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The Politics of Freedom of Expression

Mark J Richards

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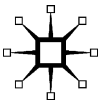

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To my wife, Angela, and our children, Ross and Sophie.

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1
Introduction

Police Department of Chicago v Mosley and *Grayned v City of Rockford*

For seven months in 1967 and 1968, Earl Mosley carried out a peaceful, quiet and usually solitary protest against racial discrimination in admissions at Jones Commercial High School in Chicago. As he paced the public sidewalk adjoining the school, he held a sign stating: 'Jones High School practices black discrimination. Jones High School has a black quota.' His protests at the school came to an end on 4 April 1968, the day before a new Chicago ordinance went into effect. Chicago had prohibited picketing or demonstrating on a public way within 150 feet of a school building during school hours, including half an hour before and after the school day. The ordinance exempted peaceful picketing of a school involved in a labor dispute. Mosley, a federal postal worker, learned about the new ordinance in a newspaper report and inquired of the Chicago Police Department whether the ordinance affected his protest; he was informed that, should he continue, he would be arrested. Mosley's alternative was to protest across the street from the school, beyond the 150-foot zone. He testified that this method was not particularly effective.

> When I was across the street from the school, 150 feet away, you cannot hardly see me. The question that all of the people asked me was, 'Where is the school located?' They don't even see the school across the street, you know. So, what it does, it takes away a certain amount of the effectiveness ... [W]hen I am across the street, I am sort of out of the picture. (*Police Department of Chicago v Mosley,* 408 US 92, 93, 1972)

Frustrated with the limitations imposed upon his freedom of expression by the new ordinance, Mosley challenged the ordinance in the federal district

court, claiming the ordinance restricted his first amendment right of expression and violated the equal protection of the laws guaranteed by the fourteenth amendment (*Mosley*, p. 94).

On 25 April 1969, Richard Grayned was arrested during a demonstration at West Senior High School in Rockford, Illinois. Some of the 200 protesters carried signs explaining their concerns with the school, such as: 'Black history with black teachers', 'Black cheerleaders to cheer too' and 'Equal rights, Negro counselors' as they marched on a sidewalk set back from the street, approximately 100 feet from the school. Other protesters raised their clenched fists, symbolizing 'Power to the people' (*Grayned v City of Rockford*, 408 US 104, 105, 1972). Justice Thurgood Marshall's opinion for the US Supreme Court indicated that other facts about the protests were in dispute. Witnesses for the protesters testified that they protested in a quiet, orderly fashion, few students came to the windows to watch the protest, police with loudspeakers made the most noise and, overall, the school was not disrupted. One officer testified that the protest was 'very orderly' (*Grayned*, pp. 122–3, Douglas J, dissenting in part). The city's witnesses contended that hundreds of students came to the windows to watch the demonstration, protesters encouraged students to leave the classrooms and join the protest and tardiness after period changes dramatically increased due to students going outside to observe the protest, all of which disrupted the orderly procedure of the school (*Grayned,* pp. 105–6).

There was no dispute as to what happened next. The police warned the protesters and then proceeded to arrest 40 of them, including Grayned. Grayned was convicted of violating an antipicketing ordinance identical to the one challenged by Mosley in Chicago. Grayned was fined $25 for the violation, and another $25 for violating an antinoise ordinance that prohibits anyone on grounds adjacent to a school or class that is in session from making a noise or diversion that 'disturbs or tends to disturb the peace or good order of such school session or class thereof' (Rockford, Illinois Code of Ordinances, c. 28, 19.2(a), quoted in *Grayned*, pp. 107–8). Grayned raised facial challenges to the two ordinances, claiming they were vague and overbroad, in violation of the first amendment. He did not contest their constitutionality as applied to him, even though he could have done so, considering that there was no evidence that he protested in a disruptive or noisy manner (*Grayned*, p. 124, Douglas J, dissenting in part).

The Supreme Court heard oral arguments in the two cases on 19 January 1972 and issued its opinions on 26 June 1972. The Court unanimously agreed that the Chicago antipicketing ordinance and the identical Rockford antipicketing ordinance were unconstitutional, but the Court upheld the Rockford antinoise ordinance by a vote of 8:1, with Justice William Douglas dissenting. What was the critical difference between the two ordinances?

The fatal flaw of the Chicago and Rockford antipicketing ordinances, according to Marshall's opinion for the Supreme Court, was that they discriminated on the basis of the content of expression. The law treated protesters differently based on the subject matter of their demonstration. By exempting picketing of schools regarding labor disputes from punishment under the ordinances, Chicago and Rockford privileged labor protests over demonstrations involving racial equality or any other subject.

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor–management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'. (*Mosley*, pp. 95–6, quoting *New York Times v Sullivan*, 376 US 254, 270, 1964)

Marshall quoted from *Sullivan*, a landmark case involving a libel suit filed by an elected commissioner of Montgomery, Alabama, against the newspaper for publishing an advertisement criticizing the actions taken against student demonstrators and Dr Martin Luther King Jr by Montgomery police and others. Marshall's reference is but one of the connections between the Supreme Court's civil rights jurisprudence and the development of modern first amendment jurisprudence, which I explore in greater depth in Chapter 3. In the eyes of Justice Marshall and his Supreme Court brethren, this content control was an affront to both the first amendment and the equal protection clause of the fourteenth amendment. Marshall observed that Chicago's differential treatment of picketing presented an equal protection clause issue, but that claim was 'closely intertwined with First Amendment interests' (*Mosley*, p. 95).

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more

> controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. (*Mosley*, p. 96, quoting Meiklejohn, 1948, p. 27)

Marshall's recognition of the connection between the first and fourteenth amendments was a key development in the jurisprudence of freedom of expression because it formalized judicial review of first amendment issues by using prescribed standards of review, a practice which had previously been more commonplace in the context of the equal protection clause. Of course, this was not the first time that the Supreme Court observed that these fundamental principles of freedom of expression and equality were intertwined. In Chapter 3 I explore the essential role that race and the civil rights cases played in shaping the Supreme Court's free expression jurisprudence. What I wish to emphasize here is that Marshall's opinions in *Mosley* and *Grayned* brought together strands of free expression and equal protection jurisprudence by connecting the principles and by establishing formally different levels of judicial scrutiny for laws depending on whether government discriminated on the basis of content.

