal model, strategic model (Epstein and Knight 1998) and attitudinal model (Segal and Spaeth 1993, 2002) all make the same prediction: compliance. Under these circumstances, one cannot differentiate between sincere or strategic, unconstrained or constrained behavior. Thus, the true and more stringent test of hierarchical constraint is when circuit court judges' ideologies are divergent from the relevant Supreme Court precedents. Support for constrained decision-making under this theoretical framework requires responsiveness to Court-established legal considerations as well as evincing such behavior *in spite of* divergent preferences. In other words, judges must apply the appropriate doctrine and generally vote in accordance with Supreme Court precedent even when judges prefer to deviate and vote consistent with their ideologies.

Furthermore, the mechanisms through which constraint is evinced must also be clarified. If truly influential in the decision-making calculus, hierarchical constraints must shift the overall behavior, but in doing so can also affect the role of ideology in the

eventual vote choice. A theory of heterogeneity in the preference-behavior relationship (Bartels 2005, 2009) argues that the impact of ideology on the eventual vote choice is not constant as has been previously been modeled. Rather, decision-making contexts, which are hierarchical constraints, may accentuate or attenuate the role of ideology on the eventual vote choice. For significant and meaningful hierarchical constraint to be present, Court preferences and/or legal considerations must affect the final vote and, in doing so, can also mitigate the impact of a given judge's policy preferences on that vote choice. While previous research has incorporated legal and ideological considerations into theoretical and empirical specifications of judicial vote calculus, these models have assumed independent and constant effects for ideology and the relevant legal considerations on the eventual behavior. In other words, previous examinations have omitted a discussion of the possible interaction between the role of hierarchical constraints and ideology.

Structure of the Dissertation

In the following chapters, I will further explore whether and to what degree judges at the Courts of Appeals are actually constrained by the Supreme Court. Chapter Two will discuss and explore the theories of hierarchical constraint and heterogeneity in judicial decision-making. Employing these theories and their empirical implications, I examine the ability of Supreme Court doctrine and/or jurisprudence to affect lower court decisions as well as the choices judges make at the U.S. Courts of Appeals. Using originally collected data, this dissertation examines the impact of hierarchical constraints under three different circumstances and areas of jurisprudence—free expression, abortion

and religious free exercise. The studies progress from the most stringent of tests to the least stringent, from a subtle modification in doctrine to an explicit shift in jurisprudence. This, however, does not mean that hierarchical constraint is guaranteed or even that the likelihood of hierarchical constraint increases as the dissertation progresses. Rather, in each subsequent examination, the expectation of sophisticated rather than sincere decision-making does indeed increase, but each study still offers ample opportunity for judges to vote consistently in accordance with their own ideologies rather than Court-established legal precedent.

Chapter Three investigates the Supreme Court-circuit court relationship in a specific issue area thereby allowing for a test of judges' sensitivity to the ability of legal considerations to constrain the choices judges make. I examine free expression cases within the jurisprudential regime framework established by Richards and Kritzer (2002). Specifically, the purpose of this chapter is to determine whether or not the Court's decisions in *Grayned* v. *Rockford* (1972) and *Chicago Police Department* v. *Mosely* (1972) provided formal guidance to the lower courts when adjudicating free expression cases. Although *Grayned* and *Mosely* did not explicitly overturn previous free expression jurisprudence, Richards and Kritzer (2002) argue that these cases represent a new jurisprudential regime that, at the very least, structures adjudication at the Supreme Court. If the Court imposes a hierarchical constraint on circuit courts, the intuition should follow that circuit court judges, too, adjusted decision-making after *Grayned* and *Mosely*. Examining free expression cases handled at the Courts of Appeals from 1944 to 2006, I test for whether and to what degree circuit court judges' decision-making comports with the conceptualization of content-neutrality jurisprudential regime.

The purpose of Chapter Four is to examine the impact of Supreme Court decisions in the area of abortion and the influence they had on cases handled at the U.S. Courts of Appeals from 1973 to 2006. Specifically, this chapter seeks to determine whether and to what degree circuit court judges were responsive to the Court's shifting jurisprudence from the strict scrutiny standard enumerated in *Roe* v. *Wade* (1973) to the undue-burden standard. There is doubt as to whether lower court judges would be responsive to Justice O'Connor's special concurrence in *Webster* v. *Reproductive Health Services* (1989), which arguably established the undue-burden standard as the law of the land according to the *Marks* Doctrine (see *Marks* v. *U.S.*, 1977). Given its uncertain status as the dominant precedent, undue burden prior to its clarification in *Planned Parenthood* v. *Casey* (1992) was subject to strategic deviation. In this chapter, I not only examine judges' applications of different scrutiny levels to determine if judges' usage of undue burden suggests sophisticated behavior, but also whether undue burden influenced the final judicial voting behavior and, therefore, the level of support for abortion rights. As such, this chapter seeks to determine at what point abortion jurisprudence effectively shifted, clarify the impact of undue burden on judicial decision-making at the U.S. Courts of Appeals, and examine whether circuit court judges decided cases in a manner consistent with Supreme Court decision-making and the conceptualization of hierarchical constraint.

Chapter Five looks at Courts of Appeals decision-making in free exercise cases. This issue area provides not only a shift in doctrine by the Supreme Court but a congressional challenge to the Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith* (1990). Looking specifically at the impact of

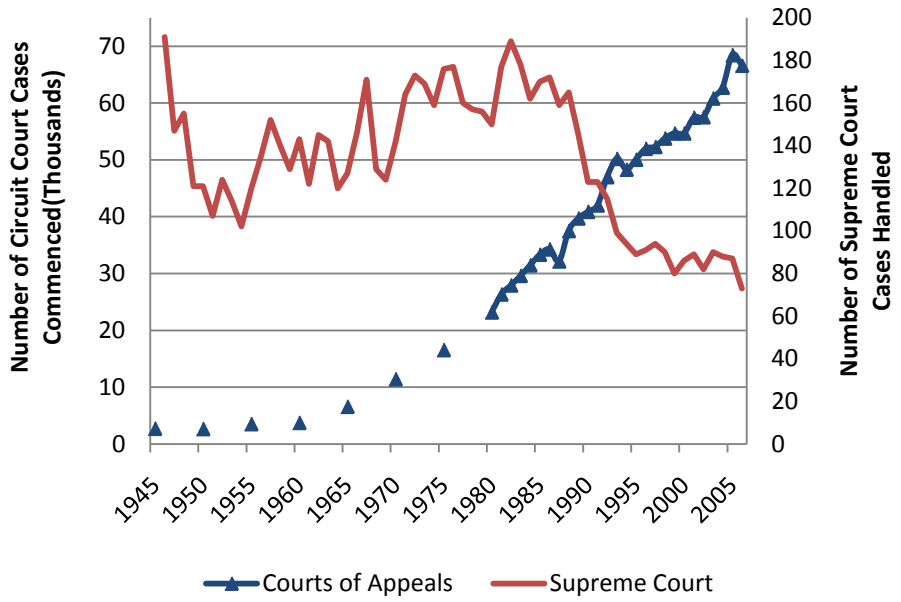
congressional statute and Supreme Court precedent on circuit court panel decisions, two examinations (Brent 1999, 2003) conclude that Congress can indeed be an additional principal of the Courts of Appeals. Brent (1999) finds that, post-RFRA, Congress was able to increase circuit court support of free exercise claims; the levels of litigant success in this issue area actually increased to levels almost identical to the pre-*Smith* era. Brent concludes that legal socialization to follow Supreme Court decision-making and the institutional mechanisms that make the Court a functioning principal (oversight, review and possible reversal) were not enough to maintain compliance with *Smith* when contradicted by congressional legislation. Although it clearly is not the first to examine religious free exercise cases, this study attempts to remedy theoretical and empirical concerns from the Brent (1999, 2003) examinations as well as decipher the role of conflicting congressional and Court instructions for the circuit courts on the choices judges make.

Finally, I provide a brief discussion regarding the results from the empirical analyses and some general conclusions in Chapter Six. By accounting for hierarchical constraints and the manner in which they may be evinced, this dissertation seeks to widen and expand upon previous examinations of judicial decision-making at the U.S. Courts of Appeals. Specifically, this dissertation tests whether and to what degree judges are indeed constrained in the choices they make. Does judicial behavior (i.e., the final vote choice or even applying the relevant "test" of constitutionality) suggest compliance in spite of divergent preferences? Furthermore, significant and meaningful Supreme Court influence—by way of responsiveness to the relevant legal considerations established in contemporary Court's decisions—should be evinced not only through its impact on a

given judge's behavior, but also through the effect of ideology on that behavior. Taking into account the possible heterogeneity in the preference-behavior relationship as well as the conceptualization of distinguishable Supreme Court influence, this dissertation seeks to clarify the relationships between ideology, hierarchical constraints and the eventual vote choice at the U.S. Courts of Appeals.

More importantly, if lower court compliance with the Supreme Court-established precedent is simply achieved through convergent preferences of legal considerations and judicial ideology, it may signal a fundamental breakdown in the federal judiciary. In other words, the Supreme Court could be incapable of monitoring and inducing compliance from judges that may potentially go "rogue." Through judicial review, the Supreme Court in its decisions determines the "line" in which the government—state and federal—cannot cross in terms of individual rights and liberties. As a result, a failure on the part of lower court judges to comply with the Supreme Court, especially when preferences are divergent, can have drastic repercussions for those civil rights and liberties.

Figure 1.1. Comparison of the Supreme Court Cases Handled and Circuit Court Cases Commenced



Source: For Supreme Court cases, the Spaeth Supreme Court Database was used. For circuit court cases, data was obtained from Annual Reports of the Director from the Administrative Office of the U.S. Courts and Songer, Sheehan, and Haire (2003).

Chapter 2
Hierarchical Constraint and Heterogeneity in the Preference-Behavior Relationship

To examine lower court compliance with the Supreme Court, there have been several different approaches. Applying principal-agent theory to the federal judiciary, Songer, Segal and Cameron (1994) discuss and find evidence for two forms of compliance—congruence and responsiveness—with the Supreme Court. Congruence suggests that the agent makes decisions as the principal would under the same conditions. In the area of search and seizure, the authors find that case facts help to explain the likelihood that a federal appellate court decision will uphold the validity of a challenged search. Similar to the predictive power of case facts in Supreme Court decisions in search and seizure (Segal 1984), case facts at the Courts of Appeals are also significant predictors of case outcomes. Generally, the Songer et al. (1994) examination finds that circuit court judges evince a good degree of congruence with Supreme Court adjudication in the area of search and seizure. But, this congruence is not perfect and there is substantial variation between the Courts of Appeals and the nation's highest court.

Although making decisions similar to the Supreme Court under similar factual circumstances is important, Songer et al. (1994) indicate that responsiveness is key. The Court's role as a principal may not be best represented by the power of single decisions, but rather by general policies fostered over a series of decisions. As Hellman (1996) argues, "the Court can best serve the needs of the national law by laying down broad principles, leaving their application and elaboration largely to the federal courts of

appeals…" (433). For the federal judiciary, compliance through responsiveness requires that judges are receptive and sensitive to shifts in Supreme Court preferences.

Analyses have also concluded that the lower courts are sensitive to the Court's decisional trends, but, similar to congruence, the degree of responsiveness has been varied (e.g., Cannon 1973; Stidham and Carp 1982). For example, Songer et al. (1994) find significant influence on lower court decision-making as the Supreme Court became more conservative in the area of search and seizure. As the Burger Court and its law-and-order approach to criminal justice progressed, the decisions made at the Courts of Appeals, too, became more conservative. This led to an increased likelihood, overall, that a search would be deemed valid. In the law of confessions, Benesh (2002), too, finds a similar form of responsiveness; even controlling for lower court panel ideology, Supreme Court preferences elicit a systematic and significant impact on the choices judges make. Increasing Court conservatism leads to a higher propensity for an obtained confession to survive a challenge of illegality.

Examining the shift in labor and antitrust litigation at the Courts of Appeals, Songer (1987) finds that decisions at the Courts of Appeals were responsive to shifting Supreme Court preferences. For labor relations cases, decisions handed down at the circuit courts became more liberal when Chief Justice Warren replaced Chief Justice Vinson; the same relationship occurred in antitrust cases. Responsiveness also occurred when the conservative Burger Court replaced the more liberal Warren Court; in this period, the circuit courts in both issues areas shifted back in the conservative direction.

As principal-agent theory argues, the preferences of the principal are of most importance to the choices agents make. In other words, congruence and responsiveness

requires adherence to the Supreme Court's preferences, which can be quite plausible in most instances. Adherence to Supreme Court preferences can be especially important absent clear guidance or instructions from the justices, which can occur for instance where new issues and types of regulations arise. Looking at circuit court reactions to new rules announced at the Courts of Appeals in the areas of search and seizure, antitrust and environmental law, Klein (2002) finds that circuit court judges are responsive to the Supreme Court's preferences. As the author notes in his examinations of the Courts of Appeals, circuit court judges often decide cases in the absence of clear Supreme Court decisions. While Courts of Appeals judges apparently seize the opportunity to make the law, the legal rules developed at the circuit courts often are "not dramatically different from what would have emerged from the Supreme Court" (136). Klein (2002) concludes that it is the collective goal (shared by judicial decision-makers) of making sound legal policy that induces compliance with the Supreme Court; he further posits that this goal leads judges to want to perform their duties well and, therefore, keeps these judges sensitive to the Court's preferences and (even indirectly applicable) precedents. Similarly, others (e.g., Kornhauser 1989, 1995) suggest that judges share a common objective of wanting to correctly decide as many cases as possible, making judges a "team." As a consequence, compliance with the Supreme Court and uniformity of law emerge from an institution (i.e., the federal judiciary) aimed at deciding cases correctly.

But, where Supreme Court precedent and the preferences of the justices suggest different outcomes, it should be the case that the law functions as the established and relevant hierarchical constraint. Moreover, there is often uncertainty as to the Supreme Court's exact preferences, especially when Court membership has changed or when there

is an absence of a guiding precedent established by the contemporary Court. When the Supreme Court hands down a decision on a given issue area in the form of a written opinion, the Court clearly establishes its preferences thereby eliminating, or, at the very least decreasing, the uncertainty of the Court's preferences. Responsiveness also requires that lower court judges decide cases in a manner that is consistent with contemporary Supreme Court jurisprudence. In other words, judges must be sensitive and responsive to new precedents handed down by the Court, especially when the Court signals a deviation or refinement from previous precedent or doctrine. It is through these hierarchical constraints—Supreme Court doctrine, precedents, and jurisprudence—that the Court can induce compliance.

Previous research has examined these instances—where the Supreme Court hands down major decisions—finding similar results as to those examining congruence with and/or responsiveness to Court preferences. Overall, the lower courts appear to adjust decision-making to match changes in doctrine or precedent, but the degree of compliance and the time to eventual adherence vary. For example, Songer and Sheehan (1990) examine the impact of *Miranda* v. *Arizona* (1966) and *New York Times* v. *Sullivan* (1964) on lower court decision-making. As far as case outcome, the impact of *Miranda* seems to be in question. Comparing decisional trends before and after *Miranda*, the increase in liberalism is not significant[1]; neither is an observed decrease in liberalism when the Court shifts from Warren to the Burger Court.

[1] A possible reason for this could be the fact that *Miranda* applied to government actions more so than Court adjudication; informing a suspect of his constitutional rights to remain silent and to counsel are functions that were undertaken at the state and federal law enforcement agencies. Only upon failure or a question of failing to adhere to *Miranda* would there be a case or controversy for the Courts of Appeals to decide. Compliance with *Miranda* may have had judicial repercussions, but, most likely, it had more influence on the choices and actions of law enforcement officers than judicial decision-makers.

Examining the impact of factual circumstances in Courts of Appeals cases, Benesh (2002), too, examines the law of confessions. In the post-*Miranda* period, she finds a that significant predictor is whether an individual was apprised of his rights to remain silent and to an attorney; if a person was indeed informed of her *Miranda* rights, the obtained confession was more likely to survive a challenge to its validity. Other case facts, such as whether law enforcement agents used psychological coercion or tactics that are related to creating a hostile environment (e.g., police relays and the suspect was held incommunicado), were also significant predictors. Benesh (2002) concludes that lower court judges comply and utilize case facts deemed pertinent in Supreme Court decisions that govern the law of confessions. The examination also provides a qualitative survey of Courts of Appeals applications of Supreme Court decisions. There are indeed several "creative" opinions that distinguish Supreme Court precedent relegating it to *dicta* and, therefore, deviate from the spirit of the Court's precedent. As the author concludes, the circuit courts, however, adhere to Supreme Court decisions overwhelmingly more often than not.

As for the impact of *New York Times*[2] in the Songer and Sheehan (1990) analyses, there is an observed increase in liberalism post-*New York Times*; this result, however, is not statistically significant. When shifting from the Warren to Burger Court, there is indeed a strong shift in the liberal direction for cases pertaining to libel. This finding is indeed an oddity. To investigate further, the authors parcel out voting trends by

[2] The Court, in their opinion, established that actual malice had to be present and proven in order a challenger to successfully seek damages from possible libelous speech. As enumerated by the Court's opinion, actual malice is defined as knowingly publishing falsehoods or publishing material with a reckless disregard for the truth; the burden falls to the challenger of the speech to prove that the speech was done with actual malice before they can claim damages. With such a hefty requirement, the Court placed a heavy burden of proof on public officials and, eventually, public figures, and it is no wonder that ruling in favor of the freedom of press became the norm at the Courts of Appeals, after *New York Times*.

Democratic and Republican judges. While not statistically different between the pre-*New York Times* period, Democrats increased in liberal votes. Republican judges, on the other hand, decreased liberalism after New York Times, but this too is insignificant. With the switch from the Warren Court to the Burger Court, both Democrat and Republican judges evince a greater amount of liberalism; this effect also occurs for hold-over judges from the period before *New York Times* as well. These results seem counter to expectations from the agency model, where preferences of the principal take precedence over the law. Regardless of the high level of First Amendment protection from *New York Times*, it should be the case that judges decrease in levels of liberalism after Burger replaced Warren as Chief Justice. The authors suggest that the Supreme Court (even with the more conservative Burger as Chief Justice) continued to expand First Amendment protections against libel claims; as such, the Songer and Sheehan (1990) examination concludes that the Supreme Court exerted significant influence on circuit court adjudication of libel cases post-*New York Times*.

In the area of obscenity, Songer and Haire (1992) examine competing models of judicial decision-making and find overall, Courts of Appeals responsiveness to changes in Supreme Court decision-making. Most importantly, the authors find evidence that changing Court jurisprudence had a significant and systematic impact on the choices judges make in the law of obscenity. Changing from the *Roth* standard enunciated in *Roth* v. *United States* (1957) to the *Miller* test established in *Miller* v. *California* (1973) led to an overall decrease in the likelihood of a liberal vote (supporting nonrestrictive positions). The impact is modest, at best; the predicted probability for the propensity for

a liberal vote decreases about 2.5 percent.[3] While the Supreme Court significantly impacted the choices judges make in the area of obscenity, it did not have a sizeable and substantial influence.[4]

Examining a specific Court shift in free exercise jurisprudence, Brent (1999) examines the principal-agent relationship between the Supreme Court and the Courts of Appeals; he finds that *Employment Division, Department of Human Resources* v. *Smith* (1990) had a significant impact, decreasing the overall likelihood that a claimant will win religious free exercise cases when compared with the decisions made pursuant to *Sherbert* v. *Verner* (1963). The reason is that the Supreme Court in *Smith* shifted the level of scrutiny from the compelling interest test announced in *Sherbert* and reaffirmed in *Wisconsin* v. *Yoder* (1972); post-*Smith*, the standard eerily resembled the one enumerated in *Reynolds* v. *United States* (1879), where individuals are not relieved of

[3] Please note the authors do not discuss or present this predicted probability. I calculated the predicted probabilities using the logit coefficients in Songer and Haire (1982), holding all other variables at zero. Because the authors use a series of dummy variables to control for attitudinal, litigants, case characteristics and legal arguments, this estimated probability is for a case decided by an Eisenhower appointment to a Southern Circuit (Fourth, Fifth or Eleventh Circuits). The litigant in this case would be "other", which according to the authors coding strategy would generally be "media interests, including radio/TV stations, movie theaters and producers, and newspapers" (971). The case characteristics would either "topless dancing, audio tapes, paintings, or 'still' photographs" (972). Lastly, the defense, or legal argument, advanced by the litigant would exclude First Amendment, Privacy, Prior Restraint or the prosecution failed to prove scienter.

[4] There is a possible reason for the lack of a substantial impact at the Courts of Appeals. Prior to *Miller*, the standards for deciphering whether material or speech was obscene was to be determined by the average person taking the work in question as a whole; these two standards remained in place post-*Miller*. The average person, prior to *Miller*, was to apply national standards in determining whether a work comports with contemporary community standards; the *Miller* Test requires using contemporary community standards as defined by applicable state law. While the applicable state law qualification to the contemporary community standard should and probably did have a major impact on state adjudication of obscenity cases, the Courts of Appeals, who mainly hear claims involving federal statutes and actions, are hardly going to be greatly impacted by this change. So, the major impact of *Miller* at the Courts of Appeals depends upon the effect the "value of the work" prong. Prior to *Miller*, the standard was based on *Memoirs* v. *Massachusetts* (1966), which dictates that the work, in order to be deemed obscene, must be utterly without redeeming social importance; this standard changes under *Miller*, where works must lack serious literary, artistic, political, or scientific value in order to be deemed obscene and, thus, less protected than other forms of speech safeguarded by the First Amendment. This one change is hardly enough to drastically shift the decisional trends or substantial impact the choices circuit court judges make in deciding obscenity cases.

compliance with laws that were valid, neutral and generally applicable even if these laws impeded on the free exercise of religion. As evinced in Brent's analyses, this less stringent standard of scrutiny stripped individuals of much success when challenging government regulations or laws on religious free exercise grounds.

The innovation in the Brent (1999) examination, however, is not the finding that Courts of Appeals applied the doctrine announced in *Smith*, but the suggestion that Congress, too, serves as a principal of the lower courts. With the passage of the Religious Freedom Restoration Act (RFRA) in 1993, Congress attempted to explicitly overturn the Court's decision by stipulating that religious free exercise questions must be adjudicated using the compelling interest test. In deciding the constitutionality of a regulation that impedes on free exercise, the Court was instructed by Congress to determine whether the regulation serves a compelling governmental interest and that regulation is the least restrictive of means. Brent (1999) finds that, post-RFRA, Congress was able to increase circuit court support of free exercise claims; the levels of litigant success in this issue area actually increased to levels almost identical to the pre-*Smith* era, which seems counter to the intuition and conventional wisdom that the Supreme Court is the appropriate principal of the federal judiciary.[5]

In 2003, Brent reexamines this question of lower court compliance. With *City of Boerne* v. *Flores* (1997), the Court responded to RFRA, firing back that the power to interpret the Constitution belongs to the Court via judicial review. And, if there were any questions or doubts as to this power and its legitimacy, Congress and the President, as the

[5] Brent (1999) attributes this to the fact that legal socialization to follow Supreme Court decision-making and the institutional mechanisms that make the Court a functioning principal (oversight, review and possible reversal) were not enough to maintain compliance with *Smith* when contradicted by congressional legislation.

Court cites, could revisit and consult *Marbury* v. *Madison* (1803). As the Court reaffirmed, the standard used in free exercise cases is no longer the compelling interest test from *Sherbert*; it is the *Smith* Test. As such, there should no longer be any confusion at the Courts of Appeals as to whether it should follow *Smith* or RFRA. With *Boerne*, the Court made clear that *Smith* is the standard. The author finds evidence that comports with the suggestion that the Court is indeed the effective principal. Litigant success, when making a free exercise claim, returned to levels post-*Smith* and pre-RFRA. In other words, challenges on the grounds of impeding on free exercise were less successful due to the lower standard that governmental actors must satisfy in order to survive constitutional challenge; this, of course, sits well with *Smith*.

More generally, looking at those instances that explicitly signal changes in Supreme Court preferences—when the Court overturns a precedent, Benesh and Reddick (2002) examine the amount of time it takes for lower court decisions to comply with these explicit policy proscriptions. These instances, where the Court overturns a standing precedent, are the most extreme of situations, given the rarity of these occurrences as well as the scale of the shift (a virtual 180 degree turnaround in some cases) in Court jurisprudence. In these instances, the authors find that the characteristics of the Supreme Court precedent and the circuit court applying the precedent directly determine the length of time until compliance with the precedent.

The Benesh and Reddick (2002) examination does yield several applicable conclusions. First, consistent with principal-agent theory and the concept of responsiveness, the lower court judges appear to be sensitive to contemporary court preferences; when the contemporary court shifts in the ideological direction of the

overruling precedent, judges are more likely to comply with that decision. Second, as the authors conclude, while compliance is often the norm, there is much variation until that adherence to an overruled precedent occurs.

In sum, previous research has found, overall, the Courts of Appeals complying with Supreme Court decision-making. Whether it be adjudicating cases in a similar manner (e.g., Songer et al. 1994), responding to shifts in Court preferences (e.g., Benesh 2002; Songer 1987), or complying with formal shifts in jurisprudence enumerated in Supreme Court decisions (e.g., Brent 2003; Benesh and Reddick 2002; Songer and Sheehan 1990), the Courts of Appeals evince a moderate degree of hierarchical constraint. But, as the literature also suggests, compliance has been varied and subject to deviation. Although scholarly work has done much to increase the knowledge of lower court compliance, this dissertation seeks to examine lower court compliance in a manner that clarifies the relationship between hierarchical constraints, ideology and the eventual choices judges make at the Courts of Appeals. In doing so, the main questions this dissertation seeks to answer are whether and to what degree judges comply with the Supreme Court.

Hierarchical Constraint and the Choices Judges Make

As noted above, the conventional wisdom is that lower court judges are constrained by the Supreme Court (e.g., Songer 1987; Songer and Haire 1992; Songer and Sheehan 1990; Songer, Segal and Cameron 1994). The Supreme Court is the court of last resort; the justices hand down doctrines, guiding principles and precedents for lower courts to apply. Lower judges can choose to defy, but they weigh doing so at the

peril of being sanctioned in the form of a reversal that establishes the weight of national precedent. This institutional set-up, where lower court judges' decisions are subject to review and possible reversal by the Supreme Court, establishes an institutional, hierarchical constraint on the choices these judges make. This relationship is especially true for the federal judiciary and particularly the jurists serving on the U.S. Courts of Appeals.

As has been well-documented, Supreme Court justices have policy preferences (e.g., Epstein and Knight 1998; Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002) and obviously would like to see those preferences evinced in the form of doctrine and precedents for lower courts and even other governmental actors to follow. Unfortunately, evidence from previous research suggests, logically, that judges at the lower courts also vote in accordance with their own policy preferences (e.g., Giles, Hettinger and Peppers 2002; Songer and Haire 1992).[6] If lower court judges were always faithful adjudicators of Supreme Court doctrine, the idea that judges systematically vote against their policy preferences runs counter to the conception of rationality and self-interest. Yet, previous research has generally concluded that compliance with the Supreme Court doctrine has been the norm rather than the exception (e.g., Benesh 2002, Benesh and Reddick 2002; Songer and Sheehan 1990).

As a possible explanation for compliance, Brehm and Gates (1997), in examining federal agency response to a principal, suggest that bureaucracies are often staffed by

[6] Other examinations of the U.S. Courts of Appeals reinforce and confirm this finding for lower court judges (e.g., Howard 1981, Songer et al. 1994). Lower court judges, overall, vote consistently with their ideologies. For example, Sunstein, Schkade, Ellman and Sawicki (2006) find that partisanship serves as a strong predictor of judges' votes in contentious issues. In other words, judges vote in accordance with their partisan-based preferences in issue areas that are salient and/or highly controversial. This result is not surprising, given the strength of ideology in predicting votes as well as the often high correlation between partisanship and ideology. Democrat-nominated judges tend to hand down more liberal decisions while Republican-nominees tend to be more conservative.

individuals who have similar policy preferences. Thus, not every circuit court judge will deviate from the Court and, therefore, fail to adhere to the Supreme Court (Benesh 2002). Brehm and Gates (1997) contend that only those agents that are ideologically divergent from the principal are most likely to shirk their responsibilities. In other words, when preferences between the principal and the agent are opposing or distant, only then will agents possibly go "rogue" and the threat of noncompliance is truly likely.[7] Given this intuition, the reason for compliance at the lower courts could be due to the fact that, in general, the circuit court judges are not ideologically divergent from the Supreme Court. Rather, the federal judiciary may be staffed by like-minded individuals and, as a result, yields similar outcomes across all levels.

If judges and justices have similar policy preferences, compliance is achieved because ideological congruence yields such an outcome. When Supreme Court-established legal considerations indicate positions that are aligned with a lower court judge's ideology, the legal model, strategic model (Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000) and attitudinal model (Segal and Spaeth 1993, 2002) all predict the same outcome. It is the problem of observational equivalence; in other words, Supreme Court influence and preference-based voting are indistinguishable. Put differently, there is an inability to differentiate between sincere (ideological) or sophisticated (strategic) judicial decision-making. If the reason for compliance is due to similar preferences between the Supreme Court and circuit court judges, the observational and empirical evidence of lower court judges' adherence to the Supreme Court is not substantively meaningful. In these instances, a conclusion of hierarchical

[7] As Benesh (2002) notes, this conceptualization of the principal-agent theory, although it seems to comport with common sense, was never explicitly stated prior to Brehm and Gates (1997), especially within the literature examining bureaucratic response.

constraint—where the Supreme Court can and does impact lower court judicial decision-making—is inappropriate.[8]

The problems of observational equivalence and the search for sophisticated/sincere behavior are not new to the political science literature. Regarding the research on congressional party politics, this discussion of constraint can be summarized by the difference between sophisticated and sincere voting behavior of members of Congress. Krehbiel (1993; 2000) examines party influence on legislator behavior. He opines that only behavior favoring party policy objectives and being independent of legislator preferences can be deemed significant party effects. Pushing this notion further, it can be suggested that party influence is only substantively meaningful when the party can induce legislator behavior that is counter to the legislator's policy preferences. If policy preferences of both the party and the legislator

[8] While it is beyond the scope of this examination, it is worthy to note that there are several theories as to what may induce adherence to Supreme Court decision-making in instances where legal considerations and/or Court preferences indicate a directionality of vote opposite that of a given judge. As suggested by Gibson (1983), "[j]udges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (32); labeled role theory, a judge should comply with the choices justices make if the judge believes that adherence to the Supreme Court is an adequate and appropriate consideration in making decisions for a given case. As another explanation, Klein (2002) contends that the collective goal of making sound legal policy—by judges and justices alike—constrains the choices judges make. In other words, the goal of making good law induces judges to be sensitive to Court preferences. This common goal, which both judges and justices share, constrains the choices of judges operating within the judicial hierarchy; Cross (2007) labels this duty theory. Brent (1999, 2003) opines that judges are socialized to adhere to the Supreme Court; Howard (1981) mirrors this suggestion.

The discussion, here, samples individual constraints on judicial decision-making. Another class of factors that may help to induce compliance involve the role of litigants (Songer et al. 1995, 1995), fire-alarm pullers (McCubbins and Schwartz 1984) including interest groups (McGuire and Caldeira 1993), and judges filing dissents, or "whistleblowers" (Cross and Tiller 1998; Hettinger, Lindquist and Martinek 2006) signaling possible deviation from Supreme Court preferences or doctrine. Moreover, Cameron, Segal and Songer (2000) argue that the Supreme Court, too, is strategic in selecting which cases to grant certiorari and therefore review. Based on the observable case factors and circumstances, the Court will be less likely to grant review where an ideologically proximate court hands down an ideologically favorable (similar) decision. Where the lower court is ideologically distant, the Court will be more likely to grant review overall, but in comparison, less likely to grant cert if the lower court rules in the ideological direction that the Supreme Court prefers. While there are a myriad of examples and theories that may explain lower court compliance, the bottom line is that there is a reasonable expectation that judges do indeed comply with the Supreme Court in spite of divergent preferences.

predict congruent outcomes, one cannot differentiate between sincere or constrained behavior. While there has been much debate as to how to measure such influence and to what degree partisan politics affect the choice legislators make (e.g., Groseclose and Stewart 1998; Ansolabehere, Snyder and Stewart 2001; Snyder and Groseclose 2000; McCarty, Poole and Rosenthal 2001), the underlying—if not, outright—assumption is that the search for constraint must be in those instances where principals and agents are ideologically divergent.

For the justices at the Supreme Court, this conception of constrained and unconstrained decision-making has been discussed in the separation of powers models. The ongoing "debate" between Spiller and his coauthors' (1992, 2003) model and the Segal (1997, 1998)/Segal and Spaeth (2002) model highlights the importance in distinguishing between sophisticated and sincere, or strategic and ideological, behavior. While Spiller and Gely (1993) argue and suggest that the justices are constrained by Congress, their model fails to distinguish between the two types of behavior (Segal and Spaeth 2002). Based on a switching regression, it could very well be the case that the findings of congressional influence on the choices justices make are driven by sincere voting. Again, for significant impact on judicial decision-making to occur, it must be evinced in the behavior of those who would prefer an opposing outcome.

This point is punctuated by Atkins and Zavoina's (1974) examination of the Fifth Circuit's application of Court doctrine in the race relation cases. Chief Judge Tuttle "gerrymandered" panel assignments placing judges that preferred the liberal outcome of desegregation on such cases and, in doing so, adhered to Court doctrine. In short, compliance was achieved because the judges on these panels were ideologically

congruent to the Court; it was not because judges were constrained by the Court's preferences for racial integration and therefore voted in a manner that is ideologically inconsistent.[9]

Collegial Constraint, Hierarchical Constraint and Compliance

There is also another consideration that can have serious repercussions for the level of lower court compliance. Like the Supreme Court justices (see Epstein and Knight 1998; Maltzmann et al. 2000), judges at the circuit courts, too, work within a collegial environment (e.g., Cross and Tiller 1998; Kornhauser 1992).[10] As Hettinger, Lindquist, and Martinek (2006) and Cross (2007) suggest, panel composition—the judges adjudicating a given case—can have serious consequences on judicial behavior. Sunstein, Schkade, Ellman, and Sawicki (2006) add that not only does the partisanship (ideology) of the judge matter, but also the partisanship of the other judges serving on a

[9] As Songer (1987) suggests, a finding in shifts in overall panel behavior (i.e., decisional outcomes of liberal or conservative) does not necessarily end the inquiry of Supreme Court impact on the lower court decision-making. The shifts in case outcome liberalism must be evinced by both Democrats and Republicans at the circuit courts to support the contention that shifts in Supreme Court ideology caused the changes in case outcomes. If both Democrats and Republicans are not voting differently, it is more likely to be the case that the shifts in liberalism are caused by presidents placing more liberal judges during the Warren and more conservative judges during the Burger Court. Songer finds that both groups—Democratic and Republican judges—were responsive to the Supreme Court's shifts in policy preferences. In other words, the analyses presented by the Songer (1987) examination suggest that the Supreme Court exerts a moderate degree of impact on Courts of Appeals decision-making, at the very least, in the areas of labor and antitrust.

[10] Justices do not make decisions in a vacuum; rather, their decisions are tempered by considerations from their colleagues (the other justices). In other words, in order to maximize their policy preferences, justices sometimes make decisions that may not be in accordance with their most preferred position. The opinion writing phase at the Supreme Court, as documented by Epstein and Knight (1998), is littered with instances where justices compromised on their preferred policy position on a case in order to achieve a decision that was closer to their ideological preferences than the alternative—losing on the merits. Maltzman et al. (2000) reinforce these findings, arguing that the justices make decisions within a collegial game. Providing empirical evidence of the opinion assignment and writing phase, the authors suggest that the justices engage in strategic actions; rather than losing, justices are more likely to compromise, accommodate and adjust opinions in order to see the realization of their policy preferences in the decisions they hand down. Moreover, in the certiorari process at the Court, the conceptualization of aggressive grants and defensive denials (Perry 1991) suggests that there should indeed by heterogeneity in the impact of policy preferences in the decision to grant review to a given petition.

given panel. They conclude that panel partisan homogeneity leads to a higher propensity for a judge to vote ideologically[11]; the authors call this ideological amplification. In other words, when serving on a panel with other like-minded jurists, a given judge is more likely to vote in accordance with his own policy preferences. The reverse is also true. Deemed ideological dampening by Sunstein et al. (2006), judges are less likely to vote ideologically when deciding cases with other jurists that hold opposing views or have distant ideological preferences.

The impact of panel ideological heterogeneity on the eventual vote choice can have serious repercussions for the likelihood a judge may deviate from the Supreme Court (Hettinger et al. 2006; Kastellec 2007). One can imagine a situation where a panel is ideologically homogenous, and yet the relevant hierarchical constraint—Supreme Court-established legal considerations—indicate a directionality of vote counter to the panel's ideology. If the attitudinal model and the panel effects hypotheses are correct, voting in accordance with policy preferences should be the outcome more often than not. If the suggestion that hierarchical constraints affect the choices judges make is correct, then it must be the case that, even in these instances, a judge will still vote in accordance with the relevant legal consideration and comply. Yet, few examinations have examined the effect panel ideological heterogeneity (especially empirically) on compliance or adhering to legal considerations when the panel effects hypothesis and the law yield divergent predictions.

By accounting for legal considerations *and* panel composition, this dissertation attempts to distinguish between two different theories explaining the robustness of panel

[11] Although the authors use partisanship as a proxy for judicial ideology, their conclusions should hold when using judges' policy preferences given the often high correlation between partisanship and ideology.

effects on the choices circuit court judges make and compliance with the Supreme Court. Cross and Tiller (1998) and Hettinger et al. (2006) posit that judges on a panel can serve as whistleblowers, signaling possible deviation from Supreme Court doctrine or jurisprudence. By dissenting from the panel decision, whistleblowers draw attention to not only disagreement among the jurists, but also potential and serious conflict between the panel decision and precedent, which generally is a key indicator if a case would be worthy of certiorari. To avoid dissent and therefore decrease the chances of Supreme Court review and possible reversal, judges are more likely to make decisions that comply with Court precedent even when preferences and legal considerations present divergent predictions for judicial behavior.

Klein and Hume (2003) provide an empirical examination that challenges the conception that threats of reversal sufficiently induce compliance from lower federal court judges. Rather, as the authors contend, there must be some other mechanism that induces adherence than simply the threat of reversal. Team theory (e.g., Kornhauser 1989, 1995) provides a possible explanation. The crux of the argument is that judges at all levels of the federal judiciary function as a team, attempting to decide "correctly" as many cases as possible. Greater ideological variation among the jurists on a given panel should induce greater levels of collegiality; these judges should work together to get the decision "right." Pushing this notion further, panel composition should function to temper ideological voting, which can induce greater levels of compliance with Supreme Court decision-making.

When legal considerations, panel composition and judges' ideologies present similar predictions, both team theory and the whistleblower hypothesis are

indistinguishable. In other words, there is no way to differentiate between sincere and sophisticated behaviors. Under these circumstances, judges will comply with the Supreme Court. If legal considerations and panel composition are divergent with judges' ideologies, judges should adjust decision-making to comport with the relevant hierarchical and collegial constraints.

Moreover, when legal considerations and panel composition are divergent from each other, the effects are conditional on a given judge's policy preferences. If a given judge's ideology and panel composition present opposing predictions from Court-established precedent, hierarchical constraint suggests that the judge will still vote in accordance with Court precedent. When the jurists on a panel have similar policy preferences, the likelihood of dissent and therefore a potential whistleblower is probably lowest. The whistleblower hypothesis might be a more accurate account of collegial constraint (and the impact of panel effects) if the judge deviates from Court precedent and instead votes in accordance with policy preferences and panel composition. The presence of ideologically distant jurists should also dampen the propensity of a given judge to vote ideologically and, as a result, increase the level of compliance with the relevant legal consideration.

When ideology indicates behavior consistent with the legal consideration yet counter to the panel composition, it should be the case that judges prefer and, therefore, behave consistently with the relevant legal consideration. All models of judicial decision-making (i.e., legal, attitudinal and strategic) comport with such an expectation. There is no incentive to deviate from policy preferences. If there is some systematic and significant movement counter to policy preferences in favor of panel composition, it

might be the case that judges are attempting to arrive at the "correct" decision. This is not to say that judges deviate from legal considerations; rather, as discussed in more detail in Chapter Three, there are instances where judicial discretion is high, which allows for judges across ideologies to vote in accordance with their policy preferences. In these circumstances, judges under the strategic model (and the whistleblower hypothesis) have no rational incentive to deviate from voting sincerely. If judges in the federal judiciary function as a team, judges will work collegially, decreasing judicial propensities to behave ideologically.

A goal of this dissertation is to define those instances where legal considerations are counter to or divergent from the policy preferences of judicial decision-makers at the U.S. Courts of Appeals. In doing so, this dissertation attempts to determine if the Supreme Court precedent, doctrine and jurisprudence can influence circuit court judges in a manner consistent with a conceptualization of hierarchical constraint. Can the Supreme Court systematically and significantly affect judicial behavior at the circuit courts when preferences are divergent? Moreover, what are the effects of collegial constraints? Can panel composition increase the propensity of judges complying with Supreme Court precedent and jurisprudence? By accounting for circuit court collegiality and hierarchical constraints, the theoretical and empirical frameworks in this dissertation provide stringent tests of judges' choices in applying particular doctrines and voting behavior.

Heterogeneity in Decision-Making

The manner in which hierarchical constraints operate in the judicial voting calculus must also be clarified. Supreme Court influence can be evinced in two ways.

On the one hand, Supreme Court influence must impact the actual behavior (i.e., choice in scrutiny level and support for individual rights) of a given judge, and on the other, it can also mitigate the impact of ideology in that behavior. While both go hand-in-hand, the overall behavioral change as well as the effect of policy preferences are two distinct mechanisms of the Supreme Court evincing influence on the choices judges make. Hierarchical constraints must change the overall propensity of a judge to behave in a particular way. If the contemporary Court shifts jurisprudence and scrutiny levels, the lower courts, too, must also apply those legal considerations accordingly. A Court decision, for example, that establishes a shift from rational basis to strict scrutiny in a given issue area should have implications for both types of judicial behavior. First, the shift in standard obviously lead to higher levels of judges adopting strict scrutiny as the appropriate "test" of constitutionality. Second and as a result, the change to strict scrutiny should lead to greater levels of liberalism at the lower courts in that issue area.[12]

Hierarchical constraints can also mediate the impact of policy preferences on the eventual judicial behavior. In other words, the relevant legal considerations may accentuate or attenuate the effect of ideology on the eventual voting behavior. Few of the previous examinations in judicial decision-making have accounted for this possible heterogeneity in the preference-behavior relationship (i.e., Bartels 2009).[13] In other

[12] Baldez, Epstein and Martin (2006) indentify indirect and direct effects of changing scrutiny levels when examining implications on judicial behavior from state versions of the Equal Rights Amendment. The direct effect of an ERA would be to increase support for individual claims of sex discrimination. An indirect effect would be increasing the likelihood of using a higher scrutiny level when adjudicating sex discrimination cases, which should have some impact on the level of support for sex discrimination claims. Here, a shift in Supreme Court jurisprudence that changes the level of judicial scrutiny—using the Baldez et al. (2006) terminology—should have both a direct and indirect effect on judicial behavior. In other words, judges should not only adopt the appropriate standard, but also behave (vote) in a manner consistent with the changed scrutiny level.

[13] Martin (2001) discusses a similar impact on representatives and senators operating under chamber and separation-of-powers constraints.

words, many models of judicial decision-making have not modeled the possible interactions between the law and policy preferences. According to Bartels (2005, 2009), the impact of ideology is not constant as has been previously modeled in almost every empirical examination employing a measure of policy preferences. Rather, there are instances, or contexts, that may increase or decrease the influence of policy preferences on the choices judges make.

Judicial decision-making does not occur in a proverbial vacuum. Instead, the choices judges make are made within contexts. For example, each case is adjudicated within contexts defined by the relevant factual circumstances and, especially for the circuit courts, the panel's ideological composition (Edwards 2003; Hettinger et al. 2006; Sunstein et al. 2006). For the purposes of the dissertation, the choices judges make are affected by legal considerations—pertinent case facts defined by Court precedents—that may accentuate or attenuate the impact of ideology on the eventual doctrinal or decisional choice.[14]

Lower court judges are more likely to apply Court doctrine when it is in line with their preferences—partisan or ideological (Cross and Tiller 1998). When legal considerations and policy preferences indicate similar directionalities in terms of vote

[14] At the Courts of Appeals, Hettinger, Lindquist and Martinek (2006) find theoretical evidence that supports the heterogeneous effect of ideology on judicial decision-making. While the evidence is not born out in their empirical results, the theoretical intuition is valid and supports the argument that ideology can have varying effects on the eventual vote choice. In examining the likelihood a judge will file a dissenting opinion and serve as a possible whistleblower to a majority decision possibly deviating from Circuit or Supreme Court precedent, the authors opine that the decision to dissent might actually increase as the ideological distance between the possible dissenter and majority opinion writer increases. But, this relationship should be accentuated when either circuit or Supreme Court preferences are more ideologically proximate than the majority opinion author. While not explicitly noted by the authors, these are indeed instances where the impact of policy preferences should be accentuated; in the words of Sunstein et al. (2006), ideological voting will be amplified. Hettinger et al. (2006) opine that the reverse should be true as well; in other words, dissent should be less likely when Circuit and/or Supreme Court preferences are further from the judge's policy preferences than the opinion writer. Here, the impact of policy preferences should be attenuated, or dampened.

choice, it should be the case that each reinforces the other; it is in these instances that there can be an accentuation of the impact of ideology on the eventual behavior. Increasing ideological divergence between a given judge's ideology and precedent should increase the attractiveness of breaking with precedent (e.g., Bueno de Mesquita and Stephenson 2002). But, when legal considerations run counter to a given judge's policy preferences, these considerations—if it serves as a sufficient hierarchical constraint—may attenuate the effect of ideology in the judicial voting calculus.

When the Supreme Court shifts doctrine and the relevant legal considerations that a circuit court judge must apply, there are two different predictions. A strict reading of the attitudinal model argues that judges decide cases sincerely and, therefore, in accordance with their policy preferences; this effect holds even in the face of Court doctrine that may be counter to judges' ideology. The legal and strategic models posit that judges may deviate systematically from their policy preferences when confronted with Court doctrine that indicate a directionality counter to judges' preferences. If the legal and strategic models are correct, the impact of hierarchical constraints can lead to a higher likelihood of sophisticated behavior—mitigating the impact of ideology or sincere behavior. Thus, if legal considerations are an adequate constraint on circuit court judges, it can also attenuate the impact of ideology on the eventual behavior of those judges that may be "rogue agents," those that are ideologically divergent from the Supreme Court.

Decision-making contexts—the case's pertinent legal considerations or the Supreme Court's preferences—may accentuate or attenuate the impact of ideology on the behavior (doctrinal and vote choice). Hierarchical constraints can operate through two distinct mechanisms; the impact of Supreme Court preferences and/or legal

considerations can be evinced through (1) the final behavior as well as (2) attenuation of the impact of ideology on that final behavior.

Panel Effects and Heterogeneity in Decision-Making

There is another consideration that accentuates or attenuates the impact of ideology. Recall the discussion regarding panel effects. According to Sunstein et al. (2006), ideological dampening suggests that a judge's policy preferences will be attenuated when serving on a panel with judges of a different political party. Ideological amplification occurs when a judge's propensity to vote in accordance with his partisan preferences is amplified by the presence of other like-partisan judges. For example, a Republican on a panel with all Republican-appointed judges is more likely to make conservative decisions compared to a panel with mixed partisanship; a Democrat on a panel of all Democrat appointees has a higher propensity to make liberal decisions when compared to a Democrat serving on a panel with partisan heterogeneity.

If truly a collegial court, panel effects should affect not only the overall propensity to vote liberally or conservatively, but also affect the role of ideology on judicial behavior. Where judges serve with ideological kin, judges should be more likely to vote in accordance with their policy preferences and, as a result, there should be an accentuation of the impact of ideology. The reverse holds true as well. When surrounded by jurists holding opposing policy preferences, the impact of ideology on judicial behavior should be mitigated and the propensity to vote sincerely should decrease.

In sum, there is strong evidence that the role of ideology in the choices circuit court judges make is not constant; even the wordage—ideological dampening and amplification—employed by Sunstein et al. (2006) supports this. Moreover, Edwards (2003) explicitly states that attitudinal perspectives of circuit court adjudication do not account for the high degree of collegiality at the Courts of Appeals; implicitly, the author states that the collegial process can mitigate ideology's effect on judicial behavior. Unfortunately, few examinations[15] within the judicial politics literature have specified empirical models to account for the ways in which hierarchical constraints and panel effects impact the voting calculus. Not only should hierarchical constraints and panel effects matter in the overall propensities of judges' choices, but they can also affect the impact of ideology on those choices. Furthermore, few (if any) empirical examinations have accounted for both the effects of hierarchical and collegial constraints on circuit court jurists.

By accounting for both avenues of influence for hierarchical constraints, this dissertation attempts to examine circuit court compliance within a more stringent theoretical and empirical test than previous examinations. Can Supreme Court decisions structure and induce compliance even when judges would prefer to deviate and instead vote their own policy preferences? And, in changing the overall behavior, can Supreme Court decisions reduce the role of judges' ideologies on voting behavior?

[15] See Bartels (2009) for a thorough examination of the choices justices make at the Supreme Court.

Chapter 3
Content-Neutrality Jurisprudential Regime: Free Expression Cases at the U.S. Courts of Appeals

The Supreme Court can constrain the choices judges make simply by handing down an opinion that guides lower court decisions. When the contemporary Court makes a decision, it has, in essence, revealed its policy preferences at least for cases in that issue area. The legal considerations—as determined by Court precedent—are formal declarations of Court preferences and are instructions to guide lower court adjudication of cases. In its opinions, the Supreme Court, acting as a hierarchical constraint on the choices judges make, can do so by formally in two ways. First, through cases that highlight pertinent factual circumstances, the justices specify important facts of a given case may help in determining whether a government action is or is not constitutional.[1] Second, the justices can enumerate the relevant "tests" to guide the decision-making processes of circuit court judges; in other words, the Supreme Court establishes a standard of judicial scrutiny that must be applied to government actions and regulations.[2]

[1] For example, in *Escobedo* v. *Illinois* (1964), the Court established that an individual has the right to an attorney the moment a general investigation or inquiry shifts to a particular suspect or person. Thus, if an individual was denied his right to an attorney when one was requested, the judge must determine whether the general inquiry shifted to an investigation of a particular suspect. If so, the denial of counsel is in violation of the Constitution. Reiterating the main legal holding from *Miranda* v. *Arizona* (1966), a suspect must be "*Mirandized"* upon arrest or before an interrogation begins. Post-*Miranda*, failure to apprise an individual of his constitutional guarantee against self-incrimination and his right to an attorney is unconstitutional *per se*.

[2] In the area of religious free exercise, the *Sherbert-Yoder* Test required judges and justices to determine whether a given law impeded or burdened religious free exercise. If it did not, the regulation would be subjected to a low level of scrutiny where the regulation was reasonably related to a legitimate secular purpose. If the regulation was determined to burden religious free exercise, judges and justices must subject the regulation to the most exacting and demanding level of scrutiny. In these instances, the regulation must advance a compelling government interest and be narrowly tailored to advance that governmental interest. There are many other issue areas that would fall under this realm of jurisprudential regimes that have nothing to do with civil rights or liberties. Take, for example, state taxation of companies engaged in interstate commerce. The Court ruled in *National Bella Hess, Inc.* v. *Department of*

Of course, higher and more demanding scrutiny levels can have serious repercussions with regards to the ability of the government to regulate or restrict civil liberties and rights.

Both forms of precedent—case fact highlighting and/or scrutiny standards—are jurisprudential regimes. Richards and Kritzer (2002) state that jurisprudential regimes "structure Supreme Court decision making by establishing which case facts are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors" (2002, 305). The authors posit that the jurisprudential regimes offer a different way to conceptualize the role of law in the choices justices make. Figure 3.1 replicates one of the authors' intuitions of a jurisprudential regime. In regards to the potential decisional outputs, Richards and Kritzer assert that this conceptualization is flexible enough to encompass any factor that may potentially impact case outcome. These factors may include policy preferences, a judge's role orientation or role attitudes (Gibson 1978), case facts, and legal policy goals (Baum 1997). They argue that decisional elements—whatever they may be—are filtered by jurisprudential regimes and, thus, are transformed into actual decisional elements. Each actual decisional element carries some specific weight in determining and influencing the justices' votes. According to the authors, the jurisprudential regime will filter and, therefore, remove any factor that may be deemed irrelevant, or insignificant, to the adjudication of the case.

[Insert Figure 3.1 about here]

Revenue of Illinois (1967) that states violated the Commerce Clause by burdening interstate commerce when it taxed companies without a physical presence in that state. The Court would affirm this bright line test in *Quill Corp* v. *North Dakota* (1992), where a lack of a physical presence fails to meet the substantial nexus required to justify taxation. Here, the adjudication of cases is determined by whether or not an out of state business has a physical presence in a state attempting to assess it taxes. If not, the taxation places a significant burden on interstate commerce and therefore would fail constitutional challenge. If so, the taxation is subject to judicial scrutiny that comports with *Complete Auto Transit* v. *Brady* (1977).

Testing this theory at the Supreme Court, Kritzer and Richards (2003) examine the strength of *Lemon* v. *Kurtzman* (1971) in establishing a jurisprudential regime when deciding cases involving an Establishment Clause claim.[3] The authors contend and find evidence for the fact that Supreme Court decision-making and adjudication of Establishment Clause cases did indeed change with its decision in *Lemon*. For example, if a regulation did not have a secular legislative purpose, it was more likely to be struck down in the post-*Lemon* regime; prior to *Lemon*, this case fact was an insignificant predictor in whether a government regulation would be upheld. If the law required government monitoring of religious institutions—a key factual circumstance for determining an excessive government entanglement in *Lemon*, the post-*Lemon* regulation was more likely to fall. This factual circumstance, on the other hand, was a significant and positive predictor in government regulations being upheld pre-*Lemon*.

Furthermore, Richards and Kritzer (2002) contend that free speech cases are adjudicated in a similar manner. The authors opine (2002) that *Grayned* v. *Rockford* (1972) and *Chicago Police Department* v. *Mosely* (1972) established this content-neutrality jurisprudential regime at the Supreme Court. First, it is up to the judicial panel to determine if the free expression restriction is content-based, content-neutral, covering a less protected form of speech (e.g., libel, fighting words, or obscenity), or failing to meet threshold as a sufficient impediment on expression (e.g., no state action). Depending on type of regulation, a level of scrutiny is to be applied. At the extremes, those regulations failing to meet threshold and are content based will be subject to rational basis and strict

[3] Under the *Lemon* Test, judicial decision-makers must determine whether three factual circumstances are present in a given regulation. First, the regulation must have a secular legislative purpose. Second, the statute's principal or primary effect can neither advance nor inhibit religion. Lastly, the statute must not foster an excessive government entanglement with religion.

scrutiny, respectively. Upon judicial determination if the government regulation is justified under the relevant interest, the law is upheld. Overall, the results in the Richards and Kritzer (2002) examination appear rather consistent with their expectations. Regulations that are content-based are more likely to be struck down post-*Grayned* and *Mosely*; while in the period before *Grayned*, whether a statute was content-based was not a significant predictor in the likelihood a statute impeding on free expression would be upheld. What is interesting is that content-neutrality plays no significant role in adjudication post-*Grayned*, but leads to a higher propensity for a regulation to be upheld pre-*Grayned*.

Figure 3.1 actually reproduces Figure 1c of the Richards and Kritzer (2002) examination. Under this conceptualization of judicial decision-making, potential "decision elements can be completely unmediated by the jurisprudential regime" (309). While the authors do not contend this, their specification of judicial decision-making in free expression actually assumes that ideology is completely unmediated by the jurisprudential regime. As such, the potential decision element "A" in Figure 3.1 is ideology as modeled in the Richards and Kritzer (2002) examination. Almost all previous examinations have similarly modeled only one mechanism through which legal considerations can affect judicial decision-making—the final outcome or vote choice, depending on the unit of analysis. In other words, previous research has only captured the direct relationship on the final judicial behavior.

In doing so, these models functionally assume that the impact of policy preferences is constant. Because of this omission, prior theoretical and empirical specifications have omitted the possible interaction between the law and ideology

(Bartels 2009). Recall the discussion above regarding heterogeneity in decision-making. Under the theory of heterogeneity in the preference-behavior relationship (Bartels 2005), jurisprudential regimes—legal considerations structured by Supreme Court precedent—can have two means of influencing the eventual behavior. One, it can directly impact judicial choice (doctrinal or decisional); two, it can attenuate or accentuate the impact of ideology on that eventual choice. In other words, the role of ideology is not constant. It depends upon the circumstances or contexts in which those decisions are made.

Hierarchical constraints in the form of Court-established legal considerations (relevant factual circumstances and appropriate levels of judicial scrutiny) can attenuate or accentuate the role of ideology on judicial behavior. Thus, the role of law is not only to affect the actual decisional or doctrinal choice of a given judge, but it can also serve to mediate the impact of ideology on the choices judges make. Figure 3.2 depicts this relationship. Notice that the jurisprudential regime affects the vote choice directly but also works to affect the impact of ideology on that vote choice.

[Insert Figure 3.2 about here]

Fusing the theory of jurisprudential regimes with the concept of heterogeneity in the impact of ideology, Bartels (2009) reexamines the content-neutrality jurisprudential regime at the Supreme Court described from Richards and Kritzer (2002). He finds that the law can function as a constraint—not only altering the overall propensity of a liberal decision, but also affecting the role of ideology on judicial vote choice. This constraint, however, varies in its effect of judicial decision-making due to the varying levels of judicial discretion afforded to the justices from the different "tests" or scrutiny levels, which are made applicable from pertinent and relevant case facts. For the purposes of

this dissertation, there are two main implications from the Bartels (2009) examination. First, theoretical and empirical examinations must account for the interaction between the law and ideology. Second and more importantly, the law can influence the amount of judicial discretion, constraining judicial decision-makers or freeing them to vote in accordance with their policy preferences.

While the Court jurisprudence has changed and continues to change, the importance of Court precedent may not be a constraint on its own decisions[4], but rather a serious and pertinent hierarchical constraint on the choices lower court judges make. Given the vast number of cases handled by the Courts of Appeals, it is a necessary function that jurisprudential regimes—as established by Supreme Court precedent—govern lower court adjudication of cases. From a hierarchical perspective, Supreme Court-established legal considerations should serve to structure the manner in which judges adjudicate cases and highlight important factual circumstances that are important in the decision-making process. Furthermore, the strength of these hierarchical constraints can affect the level of discretion afforded to judicial decision-makers. Depending on the level of discretion, there may be room for judges to vote in accordance with their policy preferences while still maintaining compliance.[5] Furthermore, the strength of these legal considerations can have serious repercussions for who wins on a

[4] There has been a continuing debate as to whether precedent actually constrains Supreme Court decision-making. Please see the Segal and Spaeth (1996) examination for an interesting test of the legal model as well as for a series of responses.

[5] Instances where there is obviously discretion in determining the presence or absence of a particular case fact include whether there was probable cause for a given search; whether law enforcement agents were acting in good faith as stipulated in *United States* v. *Leon* (1984); whether there is an excessive government entanglement with religion; whether a work has a serious political, literary, artistic or political value as deemed in *Miller* v. *California* (1973); or, whether the totality of circumstances of a partially-corroborated anonymous tip justified probable cause as enumerated in *Illinois* v. *Gates* (1983).

challenge of constitutionality of a governmental restriction of rights and individual rights and liberties.

The goal of this chapter is determine whether and to what degree hierarchical constraints via legal considerations influence the choices judges make in a specific issue area. Applying the Richards and Kritzer (2002) conceptualization of a jurisprudential regime, I examine the ability of the Supreme Court to determine the manner in which Courts of Appeals judges adjudicate cases in the area of free expression. Do lower court judges adhere to a jurisprudential regime when deciding free expression cases? If the overall findings suggest compliance, to what degree is that compliance achieved by circuit court judges across ideologies? More specifically, can the content-neutrality jurisprudential regime (Richards and Kritzer 2002) induce compliance when the legal considerations indicate a directionality that is counter to a given judge's policy preferences? Again, a failure on the part of lower court judges to comply with the Supreme Court, especially when preferences are divergent, can have drastic repercussions for the limits of government intrusion into safeguarded civil liberties.

For a several reasons, this is an extraordinarily stringent test of compliance and hierarchical constraint at the U.S. Courts of Appeals. First, compliance and responsiveness is generally lower for civil rights and civil liberties (Baum 1978); as an example of the latter, free expression already may be subject to judicial deviation and possible defiance. Second, free expression cases, as Richards and Kritzer (2002) note, offer ample opportunity and "room for attitudes to operate" (310). Third, and most importantly, free expression is a rather broad and, possibly, over-inclusive collection of issues, which include free speech (traditional or even symbolic), press, protest, assembly,

and association. As such, the topic of free expression provides a plethora of individual issue areas that not only have significant Supreme Court rulings and landmark precedents, but also doctrines and tests structuring adjudication within individual subtypes of expression. To ask judges to decide in a manner consistent with each issue area and, overall, to comport with a free expression jurisprudential regime is a hefty task. Evidence of hierarchical constraint within the framework of a content-neutrality jurisprudential regime would be impressive given free expression's broad and very inclusive nature.

Free Expression Jurisprudential Regime at the U.S. Courts of Appeals

Determining Levels of Scrutiny

In the area of free expression, Richards and Kritzer (2002) suggest that the Court established a jurisprudential regime with its decisions in *Grayned* and *Mosely*. Although the authors provide evidence for predictions after the establishment of the content-neutrality jurisprudential regime, they offer little guidance as to case outcomes and judicial decision-making prior to *Grayned*. Because the Richards and Kritzer (2002) examination is almost agnostic as to the state of free expression prior to *Grayned*, the discussion and hypotheses that follow are not only a fusion of the intuitions developed in Richards and Kritzer (2002) as well as Bartels (2009) for the post-*Grayned* content-neutrality jurisprudential regime, but also a "best guess" as to the state of free expression jurisprudence prior to *Grayned* and *Mosely*.

Under *Grayned* and *Mosely*, judges must ask whether the law or action at issue regulates the content of expression. These free expression restrictions, according to

Richards and Kritzer (2002) fall into four general categories based on the manner and type of restriction: threshold, less protected, content-neutral and content-based. The type/manner of the restriction should not only have repercussions for judicial decision-making, but also who wins at the U.S. Courts of Appeals (i.e., the challenger or restrictor of a free expression restriction). Figure 3.3 presents the expectations for the level of support for individual rights by the type of free expression restriction before and after *Grayned* and *Mosely*.

[Insert Figure 3.3 about here]

The Supreme Court has generally read and continues to interpret the Constitution as a protector of individual rights. In most issue areas including free expression, this protection of individual rights only extends to protect civil rights and liberties from government intrusion or restriction; the Constitution, however, does not extend to instances where there is no state action (government involvement) to restrict the rights and liberties. In other words, there is no protection from purely private actions. Private restrictions of individual rights (in the abstract) are instances where the initial threshold question of whether the law can afford a remedy fails. Thus, under these "threshold not met" or "below threshold" situations, support for individual rights should be at best rather low.[6] While not explicitly stated in the Richards and Kritzer (2002) examination, failure to meet the state action requirement and the repercussions for free expression rights should remain constant prior to and after *Grayned*. As depicted in Figure 3.3, support for free expression rights by way of threshold case outcomes should be roughly the same in both jurisprudential periods.

[6] For convenience, I will refer to these types of restrictions simply as "threshold" restrictions or cases.

Less protected expression, which is often considered to be outside the scope of First Amendment protections (Epstein and Walker 2008), are those classes of speech that the Court has generally considered subject to more stringent restrictions. Given the nature of the expression, government restrictions, which would be struck down as unconstitutional if they targeted political or social speech, may withstand constitutional challenge if they seek to regulate a less protected form of expression, which include libel, obscenity, criminal speech, and fighting words. While it is left for judicial determination as to whether a specific expression is indeed less protected, support for individual rights should be low when the restriction targets less protected free expression. As shown in Figure 3.3, this low support should be roughly the same pre- and post-*Grayned*.

For both less protected and threshold (no state action) restrictions, the appropriate test is rational basis according to the Bartels (2009) examination. Under this test, the regulation is presumed valid. The government only has to show that such restrictions on expression are reasonably related to a legitimate government purpose. Here, the burden of proof is on the challenger to show that the government action is arbitrary, capricious, and unreasonable. With such a heavy burden, the government should obviously win more often than not, indicating less support for free speech challenges to state or federal regulations or actions.

When the restriction (by a government actor) is shown to regulate a protected class of expression (and not a less protected class of expression), the level of scrutiny that should be applied, under the guidance of *Grayned* and *Mosely*, depends on whether the instant regulation is content-based or content-neutral. For example, a government action that restricts free expression—in purpose or effect—by targeting or discriminating

against a particular viewpoint would be considered a content-based regulation, law or action. In these instances, the law is presumed to be invalid. The burden of proof then rests on the government to show that such a regulation serves a compelling government interest and that the law is the least restrictive of means (or narrowly tailored) to meet the government's interest. Under strict scrutiny, more often than not, the individual challenging the constitutionality of a government regulation should win. Although it affords the government a great degree of latitude and deference, the Supreme Court has consistently and generally taken a negative view of content-based restrictions. As Figure 3.3 shows, I hypothesize that content-based restrictions (at the case level) are high prior to and, especially, after *Grayned*.

Restrictions that do not discriminate or specifically target a particular viewpoint are considered content-neutral. From the coding strategy employed in the Richards and Kritzer (2002) examination, regulations or restrictions on the times, places and/or manners of expression are facially neutral and are generally agnostic in regards to the viewpoint of the expression. Prior to the establishment of a jurisprudential regime, it is uncertain as to the appropriate level of judicial scrutiny for content-neutral cases. Supreme Court precedent, however, does recognize that expression is subject to reasonable times, places and manners of restrictions (Epstein and Walker 2008), which suggests that the appropriate test would be rational basis before the Court's decision in *Grayned* and *Mosely*. When a law or action is determined to be content-neutral after *Grayned* and *Mosely*, judges should apply an intermediate level of scrutiny to decide whether or not the restriction comports with the Constitution. As such, the change from the pre-*Grayned* period to the post-*Grayned* is in judicial treatment and adjudication of

content-neutral restrictions on free expression. While threshold, less protected, and content-based restrictions are assumed to remain constant according to their applicable scrutiny levels, content-neutral regulations shifted from a rational-basis type test (derived from the reasonableness time, place, and manner framework) to an intermediate level of scrutiny. If there are observable changes in case outcomes and judicial behavior, it should be found in the adjudication of content-neutral restrictions on free expression.

Under intermediate scrutiny, the government must show that the law is narrowly tailored and substantially related to advance an important government interest. Under rational basis, the burden on the government is so slight that laws are generally presumed to be valid. Restrictions are more likely to be struck down under the compelling interest test because the burden of proof is so heavy on the government. Intermediate scrutiny does not explicitly place the burden of proof on the challenger of the government restriction or on the government. When adjudicating cases under intermediate scrutiny, there is no clear indication as to who wins—the individual or the government. The wordage does suggest a heightened standard compared to rational basis and a less stringent test than the most exacting level of judicial scrutiny (the compelling interest test). In terms of support for free expression claims, intermediate scrutiny should lead to outcomes somewhere in the middle. In other words, it should yield more support for free expression claims compared to adjudication under rational basis, but less free expression support when deciding the constitutionality of a restriction under the compelling interest test (strict scrutiny). As a result, I predict that cases dealing with content-neutral restrictions should be more supportive of free expression rights after the Court's decision in *Grayned* when compared to case outcomes prior to *Grayned*.

Previous examinations of the content-neutrality jurisprudential regime have not accounted for the possibility that support for individual free expression rights under less protected and threshold restrictions may vary depending upon the manner expression is restricted (i.e., whether it is content-neutral or content-based). Although the overall support for individual rights should be lower when adjudicating less protected and threshold restrictions, the differential treatment of content-based or content-neutral restrictions under the jurisprudential regime should also trickle down. In other words, even less protected and threshold restrictions that are content-based should be struck down more often than content-neutral restrictions.

Impact of **Grayned** *on Judicial Decision-Making*

[Insert Figures 3.4 and 3.5 about here]

Based on the type of restriction, the application of the appropriate level of judicial scrutiny for a given restriction can have serious repercussions on the level of discretion afforded to judges (Bartels 2009). This discretion, as a result, not only influences the overall judicial behavior but also can influence the role of ideology in the decision-making calculus. Figures 3.4 and 3.5 present the predicted levels of support for free expressions rights by conservative and liberal judges, respectively. Moderates, as their ideologies may suggest, are the jurists most likely to comply with the Supreme Court. As such, I predict that moderate judges' behaviors will be consistent with the case outcome predictions presented in Figure 3.3.

If it is assumed that protecting free expression rights is favored by liberal judges[7], conservatives should prefer instances where rational basis is to be applied, which would lead to lower levels of support for free expression rights, *ceteris paribus*. As such, restrictions by purely private entities (i.e., below threshold cases) or those that target less protected forms of expression are instances where conservative judges are free to vote in accordance with their policy preferences. Rational basis simply reinforces conservative judicial ideology. There are two possible predictions under these conditions. First, an accentuation of ideology can be observed, where conservatives are "free" to uphold government actions or regulations. Second and more likely to be the case, policy preferences may have no further to go; conservatives may already behave so conservatively that increasing support for the government may be indeed impossible. Under this latter hypothesis, conservatives simply vote the same with little to no significant accentuation in the role of ideology on judicial behavior.

If the theory of hierarchical constraint is correct, liberals, on the other hand, should be constrained and, therefore, the impact of ideology on the eventual vote choice should be attenuated. When rational basis is the appropriate level of scrutiny, free

[7] The conventional wisdom is that expanding civil liberties should be preferred by liberals while restricting those liberties should be favored by conservative jurists. As a civil liberty, free expression should be no different. Epstein and Segal (2006), however, argue that free expression rights may not be considered as fundamental and basic as the conventional wisdom suggests. The authors examine Supreme Court support for free expression rights and find that liberal justices are more willing to suppress free expression rights where cases present a value-conflict compared to cases where the free expression question is "pure." In other words, liberal judges support free expression rights less when cases presented with multiple values compared to cases that present only a free expression question. A cursory glance at free expression cases in the sample (described below) suggests that this may not be overly problematic for the substantive conclusions of this examination. First, a vast majority of the cases are "pure" cases that do not present a potential value conflict. Second, many of the potential value conflict cases present content-neutral restrictions on free expression. An example in the data would be the Freedom of Access to Clinic Entrances Act of 1994, which is a content-neutral restriction on abortion protestors; the potential conflict comes from support for abortion rights or support for free expression. Thus, if there is a substantial impact on the results and conclusions due to the presence of value conflict cases, it will mainly be on content-neutral restrictions of free expression.

expression claims should fall more often than not. In these instances, the legal consideration via scrutiny levels runs counter to what liberals would want if voting consistently with their ideologies. When a governmental regulation targets a less protected form of speech or fails to significantly burden free expression rights (i.e., no state action), liberal judges should be less likely to support free expression claims overall. Furthermore, as the theory of heterogeneity in the preference-behavior relationship suggests, the impact on ideology should be negative suggesting that rational basis—and its presumed validity for government regulations on expression—moderates the impact of ideology on the choices that judge make when preferences and legal considerations are divergent.

Liberal judges should be free to vote in accordance with ideology when determining the constitutionality of a content-based restriction on free expression rights. Similar to conservative jurists under rational basis, liberal judges adjudicating under strict scrutiny are presented with a standard that reinforces their policy preferences. Thus, there may be an accentuation of the role of ideology on judicial behavior; or, more likely to be the case, liberal judges already behave and decide cases so liberally that further movement (increases) in support for free expression rights would be negligible. If strict scrutiny is to serve as a hierarchical constraint operating through the influence of ideology on the eventual vote choice, it should be evinced through conservative jurists when adjudicating content-based restrictions. Strict scrutiny can affect conservative judges in two ways. First, because of the presumed invalidity of government regulations under the compelling interest test, it should increase the overall propensity of supporting free expression claims. Second, when a statute is content-based, the legal considerations

can also and should attenuate the impact of policy preferences on the eventual vote choice for conservative judges.

Bartels (2009) argues that judicial discretion is high when a law regulates expression but is neutral with respect to such content; as a result, the impact of ideology for both liberals and conservatives are high when determining the constitutionality of content-neutral restrictions on free expression. Under intermediate scrutiny, there is no clear prediction as to whether the government or the individual should win more often. Even if the burden of proof may rest with the government to show that regulation is related to an important government interest, the standard of scrutiny does not yield as strong a predictive outcome in terms of upholding or striking down the government regulation of expression. Because the burden of proof is most likely somewhere in the middle for intermediate scrutiny, adjudication of these restrictions allows for greater judicial discretion and, as a result, frees judges to vote in accordance with their policy preferences.[8]

Figures 3.4 and 3.5 depict the predicted levels of judges' support for free expression rights when faced with a content-neutral restriction. Because of the greater level of judicial discretion, conservatives can vote consistently with their ideologies and are predicted to vote to restrict free expression rights. Liberals, on the other hand, should vote at high levels to support free expression rights when the restriction is content-neutral. Because there should be accentuations in the roles of ideology for liberals and conservatives, these jurists should most likely polarize, with each voting in accordance with what would be predicted under a strict reading of the attitudinal model.

[8] This might be an explanation for the oddity in the Richards and Kritzer (2002) examination of free speech claims at the Supreme Court. There, the authors find content-neutrality plays no significant role in adjudication post-*Grayned*, but leads to a higher propensity for a regulation to be upheld pre-*Grayned*.

Panel Effects and Compliance under **Grayned**

In regards to panel effects, individual judicial decision-making can be affected by the other judges serving on a given panel (Sunstein et al. 2006). Because the entire area of free expression has never been tested, it may be difficult to discern what the implications of panel composition will be under such a large framework. The Sunstein et al. (2006) examination empirically tests the impact of panel heterogeneity in the issue areas of campaign finance, obscenity, Federal Communications Commission decisions, and commercial speech. According to the Richards and Kritzer (2002) framework, laws or regulations on three out of the four (obscenity, Federal Communications Commission decisions and commercial speech) of these types of restrictions are considered less protected restrictions. In each of these areas, the support for the panel effects hypothesis is mixed, where ideological amplification and ideological dampening only hold true for one set of judges (either Democrat- or Republican-appointed, but not both) or does not hold at all. The same can be said for campaign finance laws, which would be included in the sample if there was a challenge on free expression grounds. Perhaps, the reason for the possible "muddied" effects of ideological amplification or ideological dampening is due to the fact that the panel effects analyses in the Sunstein et al. (2006) do not control for the role of law and legal considerations.

The impact of panel composition on the judicial behavior, too, should be conditional on the context, which here is the applicable level of scrutiny. Rational basis and strict scrutiny are extremely demanding due to their presumptions of validity and invalidity, respectively. There are two plausible hypotheses as to the role of panel

effects. First, the heavy burdens of proof from the reasonable relation and compelling interest tests may lead to an ineffectiveness of panel effects because the outcome may already be predetermined by the relevant legal considerations whenever a restriction fails to meet threshold, targets a less protected class of expression, or discriminates against a given viewpoint (content-based). Thus, under these circumstances, panel effects will have little impact on the choices judges make.

Second, panel composition may have an effect in increasing the likelihood of compliance when judicial discretion is low and preferences are divergent from the relevant legal consideration. The whistleblower hypothesis may hold true if judges vote counter to their policy preferences when the legal considerations indicate such *and* there is another judge on the panel that is ideologically distant. For example, when presented with a content-based restriction, conservative judges should vote more liberally than their ideologies would predict if strict scrutiny serves as a sufficient and relevant hierarchical constraint. The whistleblower hypothesis suggests that a conservative judge may deviate and vote to restrict free expression rights when serving on a panel with only other conservatives. The conservative judge, however, should vote to support free expression rights with the presence of one liberal judge, which presents a potential dissenter and whistleblower on the panel.

Where judicial discretion is high, the argument can be made for a substantial or a negligible influence of panel composition on judicial behavior. Both are equally plausible. First, panel effects will have no effect for any judge—liberal or conservative—simply because judicial discretion is at its highest and therefore judges are free to vote their policy preferences regardless of the panel composition. There may be

no rational incentive for these judges to deviate from ideological voting in these instances. Second, panel effects—once accounting for the possible variation in the role of ideology—can be significant where judicial discretion is high. This would support the contention that intermediate scrutiny increases judicial discretion and increases the propensity to vote collegially under the uncertainty that intermediate scrutiny offers. If panel composition influences the choices judges make when judicial discretion is high, the evidence would support a team theory perspective of panel effects at the circuit courts.

In sum, where the restriction lacks a state action, regulates less protected expression, or attempts to discriminate a viewpoint, panel effects may have no role in decision-making. Due to the little discretion in judicial vote choice when adjudicating under rational basis or strict scrutiny, there may be too little room for collegial constraints such as panel effects to affect the choices judges make. If the whistleblower hypothesis is correct, panel composition, however, can increase the level of compliance when policy preferences are divergent from the relevant legal consideration. Where judges are free to vote in accordance with their policy preferences (content-neutral restriction of free expression), either expectation for panel effects—influence or no influence—is a plausible occurrence.

Data and Methods

In order to test the hypotheses discussed above, original data was collected for all free expression cases decided at the U.S. Courts of Appeals from 1943 to 2006. Identification of the population of free expression cases was completed through searches

on Lexis/Nexis[9], which includes some information for some case opinions that were unpublished.[10] Cross-petitioned cases were counted as separate cases if it challenged different provisions or aspects of a restriction seeking to *suppress* free expression rights. Cases containing multiple docket numbers were counted as separate cases if the circuit court opinion made note of the controversies as being different for each docket number, indicated different provisions from each docket number, or arose from different states within the circuit. In order to be included in the relevant population, cases had to pertain to a challenged suppression or restriction of free expression rights.[11]

For the judge-level analysis, the dependent variable is coded 1 if a judge votes in favor of free expression rights, 0 otherwise. Thus, the unit of analysis is a given vote choice by a given judge. The empirical model can be written as follows:

(3.1) Supported Free Expression Rights$_i$ = β_0 + β_1*Judge's Ideology$_i$ + β_2*Less Protected (Content-Neutral)$_i$ + β_3*Less Protected (Content-Based)$_i$ + β_4*Content-Neutral$_i$ +β_5*Content-Based$_i$ + β_6*Panel Composition$_{ij}$ + β_7*Judge's Ideology$_i$ X Less Protected (Content-Neutral)$_i$ + β_8*Judge's Ideology$_i$ X Less Protected (Content-Based)$_i$ + β_9*Judge's Ideology$_i$ X Content-Neutral$_i$ + β_{10}*Judge's Ideology$_i$ X Content-Based$_i$ + β_{11}*Judge's Ideology$_i$ X Panel Composition$_i$ + β_{12}*Post-*Grayned*$_i$ + β_{13}*Post-*Grayned*$_i$ X Judge's Ideology$_i$ + β_{14}*Post-*Grayned*$_i$ X Less Protected (Content-Neutral)$_i$ + β_{15}*Post-*Grayned*$_j$ X Less Protected (Content-Based)$_i$ +

[9] While this method does place much discretion in identifying the relevant population of cases, the selection process proceeded quite cautiously to ensure that as many relevant cases were included. First, searches on Lexis/Nexis were completed employing the following search terms: "free speech", "freedom of speech", "free press", "freedom of press", "free expression", "freedom of expression", "free assembly", "freedom of assembly", "free association", "freedom of association", "expressive association", "free w/10 protest", "protestor" (narrowed by "speech"), "actual malice" (narrowed by "libel"), obscene (narrowed by "speech" or "press" or "expression"), "chilling effect" (narrowed by "speech" or "press" or "expression"), "fighting words", "symbolic speech", "hate speech" and "time, place, manner" (narrowed by "speech" or "press" or "expression").

[10] As Songer (1988) cautions, the use of Shepard's Citations only elicits cases include full citations or case names in the opinion. Lexis/Nexis is a more appropriate source for case selection. Although it occasionally suffers from problems of search over-inclusion as well as under-inclusion, it does offer some information for some unpublished opinions, which is preferable to only using published opinions.

[11] Cases where the controversy began with a restriction of free expression rights, but the overall question answered by the court focused on standing, justiciability or jurisdiction, were also included. If one is to accept the possibility of opinions being post-hoc justifications for ideological voting, omission of such litigation and the subsequent decisions would be problematic and bias the results.

β_{16}*Post-*Grayned*$_i$ X Content-Neutral$_i$ + β_{17}*Post-*Grayned*$_i$ X Content-Based$_i$ + β_{18}*Post-*Grayned*$_i$ X Panel Composition$_i$ + β_{19}*Post-*Grayned*$_i$ X Judge's Ideology$_i$ X Less Protected (Content-Neutral)$_i$ + β_{20}*Post-*Grayned*$_i$ X Judge's Ideology$_i$ X Less Protected (Content-Based)$_i$ + β_{21}*Post-*Grayned*$_i$ X Judge's Ideology$_i$ X Content-Neutral$_i$ + β_{22}*Post-*Grayned*$_i$ X Judge's Ideology$_i$ X Content-Based$_i$ + β_{23}*Post-*Grayned*$_i$ X Judge's Ideology$_i$ X Panel Composition$_i$ + ε_i

Judge's ideologies are ideological scores derived from the Giles et al. (2001) coding strategy. A given judge's ideology takes on the value of the nominating president's common space score (Poole 1998) if senatorial courtesy is inactive. If senatorial courtesy is in play, a given judge's ideology takes on the value of the home-state senator of the president's party; if both home-state senators share the same party affiliation as the nominating president, the judge's ideology is measured as the average of the senators' common space scores. For ease of interpretation with the dependent variable, I multiply the common space scores by a value of -1, so that increasing values translates into increasing liberalism.

Panel Composition is measured as the proportion of the other panelists with an ideology score (as determined by the Giles et al. (2001) coding strategy, which again is "flipped") less than zero, which is the theoretical midpoint of the common space scores. This measure, as a result, varies within cases and by each observation. For example, if a judge serves with two judges whose common space scores are less than zero, *Panel Composition* takes on the value of 1; if both judges have common space scores greater than zero, the variable has a value of 0. If one of the remaining panelists has an ideology score greater than zero and the other's ideology score is less than zero, the variable is coded 0.5. While this coding strategy to capture panel effects loses the finer details of a continuous measure of ideology, it serves as a parsimonious specification of panel

composition akin to the Sunstein et al. (2006) examination, which uses partisanship of the appointing president.

As for the case facts, the coding strategies for all legal variables are derived from the Richards and Kritzer (2002) examination.[12] The excluded category consists of restrictions that failed to meet threshold. Because case facts are coded from circuit court opinions, there is a need to remove as much coder discretion as possible while also avoiding measurement strategies that are based on judicial determinations. The Richards and Kritzer (2002) examination determines that threshold cases are those "in which free expression is not abridged or there is no government action" (311). To limit coder discretion of whether or not free expression was abridged, threshold restrictions in this examination include only cases where restrictions are purely private in nature. In other words, the excluded category contains only restrictions that lack a government action.

Less Protected (Content-Neutral) is a dichotomous variable, coded 1 if a restriction targets a less protected form of expression and is a content-neutral restriction, 0 otherwise. *Less Protected (Content-Based)*, too, is a dichotomous variable; it is coded 1 if a restriction targets a less protected form of expression and is a content-based restriction, 0 otherwise. Similar to Richards and Kritzer (2002), the less protected categories include commercial speech, obscenity[13], broadcast media expression (excluding restrictions on only cable television), expression in nonpublic forums[14] or private property against the will of the owner, expression in schools, picketing at

[12] Please see Appendix A for exact coding strategies the variables coded for this study.
[13] Please note that I include ordinances that attempt to regulate nudity or establishments that have nude entertainment as restrictions that target obscene expression.
[14] Because it is not explicit stated in the Richards and Kritzer (2002) examination, I include in this examination prisons, borders and airports as nonpublic forums for expression. Moreover, I also code expressions by potential or actual military personnel as less protected.

secondary sites by labor unions, expression of political appointees, and libel against private figures. Additionally, I include the following categories: criminal speech (expression that leads to violence or threatens national security) and expression limited by judicial decree, which includes stipulations from parole or probation, gag orders, restrictions on reporter access to trials and hearings, and claims of reporter privilege. If a restriction was justified by the government because it targeted a less protected class of expression, the restriction was considered a less protected regulation whether or not the final decision determined the instant expression was indeed less protected. For example, if the Postmaster General refused to deliver mail that he believed to be obscene, the free expression restriction was coded as less protected regardless of whether or not the circuit court panel determined the material to be obscene.

Content-Neutral is a dummy variable coded 1 if the free expression restriction is content-neutral, 0 otherwise. *Content-Based* is a dummy variable coded 1 if the free expression restriction is content-based, 0 otherwise. Admittedly, there is much discretion in determining whether a free expression restriction is content-based or content-neutral. But, several coding strategies were used to help alleviate these concerns. Regulations that attempt to restrict the times, places, manners and locations of expression are generally considered content-neutral. An example would be when a city or local government requires permits for all parades or demonstrations. Restrictions are considered content-based if it viewpoint discriminates or if the application of a restriction is left at the sole discretion of one or two individuals or entities. For example, if the discretion to grant a permit or not is left to one city official or entity, the denial of the permit would be considered a content-based restriction even though the law itself would

be content-neutral. Claims of retaliation for free speech or expression by the individual challenger of government restrictions are considered content-based; similarly, claims of malicious or selective prosecution for free expression are also considered content-based. An example of this would be when a government employee is allegedly fired for making comments to the press or for having a particular partisan affiliation[15], which surprisingly occur with some regularity in the data.

All variables are interacted with *Post*-Grayned, which is a dummy variable coded 1 if a case was decided after the Supreme Court handed down its decision in *Grayned*, 0 otherwise. Each of the case-fact variables as well as *Panel Composition* are cross-level interacted with judges' ideology. The reason for the interactions stems from the discussion above regarding the variation in the effects of ideology on judicial behavior. The impact of case facts, for example, should shift the overall behavior, which would be the probability of voting liberally; in doing so, the impact of case facts can also affect the role of policy preferences on that eventual vote choice. Following the lead of Bartels (2009), I control for those by specifying interactions of case variables (e.g., whether the restriction was content-based or content-neutral) with judicial ideology. After coding of the relevant variables, the model has 16,347 votes from 5129 cases.[16]

Results

Aggregate-Level Results: Case Outcomes

[15] Please note that if the opinion made special note of the fact that the employee was a politically appointed, this type of restriction (content-based) would be considered less protected.

[16] In this sample, several retired Supreme Court justices (Clark, Powell and Reed) participated in circuit court decisions; for these votes, the Judicial Common Space (JCS) scores (Epstein, Martin, Segal and Westerland (2006) from their respective last term of service at the Supreme Court was used. Exclusion of these votes do not alter the overall conclusions of this examination.

The first point of inquiry is whether Courts of Appeals panel decision-making comports with the expectations derived from *Grayned* and *Mosely*. Specifically, do case outcomes compare with the predictions from the content-neutrality jurisprudential regime? As stated above, the corresponding levels of applicable judicial scrutiny based on the factual circumstances should lead to predictable levels of support for free expression claims. Table 3.1 presents the aggregate analyses (cross-tabulations) for case outcomes by jurisprudential time period and by restriction type.

[Insert Table 3.1 about here]

When dealing with regulations that impede upon less protected classes of expression or fail to meet threshold (no state action), judges should employ rational basis. In these instances, support for free expression rights should be rather low. For threshold cases, circuit court decisions supported free expression for about 31 percent of the time before the Court's *Grayned* decision. After *Grayned*, support increased slightly, but remained at about 31 percent. The difference is not significant[17], which confirms the contention that support for rights remained constant for private restrictions of free expression.[18]

Restrictions that target less protected expression also evince a low level of support. Prior to *Grayned*, support for free expression rights was at about 36 percent. Circuit court decisions actually increased support for free expression rights by about 4

[17] For the aggregate analyses, all tests of significance are based on difference of proportions tests. Unless otherwise stated in the text, the null hypotheses for these tests are where the differences in proportions are equal to zero.

[18] An attempt was made to determine whether threshold cases would be different if the restrictions were content-based or content-neutral. Unfortunately, there were too few instances of content-neutral private restrictions of free expression. Prior to *Grayned*, there were only two cases where a restriction was content-neutral. After *Grayned*, there were only 17. Given the low number of cases, all test for differences in proportions between content-neutral and content-based threshold restrictions suggest no significant differences. Therefore, I exclude any analyses of these cases and treat threshold cases as one class regardless of the restriction on content.

percent after Grayned (*p*-value at about 0.057). Recall the hypothesis that decision-making for less protected restrictions should not significantly change with the establishment of the content-neutrality jurisprudential regime. A possible explanation for this increase could be a change in how circuit court panels decide the constitutionality of restrictions based on whether restrictions are content-based or content-neutral. The rise in support for free expression rights could be driven by an increase in panel decisions striking down less protected restrictions that are content-based.

Table 3.1 also parcels out less protected restrictions by the manner expression is regulated (content-based or content-neutral). When determining the constitutionality of less protected content-neutral restrictions, circuit court decisions increased support for free expression rights by about 7 percent after *Grayned*, which is not statistically significant. For less protected content-based restrictions before and after *Grayned*, support for free expression rights were about 38 percent and 44 percent respectively, which is significant. This suggests that adjudication for less protected restrictions follows the guiding structure (content-neutral versus content-based) from a content-neutrality jurisprudential regime.

The evidence from case outcomes for content-based restrictions (that do not target less protected expression) also supports the hypotheses stated above. First, support for free expression rights, prior to *Grayned*, was at about 45 percent, which is higher than decisional support for all other types of restrictions and comparisons suggest statistically significant differences. Second, free expression support increased to about 47 percent after *Grayned* (*p*-value at about 0.626). This confirms not only the fact that content-based restrictions of expression are considered suspect (and receive strict scrutiny), but

also there was no substantial change to how circuit court panels handle content-based restrictions after *Grayned*.

For content-neutral restrictions, case-level support for free expression rights was at about 35 percent prior to *Grayned*. Tests comparing case-level support for free expression rights for less protected (content-based or content-neutral), below threshold and content-neutral restrictions, however, overall confirm that there are no significant differences.[19] Rational basis analysis leads to lower levels of support for free expression claims when restrictions are purely private, target less protected classes, or focus on the times, places and manners of expression. Post-*Grayned*, support for free expression rights are about 27 percent for content-neutral restrictions, which is indeed lower than the 47 percent when faced with a content-based restriction. This difference between content-based and content-neutral restrictions is significant. This finding lends support for the Richards and Kritzer (2002) findings that content-based restrictions are more likely to be struck down than content-neutral restrictions under the content-neutrality jurisprudential regime.

Unfortunately, support for free expression rights actually decreased by about 8 percent when circuit court panels determine the constitutionality of content-neutral restrictions after *Grayned* (*p*-value of about 0.163).[20] When comparing less protected content-neutral restrictions with content-neutral cases that do not target less protected

[19] In comparing restrictions that should be adjudicated under rational-basis inquiries, there are two significant differences before *Grayned*: (1) comparison in proportions of less protected (content-neutral) and content-neutral restrictions; and (2) comparing both content-based and content-neutral less protected restrictions. There, however, are no significant differences comparing any combination of less protected (content-based), threshold, or content-neutral restrictions. Given this, I am more apt to conclude that there rational basis test generally lead to the same outcomes with regards to restrictions of free expression rights.

[20] Under a one-tailed test (where the null hypothesis is difference in proportions is greater than zero), the *p*-value is 0.918. This, of course, is a more appropriate test due to the fact that I have a directional hypothesis. As is clear, the substantive conclusion remains the same: there is no significant change in case-level support for free expression rights when deciding the constitutionality of content-neutral restrictions.

forms of expression, there are no significant differences. This is not overly surprising given the fact that free expression support for both is about 27 percent after *Grayned*. Moreover, the difference between less protected content-based restrictions is also insignificant. These findings, however, are surprising when Figure 3.3 predicted higher levels of support for content-neutral restrictions compared to less protected restrictions post-*Grayned*.

Aggregate-Level Results: Judges' Choices

As Figure 3.3 suggested, content-neutral restrictions should be where there is an observable change in terms of support for free expression rights after the Court's decision in *Grayned*. The findings for content-neutral restrictions, however, seem counter to the idea that intermediate scrutiny leads to heightened levels of support when compared to the reasonable-relation tests. Furthermore, this seems to suggest that this study—at least, for case outcomes—finds no strong support for a free expression jurisprudential regime at the U.S. Courts of Appeals. There is a plausible explanation. Recall the discussion regarding judicial discretion and intermediate scrutiny. Because discretion is at its peak (compared to decision-making under rational basis and strict scrutiny), it may be the case that this decrease is driven by conservative jurists who are free to vote in accordance with their policy preferences when determining the constitutionality of content-neutral restrictions on free expression.

[Insert Table 3.2 about here]

Table 3.2 presents percentage of judges' support for free expression rights by jurisprudential period, restriction type, and partisanship of the appointing president.

Because of the often high correlation between ideology and partisanship, it should be the case that Republic-appointed judges are more conservative than Democratic-appointed judges. Thus, partisanship of the appointing president should serve as a strong, preliminary test of the hypotheses regarding hierarchical constraint and the choices judges make in the area of free expression.

Support for free expression rights is relatively similar (low) in threshold cases before and after the Court's decision in *Grayned*. Before and after *Grayned*, Republican-appointed jurists supported free expression at about 35 and 32 percents, respectively. For Democrats, the level of support is at about 35 and 34 percents in threshold cases before and after *Grayned*, respectively. Difference in proportions tests confirm that both Republican- and Democrat-appointed judges vote relatively the same prior to and after *Grayned*.[21]

As for less protected restrictions, Republican-appointed judges supported free expression rights about 36 percent of the time before *Grayned*; the number increases to about 37 percent after the *Grayned* decision (*p*-value at about 0.566). In regards to Democrat-appointed judges, the level of support for free expression rights increases by about 8 percent after *Grayned*, which is statistically significant. This, of course, runs counter to the predicted levels of support from Figures 3.4 and 3.5. Perhaps the increase in Democrat-appointed jurists' support is due to deciding cases that pertain to a content-based, less protected restriction.

[21] This not only includes time period difference in proportions test, which are presented in Table 3.2, but also test comparing Democrat- and Republican-appointed judges both pre- and post-*Grayned*. In each, the null hypotheses that the differences in proportions are equal to zero cannot be rejected.

Similar to Table 3.1, Table 3.2 also parcels out less protected restrictions by the manner in which the content of expression is suppressed.[22] Republican-appointed judges may show an increase in support when deciding the constitutionality of both content-neutral and content-based restrictions that target less protected forms of expression. Neither increase is statistically significant, suggesting insubstantial differences in voting before and after *Grayned*. But, the behavior of these jurists does suggest that they are more suspect of content-based restrictions of less protected expression. Republican-appointed jurists are significantly more likely to strike down content-based restrictions in both jurisprudential periods.

In regards to Democrat-appointed judges, the level of support for free expression rights increased from 28 percent (pre-*Grayned*) to about 37 percent (post-*Grayned*) when faced with a content-neutral restriction that seeks to suppress less protected expression (*p*-value at about 0.067). For less protected restrictions that are content-based, there is also a statistically significant increase of about 9 percent after the *Grayned* decision. Moreover, when comparing the two manners of less protected restrictions, Democrat-appointed judges—similar to their Republican-appointed brethren—are significantly more suspect of content-based restrictions that target less protected forms of expression.

Although it appears that Democrat- and Republican-appointed judges comport with the structuring of *Grayned*, an argument that *Grayned* influenced the choices that judges make finds mixed results here. When determining the constitutionality of content-based, less protected restrictions, Democrat- and Republican appointed judges evinced higher levels of support (compared to content-neutral, less protected restrictions) prior to

[22] Again, I do not parcel out threshold cases by the manner they are restricted (content-neutral or content-based) because there are too few cases and, as a result, too few votes to adequately test hypotheses.

the Court's decision in *Grayned*. As such, it is difficult to conclude that *Grayned* did indeed alter the manner in which judges adjudicate restrictions seeking to regulate less protected expression.

As for content-based restrictions, Republican-appointed judges supported free expression rights at high levels both before and after *Grayned*. Prior to the Court's decision, these judges supported free expression rights about 44 percent of the time. Afterwards, these judges continued to vote liberally about 43 percent of the time; the difference is insignificant. This, of course, comports with expectations that strict scrutiny is the appropriate test of content-based restrictions, which *Grayned* did not alter. Furthermore, Republican-appointed judges supported for free expression rights at higher levels when presented with a content-based restriction than all other types of restrictions.[23]

When deciding the constitutionality of content-based restrictions, Democrat-appointed judges supported free expression rights at high levels both before and after the establishment of the content-neutrality jurisprudential regime. Prior to *Grayned*, Democrat judges voted to support free expression rights at about 47 percent. After *Grayned*, this support increased to about 51 percent (*p*-value at about 0.033). The establishment of the content-neutrality jurisprudential regime appears to have reinforced Democrat-appointed judges' ideologies and therefore accentuated their propensity to support free expression claims against content-based restrictions, post-*Grayned*. Similar to Republican-appointed judges pre-*Grayned*, Democrat-appointed judges were

[23] This is confirmed by difference in proportions tests comparing content-based restrictions with less protected (content-neutral), less protected (content-based) and content-neutral cases within jurisprudential periods (i.e., before and after *Grayned*) All suggest that Republican-appointed judges supported free expression rights more when deciding the constitutionality of content-based restrictions.

significantly more likely to strike down content-based restrictions than threshold, less protected (content-neutral) and less protected (content-based) restrictions, which all comport with the expectations above. But, unlike Republican-appointed judges before *Grayned*, Democrat-appointed judges were not significantly more likely to strike down content-based restrictions than content-neutral restrictions.

For content-neutral restrictions, Republican-appointed judges supported free expression rights 27 percent of the time, which decreases to 25 percent after *Grayned* (*p*-value at about 0.711). This is not surprising given the hypothesized impact of intermediate scrutiny on judicial decision-making of conservative judges. Again, intermediate scrutiny allows judges to vote in accordance with their policy preferences and it appears to be the case for Republican-appointed judges after *Grayned*. Free to vote in accordance with their ideologies, these assumed-conservative jurists obviously do so to the point that adjudication for content-neutral restrictions mimics decision-making for content-neutral less protected restrictions (pre- and post-*Grayned*) and threshold cases (pre-*Grayned*). The difference in proportions tests suggest an accentuation of ideology for Republican-appointed judges such that they are even less likely to support free expression rights in content-neutral restrictions when compared to threshold cases (post-*Grayned*) and content-based restrictions targeting less protected forms of expression (pre- and post-*Grayned*).

Prior to *Grayned*, Democrat-appointed judges supported free expression rights 44 percent of the time when presented with a content-neutral restriction, which is not significantly different from content-based restrictions (47 percent). Before *Grayned*, it appears that Democrat-appointed judges were resistant to uphold regulations on free

expression whether or not the manner of the restriction was content-based or content-neutral. If expression was subject to reasonable time, place and manner restrictions (suggesting a rational-basis inquiry) prior to *Grayned*, this finding, of course, is counter to a conceptualization of hierarchical constraint at least for Democrat-appointed judges.

After *Grayned*, liberal judges are presented with an opportunity to vote in accordance with their policy preferences while still maintaining compliance with Supreme Court jurisprudence. In other words, liberals are able to support free expression at high levels after *Grayned* when determining the constitutionality of a content-neutral restriction. As depicted in Table 3.2, this does not appear to be the case. Rather, Democrat-appointed judges voted to support free expression rights about 36 percent of the time, which is a decrease of about 6 percent from the period before *Grayned*. Despite the fact that this level of support is significantly higher than Republican-appointed judges' support, this finding suggests that Democrat-appointees failed to seize an opportunity and instead became less supportive of free expression rights after *Grayned*.

Similar to Republican-appointed judges after *Grayned*, Democrat-appointed judges treated content-neutral restrictions similarly regardless of whether the government law or action targeted a less protected form of expression. Specifically, Democrat-appointed judges show no significant differences in support for free expression rights when deciding cases dealing with content-neutral and less protected (content-neutral) restrictions after *Grayned*. The same is true of Republican-appointed judges.

Regardless of whether the government action or law attempts to regulate a less protected form of expression, Democrat-appointed judges appear to handle content-based restrictions the same. Comparing post-*Grayned* content-based and less protected

(content-based) restrictions, Democrat-appointed judges are equally as likely to strike down a content-based restriction as they are to hold a less protected content-based restriction as unconstitutional. After *Grayned*, Republican-appointed judges, on the other hand, are significantly more likely to strike down a content-based restriction that does not seek to regulate a less protected form of expression than one that does not.

Empirical Model Results: Impact on Judicial Decision-Making

While the aggregate analyses above provide much insight into judicial decision-making of free expression cases at the U.S. Courts of Appeals, it does not account for collegial considerations and does not account for the idiosyncrasies of cases handled by the circuit courts. Thus, to examine hierarchical and collegial constraints under a more empirically rigorous approach, I estimated Equation 3.1 using full maximum likelihood.[24]

[Insert Table 3.3 about here]

Table 3.3 presents the results from the logistic regression.[25] While there are indeed coefficients that are significant, they are conditional on the base-line effect. In

[24] Hettinger et al. (2006) as well as Giles, Walker and Zorn (2006) discuss the role of en banc review, which is a means for each of the Courts of Appeals to oversee possible deviations by a panel. Although this is an important aspect of agenda control at the circuits, all decisions, en banc or otherwise, are still subject to Supreme Court oversight.

[25] Please note that I also estimated Equation 3.1 using a multilevel model nesting judges' choices (level-1) within cases (level-2), specifying random intercepts to control for the unobserved heterogeneity in the response. A likelihood ratio test comparing Equation 3.1 and the hierarchical model suggests that the random intercept provides a better fit to the data than a logistic regression that does not specify random parameters. There are differences in the coefficients and the predicted probabilities, but the general conclusions regarding the impact of hierarchical and collegial constraints are generally the same. Moreover, given the large number of cases and the small number of observations within each case (average cluster size of about 3), the multilevel model results are quite different from the aggregate analyses presented above, which may be an indication of instability in the estimation process. Therefore, I present a more empirically parsimonious specification. The results from the multilevel model are available upon request.

order to account for both the main and conditional effects, I interpret the results using predicted probabilities based on the results presented in Table 3.3.[26]

[Insert Figure 3.6 about here]

Figure 3.6 presents the predicted probabilities of supporting free expression rights by ideology and restriction types.[27] As depicted in Figure 3.6a, support for free expression rights is low for private restrictions of expression. This holds true across judicial ideologies and across jurisprudential periods (i.e., pre- and post-*Grayned*). For liberals,[28] the predicted probability of supporting a free expression claim is about 37 pre- and post-*Grayned*. Obviously, this shows a moderate degree of hierarchical constraint on the part of liberal judges since it is assumed that these jurists prefer to support free expression claims. As the ones most likely to comport with Supreme Court decision-making, moderates support free expression rights at a predicted probability of 32 percent in both jurisprudential periods. For conservatives, the predicted probability of supporting free expression rights remains constant at about 29 percent. There are no significant differences in predicted probabilities comparing different levels of judicial ideologies

[26] Please note that I use predicted probabilities derived from the coefficients; in order to account for the uncertainty of the estimates, the predicted probabilities are based on 500 iterations simulated in a process akin to utilizing the "clarify" procedure (King, Tomz, and Wittenberg 2000). More specifically, I drew 500 simulations for the parameters from a normal distribution. The sampling distribution had a mean equal to the vector of parameter estimates and a variance equal to the variance-covariance matrix of estimates. Then, the simulated parameter estimates were translated into predicted probabilities of a liberal (supporting free expression) vote, where the independent variables were set to the values of interest.

[27] I also estimated a model similar to Equation 3.1 where less protected forms of expression are combined, which is a closer approximation of the Richards and Kritzer (2002) and Bartels (2006) examinations. The substantive results for the other restrictions remain the same; the results for less protected restrictions when combined mirror the conclusions from less protected restrictions that are content-based. For a complete replication of the results, please see Appendix A.

[28] High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. For the sake of brevity, I opt to interpret only liberals and conservatives (instead of high liberals and high conservatives as well). A table of the actual values of the predicted probabilities and their corresponding standard deviations are presented in Appendix A.

prior to *Grayned*. After the Court's decision, there are significant differences for all comparisons; the mean difference in predicted probabilities comparing liberals and conservatives is a gap of about 8 percent. Tests for changes in behavior before and after *Grayned* suggest little to no significant alteration in support for free expression rights. As expected, the substantive conclusion from Figure 3.6a is that the Bill of Rights offers little protection against purely private restrictions on free expression before and after *Grayned*.

Figure 3.6b presents the predicted probabilities of supporting free expression rights for content-neutral restrictions that seek to regulate less protected forms of expression. Again, it is predicted that conservatives should prefer a lower level of adjudication (rational basis) when determining the constitutionality of free expression restrictions. This is the case for less protected restrictions that are content-neutral. The predicted probabilities of a conservative judge supporting free expression rights are 17 and 26 percents before and after *Grayned*, respectively; the change in support, however, are not significant. The low level of support remains the same for moderates as well. The predicted probabilities of moderates supporting free expression rights increased by about 7 percent after *Grayned*, which is significant. As the possible "rogue agents," it should be the case that liberals vote to restrict free expression rights before and after *Grayned*. This appears to be the case. Prior to *Grayned*, the predicted probability of a liberal judge supporting free expression is about 30 percent. After, it rises to about 36 percent, which is an insignificant difference in voting behavior on the part of liberal judges.