Mosley and *Grayned* established the primary line of inquiry for the Supreme Court's modern first amendment jurisprudence. The Court inquires whether the challenged law is a content-based or content-neutral regulation. When laws are aimed at the communicative impact or viewpoint of the expression, they are considered *content-based* and are subject to the strict scrutiny standard of review; these regulations must be the least restrictive means of achieving a compelling state interest, or they will be struck down as unconstitutional. *Content-neutral* regulations do not explicitly aim at communicative impact or viewpoint. Content-neutral laws are usually time, place or manner regulations, or general regulations that have an incidental effect on speech. Content-neutral laws are judged according to intermediate scrutiny, which requires the laws must not restrict more speech than is necessary to achieve a significant government interest. Lawrence Tribe (1988) described the Supreme Court's basic free expression jurisprudence as a 'two-track' analysis, with content-based laws on track one and content-neutral laws on track two.

The concepts of content-based and viewpoint-based regulations of expression are closely related, but somewhat distinct. Content-based is a broader

category and includes viewpoint-based; viewpoint-based discrimination is included within the category of content-based discrimination, but there are some types of content-based discrimination that are not viewpoint-based. In limited public forums, the Supreme Court permits content-based but not viewpoint-based regulations. For example, a public university could choose to host a conference on the constitutionality of gay marriage, which is a content-based decision; it could exclude presenters who wished to focus on the constitutionality of drone strikes against alleged terrorists, as such presentations would not be germane to the purpose of the forum. However, for the same conference, the university could not choose to include only pro-gay marriage presenters, as this would constitute viewpoint-based discrimination. Of course, the line between content-based and viewpoint-based discrimination can be blurred, as I elaborate in Chapters 3 and 6.

The content-neutrality jurisprudential regime

Why does this matter? How would we know if it mattered? For decades, political scientists and legal scholars have attempted to discern the relative influence of law and politics on the decisions of Supreme Court justices. The debate over whether law is fueled by politics has existed since the time of Socrates, if not earlier. In Plato's *Republic*, Thrasymachus argued that justice was simply the interest of the strongest; essentially, justice is defined by those in power, and he challenged Socrates to show that justice was something more (Grube, 1974, pp. 336–54). With improvements in computer technology in recent decades fueling the power of software for statistical analysis and increasing the availability of online databases of court opinions, scholars have been examining the classic question of law versus politics in new ways.

In this book, my goal is to understand the extent to which legal and political factors explain how the justices have voted in freedom of expression cases from the start of Earl Warren's term as Chief Justice in 1953 to the June 2012 decisions of the Supreme Court under the leadership of Chief Justice John Roberts. In particular, I consider the influence of the justices' political attitudes, the content-neutrality jurisprudence and external factors such as the level of government and type of party involved in the case, as well as friend of the court briefs.

Advocates of the attitudinal model contend that the politics of the justices drive the justices' decisions. 'Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.' (Segal and Spaeth, 1993, p. 65) Using a statistical database of every Supreme Court decision, beginning in 1953, Jeffrey Segal and Harold Spaeth (1993) demonstrated that the political leanings or 'attitudes' of the justices effectively predict how they vote. The attitudinalists

have even gone so far as to claim that attitudes are the only systematic factor that explains how the justices vote (Segal and Spaeth, 1994, p. 11). In effect, they claim that law matters little to the justices. Although they conceded that, at times, the justices voted based on legal precedent, the frequency is 'so low that only ... preferential models ... appear to be in the right ballpark' (Spaeth and Segal, 1999, p. 288).

In my view, the justices do act based on their attitudes, but the attitudinal model is too simplistic. In a 2002 article, Herbert Kritzer and I proposed a new way of conceptualizing the role of law in explanations of Supreme Court decision-making, which we call jurisprudential regime theory. A jurisprudential regime is 'a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area' (Richards and Kritzer, 2002, p. 308).

Law is not a mechanical construct dictating the outcome of cases for the justices. The influence of law on Supreme Court decision-making is best considered from a neoinstitutional perspective, which encompasses both interpretive (Smith, 1988; Clayton and Gillman, 1999) and rational choice (Epstein and Knight, 1998) approaches, as I elaborate in Chapter 2. Law, like other institutions, is created by actors (justices) with policy goals (attitudes) whose subsequent decisions are then in turn influenced but not determined by the institutional structure they have created. Martin Shapiro's early work on political jurisprudence recognized that there is room for both law and politics in explanations of the Supreme Court (Shapiro, 1964; 1968). As Kritzer and I noted: 'Leaving jurisprudence out of the analytic framework fails to recognize both the distinctive nature of courts and the theoretical point that ideas and institutions matter.' (Richards and Kritzer, 2002, p. 306) Jurisprudential regime theory builds on neoinstitutionalism by theorizing that attitudes, jurisprudence and strategic considerations all play a role in Supreme Court decision-making.

In this book I apply jurisprudential regime theory to freedom of expression, based on a dataset I constructed from coding all cases that raised a free expression issue from 1953 to 2012. My goal is to explain why the justices vote as they do in free expression cases. According to the two levels of review established by *Mosley* and *Grayned* in 1972, I observe several patterns in how the justices vote. First, attitudes played a prominent role in the justices' decisions; this finding was not conditioned by the regime. Second, the justices were more likely to strike down content-based laws after the regime was established, because the Supreme Court was applying strict scrutiny. Third, after 1972, the justices were more likely to uphold content-neutral laws than content-based laws, because the justices applied a more lenient standard of review to content-neutral attempts to regulate speech. Fourth, although

intermediate scrutiny is a more lenient standard of review than strict scrutiny, the application of intermediate scrutiny in 1972 was more protective of speech governed by content-neutral laws compared to the high level of deference the justices afforded such laws before 1972. As a result, the justices were more likely to uphold content-neutral laws before 1972 than they were after the standard of review was established. The observed statistical pattern fits quite well with the observations made by a prominent first amendment scholar, Kenneth Karst, a few years after *Mosley* and *Grayned* were decided, who noted *Mosley* is a landmark precedent that declares a 'principle of major importance'. This principle 'requires courts to start from the assumption that all speakers and all points of view are entitled to a hearing, and permits deviation from this basic assumption only upon a showing of substantial necessity' (Karst, 1975, p. 28, quoted in Shiffrin and Choper, 1996, p. 393). I refer to this principle and the cases which established it, *Grayned* and *Mosley*, as the *content-neutrality jurisprudential regime*.

Contemporary relevance of the content-neutrality jurisprudential regime

Skeptics may wonder whether a jurisprudential regime established in 1972 still has relevance today. In fact, the reach of the content-neutrality regime is quite extensive and the justices continue to use it, as illustrated by the justices' reasoning in several recent, controversial decisions. *Citizens United v Federal Election Commission* (130 S. Ct 876, 2010) was an incredibly controversial, divisive decision in which the Supreme Court, reflecting attitudinal divisions with a 5:4 vote, overturned a section of the Bipartisan Campaign Reform Act of 2002 (BCRA) because the majority saw it as a form of content-based discrimination against the right of corporations to fund independent political broadcast advertisements. Interestingly, Justice John Paul Stevens, dissenting, still applied the content-neutrality framework but found this section of the BCRA permissible. In *Brown v Entertainment Merchants Association* (131 S. Ct 2729, 2011), the Supreme Court struck down California's attempt to regulate 'violent' video games, by a vote of 7:2. California had attempted to bypass the content-neutrality regime by arguing that violent, interactive speech targeted at children was outside the first amendment, but the majority firmly rejected this argument. *Snyder v Phelps* (131 S. Ct 1207, 2011) considered the hateful, anti-gay expression of the Westboro Baptist Church, which had picketed the funeral of a US soldier who had died in Iraq. The Supreme Court, by a vote of 8:1, overturned an imposition of liability against the church for intentional infliction of emotional distress. The Court observed that the content of the church's expression was protected; the protests concerned a matter of public importance and took place in a public location. These cases show that

a majority of the Roberts Court continues to support the content-neutrality jurisprudence, although the decisions were not unanimous. Other recent cases call into question the limits and influence of the content-neutrality jurisprudence. In 2012, the Supreme Court struck down the Stolen Valor Act of 2005 in *US v Alvarez* (132 S. Ct 2537, 2012). The Act made it a crime to lie about the receipt of military honors. Four justices, Anthony Kennedy, Roberts, Ruth Bader Ginsburg and Sonya Sotomayor, ruled that the law was content-based and failed strict scrutiny. Stephen Breyer and Elena Kagan joined the plurality in agreeing that the law could achieve its goals in a less restrictive manner, but refused to label the law content-based or apply strict scrutiny. Antonin Scalia, Clarence Thomas and Samuel Alito dissented and would have upheld the law. In Chapter 5, as part of a qualitative examination of the Supreme Court's treatment of content-based regulations of expression, I examine these cases in greater detail, along with another case in which the Roberts Court did not support freedom of expression. In *Holder v Humanitarian Law Project* (130 S. Ct 2705, 2010), by a vote of 6:3, the Supreme Court upheld a federal law criminalizing support for terrorist groups. The Court upheld the law despite considering it to be content-based.

Certainly, not every regulation of expression is content-based. In *Christian Legal Society v Martinez* (130 S. Ct 2971, 2010), the Supreme Court upheld a law school policy requiring student groups to have open membership policies. The Court found the policy to be a reasonable, viewpoint-neutral regulation that conditioned access to a limited public forum. However, the Court split along attitudinal lines by a vote of 5:4, with the dissenters arguing that the policy amounted to viewpoint-based discrimination against the Christian Legal Society, which had been denied registered student organization status. I look at this case in Chapter 6.

Outline of the book

In Chapter 2, I set out the theory that guides my approach through the rest of the book. I begin with an explanation of how the theories of political jurisprudence and neoinstitutionalism enable me to incorporate attitudinal, strategic and jurisprudential approaches in a coherent model. The justices are politically motivated and at times may consider strategic considerations, but I theorize that jurisprudential regimes matter to the justices as well. Potential external strategic considerations include the type of party and the level of government involved in the case, and the participation of government and interest groups through friend of the court briefs. I explain how and why the justices use jurisprudential regimes and conclude with a discussion of criticisms and limitations of the theory, including a discussion of the applicability of jurisprudential regime theory outside the US. I observe that a variety of

scholars have used qualitative and quantitative institutionalist approaches to explain judicial politics in a range of countries. Jurisprudential regime theory was designed to be a broadly applicable theory, and scholars have already applied it to other countries.

Chapter 3 is an examination of the justifications, origins and development of the content-neutrality jurisprudential regime. At the time of *Mosley* and *Grayned*, the Supreme Court was divided, according to attitudinal measures, with four liberals, four conservatives and one moderate, but the justices built consensus for the regime by justifying content-neutrality in terms of political values such as self-government, security, open debate and equality. The National Association for the Advancement of Colored People (NAACP) and the civil rights movement shaped the development of the content-neutrality jurisprudence and helped to build consensus by bringing equality and equal protection claims to the first amendment. In addition, content-neutrality serves as a limiting principle on freedom of expression. This also helped to create consensus among the justices by protecting the core of freedom of expression while allowing the justices to draw limits on freedom of expression by permitting the government to regulate in a content-neutral way.

Having explained the development of the content-neutrality regime, I proceed to my quantitative and qualitative analyses of the freedom of expression cases decided from 1953–2012. In Chapter 4, I explain my quantitative analysis, starting with my rules for coding, my decisions regarding which variables to include in the model, and the types of statistical tests I chose. I present the results of my logistic regression analysis of the free expression cases. Using regression models enables me to incorporate multiple variables and isolate the effects of each one while holding the influence of the other variables constant.

For the most part, the Supreme Court is likely to strike down content-based laws after 1972. In Chapter 5, I look qualitatively at how the Supreme Court changed in its treatment of content-based laws before and after *Grayned* and *Mosley*. Using interpretive methods, I examine key cases that are emblematic of the Supreme Court's actions, as well as cases in which the Court upheld content-based laws.

In Chapter 6, I engage in an interpretive analysis of the justices' treatment of content-neutral laws before and after the regime was established. I examine key examples of both content-neutral laws that are upheld and ones that are struck down. I also interpret cases in which the distinction begins to break down, such as regulations governing nude dancing.

I conclude the book in Chapter 7 with some observations on the importance of the content-neutrality regime and what it illustrates about US Supreme Court decision-making. I compare the development of the content-neutrality jurisprudence in the US to the approaches to freedom of expression

in Canada, Germany, Japan and the UK. Although the approach of the high court in each country is distinctive, comparisons can be made in terms of judicial independence, judicial review, balancing of freedom of expression against other constitutional values, and the values used to justify freedom of expression.