Figure 3.6c presents the predicted probabilities for less protected (content-based) restrictions. Prior to *Grayned*, the predicted probability of supporting free expression rights for liberals is about 41 percent; the predicted probabilities are about 39 and 38 for moderates and conservatives, respectively. Comparisons of the predicted probabilities suggest insignificant differences across levels of ideology. After *Grayned*, the predicted probability of conservative jurists supporting free expression rights rises to 40 percent, which is an insignificant increase. For moderates deciding after *Grayned*, the predicted probability of supporting free expression is about 45 percent. For liberals, the increase in predicted probabilities is even more drastic. The predicted probability of a liberal judge voting to support free expression rights is about 49 percent. Changes in predicted probabilities are significant for liberals and moderates, suggesting that these circuit court judges became even more suspect of content-based restrictions that target less protected forms of expression.

Figure 3.6d presents the predicted probabilities for content-neutral restrictions; it shows a strong degree of polarization across ideologies prior to and (and to a lesser degree) after *Grayned*. Comparing levels of ideology, there are significant differences in predicted probabilities before and after *Grayned*. In other words, liberals, moderates and conservatives are polarized in both jurisprudential periods. According to Figures 3.4 and 3.5, the strongest level of polarization, however, should occur after *Grayned*'s establishment of a jurisprudential regime because of the increased level of judicial discretion under intermediate scrutiny. This is not the case.

For liberals, the predicted probabilities of supporting free expression rights are about 47 percent prior to *Grayned* and about 35 percent after *Grayned*. This, of course, is

counter to expectations. Again, under the content-neutrality jurisprudential regime, liberal judges are presented with an opportunity to vote in accordance with their policy preferences and support free expression at high levels. These judges, however, voted against their ideologies and instead became more likely to suppress free expression rights after *Grayned*. The predicted probability of a moderate judge supporting free expression rights is 34 percent, which drops to about 30 percent after *Grayned*. For conservatives, the predicted probabilities of supporting free expression rights before and after *Grayned* are 23 and 25 percents, respectively.

Based on Figure 3.6d, conservatives did not alter decision-making for content-neutral restrictions. Free to vote in accordance with their ideologies, these jurists clearly did so. Moderate and liberal judges voted counter to expectations; intermediate scrutiny should have elevated free expression support by these judges, but both actually decreased support after the Court's decision in *Grayned*. Comparisons of decision-making prior to and after *Grayned*, however, suggest that moderate and conservative judges behave the same. In other words, moderates and conservatives did not significantly alter support for free expression rights with the establishment of the content-neutrality jurisprudential regime. Yet, liberal jurists clearly voted counter to expectations and significantly decreased support for free expression rights.

The predicted probabilities for content-based restrictions are presented in Figure 3.6e. Again, there should be no formal changes in how the Supreme Court deals with viewpoint discrimination before or after *Grayned*. As a result, there most likely should be no alteration in circuit court judges' adjudication of content-based restrictions. As depicted in Figure 3.6e, there clearly appears to be changes in judicial behavior. For

liberal judges, content-based restrictions present an opportunity for these jurists to vote in accordance with their policy preferences. As such, they are not theoretically constrained when presented with a content-based restriction. Pre-*Grayned*, the predicted probability of a liberal judge supporting free expression rights is about 46 percent; the predicted probability increases significantly to about 51 percent after *Grayned*. Liberal judges appear to have taken full advantage of the content-neutrality jurisprudential regime. For moderates adjudicating prior to *Grayned*, the predicted probability of supporting free expression is about 45 percent, which mildly and insignificantly increases to about 47 percent after *Grayned*. Prior to *Grayned*, the predicted probability for conservative judges is about 44 percent. After *Grayned*, free expression support by conservative judges decreases to about 43 percent, which is an insignificant alteration in judicial behavior. While liberals significantly altered behavior after *Grayned* and became less supportive of content-based restrictions, conservative and moderate jurists did not significantly alter their support for free expression rights.

The predicted probabilities of judicial support under content-based restrictions, prior to *Grayned*, are higher than threshold as well as both forms of less protected restrictions. This relationship generally holds true across all levels of judicial ideology except for liberal judges who voted similarly when deciding the constitutionality of content-neutral and content-based restrictions. This higher level of support before *Grayned* suggests that judges were more likely to strike down content-based restrictions on expression. After *Grayned*, all judges regardless of ideology continued to support free expression the most when those liberties are restricted in a content-based manner.

Applications of different levels of judicial scrutiny and the corresponding levels of judicial discretion, moreover, can induce similar decision-making among jurists across levels of ideology. But, this tempering of the role of ideology is hardly complete or perfect. Prior to *Grayed*, comparisons of the predicted probabilities suggest that liberals, moderates and conservatives alike voted similarly when deciding threshold, less protected (content-based) and content-based restrictions. Yet, when adjudicating less protected (content-neutral) and content-neutral restrictions, there are significant differences when comparing liberals, moderates and conservatives before the establishment of the content-neutrality jurisprudential regime. Post-*Grayned*, significant differences exist across levels of ideology and degrees of judicial discretion. In other words, polarization among liberals and conservatives (as well as moderates) is the new reality when adjudicating free expression cases.

Multilevel Model Results: Panel Effects and Judicial Compliance

The results presented above were either agnostic in regards to the impact of panel composition (aggregate analyses) or held panel composition at its mean level (estimates from Equation 3.1). The latter examines judicial behavior for the average case and average composition of the other jurists, where there is one liberal and one conservative for a three judge panel. Do the results substantively and significantly change when changing the degree collegial constraints factor into the choices judges at the circuit courts make? And, if panel effects do indeed alter decision-making for free expression cases, what does this mean for the level of compliance for these adjudicators of the law? To examine panel effects, Figure 3.7 presents the predicted probabilities for supporting

free expression rights across levels of judicial ideology by context and panel composition.

[Insert Figure 3.7 about here]

Please note that tests for significant effects in panel composition on the predicted probabilities of support for free expression rights suggest that panel composition had little to no effect on judicial decision-making prior to *Grayned*. For the pre-*Grayned* period, the conclusion is that judges voted the same whether serving with like-minded jurists or judges holding opposing ideological views. Thus, Figure 3.7 presents the predicted probabilities for only the post-*Grayned* jurisprudential regime. After *Grayned*, all tests for differences in the predicted probabilities at varying levels of panel composition suggest that judges are significantly affected by the other judges serving with them on panels regardless of ideology.[29]

Figure 3.7a presents the predicted probabilities of support free expression rights for threshold cases. Liberal judges, when serving on a panel with other liberals, have a predicted probability of supporting free expression rights at about 41 percent. When there is at least one potential whistleblower (here, a conservative judge) on the panel[30], the predicted probability falls to about 37 percent. When surrounded by conservatives, the predicted probabilities fall to 33 percent. Moderate judges, being the most likely to be influenced by collegial constraints, do significantly change their behavior depending

[29] High conservatives, across types of restrictions, are marginally influenced by panel composition after *Grayned*.

[30] Please note that I use the whistleblower term when the level of scrutiny provides an overall prediction of the level of support for free expression rights. These would be instances of low judicial discretion. Whistleblowers are those judges with convergent ideologies with the relevant legal consideration. For example, under rational basis, the law should lead to more conservative outcomes. As a result, a conservative judge should be the potential whistleblower when serving with liberal judges. For strict scrutiny, liberal judges should serve as the potential whistleblower when serving with conservative judges. Under instances of high judicial discretion, I assume that there is no potential whistleblower because the law does not offer a clear indication in terms of support for free expression rights.

on who serves with these jurists. Changing the ideologies of the other judges from all liberal to all conservative decreases the predicted probability (about 6 percent) to about 30 percent. Conservatives, when surrounded by only liberal judges, tend to increase their support for free expression rights; the predicted probabilities rise from 27 to about 31 percent. Post-*Grayned*, the behavior of circuit court judges suggest that panel composition has a significant impact.

In regards to content-neutral restrictions that seek to regulate less protected forms of expression, Figure 3.7b shows the predicted probabilities after the *Grayned* decision. When serving with only other like-minded judges, liberals have a predicted probability supporting free expression rights of about 40 percent. When the remaining judges are "mixed" in regards to ideology, the predicted probability drops to about 36 percent. The predicted probability is about 33 percent when a liberal judge serves with only conservative jurists. Conservative judges are not nearly as collegial in comparison, which is not surprising given the fact that the law provides a prediction that comports with their policy preferences. When the other panelists are all liberals, a conservative judge has a predicted probability of about 28 percent, which is an increase from a predicted probability of 24 percent when serving with other conservatives. Moderates have a predicted probability of about 34 percent when the other panelists are liberal. This drops down to 28 percent when serving with only conservative jurists.

For content-based restrictions of less protected forms of expression, Figure 3.7c presents the predicted probabilities. Conservative judges are significantly more suspect of content-based restrictions even though the target of the regulation is less protected. Support for free expression rights is at a predicted probability of 37 percent when serving

with other conservative jurists. When the law seems to favor their policy preferences, conservative judges appear to work collegially, voting counter to ideologies and increasing support for expression rights as the number of liberals on the panel increase. It is a significant increase to a predicted probability of about 42 percent. Moderates are also significantly affected by panel composition, decreasing support (by about 7 percent) when ideological composition of the remaining judges changes from all liberals to all conservatives. Liberal judges support free expression rights at a predicted probability of about 53 percent when working with other liberals. The presence of one conservative drops the predicted probability to about 49 percent, which is a decrease of about 4 percent. When liberal judges are surrounded by conservatives on a panel, the predicted probability of supporting expression rights is about 45 percent.

Figure 3.7d presents the predicted probabilities of supporting free expression rights for content-neutral restrictions that do not target less protected classes. Again, intermediate scrutiny should polarize judges because they are free to vote in accordance with their ideologies. With no incentive to work collegially, judges significantly alter decision-making to comport with the other judges on the panel, but the adjustments in behavior and the overall support for free expression rights are rather anemic. They are so low that the predicted probabilities mirror judicial behavior under less protected content-neutral and threshold restrictions; tests of the predicted probabilities suggest no significant differences between the three types of restrictions across levels of panel composition. When changing ideological composition of the other panelists from all liberals to all conservatives, the predicted probabilities of supporting expression rights for liberals, moderates and conservatives decrease by about 7, 6, and 4 percents, respectively.

For content-based restrictions, Figure 3.7e presents the predicted probabilities. Liberals judges have a predicted probability of about 55 percent, when working with other liberals. This high level of support drops to about 47 percent when surrounded by conservative judges. Here, the law favors judicial ideology for liberals; yet, it appears that liberal judges are willing to work within a collegial environment and adjust their behavior according to who serves on the panel with them. Moderates are the same. When serving with only liberals, the predicted probability increases to about 50 percent, which is a change of about 6 percent compared to decision-making with only conservatives on the panel. The presence of only judges holding opposing ideological views can increase conservative judges' support for expression rights by about 6 percent. Conservative judges have a predicted probability of about 40 percent when working with other conservatives.

Discussion

The broad question this study seeks to answer is whether the law—established by the Supreme Court—can serve as a sufficient constraint on the choices judges make even when preferences between policy preferences and legal considerations are divergent. Recall the discussion above regarding the interaction between law and ideology (Bartels 2009). Figure 3.8 presents the results from Figure 3.6 in a different manner to support the hypothesis that the impact of ideology is non-constant as has been previously modeled. Comparing predicted probabilities across different contexts by ideology, Figure 3.8 shows that the role of ideology—the level of which is held constant—varies by context. In other words, the different types of restrictions and the corresponding level

of scrutiny to be applied can have drastic effects for the role of ideology and the level of support for free expression rights. As shown in Figure 3.8, there is clearly an interaction between policy preferences and legal considerations on the choices judges make, prior to *Grayned*. Post-*Grayned*, the role of ideology, however, appears more constant as evinced by the relatively stable and consistent gap between liberals and conservatives. While there are clearly shifts in the overall propensity to support free expression rights (with peaks for content-based restrictions that do and do not target less protected forms of expression, the impact of ideology seems to suggest and mirror a conclusion mentioned above: a divide between liberals, moderates and conservatives alike.

[Insert Figure 3.8 about here]

Impact on Judicial Decision-Making and Compliance

Moreover, the application (empirically and, of course, theoretically) of this intuition should have serious repercussions for conclusions of circuit court judges' complying with Supreme Court decision-making. The results presented above provide mixed results. Where judicial discretion is low, it should be the case that the impact of ideology is low when the legal considerations and judicial ideology are divergent. Where judicial discretion is high, the impact of ideology on judicial vote choice can lead to polarization across levels of judicial ideology. In other words, liberals and conservatives—where they are free to vote in accordance with policy preferences—should show significant differences in voting behavior.

For threshold cases (low judicial discretion), there are no significant differences across ideologies prior to *Grayned*; this of course comports with expectations that the

Constitution provides little recourse for purely private restrictions. After *Grayned*, there is a significant gap between liberals and conservatives. But, this result is muted by the fact that there are no significant alterations in judicial behavior when comparing the pre- and post-*Grayned* jurisprudence. Because conservatives are faced with convergent policy preferences and legal considerations, the fact that liberal judges, who would prefer to support free expression rights, vote counter to expectations from the attitudinal model suggests a high level of hierarchical constraint.

For less protected (content-neutral) restrictions, the results are mixed. Tests for significant differences across ideologies are significant prior to and after *Grayned*. While the comparisons across levels of ideology suggest polarization, the insignificant differences when comparing these restrictions with threshold cases as well as the comparatively low level of support on the part of liberal judges suggest significant hierarchical constraint by the Supreme Court through legal considerations. The conclusion is that, while voting significantly different, judges across all levels are more likely to uphold government restrictions on less protected expression if it is in a content-neutral manner.

In regards to less protected (content-based) restrictions, tests for significant differences across all levels of ideology confirm that liberals, moderates and conservative judges vote differently after *Grayned*. Prior to *Grayned*, the differences are rather small and statistically insignificant. Moreover, higher levels of panel heterogeneity induced increasing similarities in support from judges across levels of judicial ideology before *Grayned*. The fact that less protected expression are generally outside constitutional protection should lead to insignificant or, at the very least, insubstantial differences if

legal considerations are to operate as hierarchical constraints on the choices judges make. This is not the case after *Grayned*. Judges—even in this area where judicial discretion is low—polarize, which of course is counter to expectations. Fortunately, jurists are sensitive to other judges serving on the panel. Comparisons of the predicted probabilities for liberals and conservatives when they are respectively surrounded by ideologically opposing brethren suggest that collegial constraints can "bridge" the gap between liberals and conservatives.

The Bartels (2009) examination, after accounting for the interaction of the law and ideology, finds that less protected restrictions and the corresponding rational basis inquiries serve may not sufficiently constrain the impact of policy preferences on the choices justices make after *Grayned*. Here, liberal, moderate and conservative jurists vote significantly different as well, suggesting that legal considerations may not function to temper ideology. I offer an alternative explanation. Whether the restriction is content-based or content-neutral in regulating less protected forms of expression, each restriction is still subject to judicial determination of whether the restricted expression is indeed outside the scope of First Amendment protections. Specifically, it may be the case that obscene materials are subject to greater restrictions than non-obscene social and political speech; but, judges should and probably do apply the *Miller* test to decipher whether the instant material is obscene or not. If the material is obscene, rational basis inquiry should be applied. If not, the material may be adjudicated under a level of scrutiny akin to the compelling interest test. Thus, this additional inquiry may be enough to allow judicial ideologies to influence the overall behavior and may lead to a polarization of judges across ideologies.

For content-neutral restrictions, tests for significant differences across ideologies are significant before and after *Grayned*. As suggested by the Bartels (2009) examination, it is the case that liberals and conservatives polarize under intermediate scrutiny and the higher judicial discretion it offers. The polarizing effect post-*Grayned*, however, is not as large as that which existed prior to *Grayned*, when judicial discretion was arguably lower. Under intermediate scrutiny, liberal judges are afforded the opportunity to vote in accordance with their policy preferences. Due to the fact that liberal judges' support for free expression rights lower after *Grayned*, it suggests that these judges simply failed to seize an opportunity to vote ideologically (while still maintaining compliance) and instead voted in a manner generally consistent with moderates and conservatives.

Adjudication for content-based restrictions suggests that the law presents a significant hierarchical constraint on the choices judges make. Comparisons across levels of ideology suggest no significant differences in how liberals, moderates or conservatives decide cases when presented with content-based restrictions prior to *Grayned*. This conforms to the expectation that strict scrutiny limits judicial discretion. After *Grayned*, the predicted probabilities may suggest polarization. The overall findings for content-based restrictions are not damning for judicial compliance on the part of conservative jurists. These judges supported free expression rights at the highest level when presented with a content-based restriction than any other restriction and increase that support as the number of liberals on the panel increase. Again, surrounding conservatives (who are the potential rogue agents here) with liberal judges (potential whistleblowers) brings the predicted probabilities to levels similar to liberal judges serving with only conservatives.

Sensitivity Analyses

The results presented above also provide mixed support for the hypotheses that *Grayned* had its intended effect and was the definitive point where jurisprudence shifted. Prior to *Grayned*, judicial decision-making generally comports with expectations. As evinced through the low level of support for free expression rights, threshold and less protected (content-neutral and content-based) restrictions seem to pass constitutional muster with greater ease than content-based restrictions. This effect is consistent across all levels of judicial ideology. Content-based restrictions, before the Court's decision in *Grayned*, were treated as suspect, which is supported by judges across all ideologies being more likely to strike down content-based restrictions than any other type (except for high liberals and liberals). Before *Grayned*, the adjudication of content-neutral cases, however, seemed to polarize judges attempting to determine the constitutionality of reasonable time, place and manner restrictions.

Despite a few surprising findings prior to the establishment of the content-neutrality jurisprudential regime, it should be the case that post-*Grayned* adjudication mirrors the expectations detailed above, but this does not seem to be the case entirely. A comparison of content-neutral (Figure 3.6d) and content-based (Figure 3.6e) restrictions offers conflicting evidence of the establishment of a content-neutrality jurisprudential regime. After *Grayned*, judges across levels of ideology are more likely to strike down content-based restrictions compared to those that are content-neutral. This finding lends support for the Richards and Kritzer (2002) examination, which predicts such an effect. Because the Richards and Kritzer (2002) examination is rather agnostic about pre-

Grayned jurisprudence, it is difficult to conclude that *Grayned* had its proposed effect when comparing pre- and post-*Grayned* jurisprudence in this examination. The increase in the likelihood of supporting free expression rights comes from two sources: (1) an increase in a given judge's propensity to support free expression rights where restrictions are content-based as well as (2) a decrease in support when restrictions are content-neutral. For content-neutral restrictions, the decrease is consistent across ideologies despite the elevated level of scrutiny and an opportunity for liberal judges to vote in accordance with their policy preferences. For content-based restrictions, the increase in the support of free expression rights occurs across all levels of ideology, but comes from a case (*Grayned*) that did not necessarily alter the applicable scrutiny level.

Although the expectations for threshold and less protected (content-neutral) restrictions hold as judges appear to consistently uphold these restrictions, adjudication under restrictions that target less protected expression as a whole (content-based and content-neutral) does not comport with expectations. The results presented in Figure 3.6c (content-based, less protected) seem counter to the hypotheses stated above and a conceptualization of hierarchical constraint. At all levels of judicial ideology, judges significantly increased support for free expression rights after *Grayned*, which is surprising given the fact that there were no formal changes in the handling of less protected expression with the establishment of the content-neutrality jurisprudential regime.

After *Grayned*, adjudication of less protected (content-based) and less protected (content-neutral) restrictions mimic that of their content-based and content-neutral

counterparts that do not regulate less protected forms of expression.[31] Comparing Figures 3.6c and 3.6e as well Figures 3.6b and 3.6d, it is clear that support for free expression rights by judges are similar when adjudicating content-neutral and content-based cases regardless of whether the restriction seek to regulate a less protected form of expression. The relationship is especially stronger for content-neutral restrictions, where there are no significant differences between judicial treatment of content-neutral and less protected content-neutral restrictions. This is surprising given less protected forms of expression are subject to rational basis inquiries and content-neutral restrictions receive intermediate scrutiny.

The distinction between content-neutral and content-based restrictions clearly trickled down to less protected forms of expression. Comparing the predicted probabilities presented in Figures 3.6b and 3.6c, it is clear that judges were more likely to strike down content-based restrictions of less protected expression than they were when presented with a less protected content-neutral restriction. This, of course, would comport with a general structuring of the content-neutrality jurisprudential regime. Unfortunately, tests for differences in predicted probabilities for decision-making prior to and after *Grayned* suggest that it may not have been *Grayned* that created the distinction on the manner in which less protected expression is regulated. This structuring of adjudication (where content-based restrictions are suspect) was present at the Courts of Appeals prior to the Supreme Court's decision in *Grayned*. There is doubt as to whether

[31] Furthermore, comparing the differences in predicted probabilities between less protected (content-based) and content-neutral cases, suggests that judges are clearly more likely to strike down less protected (content-based) restrictions than content-neutral restrictions after *Grayned*. This effect is significant across all levels of judicial ideology. The high levels of support for free expression are rather striking given the fact that less protected forms of expression are generally considered outside the scope of First Amendment protection.

Grayned was the actual point where free expression jurisprudence shifted and whether *Grayned* significantly altered judicial decision-making at the Courts of Appeals.

[Insert Figure 3.9 about here]

As an additional check regarding the concerns of the appropriateness and impact of *Grayned*, I perform a sensitivity analysis. In order to do such a sensitivity analysis akin to that in Richards and Kritzer (2002), I estimated the model in Equation 3.1, but changing the point in time at which there would be a permanent intervention. From the Richards and Kritzer (2002) examination, there is only one likely candidate—*Grayned*. In order to rule out other possible cut-points, I also specified different permanent interventions and estimated a model to similar to Equation 3.1 for each year from 1951 to 2004. Figure 3.9 presents the χ^2 test statistics for each of the Wald tests from the logistic regressions. As an empirical confirmation of the concerns regarding the impact of *Grayned*, Figure 3.9 shows that *Grayned* is not the largest test statistic, but rather one of the lower estimates of model fit. The largest χ^2 test statistic comes from a model similar to Equation 3.1, specifying a *Post-1965* interactions rather than *Post-Grayned*.

Conclusion

This chapter attempted to decipher to whether and to what degree *Grayned* established a content-neutrality jurisprudential regime at the U.S. Courts of Appeals. By applying the theories of hierarchical constraint and heterogeneity in the preference-behavior relationship, this study examined the impact of *Grayned* under a theoretically and empirically rigorous framework. Unfortunately, the results suggest that *Grayned* may not have been point at which free expression jurisprudence shifted. And, the

results—at best—only lend mild support for *Grayned* being able to appropriate structure adjudication at the circuit courts. While there is doubt as to *Grayned*'s impact on Courts of Appeals decision-making, this is not enough to say that circuit court judges failed to comply with Supreme Court jurisprudence. There is evidence that judges adjust decision-making based on the type of restriction as well as manner (content-neutral or content-based) in which the government restricts free expression rights. The latter holds across all levels of ideology: liberal, moderate, or conservative.

Although Hellman (1996) argues that the Court should lay down broad principles in its decisions leaving the details for the lower courts to decide, the conceptualization of a content-neutrality jurisprudential regime may simply be too broad to induce exact and perfect compliance as well as consistent and significant hierarchical constraint. The content-neutrality jurisprudential regime encompasses not only free speech, but other elements of expression including press, association, and all less protected classes of speech. To ask judges to comply with not only *Grayned*, but also other cases more specifically and directly applicable to individual issue areas seems like a daunting requirement for compliance and hierarchical constraint.

For example, the content-neutrality jurisprudential regime incorporates obscenity and libel cases in the less protected category, but each have major Court precedents, doctrines and jurisprudence. Moreover, both obscenity and libel after major Court decisions in each area provide differing predictions for the likelihood of supporting freedoms of speech and press. Thus, this study examines circuit court judges deciding under the most stringent of circumstances. A more appropriate test of compliance is to look at specific issue areas and the applicable doctrines, material facts, and relevant

"tests" within each. If hierarchical constraint is present, it should be the case that judges comply in these individual issue areas in spite of divergent preferences and that the relevant legal considerations can temper the role of ideology on vote choice.

Figure 3.1. Jurisprudential Regime Model (Richards and Kritzer 2002)

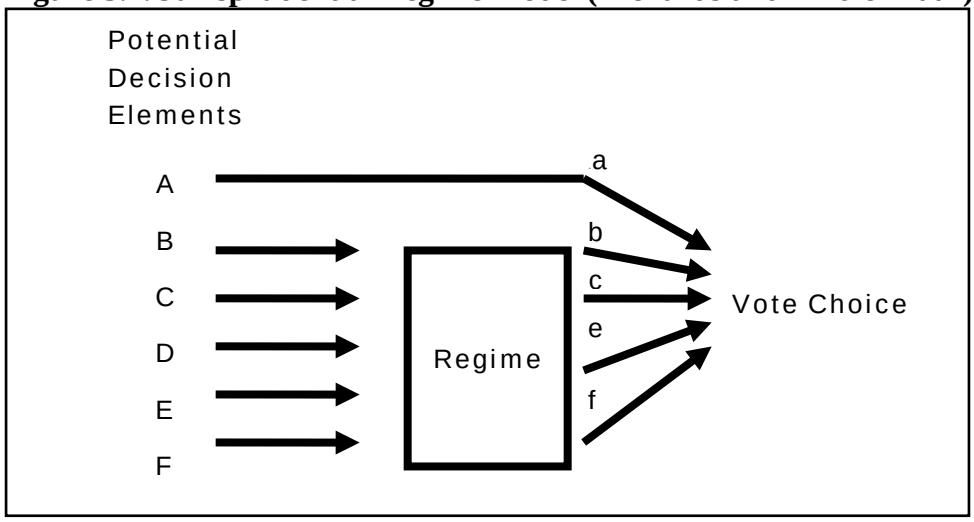


Figure 3.2. Jurisprudential Regime as a Hierarchical Constraint

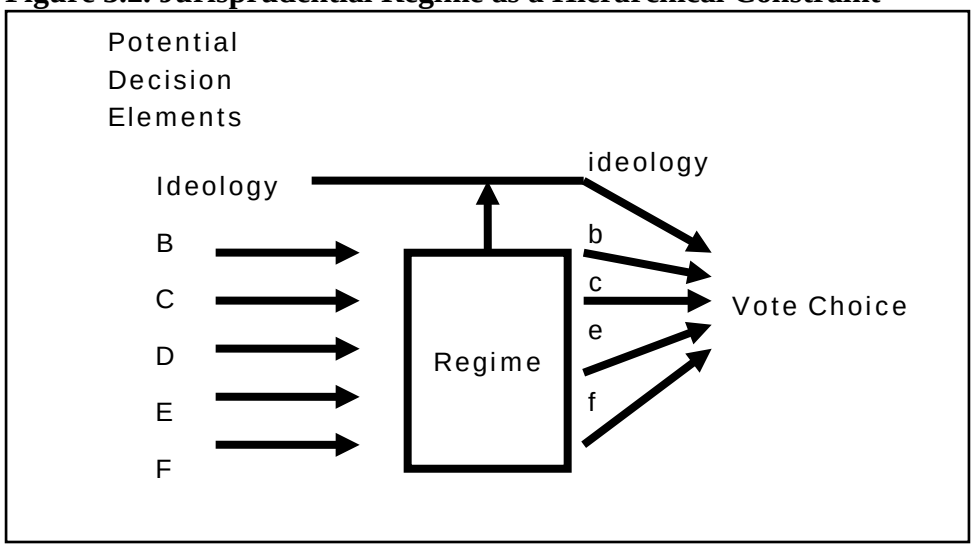


Figure 3.3. Predicted Support for Free Expression Rights for Case Outcomes by Restriction Type

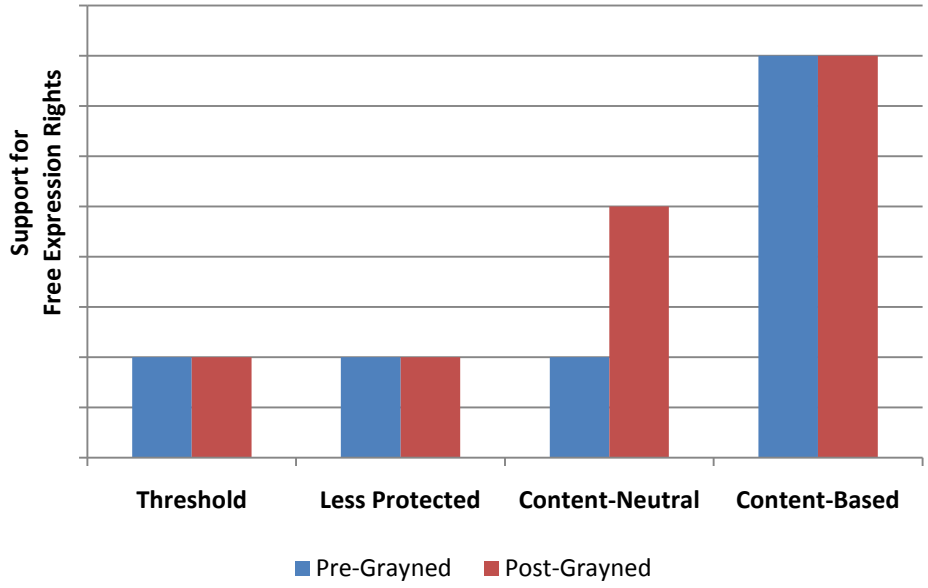


Figure 3.4. Predicted Support for Free Expression Rights for Conservative Judges by Restriction Type

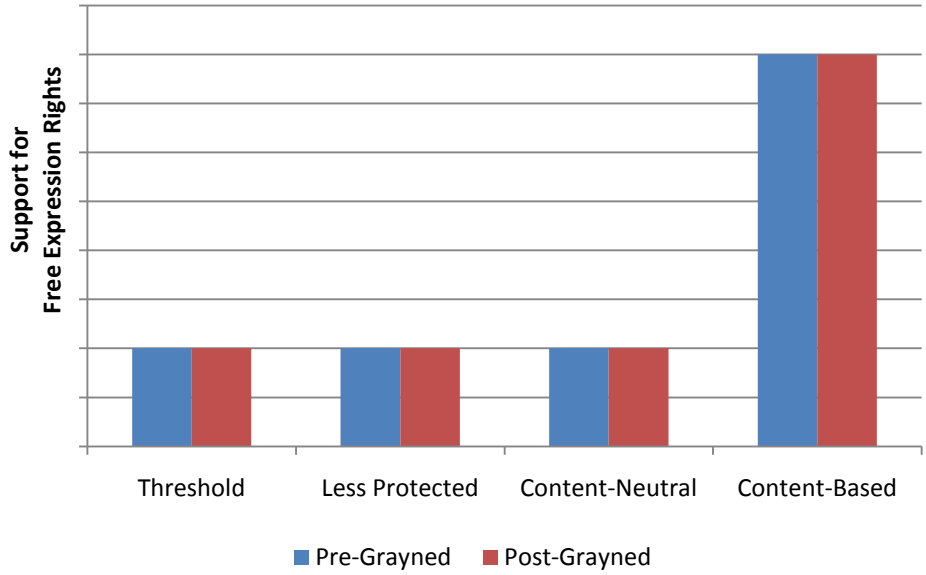


Figure 3.5. Predicted Support for Free Expression Rights for Liberal Judges by Restriction Type

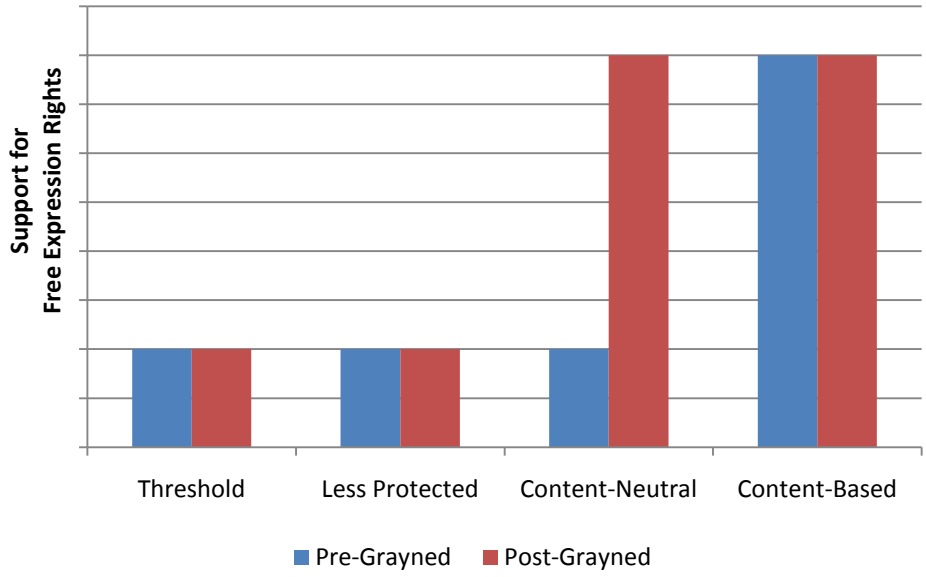
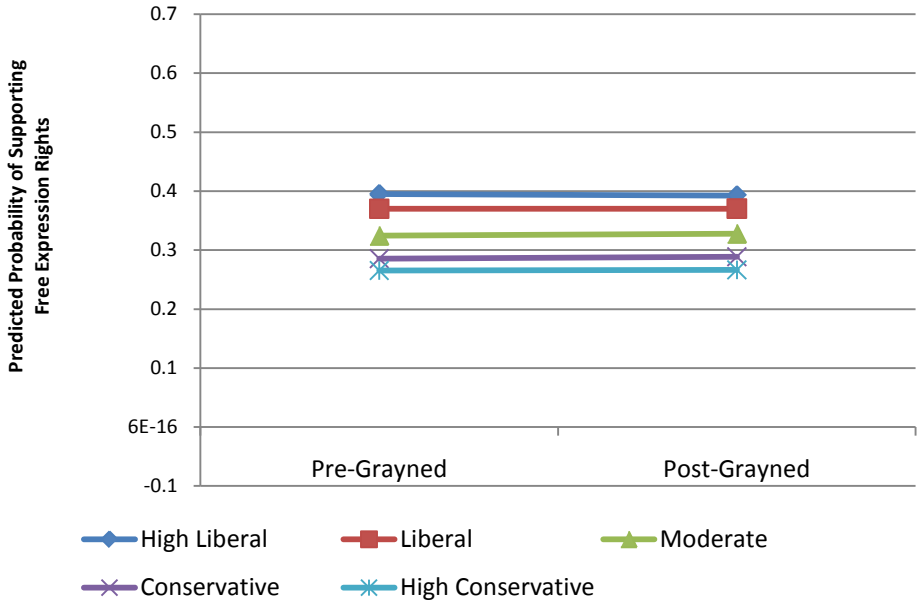
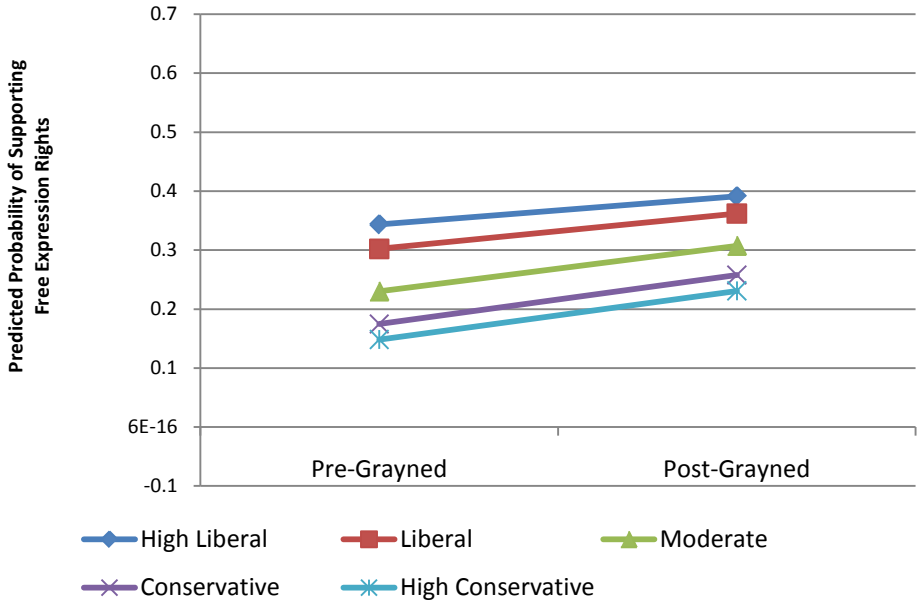


Figure 3.6a. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Threshold Case



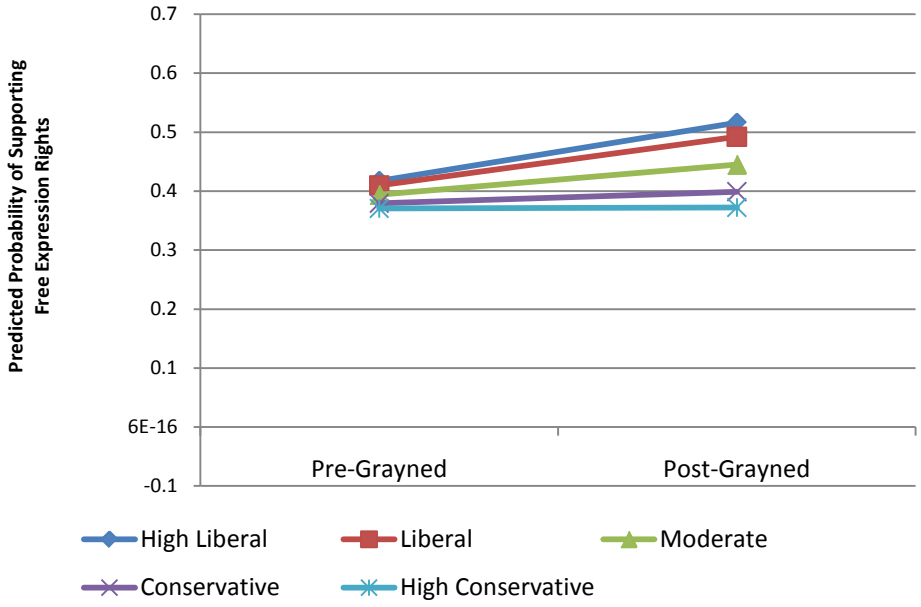
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.6b. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Less Protected (Content-Neutral) Case



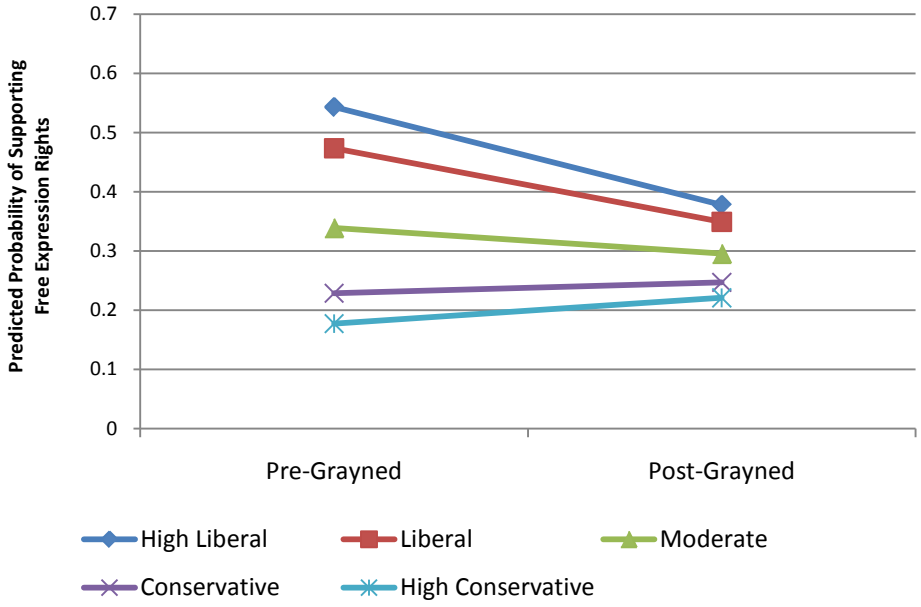
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.6c. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Less Protected (Content- Based) Case



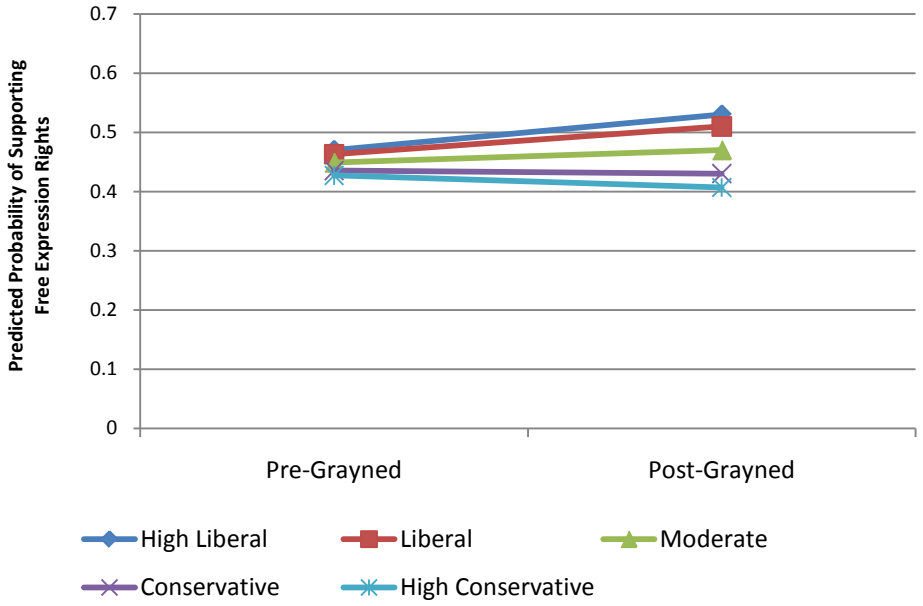
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.6d. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Content-Neutral Case



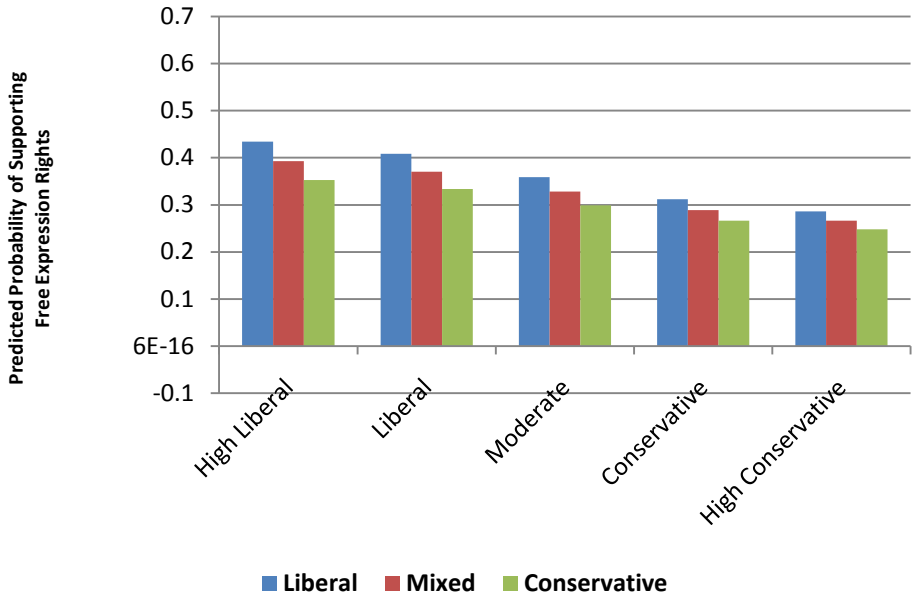
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.6e. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Content-Based Case



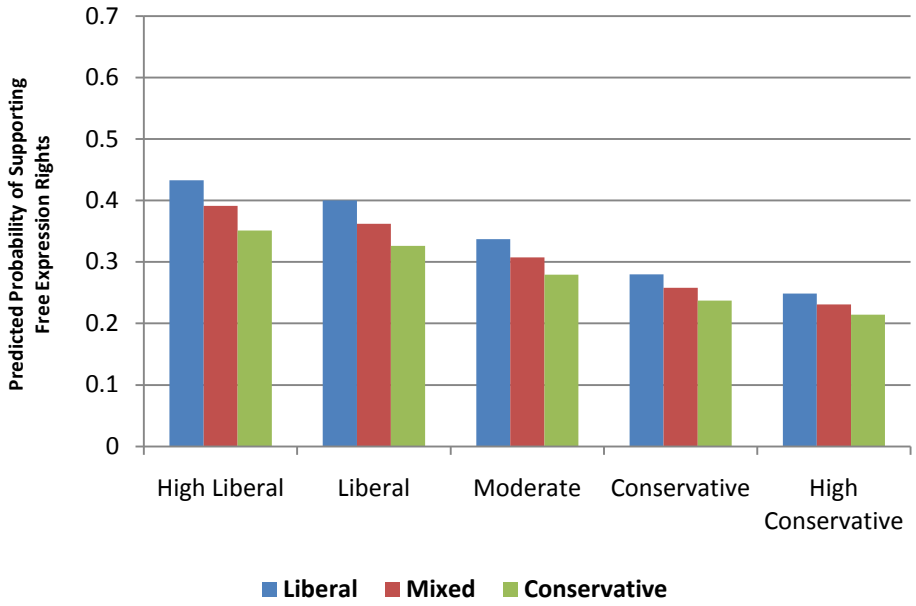
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.7a. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Threshold Case by Panel Composition



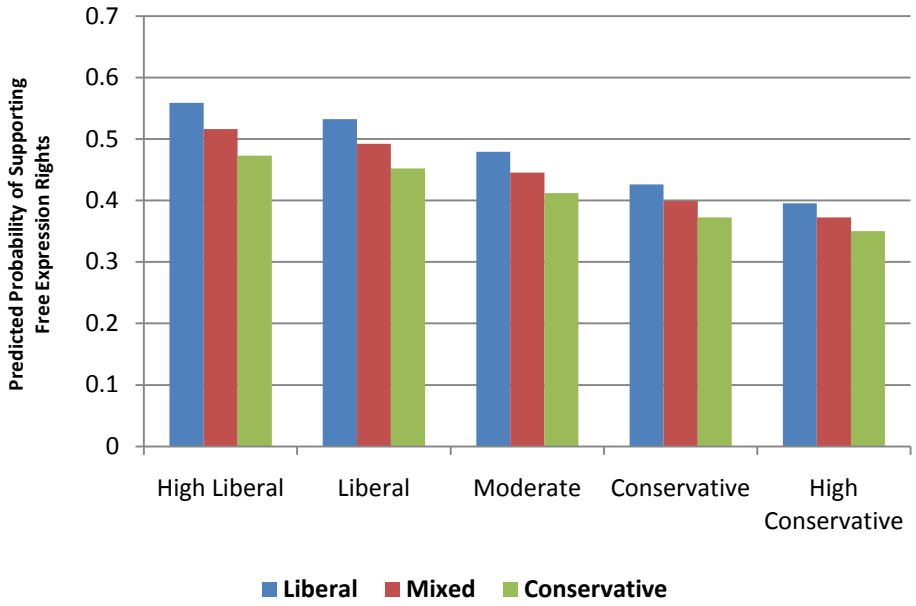
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.7b. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Less Protected (Content-Neutral) Case by Panel Composition



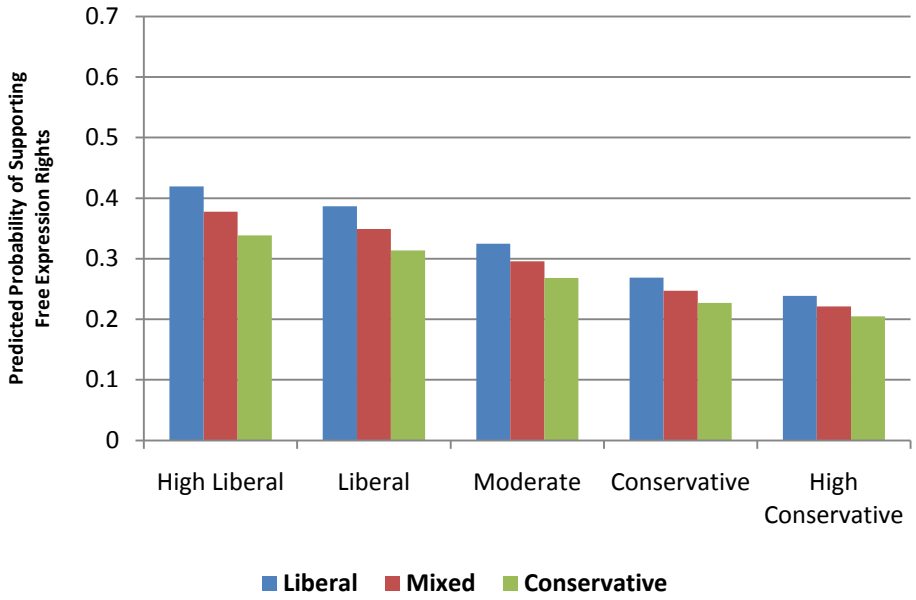
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.7e. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Less Protected (Content-Based) Case by Panel Composition



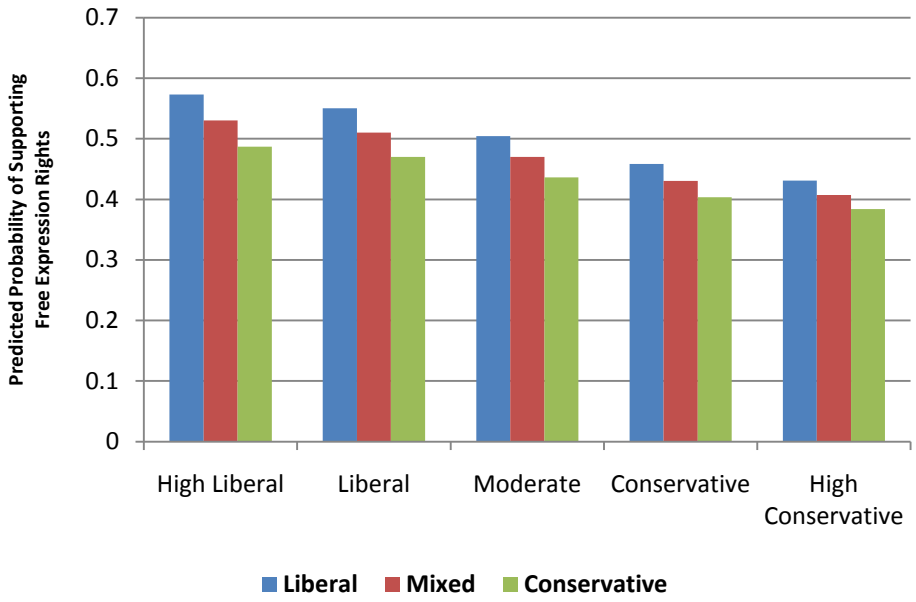
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.7d. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Content-Neutral Case by Panel Composition



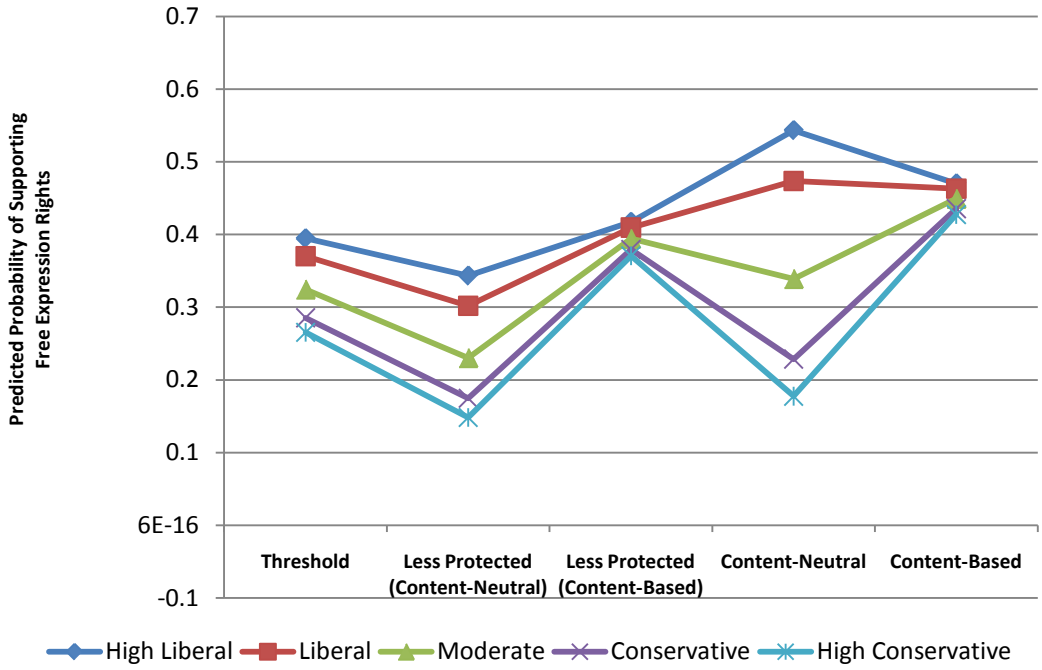
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.7e. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Content-Based Case by Panel Composition



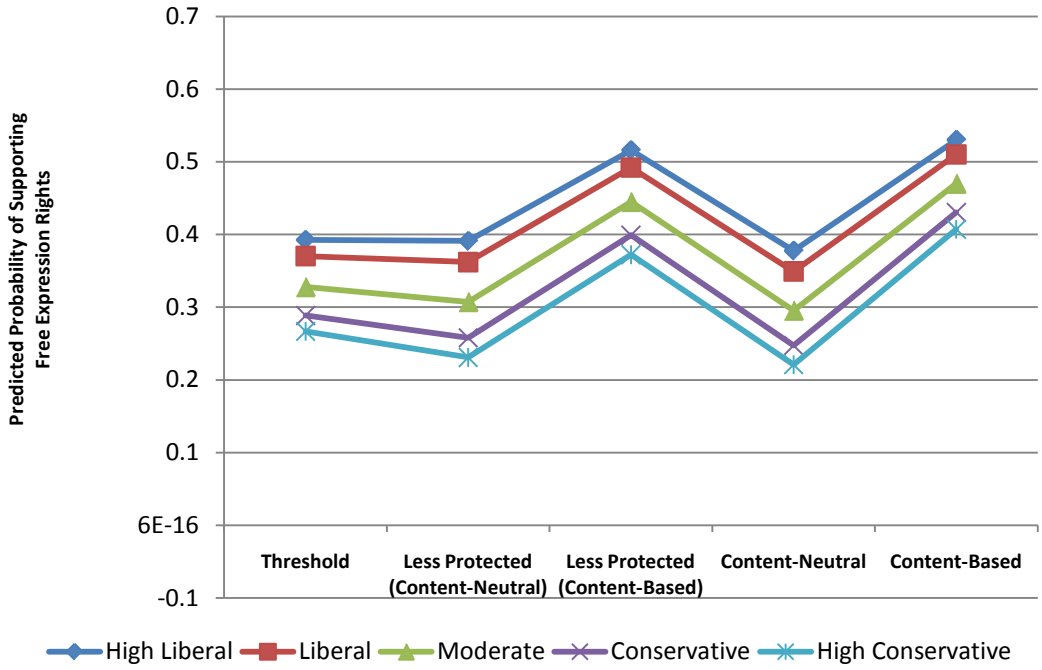
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.8a. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Pre-*Grayned* by Ideology and Free Expression Restriction



Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.8b. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Pre-*Grayned* by Ideology and Free Expression Restriction



Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 3.9. Sensitivity Analysis: Testing for the Appropriate Shift in Free Expression Jurisprudence

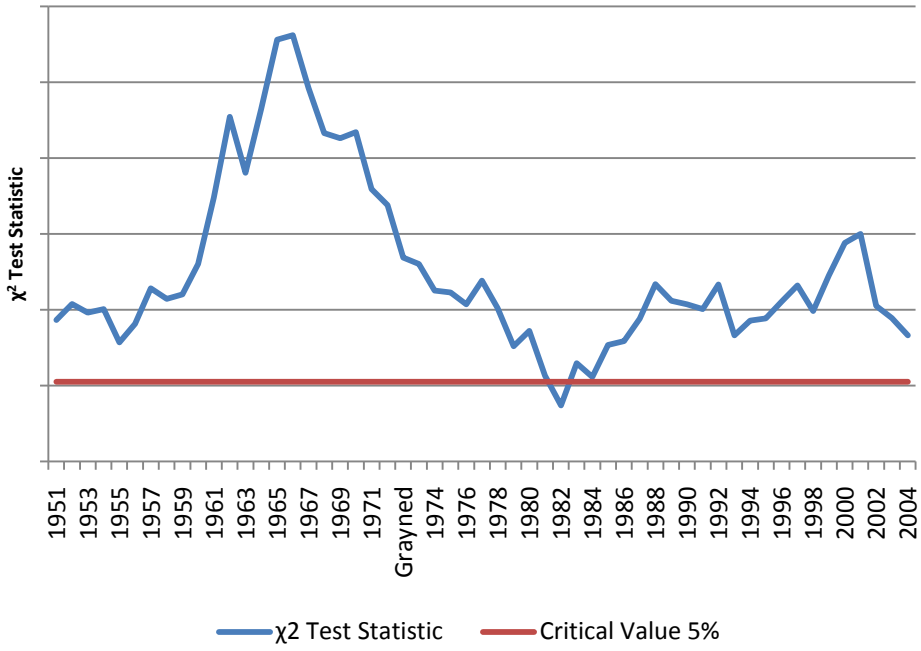


Table 3.1. Support for Free Expression Rights by Type of Restriction

	Pre-*Grayned*[1]	Post-*Grayned*[2]	*p*-value[3]
All Cases			
Percent Support of Cases	0.388	0.403	0.358
Number of Cases	1055	4087	
Threshold Restriction			
Percent Support of Cases	0.306	0.314	0.916
Number of Cases	49	255	
Less Protected Restriction			
Percent Support of Cases	0.357	0.401	0.057
Number of Cases	572	1911	
Content-Neutral Restriction			
Percent Support of Cases	0.353	0.272	0.163
Number of Cases	68	493	
Content-Based Restriction			
Percent Support of Cases	0.454	0.468	0.626
Number of Cases	366	1428	
	Pre-*Grayned*	**Post-*Grayned***	***p*-value**
Less Protected (Content-Neutral) Restriction			
Percent Support of Cases	0.197	0.271	0.190
Number of Cases	71	402	
Less Protected (Content-Based) Restriction			
Percent Support of Cases	0.379	0.435	0.027
Number of Cases	501	1509	

Note: *Grayned* = *Grayned* v. *Rockford* (1972) and *Chicago Police Department* v. *Mosely* (1972)

[1] $\chi^2 = 20.941$ with 5 df; p-value = 0.001

[2] $\chi^2 = 107.553$ with 5 df; p-value = 0.000

[3] *p*-values are from difference in proportions test; the null hypothesis is the difference between Pre-*Grayned* and Post-*Grayned* equals zero.

Table 3.2. Judges' Support for Free Expression Rights by Type of Restriction and Partisanship of Appointing President						
	Republican-Appointed Judges			*Democrats-Appointed Judges*		
	Pre-*Grayned*	Post-*Grayned*	*p*-value[1]	Pre-*Grayned*	Post-*Grayned*	*p*-value[1]
All Cases						
Percentage of Votes	0.375	0.371	0.333	0.417	0.461	0.000
Total Number of Votes	1279	7368		2061	5807	
Threshold Restriction						
Percentage of Votes	0.346	0.321	0.714	0.347	0.337	0.858
Total Number of Votes	52	461		101	362	
Less Protected Restriction						
Percentage of Votes	0.357	0.368	0.566	0.388	0.467	0.000
Total Number of Votes	729	3381		1104	2809	
Content-Neutral Restriction						
Percentage of Votes	0.267	0.249	0.711	0.440	0.357	0.064
Total Number of Votes	90	912		141	711	
Content-Based Restriction						
Percentage of Votes	0.436	0.427	0.712	0.467	0.514	0.033
Total Number of Votes	408	2614		715	1925	
	Pre-*Grayned*	Post-*Grayned*	*p*-value[1]	Pre-*Grayned*	Post-*Grayned*	*p*-value[1]
Less Protected (Content-Neutral) Restriction						
Percentage of Votes	0.207	0.260	0.270	0.283	0.365	0.067
Total Number of Votes	92	759		138	611	
Less Protected (Content-Based) Restriction						
Percentage of Votes	0.378	0.399	0.331	0.403	0.495	0.000
Total Number of Votes	637	2622		966	2198	

Note: *Grayned* = *Grayned* v. *Rockford* (1972) and *Chicago Police Department* v. *Mosely* (1972)

[1] *p*-values are from difference in proportions test; the null hypothesis is the difference between Pre-*Grayned* and Post-*Grayned* equals zero.

Table 3.3. Model of Support for Free Expression Rights

	Coefficient	Rob. Std. Err.	*p*-value
Ideology	0.646	0.585	0.269
Panel Composition	0.117	0.113	0.300
Less Protected (Content-Neutral)	-0.487	0.273	0.074
Less Protected (Content-Based)	0.298	0.208	0.151
Content-Neutral	0.051	0.251	0.839
Content-Based	0.528	0.211	0.012
Ideology X Panel Composition	-0.243	0.361	0.502
Ideology X Less Protected (Content-Neutral)	0.509	0.777	0.512
Ideology X Less Protected (Content-Based)	-0.359	0.599	0.549
Ideology X Content-Neutral	1.081	0.755	0.152
Ideology X Content-Based	-0.365	0.612	0.551
Post-*Grayned*	0.199	0.218	0.362
Ideology X Post-*Grayned*	-0.038	0.629	0.952
Panel Composition X Post-Grayned	-0.391	0.124	0.002
Less Protected (Content-Neutral) X Post-*Grayned*	0.401	0.289	0.165
Less Protected (Content-Based) X Post-*Grayned*	0.205	0.223	0.357
Content-Neutral X Post-*Grayned*	-0.197	0.268	0.463
Content-Based X Post-*Grayned*	0.076	0.226	0.737
Ideology X Panel Composition X Post-Grayned	0.114	0.389	0.771
Ideology X Less Protected (Content-Neutral) X Post-*Grayned*	-0.356	0.824	0.666
Ideology X Less Protected (Content-Based) X Post-*Grayned*	0.351	0.643	0.585
Ideology X Content-Neutral X Post-*Grayned*	-0.929	0.801	0.246
Ideology X Content-Based X Post-*Grayned*	0.276	0.655	0.674
Constant	-0.786	0.203	0.000
Log Likelihood	-10828.24		
Number of Votes	16347		
Number of Cases	5129		

Note: the p-values are based on two-tailed tests of significance of the coefficients.

Chapter 4
Unburdened:
Adjudication of Abortion Cases at the U.S. Courts of Appeals

While there is little doubt that the justices have been and continue to be major players in the abortion debate, a less studied aspect is the role of lower court judges in determining the degree to which the government—state and federal—may regulate the right to an abortion. The question must be raised: can the Supreme Court effectively constrain the choices judges make in the issue area of abortion?

Following the Supreme Court's decision in *Webster* v. *Reproductive Health Services* (1989), United States Circuit Court judge Samuel A. Alito saw an opportunity that few other lower court judges saw. In *Webster*, the dispositional majority may have determined and found that all the restrictions on abortion at issue were constitutional, but the highly fractured dispositional majority was unable to attain a doctrinal majority as to the reason why these provisions were constitutional. For plurality decisions (i.e., where no opinion in the majority opinion achieves the assent of at least five justices) such as *Webster*, the poorly understood doctrine of *Marks* v. *United States* (1977) becomes the guide to determine the relevant rule of law. Applying *Marks* to *Webster*, the controlling rule was not Justice Rehnquist's opinion, which received the title "Judgment of the Court", but rather Justice O'Connor's concurring opinion. According to *Marks*, O'Connor's concurrence, which established the undue-burden test as the appropriate test of the constitutionality of abortion restrictions, is the relevant rule of law.

For conservative jurists such as Alito, the application of *Marks* to *Webster* has its advantages. First, it offered conservative judges the opportunity to effectively remove

the strict-scrutiny/compelling-interest standard established in *Roe* v. *Wade* (1973) and replace it with the more lenient intermediate-scrutiny/under-burden standard. Second, undue burden allows for greater impact of policy preferences than strict scrutiny, where the heavy burden of proof on the government leads to the presumption of unconstitutionality, or rational-basis tests, where the burden of proof on the government is so light that regulations generally prevail. With intermediate levels of scrutiny, the burden of proof is somewhere in the middle, allowing for greater judicial discretion.

Counter to expectations, few judges applied undue burden after *Webster*; other than Alito, most Courts of Appeals judges, even conservative ones, failed to seize the *Webster*-created opportunity for increased judicial discretion. As will be examined and confirmed below, it was not until *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), where a Court plurality adopted the undue-burden standard, did lower court judges begin to do so. The question I examine in this paper is whether the adoption of intermediate-scrutiny standards such as undue burden can increase judicial discretion, such that the influence of their attitudes (ideologies) increases, as compared to legal standards where judicial discretion is inherently lower. More generally, the question can be phrased: Can the law (Court established-doctrine or legal considerations) interact with the policy preferences of circuit court judges?

Moreover, I seek to determine whether the choices circuit court judges make offer support for a conceptualization of hierarchical constraint—compliance with Court-established legal considerations despite a preference for deciding a case in the opposite direction. If lower court compliance with the Supreme Court-established precedent is simply achieved through convergent preferences of legal considerations and judicial

ideology, it may signal a fundamental breakdown in the federal judiciary. Through judicial review, the Supreme Court in its decisions determines the "line" in which the government—state and federal—cannot cross in terms of individual rights and liberties. As a result, a failure on the part of lower court judges to comply with the Supreme Court, especially when preferences are divergent, can have drastic repercussions for those civil rights and liberties.

Testing these theories on abortion cases decided at the U.S. Courts of Appeals from 1973 to 2006 serves as a stringent test of the factors influencing judicial decision-making and how those factors may be evinced. In an issue area that is arguably one of the most divisive and polarizing in the last thirty years, lower court compliance in the area of abortion is uncertain; with the stakes considered high and salient, it might be the case that judges at the circuit courts simply vote their policy preferences and potentially deviate from the legal considerations established by the justices when precedent and judges' ideologies are divergent.

Supreme Court Abortion Jurisprudence

Instances where the Court deviates or changes jurisprudence in a given issue area are clear enunciations of Court preferences that can and should guide and structure adjudication at the Courts of Appeals. Abortion jurisprudence underwent such a change in Court preferences and the relevant standard of judicial scrutiny, making the issue area an ideal place to test lower court adherence and sensitivity to changes in relevance of certain legal considerations. In 1973, *Roe* established that strict scrutiny should be the test of constitutionality for abortion regulations; under this standard, judges must

determine whether a law advances a compelling government interest and whether that law is the least restrictive of means to advance that interest.[1]

Subsequently, *Webster* v. *Reproductive Health Services* (1989) shifted jurisprudence to the undue-burden standard. There is doubt as to the effectiveness of *Webster*, which unfortunately was a plurality decision. Where legal standards achieve a doctrinal majority, the application of the relevant test is rather simple; the law of the land is the standard endorsed by the doctrinal majority. Plurality decisions do not offer such clear legal guidance for the lower courts to follow. A panel of circuit court judges write "In splintered decisions where no single rationale 'enjoys the assent of five Justices,' the situation becomes more complex, but the controlling principle is the same" (*Planned Parenthood* v. *Casey* 1991).

For plurality opinions, the justices offered guidance in *Marks* v. *United States* (1977); the *Marks* Doctrine dictates that the narrowest standard emerging from the dispositional majority becomes the controlling and relevant standard for judges to apply.[2] As Stearns (1997) notes, "the opinion decided on the narrowest grounds is that opinion that would least alter the status of the law at the time of the decision" (128). In upholding regulations, the law of the land is the standard that upholds the least number of statutes; in striking down provisions, the narrowest grounds standard dictates the law of the land is that the opinion "would strike down the *fewest* statutes" (Stearns 1997). Moreover, the

[1] Under *Roe*, the first trimester was to be free from government regulation that impedes upon the right to an abortion; the choice was left to a woman and her physician. The second trimester of a pregnancy was where the government's interest became legitimate and any reasonably related regulation could survive a challenge of constitutionality. In the third trimester, the government's interest in protecting potential life became compelling; thus, the government could even proscribe abortions except where the life or health of the mother was in danger. Under this trimester framework, the increasing governmental interest was coterminous with the progression of the pregnancy.

[2] Under plurality opinions, the Court specifically stated that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."

same Courts of Appeals panel deciding *Planned Parenthood* v. *Casey* (1991) continues: "Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land." As a result, the reality from *Marks* is that the doctrine endorsed by the median position on the Court is the law of the land.

According to the opinions signed in *Webster*, Figure 4.1 places the justices on a single dimension ranging from most restrictive to most permissive of the right to an abortion. As depicted, Justice Scalia's concurrence emerges as the most restrictive. He advocated for an explicit overturn of *Roe*, which would lead one to conclude that rational basis would be the appropriate level of judicial scrutiny to examine the constitutionality of an exercise of legitimate government powers. Of those justices in *Webster*'s dispositional majority (Kennedy, O'Connor, Scalia, Rehnquist and White), Justices Rehnquist, Kennedy and White applied rational basis to determine the constitutionality of a government regulation that required physicians to test a fetus for viability prior to performing an abortion. On the other end of the spectrum, the justices in the dispositional minority (Blackmun, Stevens, Marshall and Brennan) supported maintaining *Roe*'s substantive holdings; as a result, it is assumed that these justices advocated for the application of strict scrutiny. On this spectrum, the compelling interest test (and its heavy burden of proof for the government) would be the most permissive to the right to obtain an abortion.

[Insert Figure 4.1 about here.]

What is interesting is that, in *Webster*, only one justice in the dispositional majority endorsed and supported undue burden. Specifically, O'Connor argued that, pre-viability, a law was constitutional unless it was unduly burdensome to the right of a woman seeking an abortion. Because O'Connor's opinion represented the median position on the Court as well as the necessary vote to achieve a dispositional majority, the undue-burden standard emerged as the law of the land under the *Marks* Doctrine. But, this opinion failed to achieve the all important label of "Judgment of the Court"; it was not the opinion, in the dispositional majority, to have the most justices signing and, therefore, endorsing the opinion. That status belonged to Justice Rehnquist's opinion, which achieved the most votes and therefore received the title of "Judgment of the Court." Again, under *Marks*, the standard emerging from the dispositional majority that is decided on the narrowest grounds—and, therefore, the median justice—is the appropriate standard for the lower courts to apply when working under a precedent that was a plurality decision. The law of the land is not the opinion achieving the most justices signing it and, as a result, not the opinion that receives the label of "Judgment of the Court" (Stearns 1997).

This duality—where the judgment of the Court is one opinion (Rehnquist) and the law of the land under *Marks'* narrowest standard approach (O'Connor) is another—further burdens the ability of the common man to determine the correct level of judicial scrutiny when adjudicating abortion cases. Because they are vastly more learned in legal interpretation and institutionally responsible to apply the "correct" precedent and doctrine, it must be the case that judges at the Courts of Appeals—and even other courts—should be able to determine that undue burden was binding law as of the Court's

decision in *Webster*. At the very least, the duality should provide strategic opportunities for liberals to remain true to the compelling-interest standard but conservatives to adopt the undue-burden test.

With the plurality decision in *Webster*, another point should be stressed, aside from the level of judicial scrutiny. The Rehnquist and O'Connor opinions stressed that *Webster* is to be distinguished from *Roe*, thus affording no opportunity to question whether or not *Roe* should be overturned. Another one of the substantive holdings—the trimester framework—from *Roe* was effectively removed. In *Webster*, Rehnquist's opinion (joined by Justices Kennedy and White) called the trimester framework rigid and arbitrary[3]; instead, the abortion regulation should be subject to rational basis at all points of the pregnancy. As a result, the government's interest in *Webster* was legitimate and should survive constitutional challenge. For O'Connor, the appropriate time a government's interest becomes compelling is the post-viability mark. Prior to viability, a state's interest is legitimate. Thus, any regulations reasonably related to that legitimate government interest can survive constitutional challenge pre-viability. This marked a clear and major departure from *Roe*'s trimester framework. Justices Blackmun, Stevens, Brennan, and Marshall, of course, labeled the plurality's decision a deviation from the spirit and substance of *Roe*.

In spite of the presence of *Marks* as the guiding precedent for plurality opinions, there is clearly doubt as to whether lower court judges would adhere to undue burden without the explicit support of a majority of justices. There are two other aspects of the *Webster* plurality that open the door to possible deviation or shirking. First, as Canon

[3] In actuality, the plurality opinion deemed the trimester framework made constitutional law in the area of abortion "a virtual Procrustean bed…."

and Johnson (1998) note, clear and unambiguous Supreme Court policies are most likely to elicit compliance at the lower courts. *Webster,* arguably, does not fall into that category. Of the three opinions constituting the dispositional majority, only one applied undue burden, another called for an explicit overturn of *Roe*, and the last employed rational basis.

The application of rational basis by Rehnquist was specifically targeted toward the regulation that required viability testing of the fetus prior to abortion. Neither Rehnquist nor Scalia, however, explicitly stated a shift in the level of judicial scrutiny to be used when adjudicating abortion cases. Moreover, the opinion to emerge as the law of the land (O'Connor's) failed to provide a detailed discussion as to what actually constituted an unduly burdensome regulation that impedes on the right to an abortion. The complexity in deciphering the *ratio decidendi* from the three separate opinions that constituted the majority, while not impossible, is problematic in providing the lower courts with clear guidelines to adjudicate abortion cases. Rather than providing conclusive answers in the opinion that were obvious and readily available, *Webster* is, arguably, an example where rampant disagreement between the justices makes the exact location of the Court preferences, as a whole, unclear.

Moreover, in *Webster* (and even in her dissents in previous court decisions), O'Connor never truly clarified the elements of a regulation that would be unduly burdensome to the right to an abortion. As Justice Alito noted during his confirmation hearing, "our panel, after some effort, determined under the *Marks* standard for determining what the holding of a case is when there's no majority opinion, that the standard was the Undue-burden standard. And there just wasn't a lot to go on…. I looked

for whatever guidance I could find" (Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States, 2006).

Second, the plurality status itself raises serious questions as to the likelihood that the area of abortion would generate significant impact on the choices judges make at the Courts of Appeals. As Benesh and Reddick (2002) suggest, the status of a precedent does have serious consequences for the probability that a judge will comport with a Supreme Court decision; while they examine only explicit overturns of previous Court precedent, the authors find that the composition of the dispositional majority significantly impacts the degree of compliance. For example, minimum winning coalitions, although not significant in the empirical analysis, decreases the speed of compliance. A unanimous decision, on the other hand, significantly and systematically increases the likelihood of Courts of Appeals adherence to explicit overturns of precedent.

If the composition of the majority matters in circuit court adherence to Court overturns, the same intuition should follow for shifts in Court doctrine that are plurality opinions, where no doctrine is applied and supported by at least a majority of the justices. In instances of a plurality decision, compliance with Supreme Court decision-making (doctrine) can be subject to deviation by circuit court judges.[4] Again, O'Connor's opinion did not receive the all important title of "Judgment of the Court" and, therefore, places her position and the undue-burden standard on tenuous ground; it is hardly what Senator Specter (R-PA) might deem a "super" precedent, which is what he labeled *Roe*

[4] Even in dissent, Justice Blackmun's opinion does highlight—while not explicit—the plurality status of the dispositional majority. He refers to Justices Rehnquist and O'Connor's opinions as the plurality opinion, but when discussion Justice Scalia's opinion, he often refers to by the author's name. This latter approach was mirrored in Justice Stevens' dissenting opinion as well. Although the reference to the plurality status may be idiosyncratic to personal writing style or actually labeling the Rehnquist and O'Connor opinions correctly as plurality opinions, the reference to the "plurality" instead of using the authors' names is suggestive of the fact that the plurality status is of importance. Moreover, this is especially pertinent when references to the word "plurality" occur roughly 70 times in Blackmun's dissent.

during Samuel Alito's confirmation hearing to be associate justice (Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States, 2006).

[Insert Figure 4.2 about here.]

It was not until *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), which was also a plurality opinion, that the Court reaffirmed and clarified the undue-burden standard as the law of the land. Figure 4.2 depicts the justices' positions on the standard of scrutiny. In *Casey*, the undue-burden standard was not only supported by O'Connor, who co-authored the joint opinion with two other justices (Souter and Kennedy), but also that joint opinion received the title, "Judgment of the Court." With three justices employing undue burden to determine the constitutionality of an abortion regulation, the standard advocated by O'Connor for abortion cases was on surer footing than it was in *Webster*. Thus, with the plurality in *Casey*, both the judgment of the court and *Marks'* narrowest grounds approach indicate that undue burden is indeed the law of the land and, as a result, the appropriate level of judicial scrutiny to apply when adjudicating abortion cases.

[Insert Table 4.1 about here]

Table 4.1 summarizes the substantive holdings from *Roe*, *Webster* and *Casey*. Through the substantive holdings in *Casey*, which mirror those in *Webster*, the Court clearly established its preference for the undue-burden standard and clearly rejected the trimester framework. Adjudication of abortion cases should follow the jurisprudence enumerated in *Webster* and reaffirmed in *Casey*. Given the multiple ambiguities of Webster, it should be *Casey* that significantly altered abortion jurisprudence at the Courts

of Appeals. With the shift in scrutiny and the rejection of the trimester framework, the justices in *Casey* established a new jurisprudential regime for lower court judges to adjudicate abortion cases.

With the uncertainty of the appropriate standard for abortion cases, the time period between *Webster* and *Casey* also offers a strategic dynamic. Which judges, if any, would apply undue burden? As Cross and Tiller (1998) note, those legal rules that reinforce ideology are the ones most likely to be followed. The less stringent standard of undue burden (compared to strict scrutiny) would be preferred by conservative judges, who are assumed to favor restricting the right to an abortion. Thus, a simple prediction from the period immediately following *Webster* is that conservative judges were the ones most likely to employ undue burden in deciding abortion cases.

When *Casey*[5] was adjudicated at the Courts of Appeals, then Circuit Judge Alito applied the undue-burden standard. During his confirmation hearing to become an associate justice to the Supreme Court, he was asked a question as to why he applied the undue-burden standard prior to the Court's review of his circuit court case; he responded that undue burden was indeed the law of the land (Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States, 2006). Was this because he preferred such an outcome as a conservative judge or was he simply following precedent? Here, the legal, strategic and attitudinal models all predict similar outcomes. There is no way to differentiate between which model of judicial decision-making is the cause of his actions.

On the other hand, liberal judges may have enough "wiggle" room to deviate from the relevant precedent. First, O'Connor's opinion in *Webster* never defined what exactly

[5] *Casey* v. *Planned Parenthood* (1991)

constitutes an undue burden. Second, with only one opinion signed by only one justice advocating the standard, undue burden is on less sure footing than precedents that achieve a minimum of five justices. As mentioned above, the label of "Judgment of the Court" and the *Marks* Doctrine conflict as to whether undue burden is the law of the land. Thus, if a Cross and Tiller (1998) prediction is to hold, liberal judges should be less likely to apply under burden than conservatives. Furthermore, moderates are those very judges that are most likely to comply with Supreme Court decisions. Stemming from the fact that their policy preferences place them in the ideological middle-ground, these judges should be most responsive to shifts in Court jurisprudence.

The Impact of Undue Burden on Judicial Decision-Making

The impact of Supreme Court-established scrutiny levels on circuit court decision-making can be evinced in two ways. First, changing standards of adjudication must change the overall propensity of a judge to vote in a particular way. If the contemporary Court shifts jurisprudence and scrutiny levels, the lower courts, too, must also apply those legal considerations accordingly. A Court decision that shifts from rational basis to strict scrutiny in a given issue area, for example, should lead to greater levels of liberalism at the lower courts in that issue area. Second, scrutiny levels can also mediate (accentuate or attenuate) the impact of policy preferences on the eventual vote choice. While the idea of the interaction between legal doctrine and ideology has both explicitly and implicitly been mentioned in previous work, a primary contribution of the Bartels (2009) examination is that it provides empirical specification and confirms the fact that scrutiny levels can induce heterogeneity in the effect of ideology on vote choice

at the Supreme Court. The same can be said for other judicial decision-makers. In other words, the law can interact with policy preferences.

Again, with *Casey*, the Court placed undue burden on firmer footing than *Webster*. It should be the case that judges no longer employ strict scrutiny as a test of constitutionality after the Court's affirmation in *Casey* of undue burden, which again is a less stringent level of scrutiny. This change allows for a prediction that circuit court cases post-*Casey* should be less supportive of the right to an abortion, *ceteris paribus*. This general hypothesis captures only one aspect of hierarchical constraint—the shift in the overall propensity of a given outcome.

Where rational basis and strict scrutiny would predict conservative and liberal outcomes, respectively, undue burden places the legal considerations in between, offering no clear guidance as to whether the decision should support striking down or upholding a given regulation. With no presumed validity or unconstitutionality of a given law, undue burden is an intermediate level of judicial scrutiny. This can have serious repercussions for the amount of judicial discretion available to judicial decision-makers operating under different standards of adjudication; as a result, this discretion can have drastic repercussions for the likelihood of adherence to precedent. Increased discretion can be evinced through the impact of preferences on the eventual behavior, which is the second possible mechanism legal considerations can affect the choices judges make.

While undue burden in the abstract affords much discretion to lower court judges, the Court in *Casey* offered several examples of laws or regulations that do not constitute substantial obstacles to a woman obtaining an abortion. Where lower court judges are presented with a case concerning these provisions, judicial discretion even under undue

burden is low. The joint opinion in *Casey* determined that recordkeeping and reporting requirements, parental notification or consent laws, informed consent requirements, and provisions that mandated at least a 24-hour waiting period were not undue burdens and, therefore, constitutional. These types of provisions should be upheld and therefore withstand constitutional challenge. This also supports the fact that undue burden is a less stringent standard. In *Akron* v. *Akron Center for Reproductive Health* (1983), the Court was presented with provisions mirroring those at issue in *Casey*; all were struck down as unconstitutional under strict scrutiny. In *Casey*, the only provision struck down was a spousal consent requirement before a married woman could obtain an abortion.

[Insert Figures 4.3 about here.]

Figure 4.3a presents the hypothesized support levels for abortion rights when a case pertains to a *Casey* provision, comparing the pre- and post-*Casey* time periods. Adherence, and the degree of hierarchical constraint, should be high where judicial discretion is low (Bueno de Mesquita and Stephenson 2002). Prior to *Casey*, the heavy burden of strict scrutiny should lead to high levels of support for abortion rights. Where judicial discretion is low (i.e., a provision similar to that upheld in *Casey*), liberals, moderates, and conservatives alike should decrease support for abortion rights after *Casey*. Prior to *Casey*, liberal judges adjudicated abortion cases under strict scrutiny; this would reinforce their ideologies because they are assumed to prefer supporting abortion rights and striking down restrictions on abortion. If hierarchical constraint is present, it must be the case that liberals move in the conservative direction when adjudicating a case concerning a *Casey* provision. If they vote counter to their policy preferences post-*Casey*, hierarchical constraint is present. Moderates are the ones most likely to adhere to

Supreme Court doctrine and, as such, should shift with Court jurisprudence, decreasing their support for abortion rights. Conservatives are ideologically predisposed to restrict abortion rights. Deciding cases under a less stringent standard should reinforce their ideologies; their policy preferences indicate a similar directionality as Court jurisprudence when deciding a case pertaining to a *Casey* provision. For conservatives, pre-*Casey*, hierarchical constraint should be evinced through supporting the right to abortion, which is evidence of Court-established legal considerations constraining judges.

Figure 4.3b depicts the hypotheses where judicial discretion is high (i.e., where a case does not concern a provision upheld in *Casey*). The undue-burden standard in *Webster* and *Casey*: (1) left unanswered the question of what exactly is a substantial obstacle and at what point does a regulation unduly burden the right to an abortion; (2) remained a standard that was unable to achieve the support of a majority of justices; and (3) led to differing results in concurring and dissenting opinions applying the standard. The discretion available to liberal judges should be evinced in post-*Casey* jurisprudence. Prior to *Casey*, again, strict scrutiny as the applicable and relevant legal consideration should lead to high levels of support for abortion rights.

Because undue burden is a less stringent standard for abortion regulations to survive constitutional challenge, moderates being ideologically predisposed to adhere to Court precedent should decrease support for abortion rights. In the post-*Casey* jurisprudence, conservative judges should be freer to vote more conservatively in abortion cases, overall, when compared to the cases decided between *Roe* and *Casey*. Although not the rational basis standard that would reinforce conservative decision-making the most, undue burden is a less stringent standard compared to strict scrutiny.

As a result, conservatives should vote more conservatively after *Casey*. Pre-*Casey*, conservative judges would have been constrained by the strict scrutiny standard. There should be an accentuation of the impact of ideology on the eventual vote choice for conservative judges deciding abortion cases post-*Casey*. Liberals, under the *Roe* jurisprudence, were unconstrained. Where judicial discretion is high, liberal judges are still free to vote in accordance with their policy preferences and support the right to an abortion; this should lead to voting behavior (liberal) consistent with the pre-*Casey* period.

Panel Effects and Judicial Compliance

Panel ideological composition can also contribute to judicial voting behavior (Hettinger et al. 2006; Sunstein et al. 2006). The results from the Sunstein et al. (2006) examination are robust for most issue areas, but the authors find little to no evidence in the area of abortion (as well as capital punishment). There are two possible explanations. First, as Sunstein et al. (2006) note, abortion views are often entrenched and unlikely to move regardless of panel composition. Second, the effect of panel composition—even when policy preferences are entrenched—is conditional on a given judge's ideology and jurisprudence. Unfortunately, few examinations have specified empirical models to account for the ways in which hierarchical constraints and panel effects impact the vote choice. Not only should hierarchical constraints and panel effects matter in the final judicial behavior, but can also affect the impact of ideology on that behavior.

There is competing expectations for the impact of panel composition at different time periods of abortion jurisprudence. Because strict scrutiny is such a demanding test

of constitutionality, panel effects may have played no significant role prior to undue burden. Judicial discretion is at its lowest ebb and strict scrutiny. The overall level of abortion rights support may be so high, leaving little room for panel composition to increase or decrease the overall judicial behavior.

Post-*Casey*, the impact of panel composition may be conditional on the level of discretion afforded to judges. Where judicial discretion is low (cases concerning a *Casey* provision), panel effects may have no effect. Similar to adjudication under strict scrutiny, the constitutionality of *Casey* provisions may already be determined by Supreme Court precedent; as such, panel composition may play little to no role in judicial decision-making. But, under low discretion, panel composition can increase the level of compliance. Here, liberal judges are the potential rogue agents. Therefore, the presence of a potential whistleblower may keep judges from deviating from *Casey*.

For cases that do not pertain to a Casey provision, panel effects may have no effect for any judge—liberal or conservative—simply because judicial discretion is at its highest and therefore judges are free to vote their policy preferences regardless of the panel composition; this would support the Sunstein et al. (2006) findings for abortion cases. Moreover, with the stakes so high, the incentives for deviating from ideological voting in favor of collegiality may be minimal at best. Alternatively, panel effects—once accounting for the possible variation in the role of ideology—can be significant, post-*Casey*. This would support the contention that undue burden increased judicial discretion and increased the propensity to vote collegially under the uncertainty that undue burden offers.

This is not to say that hierarchical constraint and compliance are guaranteed in abortion jurisprudence at the U.S. Courts of Appeals. Although *Casey* clarified the legal standard applicable in abortion cases, *Casey*'s plurality status (where no opinion received the assent of at least five justices) introduces the possibility of strategic deviation on the part of lower court judges[6]; it is hardly what Senator Specter (R-PA) might deem a "super" precedent, which is what he labeled *Roe* during Samuel Alito's confirmation hearing to be associate justice (Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States, 2006). Taking the plurality status of *Casey* as well as the politicized nature of abortion, there are doubts as to whether circuit court judges would comply even when preferences are divergent. Again, this would make examining circuit court compliance in abortion cases a very stringent test of hierarchical constraint and the interactions between law and ideology.

Data and Methods

In order to test the hypotheses discussed above, original data were collected for all abortion cases decided at the U.S. Courts of Appeals from 1973 to 2006. Identification of the population of abortion cases was completed through searches on Lexis/Nexis[7], which

[6] The status of a precedent has serious consequences for the probability that a judge will comport with a Supreme Court decision (Bueno de Mesquita and Stephenson 2002; Lax 2003). While Benesh and Reddick (2002) examine only explicit overturns of Court precedent, the authors find that the composition of the dispositional majority significantly impacts the degree of compliance. A unanimous decision, for example, increases the rapidity of circuit court adherence. If the composition of the majority matters in circuit court compliance, the same intuition should follow for shifts in Court doctrine that are plurality opinions. For plurality decisions, compliance with Supreme Court decision-making (doctrine) can be subject to deviation by circuit court judges.

[7] While this method does place much discretion in the researcher in identifying the relevant population of cases, the selection process proceeded quite cautiously to ensure that as many relevant cases were included in the examination. The coding strategy was as follows. First, searches on Lexis/Nexis were completed

also gives information for case opinions that were unpublished.[8] Cross-petitioned cases were counted as separate cases if it challenged different provisions or aspects of a government regulation seeking to *restrict* the right to an abortion. Cases containing multiple docket numbers were counted as separate cases if the circuit court opinion made note of the controversies as being different for each docket number, indicated different provisions from each docket number, or arose from different states within the circuit. In order to be included in the population of cases employed in this examination[9], cases had to pertain to the constitutionality of abortion regulations that seek to limit the right to an abortion in general, as a target of government spending, or as a medical procedure.[10]

For the judge-level analysis, the dependent variable is coded 1 if a judge votes in favor of abortion rights, 0 otherwise. Similar to the previous chapter, I employ a two-level hierarchical model (Raudenbush and Bryk 2002; Skrondal and Rabe-Hesketh 2004),

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employing three main search terms; they were "abortion", "trimester" and "viability". In order to supplement this list, searches employing major Supreme Court decisions in the area of abortion were also completed; they were *Roe* v. *Wade* (1973) *Doe* v. *Bolton* (1973), *Akron* v. *Akron Center for Reproductive Health (1983)*, *Webster* v. *Reproductive Health Services* (1989), and *Planned Parenthood* v. *Casey* (1992). Moreover, as recommended by a research assistant, several repeat participants either as direct party, litigator or amicus brief were searched. Among others, search terms included "Hope Clinic" and "National Abortion Federation". Second, each case was then screened to ensure that it involved a controversy surrounding a government regulation of abortion. Then, case facts and variables were coded according to the measurement strategy discussed. As a final robustness check, Shepard's Citations was used, searching for Courts of Appeals cases citing major Supreme Court decisions in the area of abortion; the list of cases included *Roe*, *Akron*, *Webster* and *Casey*.

[8] As Songer (1988) cautions, the use of Shepard's Citations only elicits cases include full citations or case names in the opinion. Lexis/Nexis is a more appropriate source for case selection. Although it occasionally suffers from problems of search over-inclusion as well as under-inclusion, it does offer some information for unpublished opinions.

[9] Cases where the controversy began with such a regulation, but the overall question answered by the court focused on standing, justiciability or jurisdiction, were also included. If one is to accept the possibility of opinions being post-hoc justifications for ideological voting, omission of such litigation and the subsequent decisions would be problematic and bias the results.

[10] Several case types were not included such as regulations that limit access to abortion protestors. Please note that Sunstein et al. (2006) include these cases in their examination of panel effects on abortion cases, but these regulations are instances where state or federal legislation sought to protect the right to an abortion. Because abortion protesting near clinics is inherently a free speech question, the jurisprudence would follow the content-neutrality jurisprudential regime described in Richards and Kritzer (2002) rather than an undue burden jurisprudential regime; upon removing these cases from the Sunstein et al. data, this paper contains about 94 percent of the cases in their sample. As for the cases in the time period they examine (1983 to 2004), I identify 50 more cases leaving an overlap of about 58 percent.

which is the appropriate method and empirically rigorous specification of circuit court compliance. If judges' choices are indeed nested by cases, a failure to account for the hierarchical nature of the data would lead to a violation of the assumption that the observations are independent and the error terms for these observations are uncorrelated. The structural model can be written as follows[11]:

$$\text{(Level-1 equation)} \quad \eta_{ij} = \pi_{0j} + \pi_{1j}\text{Judge's Ideology}_{ij} + \pi_{2j}\text{Panel Composition}_{ij} + \pi_{3j}\text{Judge's Ideology}_{ij} \text{ X Panel Composition}_{ij} + \pi_{4j}\text{Panel Composition}_{ij} \text{ X Post-}Casey_j + \pi_{5j}\text{Judge's Ideology}_{ij} \text{ X Panel Composition}_{ij} \text{ X Post-}Casey_j$$

$$\text{(4.1)} \quad \text{(Level-2 equations)} \quad \pi_{0j} = \beta_{00} + \beta_{01}\text{Casey } Provision_j + \beta_{03}Post\text{-Casey}_j + \beta_{04}Post\text{-Casey}_j \text{ X Casey } Provision_j + r_{0j}$$

$$\pi_{1j} = \beta_{10} + \beta_{11}\text{Casey } Provision_j + \beta_{13}Post\text{-Casey}_j + \beta_{14}Post\text{-Casey}_j \text{ X Casey } Provision_j +$$

As Equation 1 notes, judges' choices (level-1) are nested within cases (level-2). Any case-level heterogeneity that is not captured by the observed effects is encompassed by r_{0j}, which represents random intercepts to account for unobserved heterogeneity in the response that vary across cases.

Judge's ideologies are ideological scores derived from the Giles et al. (2001) coding strategy. A given judge's ideology takes on the value of the nominating president's common space score (Poole 1998) if senatorial courtesy is inactive. If senatorial courtesy is in play, a given judge's ideology takes on the value of the home-state senator of the president's party; if both home-state senators share the same party affiliation as the nominating president, the judge's ideology is measured as the average of

[11] Because of the binary dependent variable, a Bernoulli sampling model is specified employing a logit link. For the logit link, the probability of a liberal vote for choice *i* in case *j* is defined as $\Pr(Y_{ij}=1) = p_{ij}$. η_{ij} is defined as the log-odds of p_{ij}, where $\eta_{ij} = \log[p_{ij}/(1- p_{ij})]$ allowing for specification of the log-odds as a linear function of the level-1 independent variables.

the senators' common space scores. For ease of interpretation with the dependent variable, I multiply the common space scores by a value of -1, so that increasing values translates into increasing liberalism.

Panel Composition is measured as the proportion of the other panelists with an ideology score (as determined by the Giles et al. coding strategy, which again is "flipped") less than zero, which is the theoretical midpoint of the common space scores. Each of the case-level variables (as well as Panel *Composition*) are cross-level interacted with judges' ideology. The reason for the interactions stems from the discussion above regarding the variation in the effects of ideology on vote choice. The impact of case facts and panel composition should shift the overall behavior, which would be the probability of voting liberally; in doing so, the impact of case facts can also affect the role of policy preferences on that eventual vote choice. I control for those by specifying cross-level interactions of case-level factors with judicial ideology.

As for the case specific (level-2) variables, Casey *Provision* is measured as a dummy variable coded 1 if a case concerns one of the provisions discussed in *Casey* AND was upheld by the Court in *Casey*, 0 otherwise. Therefore, if a government regulation on abortion concerned parental consent, medial recordkeeping, informed consent, or a 24-hour waiting period, the variable Casey *Provision* was coded 1, 0 otherwise. If the provision pertained to spousal consent, the variable was coded 0 because the Court in *Casey* regarded this regulation constituted an undue burden and thus fails to comport with the Constitution. All variables are interacted with *Post*-Casey, which is a dummy variable coded 1 if a case was decided after the Supreme Court handed

down their decision in *Casey*, 0 otherwise. After coding of the relevant variables, the model has 669 votes (level-1) nested within 210 cases (level-2).[12]

Results and Discussion

Aggregate-Level Results: Applications of Undue Burden

Before turning to the impact of undue burden on the choice judges make, I examine whether and to what degree judges apply undue burden. I do this for several reasons. First, it provides a more qualitative examination of which case—*Webster* or *Casey*—established undue burden as the appropriate and effective law of the land for abortion cases. If *Webster* did not shift the manner in which judges decide abortion cases, did conservative judges seize the opportunity and apply undue burden? Table 4.2 presents the percentage of judges, parceled out by partisanship of the appointing president, advocating the undue-burden standard in three time periods: (1) pre-*Webster*, (2) post-*Webster*, but pre-*Casey* and (3) post-*Casey*.

[Insert Table 4.2 about here.]

As the results in Table 4.2 indicate, circuit court judges were applying and utilizing undue burden at the Courts of Appeals prior to the Supreme Court's decision in *Webster*. During this period, 54 judges wrote, signed or joined an opinion employing undue burden or a standard very similar to undue burden; nineteen cases yielded majority opinions that applied undue burden. While this is a small number considering the fact

[12] There are actually more judges votes; because of the Giles et al. (2002) measurement strategy, some ideological scores were unattainable. Presidential Common Space Scores do not exist for Roosevelt or Truman. Part of the problem was resolved by using Truman's Senate Common Space Score and a majority of Roosevelt's nominees had senatorial courtesy in play. In this sample, one retired Supreme Court justice (Clark) participated in circuit court decisions; for these votes, the Judicial Common Space (JCS) scores (Epstein, Martin, Segal and Westerland (2006) from their respective last term of service at the Supreme Court was used.

that there were over 300 judges' choices in 105 cases in the pre-*Webster* time period, it does show that judges at the Courts of Appeals did apply undue burden nonetheless.[13]

This finding is counter to expectations from agency theory, which suggests a top-down approach to lawmaking. The circuit courts instead developed their own jurisprudence during the aftermath of *Roe*. As new state regulations replaced the antiquated "all-out" criminal bans on abortion, state and federal governments developed new ways to regulate and/or restrict the right to an abortion. Thus, without clear Supreme Court guidance, the circuit court—as Klein (2002) might put it—seized the opportunity to make the law at the Courts of Appeals.

The first decided case in the data was in 1978, handled by the Seventh Circuit (*Wynn* v. *Carey*). There, the panel was asked to determine whether parental consent and judicial bypass laws comport with the Constitution. The circuit court panel determined that the laws were "unduly burdensome" to a minor's right to an abortion. According to the judges, the provisions were struck down because they created an unconstitutional barrier to a fundamental right. Indeed, other circuits—namely, the First, Fifth, Sixth, Eighth, and Tenth—adopted similar positions on abortion regulations prior to *Webster*'s establishment of undue burden as the law of the land.

[13] An opinion was coded as employing undue burden if it fulfilled one of several criteria. An opinion was coded as applying undue burden if it labeled a provision from an abortion regulation constituted an "undue burden" or was "unduly burdensome" on a woman's right to an abortion. Simply mentioning a district court decision that determined a provision to be an undue burden, discussing a plaintiff's or defendant's arguments regarding whether a law was an undue burden, or citing and reviewing previous Supreme Court decisions did not count. Instances where judges engaged in determining whether the purpose or effect of a law placed a substantial (or significant) burden, impediment, or obstacle on a woman obtaining an abortion were also coded as employing the undue-burden standard if the opinion engaged in the compelling interest or rational basis test upon such a determination. While this coding strategy is arguably subjective, it was chosen to alleviate and eliminate as much discretion in coding as possible. Moreover, a research assistant separately coded all the cases to determine whether or not an opinion applied undue burden; we perfectly correlate.

With nine cases out of the 19 that yielded majority opinions that apply undue burden or a similar standard, the Eighth Circuit was beginning to establish a line of jurisprudence and precedent within its own jurisdiction. One case, *Women's Health Center* v. *Webster* (1989) does stand out because the opinion applied a standard very similar to that of undue burden.[14] The panel opinion decided that the appropriate test would be the compelling interest test in abortion cases, but the application of strict scrutiny is only triggered when the government places "sufficiently substantial and not de minimis restrictions on abortion."

While not nearly a majority of Courts of Appeals decisions applied undue burden prior to *Webster*, one can see that the law developed at the circuit courts did mirror the Supreme Court's decisions in *Webster* and *Casey*. This finding supports an oddity that Klein (2002), too, finds in his examination of the Courts of Appeals in the issue areas of search and seizure, antitrust and environmental law. As he concludes, Courts of Appeals judges apparently seize the opportunity to make the law, but the legal rules developed at the circuit courts often are "not dramatically different from what would have emerged from the Supreme Court" (136). Although I offer no formal explanations or suggestions regarding the mechanism that induced the early developments of abortion jurisprudence using undue burden[15], I also find that the law developed at the Courts of Appeals oddly resembles that which the Supreme Court would later adopt and apply.

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[14] This is not the case that was appealed to the Supreme Court, but both this case and the one appealed to the Supreme Court, *Reproductive Health Service* v. *Webster* (1988) were decided in the same circuit. In the latter case, the panel there deemed provisions from an abortion regulation to be unduly burdensome to a woman's right to an abortion, which too would be coded as a case that applied undue burden.

[15] In his examination, Klein (2002) concludes that it is the collective goal (shared by judicial decision-makers) of making sound legal policy that induces compliance with the Supreme Court; he further posits that this goal leads judges to want to perform their duties well and, therefore, keeps them to be sensitive to the Court's preferences and precedents. This finding may also be supported by the theory of delegation, where the Court hands down general principles for the lower courts to apply leaving room for interpretive

Returning to the original proposition, conservatives should be the ones more likely to apply undue burden in the time period post-*Webster*, but pre-*Casey*. To examine this, I parcel out judicial applications of undue burden by partisanship of the appointing president. Given the often high correlation between ideology and partisanship, Republican-appointed judges should be more likely to apply undue burden than their Democrat-appointed brethren. According to Table 4.2, this does not appear to be the case.[16] In the time period between *Webster* and *Casey*, a total of 10 judges applied undue burden or something akin to the undue-burden standard. Six were Republican-appointed judges and four were Democrat appointees. Thus, a higher proportion of the judges applying the undue burden standard were Republican appointees, which offers mild evidence of more conservative jurists applying undue burden more often in the period between *Webster* and *Casey*. Unfortunately, a smaller percentage of Republican-appointees, voting between *Webster* and *Casey*, applied the undue burden standard compared to Democrat-appointed judges. Tests for significant difference in the proportions confirm that Republican-appointed judges are not significantly more likely to apply the undue-burden standard than their Democrat-appointed brethren in any of the

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discretion in the Court's opinion (McCubbins et al. 1987, 1989; Epstein and O'Halloran 1994; Huber and Shipan 2002). Thus, in handling new problems, controversies and issues, the lower courts applying Supreme Court doctrine, preferences and precedent develop new legal rules that still maintain the substance and spirit of Supreme Court decision-making.

[16] I also replicate the analysis in Table 4.2 specifying a trichotomous version of ideology. Liberal judges are judges whose ideology scores, as defined by the Giles, Hettinger, and Peppers (2001) measurement strategy, are at least one standard deviation away from the mean in the liberal direction. Moderate judges are those within one standard deviation from the mean. Conservative judges are those judges whose ideological scores place them at least one standard deviation away from the mean in the conservative direction. Of the 10 judges applying the undue burden standard, two were liberal and 7 were considered moderates under the one standard deviation strategy. The latter comports with the expectation that moderates, being ideologically predisposed to adhere to Supreme Court decision-making, should be sensitive to the undue-burden standard enumerated in *Webster*. Only one conservative judge, as defined by a one standard deviation away from the mean of ideology in the data, applied undue burden in the time period examined. Who is this one judge adhering to the teachings of rationality as well as the Cross and Tiller (1998) proposition? It was future Supreme Court justice Samuel Alito. The results from this analysis are presented in the Appendix for this chapter.

abortion jurisprudential time periods. This, of course, suggests that conservatives were not more likely to apply the undue-burden standard than liberal judges.[17]

If only ten judges employed undue burden in the period between *Webster* and *Casey*, the question still remains: what, if not undue burden, were these judges employing? Table 4.3 presents a breakdown of the legal rules applied by judges across the same three time periods and again by partisanship of the appointing president.[18] As Table 4.3 suggests, strict scrutiny as a blanket test of constitutionality did not dominate the time period prior to *Webster*; this is slightly surprising given *Roe*'s substantive holdings. Instead, the circuit courts applied a plethora of different approaches covering the full gambit of tests of constitutionality.[19]

[Insert Table 4.3 about here.]

The same holds true for the time period between *Webster* and *Casey*, where the tests of constitutionality ranged equally through rational basis, strict scrutiny and undue

[17] Several Democrat-appointed judges applied undue burden during this time period. Two of these judges are notable. One, Senior Circuit Judge Bright from the Eighth Circuit, could have been following circuit norms in applying a standard similar to undue burden or the factual circumstances of the case called for such an analysis. Both seem to be appropriate answers. In the case, *Coe* v. *Melahn* (1992), the plaintiff was suing an insurance company for policies that she alleged impinged on her right to an abortion. The panel decision, which Bright joined, determined that the insurance coverage policies regarding elective abortions did not constitute an undue burden. Moreover, the plaintiff failed to show that the policies placed an "absolute obstacle" on her abortion decision. The another Democrat-appointed judge applying under burden was Judge Seitz from the Third Circuit, who was serving on the same panel as Alito when deciding *Casey* v. *Planned Parenthood* (1991). This is not surprising given the collegial nature of the U.S. Courts of Appeals (e.g., Cross and Tiller 1998; Hettinger, Lindquist and Martinek 2006; Sunstein et al. 2006).