I also address the differences between positive and interpretive social scientific methods. I employ statistical methods to test hypotheses on a large number of cases, similar to positivists like the attitudinalists, but I have also been influenced by Howard Gillman's (1999) conception of the Supreme Court as an idea, not a building or game, so I strive to be attentive to the importance of language and interpretation in Supreme Court decision-making. I weigh the advantages of each approach and explain what is required to speak to each school of thought. I also consider the usefulness of my methodology for the study of high court decision-making in other countries

It is my intention that this book will effectively illustrate a critical development in constitutional politics and jurisprudence, the Supreme Court's application of equal protection principles to freedom of expression jurisprudence and the consequent elevated protection of the cherished liberty of expression. I strive to explore the origins of the content-neutrality jurisprudence, including its political dimensions and the role of the civil rights movement in developing it. I also endeavor to show how this jurisprudence transformed the Supreme Court's freedom of expression decision-making.

2
Jurisprudential Regime Theory

Jurisprudential regime theory is a comprehensive theory of Supreme Court decision-making that provides a coherent framework for incorporating attitudinal, strategic and jurisprudential factors. In this chapter, I provide a detailed look at this theory, and show how it builds on, challenges and contributes to the Supreme Court decision-making literature. I explain how political jurisprudence and neoinstitutionalism provide the theoretical underpinnings for jurisprudential regime theory. I elucidate how and why the justices use jurisprudential regimes. I conclude with a discussion of the main criticisms and limitations of the theory. Although jurisprudential regime theory is not suitable for explaining every area of Supreme Court decision-making, it does have the advantage of testing for a wider variety of factors than the attitudinal model does. In particular, it is well suited for explaining the justices' freedom of expression decision-making, because it incorporates attitudes, jurisprudence and strategic factors into a single framework. An attitudinal approach which left out the content-neutrality jurisprudence would be an incomplete explanation, so jurisprudential regime theory guides the statistical and interpretive analyses I perform in subsequent chapters.

Key aspects of jurisprudential regime theory

The key aspects of jurisprudential regime theory were first articulated in my 2002 article with Herbert Kritzer (Richards and Kritzer, 2002). A jurisprudential regime is a key precedent or set of precedents that structures how the justices of the Supreme Court evaluate cases. The use of the term 'jurisprudential' indicates that the regime is limited to a certain area of law. The justices use jurisprudence to identify key elements of cases, such as whether a regulation of expression is content-based or content-neutral, and set up standards of review or analytic tests. The justices evaluate these case factors

differently before and after the regime is established (Richards and Kritzer, 2002, p. 308).

Statistical and interpretive methodologies are used to test whether a potential jurisprudential regime actually makes a difference to the justices in their decision-making. Interpretive methodologies are used to identify a jurisprudential regime and trace its origin, to reveal the role of values in building support for a regime (see Chapter 3), to analyze the roles of jurisprudence and attitudes in the justices' decision-making, and to examine the incremental development of law (see Chapters 5 and 6). Statistical methodologies are used to model which factors matter most to the justices and to examine whether the justices change their evaluation of jurisprudential factors after the regime is established (see Chapter 4).

Jurisprudential regime theory cannot be captured by the simplistic formulas of 'law versus attitudes' or 'law constrains attitudes'. Rather, it follows Martin Shapiro's notion of 'political jurisprudence' (Shapiro, 1964; 1968), which sees the judicial system as a network of political institutions, but also recognizes the jurisprudential distinctiveness of those institutions. Neoinstitutionalism provides a similar but more contemporary framework for jurisprudential regime theory. The institutional setting of the Supreme Court means the justices are appointed for life and are politically unaccountable, which enables them to act based on attitudes. Jurisprudential regime theory incorporates attitudes in several ways. It assumes that the justices act based on attitudes and always includes this factor in every model. Justices can create jurisprudential regimes with attitudinal goals in mind. In addition, justices are not mechanistically bound or constrained by jurisprudential regimes. Justices have agency in jurisprudential regime theory. The justices are free to disregard a jurisprudential regime in any particular case.

Given the point in time at which jurisprudential regime theory developed, its posture with respect to attitudinalism was different from some earlier challenges to attitudinalism. As Jeffrey Segal and Harold Spaeth noted in 2003, the attitudinal model at that time was no longer being treated with as much 'opprobrium' as it had been a decade earlier (Segal and Spaeth, 2003, p. 32). I reject the normative criticism of the attitudinal model that it promotes an instrumentalist view of law and teaches a lack of respect for constitutional principles. Making this type of argument is blaming the messenger and falsely imputes causality. In addition, I am willing to accept the attitudinalists' challenge to statistically model judicial behavior. In this sense, jurisprudential regime theory builds on attitudinal theory. Had the attitudinalists not set out to systematically model the influence of the justices' attitudes on their decisions, jurisprudential regime theory would not have been possible.

The attitudinal model 'holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of

the justices' (Segal and Spaeth, 2002, p. 86). Overall, the attitudinalists make a very persuasive case for why the justices of the Supreme Court vote based on their attitudes or policy goals. The institutional setting of the Court means that the justices sit at the apex of the judicial system and are not subject to any substantial external political accountability, whether it be to another political branch of government, the public, or interest groups. The Supreme Court has tremendous control over the cases it chooses to hear, which allows it to choose cases based on the policy goals the justices wish to advance. It is unlikely that the justices have ambition for higher office and, even if they did, it would be unlikely to cause them to moderate their pursuit of their policy goals. Recruitment processes also bring policy-oriented appointees to the Court.

If attitudes are so important, then what is the unique contribution of jurisprudential regime theory? There are a variety of distinctive insights which I will introduce here and elaborate throughout this chapter. The primary one is that jurisprudential regime theory provides a more comprehensive theory that explains more of what goes into the justices' decisions; it does so by drawing on a wide range of literature about how the law matters to the justices. The attitudinal model is too simplistic. By reducing judicial behavior to attitudes, the attitudinalists miss jurisprudential and strategic considerations that jurisprudential regime theory is able to incorporate.

Neoinstitutionalism provides the foundation for jurisprudential regime theory. Jurisprudential regime theory is not simply 'attitudes plus law'. One problem with simply trying to add law to the attitudinal model is that the attitudinal model argues that law is based entirely on attitudes. How is it possible, then, to argue that both jurisprudential regimes and attitudes matter? Neoinstitutionalism provides the framework. Neoinstitutionalism posits that institutional settings and political actors, who possess agency, both play roles in political actions. Political actors create institutions and those institutions in turn have some influence on the political actors. Institutions are not just buildings, but also ideas (Gillman, 1999). A legal construct, in the form of a key precedent or a jurisprudential regime, can be a type of institution. These regimes are created by justices, who may be acting on the basis of attitudes, but once these regimes are created, the justices begin to look at cases differently. (*Political* regimes are identified more broadly as political and policy coalitions.) While jurisprudential regime theory uses neoinstitutionalism as the foundation, it also contributes to this literature by developing the concept of a jurisprudential regime, and by showing how statistical and interpretive methods can complement each other in order to provide a more comprehensive explanation.

How do jurisprudential regimes actually function? The role of language is important in understanding how jurisprudential regimes function at micro

and macro levels. At the micro level, how do justices use jurisprudential regimes? When cases come to the Supreme Court, the minds of the justices are not blank slates. The language of the law creates categories that provide guidance to justices, judges, lawyers and others who rely upon the law. The justices use jurisprudential regimes to identify key case factors. Jurisprudential regimes can also define how those case factors are weighed by setting up standards of review or balancing tests. At the macro level, appreciating the role of language also helps to explain the utility of jurisprudential regimes to the justices and to society. Jurisprudential regimes provide guidance not only to the people and institutions that rely upon the law, but also to the justices, and regimes help them to form majorities that render coherent opinions and avoid coordination problems.

Jurisprudential regime theory incorporates several insights of the strategic model. Both internal and external strategic considerations highlight the strategic utility of a jurisprudential regime. Internally, if the justices were purely acting on the basis of attitudinal predilections, they could create difficulties with coordination. The justices might not achieve majorities that could agree on coherent frameworks. Cobbling together coalitions based on pluralities does not provide for coherent legal guidance for lower court judges and the institutions and individuals that rely on the law. Jurisprudential regime theory contends that regimes help the justices to overcome coordination problems by identifying key case factors and creating analytic tests and standards of review for weighing those factors.

Externally, a jurisprudential regime is consistent with the norm of *stare decisis*. Lee Epstein and Jack Knight discussed the norm with respect to precedent in general, but jurisprudential regime theory builds on their work by showing how a jurisprudential regime can be a particularly effective type of precedent. Establishing and applying a jurisprudential regime respects community expectations that are rooted in the stability of law and the rule of law. When the justices apply a jurisprudential regime, they gain community respect for the legitimacy of the Court's decisions (Epstein and Knight, 1998, pp. 164–5).

Jurisprudential regime theory contends that other external considerations could matter to the justices. These external considerations include the level of government involved in the case, the identity of the parties and the participation of interest groups or governments through friend of the court briefs. These considerations may or may not be mediated by the jurisprudential regime. In other words, the theory readily acknowledges that factors outside of a regime, such as attitudes or interest group participation, can matter to the justices as they decide cases.

At their narrowest, attitudinal, strategic or legal explanations of Supreme Court decision-making reduce explanations down to one factor. These

single-factor explanations occur when the attitudinal model posits that any potential legal or strategic behavior is rooted in attitudes, the legal model theorizes that citations to precedent mean attitudinal behavior is actually based on law, or the strategic model claims that almost any type of judicial action is strategic. Jurisprudential regime theory strengthens explanation of judicial decision-making by incorporating and testing a wide range of potential factors while avoiding the mistake of reducing the cause of these factors to single-factor (e.g. purely attitudinal, strategic or legal) explanations. The theory strives to identify the role of these three primary motivations while candidly acknowledging the limits of statistical and interpretive empirical approaches in discerning which combination of jurisprudential, attitudinal and strategic factors best explain why the justices vote as they do.

The political jurisprudence of jurisprudential regimes

At the time that Kritzer and I were developing jurisprudential regime theory, the scholarly debates regarding the role of law in Supreme Court decision-making were largely framed as law versus attitudes. This formulation was too simplistic and we looked back to Shapiro's (1964; 1968) concept of 'political jurisprudence' to support our point that jurisprudence could still play a role in a political Supreme Court, a role that could not be reduced to purely attitudinal considerations. Shapiro's work in the 1960s anticipated the insights of the neoinstitutional scholars of the 1990s (Kritzer, 2003). The political component of political jurisprudence means that courts and judges are political institutions that exercise political power. Courts are staffed by political actors with political goals in mind and also need to be analyzed in the context of the political system. Kritzer noted that such an argument seemed trite in 2003, but at the time Shapiro wrote, it was more controversial. Today, attitudinalists and neoinstitutionalists alike would accept Shapiro's propositions, which is a good indication of why political jurisprudence is a necessary starting point (Kritzer, 2003, pp. 388–9). Shapiro serves as key bridge between the old and new institutionalists (Kritzer, 2003, p. 387).

The jurisprudential component of political jurisprudence means that scholars should not treat courts as just another political agency or a small legislature. While Shapiro was opposed to analyses of the Supreme Court that attempted to isolate it from the political sphere and treat it as a completely unique institution above the political fray, he kept in mind that that jurisprudence matters. When Kritzer and I began to explicate jurisprudential regime theory, our starting point was to accept many of the propositions of the attitudinal and strategic models, and we then looked to bring jurisprudence back in. Shapiro's political jurisprudence provided an appropriate theoretical foundation (Richards and Kritzer, 2002, pp. 305–6, 315, citing

Shapiro, 1964 and 1968). Shapiro saw the relevance of jurisprudence in the content of opinions, the Supreme Court's relations to other institutions, which vary depending on the area of law that is relevant to a particular relationship, and *stare decisis*.

The content of opinions provides guidance to other political actors who rely upon the law, and the opinions matter more than which party won the case (Richards and Kritzer, 2002, p. 306, citing Shapiro, 1968, p. 39). Jurisprudence also matters because the Supreme Court's relation to other institutions will vary based on different areas of jurisprudence. The area of law involved in a case may vary by whether a case is a matter of constitutional or statutory law, the level of detail or technical expertise involved and the type of policy implementation process (Kritzer, 2003, p. 390). In some areas of statutory law, Congress may leave significant questions open for the Supreme Court to resolve, while at other times Congress provides clearer guidance. In some areas of jurisprudence, external interest groups may be largely kept out of the policy-making process and therefore seize on opportunities to participate through the judicial process (Kritzer, 2003, pp. 395–6).