[18] A judge was considered to have engaged in undue burden similar to the coding previously discussed above. For rational basis, the judge, first, must *not* have engaged in an inquiry into whether the law had the purpose or effect of creating a substantial obstacle or significant burden on the right to an abortion. Second, the judge must engage in determining whether the law had a reasonable relation to a legitimate government function. If these two requirements were met, the judge was coded as having utilized rational basis. If a judge again does *not* enter a discussion of a substantial obstacle as a trigger for compelling interest, the judge was coded as having applied strict scrutiny if she inquired as to whether the government advanced a compelling interest or attempted to decipher whether the law was narrowly tailored to meet a compelling interest. All other judicial inquiries, if not meeting the three tests—undue burden, rational basis, or strict scrutiny—discussed, were coded as "other" or "applied no judicial scrutiny."

[19] As for those cases applying no standard or are considered "other," about half of those judicial vote choices are related to standing, justiciability or jurisdiction questions. The other half, which do not mention the status of the litigant or the lack of a controversy, are mainly opinions that do not engage in judicial scrutiny based on the coding strategy employed in this examination.

burden. Although *Webster* offered conservative judges the opportunity to move to a lower standard to adjudicate abortion cases, it appears that very few conservative judges got the memo. Rather, seven Republican-appointed judges, still employ strict scrutiny before *Casey* conveyed the message that undue burden was the law of the land.

The most convincing evidence presented in Table 4.3 is that strict scrutiny is eliminated as a test of constitutionality for abortion regulations post-*Casey*. Not a single opinion employs the compelling interest test after the Court clarified its position and the undue-burden standard in *Casey*.[20] Again, the reason for the lack of consistency in the time period between *Webster* and *Casey* is simple; it was not until the latter was the undue-burden standard clarified and garnered the support of more than one justice in the dispositional majority.

With *Casey*, a regulation is defined as unduly burdensome to the right of an abortion if, as the joint opinion in *Casey* states, it places a substantial obstacle to a woman seeking an abortion. A judge must determine if the government regulation places an undue burden on a woman's ability to get an abortion; if this is the case, strict scrutiny is to be applied. If not, rational basis is to be applied. As noted above, *Casey* also reaffirmed *Webster*'s other substantive holding: the point of viability replaces the trimester framework.

Thus, for constraint to be present, liberal judges, who would not prefer such an outcome, must adopt and employ the undue-burden standard as is, indeed, the law of the

[20] In the Chapter Appendix, I replicate the analyses from Table 4.3. There, I present the standards breakdown by the trichotomous measure discussed above as well as a dichotomized ideology measure. For ideology, liberals are now coded as having a Giles et al. score greater than zero, which is the theoretical midpoint of the Common Space Scores. The results comport generally comport with Table 4.3 in that prior to *Webster*, circuit court judges endorsed all three major approaches in abortion jurisprudence. The replication analysis also supports the position that it was *Casey*, not *Webster* that established a cut-point in abortion jurisprudence. Undue burden was on firm ground compared to the rather hodge-podge applications of judicial scrutiny in the period prior to *Webster* and the period between *Webster* and *Casey*.

land post-*Casey*. Table 4.3 evinces that fact.[21] While *Webster* marked the major departure from *Roe*, it is *Casey* that seems to have captivated both liberal and conservative judges. It appears that *Casey* is the appropriate point in which the shift in the abortion jurisprudential regime occurred. Adherence in the application of undue burden is only one step of the inquiry in this paper. The question still remains: what effect did *Casey* have on the right to an abortion and case outcomes at the Courts of Appeals?

Aggregate-Level Results: Case Outcomes

[Insert Table 4.4 about here.]

As for the right to an abortion, Table 4.4 provides percent of decisions supporting the right to an abortion at the Courts of Appeals.[22] If undue burden truly is a less stringent standard, there should be more conservative decisions post-*Casey* when compared to case outcomes prior to *Casey*. As the results in Table 4.4 indicate, the period post-*Casey* yielded about a nine percent decrease support for the right to an abortion; the difference in proportions test is marginally significant. What is even more

[21] I also performed difference in proportions tests of judges employing the undue-burden standard between time periods. In other words, I test for the difference in the proportions applying undue burden for Democrat- and Republican-appointed judges pre-*Webster* versus post-*Webster*, but pre-*Casey* as well as post-*Webster*, but pre-*Casey* versus post-*Casey*. For the first set of time period difference in proportions tests, all *p*-values suggest that the difference between time periods is indistinguishable from zero. But, this is not surprising given the small n in the latter time period. The comparison in proportions for post-*Webster*, but pre-*Casey* versus post-*Casey*, however, yielded significant differences. All judges were more likely to apply undue burden post-*Casey*. Republican- and Democrat-appointees evinced significant changes in behavior with *p*-values of 0.000 and 0.030, respectively.

[22] A case outcome was coded to support the right to an abortion if the decision struck down at least one provision of a state or federal regulation that sought to restrict access to an abortion. Moreover, a case outcome was deemed to favor abortion rights if it upheld a temporary or permanent injunction placed by a district court judge enjoining enforcement of at least one provision in a given regulation. Lastly, if the question centered on whether a litigant had standing, jurisdiction or justiciability, the case outcome was coded as favoring the right to an abortion if the result of the case allowed a litigant to challenge or continue to challenge a regulation (in whole or in part) that sought to inhibit or restrict access to abortion services.

striking is the difference between time periods for provisions that were upheld by the Supreme Court in *Casey*. If a case contained a provision that included record keeping or reporting requirements, called for parental or informed consent, or mandated at least a 24-hour waiting period, the panel supported the right to an abortion about 42 percent of the time after *Casey*. This is staggering compared to the 74 percent of decisions favoring the right to an abortion prior to *Casey* when a law contained a regulation upheld in *Casey*.

But, where a law does not concern a *Casey* provision, the difference between the two periods is insignificant; in actuality, the level of support is actually in the wrong direction under a looser standard of undue burden. An explanation for this insignificant finding could be from the impact of the undue-burden standard itself. The shift in jurisprudence from strict scrutiny to undue burden leaves much discretion on the part of judges to apply the relevant legal rule. Although the Court applied undue burden to the regulations at issue in *Casey* and thus provided several examples of what would constitute a substantial obstacle to a woman seeking an abortion, the determination of whether or not a law represents an undue burden is at the discretion of the judge. As Justice Scalia notes in his dissent in *Casey*, the application of undue burden led the Court to very different conclusions from previous cases employing strict scrutiny as the test of constitutionality for government regulations of abortion. Stevens, even in concurrence, applied undue burden and found that the 24-hour waiting period constituted a substantial obstacle to a woman seeking an abortion; he would strike down such provisions whereas the joint opinion upheld it.

While it is clear that the percentage of decisions favoring the right to an abortion significantly decreased especially where a case concerned at least one provision upheld in

Casey, the question remains: how did liberal and conservative judges vote in these cases? Was the evinced decrease in the percentage of cases supporting abortion rights driven mainly by conservative judges? If this is the case, it would be a strong indication that the Court constrained the choices of conservative judges with the strict scrutiny standard, pre-*Casey*. Thus, if undue burden truly increases judicial discretion, conservative judges should vote more conservative post-*Casey* and liberal judges should not vote significantly different when comparing pre- and post-*Casey* time periods.

Aggregate-Level Results: Judges' Choices

[Insert Table 4.5 here]

Table 4.5 presents the impact of undue burden on judicial vote choice by restriction type and by partisanship of the appointing president. Discussing the overall results first, it appears that Democrat-appointees have gotten more supportive of abortion rights post-*Casey*, increasing support from 57 percent to 59 percent across all cases. Based on a difference in proportions test, the result is not statistically significant. Second, Republican-appointed judges convincingly decreased support for abortion rights after *Casey*. Prior to *Casey*, these judges evince a high level of hierarchical constraint voting to support abortions rights about 59 percent of the time. But, post-*Casey* and the clear enumeration of undue burden, these judges voted far more conservatively; the difference is a decrease of more than 15 percent after undue burden became the law of the land. Combining these results with that described in Table 4.4, it appears the decrease in support for abortion rights at the Courts of Appeals was driven in large part by Republican-appointed judges free to vote more conservatively under undue burden.

To preliminarily examine hierarchical constraint as described in Figures 4.3A and 4.3B, Table 4.4 also parcels judicial vote choice by levels of discretion. Judicial discretion is low in cases concerning *Casey* provisions; it is high where there is no Casey provision at issue. For cases pertaining to a *Casey* provision, Republican-appointed judges evince a high level of hierarchical constraint prior to the Court's decision in *Casey*, supporting abortion rights about 66 percent of the time. After *Casey*, these judges clearly vote to suppress abortion rights; only voting to strike down a *Casey* provision about 28 percent. When determining the constitutionality of a *Casey* provision after *Casey*, these jurists are presented with legal considerations that are convergent with their policy preferences. A test for significant differences in proportions confirms that Republican-appointed judges systematically altered decision-making. Where legal considerations comports with ideology, Democrat-appointed judges support abortion rights 60 percent of the time prior to *Casey*. After *Casey*, there is a decrease in support to about 49 percent, but this change is not statistically significant. In other words, the aggregate analysis for adjudication of *Casey* provisions suggests that Democrat-appointed judges appear mildly resistant and unresponsive to Court jurisprudence even when judicial discretion is low.

Under high levels of judicial discretion (no *Casey* provision), Democrat-appointed judges appear to vote to support abortion rights at high levels both pre- and post-*Casey*. Prior to *Casey*, where legal considerations are in line with policy preferences, Democrat-judges support abortion rights about 55 percent of the time. After *Casey*, this number increases to about 67 percent. When the null hypothesis is the difference in proportions

equals zero, this finding is close to marginally significant (*p*-value = 0.112).[23] Free to vote in accordance with their policy preferences, Democrat-appointed judges seem to take advantage of the high discretion offered under undue burden. Republican-appointed judges, on the hand, appear to vote at a level of support for abortion rights consistent with their pre-Casey decision-making. At least through the aggregate analysis, Republican-appointed judges do not appear to seize the opportunity to restrict abortion rights.

In conclusion, there is some evidence that *Casey* impacted judicial decision-making at the Courts of Appeals. Both Republican- and Democrat-appointed judges uphold laws more often when they contain a provision previously upheld by the Court. As for the argument of increased judicial discretion, there is at least some mild evidence that undue burden reinforces judicial ideology. Post-*Casey*, Democrat-appointed judges increased support for abortion rights while conservatives restricted the right to an abortion.

Multilevel Model Results: Impact on Judicial Decision-Making

While the aggregate analyses above provide much insight into judicial decision-making of free expression cases at the U.S. Courts of Appeals, it does not account for collegial considerations and does not account for the idiosyncrasies of cases handled by the circuit courts. Thus, to examine hierarchical and collegial constraints under a more empirically rigorous approach, I estimated Equation 4.1 using full maximum likelihood.[24]

[23] Table 4.5 only presents *p*-values from difference in proportions tests where the null hypothesis is the difference between pre-*Casey* and post-*Casey* is greater than zero.

[24] Several alternative models were estimated to determine the necessity for modeling circuit variation in abortion jurisprudence. First, the likelihood ratio test suggests that there is no significant difference between the model estimated in Equation 1 and a model utilizing circuit court dummies. Second, a three-level model was estimated nesting judge's choices (level-1) within cases (level-2), which in turn was nested within circuits (level-3). The likelihood ratio test suggests that there is no significant difference between

[Insert Table 4.6 about here]

Table 4.6 presents the results from the random effects (intercept) logistic regression. The appropriateness of the random effects design is demonstrated through both the variance component and the Breusch-Pagan Lagrangian Multiplier Test, which provides a test statistic, distributed as χ^2, for the significance of the random effects.[25] First, the estimate of the variance component is significant, confirming there is unobserved heterogeneity at the case-level. Second, the Breusch-Pagan χ^2 is significant well beyond the 0.001 level, which suggests that there is a significant difference between the random effects model and a pooled logistic regression that does not model the random parameters.[26] In other words, the random intercept model provides a better fit of the data compared to a simple logistic regression. While there are indeed coefficients that are significant, they are conditional on the base-line effect.[27] In order to account for both the main and conditional effects, I interpret the results using predicted probabilities based on the results presented in Table 4.6.[28]

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the model in Equation 2.1 and the three-level model. In sum, there is no serious circuit-based variation and, therefore, I present the most parsimonious (yet appropriate) model that produces the best fit of the data.

[25] The null hypothesis is that the variance of r_{0j}, the case-level effects, equals zero.

[26] I also estimated a model that accounted for case-level unobserved causal heterogeneity in ideology. In other words, I estimated a model specifying a random coefficient for ideology. The likelihood ratio test suggests no significant differences between a model specifying both random intercepts and a random coefficient for ideology and a model that only specifies random intercepts. Thus, I present the most parsimonious specification.

[27] There are large coefficients for ideology and the interactions with ideology. This is due to the measurement strategy of ideology, which theoretically ranges from -1 to 1 but never actually attains those values. The variable only ranges from -.587 to 0.625, with a mean and standard deviation of -.005 and .373, respectively. Therefore, the coefficient for the main and conditional effects of ideology translates into a 1 unit increase in ideology, which it never attains.

[28] Please note that I use predicted probabilities derived from the coefficients; in order to account for the uncertainty of the estimates, the predicted probabilities are based on 5,000 iterations simulated in a process akin to utilizing the "clarify" procedure (King, Tomz, and Wittenberg 2000). More specifically, I drew 5,000 simulations for the parameters from a normal distribution. The sampling distribution had a mean equal to the vector of parameter estimates and a variance equal to the variance-covariance matrix of estimates. Then, the simulated parameter estimates were translated into predicted probabilities of a liberal (supporting free expression) vote, where the independent variables were set to the values of interest.

[Insert Figure 4.4 about here.]

Figures 4.4a and 4.4b serve as the test of the hypotheses depicted in Figures 4.3a and 4.3b, respectively. Figure 4.4a presents the predicted probabilities where judicial discretion is low (a case containing at least one provision upheld in *Casey*). Comparing pre- and post-*Casey* time periods, it is evident that the Supreme Court significantly affected circuit court jurisprudence in the area of abortion. Prior to *Casey*, judicial support for abortion rights was quite high, regardless of the policy preferences of judges. Liberals did so with a predicted probability of about 66 percent.[29] Compared to liberal judges, moderates and conservatives were not drastically different; they had predicted probabilities of supporting abortion rights at about 62 and 57 percents, respectively. This suggests that the strength of strict scrutiny and its heavy support for individual rights left little judicial discretion at the circuit courts. Conservative voted no different than liberals or moderates, offering strong evidence that prior to *Casey* conservative jurists behave in a manner consistent with the conceptualization of hierarchical constraint. They voted against their ideologies.

Post-*Casey*, support for abortion rights plummets for moderates and conservatives in decisions involving at a provision similar to those upheld in *Casey*. Moderates support abortion rights at a predicted probability of 13 percent, which is a drop of about than 49 percent when compared to the pre-*Casey* time period. This drop in predicted probabilities is significant for conservatives as well, who supported abortion rights about

[29] High liberal and high conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means. For brevity, I only discuss the results for liberals, moderates, and conservatives. The results are not overwhelmingly different when comparing liberals with high liberals as well as conservatives with high conservatives.

56 percent less after *Casey*. The behavior of conservatives and moderates are not surprising. Moderates, because of their ideological disposition, are the ones most likely to adhere to Supreme Court precedent. Conservatives, here, are presented with a legal consideration that comports with their policy preferences; all models of judicial decision-making predict compliance on the part of conservative jurists. Liberals, on the other hand, decrease support by about 7 percent, which is not statistically different from their pre-*Casey* decision-making. There is clearly doubt as to whether the Supreme Court can constrain the choices judges make even when judicial discretion is low. Liberals, who would prefer to support abortion rights, did so despite the fact that the Supreme Court stated provisions akin to the ones in *Casey* do not present undue burdens on women seeking abortions.[30]

Figure 4.4b produces the predicted probabilities where judicial discretion is high (i.e., a case not involving a provision upheld in *Casey*). It suggests that *Roe* had a significant impact on judicial vote choice, leaving little judicial discretion. Liberals supported the right to an abortion with a predicted probability of about 73 percent. Prior to *Casey*, moderates and conservatives have predicted probabilities of about 60 and 43 percents, respectively. Similar to instances of low judicial discretion post-*Casey*, there are no significant differences in predicted probabilities pre-*Casey* when comparing

[30] While it is a potential concern that cases post-*Casey* may be systematically different from those provisions challenged pre-*Casey*, this is not as problematic for the analysis presented in this paper. First, I control for the presence of a *Casey* provision. Second, the distribution of cases containing a *Casey* provision is relatively the same for both periods. Pre-*Casey*, about 36 percent of the cases contain at least one *Casey* provision; this number rises to about 45 percent post-*Casey*. Second, as opposed to the Supreme Court, the circuit courts must hear most appeals as a matter of right; this eliminates some concern regarding the potential strategic actions of litigants seeking circuit court review. Lastly, a detailed examination of the cases containing a *Casey* provision reveals that most provisions are not drastically different from the provisions at issue in *Casey*. While some cases deal with minor alterations to one or more *Casey* provisions, the expected decrease in the likelihood of support for abortion rights in these cases comports with expectations derived from the theory of hierarchical constraint.

liberals, moderates and conservatives. In spite of the variation in predicted probabilities, the insignificant differences across levels of ideology suggest Court jurisprudence placed a significant hierarchical constraint on conservative judges prior to *Casey*.

Post-*Casey*, liberal judges increased support for abortion rights from about 73 percent to 98 percent, but this difference is not statistically significant. Liberal judges behaved much the same way post-*Casey* as they did pre-*Casey*. Moreover, moderate judges increased support to predicted probability of about 83 percent, which is also indistinguishable from the pre-*Casey* period.[31] Conservatives appear to have voted at the same level of support for abortion rights as they did pre-*Casey*. The change in predicted probability is a decrease of about 1 percent. What lends strong support for the fact that increased judicial discretion leads to ideological voting, however, is the finding that conservatives compared to liberals and moderates polarize. Prior to *Casey*, there are no significant differences across levels of ideology whether or not the case concerned a provision similar to the one in *Casey*. After *Casey*, judges are free to vote in accordance with their policy preferences because they are unburdened by the relevant legal consideration.

[Insert Figure 4.5 about here]

Figure 4.5 helps to further elaborate this point as well as offer support for the conceptualization that the law interacts with ideology. Figure 4.5a presents a comparison of the predicted probabilities for cases pertaining to and not containing a *Casey* provision

[31] Under high judicial discretion here, the insignificant differences comparing pre- and post-*Casey* could be due to the fact the model only controls for *Casey* provisions that are upheld. The case types in this portion of the sample (high discretion) might still concern other provisions where the Court may have handed down decisions. The circuit courts handled cases concerning partial-birth restrictions but also monetary appropriations by the federal government or state. Both issue areas, up until 2007, had differing predicted directionalities (liberal or conservative) in outcome. In short, there is still variation in case facts.

in the pre-*Casey* jurisprudential period. The differences in predicted probabilities when deciding a case with or without a *Casey* provision are not significant for liberals and moderates. But, test for differences for conservatives are marginally significant, suggesting that conservatives are somewhat less likely to support abortion rights where a case does not pertain to a *Casey* provision. But, again, comparisons based on judicial policy preferences are not significant. This depiction reiterates the fact that strict scrutiny and the *Roe* jurisprudence significantly constrained judicial behavior; conservatives voted to support abortion rights in spite of their divergent preferences.

Figure 4.5b, however, presents a very different perspective for cases adjudicated after *Casey*. It is clear from Figure 4.5 that the gulf between liberal and conservative jurists has grown under undue burden. When unburdened by the law (high judicial discretion), the gap between liberals and conservatives, which was about 30 percent in predicted probabilities (insignificant) pre-*Casey*, grows to about 55 percent (significant) after *Casey*. Even where judicial discretion is low (cases pertaining to a *Casey* provision), the divide has grown. Prior to *Casey*, the difference between liberals and conservatives was about 9 percent in predicted probabilities of supporting abortion rights; after *Casey*, the divide grows to about 58 percent.

Multilevel Model Results: Panel Effects and Judicial Compliance

The impact of panel composition is conditional on the decision-making context or legal consideration as well as the ideology of the judicial decision-maker. For all tests for differences in the effects of panel heterogeneity on the predicted probabilities pre-*Casey*, there are no significant changes moving from all liberal to all conservative composition

of the other judges on the panel. Judges vote to support the right to an abortion regardless of panel composition prior to *Casey*. This also offers evidence suggesting that the *Roe* jurisprudence had marked influence on the choices judges make leaving little judicial discretion for possible compromise due to service on a collegial court.

[Insert Figure 4.6 about here]

Figure 4.6a (high discretion) and 4.6b (low discretion) present the predicted probabilities, comparing levels of ideology across the liberal, mixed, and conservative ideological panel composition after the Court's *Casey* decision. Under instances of high judicial discretion, judges across levels of ideology do not behave ideologically. Although there is clearly movement in the predicted probabilities, tests suggest that there are no significant adjustments in judicial behavior when panel composition changes. This comports with the Sunstein et al. (2006) examination, which concludes that judges are less likely to work collegially when views are entrenched. This also supports the idea that increased judicial discretion allows judges to vote ideologically. When afforded such an opportunity, deviating from voting sincerely may seem irrational.

According to Figure 4.6b (low judicial discretion), conservatives are unmoved by who else serves on the panel with them. Tests of the predicted probabilities suggest that conservatives do not significantly adjust their low level of support when legal considerations reinforce their policy preferences. While there is movement in the predicted probabilities, moderates also do not change behavior significantly where the law affords little discretion. Liberal judges, on the other hand, appear willing and likely to support the right to an abortion when serving on a panel with like-minded jurists. Perhaps a subversive interpretation is that liberal judges are likely to deviate from

Supreme Court precedent when there is ideological homogeneity on the panel. When the remaining judges are mixed with regards to their ideologies, liberals significantly decrease support for abortion rights by about 33 percent. This lends support for the whistleblower hypothesis from Cross and Tiller (1998) and Hettinger et al. (2006).[32] When legal considerations and ideology are divergent, liberals present a threat of "going rogue" when deciding cases with other ideologically proximate judges, but that begins to disappears when serving on an ideologically heterogeneous panel.

A predicted probability of 60 percent (when liberals serve with a potential whistleblower), however, may not seem like full compliance especially compared to the level of support evinced from moderates and conservatives. Liberal judges are still willing to deviate from Supreme Court precedent even with a potential whistleblower serves on the panel. A plausible explanation may be that the presence of one whistleblower may not be sufficient to change the outcome of a case. For a three judge panel, there are still two liberals, creating a panel majority. Even though a whistleblower (through dissent) may draw attention to potential noncompliance by the panel majority, the other (liberal) judges have a decision that supports abortion rights. This may seem short-sighted on the part of liberal judges, but such defiance requires either en banc review by the circuit or Supreme Court reversal. Until then, their decision to support abortion rights stands.

If serving with only conservatives on the panel, the predicted probability of liberal judges supporting abortion rights falls significantly and drastically to just 8 percent. This

[32] Again, the potential for deviation from Court precedent decreases with the presence of a judge that may file a dissent signaling a possible "shirking" by a panel. A judge will be more likely to file a dissent where a panel deviates from Court precedent and where that precedent is closer to the potential dissenter's policy preferences. In order to avoid the possibility of whistleblowing, judges should be more likely to vote against their policy preferences when an ideologically distant jurist also serves on the panel.

makes sense. If the conservatives are voting in accordance with their policy preferences (which they should according the results), the outcome of the case is predetermined. Abortion rights will not be supported by the panel majority. When presented with a Casey provision (low judicial discretion), a liberal judge dissenting would not change the outcome of the case nor have a plausible chance of Supreme Court review. Rather than lose credibility as a constant dissenter or draw criticism for ideological voting, the liberal judge should be more likely to vote against her policy preferences.

[Insert Figure 4.7 about here.]

As one last point, I empirically verified whether *Casey* was indeed the true "cut-point" where abortion jurisprudence effectively shifted from the substance of *Roe*. In order to do such a sensitivity analyses akin to that in Richards and Kritzer (2002), I estimated the model in Equation 4.1, but changing the point in time at which there would be a permanent intervention. From Supreme Court jurisprudence, there are only two likely candidates—*Webster* and *Casey*. Thus, I also estimated Equation 4.1 substituting the Post-*Casey* dummy variable with a Post-*Webster* variable. A dummy variable was coded 1 if the case was decided after the Court's decision in Webster, 0 otherwise. But, in order to rule out other possible cut-points, I also specified different permanent interventions and estimated a model to similar to Equation 1 for each year from 1976 to 2004.

Figure 4.7 presents the χ^2 test statistics for each of the Wald tests from the logistic regressions. The largest test statistic, which is the general standard for determining the appropriate model in sensitivity analyses, is a model that specifies a post-1988 intervention. The second largest test statistic is the one derived from the model in

Equation 4.1. Again, *Webster* and *Casey* are the only two likely candidates for changing abortion jurisprudence to the undue-burden standard. As a result, specifying *Casey* as the point at which abortion jurisprudence changed at the Courts of Appeals appears to be legally *and* empirically justified.[33]

Conclusion

Under the most stringent conditions (utilizing abortion jurisprudence), this paper attempted to resolve gaps left from previous research regarding the role of law and the choices lower court judges make. First, compliance alone is insufficient when examining whether and to what degree Supreme Court-established legal considerations influence judicial decision-making at the lower courts. The search for hierarchical constraint can only be achieved when judges comply with the relevant legal considerations *in spite of* divergent preferences. When examining constraint within the federal judiciary (and the law) or another hierarchical setting such as bureaucracies, conclusions of compliance must be drawn from instances where preferences are divergent. This examination, under this more stringent conceptualization of constraint, finds mixed evidence that the law (determined by the justices) can serve as a sufficiently strong hierarchical constraint on the choices judges make at the Courts of Appeals. When policy preferences are divergent from the relevant legal consideration, judges appear quite willing to deviate, voting sincerely rather than complying.

Second, there is evidence here for the fact that legal considerations operate not only in shifting the overall judicial behavior, but it also the role of ideology on vote

[33] The χ^2 test statistic is 29.94 for the model specified in Equation 4.1. The highest test statistic (30.81) is for a model that specifies a Post-1988 model. While this might be an indication of *Webster*'s impact, the model that actually is specifies a Post-*Webster* intervention has a smaller test statistic, which equals 24.24.

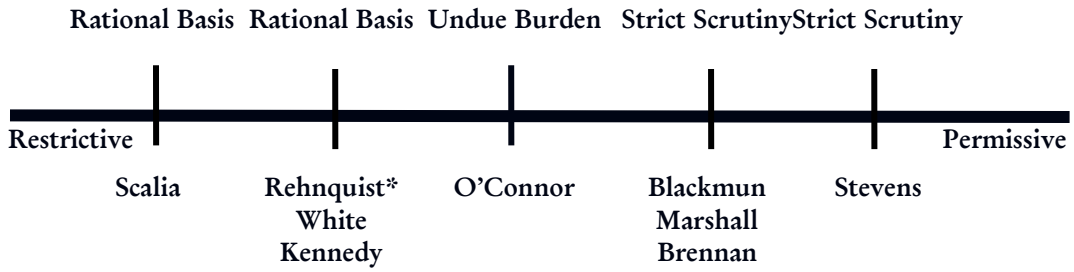
choice. In accordance with Bartels (2009), the conceptualization that the law interacts with ideology incorporates not only the attitudinal model, but also the legal and strategic models of judicial decision-making. The empirical model and the subsequent results serve as a bridge in the debate between whether judges vote in accordance with policy preferences or legal considerations. Moreover, when examining the role of panel composition on judicial decision-making, this study finds that panel effects are conditional on the context and the ideology of a given judge.

With regards to the results presented here, the level of discretion afforded to jurists through legal doctrine can have serious consequences for judicial decision-making. Instances of high discretion will accentuate the role of ideology on vote choice; liberal and conservatives will vote according to their policy preferences and, as a result, polarize. The adoption of undue burden increased judicial discretion afforded to jurists as well as the placed a less stringent standard of scrutiny for abortion provisions to survive constitutional challenge. This had a pronounced effect on conservative jurists, post-*Casey*. Conservatives, no longer operating under strict scrutiny, became unburdened because undue burden presented a doctrine that reinforced ideology, regardless of the factual circumstances. These jurists were now free to vote in accordance with their preferences and any deviation might be considered irrational.

Another implication of this examination is the fusing of both legal considerations and panel composition on the choices judges make and the degree of compliance with the Supreme Court. Where judicial discretion is high and views are entrenched, panel composition plays no significant role in changing judicial behavior. Judges simply vote their policy preferences. Where judicial discretion is low, panel composition does not

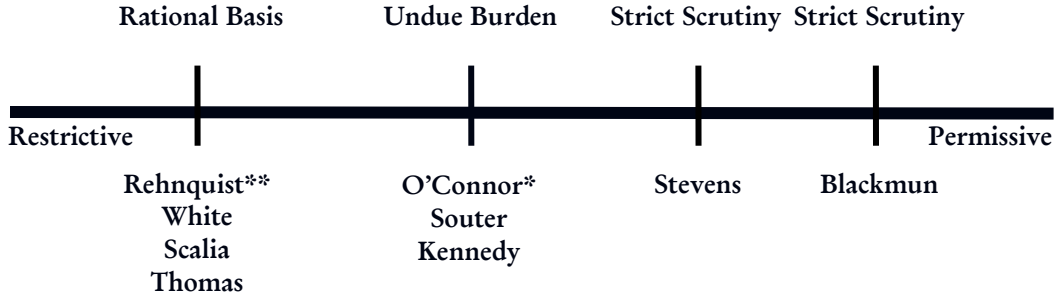
affect judges whose policy preferences are convergent with the relevant legal consideration. Panel composition, however, can increase the level of compliance when there is a potential whistleblower to signal possible deviation from Court precedent.

Figure 4.1. Permissiveness of the Right to an Abortion
The Legal Rules Supported in *Webster* v. *Reproductive Health Services*



**Judgment of the Court*

Figure 4.2. Permissiveness of the Right to an Abortion
The Legal Rules Supported By the Justices in *Planned Parenthood* v. *Casey*



** Judgment of the Court/Joint Opinion*

*** All justices in this opinion also joined another opinion written by Justice Scalia*

Figure 4.3a. Predicted Support for Abortion Rights: Low Judicial Discretion

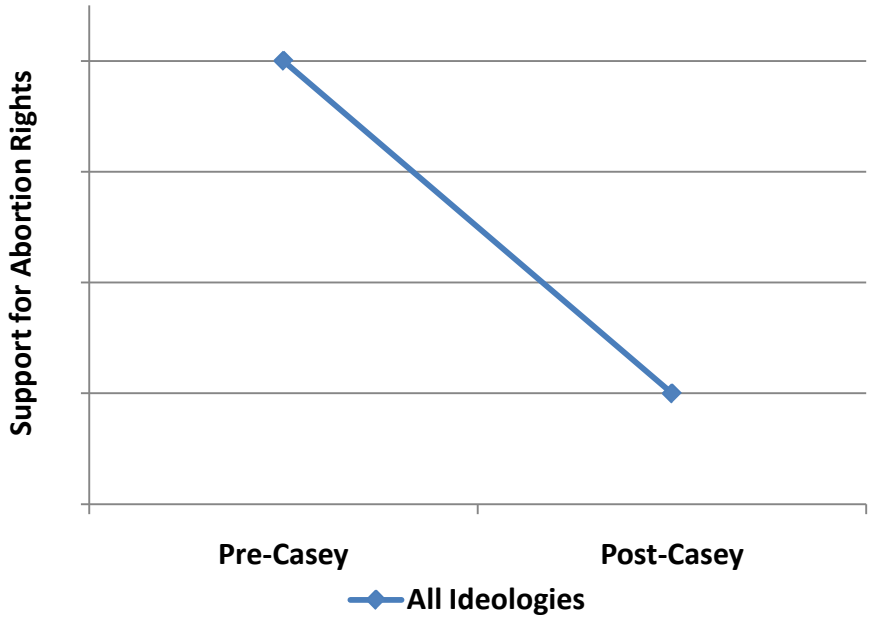


Figure 4.3b. Predicted Support for Abortion Rights: High Judicial Discretion

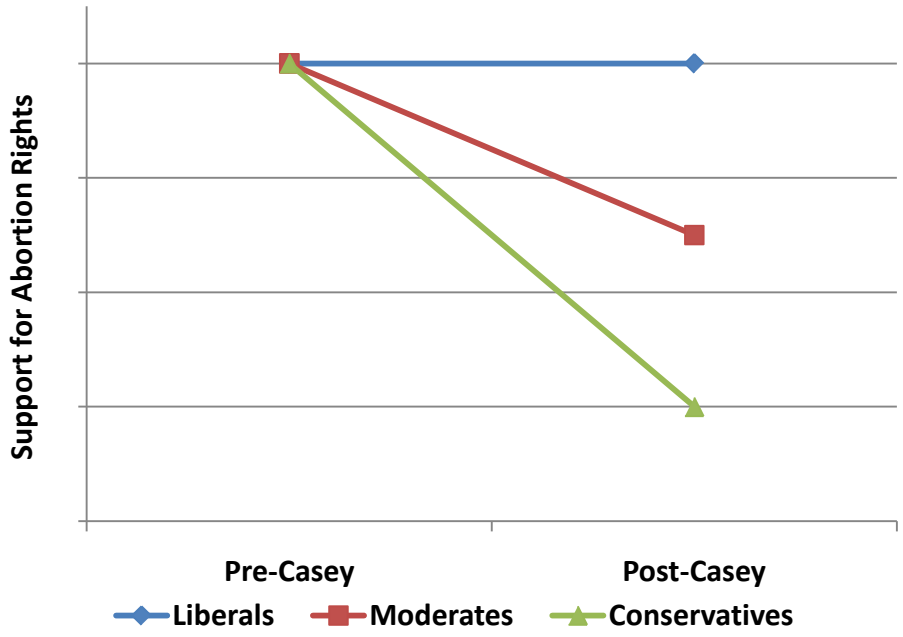
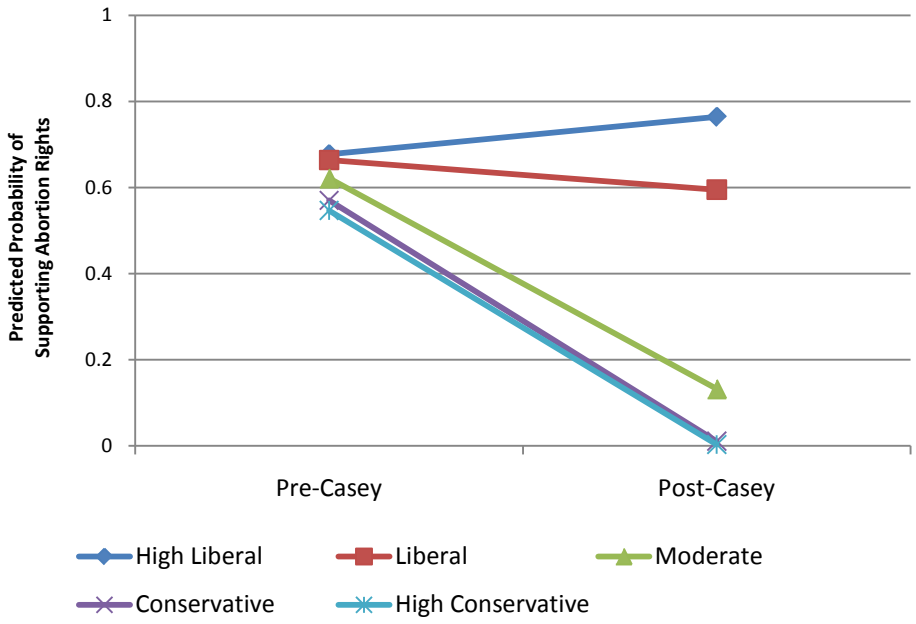
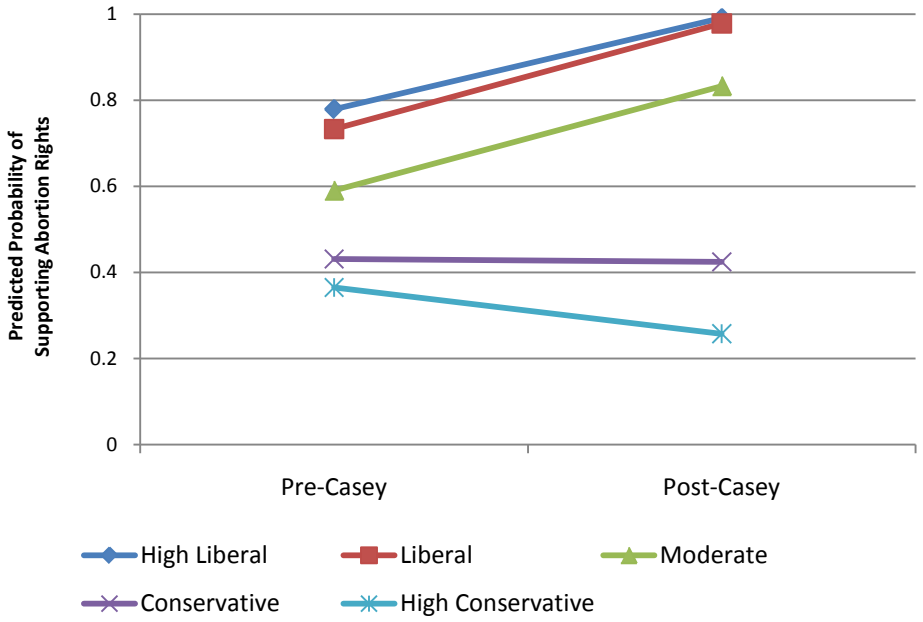


Figure 4.4a. Predicted Probability of Supporting Abortion Rights, Low Judicial Discretion



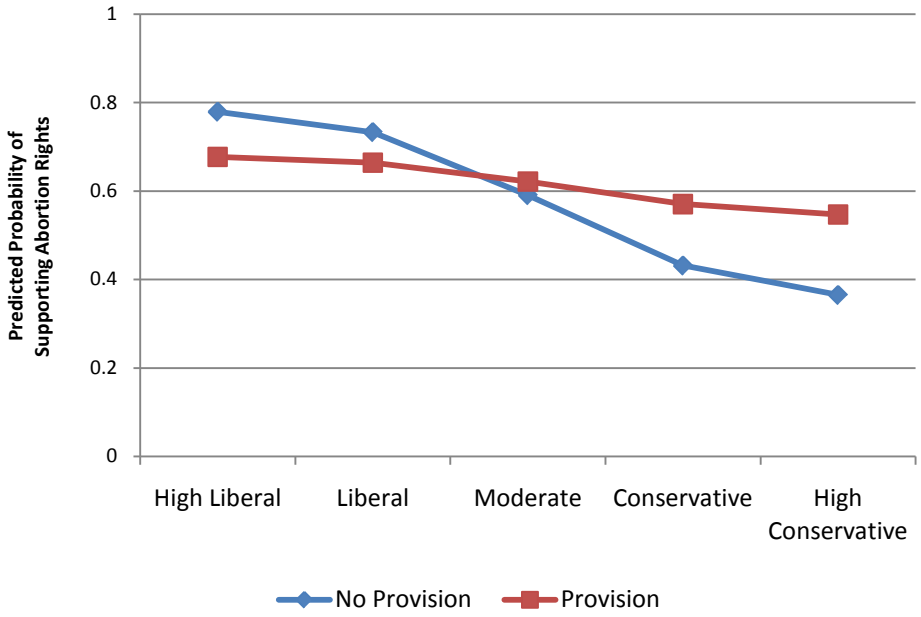
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 4.4b. Predicted Probability of Supporting Abortion Rights, High Judicial Discretion



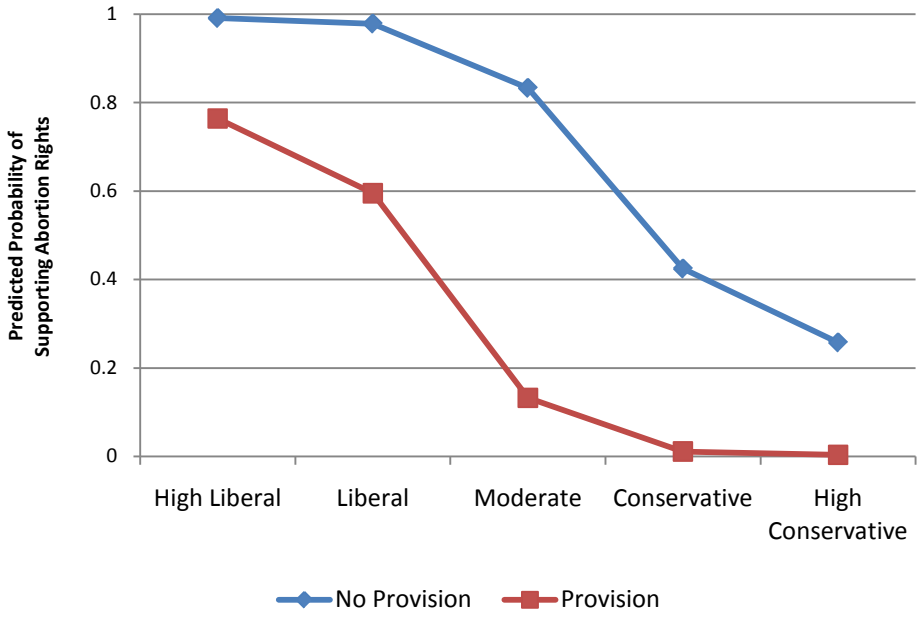
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 4.5a. Predicted Probability of Supporting Abortion Rights: Pre-*Casey*



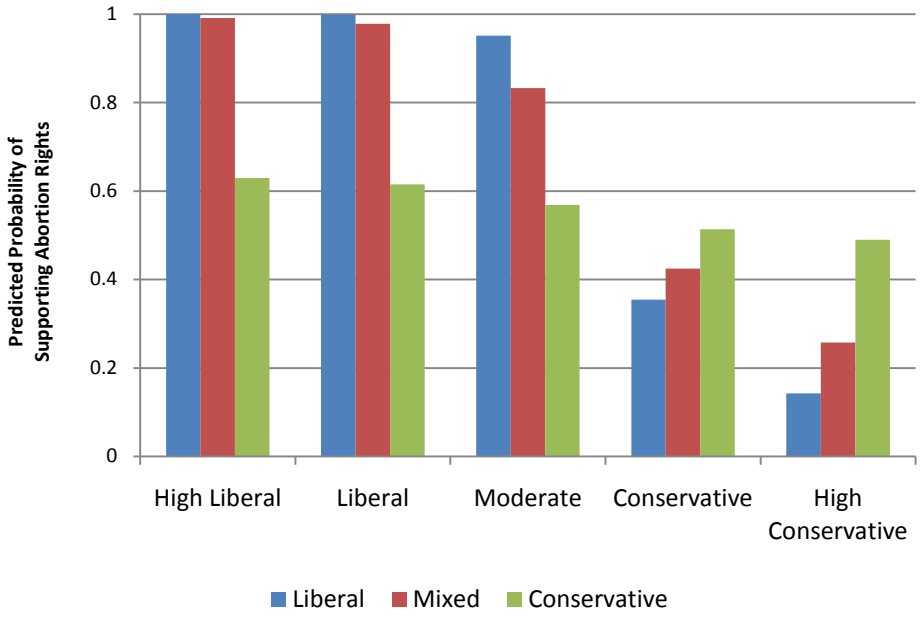
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 4.5b. Predicted Probability of Supporting Abortion Rights: Post-*Casey*



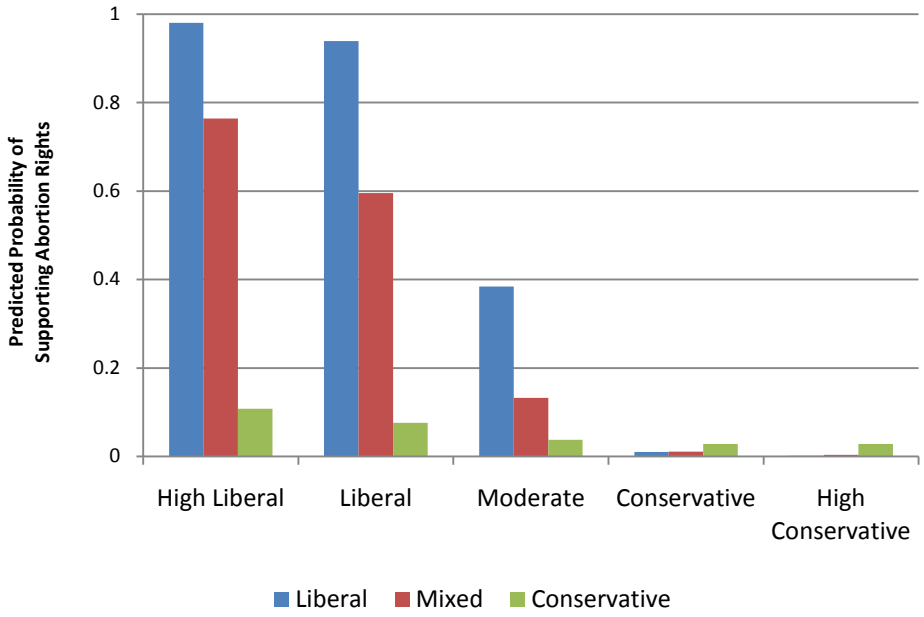
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 4.6a. Predicted Probability of Supporting Abortion Rights by Panel Composition: No *Casey* Provision, Post-*Casey*



Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 4.6b. Predicted Probability of Supporting Abortion Rights by Panel Composition: *Casey* Provision, Post-*Casey*



Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 4.7. Sensitivity Analysis: Testing for the Appropriate Shift in Abortion Jurisprudence

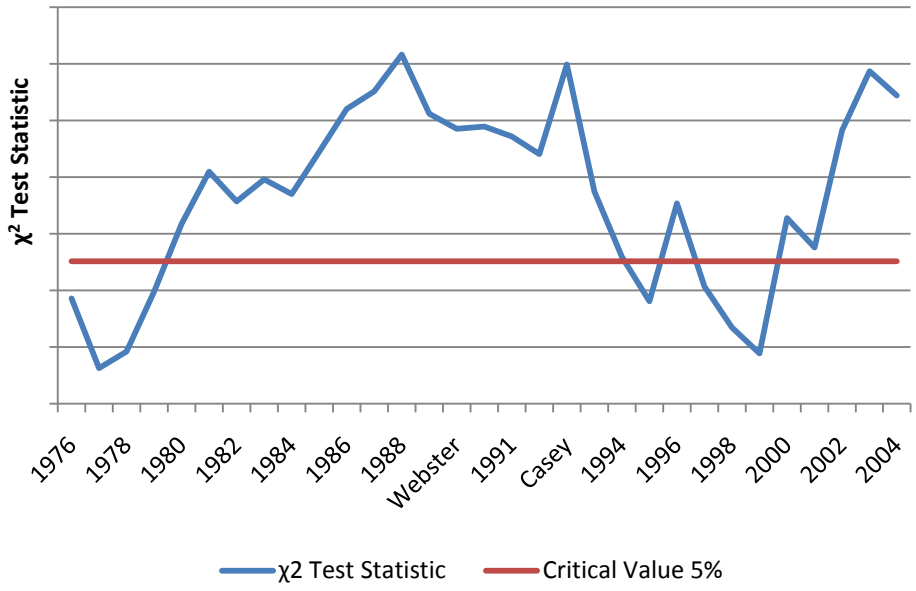


Table 4.1. Substantive Holdings from Supreme Court Abortion Cases

	Roe v. Wade (1973)	*Webster v. Reproductive Health Services (1989)*	*Planned Parenthood v. Casey (1992)*
Framework	Trimester	Viability	Viability
Scrutiny Level	Strict Scrutiny	Undue Burden	Undue Burden
Right to an Abortion	Fourteenth Amendment	No Mention	No Mention

Table 4.2. Judges' Applications of Undue Burden in Abortion Cases

	Pre-*Webster*	Post-*Webster* Pre-*Casey*	Post-*Casey*	*p*-value[1]
Republican-Appointees	0.145	0.167	0.560	0.000
Democrat-Appointees	0.197	0.235	0.517	0.000
p-value[2]	0.206	0.551	0.463	

Note: *Casey* = *Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992); Webster = Webster v. Reproductive Health Services (1989)*

[1] *p*-values are from χ^2 tests for the corresponding rows.

[2] *p*-values are from difference in proportions test; the null hypothesis is the difference between Republican-appointees and Democrat-appointees equals zero.

Table 4.3. Number of Judges Employing Different Scutiny Levels by Partisanship of Appointing President

	Pre-*Webster*[1]		Post-*Webster*/Pre-*Casey*[2]		Post-*Casey*[3]		
	Democrats	Republicans	Democrats	Republicans	Democrats	Republicans	Total
Other/No Mention	76	88	7	16	58	74	319
Rational Basis	19	20	1	7	0	3	50
Undue Burden	30	24	4	6	62	98	224
Strict Scrutiny	32	34	5	7	0	0	78
Total	157	166	17	36	120	175	671

Note: *Casey* = *Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992); Webster* = *Webster v. Reproductive Health Services (198*

[1] p -values= 0.710 from χ^2 tests for the corresponding time period.

[2] p -values= 0.484 from χ^2 tests for the corresponding time period.

Table 4.4. Support for Abortion Rights by Type of Restriction

	Pre-*Casey*[1]	Post-*Casey*[2]	*p*-value[3]
All Cases			
Percent Support of Cases	0.648	0.551	0.078
Number of Cases	122	89	
Casey Provision			
Percent Support of Cases	0.744	0.425	0.002
Number of Cases	43	40	
No Casey Provision			
Percent Support of Cases	0.595	0.653	0.745
Number of Cases	79	49	

Note: *Casey* = *Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992)*

[1] *p*-value = 0.099; null hypothesis is difference between *Casey* and No *Casey* Provision equals zero.

[2] *p*-value = 0.031; null hypothesis is difference between *Casey* and No *Casey* Provision equals zero.

[3] *p*-values are from difference in proportions test; the null hypothesis is the difference between Pre-*Casey* and Post-*Casey* is greater than zero.

Table 4.5. Judges' Support for Abortion Rights by Type of Restriction and Partisanship of Appointing President

	Republican-Appointed Judges				*Democrats-Appointed Judges*		
	Pre-*Casey*[1]	**Post-*Casey*[2]**	***p*-value[5]**		**Pre-*Casey*[3]**	**Post-*Casey*[4]**	***p*-value[5]**
All Cases				**All Cases**			
Percentage of Votes	0.589	0.440	0.002	Percentage of Votes	0.569	0.592	0.651
Total Number of Votes	202	175		Total Number of Votes	174	120	
Casey Provision				**Casey Provision**			
Percentage of Votes	0.662	0.278	0.000	Percentage of Votes	0.597	0.491	0.122
Total Number of Votes	68	72		Total Number of Votes	67	53	
No Casey Provision				**No Casey Provision**			
Percentage of Votes	0.552	0.553	0.507	Percentage of Votes	0.551	0.672	0.942
Total Number of Votes	134	103		Total Number of Votes	107	67	

Note: *Casey* = *Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992)*

[1] *p*-value = 0.135; null hypothesis is difference between *Casey* and No *Casey* Provision equals zero.

[2] *p*-value = 0.000; null hypothesis is difference between *Casey* and No *Casey* Provision equals zero.

[3] *p*-value = 0.554; null hypothesis is difference between *Casey* and No *Casey* Provision equals zero.

[4] *p*-value = 0.045; null hypothesis is difference between *Casey* and No *Casey* Provision equals zero.

[5] *p*-values are from difference in proportions test; the null hypothesis is the difference between Pre-*Casey* and Post-*Casey* is greater than zero.

Table 4.6. Model of Judicial Support for Abortion Rights

	Coefficient	Std. Err.	p-value
Ideology	2.329	2.252	0.301
Panel Composition	-1.702	1.707	0.319
Casey Provision	0.233	1.676	0.889
Ideology X *Casey* Provision	-1.454	2.040	0.476
Ideology X Panel Composition	-0.404	3.779	0.915
Post-*Casey*	2.281	1.599	0.154
Ideology X Post-*Casey*	9.362	3.607	0.009
Panel Composition X Post-Casey	-1.538	2.204	0.485
Casey Provision X Post-*Casey*	-4.241	2.204	0.054
Ideology X *Casey* Provision X Post-*Casey*	2.350	3.055	0.442
Ideology X Panel Composition X Post-*Casey*	-10.511	5.175	0.042
Constant	1.317	1.244	0.290
Variance Component (Random Intercept)	5.801	0.312	
rho	0.911	0.009	
Log Likelihood	-191.050		
Number of Votes	669		
Number of Cases	210		

Note: p-values are based on two-tailed tests.