Shapiro also integrated jurisprudence with his institutional approach to the courts in his various works regarding the norm of *stare decisis*; Kritzer (2003, pp. 401–6) cogently synthesized Shapiro's *stare decisis* scholarship. Shapiro rejected any traditional, mechanistic views of the role of precedent determining who wins and he would have been comfortable with attitudinal explanations of who wins and loses, but, in his view, this was beside the point, as the content of a judicial opinion and its policy effects are more important. Shapiro saw precedent functioning as a type of incrementalism in common law judicial decision-making. Judges view cases in an incremental context of precedent, which shapes the parameters of decisions and limits the implementation of radical changes in law and policy (Kritzer, 2003, pp. 402–3). Judges do have some freedom within incrementalism, but it is not unlimited (Richards and Kritzer, 2002, p. 306, citing Shapiro, 1968, p. 71). Shapiro used communication and socialization theories to explain how precedent can promote unifying jurisprudential effects. Communication between judges occurs through the common law process of reading, analyzing and drafting precedent. Judges and lawyers use redundant citations, including citations to other jurisdictions, to build authority (including non-binding authority with cross-jurisdictional citations) in their opinions and briefs. Citations to precedent in other jurisdictions enhance the homogenization of legal policy, even in areas like tort law where the law theoretically could vary greatly from state to state but does not. Such redundant communications also promote incremental decision-making by emphasizing commonalities among cases (Kritzer, 2003, pp. 404–6). Socialization comes into play through the shared training, discipline and

experiences of lawyers and judges, as well as their shared system of communications (Kritzer, 2003, p. 403).

Shapiro's political jurisprudence laid the foundation for modern neoinstitutional approaches to the study of law by studying the Supreme Court as a political institution, situated in a political, institutional context. He was also careful to elaborate the unique role of jurisprudence in providing guidance to other political actors, in structuring the Court's relations with other institutions and in working through the norm of *stare decisis* as a type of incrementalism and political socialization that works to homogenize legal policy. Jurisprudential regime theory builds on Shapiro's political jurisprudence by applying contemporary statistical methods to attempt to discern whether political, strategic and/or jurisprudential factors best explain decision-making in particular areas of law.

In addition, the qualitative approaches I employ in this book build on Shapiro's political jurisprudence. Although, due to limitations of the journal article format, my past empirical applications of jurisprudential regime theory have largely focused on major breakpoints in the Supreme Court's decision-making, jurisprudential regime theory is compatible with an incremental approach to legal development. As Brandon Bartels and Andrew O'Geen (2008) put it, legal change could be both revolutionary and evolutionary. Richard Pacelle, Bryan Marshall and Bret Curry theorized four stages of issue evolution, where Court doctrine begins as unstable, stabilizes, moves to a stage where cases become harder, and finally moves to multidimensional issue space where the issue is tied to another issue (Pacelle Jr et al., 2007). Although the quantitative aspects of jurisprudential regime theory are suited to testing for major breaks that signify the start of a new regime, qualitative methods are needed to provide a more complete picture. As Shapiro argued, jurisprudence and the content of opinions matter, as well as political and institutional factors. Qualitative methods are needed to understand the creation of a line of jurisprudence, as well as its development. As Chapter 3 illustrates, the content-neutrality regime came about through an incremental process that was a result of interplay between justices with political perspectives and parties like the National Association for the Advancement of Colored People (NAACP) and other members of the civil rights movement. The justices also used political values such as self-government, security, open debate and equality to justify the content-neutrality jurisprudence, which evolved through the content of the Court's opinions. The qualitative approach I use in Chapters 5 and 6 looks at the political divisions and alliances among the justices and helps to explain the different questions that arise after a new regime is established. For example, is regulation of adult nude dancing a content-neutral regulation of conduct? The facts sometimes challenge the content-neutrality regime, resulting in a breakdown of consensus among the justices as to how

the jurisprudential categories apply. These qualitative methods build upon Shapiro's theory of political jurisprudence. Another way in which jurisprudential regime theory develops Shapiro's work is to make explicit how political jurisprudence connects to neoinstitutionalism.

Jurisprudential regime theory builds on the foundation of neoinstitutionalism

Rather than approaching the question of the role of law in Supreme Court decision-making as 'law versus attitudes', jurisprudential regime theory builds on a neoinstitutional foundation and theorizes that law, attitudes and strategic considerations may all matter. Law in the form of a jurisprudential regime is best understood as a principled, institutional construct created by the justices, rather than a mechanistic constraint imposed on the justices. Jurisprudential regime theory posits that the justices may sometimes depart from their attitudinal predilections in order to accommodate legal or strategic considerations, and that sometimes these attitudinal and jurisprudential considerations may interact, such as when justices create jurisprudential regimes with attitudinal goals in mind. Ultimately, the question of which of these factors matters to the justices is an empirical question that cannot be settled by theory but must be investigated using statistical and interpretive methods.

Neoinstitutional approaches in the political science discipline began to coalesce in the 1980s (March and Olson, 1984). In contrast to earlier institutional scholarship, the neoinstitutionalists attempted to be less descriptive and instead provide a more dynamic account of the role of institutions. In addition, the neoinstitutional scholars theorized a more expansive conception of institutions that went beyond formal institutions and the state to include interpretive considerations such as norms and ideologies (Clayton, 1999, p. 32). In recent decades, two major strands of institutionalism as applied to judicial politics have developed. Rational choice institutionalism, also known as the strategic model, examines how institutional structure creates strategic considerations that lead the justices to depart from the pursuit of their sincere preferences. Interpretive or historical institutionalism tends to eschew the modeling of rational choice approaches and instead looks at the influence of ideas and norms (Gillman, 1999, p. 77) as well as historical patterns of political development (Smith, 2008).

Understanding attitudes in a neoinstitutional framework

The attitudinal model has an intuitive appeal, as journalists commonly use terms like liberal and conservative to describe the justices and their votes, but

it is also effective in providing a statistical explanation of how the justices vote. Analyzing statements about the justices' ideologies drawn from newspaper editorials at the time the justices were nominated to the Supreme Court produced scores for justices' ideologies ranging from extremely conservative to extremely liberal (–1.0 to 1.0) (Segal and Cover, 1989; Segal et al., 1995). Correlating these Segal-Cover scores with votes produced a correlation of 0.76 with the justices' votes in civil rights and civil liberties cases (Segal and Spaeth, 2002, p. 323). This measure was also used to effectively explain the justices' votes in a multiple regression analysis of search and seizure cases (Segal and Spaeth, 2002, pp. 324–5). The evidence that attitudes matter is solid, and a neoinstitutional framework provides a plausible explanation of why attitudes matter.