Chapter 5
Congress and the Court:
Religious Free Exercise Cases at the U.S. Courts of Appeals

For religious free exercise claims, the Supreme Court shifted jurisprudence with its decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith* (1990). Changing the level of judicial scrutiny to be applied when determining the constitutionality of government actions or laws that inhibit the right to freely exercise one's religion, the majority opinion rejected the compelling interest, strict scrutiny standard established in *Sherbert* v. *Verner* (1963) and its subsequent 30-plus years of progeny. Although the Court has changed jurisprudence in other issue areas before, the *Smith* decision adopted a test of constitutionality resembling the rational basis test, which would support individual liberties the least. While the impact of such an explicit shift in Court adjudication is debatable in regards to its influence on the justices themselves, the jurisprudential change to *Smith*'s valid and neutral standard should constrain decision-making at the U.S. Courts of Appeals. Being the appellate court directly accountable to the Supreme Court, circuit courts are the immediate subordinate within the federal judiciary and therefore should adjudicate in a manner consistent with Supreme Court jurisprudence.

Given the lower level of scrutiny for government actions and laws to pass constitutional muster, it should be the case that support for free exercise rights decreased after *Smith*, which is what the Brent (1999) examination finds at the Courts of Appeals. The innovation of the Brent (1999) examination, however, is not the finding that circuit

court panels adhered to the *Smith* standard, but the suggestion that Congress, too, serves as a principal of the lower courts. In response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. The purpose of the statute was to explicitly reject the Court's decision and reinstate strict scrutiny as the appropriate level of judicial scrutiny employed when adjudicating cases concerning religious free exercise. This law, according to the dictates of Congress applied to all levels—state and federal—as well as all branches of government. Brent (1999) finds that, post-RFRA, Congress was able to increase circuit court support for free exercise claims; the levels of litigant success in this issue area actually increased to that almost identical to the pre-*Smith* era. Brent concludes that legal socialization to follow Supreme Court decision-making and the institutional mechanisms that make the Court a functioning principal (i.e., oversight, review and possible reversal) were not enough to maintain compliance with *Smith* when contradicted by congressional legislation.

The purpose of this chapter is to reexamine the role of the Supreme Court's religious free exercise jurisprudence on decisions at the Courts of Appeals. Specifically, this chapter seeks to rectify not only the theoretical, but also methodological concerns from previous examinations that conclude Congress too can serve as a principal of the judicial hierarchy in spite of the justices' interpretation of the constitution. Using originally collected data, this chapter examines a larger time period (1943 to 2008) attempting to decipher whether or not circuit court panels actually deviated from Supreme Court precedent in favor of congressional statute when deciding religious free exercise cases. Moreover, this examination goes beyond simple outcome of the panel and seeks to determine the influence of both Congress and the Supreme Court on the

choices judges make. In an empirically rigorous approach, this chapter examines whether shifts in jurisprudence and congressional statutes influenced judges—if at all—equally across ideologies.

Multiple Principals of the U.S. Courts of Appeals

Given the hierarchical nature of the federal judiciary, the conventional wisdom is that judges at the U.S. Courts of Appeals are constrained decision-makers, operating as adjudicators of the law that the Supreme Court establishes. While the justices at the Supreme Court arguably are unconstrained to vote their policy preferences or ideologies (Segal and Spaeth 1993, 2002), lower court judges do not enjoy the same institutional insulation as the justices serving at the nation's highest court. Although lower court judges also serve life tenures and have no direct electoral accountability, jurists at the Courts of Appeals do not have discretionary control of their dockets; they must hear appeals from the federal district courts as a matter of right.

Furthermore, judges are subject to Supreme Court review and possible reversal. Serving on the court of last resort, the justices hand down doctrines, guiding principles and precedents for lower courts to apply; circuit court judges can choose to defy, but they weigh doing so at the peril of being sanctioned in the form of a reversal that establishes the weight of national precedent. This institutional set-up, where lower court judges are subject to review and possible reversal by the Supreme Court, establishes an institutional, hierarchical constraint on the choices judges make. The ability for circuit court judges to vote their policy preferences should indeed be constrained by the fact that virtually all

decisions handed down at the Courts of Appeals are within the Supreme Court's appellate jurisdiction to oversee.

The ability of review and reversal, however, is the only formal mechanism the Supreme Court has at its disposal to induce compliance and remedy noncompliance. When compared to market-based firms and companies examined through a principal-agent lens (e.g., Moe 1984; Songer, Segal and Cameron 1994), the Supreme Court sits at a disadvantage in terms of the available tools to induce compliance of lower courts within the federal judiciary. A majority of the tools that alleviate the problems inherent in the principal-agent relationship belong not to the justices, but instead are constitutionally delegated to Congress. With these powers available to it, Congress can be seen as an *additional* principal to the lower federal courts.

For example, Moe (1984) also discusses at length the problem of adverse selection that principals face in a given hierarchy. Adverse selection speaks to the difficulty in "unobservability of the information, beliefs, and values on which the decisions of others are based" (754); principals would obviously like to select agents that are like-minded, but due to this unobservability, are unable with perfect precision to employ only ideal agents. This problem in the principal-agent dynamic is not tapped or necessarily relevant in a Circuit Court and Supreme Court interaction. The "Advice and Consent" process of Article III judgeships would suggest that adverse selection would obviously be problematic for nominating presidents and confirming senators. For the most part, the Supreme Court supervises—with a few notable exceptions—circuit court judges where the justices had no input as to "employment."

The powers to reduce benefits (rather than salaries) and to impeach judges are constitutionally available, but these possible means of exertion of principal influence on agents rests with Congress not the justices. Moreover, market-based companies can offer incentives for productivity and compliance with a given owner's or manager's goals. The Supreme Court cannot offer such economic incentives for judges deciding more cases in line the Court; furthermore, an Article III judge theoretically receives a salary regardless of her productivity or compliance with the justices. If raising salaries could be perceived as a reward for performing one's job well, this outlet is of course available but the power does not rest with the Supreme Court, but rather in the hands of Congress.

Specifically, with regards to the federal judiciary, Congress has the ability to modify—expand or contract—the appellate jurisdiction of the federal judiciary. This power generally allows Congress to determine the types of cases the judicial branch is able to hear and decide. While the justices may indeed determine the doctrines and guiding legal principles for lower courts to apply, Congress has the ability to entirely remove a class of statutory appeals from federal court review. Furthermore, despite the fact that it is rarely used, Congress also has the ability to add or subtract the size and shape in terms of layers of the federal judicial hierarchy. Absent compliance with the preferences of the legislative branch, Congress is more aptly and constitutionally equipped to sanction judges at the Courts of Appeals when compared to the Supreme Court.

With the acceptance of the fact that there may be multiple principals of the Courts of Appeals, the question still remains as to which of the principals should the circuit courts follow when Congress and the Court collide. Where each principal provides

divergent instructions for the lower courts, will judges at the Courts of Appeals choose to follow the Supreme Court or Congress? The answer to this question should depend upon the type of issue or question—statutory or constitutional interpretation—that a given circuit court must answer. With regards to statutory interpretation, lower federal courts should follow the dictates and instructions of Congress. Previous research has concluded that Congress should and can influence the lower federal courts in statutory interpretation cases (e.g., Randazzo, Waterman, and Fine 2006). This should not come as a surprise given the fact that the Supreme Court, too, recognizes and continues to show deference to this coordinate branch of government when the question presented to the Court is statutory in nature (e.g., *Chevron, Inc.* v. *National Resources Defense Council,* 1984). Thus, while both possible principals of the judicial hierarchy may present divergent instructions for the lower courts, deference to Congress in statutory interpretation cases follows Supreme Court jurisprudence and precedent.

When the circuit courts are presented with a constitutional question, it should be the case that jurists at the Courts of Appeals apply and adhere to Supreme Court rulings. Previous research suggests and, generally, concludes that the lower courts comply with Supreme Court decision-making. Although the degree of compliance and the time to eventual adherence vary (e.g., Benesh and Reddick 2002; Brent 1999, 2003; Songer 1987; Songer and Sheehan 1990), compliance at the U.S. Courts of Appeals is the norm rather than the exception (e.g., Songer and Haire 1992; Songer et al. 1994). This degree of adherence to the Court is even achieved under instances of high judicial discretion. As the Klein (2002) examination of Courts of Appeals finds, circuit court judges often decide cases in the absence of clear Supreme Court decisions to serve as guides. While

Courts of Appeals judges apparently seize the opportunity to make the law, the legal rules developed at the circuit courts often are "not dramatically different from what would have emerged from the Supreme Court" (136). Given this adherence even when Supreme Court preferences are implicit at best, compliance should hold even when Congress presents instructions that are in explicit opposition to those of the justices.

The free exercise of religion offers an ideal issue area to examine and test the effect of congressional and Supreme Court influence on the Courts of Appeals. As mentioned briefly above, this issue area not only underwent an explicit shift in Supreme Court jurisprudence established in *Employment Division, Department of Human Resources of Oregon* v. *Smith* (1990), but also presents the circuit courts with a statute, the Religious Freedom Restoration Act (RFRA), that attempts to overturn the justices' decision. Thus, circuit court panels and, as such, jurists are presented with differing instructions from the two possible principals of the lower courts of the federal judiciary. Will the Courts of Appeals adhere to the standard established in *Smith* or follow RFRA? Given the fact that this chapter examines a longer time period, this issue area also provides not just one, but two congressional attempts to undo the Court's decision in *Smith*. Moreover, as a salient issue area, compliance in cases where a civil liberty or right is in question (Baum 1978), making this an appropriate and rigorous test of Supreme Court adherence when Congress and the Court collide over constitutional questions.

Although previous examinations (Brent 1999, 2003) have examined this issue area, several questions still remain. First, the main dependent variable utilized in the Brent (1999, 2003) examinations was whether a given panel decision favors the free

exercise claimant or not. For example, a claimant challenged the constitutionality of a government restriction on free exercise and free speech grounds. The panel decision would be considered supportive of the free exercise claimant if the panel determined the laws or actions were unconstitutional even if the panel rested its justification on free speech grounds and not free exercise rights. While this may seem like a plausible approach, it more accurately measures support for individual rights. As a result, the coding strategy can be problematic when examining judicial decision-making at the Courts of Appeals in a given issue area and especially the impact of *Smith* and RFRA. It can potentially inflate the level of support for free exercise rights where none actually existed. To determine the influence of the Court and Congress on Courts of Appeals decision-making, the appropriate measure should be whether or not circuit court panels and jurists supported free exercise rights. Second, the unit of analysis in the Brent (1999, 2003) examinations was a given case (panel decision). The results, therefore, do not discuss whether and to what degree the *Smith* decision and/or RFRA influenced the choices judges at the Courts of Appeals make. In other words, will Congress impact judges when the Court and Congress present conflicting instructions on constitutional interpretation questions? Will this effect be equal across all ideologies?

Congress, the Court, and Free Exercise of Religion

In *Sherbert* v. *Verner* (1963), the Supreme Court established a shift in jurisprudence for cases claiming a governmental burden on the free exercise of religion. There, the Court determined that if a government regulation or action places a significant burden on religious exercise, the government must show that the burden is justified by a

compelling interest. Furthermore, that the law or action is the least restrictive means of accomplishing that interest in order to survive a challenge of constitutionality. What would eventually be called the *Sherbert-Yoder* compelling interest test placed a heavy burden of proof on the government and the presumption of unconstitutionality for that government action. In such instances where there was indeed a burden on religious free exercise, it would be difficult for government actions or regulations to survive challenge. When compared to lesser levels of judicial scrutiny such as rational-basis tests (e.g., in age discrimination cases) and intermediate (or heightened) scrutiny (e.g., in sex/gender discrimination cases), the compelling interest test from *Sherbert* should be highly supportive of individual rights in the area of religious free exercise.

With *Employment Division, Department of Human Resources of Oregon* v. *Smith* (1990), the Court majority explicitly rejected the *Sherbert-Yoder* test. With such a heavy burden for government actions and regulations to pass constitutional muster, the *Sherbert-Yoder* test made each individual an exception under the law. In place of the compelling interest test, the Court put forth a new standard suggesting that free exercise clause no longer relieves an individual's obligation to comply with valid and neutral laws that were generally applicable. This would be the case even if the law possibly burdened the free exercise of religion. This drastic change from the most stringent of judicial scrutiny to a law resembling the doctrine announced in 1879 by the Court's decision in *Reynolds* v. *United States* (Gedicks 1992). In essence, if a government action or law was secular and served a legitimate interest, the Court would presume that the action or law to be constitutional. As adjudicators of the law set by the Court, jurists at the Courts of Appeals should follow this change in jurisprudence. With the presumption of validity,

support for free exercise rights should decrease after the Court's decision in *Smith*. Compared to decisions made under the *Sherbert-Yoder* jurisprudence, challenges against government actions or laws as unconstitutional burdens on religious free exercise should fail more often after *Smith*. Looking at support for the free exercise claimant, Brent (1999) does indeed find this to be the case. In regards to individual votes of judges, if the Court is truly a constraint, there should be decreases in support for free exercise rights across judicial ideologies—liberal and conservative.

While there was dissent within the Court regarding the majority's decision in Smith, Congress also opposed the shift in jurisprudence. In response, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. As explicitly stated in the legislation as its purpose, Congress attempted to explicitly overturn the Court's decision by stipulating that religious free exercise questions must be adjudicated using the compelling interest test. In deciding the constitutionality of a regulation that impedes on free exercise, the Court was instructed by Congress to whether the regulation serves a compelling governmental interest and that regulation is the least restrictive of means. Moreover, RFRA required the usage of the compelling interest test across levels of government—including the federal judiciary and agencies—as well as to the state governments. RFRA represents a direct opposition and contradiction to the Court's instructions in Smith. With the ample evidence (e.g., Benesh and Reddick 2002; Songer 1987; Songer and Sheehan 1990) suggesting that compliance with the Supreme Court at the Courts of Appeals, it should be the case that the circuit court decisions should support free exercise rights in accordance with *Smith* decision instead of elevating rights as mandated in RFRA.

Supportive of the dual-principals hypothesis of the federal judiciary, Brent (1999), however, finds that, post-RFRA, Congress was able to increase circuit court support of free exercise claims; the levels of litigant success in this issue area actually increased to levels almost identical to the pre-*Smith* (i.e., *Sherbert-Yoder*) era. Brent concludes that legal socialization to follow Supreme Court decision-making and the institutional mechanisms that make the Court a functioning principal (oversight, review and possible reversal) were not enough to maintain compliance with *Smith* when contradicted by congressional legislation. While this may indeed be the case, there is an alternative hypothesis that remains untested.

The dictates of RFRA applied to all levels of government—state and federal. While the Supreme Court may not look kindly upon congressional legislation impeding upon its duty as interpreter of the U.S. Constitution or even constraining the decision-making powers of the several states, the justices have traditionally shown deference to Congress being able to instruct and oversee federal agencies and bureaucracies. It can be suggested that an increase in support for free exercise rights can emerge from RFRA while still maintaining compliance with the Supreme Court. For cases where the federal government is a party, an increase in support for free exercise rights would not be overly surprising; it would show the appropriate deference to Congress controlling federal agencies. But, for cases where the federal government is not a party, it should be the case that circuit decisions follow the *Smith* decision.[1]

[1] As a caveat to the impact of RFRA, any changes in support for free exercise rights through panel decisions might be minimal at best when the federal government is a litigant in a given case. Research has shown the importance of the Solicitor General's Office and other federal attorneys in influencing the final decisions (e.g., Galanter 1974; Ulmer 1985; McGuire 1998). At the Supreme Court, the Solicitor General's Office and the federal government as a whole have more experience appearing before the Supreme Court and achieve greater degrees of success (Segal 1988, 1990; Sheehan, Mishler and Songer 1992; McGuire 1998). Songer and Sheehan (1992) note the same federal government advantage in the U.S. Court of

The Court had an opportunity in 1997 to answer the question of RFRA's constitutionality as applied to the federal judiciary and the several states. With *City of Boerne* v. *Flores* (1997), the Court responded to RFRA, firing back that the power to interpret the Constitution belongs to the Court via judicial review. And, if there were any questions or doubts as to this power and its legitimacy, Congress and the President, as the Court cites, could revisit and consult *Marbury* v. *Madison* (1803). As the Court reaffirmed, the standard used in free exercise cases is no longer the compelling interest test from *Sherbert*; it is *Smith*. As a result, there should no longer be any confusion at the Courts of Appeals as to whether it should follow *Smith* or RFRA.

In 2003, Brent reexamines this question of lower court compliance. The Brent (2003) examination finds evidence that comports with the suggestion that the Court is indeed the effective principal. Litigant success, when making a free exercise claim, returned to levels post-*Smith* and pre-RFRA. In other words, challenges on the grounds of impeding on free exercise were less successful due to the lower standard that governmental actors must satisfy in order to survive constitutional challenge; this, of course, sits well with *Smith* and the idea that the Supreme Court is the final adjudicator of the Constitution. This should be the case when examining support for free exercise rights as opposed to support for the free exercise claimant. Moreover, given the low discretion (presumption of validity) afforded under a rational-basis test like *Smith*, the effect of low

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Appeals. Much like Sheehan et al. (1992), Songer and Haire (1992) in looking at obscenity cases at the Court of Appeals, find varying degrees of success for different kinds of litigants, but also a distinct advantage for the federal government. Thus, even if RFRA mandates a higher standard for governmental actions to pass constitutional muster, the effect may be mitigated by the fact that the federal government simply wins more often (either due to experience of their litigators or to the fact that it is the federal government as the opposing party).

support for religious free exercise should be constant across all judges whether they are liberal or conservative.

Although the Court struck down (at least, in part) the congressional attempt to usurp the Court's decision in *Smith*, Congress continued its efforts to reinstate the *Sherbert-Yoder* compelling interest test as the appropriate standard to decide free exercise questions. The Court in *Boerne* took a harsh view of the usage of the Enforcement Clause in the Fourteenth Amendment as the justification for RFRA. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although it focused mainly on zoning issues and incarcerated individuals, the act stipulated that the compelling interest standard was to be used in determining the legality of actions or laws that may burden the free exercise of religion. The RLUIPA applied to all institutions receiving federal funds, which Congress justified its ability to regulate on its ability to tax and spend. Not forcing other institutions to follow congressional statute, but rather making it conditional on receipt of federal funds is a congressional tool that the Supreme Court generally has deemed acceptable. In other words, the *Sherbert-Yoder* test would be the standard to determine the constitutionality of any action that burdens the free exercise of religion if that institutional received federal funds. As a result, the actor burdening religious rights now faced a presumption of unconstitutionality and carried the burden of showing that the action or law was the least restrictive of means in meeting a compelling interest. Given the fact that the RLUIPA finds its powers in congressional authority to tax and spend (again, something the Supreme Court has a favorable view of), the circuit court decisions should show an increase in support for religious free exercise claims. Due to the low level of discretion afforded to jurists under the compelling interest test,

circuit court judges should vote in accordance with RLUIPA across all ideologies. In other words, liberal, moderates and conservatives alike should support religious free exercise more than decisions adjudicated under *Smith* or *Boerne*.

The Court affirmed the constitutionality of the RLUIPA in *Cutter* v. *Wilkinson* (2005). The Court confirmed that the RLUIPA was an appropriate usage of congressional powers to tax and spend. Therefore, Congress could make the use of the *Sherbert-Yoder* standard as the appropriate test of constitutionality of actions, laws or regulations of institutions that receive federal funds. As a result, there should be a negligible difference when comparing the decisions made after RLUIPA and *Cutter*. There should a greater level of support for free exercise rights than the jurisprudential period immediately following *Smith* and prior to RFRA.

As mentioned quickly above, judicial discretion is arguably low in each of the jurisprudential periods. Whether it is the *Sherbert-Yoder* compelling interest test or the *Smith* standard, the Court has assigned the burden of proof. Because the burden of proof is on the government is heavy under the compelling interest test, religious free exercise rights should be higher when compared to the *Smith* standard. The reverse is also true of course. The burden of proof under rational basis-type tests such as *Smith* is assigned to the individual challenging the government law or action. Under this legal consideration, it should the case that support for religious free exercise should decrease. Furthermore, case decisions and even individual judge's votes should reflect similar directionalities. If the heavy constraints of the *Sherbert-Yoder* compelling interest test and the *Smith* standard are truly influences on the choices judges make, the impact should be consistent for liberals and conservatives alike. Conservatives, who are assumed to prefer a lower

level of adjudication, should evince a high level of support for religious free exercise rights under the compelling interest standard when compared to the *Smith* standard. Liberals, on the other, are free to vote in accordance with their ideologies under *Sherbert-Yoder*. But, with the Court's decision in *Smith* and affirmation in *Boerne,* it should be the case that liberals vote to suppress religious free exercise rights.

If lower court jurists comply with the Supreme Court (or even Congress), that adherence should be attained by the fact that all judges regardless of their ideologies voted in a manner consistent with compliance. Thus, it should be the case that under the *Smith* standard (comparatively more conservative decisions) liberals voted on average should vote against free exercise rights and, arguably, against their ideological preferences to support such rights. If lower court compliance with the Supreme Court-established precedent is simply achieved through convergent preferences of legal considerations and judicial ideology, it may signal a fundamental breakdown in the federal judiciary. Through judicial review, the Supreme Court in its decisions determines the "line" in which the government—state and federal—cannot cross in terms of individual rights and liberties. As a result, a failure on the part of lower court judges to comply with the Supreme Court, especially when preferences are divergent, can have drastic repercussions for those civil rights and liberties.

Data and Methods

In order to test the hypotheses discussed above, original data was collected for all free exercise cases decided at the U.S. Courts of Appeals from 1945 to 2006. Identification of the population of cases was completed through searches on

Lexis/Nexis[2], which includes some information for case opinions that were unpublished.[3] In order to be included in the population of cases employed in this chapter[4], cases had to pertain to the constitutionality of regulations or provisions that seek to limit and restrict religious free exercise rights. Cases that were cross-petitioned were counted as separate cases if the petitions challenged different provisions or aspects of a government regulation seeking to restrict the right of religious free exercise. Moreover, cases containing multiple dockets were also counted as separate cases if the circuit court opinion made note of the controversies as being different for each docket, indicated different provisions for each docket, or arose from different states within the circuit.

For the case-level analyses, two dependent variables were coded. One was whether the panel decision favored the free exercise claimant, which is the dependent variable of interest in the Brent (1999, 2003) examinations. The other dependent variable was coded 1 if the panel decision favored the free exercise of religion, which again is the appropriate coding when examining the influence of a shift in a particular jurisprudence. This case was coded 1 if the court decision favored free exercise rights and 0 otherwise.

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[2] While this method does place much discretion in the researcher in identifying the relevant population of cases, the selection process proceeded quite cautiously to ensure that as many relevant cases were included in the examination. The coding strategy was as follows. First, searches on Lexis/Nexis were completed employing search terms similar to those utilized in Brent (1999, 2003). For the entire period, they were "free exercise w/5 religio!", "compelling w/5 interest w/10 religio!", "wisconsin w/10 yoder", "free exercise clause", "strict scrutiny w/25 religio!", and "sherbert w/10 verner"; for cases after 1989, the search terms were "employment division w/10 smith", "religious freedom restoration act", "RFRA", and "Boerne". Second, each case was then screened to ensure that it involved a controversy surrounding a government regulation or action that restricts the free exercise of religion.

[3] As Songer (1988) cautions, the use of Shepard's Citations only elicits those cases include full citations or case names in the opinion. Lexis/Nexis is the appropriate source for case selection. While it occasionally suffers from problems of search over-inclusion as well as under-inclusion, it does offer information on published cases or and some information for unpublished, alleviating some concerns as to the potential bias from including only published decisions.

[4] Cases where the controversy began with such a regulation, but the overall question answered by the court focused on standing, justiciability or jurisdiction, were also included. If one is to accept the possibility of opinions being post-hoc justifications for ideological voting, omission of such litigation and the subsequent decisions would be problematic and bias the results.

For the judge-level analyses, the dependent variable is coded 1 if the judge voted to support free exercise rights, 0 otherwise. Thus, the unit of analysis is a given vote choice by a given judge.

Again, judicial decisions at the Supreme Court and the circuit courts, however, do not occur within a proverbial vacuum. Instead, judges at the Courts of Appeals serve with other judges serving on the panel; in each of these situations, a judge makes a decision examining the same case facts and legal considerations as the other panelists. The collegial nature of judicial decision-making at the Courts of Appeals suggests a hierarchical structure in the data where judges' choices *are nested within* cases. As a result, I employ a two-level hierarchical model (Raudenbush and Bryk 2002; Skrondal and Rabe-Hesketh 2004), which is the appropriate method and empirically rigorous specification of circuit court compliance.[5] The structural model can be written as follows:

(Level-1 equation) $\eta_{ij} = \pi_{0j} + \pi_{1j}$Judge's Ideology$_{ij} + \pi_{2j}$Panel Composition$_{ij}$ +
π_{3j}Judge's Ideology$_{ij}$ X Panel Composition$_{ij}$ +
π_{4j}Panel Composition$_{ij}$ X *Smith*$_j$ +
π_{5j}Judge's Ideology$_{ij}$ X Panel Composition$_{ij}$ X *Smith*$_j$ +
π_{6j}Panel Composition$_{ij}$ X RFRA$_j$ +
π_{7j}Judge's Ideology$_{ij}$ X Panel Composition$_{ij}$ X RFRA$_j$ +
π_{8j}Panel Composition$_{ij}$ X *Boerne*$_j$ +
π_{9j}Judge's Ideology$_{ij}$ X Panel Composition$_{ij}$ X *Boerne*$_j$ +
π_{10j}Panel Composition$_{ij}$ X RLUPA$_j$ +
π_{11j}Judge's Ideology$_{ij}$ X Panel Composition$_{ij}$ X RLUIPA$_j$ +
π_{12j}Panel Composition$_{ij}$ X *Cutter*$_j$ +
π_{13j}Judge's Ideology$_{ij}$ X Panel Composition$_{ij}$ X *Cutter*$_j$

(5.1) (Level-2 equations) $\pi_{0j} = \beta_{00} + \beta_{01}$U.S. Litigant$_j$ +
β_{02}*Smith*$_j$ +
β_{03}*Smith*$_j$ X U.S. Litigant$_j$ +
β_{04}RFRA$_j$ +

[5] If judges' choices are indeed nested by cases, a failure to account for the hierarchical nature of the data would lead to a violation of the assumption that the observations are independent and the error terms for these observations are uncorrelated.

$$
\begin{aligned}
&\beta_{05}\text{RFRA}_j \text{ X U.S. Litigant}_{j\,j} + \\
&\beta_{06}\textit{Boerne}_j + \\
&\beta_{07}\textit{Boerne}_j \text{ X U.S. Litigant}_j + \\
&\beta_{08}\text{RLUIPA}_j + \\
&\beta_{09}\text{RLUIPA}_j \text{ X U.S. Litigant}_j + \\
&\beta_{010}\textit{Cutter}_j + \\
&\beta_{011}\textit{Cutter}_j \text{ X U.S. Litigant}_j + r_{0j} \\
\pi_{1j} = \beta_{10} &+ \beta_{11}\text{U.S. Litigant}_j + \\
&\beta_{12}\textit{Smith}_j + \\
&\beta_{13}\textit{Smith}_j \text{ X U.S. Litigant}_j + \\
&\beta_{14}\text{RFRA}_j + \\
&\beta_{15}\text{RFRA}_j \text{ X U.S. Litigant}_{j\,j} + \\
&\beta_{16}\textit{Boerne}_j + \\
&\beta_{17}\textit{Boerne}_j \text{ X U.S. Litigant}_j + \\
&\beta_{18}\text{RLUIPA}_j + \\
&\beta_{19}\text{RLUIPA}_j \text{ X U.S. Litigant}_j + \\
&\beta_{110}\textit{Cutter}_j + \\
&\beta_{111}\textit{Cutter}_j \text{ X U.S. Litigant}_j
\end{aligned}
$$

As Equation 5.1 notes, judges' choices (level-1) are nested within cases (level-2). Any case-level heterogeneity that is not captured by the observed effects is encompassed by r_{0j}, which represents random intercepts to account for unobserved heterogeneity in the response that vary across cases.

Judge's ideologies are ideological scores derived from the Giles et al. (2001) coding strategy. According to the Giles et al. (2001) measurement strategy, a given judge's ideology takes on the value of the nominating president's common space score (Poole 1998) if senatorial courtesy is inactive. If senatorial courtesy is in play, a given judge's ideology takes on the value of the home-state senator of the president's party; if both home-state senators share the same party affiliation as the nominating President, the judge's ideology is measured as the average of the senators' common space scores. For ease of interpretation with the dependent variable, I multiply the common space scores by a value of -1, so that increasing values translates into increasing liberalism.

Panel Composition is measured as the proportion of the other panelists with an ideology score (as determined by the Giles et al. coding strategy, which again is "flipped") less than zero, which is the theoretical midpoint of the common space scores. As for the case-level variable, *U.S. Litigant* is a dummy variable coded 1 if one of the parties to a case is the federal government or a member of the federal government in his official capacity, 0 otherwise.

Smith is dummy variable coded 1 if the case was decided after the *Smith* decision, but prior to the passage of RFRA. In all other instances, the variable is coded 0. *RFRA* is a variable coded 1 if the case was decided after RFRA and prior to the *Boerne* decision, 0 otherwise. *Boerne* is coded 1 if the case was decided post-*Boerne* and prior to the passage of the RLUIPA, 0 otherwise. RLUIPA is a variable coded 1 if the case was decided after the RLUIPA and prior to the Supreme Court's decision in *Cutter*. Finally, *Cutter* is another dummy variable coded 1 if the case was decided after Cutter, 0 otherwise. As a result, the baseline category for the model is the *Sherbert-Yoder* time period.[6]

As indicated in Equation 5.1, each of the case-level variables are cross-level interacted with judges' ideology. The reason for the interactions stems from Bartels (2005, 2009) regarding the variation in the effects of ideology on vote choice. The impact of case facts, for example, should shift the overall behavior, which would be the probability of voting liberally; in doing so, the impact of case facts can also affect the

[6] Due to the lack of variation in the dependent variable at the judge-level, the analyses employing the multilevel model excludes all cases (16) decided prior to the Court's decision in *Sherbert* v. *Verner* (1963).

role of policy preferences on that eventual vote choice. I control for those by specifying cross-level interactions of case-level factors with judicial ideology.[7]

Results and Discussion

Aggregate-Level Results: Case Outcomes

[Insert Table 5.1 about here.]

Table 5.1 presents the results from the aggregate analyses of the effect of congressional and Court actions on panel decisions. This table compares the results from using the different dependent variables of interest—support for religious free exercise rights versus support for the free exercise claimant. Prior to *Sherbert*, the general conclusion is that support for free exercise rights and support for free exercise claimants were relatively low (at about 6 percent). After the Court's decision in *Sherbert* v. *Verner* in 1963, support for free exercise rights and claimants increased to about 30 percent. Given the low level of support prior to *Sherbert*, the change is quite dramatic. This confirms the expectation that the *Sherbert*-*Yoder* compelling interest test should be more supportive of the free exercise of religion. Although support for either free exercise rights or claimant are identical prior to and immediately following the Court's decision in *Sherbert*, the dependent variables of interest begin diverging after the Supreme Court handed down *Wisconsin* v. *Yoder* (1972). As an initial confirmation of the approach(es) used in this chapter, I will first discuss the results when utilizing the dependent variable

[7] Because of the rather small proportion of cases where the United States is an actual litigant, it is difficult to specify a model that specifies interaction of the *U.S. Litigant* variable with each of the corresponding jurisprudence periods of interest. The general conclusion from the aggregate analyses suggests that the presence of the United States as a litigant only decreases support for religious free exercise rights. The only time period where there are significant differences between Republican- and Democrat-appointed judges is the period after RFRA but before *Boerne*. I did estimate a model omitting the interactions of U.S. Litigant and the different jurisprudential periods. The results, which can be found in Appendix C, are generally the same and the overall substantive conclusions do not change.

from the Brent (1999, 2003) examinations. If the results do not comport or confirm the findings in those examinations, the results here obviously would be suspect.

Fortunately, the results confirm the conclusions from both the Brent (1999) and the Brent (2003) examinations. First, the Supreme Court's decision in *Smith* did indeed appear to have a significant impact on panel outcomes and the support for the free exercise claimant; more specifically, support for the claimant dropped from about 38 percent to about 30 percent when comparing the *Sherbert-Yoder* period to the *Smith* standard. Second, the aggregate analysis suggests an increase in support for the free exercise claimant after the passage of RFRA. This is of course replicates and confirms the conclusions drawn from the Brent (1999) examination. When utilizing support for the free exercise claimant as the dependent variable of interest, it appears that Congress through RFRA did indeed change the manner in which circuit court panels decide. Also similar to the Brent (1999) examination, the increase is so great that it returns to levels that akin to the *Sherbert-Yoder* era (about 38 percent). The results suggest that Congress effectively altered circuit court jurisprudence in the area of religious free exercise. Third, the results again confirm that the Court's decision in *Boerne* effectively decreased support for religious free exercise claimants. As evinced by the change in circuit court panel outcomes, the conclusion from the Brent (2003) examination is that the Supreme Court reasserted itself as the primary principal of the U.S. Courts of Appeals.

Although the replication of the Brent (1999, 2003) examinations confirms the conclusions made in each, a perusal of Table 5.1 and the results regarding religious free exercise rights suggests a very different story. Where the Brent (1999, 2003) examinations' dependent variable suggests an increase in support immediately after the

Court's decision in *Yoder*, support for free exercise rights remains rather constant. The consistency of free exercise rights comparing *Sherbert* and *Yoder* makes sense; given the fact that there was no formal change in legal considerations and the Court affirming the compelling interest test in *Yoder*, the level of support for free exercise rights should and did remain rather constant at about 30 percent.

The most striking result from the aggregate analysis is the interpretation of the impact of the Court's decision in *Smith* on circuit court panel outcomes, which changes depending on the dependent variable of interest. While both support for the free exercise claimant and rights are rather close, the inflated support for free exercise claimants in the *Sherbert-Yoder* period show a drastic decrease in support (about 8 percent). In other words, the interpretation when using the dependent variable from the Brent (1999, 2003) examinations is that the Supreme Court indeed influenced decisions at the Courts of Appeals. This finding sits well with the expectation that the Supreme Court is the principal of the Courts of Appeals.

When examining support for free exercise rights, the changes in panel outcomes between the *Sherbert-Yoder* era and the *Smith* decision, however, are negligible at best (about 2 percent). A difference of proportions test suggests that there is no significant difference in case outcomes when comparing the impacts of *Sherbert-Yoder* and *Smith*. In other words, the conclusion from examining case-level support for free exercise rights suggests that circuit court panels did not decrease support as would be predicted by a replacement of the compelling interest test with the *Smith* standard. Investigating further, Table 1 also separates out cases by whether the United States was a litigant in the case or not. When parceling out cases by whether the federal government was a party or not,

Table 5.1 shows the expected impact of *Smith* where the percent support of all cases did not. In both instances, support for free exercise rights decreased about 7 percent after the Supreme Court handed down its decision in *Smith*. Given the small number of cases where the United States is a litigant in the post-*Smith* and the already low level of support, the decrease in support of free exercise rights is not substantial. The difference for non-U.S. litigant cases, however, is a decrease of about 8 percent after the *Smith* decision.

When examining the impact of RFRA on overall (i.e., all cases in the sample) panel support for free exercise rights, Table 5.1 shows little or no difference in the decision-making patterns in case outcome. The post-RFRA time period shows about 1 percent decrease in support for religious exercise rights when compared with the period immediately following *Smith*. It appears that RFRA did not have the effect on religious free exercise rights at the circuit courts that Congress may have wanted when passing the legislation.

Recall the discussion above regarding the possible effect RFRA might have (increasing support for religious rights) while still maintaining congruence with Supreme Court adjudication. If RFRA were to have an impact, it would be in cases where the federal government was an actual litigant. As evinced in Table 5.1, support for free exercise rights remained virtually the same in cases where the United States was not a litigant. Whenever the federal government was a litigant in the case, support for free exercise rights, on the other hand, did increase after the passage of RFRA (4 percent). This offers—at the very most—mild support for the fact that an increase in support could occur, but the increase is neither sizable nor substantial given the small number of cases

in the sample. Furthermore, federal litigants appear to have far more success, which supports previous work showing deference by the Courts of Appeals to a coordinate branch government (e.g., Songer and Haire 1992; Songer and Sheehan 1992). As noticeable in Table 5.1, the free exercise rights generally are supported less whenever the federal government is a litigant compared to instances where they are not a direct party. Much like the Supreme Court, federal government laws, regulations and actions are more likely to survive constitutional challenge at the Courts of Appeals.

Similar to the findings in Brent (2003), free exercise rights decreased after the Court's decision in *Boerne*. Overall, support for religious free exercise fell from 27 percent after RFRA to about 20 percent post-*Boerne*. When the sample is split between U.S. and non-U.S. litigant cases, the decrease is about 12 and 5 percents, respectively.

With the passage of the RLUIPA by Congress, support for free exercise rights increased. The percentage of cases making favorable decisions for free exercise rights rises to the level of decisions made under the *Sherbert-Yoder* era of adjudication. It is an increase of almost 10 percent support, suggesting that Congress through its tax and spend powers effectively altered the test to be used when determining the constitutionality of actions, laws and regulations of institutions receiving federal funds. A difference in proportions test confirms the significant increase in support for free exercise rights after RLUIPA.

As discussed above, by placing the power to regulate free exercise of religion on the tax and spend powers, Congress created a law and a means for exerting influence on other institutions—state and federal—that the Supreme Court has generally accepted. As confirmed by *Cutter*, Congress reinstated the *Sherbert-Yoder* compelling interest test as

the appropriate standard. While showing a circuit court decisional decrease in support of religious free exercise, the percentages from the post-*Cutter* period are negligible in comparison to cases decided immediately following the passage of the RLUIPA.

The aggregate analyses of case outcomes suggest that compliance is the norm rather than the exception at the Courts of Appeals. Support for free exercise rights decreased (although minimally) after the passage of *Smith* and increased with the passage of the RLUIPA. Moreover, when examining cases where the federal government is a litigant, the overall low level of support for individuals challenging the actions as unconstitutional comports with Supreme Court decision-making. Deference to a coordinate branch of government is mirrored at the Courts of Appeals. As opposed to previous examinations, the results do not indicate that RFRA had a substantial impact on decisions at the circuit courts. Although the RLUIPA affected circuit court decision-making, its impact and effect are consistent with Court interpretation and acceptance of the usage of the tax and spend powers. With the non-effect of RFRA and the impact of RLUIPA, the results confirm and lend support to the fact that the Supreme Court is the sole principal of the lower federal courts when interpreting the Constitution.

Aggregate-Level Results: Judges' Choices

[Insert Table 5.2 about here]

The question, however, still remains as to whether Supreme Court compliance was achieved because all judges at the circuit courts adhered to Court jurisprudence or whether it was accomplished by judges still voting in accordance with their ideologies. Given the often high correlation between partisanship and ideology as well as the general

success of presidents to nominate like-minded individuals, partisanship of the appointing president should serve as a good indicator of the ideology of a given judge. As would be expected, Democrat-appointed jurists should, overall, support free exercise rights than their Republican-appointed counterparts. But, the true test would be whether and to what degree these judges adjusted their decision-making to comport with Supreme Court adjudication in the area of religious free exercise. Table 5.2 presents the percentage of votes by time period, the presence of the federal government or not, and partisanship of the appointing president.

As the results in Table 5.2 suggest, Republican-appointed judges follow the general pattern of the results from Table 5.1. For both cases where the federal government is a litigant and is not a party to a case, Republican-appointed judges decreased support for religious free exercise rights after the Supreme Court handed down the *Smith* decision. For non-U.S. Litigant cases, a difference of proportions test confirms and suggests significant differences in adjudication by Republican-appointed judges pre- and post-*Smith*. It can be suggested, however, that the shift in jurisprudence from the *Sherbert-Yoder* test to the *Smith* standard would be favored and preferred by more conservative jurists. As such, the true test of constraint would come when presented with adopting and accepting the compelling interest test. The passage of the RLUIPA appears to have led to an increase in support for free exercise rights by Republican-appointed judges. For non-U.S. litigant cases, the increase in support for free exercise rights is confirmed by a difference in proportions test.[8] Even when Republican-appointed judges

[8] I only indicate the significant changes based on difference of proportions tests comparing one time period to the time period preceding it. Determination of significant differences is based on one-tailed tests due to the fact that there are directional hypotheses as to the influence of Supreme Court decisions and congressional statutes.

would not prefer to do so, they supported the free exercise of religion prior to *Smith* and post-RLUIPA. This, of course, conforms to the expectation that the Supreme Court is the principal of the federal judiciary.

The results for Democrat-appointed judges, however, are mixed. As the case with Republican-appointed judges, support for the federal government is rather high. Where the federal government is a litigant, Democrat-appointed judges show a good degree of deference much like the justices. Democrat-appointed jurists decreased support for free exercise rights by about 3 percent. After *Boerne*, Democrat-appointed judges' support for individual challengers of federal government actions, laws and regulations becomes anemic at best. Clearly, these judges voted against their assumed preferences by supporting the federal government.

The impact of RFRA is most apparent with Democrat-appointed jurists. Apparently recognizing that RFRA could indeed change the standard from *Smith* to the compelling interest test, these jurists supported free exercise rights about 50 percent whenever the federal government was a direct party. Whereas Republican appointed judges made little movement in U.S. litigant cases until RLUIPA, it appears that Democrat-appointed judges seized the opportunity that RFRA presented to increase support for religious free exercise rights. This impact, of course, was short lived.

Where the federal government is not a litigant, the results do not comport with the expectation that the Supreme Court can impact and constrain the choices judges make. First, there is no noticeable decrease in support by Democrat-appointed judges after the *Smith* decision. Adjudicating under the valid and neutral standard, these jurists simple voted near identically to how they voted under the compelling interest standard from

Sherbert. Although there is a decrease in support after RFRA, Democrat-appointed jurists continued to support free exercise rights at a high level even after the Court's decision in *Boerne*. The levels to which they support religious free exercise rights in the *Boerne* period are almost as high as their decision-making under the compelling interest test of RLUIPA and *Cutter*. In other words, the Court's decision in *Smith* made little or no difference for Democrat-appointed judges. As a loose confirmation of this (non-)effect on the choices of Democrat-appointed judges, the likelihood-ratio χ^2 test serves a test of the distribution of liberal votes across time periods; it is a test of whether the proportions across time periods are equally distributed. For Republican-appointed judges and in the overall percentage of votes, the χ^2 test suggest significant variation across the time periods; decision-making varied across different jurisprudential context. The only instance of insignificant alterations (at the judge-level) in the proportion of support for free exercise rights comes from Democrat-appointed judges in cases where the federal government is not a litigant.

Multilevel Model Results: Judicial Decision-Making

To confirm these findings and also examine the impact of collegial constraints, I estimated the random intercept multilevel model specified in Equation 5.1 using full maximum likelihood. Table 5.3 presents the results from the random effects (intercept) logistic regression. The appropriateness of the random effects design is demonstrated through both the variance component and the Breusch-Pagan Lagrangian Multiplier Test, which provides a test statistic, distributed as χ^2, for the significance of the random

effects.[9] First, the estimate of the variance component is significant, confirming there is unobserved heterogeneity at the case-level. Second, the Breusch-Pagan χ^2 is significant well beyond the 0.001 level, which suggests that there is a significant difference between the random effects model and a pooled logistic regression that does not model the random parameters. In other words, the random intercept model provides a better fit of the data compared to a simple logistic regression. While there are indeed coefficients that are significant, they are conditional on the base-line effect. In order to account for both the main and conditional effects, I interpret the results using predicted probabilities based on the results presented in Table 5.3.[10]

[Insert Table 5.3 about here]

While the random intercept model may be the appropriate specification, the time period interactions push the limits of the multilevel model and even a regular logistic regression. Because of the specification of these time period interactions, I am in essence estimating a random intercept multilevel model for each time period where cases are sparse.[11] This is problematic for maximum likelihood estimations because it only has asymptotic properties. As such, estimates from the multilevel should be viewed cautiously. The results and the corresponding interpretations presented below only serve as an additional empirical verification of the hypotheses and aggregate analyses discussed above.

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[9] The null hypothesis is that the variance of r_{0j}, the case-level effects, equals zero.

[10] Please note that I use predicted probabilities derived from the coefficients; in order to account for the uncertainty of the estimates, the predicted probabilities are based on 5,000 iterations simulated in a process akin to utilizing the "clarify" procedure (King, Tomz, and Wittenberg 2000). More specifically, I drew 5,000 simulations for the parameters from a normal distribution. The sampling distribution had a mean equal to the vector of parameter estimates and a variance equal to the variance-covariance matrix of estimates. Then, the simulated parameter estimates were translated into predicted probabilities of a liberal (supporting free expression) vote, where the independent variables were set to the values of interest.

[11] For example, there are only 33 cases after *Cutter* and only 46 cases between *Smith* and RFRA.

[Insert Figure 5.1 about here]

Figure 5.1 presents the predicted probabilities of supporting free exercise rights by time period and by whether the United States is a litigant or not. Figure 5.1a are the predicted probabilities of supporting free exercise rights for non-U.S. litigant cases. During the *Sherbert-Yoder* jurisprudential period, liberal judges supported free exercise rights at a predicted probability of about 59 percent when the United States was not a litigant in a given case. This high level of support is not surprising given the fact that the compelling interest test established in *Sherbert* and affirmed in *Yoder* serves to only reinforce liberal ideology. For moderates and conservatives, the predicted probabilities of supporting religious free exercise rights are 36 and 17 percents, respectively. Tests for significant differences across levels of ideologies suggest that liberals, moderates and conservatives behave significantly different from each other. This is a surprising finding. The heavy burden of proof on the government under strict scrutiny should induce similar decision-making from judges across levels of ideology. Instead, the significant differences comparing liberals, moderates and conservatives suggest that the *Sherbert-Yoder* test may not be as compelling as predicted.

An alternative hypothesis is that *Sherbert-Yoder* is not necessarily strict scrutiny in spite of its designation as the compelling interest test. Similar to other "tests" from Supreme Court precedents like undue burden for abortion, judicial inquiry does not begin with the government interest and whether the law is the least restrictive of means. Rather, the appropriate level of judicial scrutiny applies after a determination of whether or not the government significantly or substantially burdens rights. In the instant issue area, the question is whether or not government substantially burdens the free exercise of

religion. This initial question prior to application of judicial scrutiny of the government interest and the manner of the restriction may add in enough judicial discretion making the *Sherbert-Yoder* compelling interest test akin to intermediate scrutiny functionally.

To punctuate this point of increased judicial discretion, judges across levels of ideology do not significantly alter support for free exercise rights when the United States is a litigant. Deference to a coordinate branch of government dictates that support for free exercise rights should decrease when the United States is direct party. As depicted in Figure 5.1b, the predicted probabilities liberal, conservative and moderate judges are about 61, 51 and 40 percents, respectively. These are not statistically different from the predicted probabilities when adjudicating non-U.S. litigant cases.

After the Court's decision in *Smith*, the predicted probability of supporting free exercise rights when in a non-U.S. litigant case for a liberal judge is about 38 percent. While this may seem like a drastic increases compared to the *Sherbert-Yoder* time period, the difference is not statistically significant. In other words, liberal judges did not vote significantly different when adjudicating under the *Smith* standard or the *Sherbert-Yoder* compelling interest test. Given the lower standard of adjudication from *Smith* that is counter to ideology, this lack of responsiveness to Court jurisprudence on the part of liberal judges suggest a lack of hierarchical constraint when preferences and legal considerations are divergent. After *Smith*, the predicted probability of a conservative judge supporting religious free exercise rights raises to about 44 percent, which seems counter to expectations that conservative judges should prefer and take advantage of a lower level of judicial scrutiny. But, according to a test in changes in the predicted probabilities, conservative judge do not vote significantly different compared to

adjudication under *Sherbert-Yoder*. The predicted probability of supporting free exercise rights for a moderate judge increases by about 40 percent after *Smith*, which is also insignificant. This is counter to predictions that moderates should be the ones most sensitive and likely to comply with Supreme Court decision-making. This is not the case. Post-*Smith*, judges across levels of ideology support free exercise rights at the same levels as they did under the *Sherbert-Yoder* test.[12]

When circuit court judges are presented with countering instructions from the two possible principals, what will these jurists do? The predicted probability for conservative jurists, who would most likely prefer the *Smith* standard to the compelling interest test commanded by RFRA, is about 21 percent. Moderates, too, decrease support for free exercise rights; the predicted probability is about 38 percent. This decrease in predicted probabilities from the *Smith* era is marginally significant. Liberal judges support religious exercise rights with a predicted probability of about 69 percent. Tests of the predicted probabilities suggest statistically insignificant differences comparing adjudication immediately following *Smith* and RFRA. It appears that judges remain unresponsive to the shift in the Court's *Smith* decision and unmoved by contradictory instructions from Congress.

Recall that the application of RFRA applied to all levels of government—state and federal. For the latter, this presents an opportunity to support free exercise rights even though the federal government is a litigant. By instructing federal agencies to apply the compelling interest test, it may be the case the support for free exercise rights increases after RFRA when the federal government is a direct party. As Figure 5.1b

[12] Tests of differences in predicted probabilities between non- and U.S. litigant cases during this time period suggest no significant differences across levels of ideology.

suggests, moderates and liberals—as would be expected—behave in a manner consistent with adjudication under the *Sherbert-Yoder* compelling interest test. The predicted probability of supporting free exercise rights for liberal judges is about 98 percent, but this is statistically indistinguishable from liberal judges' adjudication of non-U.S. litigant cases. When the federal government is a litigant, the predicted probability for moderates is about 83, which is marginally significant compared to non-U.S. litigant cases. Tests for differences in predicted probabilities suggest that conservatives vote similarly whether or not one of the litigants in a case is the federal government, which is not contradictory to expectations. Deference to a coordinate branch, which is also supported by Supreme Court precedent, suggests that the effect of the *Sherbert-Yoder* test on these cases may be muted. Conservatives appear to behave consistent with deferring to the United States rather than elevating free exercise rights as stipulated in RFRA.

With *Boerne*, support for free exercise rights remains at levels akin to decision-making under *Smith*. According to Figure 5.1a, the predicted probabilities across levels of ideologies are about 37, 32 and 29 percents for liberals, moderates and conservatives, respectively. After the Court firmly dealt with any possible confusion as to which branch was the appropriate interpreter of the Constitution, circuit court judges—uniformly across policy preferences—voted to restrict religious free exercise rights. Test for differences in predicted probabilities across levels of ideology confirm that judges behave similarly after the Court's decision in *Boerne*.[13]

With the passage of the RLUIPA, support for religious free exercise rights decreased across all levels of judicial ideology when the U.S. is not a litigant. The

[13] Tests of differences in predicted probabilities between non- and U.S. litigant cases during this time period suggest no significant differences across levels of ideology.

predicted probability of a liberal judge supporting free exercise rights is about 20 percent, which is an insignificant change when compared to circuit court jurisprudence immediately following the Court's decision in *Boerne*. The same trend holds for conservative and moderate judges. Moderates support free exercise rights at a predicted probability of about 16 percent. For conservative judges, the predicted probability is about 17 percent after the passage of RLUIPA. It appears that Congress, by making strict scrutiny the appropriate test for religious free exercise rights when a governmental actor receives federal funding, did not significantly influence the choices judges make at the circuit courts. As mentioned above, support for the RLUIPA and therefore individual religious rights, however, comports with Supreme Court interpretation of congressional tax and spend (as well as commerce) powers. Test for significant differences in predicted probabilities across levels of ideology confirm that liberals, moderates and conservatives alike after the passage of RLUIPA.

When the U.S. is a litigant, the impact of RLUIPA is significant on one group of judges: conservatives. Compared to their adjudication after Boerne (predicted probability of virtually zero), conservative judges increased support to about 53 percent after RLUIPA. Voting against their policy preferences, these jurists began supporting free exercise rights at levels akin to their moderate and liberal brethren, suggesting that the dictates of RLUPIA (i.e., using the compelling interest test) had a significant effect even when preferences are divergent.

To confirm this new jurisprudence after RLUIPA and the notion that the congressional statute comports with Supreme Court decision-making, Figure 5.1a also presents the predicted probabilities after *Cutter*. There should be no significant

differences in judicial behavior comparing circuit court jurisprudence after RLUIPA with lower court decision-making after the Court's decision in *Cutter*. The predicted probability of a conservative judge supporting free exercise rights is about 69 percent after *Cutter*. For moderates and liberals, the predicted probabilities are 68 and 63 percents, respectively. Tests for differences in predicted probabilities suggest that liberals, moderates and conservatives vote similarly. Tests, however, reveal that moderates (marginally) and conservatives significantly increased support for free expression rights after the Court's *Cutter* decision.

Multilevel Model Results: Panel Effects and Judicial Compliance

[Insert Figure 5.2 about here]

Figure 5.2 presents the predicted probabilities by levels of ideology and panel composition. Specifically, Figures 5.2a, 5.2b and 5.2c depict the predicted probabilities for liberals, moderates and conservatives, respectively. Because tests comparing contexts (non- versus U.S. litigant cases yield no significant differences, I only present the predicted probabilities for instances where the federal government is not a direct party.

There are only two time period where changing levels of panel composition significantly alters judicial behavior: adjudication immediately following *Smith* and *Boerne*. But, the effect of panel composition is conditional on the ideology of a given judge. Under *Smith* and *Boerne*, legal considerations comports with conservative ideology. Deviating from sincere behavior to incorporate liberal perspective would be irrational. Although there is movement in the predicted probabilities (in the wrong direction), tests confirm that there are no significant changes in the behavior of

conservative judges at varying levels of panel composition. The impact, however, is counter to expectations.

The impact of panel composition appears to be on liberals and moderates, but is also counter to expectations. Liberals and moderates are significantly more likely to support free exercise rights prior when deciding cases with only conservatives on the panel. Under *Smith*, the presence of another like-minded jurist significantly decreases the predicted probability of a liberal judge supporting exercise rights by about 40 percent. The decrease continues to 16 percent, when liberals serve with only other liberals. The same trend holds for adjudication under *Boerne*. The subversive interpretation is that *Smith* and *Boerne* appears to have polarized judges rather than induce similar decision-making, which is to be expected from a low discretion test like the *Smith* standard.

The insignificant findings in other periods have two plausible explanations. First, the *Sherbert-Yoder* test increases judicial discretion because of the initial inquiry of whether or not restrictions actually burden free exercise of religion. As such, judges have ample discretion to vote in accordance with their policy preferences and collegiality does not offer enough incentive to deviate from behaving sincerely. Second, the heavy burden of the compelling interest test provides little discretion and therefore does not afford panel composition the opportunity to significantly alter judicial behavior.

Neither explanation, however, finds overwhelming evidence. Adjudication during *Sherbert-Yoder* jurisprudential regime suggests judges significantly polarize. There are significant differences across levels of panel composition, confirming the notion that the compelling interest test may functionally be an intermediate level of scrutiny. Decision-making under RLUIPA and Cutter, however, does not elicit

polarization. Tests for differences confirm judges vote similarly; this result holds across levels of panel composition.

Conclusion

This chapter has attempted to decipher whether or not Congress can effectively alter jurisprudence at the U.S. Courts of Appeals. Under conflicting instructions from Congress and the Supreme Court over constitutional interpretation, the case-level results here suggest that the Supreme Court is the sole principal of the federal judiciary. Generally, where Congress differs from Supreme Court mandates regarding the Constitution, the Courts of Appeals follows the Supreme Court. And, any congressional influence on circuit court decisions appears to conform to Supreme Court adjudication and deference to a coordinate branch of government.

But, the results also suggest that compliance and adherence to Supreme Court decisions (at least in the area of free exercise rights) may not be as complete and immediate as would be predicted if circuit court panels and judges were always faithful adjudicators of the law. The circuit court reaction to the *Smith* decision was rather slow. There are unsubstantial alterations to decision and voting behavior after *Smith*. It was not until the circuit courts were presented with conflicting instructions from Congress and an affirmation of the *Smith* decision through the Court's decision in *Boerne* did support for free exercise rights (at the case-level) mirror the predicted outcome—less support for free exercise claims at the U.S. Courts of Appeals.

Unfortunately, the aggregate judge-level analysis suggests something more problematic for the federal judiciary. Conditional on the partisanship of the nominating

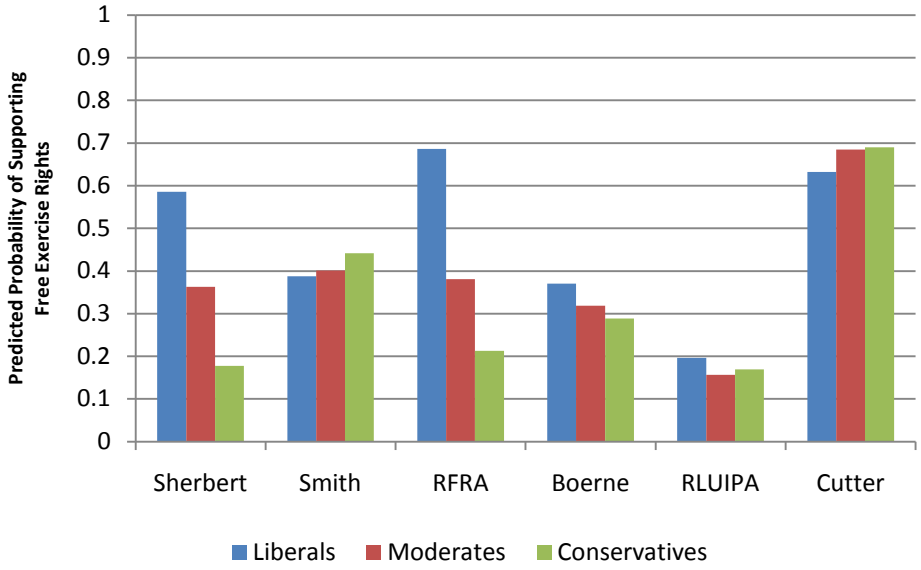
president, circuit court judges were confronted with several opportunities to vote against their assumed policy preferences and comply with Supreme Court decision-making. Republican-appointed jurists exhibited behavior that suggests they are indeed constrained by the Supreme Court. These judges increased support for free exercise rights after the *Sherbert* and after the passage of RLUIPA. In each instance, these judges should have preferred the opposite—suppress rather than support free exercise rights. Yet, their adjudication follows a pattern consistent with Supreme Court adjudication.

Democrat-appointed judges, on the other hand, appear to have resisted the application of the Supreme Court's decision in *Smith*. Instead of decreasing support for free exercise rights after *Smith*, Democrat-appointed judges voted no differently than how they voted under the compelling interest standard. While there is a decrease in support after the passage of RFRA, these judges continued to vote at high levels of support even after the *Boerne* decision. The level of support is as high as their voting behavior under the compelling interest test from RLUIPA and its affirmation in *Cutter*.

The results from the multilevel model confirm that liberal judges (and perhaps all judges) were unresponsive to Court jurisprudence after *Smith*. Liberal judges continued to support religious exercise rights (at similar levels as they did under *Sherbert*-*Yoder*) in spite of the fact that Court jurisprudence indicated a fundamental change in the opposite direction (less support). Comparing one time period with the next, there are no significant alterations to the behavior of liberal judges. Moderates and conservatives did however increase support for free exercise rights after the Court's affirmation of RLUIPA's instructions.

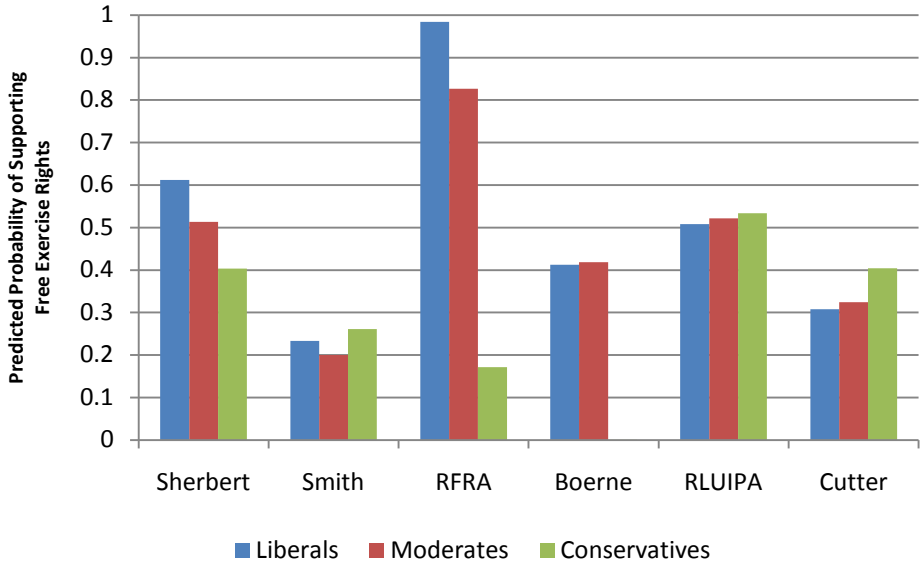
As such, another implication of this examination is that Supreme Court compliance may indeed be the norm at the U.S. Courts of Appeals, but this compliance is incomplete. In the area of free exercise of religion, compliance (which again is found in the case-level analyses) is driven by judges whose preferences are convergent with the relevant legal consideration. This, of course, raises doubt as to the Court's ability to present a significant and substantial hierarchical constraint on the choices judges make.

Figure 5.1a. Predicted Probabilities of Supporting Free Exercise Rights by Time Period: Non-U.S. Litigant Cases



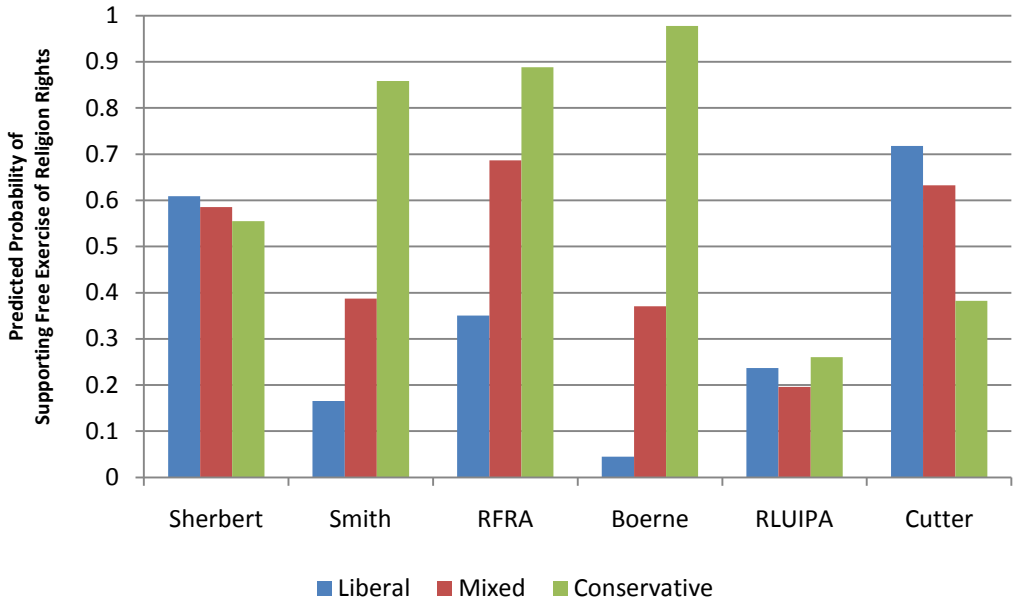
Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 5.1b. Predicted Probabilities of Supporting Free Exercise Rights by Time Period: U.S. Litigant Cases



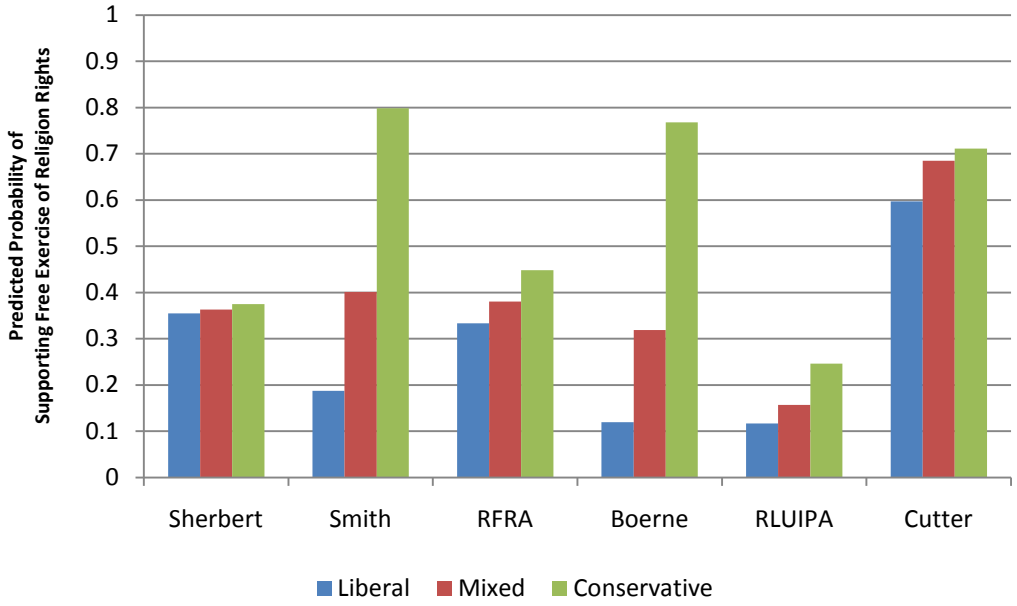
Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 5.2a. Predicted Probabilities of Supporting Religious Free Exercise Rights by Panel Composition and Time Period: Liberal Judges



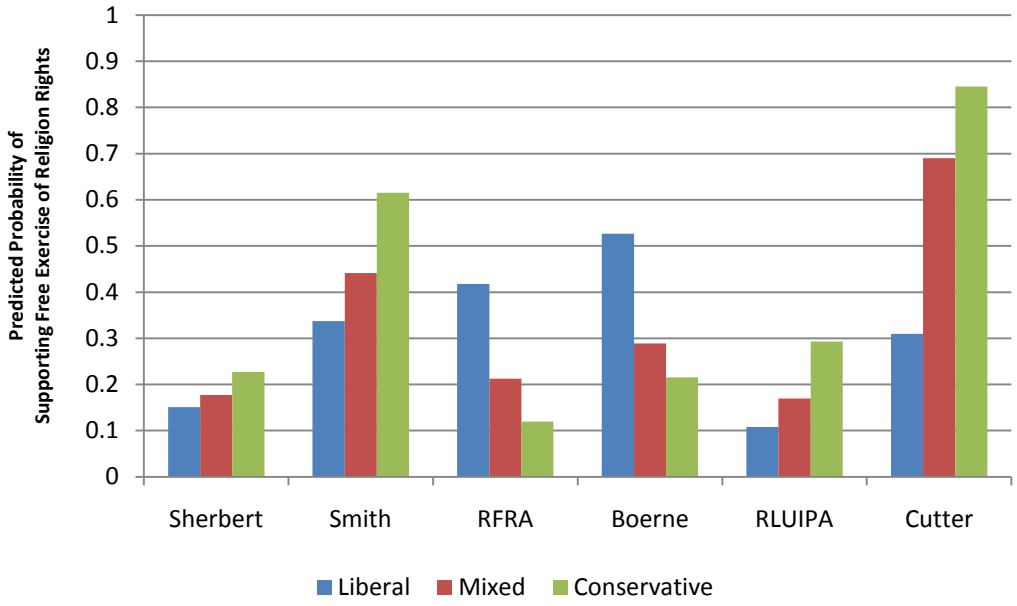
Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 5.2b. Predicted Probabilities of Supporting Religious Free Exercise Rights by Panel Composition and Time Period: Moderate Judges



Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure 5.2c. Predicted Probabilities of Supporting Religious Free Exercise Rights by Panel Composition and Time Period: Conservative Judges



Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.

Table 5.1. Support for Free Exercise Claimant and Free Exercise Rights By Jurisprudential Period

	Before *Sherbert*	Post-*Sherbert* Pre-*Yoder*	Post-*Yoder* Pre-*Smith*	Post-*Smith* Pre-RFRA	Post-RFRA Pre-*Boerne*	Post-*Boerne* Pre-RLUIPA	Post-RLUIPA Pre-*Cutter*	Post-*Cutter*
All Cases								
Percent Support for Free Exercise Claimant[a]	0.063	0.297	0.383	0.304	0.381	0.238	0.367	0.303
Percent Support for Free Exercise Rights[b]	0.063	0.297	0.308	0.283	0.270	0.206	0.300	0.273
Total Cases	16	37	266	46	63	63	90	33
U.S. Litigant Cases Only								
Percent Support for Free Exercise Rights[c]	0.000	0.350	0.216	0.143	0.188	0.067	0.200	0.143
Total Cases	14	20	116	7	16	15	20	7
Non-U.S. Litigant Cases								
Percent Support for Free Exercise Rights[d]	0.500	0.235	0.380	0.308	0.298	0.250	0.329	0.308
Total Cases	2	17	150	39	47	48	70	26

Note: Sherbert = *Sherbert* v. *Verner* (1963); Yoder = *Wisconsin* v. *Yoder* (1972); Smith = *Employment Division, Department of Human Resources* v. *Smith* (1990); RFRA = Religious Freedom Restoration Act of 1993; Boerne = *City of Boerne* v. *Flores* (1997); RLUIPA = Religious Land Use and Institutionalized Persons Act of 2000; Cutter = *Cutter* v. *Wilkinson* (2005).

[a] $\chi 2 = 13.945$ with 7 df; p-value = 0.052

[b] $\chi 2 = 8.0211$ with 7 df; p-value = 0.331

[c] $\chi 2 = 11.271$ with 7 df; p-value = 0.127

[d] $\chi 2 = 4.459$ with 7 df; p-value = 0.726

Table 5.2. Judges' Support for Free Exercise Rights by Jurisprudential Period

	Before *Sherbert*	Post-*Sherbert* Pre-*Yoder*	Post-*Yoder* Pre-*Smith*	Post-*Smith* Pre-RFRA	Post-RFRA Pre-*Boerne*	Post-*Boerne* Pre-RLUIPA	Post-RLUIPA Pre-*Cutter*	Post-*Cutter*
U.S. Litigant Cases Only								
Percentage of All Votes [a]	0.061	0.359	0.218	0.190	0.259	0.057	0.200	0.190
Total Number of Votes	49	64	348	21	58	53	60	21
Republican Appointed Judges [b]	0.000	0.440	0.199	0.188	0.150	0.115	0.244	0.267
Total Number of Votes	9	25	161	16	40	26	41	15
Democrat Appointed Judges [c]	0.077	0.324	0.235	0.200	0.500	0.000	0.105	0.000
Total Number of Votes	39	37	187	5	18	27	19	6
Non-U.S. Litigant Cases Only								
Percentage of All Votes [d]	0.333	0.235	0.413	0.362	0.305	0.292	0.319	0.286
Total Number of Votes	6	51	463	138	141	154	210	77
Republican Appointed Judges [e]	0.250	0.231	0.400	0.327	0.315	0.232	0.307	0.238
Total Number of Votes	4	26	245	98	92	82	114	41
Democrat Appointed Judges [f]	0.500	0.240	0.429	0.450	0.286	0.366	0.319	0.353
Total Number of Votes	2	25	217	40	49	71	94	34

Note: Sherbert = *Sherbert* v. *Verner* (1963); Yoder = *Wisconsin* v. *Yoder* (1972); Smith = *Employment Division, Department of Human Resources* v. *Smith* (1990); RFRA = Religious Freedom Restoration Act of 1993; Boerne = *City of Boerne* v. *Flores* (1997); RLUIPA = Religious Land Use and Institutionalized Persons Act of 2000; Cutter = *Cutter* v. *Wilkinson* (2005).

[a] $\chi 2 = 26.931$ with 7 df, p-value = 0.001; [b] $\chi 2 = 14.138$ with 7 df, p-value = 0.049; [c] $\chi 2 = 32.912$ with 7 df, p-value = 0.000; [d] $\chi 2 = 16.952$ with 7 df, p-value = 0.018; [e] $\chi 2 = 12.473$ with 7 df, p-value = 0.086; [f] $\chi 2 = 8.863$ with 7 df; p-value = 0.263

Table 5.3. Model of Support for Religious Free Exercise Rights			
	Coefficient	Std. Err.	*p* -value
Ideology	2.659	1.293	0.040
U.S. Litigant	0.757	1.174	0.519
Panel Composition	0.113	0.674	0.866
Ideology X U.S. Litigant	-1.463	1.166	0.210
Ideology X Panel Composition	-0.758	1.784	0.671
Smith	-1.928	2.737	0.481
Ideology X *Smith*	-5.267	3.817	0.168
Panel Composition X Smith	4.184	2.759	0.129
U.S. Litigant X *Smith*	-2.314	1.999	0.247
Ideology X U.S. Litigant X *Smith*	0.922	3.551	0.795
Ideology X Panel Composition X Smith	5.163	4.841	0.286
RFRA	-0.129	1.674	0.939
Ideology X RFRA	-3.085	4.197	0.462
Panel Composition X RFRA	0.449	1.943	0.817
U.S. Litigant X RFRA	1.699	1.948	0.383
Ideology X U.S. Litigant X RFRA	5.360	3.514	0.127
Ideology X Panel Composition X RFRA	7.811	5.303	0.141
Boerne	-2.594	2.568	0.312
Ideology X *Boerne*	-9.040	4.585	0.049
Panel Composition X Boerne	4.710	2.894	0.104
U.S. Litigant X *Boerne*	-38.281	219.560	0.862
Ideology X U.S. Litigant X *Boerne*	-34.088	386.435	0.930
Ideology X Panel Composition X Boerne	14.098	7.242	0.052
RLUIPA	-2.245	2.129	0.292
Ideology X RLUIPA	-1.194	3.617	0.741
Panel Composition X RLUIPA	0.869	2.449	0.723
U.S. Litigant X RLUIPA	1.864	2.584	0.471
Ideology X U.S. Litigant X RLUIPA	0.556	3.293	0.866
Ideology X Panel Composition X RLUIPA	-0.627	5.145	0.903
Cutter	1.409	2.242	0.530
Ideology X *Cutter*	0.623	4.003	0.876
Panel Composition X Cutter	0.394	2.817	0.889
U.S. Litigant X *Cutter*	-4.312	5.806	0.458
Ideology X U.S. Litigant X *Cutter*	-1.149	6.346	0.856
Ideology X Panel Composition X Cutter	-6.043	5.697	0.289
Constant	-0.760	1.172	0.517
Variance Component (Random Intercept)	6.908	0.208	
rho	0.935	0.004	
Log Likelihood	-431.451		
Number of Votes	1849		
Number of Cases	598		

Note: *p* -values are based on two-tailed tests; *Smith* = *Employment Division, Department of Human Resources* v. *Smith* (1990); RFRA = Religious Freedom Restoration Act of 1993; *Boerne* = *City of Boerne* v. *Flores* (1997); RLUIPA = Religious Land Use and Institutionalized Persons Act of 2000; *Cutter* = *Cutter* v. *Wilkinson* (2005).

Chapter 6
Conclusion

This dissertation has attempted to decipher whether and to what degree Supreme Court decisions influence the choices judges make. Specifically, the dissertation examines lower court compliance from a more appropriate perspective. Instead of simply examining whether or not circuit court judges vote and decide cases in accordance with Court doctrines and precedents, it attempts to determine whether the law (as established by the Supreme Court) can induce compliance when preferences and legal considerations are divergent. Conclusions of the nation's highest court influencing circuit court decision-making should be based on adherence from potential "rogue agents", who are judges that would prefer voting in line with their respective ideologies rather than the relevant legal considerations.

Hierarchical Constraint and Heterogeneity in Ideology

[Insert Table 6.1 about here.]

Table 6.1 summarizes the findings from the previous empirical examinations. Utilizing originally collected data on cases at the U.S. Courts of Appeals from three different issue areas, the examinations above empirically incorporate the theoretical conceptualizations of hierarchical constraint as well as the possibility of heterogeneity in the preference-behavior relationship. In other words, each of the examinations accounts for the interaction between ideology and the law. The role of ideology is not constant as has been previously assumed in many empirical models of judicial decision-making.

Rather, there are instances and contexts that may accentuate or attenuate the role of ideology on judicial vote choice. For the purposes of this dissertation, legal considerations can indeed increase the role of ideology when preferences and the law indicate similar behavior. Moreover, the law can attenuate the impact of policy preferences when the law and ideology are divergent. The justices by structuring adjudication through tests of constitutionality can increase and decrease judicial discretion. As a result, the role of ideology in the judicial voting calculus can rise and fall in line with higher and lower amounts of freedom judges have to decide in accordance with their policy preferences. Furthermore, the level of discretion from legal considerations (i.e., the applicable level of judicial scrutiny) has serious implications for compliance and the degree to which judges evince hierarchical constraint.

Under more stringent theoretical and empirical tests of compliance, the studies above examine compliance and find evidence that circuit court judges are generally responsive to jurisprudence at the nation's highest court. Similar to previous examinations, circuit court compliance seems to be the norm rather than the exception (at least according to the case-level aggregate analyses). The degree of hierarchical constraint, however, varies by context (i.e., level of judicial discretion), ideological convergence of the law and policy preferences, and the direct applicability of a particular precedent. Moreover, judges in some instances are more than willing to deviate from legal considerations and vote in accordance with their ideologies.

In regards to the freedom of expression cases, Chapter Three finds that circuit court judges overall make decisions that conform to predictions from a content-neutrality jurisprudential regime established by *Grayned* v. *Rockford* (1972) and *Chicago Police*

Department v. *Mosely* (1972). Under instances of low judicial discretion, there is evidence that judges do vote in accordance with Supreme Court jurisprudence. The little amount of judicial discretion elicits a good degree of hierarchical constraint, meaning judges vote counter to their preferences when legal considerations and ideology indicate divergent predictions. For example, it is the case that liberal jurists vote to suppress free expression rights when the relevant legal consideration suggests lower levels of support for individual liberties (e.g., a threshold or less protected content-neutral restriction). This constraint, however, is far from complete. After *Grayned*, liberal judges, when adjudicating content-based restrictions of less protected expression, support liberties at high levels. This possible deviation may not be overly problematic given the fact that moderates and conservatives also support free expression rights at high levels; the latter, of course, would prefer not to do so. This, of course, is surprising given the fact that less protected restrictions generally are considered valid because such expression is outside the scope of First Amendment protections.

Under the heavy burden of the law (low judicial discretion), judges regardless of ideology should vote similarly and in accordance with Supreme Court jurisprudence. After the supposed establishment of the content-neutrality jurisprudential regime, liberals, moderates and conservatives, however, polarize even under instances of low judicial discretion. After *Grayned*, polarization of judges seems to be the new reality of judicial decision-making of free expression cases at the circuit courts. This holds under almost every context—low or high judicial discretion. Of course, in the latter, polarization is expected due to the fact that judges are free to vote in accordance with their policy preferences. Where laws are content-neutral and subject to intermediate

scrutiny, judges across levels of ideology vote significantly different. As Table 6.1 points out, the differences, however, are not substantial, suggesting that polarization among jurists under instances of high judicial discretion is mild at best. It appears that liberals failed to seize an opportunity to support free expression rights more than the underwhelming levels when compared to adjudication under strict scrutiny.

Liberal judges, however, are not the only ones that failed to seize a strategic opportunity to vote in accordance with their policy preferences. With the confusion from the plurality decision in *Webster* v. *Reproductive Health Services* (1989), conservative judges were not more likely to apply the undue-burden standard, which is a lower level of adjudication than strict scrutiny and became the law of the land under the *Marks* doctrine. Thus, conservatives apparently missed the boat that would allow them to vote in accordance with their ideologies. As detailed in Chapter Four, it was not until the Court's decision in *Planned Parenthood* v. *Casey* (1992) that judges—across ideologies—adopted undue burden.

For abortion cases, decisional outcomes suggest circuit court compliance with the Supreme Court. But, again, the degree of hierarchical constraint is far from complete. Under *Roe* v. *Wade*, judges supported abortion rights similarly and at high levels, which mirrors the suggestion that strict scrutiny is stringent test and, generally, offers little judicial discretion. With undue burden and its offer of high judicial discretion when a case pertains to a restriction not presented in *Casey*, judges were free to vote in accordance with their policy preferences. As a result, liberals and conservatives polarize—each voting as their respective ideologies predict.

Where a case pertains to a *Casey* provision, the Court declared that these restrictions generally are not unduly burdensome on women seeking abortions and therefore constitutional *per se*. It is clearly the case that moderate judges and conservatives followed suit, voting to support abortion rights at lower levels when presented with any of the *Casey* provisions. But, liberal judges, as potential "rogue agents", appear to have defied the Supreme Court refusing to uphold *Casey*-type provisions. Similar to conservative judges deciding the constitutionality of content-based free expression restrictions, liberal judges presented with a *Casey* provision behave closer to what the attitudinal model would predict than the legal model. As with the free expression cases and religious free exercise (e.g., liberal judges' behaviors after *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 1990), there is doubt as to whether hierarchical constraint can be achieved when preferences are divergent from the pertinent legal consideration.

Panel Effects

As shown in Chapters Three and Four, panel composition, too, can have serious consequences for compliance and the amount to which judges behave as if they are constrained by Supreme Court jurisprudence. The impact of panel ideological composition appears to be conditional on the level of judicial discretion and a given judge's ideological divergence with the relevant legal consideration. Where the law predicts a similar outcome as ideology, judges are not constrained and therefore panel composition plays little to no significant role on judicial decision-making. Under instances of high judicial discretion, judges—across levels of ideology—are free to vote

in accordance with their policy preferences. Here, panel composition has at best a minimal influence on the choices judges make.

But, the effect of panel composition is strongest for compliance and hierarchical constraint. This influence is most obvious for liberals determining the constitutionality of *Casey* provisions. Where a judge is a potential "rogue agent" and therefore compliance is already suspect, increasing panel ideological heterogeneity (i.e., serving with judges that are ideologically distant) can induce greater levels of adherence to Supreme Court decision-making. If a potential "rogue agent" serves on a panel with other ideologically proximate brethren, a given judge is more likely to vote closer to ideology than what the law instructs.

The results from this dissertation can loosely speak to another possible explanation for judicial compliance. Klein (2002) contends that a collective goal of making sound legal policy constrains judges. In other words, the goal of making good law induces judges to be sensitive to Court preferences and jurisprudence. It may be the case that making sound legal policy is a driving determination in judicial decision-making. The chapters above offer evidence of collegiality even when judicial discretion is high. Under content-neutral restrictions, there is evidence that both liberals and conservatives are sensitive to other jurists on the panel and adjust their decisions accordingly. When the stakes are clearly high as with the case of abortion, the evidence from the previous chapters is more in line with the strategic model (i.e., ready and willing to maximize their policy preferences by voting ideologically whenever possible) rather than a collective goal or a team theory approach to judicial decision-making. When judicial discretion is high, compliance is achieved, but because judges are free to vote in

accordance with their policy preferences. The fact that a potential rogue judge complies when judicial discretion is low appears to be a function of the law and the ideological proximity of the other panel members. In other words, especially in the area of free expression, judges take full advantage of instances where there is a lack of a potential whistleblower among the other panelists. They will vote in accordance with ideology and, therefore, deviate from legal considerations even when the law clearly suggests otherwise.

An important implication from the results regarding panel effects is that panel composition can generally play a role in eliciting greater levels of compliance from potential rogue agents when judicial discretion is low. Specifically, compliance and higher levels of hierarchical constraint are more likely occurrences when judges serve on panels that are ideologically heterogeneous. A recommendation would be that lower court judges serve on mixed ideological panels. This, of course, would run counter to circuit courts randomly assigning judges to sit on panels. If there was enough variation in ideology within each circuit, random assignment overall, however, should be sufficient to induce greater levels of compliance with Supreme Court jurisprudence.

Panel effects and legal considerations (established through Court precedent), however, can only go so far in inducing compliance and hierarchical constraint. Chapter Four's examination of abortion is a clear example. When presented with a *Casey* provision, liberal judges simply refused to suppress abortion rights unless surrounded by conservatives. For another example, Chapter Five documents the adjudication of free exercise of religion cases at the circuit courts. As the results suggest, compliance is suspect whenever judges' ideologies are divergent from legal considerations. Panel

composition and low judicial discretion has no effect if these potential "rogue agents" are simply unresponsive to changes in Court jurisprudence.

From the decision in *Smith*, the valid and neutral standard, which is akin to rational basis and the lowest threshold for restrictions to pass constitutional muster, offers little judicial discretion. Liberal judges, who would ideologically be resistant to such a standard, did not decrease support as expected from a lower level of judicial scrutiny. Instead, liberal judges voted at statistically similar levels as they did when adjudicating under the *Sherbert*-*Yoder* compelling interest test. Furthermore, liberal judges, regardless of whether they served on an ideologically homogenous or heterogeneous panel, were unresponsive to the shift in standard in *Smith*. Although Chapter Five's analyses suggest that the Supreme Court instead of Congress is the appropriate principal of the federal judiciary, there are doubts as to whether legal considerations (and panel composition) can constrain the choices judges make when preferences are divergent and judges choose to remain unresponsive to changes in Court jurisprudence.

Broader Implications and Possible Applications

There are specific implications from this dissertation. First, when examining judicial decision-making, models must incorporate not only the legal considerations and ideology, but also the possible interaction between law and policy preferences. While this notion is not new to the literature, few examinations have explicitly examined and incorporated the fact that the role of ideology is not constant and that there are contexts (here, the law) that accentuate or attenuate the role of policy preferences on judicial vote choice. Greater levels of ideological voting are instances of sincere behavior and

mitigation of the impact of ideology suggests sophisticated or strategic behavior. The application of this conceptualization also allows for a theoretical and empirical specification that incorporates the three dominant models of judicial decision-making.

Second, the search for compliance must come from instances of adherence when preferences are divergent. This holds for not only the circuit court and Supreme Court relationship, but other examinations that attempt to decipher the difference between constrained and unconstrained, sophisticated or sincere behavior. Applied to the federal judiciary, when the law and judge's ideology predict similar outcomes, it is almost guaranteed that compliance will be the outcome. Moreover, under circumstances of convergent preferences between ideology and legal considerations, there is an inability to differentiate between the various potential influences on judicial decision-making. For a conclusion of hierarchical constraint, there must be an ability to identify the potential "rogue agents." If these judges comply, then one can conclude that the law or the relevant hierarchical constraint truly influences the choices judges make.

Third, and somewhat similarly, the broadness, or the direct applicability of the instructions, can have serious consequences for the degree to which subordinates comply with the principal. Chapter Three and the applicability of the content-neutrality jurisprudential regime is an example. To ask circuit court judges to comply with such a broad decision as *Grayned* to all free expression cases would be difficult. The freedom of expression cases incorporates all forms of expression. To name a few, this collection of issue areas includes speech, press, and association. Each form of expression is distinct and, generally, has its own directly applicable precedents, doctrines and jurisprudence. Although judges overall decide cases in a manner consistent with predictions from

Grayned (i.e., treating content-based restrictions as more suspect than content-neutral ones), there is a moderate degree of variation in conformity to the jurisprudential regime. Furthermore, as discussed in Chapter Three, there are doubts as to whether such a broad and general opinion as *Grayned* was the definitive, causal shift in circuit court judges' behavior. Compliance and hierarchical constraint are more likely when instructions from the Supreme Court are directly applicable to a given issue area or case-type.

Lastly, for the federal judiciary as well as other hierarchical settings, instructions from the "principal" can have varying levels of discretion, affecting the degree to which "agents" can vote in line with their policy preferences. This can also place the principal in a tenuous position. For example, if the level of discretion is high and the subordinates are all ideologically divergent from the principal, the outcome will be agent decisions or actions that are ideologically divergent. Under these circumstances, compliance with the principal will be difficult if agents are free to vote or act in accordance with their policy preferences. When the subordinate actors' ideologies are disproportionately divergent from the principal's, instructions offering high judicial discretion may not be an appropriate means of inducing agent actions or decisions that are convergent with principal preferences. Limiting agent discretion when preferences between the principal and agents are divergent is one of the means of inducing decisions or actions that comport with the principal's wishes.

Table 6.1. Summary of Findings from Empirical Examinations

	Free Expression		Abortion		Religious Free Exercise	
	Pre-*Grayned*	**Post-*Grayned***	**Pre-*Casey***	**Post-*Casey***	**Pre-*Smith***	**Post-*Smith***
Hierarchical Constraint (Low Judicial Discretion)						
Liberal Judges	Possible Noncompliance (Content-Neutral)	Possible Noncompliance (Less Protected Content-Based)	N/A	Possible Noncompliance (*Casey* Provision)	N/A	Possible Noncompliance
Conservative Judges	Supported	Possible Noncompliance (Less Protected Content-Based)	Supported	N/A	N/A	N/A
Heterogeneity in the Preference Behavior Relationship (High Judicial Discretion)						
High Discretion	N/A	Not Supported (Decreased Polarization under Intermediate Scrutiny)	N/A	Supported (Polarization, but also Polarization under *low* discretion)	N/A	N/A
Panel Effects						
Liberal Judges	No Effect	Conditional (Less Protected Content-Based, Content-Based)	No Effect	Conditional (only for *Casey* Provision and when surrounded by conservatives)	No Effect	Wrong Direction (suggesting polarization)
Conservative Judges	No Effect	Conditional (Content-Based)	No Effect	No Effect	No Effect	No Effect

Note: Grayned = Grayned v. Rockford (1972) and Chicago Police Department v. Mosely (1972); Casey = Planned Parenthood of Southeastern Pennsylvania v. Casey (1992); *Smith* = *Employment Division, Department of Human Resources* v. *Smith* (1990).

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Appendix A
Chapter Three Coding Strategies and Ancillary Analyses

Case Selection

Cases were searched using the following terms for three different time periods (1943 to 1971, 1972 to 1983, and 1984 to 2006):

- free speech
- freedom of speech
- free press
- freedom of press
- free expression
- freedom of expression
- free assembly
- freedom of assembly
- free association
- freedom of association
- expressive association
- free w/10 protest
- protester (narrowed by "speech")
- actual malice (narrowed by "libel")
- obscene (narrowed by "speech or press or expression")
- prior restraint (narrowed by "speech or press or expression")
- chilling effect (narrowed by "speech or press or expression")
- fighting words
- symbolic speech
- hate speech
- time, place, manner (narrowed by "speech or press or expression")

Each case was screened to ensure that the case pertained to the freedom of expressions (speech, press, assembly, protest/petition, or association) as defined by Richards and Kritzer (2002). Because the coding is largely based on opinions, any suggestion that the plaintiff challenged a law, provision, statute or action as an impediment to free expression led to the case being included in the sample. Cases pertaining to the Free Exercise or Establishment Clauses were not included unless the cases pertained to restrictions on religious speech, press, or expression akin to speech. The case must concern the restrictions on freedoms of expression. For example, if an individual challenges the constitutionality of Congress's ability to regulate child pornography moving in interstate commerce raising a Commerce Clause claim and fails to raise a free expression claim, the case is not included. But, if the case challenges the law based on an additional clause as free expression, the case is included. Obviously,

cases debating the fact of whether pornography moved in interstate commerce while not challenging the constitutionality of the law are not included in the sample of cases.

Please note that questions regarding the Speech or Debate Clause, while still a freedom of expression, are not included unless the speaker also rested his challenge on the First Amendment. For freedom of the press, cases concerning press coverage of a trial leading to undue publicity that affected the ability of a fair trial were not included. In order for press coverage of a trial to be included, the question must have been whether or not the press were allowed to cover the trial. Also, litigators/litigants challenging a gag orders constitutionality were also included if the relevant parties claimed a freedom of expression challenge. Moreover, cases involving the Freedom of Information Act were excluded unless the relevant litigants advanced a freedom of expression claim.

Cases involving challenges from the National Labor Relations Board or the FLSA were included if the speaker being restricted challenged the NLRB orders on free expression grounds. As far as labor-based disputes, private party challenges (such as a labor union being sued by a union member) were included if the restriction raised a free expression challenge.

Once a case was determined to pertain to the freedoms of expression, the following variables were coded.

Coding Strategies

dated: The actual date the case was heard.

mm/dd/yyyy

citation: The case citation.

docket: The case docket number.

published: whether the case is published or not.

1 = case is published
0 = case is not published

circuit: which circuit heard and decided the case

0 = D.C. Circuit
1 = First Circuit
2 = Second Circuit
3 = Third Circuit
4 = Fourth Circuit
5 = Fifth Circuit
6 = Sixth Circuit
7 = Seventh Circuit
8 = Eighth Circuit
9 = Ninth Circuit

10 = Tenth Circuit
11 = Eleventh Circuit
12 = Federal Circuit

judge: Name of the Judge

Last name of the Judge (ALL CAPS).

*libvote***:** Whether the judge voted to support free expression rights or not

1 = judge voted to support free expression rights
0 = otherwise

Case Fact Variables

OutcomeL: Whether the decision favored the freedom of expression or not.

1 = if the decision supported free expression
0 = otherwise

Note: If the free expression claimant won the case, but on another claim other than free expression, the case should be coded 0 (otherwise). For example, if the free expression claimant makes multiple claims (free expression rights have been violated as well as a claim of violation of the Fourth Amendment's protection against unreasonable search and seizure), the case is coded as "otherwise" if the panel ruled in favor of the Fourth Amendment claim but against the free expression claim. Also, if the Court ruled that the Due Process Clause had been violated (but this is reference to incorporating free expression rights of the First to the several states), this case counts as supporting free expression rights.

Less (Less Protected): whether the regulation falls into the one of the eight less protected categories of expression as defined in Richards and Kritzer (2002). This study also includes several other categories. If this variable is coded 1, please also code *lessother* and *addnotes* variables.

Richards and Kritzer (2002):

- *Regulation of Commercial Expression*: this category includes lawful commercial activity, which is the interchange of goods and services among individuals and corporations; this includes copyright laws.
- *Regulation of Obscenity*: whether the regulation targets obscene or alleged obscene materials.
- *Regulation of an expression in a private forum*: regulation in a private forum against the owner of that forum.
- *Libel Suits*: Suits by private figures not suing for presumed or punitive damages.

- *Content-based regulations, but not viewpoint based regulations in nonpublic forums*: Examples include military bases, hails, prisons, and specific forums not open to the public at large such as candidate debates. This does not include private forums or traditional public forums (streets, sidewalks, or parks or forums that the government has designated as public forums).
- *Content-based regulations of the broadcast media*: This includes television and radio, but not cable television. Examples of this regulation include requirements for public access to such media.
- *Regulation of Expression in Schools*: This includes elementary through high school.
- *Regulations of Picketing of Secondary Sites by Labor Unions*.

Mak (2009):

- *Criminal Speech*: Whether the words by their very utterance is a crime (examples include national security speech or speech that was a commission of a crime)
- *Military Personnel or Property* = Regulation attempted to cover military personnel or expression on a military base. Please note that this does not include military protestors unless they are protesting or attempting to protest on military property. Included in this category are laws that cover draft card mutilation and draft dodging.
- *Prison Personnel or Property* = Regulation attempted to cover prison/corrections personnel or expression in a correctional facility. This also includes parolees and parole officers.
- *Limited Public Forums and Political Appointees* = Regulation attempted to restrict limited public forums such as town halls and government buildings. This also includes access to government meetings such a city council session. Also included are political appointees, which are identified when the opinion specifically mentions the appointed status of a given speaker.

1 = if the regulation targets any of the eight of the less protected categories of expression
0 = otherwise

Note: Ordinances and laws attempting to regulate nude dancing and establishments that offer such entertainment were coded as obscenity laws.

Threshold (Threshold Not Met): whether the case reached the threshold of First Amendment protection. This includes cases where there is no government action. If this variable is coded 1, please also code *lessother* variable.

1 = if the case failed to meet threshold of First Amendment protection
0 = otherwise

Note: this is a small deviation from the Richards and Kritzer (2002) examination. There, the authors also counted restrictions as threshold cases when there was no

abridgement of expression. Rather than leaving the determination of whether or not there was an abridgement of expression at the discretion of the coder, I opted to simply count threshold cases as those that are purely private (i.e., restrictions lacking a state action).

cneutral (Content Neutral): whether the regulation covered the times, places, manner of expression. The Supreme Court has recognized that the government has the ability to regulate reasonably the times, places and manner of speech so long as it is neutral with respect to the content of expression. Also, included in this category would be those regulations that create incidental effects on speech. A regulation was deemed to be content-neutral if it meets any of the four areas covered below.

- *Content-Neutral Time Regulations*: if the regulation limited the time of expression in a content-neutral manner.
- *Content-Neutral Place Regulations*: if the regulation limited the place of expression in a content-neutral manner.
- *Content-Neutral Manner Regulations*: if the regulation attempts to cover the way in which an act of expression is presented.
- *Content-Neutral Incidental Regulations*: if the regulation has an incidental effect on speech but is content-neutral.

1 = if the regulation is content-neutral
0 = otherwise.

cbased (Content Based): whether the regulation of expression was justified by or focused on the communicative impact of expression. Some are relatively easy to identify; for example, regulations that viewpoint discriminate by targeting an individual or a group.

1 = if the case targeted expression based on content
0 = otherwise

lessother: whether the less-protected or less-threshold restriction on expression was content-based or content-neutral

Content-Based = if the provision targeting less-protected expression was content-based
Content-Neutral = if the provision targeting less-protected expression was content-neutral

Predicted Probabilities and Standard Deviations: *For All Analyses in Chapter 3*

Table A1a. Predicted Probabilities of Supporting Free Expression, Liberal Panel Composition

Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*		
Threshold			Less Protected (Content-Neutral)			Less Protected (Content-Based)			Content-Neutral		
	Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.
High Liberal	0.396	0.066	High Liberal	0.345	0.052	High Liberal	0.419	0.025	High Liberal	0.544	0.066
Liberal	0.367	0.048	Liberal	0.299	0.036	Liberal	0.406	0.018	Liberal	0.470	0.049
Moderate	0.312	0.043	Moderate	0.221	0.033	Moderate	0.381	0.017	Moderate	0.327	0.034
Conservative	0.266	0.068	Conservative	0.161	0.047	Conservative	0.357	0.031	Conservative	0.213	0.047
High Conservative	0.243	0.083	High Conservative	0.134	0.054	High Conservative	0.343	0.040	High Conservative	0.162	0.052
Post-*Grayned*			Post-*Grayned*			Post-*Grayned*			Post-*Grayned*		
Threshold			Less Protected (Content-Neutral)			Less Protected (Content-Based)			Content-Neutral		
	Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.
High Liberal	0.434	0.034	High Liberal	0.433	0.029	High Liberal	0.559	0.018	High Liberal	0.419	0.026
Liberal	0.409	0.026	Liberal	0.400	0.022	Liberal	0.532	0.014	Liberal	0.387	0.020
Moderate	0.359	0.019	Moderate	0.337	0.015	Moderate	0.479	0.010	Moderate	0.325	0.014
Conservative	0.312	0.027	Conservative	0.280	0.020	Conservative	0.426	0.014	Conservative	0.269	0.019
High Conservative	0.286	0.035	High Conservative	0.249	0.024	High Conservative	0.395	0.018	High Conservative	0.238	0.023

Pre-*Grayned*		
Content-Based		
	Mean Pred. Prob.	Std. Dev.
High Liberal	0.472	0.031
Liberal	0.459	0.022
Moderate	0.435	0.019
Conservative	0.412	0.035
High Conservative	0.398	0.047
Post-*Grayned*		
Content-Based		
	Mean Pred. Prob.	Std. Dev.
High Liberal	0.573	0.018
Liberal	0.550	0.015
Moderate	0.504	0.010
Conservative	0.458	0.015
High Conservative	0.431	0.020

Table A1b. Predicted Probabilities of Supporting Free Expression, Mixed Panel Composition

Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*		
Threshold			Less Protected (Content-Neutral)			Less Protected (Content-Based)			Content-Neutral			Content-Based		
	Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.
High Liberal	0.395	0.065	High Liberal	0.344	0.051	High Liberal	0.417	0.024	High Liberal	0.543	0.062	High Liberal	0.470	0.028
Liberal	0.370	0.048	Liberal	0.302	0.035	Liberal	0.410	0.018	Liberal	0.474	0.046	Liberal	0.463	0.021
Moderate	0.325	0.043	Moderate	0.230	0.032	Moderate	0.394	0.014	Moderate	0.339	0.032	Moderate	0.449	0.016
Conservative	0.285	0.070	Conservative	0.175	0.048	Conservative	0.379	0.024	Conservative	0.229	0.046	Conservative	0.436	0.028
High Conservative	0.266	0.087	High Conservative	0.148	0.056	High Conservative	0.371	0.032	High Conservative	0.178	0.052	High Conservative	0.427	0.037
Post-*Grayned*			Post-*Grayned*			Post-*Grayned*			Post-*Grayned*			Post-*Grayned*		
Threshold			Less Protected (Content-Neutral)			Less Protected (Content-Based)			Content-Neutral			Content-Based		
	Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.
High Liberal	0.393	0.031	High Liberal	0.391	0.026	High Liberal	0.516	0.013	High Liberal	0.378	0.023	High Liberal	0.530	0.014
Liberal	0.370	0.024	Liberal	0.362	0.020	Liberal	0.492	0.010	Liberal	0.349	0.017	Liberal	0.510	0.011
Moderate	0.328	0.017	Moderate	0.307	0.013	Moderate	0.445	0.007	Moderate	0.296	0.012	Moderate	0.470	0.008
Conservative	0.289	0.024	Conservative	0.258	0.016	Conservative	0.399	0.010	Conservative	0.247	0.015	Conservative	0.431	0.010
High Conservative	0.267	0.030	High Conservative	0.231	0.020	High Conservative	0.372	0.013	High Conservative	0.221	0.019	High Conservative	0.407	0.013

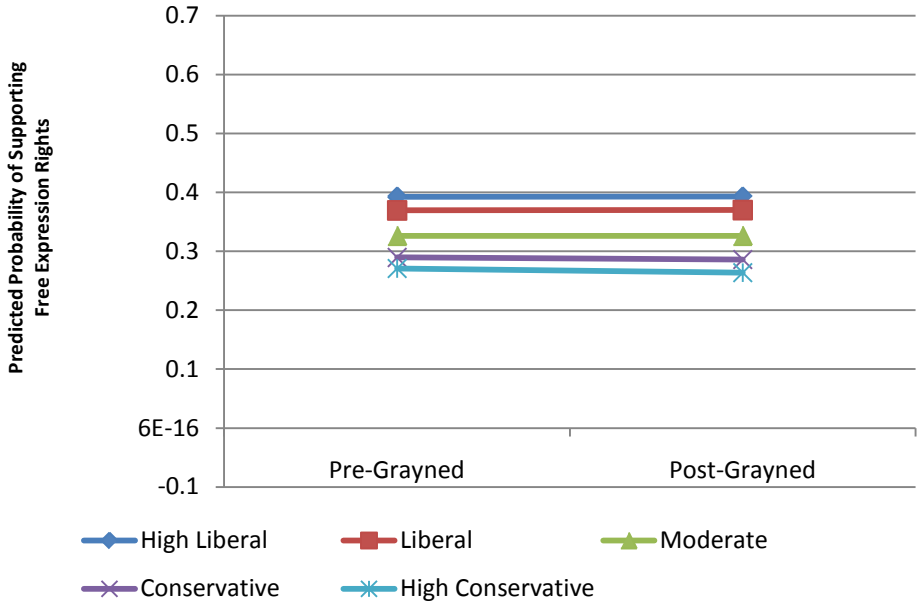
Table A1c. Predicted Probabilities of Supporting Free Expression, Conservative Panel Composition

Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*			Pre-*Grayned*		
Threshold			Less Protected (Content-Neutral)			Less Protected (Content-Based)			Content-Neutral			Content-Based		
	Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.
High Liberal	0.394	0.072	High Liberal	0.343	0.058	High Liberal	0.417	0.040	High Liberal	0.542	0.067	High Liberal	0.469	0.042
Liberal	0.374	0.053	Liberal	0.306	0.040	Liberal	0.414	0.030	Liberal	0.477	0.050	Liberal	0.467	0.032
Moderate	0.337	0.047	Moderate	0.241	0.035	Moderate	0.408	0.021	Moderate	0.352	0.035	Moderate	0.463	0.023
Conservative	0.306	0.077	Conservative	0.190	0.054	Conservative	0.403	0.036	Conservative	0.247	0.051	Conservative	0.460	0.038
High Conservative	0.290	0.098	High Conservative	0.165	0.064	High Conservative	0.400	0.049	High Conservative	0.197	0.059	High Conservative	0.458	0.051
Post-*Grayned*			Post-*Grayned*			Post-*Grayned*			Post-*Grayned*			Post-*Grayned*		
Threshold			Less Protected (Content-Neutral)			Less Protected (Content-Based)			Content-Neutral			Content-Based		
	Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.		Mean Pred. Prob.	Std. Dev.
High Liberal	0.352	0.032	High Liberal	0.351	0.026	High Liberal	0.473	0.017	High Liberal	0.338	0.024	High Liberal	0.487	0.018
Liberal	0.334	0.025	Liberal	0.326	0.020	Liberal	0.452	0.013	Liberal	0.314	0.018	Liberal	0.470	0.014
Moderate	0.299	0.016	Moderate	0.279	0.013	Moderate	0.412	0.009	Moderate	0.268	0.012	Moderate	0.436	0.009
Conservative	0.266	0.023	Conservative	0.237	0.016	Conservative	0.373	0.013	Conservative	0.227	0.015	Conservative	0.403	0.012
High Conservative	0.248	0.029	High Conservative	0.214	0.020	High Conservative	0.350	0.017	High Conservative	0.205	0.019	High Conservative	0.384	0.016

Additional Analyses for Chapter Three: Combining Less Protected Categories

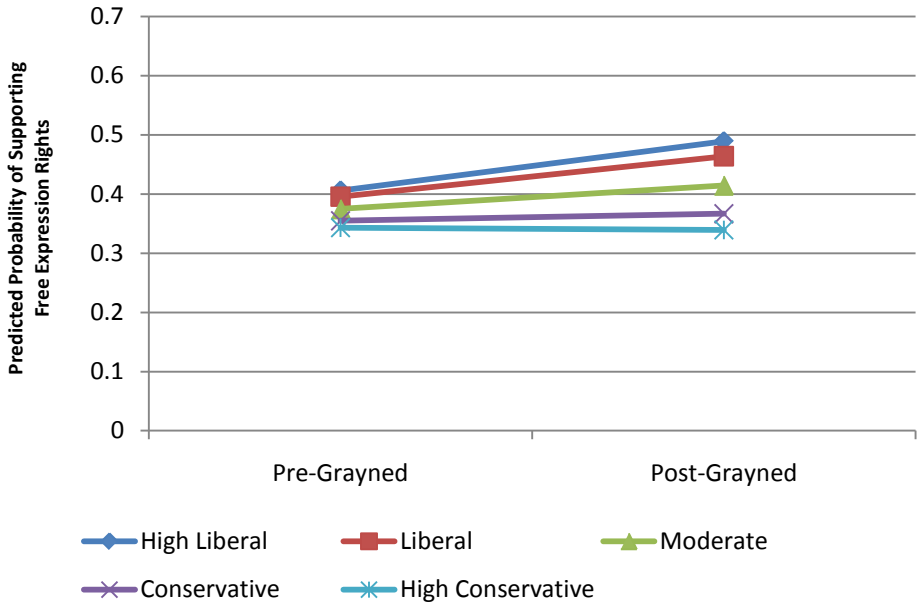
To check the robustness of the results as well as test the actual specification from Bartels (2006) and Richards and Kritzer (2002), I estimated the multilevel model combining restrictions that target less protected forms of expression. Thus, *Less Protected* is a dummy variable coded 1 if a restriction seeks to regulate less protected forms of expression (regardless of whether it is content-based or content-neutral), 0 otherwise. The results all comport with the analysis and conclusions from the model specified in Equation 3.1. Less-protected restrictions impact judicial decision-making similar to content-based restrictions of less-protected expression. In this appendix, I present the results from the multilevel model and several of the corresponding figures simply for completeness and direct comparison with previous examinations of the content-neutrality jurisprudential regime. Tables and Figures are labeled as such to mirror those in Chapter 3.