The Supreme Court largely controls its own jurisdiction. The Court chooses around 80 cases each year for oral argument from a docket that now exceeds 10,000 cases. Even in the 1970s, the justices were only taking around 3 per cent of the cases on the docket (O'Brien, 2008a, p. 177). At least four justices have to agree that a case is worthy of oral argument before a petition for writ of *certiorari* or an *informa pauperis* petition is accepted. Since 1988, the number of cases that the Court has been required to take on mandatory appeal has been negligible. Even prior to this time, many of the mandatory appeal cases were dealt with summarily. The practical effect is that the Court is free to set its own agenda and decide the cases that it deems important (Perry Jr, 1991). Also, the cases are important because they set legal policy for the lower courts. Important cases are more likely to activate the justices' policy goals than cases that come to the Supreme Court based on mandatory appeal. In addition, those cases that 'the Court does decide tender plausible legal arguments on both sides' (Segal and Spaeth, 1993, p. 77). The justices are less likely to accept cases where the law clearly favors one party. According to Segal and Spaeth (1993), this frees the justices to vote based on their policy preferences because the legal arguments are so close, but Lawrence Baum observed that 'even if the law is always indeterminate in the sense that it does not lead inevitably to one result, judges may still act on their own perception of the law' (Baum, 1997, p. 64).

The Supreme Court is also the highest court in the United States, so the justices need not be concerned with having their decisions overturned by another court (Segal and Spaeth, 2002, p. 96). This unique situation makes it more likely that the justices are free to act based on their policy goals as compared to lower courts.

Another reason why Supreme Court justices have their own policy goals is their lack of ambition for higher office (Segal and Spaeth, 2002, pp. 95–6). It is plausible that lower court judges may restrain from acting on their policy preferences based on a desire to be promoted to a higher court. Judges may have

a motivation to mask their political preferences to avoid a failed confirmation battle like Robert Bork's.[1] After judges have reached the Supreme Court, a position which has life tenure, it is unlikely that they would desire to advance to another position, although there are a few possibilities. Justices seeking to be appointed to chief justice would also have to bear in mind Senate confirmation, and justices seeking the presidency or vice-presidency would have to consider public opinion (Baum, 1997, pp. 43–4). By contrast, Epstein and Knight (1998) pointed out that, even if any contemporary justices harbor ambitions for higher office, they have not appeared to act on them. It is not clear how associate justices would be expected to adjust their votes to please all factions, not to mention their peers on the Supreme Court, while still accounting for the details of particular cases. Would this desire for promotion encourage more or less policy-oriented behavior? If anything, it seems likely it would encourage strategic pursuit of policy goals, but it is also plausible that associate justices would view as remote the possibility of promotion to a higher position and act to pursue their own policy goals given their considerable influence as one of nine justices on the US Supreme Court.

It is likely that recruitment processes draw policy-minded people to the Supreme Court, according to Baum. On the supply side, individuals who pursue high-level judgeships are likely to be attracted to those positions by the potential to influence the development of public policy (Baum, 1997, pp. 62–3). On the demand side, presidents strive to select justices whose policy goals are similar to their own (Watson and Stookey, 1995, pp. 58–9; Baum, 1997, pp. 62–3). Certainly, President George H W Bush's nomination of David Souter and President Gerald Ford's nomination of John Paul Stevens demonstrated that presidents are not always successful at predicting the policy goals of their nominees. Regardless of the match between the goals of the nominating president and the justice, it is quite plausible that nominees have a good sense of the policy implications of their votes and written opinions.

Of course, these points do not completely answer the question of how the justices decide cases. It is possible that the justices moderate the pursuit of their policy preferences based on internal and external strategic goals. It is also possible that the justices take into account jurisprudential regimes.

Rational choice institutionalism and jurisprudential regimes

Rational choice theory, which originated in the field of economics and was later applied to political behavior, is a method of inquiry which encompasses

1 President Ronald Reagan nominated Bork to Supreme Court Justice in 1987 but his nomination was rejected by the Senate.

a variety of approaches, including positive political theory, game theory, neoinstitutionalism, the new economics of organization, and law and economics. These theories use the individual as the primary level of analysis, and they focus on the rational choices which individuals make in pursuit of their own preferences (Lalman et al., 1993, pp. 77, 79).

Although rational choice theory typically operates at the individual level of analysis, some positive political theorists consider how institutions structure the choices which individuals make (Epstein and Knight, 1998, pp. 112–75), and why institutions take the forms they do. This school of thought has been referred to as new institutionalism, or neoinstitutionalism, and has been employed by empirically minded political scientists as well (Brace and Hall, 1989; Comparato and McClurg, 2007). There are a variety of conceptions of neoinstitutionalism; the rational choice version should not be confused with the analysis of the role of state institutions in political development (Skowronek, 1982), or an approach which takes a broader view of institutions as part of a 'dialectic of meaningful actions and structural determinants' (Smith, 1988, p. 89).

Strategic models are applications of rational choice theory. Strategic considerations can influence how Supreme Court justices rationally pursue their policy objectives, according to Walter Murphy's classic treatment of judicial strategy (Murphy, 1964). Strategic behavior is most clearly defined in the Supreme Court context as 'whether justices make decisions contingent on the expected behavior of future players' (Boucher Jr and Segal, 1995, p. 82; see also, Epstein and Knight, 1998, p. 12). The attitudinal model assumes that justices vote based on their sincere preferences. Strategic models consider whether the justices sometimes depart from their sincere preferences based on internal or external strategic considerations.

Unlike the attitudinal model, the strategic model conveys the interdependency of the justices (Epstein, 2008, p. 496). The internal institutional arrangements of the Supreme Court mean that sometimes the justices must take into account the preferences of their colleagues and depart from trying to achieve their sincere policy preferences. These internal institutions include the Rule of Four for the *certiorari* process, bargaining and accommodation on the content of opinions, coalition formation and opinion assignment. The institutional setting of the Court also means that the justices may take into account external considerations such as the participation of the federal government and interest groups as parties, the filing of friend of the court briefs by government and interest groups, and the preferences of Congress. Prior to examining the relevance of these external strategic considerations, I focus on how rational choice institutionalism contributes to an understanding of why the law matters to the justices. I then extend that analysis to jurisprudential regimes.