Figure A3.6a. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Threshold Case



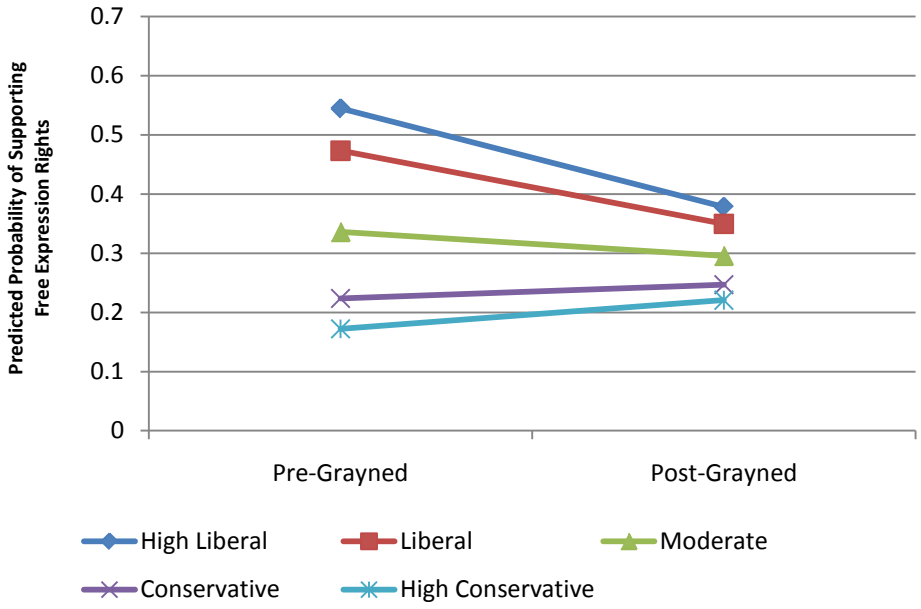
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.6b. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Less Protected Case



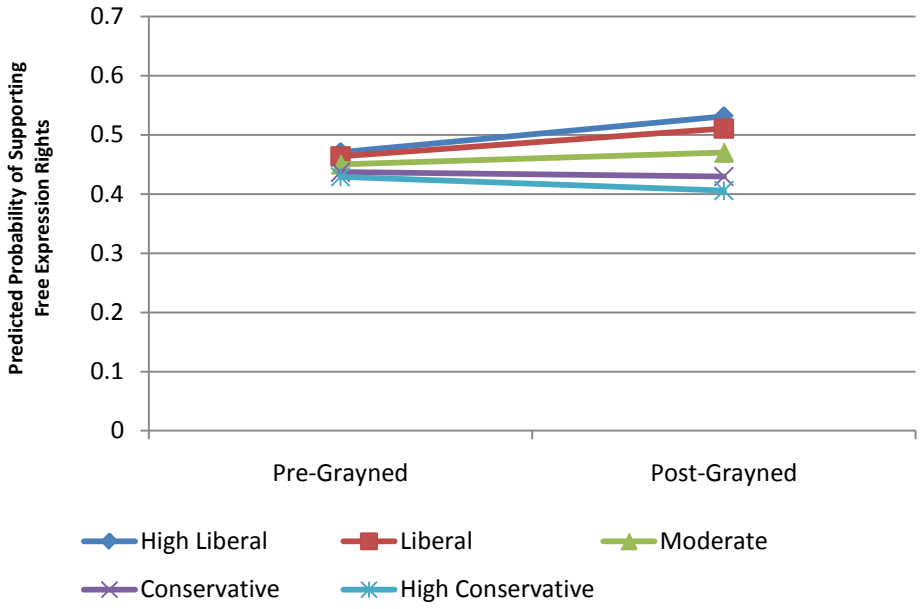
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.6d. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Content-Neutral Case



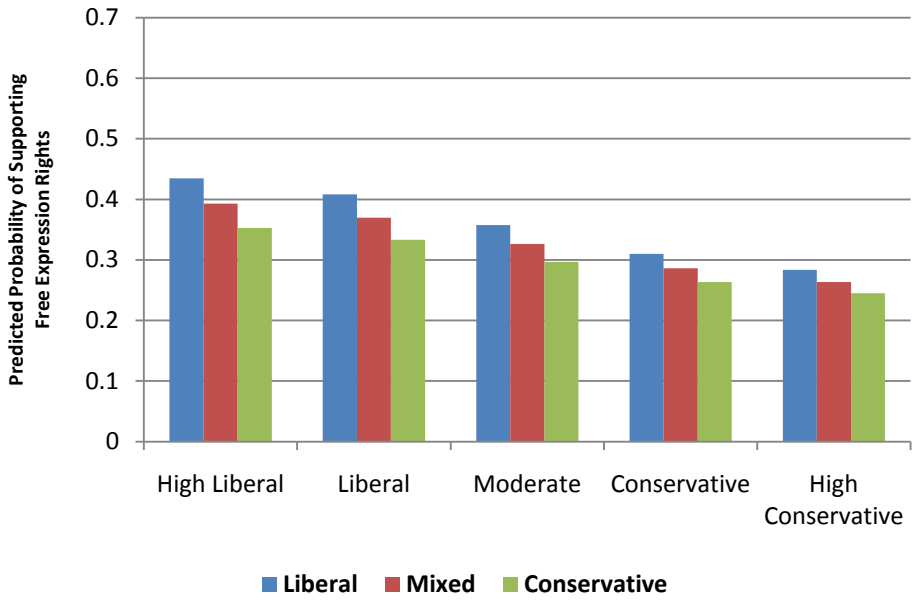
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.6e. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Content-Based Case



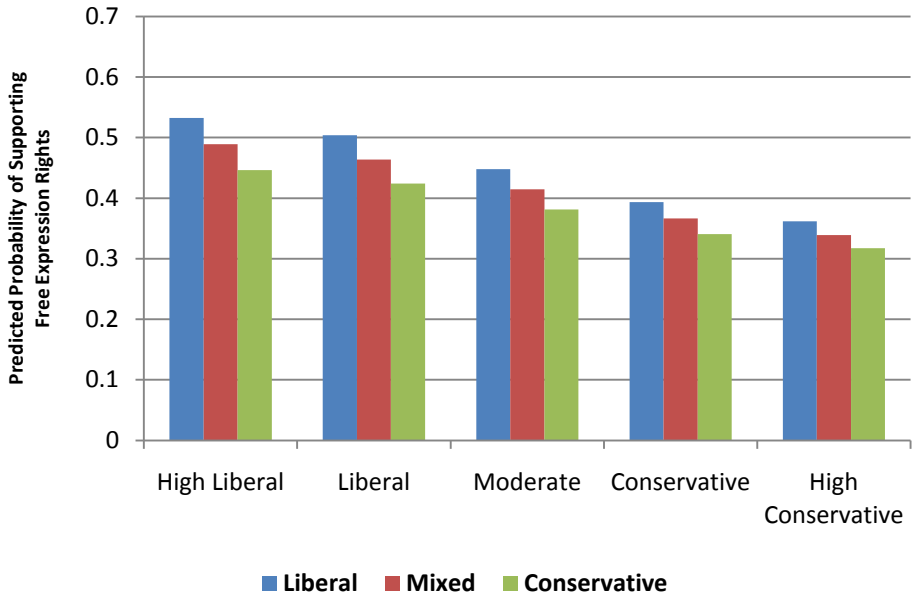
Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.7a. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Threshold Case by Panel Composition



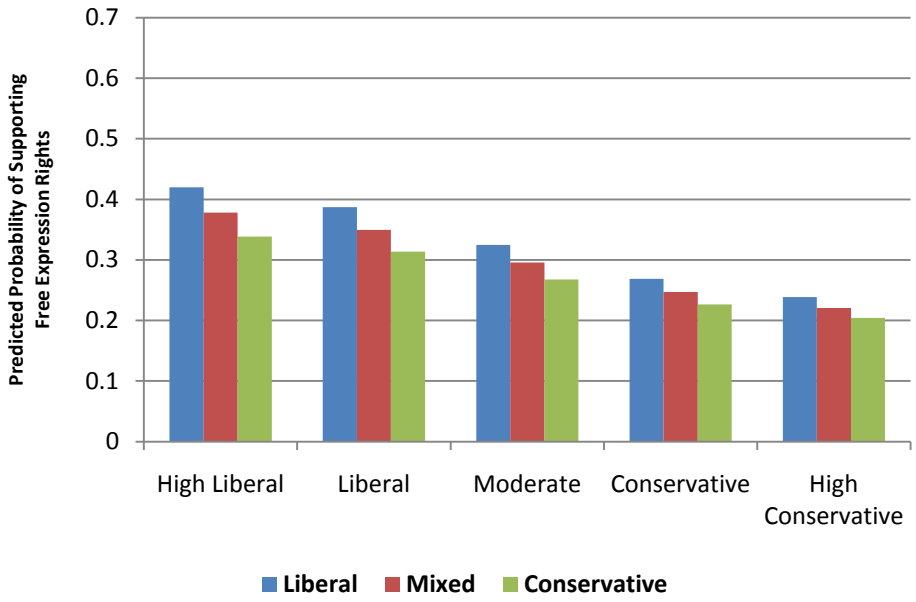
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.7b. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Less Protected Case by Panel Composition



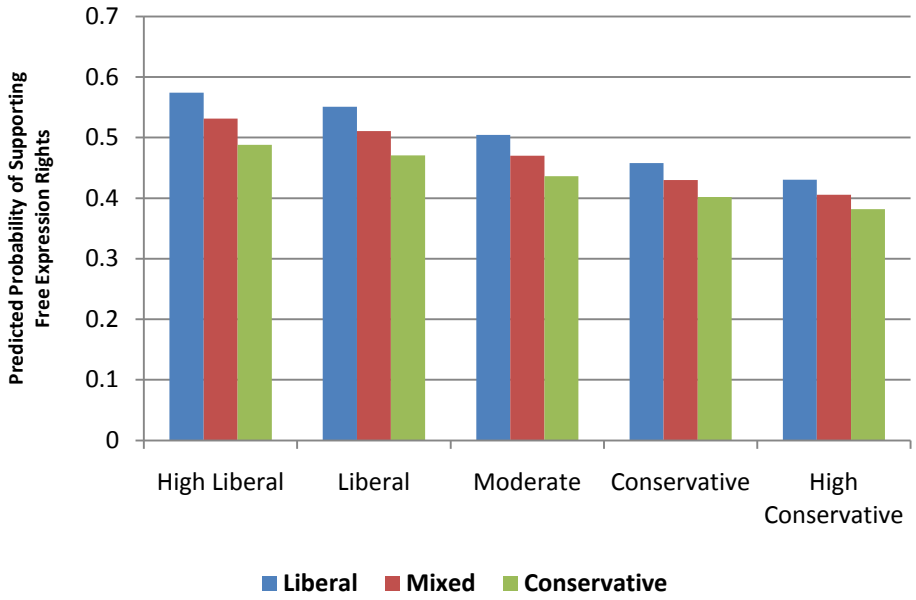
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.7d. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Content-Neutral Case by Panel Composition



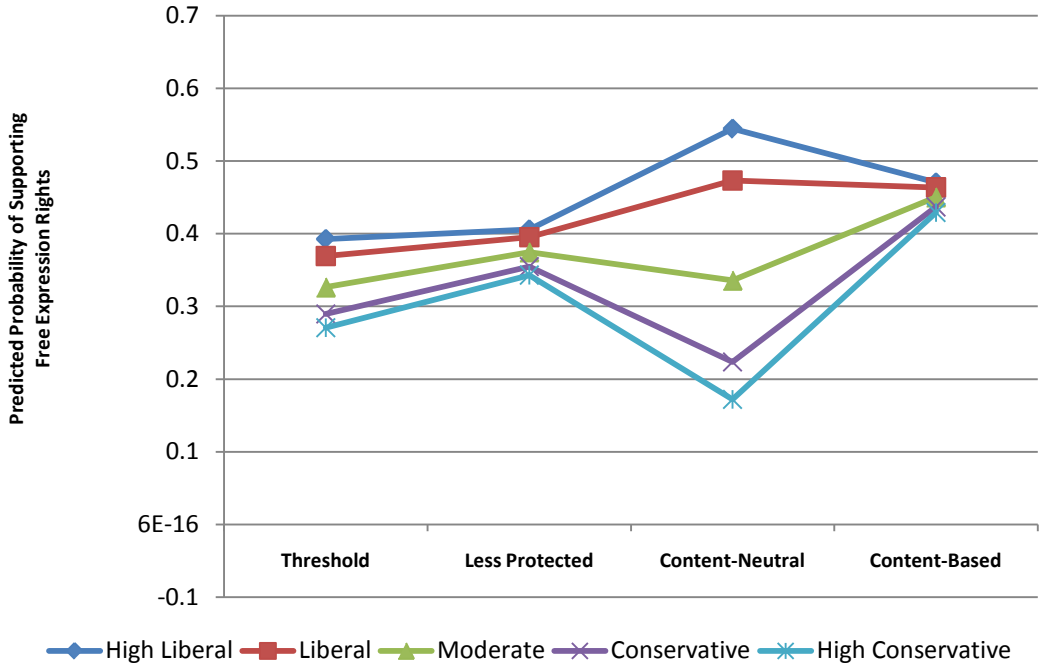
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.7e. Predicted Probabilities of Free Expression Support: Post-*Grayned*, Content-Based Case by Panel Composition



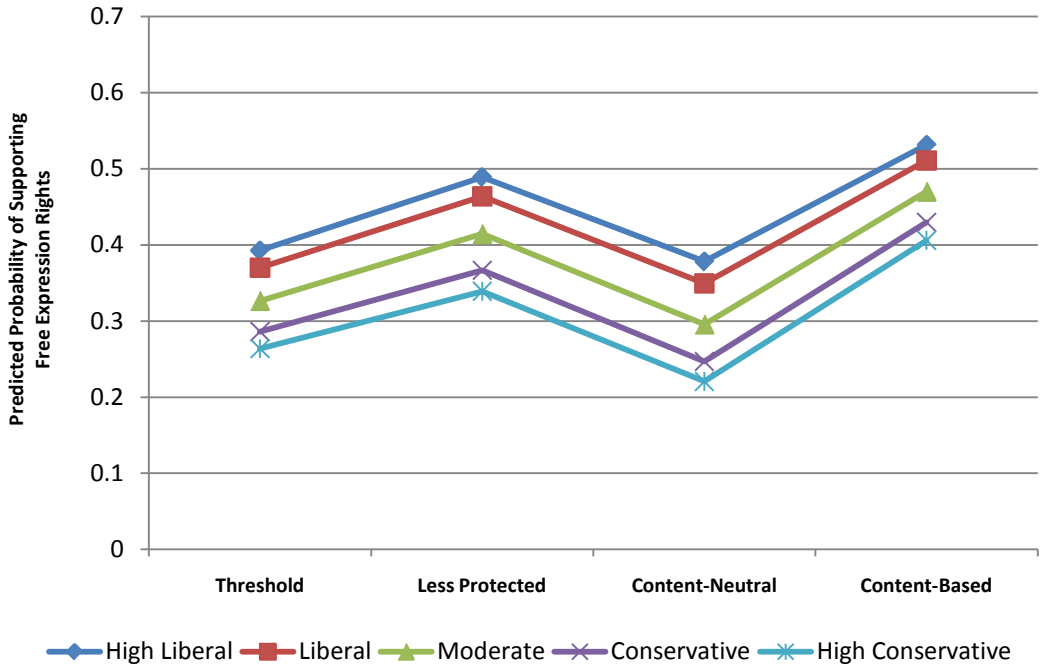
Note: Missing bars indicate predicated probabilities near or virtually zero. High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.8a. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Pre-*Grayned* by Ideology and Free Expression Restriction



Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.8b. Predicted Probabilities of Supporting Free Expression: Average Panel Composition, Pre-*Grayned* by Ideology and Free Expression Restriction



Note: High liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Liberal and conservative is defined as at one standard deviation above or below the mean of ideology in the appropriate direction. Moderate is defined by the mean of ideology. All other variables are held at their means.

Figure A3.9. Sensitivity Analysis: Testing for the Appropriate Shift in Free Expression Jurisprudence

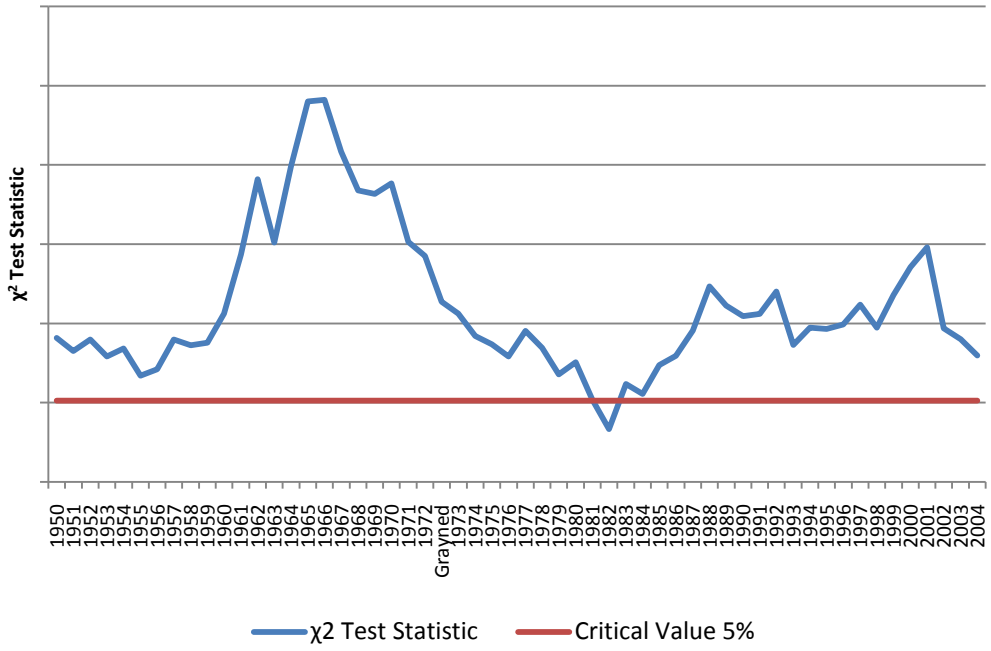


Table A2a. Predicted Probabilities of Supporting Free Expression, Liberal Panel Composition

Pre-*Grayned* Threshold	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Less Protected	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Content-Neutral	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Content-Based	Mean Pred. Prob.	Std. Dev.
High Liberal	0.397	0.064	High Liberal	0.411	0.024	High Liberal	0.549	0.064	High Liberal	0.475	0.031
Liberal	0.367	0.047	Liberal	0.393	0.017	Liberal	0.471	0.050	Liberal	0.462	0.023
Moderate	0.313	0.045	Moderate	0.360	0.017	Moderate	0.322	0.039	Moderate	0.435	0.020
Conservative	0.267	0.070	Conservative	0.329	0.029	Conservative	0.205	0.048	Conservative	0.409	0.036
High Conservative	0.244	0.085	High Conservative	0.311	0.037	High Conservative	0.153	0.051	High Conservative	0.393	0.047

Post-*Grayned* Threshold	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Less Protected	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Content-Neutral	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Content-Based	Mean Pred. Prob.	Std. Dev.
High Liberal	0.435	0.034	High Liberal	0.532	0.017	High Liberal	0.420	0.025	High Liberal	0.574	0.019
Liberal	0.408	0.026	Liberal	0.504	0.013	Liberal	0.387	0.019	Liberal	0.551	0.015
Moderate	0.357	0.018	Moderate	0.448	0.009	Moderate	0.325	0.013	Moderate	0.504	0.010
Conservative	0.310	0.025	Conservative	0.394	0.013	Conservative	0.269	0.018	Conservative	0.458	0.014
High Conservative	0.284	0.032	High Conservative	0.362	0.016	High Conservative	0.238	0.023	High Conservative	0.430	0.019

Table A2b. Predicted Probabilities of Supporting Free Expression, Mixed Panel Composition

Pre-*Grayned* Threshold	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Less Protected	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Content-Neutral	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Content-Based	Mean Pred. Prob.	Std. Dev.
High Liberal	0.393	0.064	High Liberal	0.406	0.021	High Liberal	0.545	0.063	High Liberal	0.471	0.027
Liberal	0.369	0.048	Liberal	0.395	0.016	Liberal	0.473	0.049	Liberal	0.464	0.020
Moderate	0.326	0.045	Moderate	0.375	0.013	Moderate	0.336	0.036	Moderate	0.450	0.017
Conservative	0.290	0.072	Conservative	0.355	0.021	Conservative	0.224	0.046	Conservative	0.437	0.030
High Conservative	0.271	0.089	High Conservative	0.343	0.028	High Conservative	0.172	0.050	High Conservative	0.429	0.039
Post-*Grayned* Threshold	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Less Protected	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Content-Neutral	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Content-Based	Mean Pred. Prob.	Std. Dev.
High Liberal	0.393	0.031	High Liberal	0.489	0.012	High Liberal	0.378	0.022	High Liberal	0.531	0.014
Liberal	0.370	0.024	Liberal	0.464	0.009	Liberal	0.349	0.017	Liberal	0.511	0.011
Moderate	0.326	0.016	Moderate	0.414	0.006	Moderate	0.296	0.011	Moderate	0.470	0.008
Conservative	0.286	0.022	Conservative	0.367	0.009	Conservative	0.247	0.015	Conservative	0.430	0.010
High Conservative	0.264	0.028	High Conservative	0.339	0.011	High Conservative	0.221	0.019	High Conservative	0.406	0.013

Table A2c. Predicted Probabilities of Supporting Free Expression, Conservative Panel Composition

Pre-*Grayned* Threshold	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Less Protected	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Content-Neutral	Mean Pred. Prob.	Std. Dev.	Pre-*Grayned* Content-Based	Mean Pred. Prob.	Std. Dev.
High Liberal	0.389	0.070	High Liberal	0.402	0.035	High Liberal	0.540	0.069	High Liberal	0.466	0.039
Liberal	0.372	0.053	Liberal	0.398	0.027	Liberal	0.475	0.053	Liberal	0.466	0.029
Moderate	0.341	0.050	Moderate	0.390	0.021	Moderate	0.350	0.038	Moderate	0.466	0.024
Conservative	0.314	0.079	Conservative	0.382	0.035	Conservative	0.245	0.051	Conservative	0.466	0.041
High Conservative	0.301	0.099	High Conservative	0.378	0.046	High Conservative	0.195	0.058	High Conservative	0.466	0.055

Post-*Grayned* Threshold	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Less Protected	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Content-Neutral	Mean Pred. Prob.	Std. Dev.	Post-*Grayned* Content-Based	Mean Pred. Prob.	Std. Dev.
High Liberal	0.353	0.031	High Liberal	0.446	0.016	High Liberal	0.339	0.024	High Liberal	0.488	0.017
Liberal	0.333	0.024	Liberal	0.424	0.012	Liberal	0.314	0.018	Liberal	0.471	0.014
Moderate	0.297	0.016	Moderate	0.382	0.009	Moderate	0.268	0.011	Moderate	0.436	0.010
Conservative	0.264	0.022	Conservative	0.341	0.012	Conservative	0.226	0.015	Conservative	0.402	0.013
High Conservative	0.245	0.028	High Conservative	0.317	0.015	High Conservative	0.204	0.019	High Conservative	0.382	0.017

Table A3.3. Model of Support for Free Expression Rights

	Coefficient	Std. Err.	*p*-value
Ideology	0.667	0.585	0.254
Panel Composition	0.131	0.112	0.244
Less Protected	0.211	0.207	0.307
Content-Neutral	0.047	0.251	0.851
Content-Based	0.525	0.211	0.013
Ideology X Panel Composition	-0.309	0.360	0.391
Ideology X Less Protected	-0.274	0.596	0.645
Ideology X Content-Neutral	1.093	0.755	0.148
Ideology X Content-Based	-0.359	0.612	0.557
Post-*Grayned*	0.204	0.218	0.349
Ideology X Post-*Grayned*	-0.057	0.629	0.928
Panel Composition X Post-*Grayned*	-0.407	0.124	0.001
Less Protected X Post-*Grayned*	0.168	0.222	0.447
Content-Neutral X Post-*Grayned*	-0.193	0.268	0.472
Content-Based X Post-*Grayned*	0.078	0.226	0.729
Ideology X Panel Composition X Post-*Grayned*	0.176	0.388	0.650
Ideology X Less Protected X Post-*Grayned*	0.299	0.639	0.639
Ideology X Content-Neutral X Post-*Grayned*	-0.941	0.801	0.240
Ideology X Content-Based X Post-*Grayned*	0.271	0.655	0.680
Constant	-0.790	0.203	0.000
Log Likelihood	-10879.98		
Number of Votes	16347		
Number of Cases	5129		

Note: the p-values are based on two-tailed tests of significance of the coefficients.

Appendix B
Chapter Four Coding Strategies and Ancillary Analyses

Case Selection

Cases were searched using the following terms:

- abortion
- trimester
- viability
- *Roe* v. *Wade*
- *Doe* v. *Bolton*
- *Akron* v. *Akron Center for Reproductive Health*
- *Webster* v. *Reproductive Health Services*
- *Planned Parenthood* v. *Casey*

Cases were also "Shepardized" using Shepard's Citations with the following cases/citations:

- *Roe* v. *Wade* (1973) 410 U.S. 113
- *Akron, City of* v. *Akron Center for Reproductive Health* (1983) 462 U.S. 416
- *Webster* v. *Reproductive Health Services* (1989) 492 U.S. 490
- *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) 505 U.S. 833

In order to be included in the population of cases, cases had to pertain to the constitutionality of abortion regulations that seek to limit the right to an abortion in general, as a target of government spending, or as a medical procedure. Thus, restrictions on abortion protestors are not included in this sample as those restrictions protect the right to an abortion; furthermore, restrictions on abortion protestors are more free expression questions than abortion questions.

Once a case was determined to pertain to abortion rights, the following variables were coded.

Coding Strategies

dated: The actual date the case was heard.

mm/dd/yyyy

citation: The case citation.

docket: The case docket number.

published: whether the case is published or not.

1 = case is published
0 = case is not published

circuit: which circuit heard and decided the case

0 = D.C. Circuit
1 = First Circuit
2 = Second Circuit
3 = Third Circuit
4 = Fourth Circuit
5 = Fifth Circuit
6 = Sixth Circuit
7 = Seventh Circuit
8 = Eighth Circuit
9 = Ninth Circuit
10 = Tenth Circuit
11 = Eleventh Circuit
12 = Federal Circuit

judge: Name of the Judge

Last name of the Judge (ALL CAPS).

OutcomeL: Whether the decision favored abortion rights or not

1 = if the decision favored abortion rights
0 = otherwise

For example, whether the decision struck down an unconstitutional provision in a government abortion regulation or supported an injunction (as a whole or in part) of a regulation that seeks to inhibit access to or restrict the abortion procedures. Moreover, if the claimant won the case but on different grounds, the case was coded as unsupportive of abortion rights if the decision made no mention of a woman's right to an abortion as justification for the ruling.

*libvote***:** Whether the judge voted to support abortion rights or not

1 = judge voted to support abortion rights
0 = otherwise

Undue: whether the judge employed undue burden as the level of judicial scrutiny.

1 = if the judge employed undue burden.
0 = otherwise

In order to be coded in the affirmative, a judge must engage in deciphering whether a regulation imposed an undue burden on a woman's right to an abortion. Simply citing *Casey* or *Webster* was insufficient to count as applying undue burden. The judge must make special notice of a provision placing an undue burden on a woman and/or representing a substantial obstacle. If the judge's opinion or the opinion a given judge joined describes a regulation previously struck down as an undue burden and engages in comparing that provision and the one in the instant case, it counted as engaging in undue burden.

Ration = whether the judge employed rational basis as the level of judicial scrutiny

1 = if the judge employed rational basis.
0 = otherwise

For rational basis, the judge, first, must *not* have engaged in an inquiry into whether the law had the purpose or effect of creating a substantial obstacle or significant burden on the right to an abortion. Second, the judge must engage in determining whether the law had a reasonable relation to a legitimate government function. If these two requirements were met, the judge was coded as having utilized rational basis.

Strict = whether the judge employed the compelling interest test as the level of judicial scrutiny

1 = if the judge employed rational basis.
0 = otherwise

If a judge again does *not* enter a discussion of a substantial obstacle as a trigger for compelling interest, the judge was coded as having applied strict scrutiny if she inquired as to whether the government advanced a compelling interest or attempted to decipher whether the law was narrowly tailored to meet a compelling interest.

Additional Tables for Analyses in Chapter Four

Replication of Aggregate Analyses Using Giles et al. (2001) measure

Please note that the overall substantive conclusions do not change regarding the aggregate analyses when using the common space scores as a measure of judicial ideology. For example, conservative judges are still not more likely to apply undue burden during the period between *Webster* and *Casey*. All tables are numbered to match the corresponding Tables in Chapter Four.

Table B3.2. Percent of Judges Applying Undue Burden in Abortion Cases

	Pre-*Webster*	Post-*Webster* Pre-*Casey*	Post-*Casey*	*p-value**
Liberals	0.204	0.222	0.424	0.010
Moderates	0.185	0.212	0.568	0.000
Conservatives	0.044	0.091	0.577	0.000
p-value*	0.047	0.647	0.122	
Liberals	0.191	0.200	0.521	0.000
Conservatives	0.149	0.182	0.557	0.000
p-value**	0.379	0.873	0.534	

Note: *Casey* = *Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992); Webster = Webster v. Reproductive Health Services (1989)*

* *p*-values from χ^2 tests for the corresponding rows and columns.

* *p*-values from difference in proportions tests for the corresponding columns.

Table B3.3a. Number of Judges Employing Different Levels of Judicial Scrutiny

	Pre-*Webster*		Post-*Webster*/Pre-*Casey*		Post-*Casey*		
	Liberals	Conservatives	Liberals	Conservatives	Liberals	Conservatives	Total
Other/No Mention	86	78	7	16	58	74	319
Rational Basis	23	16	3	5	0	3	50
Undue Burden	32	22	4	6	63	97	224
Strict Scrutiny	32	32	6	6	0	0	76
Total	173	148	20	33	121	174	669

Note: *Casey = Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992); Webster = Webster v. Reproductive Health Services (1989)*

Table B3.3b. Number of Judges Employing Different Levels of Judicial Scrutiny

	Pre-*Webster*			Post-*Webster*/Pre-*Casey*			Post-*Casey*			
	Liberals	Moderates	Conservatives	Liberals	Moderates	Conservatives	Liberals	Moderates	Conservatives	Total
Other/No Mention	48	91	25	4	12	7	34	59	39	319
Rational Basis	16	17	6	1	7	0	0	1	2	50
Undue Burden	20	32	2	2	7	1	25	79	56	224
Strict Scrutiny	19	33	12	2	7	3	0	0	0	76
Total	103	173	45	9	33	11	59	139	97	669

Note: *Casey = Planned Parenthood of Southeastern Pennsylvania* v. *Casey (1992); Webster = Webster v. Reproductive Health Services (1989)*

Appendix C
Chapter Five Coding Strategies and Ancillary Analyses

Case Selection

Similar to Brent (1999), the relevant search terms for all time periods are as follows:

- free exercise w/5 religio!
- compelling w/5 interest w/10 religio!
- sherbert w/10 verner
- wisconsin w/10 yoder
- free exercise clause
- strict scrutiny w/25 religio!

The relevant search terms for cases after 1989:

- employment division w/10 smith
- religious freedom restoration act
- RFRA
- boerne

Cases are only included where there are restrictions on religious free exercise. Thus, instances where the Court refrains from answering a question or dismisses a question because deciding a case would violate free exercise are not included. For example, if a minister is suing a church for whatever reason including discrimination, this case would not be included if the Court of Appeals is reviewing a lower court dismissal of the claim because deciding the case would have violated the free exercise clause. But, cases where the district court made such a decision (which would violate free exercise) would be included in the sample of cases.

Moreover, cases where the dominant constitutional questions are based on Establishment Clause are not included unless there is a Free Exercise Clause claim as well.

Coding Strategies

dated: The actual date the case was heard.

mm/dd/yyyy

citation: The case citation.

docket: The case docket number.

published: whether the case is published or not.

1 = case is published
0 = case is not published

circuit: which circuit heard and decided the case

0 = D.C. Circuit
1 = First Circuit
2 = Second Circuit
3 = Third Circuit
4 = Fourth Circuit
5 = Fifth Circuit
6 = Sixth Circuit
7 = Seventh Circuit
8 = Eighth Circuit
9 = Ninth Circuit
10 = Tenth Circuit
11 = Eleventh Circuit
12 = Federal Circuit

judge: Name of the Judge

Last name of the Judge (ALL CAPS).

*libvote***:** Whether the judge voted to support religious free exercise rights or not

1 = judge voted to support religious free exercise rights
0 = otherwise

Outcome: Whether the decision favored free exercise rights or not

1 = if the decision favored free exercise rights
0 = otherwise

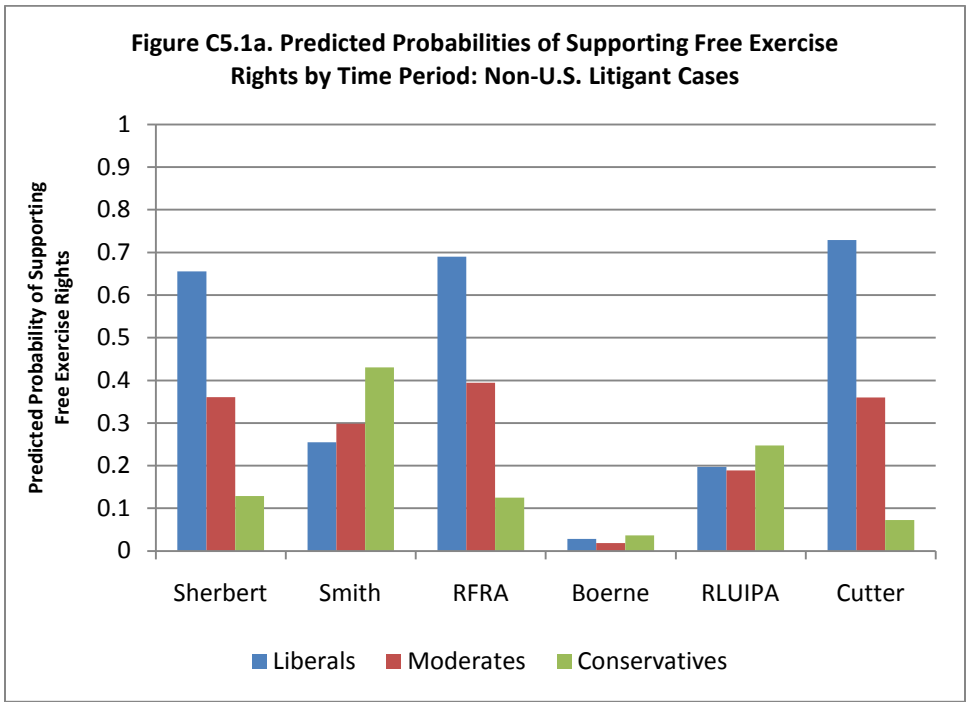
For example, whether the decision struck down an unconstitutional provision in a government regulation or supported an injunction (as a whole or in part) of a regulation that seeks to inhibit access to or restrict the free exercise of religion.

Additional Analyses for Chapter Five

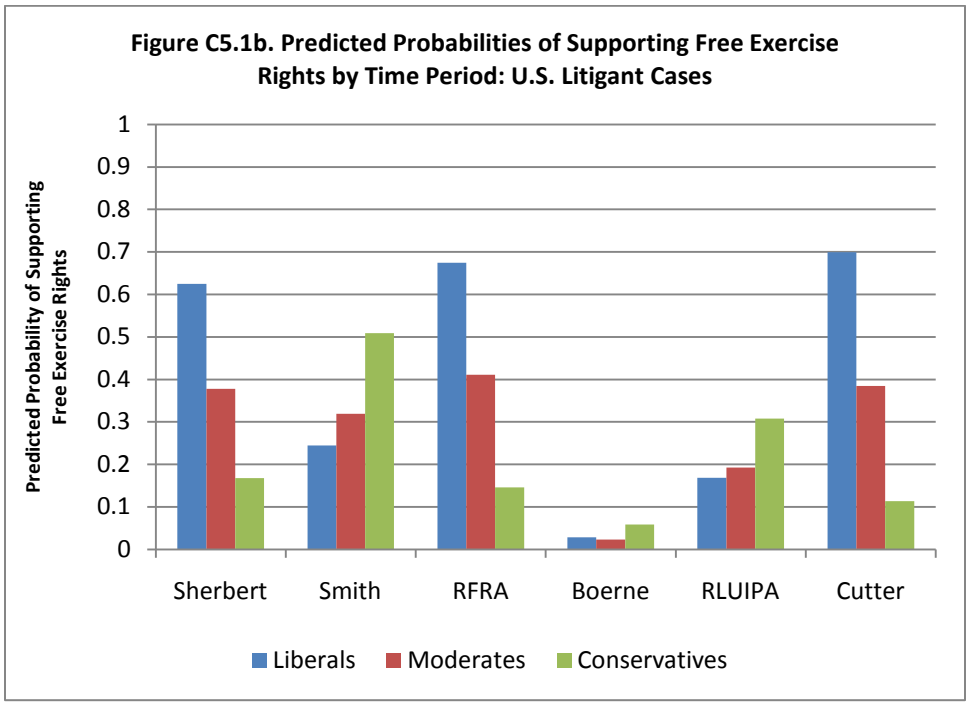
As a robustness check, I estimated a model similar to Equation 5.1, but removing the appropriate interactions of *U.S. Litigant* with each time period. All variables are coded the same. The results from Equation 5.1 and the model below generally comport with each other. While there is of course differences and variation between the results, the overall substantive interpretations remain the same. Therefore, I present the results here in the chapter appendix; Tables and Figures from this analysis are labeled to mirror the analysis presented in Chapter 5. The structural model for this robustness check can be written as follows:

(Level-1 equation) $\eta_{ij} = \pi_{0j} + \pi_{1j}\text{Judge's Ideology}_{ij} + \pi_{2j}\text{Panel Composition}_{ij} +$
$\pi_{3j}\text{Judge's Ideology}_{ij}\text{ X Panel Composition}_{ij} +$
$\pi_{4j}\text{Panel Composition}_{ij}\text{ X } \textit{Smith}_j +$
$\pi_{5j}\text{Judge's Ideology}_{ij}\text{ X Panel Composition}_{ij}\text{ X } \textit{Smith}_j +$
$\pi_{6j}\text{Panel Composition}_{ij}\text{ X RFRA}_j +$
$\pi_{7j}\text{Judge's Ideology}_{ij}\text{ X Panel Composition}_{ij}\text{ X RFRA}_j +$
$\pi_{8j}\text{Panel Composition}_{ij}\text{ X } \textit{Boerne}_j +$
$\pi_{9j}\text{Judge's Ideology}_{ij}\text{ X Panel Composition}_{ij}\text{ X } \textit{Boerne}_j +$
$\pi_{10j}\text{Panel Composition}_{ij}\text{ X RLUPA}_j +$
$\pi_{11j}\text{Judge's Ideology}_{ij}\text{ X Panel Composition}_{ij}\text{ X RLUIPA}_j +$
$\pi_{12j}\text{Panel Composition}_{ij}\text{ X } \textit{Cutter}_j +$
$\pi_{13j}\text{Judge's Ideology}_{ij}\text{ X Panel Composition}_{ij}\text{ X } \textit{Cutter}_j$

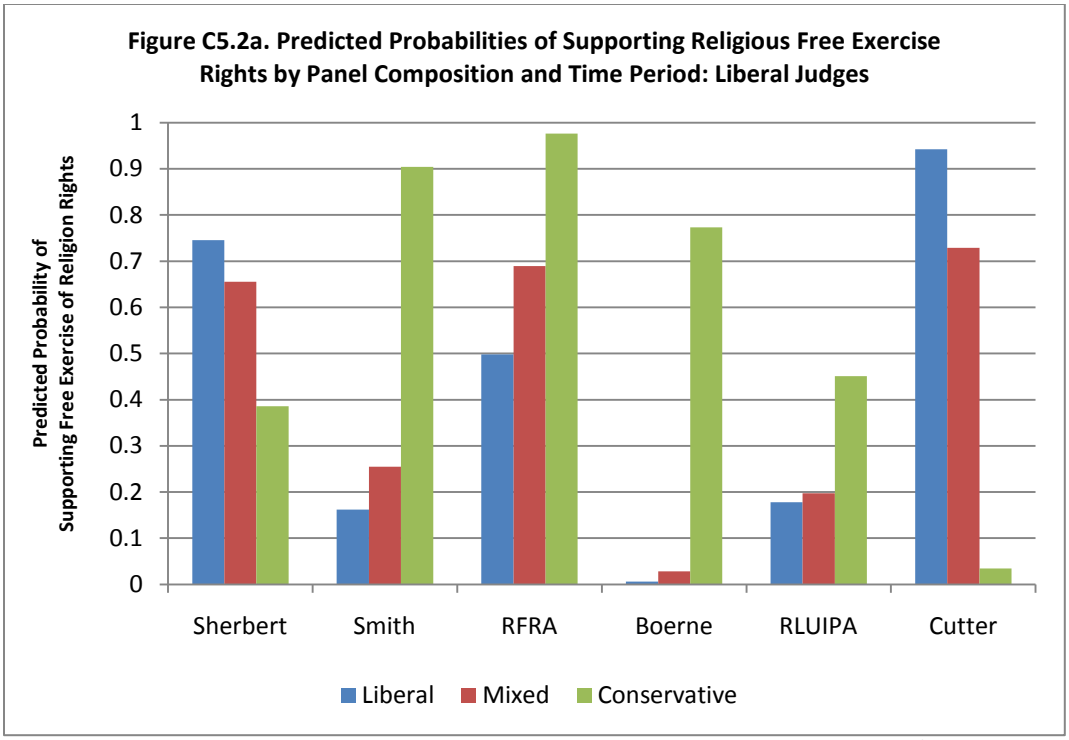
(X5.1) (Level-2 equations) $\pi_{0j} = \beta_{00} + \beta_{01}\text{U.S. Litigant}_j +$
$\beta_{02}\textit{Smith}_j +$
$\beta_{03}\text{RFRA}_j +$
$\beta_{04}\textit{Boerne}_j +$
$\beta_{05}\text{RLUIPA}_j +$
$\beta_{06}\textit{Cutter}_j + r_{0j}$
$\pi_{1j} = \beta_{10} + \beta_{11}\text{U.S. Litigant}_j +$
$\beta_{12}\textit{Smith}_j +$
$\beta_{13}\text{RFRA}_j +$
$\beta_{14}\textit{Boerne}_j +$
$\beta_{15}\text{RLUIPA}_j +$
$\beta_{16}\textit{Cutter}_j$



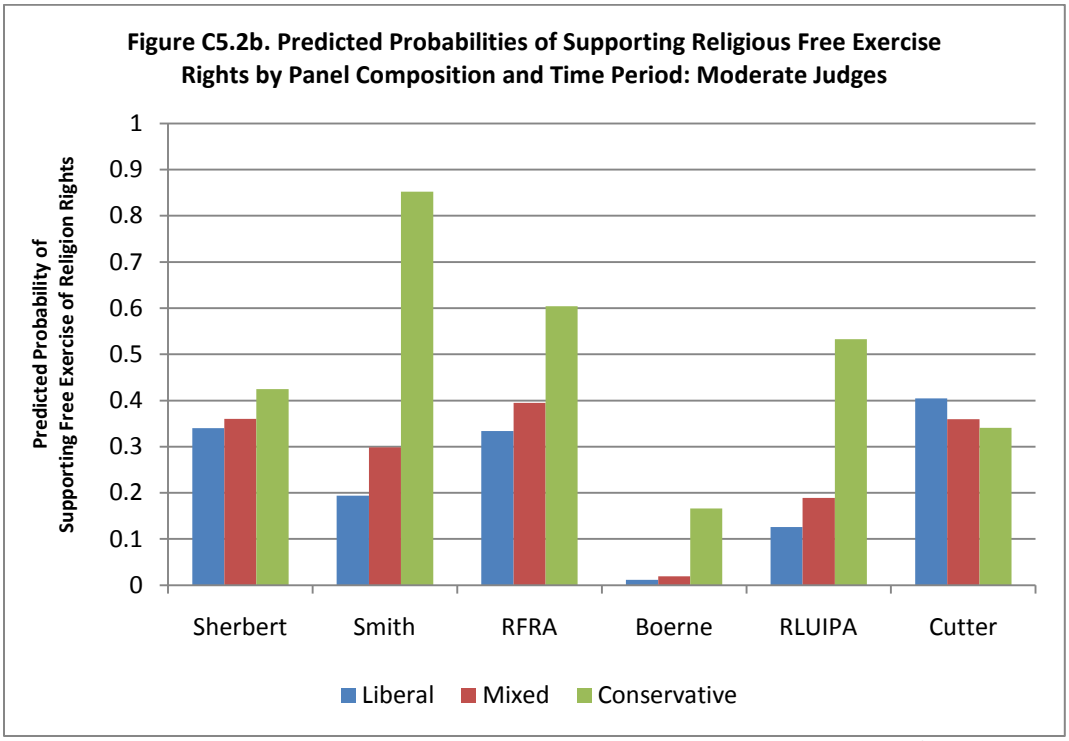
Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.



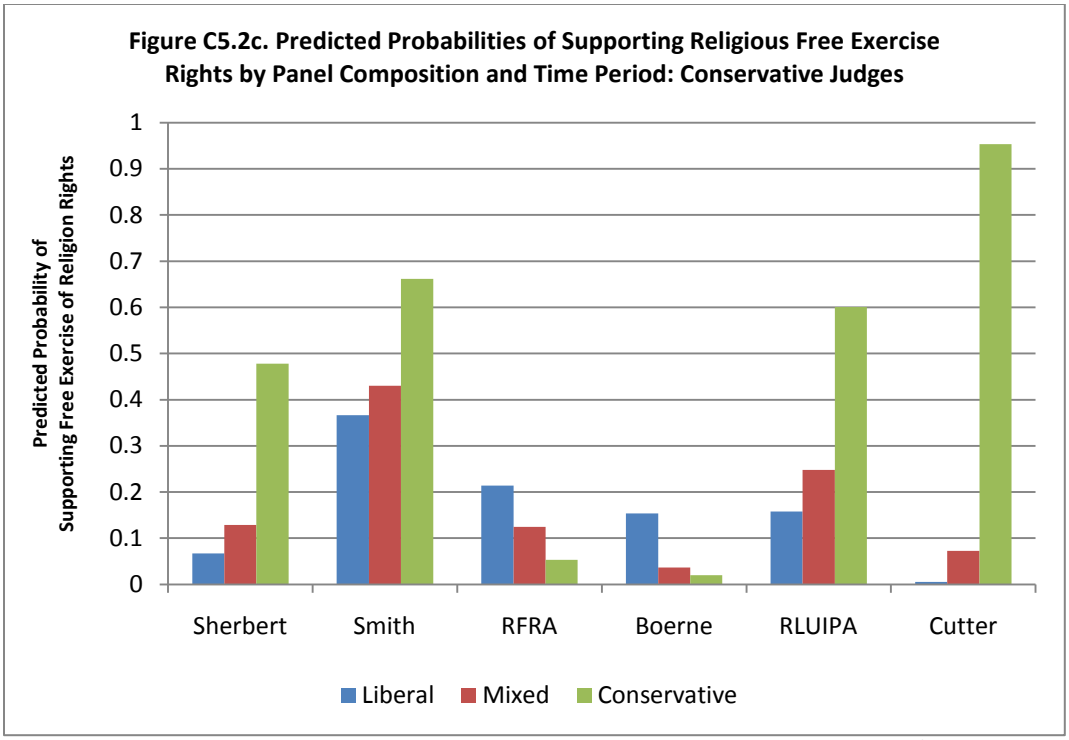
Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.



Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.



Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.



Note: Missing bars indicate predicated probabilities near or virtually zero. Liberal and conservative are defined as the 95 and 5 percentiles of ideology, respectively. Moderate is defined by the mean of ideology. All other variables are held at their means.

Table C5.3. Model of Support for Religious Free Exercise Rights

	Coefficient	Std. Err.	*p*-value
Ideology	4.289	1.524	0.005
U.S. Litigant	0.123	0.771	0.873
Panel Composition	0.441	1.145	0.700
Ideology X U.S. Litigant	-0.631	1.078	0.558
Ideology X Panel Composition	-4.702	2.552	0.065
Smith	-2.301	3.110	0.459
Ideology X *Smith*	-7.893	4.158	0.058
Panel Composition X *Smith*	4.727	3.435	0.169
Ideology X Panel Composition X *Smith*	10.321	5.539	0.062
RFRA	-0.282	1.712	0.869
Ideology X RFRA	-2.287	4.136	0.580
Panel Composition X RFRA	1.109	2.185	0.612
Ideology X Panel Composition X RFRA	10.367	5.451	0.057
Boerne	-4.942	1.891	0.009
Ideology X *Boerne*	-8.102	4.060	0.046
Panel Composition X *Boerne*	2.987	2.702	0.269
Ideology X Panel Composition X *Boerne*	16.871	6.715	0.012
RLUIPA	-1.881	1.604	0.241
Ideology X RLUIPA	-4.659	3.221	0.148
Panel Composition X RLUIPA	2.399	2.387	0.315
Ideology X Panel Composition X RLUIPA	4.179	5.063	0.409
Cutter	0.111	2.345	0.962
Ideology X *Cutter*	9.338	4.576	0.041
Panel Composition X *Cutter*	-0.922	3.478	0.791
Ideology X Panel Composition X *Cutter*	-21.486	7.532	0.004
Constant	-0.797	0.907	0.379
Variance Component (Random Intercept)	7.036	0.216	
rho	0.938	0.004	
Log Likelihood	-468.593		
Number of Votes	1849		
Number of Cases	598		

Note: *p*-values are based on two-tailed tests; *Smith* = *Employment Division, Department of Human Resources* v. *Smith* (1990); RFRA = Religious Freedom Restoration Act of 1993; *Boerne* = *City of Boerne* v. *Flores* (1997); RLUIPA = Religious Land Use and Institutionalized Persons Act of 2000; *Cutter* = *Cutter* v. *Wilkinson* (2005).