Given the institutional setting, the justices have to take into account societal norms relating to the 'rule of law in general and the role of the Supreme Court in particular' in order to preserve the Court's legitimacy (Epstein and Knight, 1998, p. 138). The norm with the most relevance to jurisprudential regime theory is *stare decisis*. *Stare decisis* is 'the norm favoring respect for precedent' (Epstein and Knight, 1998, p. 163; see also Knight and Epstein, 1996b). Why would the justices follow precedent if the precedent conflicted with their policy preferences? Epstein and Knight theorized that justices would do so to respect community expectations that are based on the stability of law and to respect the community's normative belief in the rule of law. Even if justices do not share this normative belief, they act on it so that the community respects the legitimacy of the Supreme Court's decisions (Epstein and Knight, 1998, pp. 164–5). Justices frequently comment on precedent during conferences and frequently cite precedent in their written opinions. There are very few opinions which do not cite precedent. In response to the argument that justices in the majority as well as the dissent cite precedent, the authors respond that both sides are acting consistently with the societal expectation that the justices follow the norm, so as to preserve the legitimacy of the Supreme Court (Epstein and Knight, 1998, pp. 165–72). In addition, only a small percentage of precedents are overruled. Stefanie Lindquist and Frank Cross also found that the justices rarely overturn precedent, but they also discovered that conservative justices Anthony Kennedy, Clarence Thomas and Antonin Scalia stood out for their willingness to overturn precedent more frequently than their peers and for their willingness to do so in an ideological manner (Lindquist and Cross, 2009, pp. 126–31).

Do the justices really believe in the norm of *stare decisis*, or do they only follow it for strategic reasons? According to Epstein and Knight, it does not really make a difference. If the norm is a myth that the justices act to maintain, it still has a causal effect on the justices. If justices use precedent strategically, it would only be to effectively persuade others. To be effective, the norm would have to be accepted as important by some members of the community (Epstein and Knight, 1998, p. 177).

I use this argument to frame jurisprudential regime theory in strategic terms. The justices have an interest in adopting key precedents that define case factors and set up standards of review for various areas of jurisprudence. Jurisprudential regimes enable the justices to provide guidance to the community by setting up stable, relatively enduring legal constructs. Regardless of whether it can be established that the justices agree with the normative foundations of the jurisprudential regimes, if the justices want the community to accept the jurisprudence, they can be motivated to follow it even if they do not personally agree (Epstein, 2008, p. 497). Interestingly, this norm, which is usually placed in the external strategy category, may also assist with internal

coordination problems by encouraging the justices to take into account the precedents created by themselves or other justices in the past. The work of Epstein and Knight helps us to understand why jurisprudence matters in a strategic, neoinstitutional framework. Jurisprudential regime theory also explores the relevance of external political influences such as the participation of the government and interest groups as parties or via friend of the court briefs. Although empirical applications of jurisprudential regime theory do not always find evidence that these factors matter, the theory at least remains open to the possibility.

External strategy

The federal government and the solicitor general

Units of government ranging from schools to the federal government have been involved in free expression cases before the Supreme Court. Speakers have brought suit against state and local governments as well as several types of educational institutions, including school boards, public schools, colleges, universities and university systems. Various units of the federal government, including Congress, the military, agencies of the federal bureaucracy and federal law enforcement, have all been sued for alleged violations of the right of free expression. The federal government possesses some advantages relative to private parties and other levels of government in litigating before the Supreme Court. It can assert that national interests such as national security outweigh the rights of speakers in particular cases. The federal government also has the benefit of enormous lawyer resources. The success of the federal government is best attributed to the justices' policy goals and attitudes toward the federal government (Segal, 1997), but it is not inconsistent with other goals. It can also be explained by the justices' attempt to increase their standing with the federal government or a desire to maintain a good relationship with the federal government by taking government preferences into account.

In addition, the presence of the US solicitor general as party or *amicus* offers an additional advantage to the federal government. The solicitor general focuses on cases of particular interest to the federal government and is an expert lawyer. The justices may be more inclined to vote for the federal government in such cases; this has been demonstrated in obscenity cases by Kevin McGuire (1990). Baum (1997) presented a number of explanations for why the solicitor general influences the Supreme Court, including expertise. An argument that points to a legal explanation is that the solicitor general screens federal government cases and petitions the Court to hear only the best ones. An attitudinal explanation is that presidents appoint both the solicitor general and the justices; the president's policy goals lead to appointees

with similar policy orientations. President Barack Obama's appointment of Solicitor General Elena Kagan to the Supreme Court illustrates that presidents may have similar policy goals in mind when selecting a solicitor general or a justice. In addition, the Court is dependent on the federal government to implement its decisions. This explanation is strategic, as the justices must consider the preferences of the government.

Barbara Graham examined the influence of the US solicitor general in 334 civil rights cases from 1953 to 2002 (Graham, 2003). The solicitor general is a repeat player who conveys the policy preferences of the executive branch when the US is a party to a case or when the solicitor general files a friend of the court brief. She found that the ideological direction of the solicitor general's brief mattered; liberal briefs were associated with liberal Supreme Court decisions. She also found that the federal government's participation as a party to the case, as opposed to filing a friend of the court brief, made a difference as well (Graham, 2003, pp. 262–5). One limitation of the study is that, because it did not use individual votes as the dependent variable, it was not able to ascertain whether the solicitor general's influence varies from justice to justice.

Rather than looking at the solicitor general as a repeat player, or as the tenth justice, an agent of the Court who succeeds due to legal expertise, Michael Bailey, Brian Kamoie and Forrest Maltzman (2005) used signaling theory to understand when an individual justice was likely to vote in a manner consistent with the position of the solicitor general's brief in civil liberties cases from 1953–2002. They found that the solicitor general was more likely to influence a particular justice when ideological distance between the two was smaller. In addition, when there was a significant gap in ideological distance between a solicitor general and a justice, but the solicitor general took a position that was an ideological outlier, the justice was more receptive (Bailey et al., 2005, pp. 80–1).

Although it seems plausible that the federal government could influence the justices to depart from their sincere policy preferences, some questions remain to be explored, theoretically and empirically. Does the federal government exert a unique influence compared to other parties? Can the solicitor general influence the justices by filing a friend of the court brief? Is the justices' treatment of the federal government driven by strategic, legal or attitudinal considerations?

The public, interest groups and friend of the court briefs

The public and interest groups have received a fair amount of scholarly attention and it is plausible that they influence the justices. The justices are not elected, but appointed for life, so the justices are less accountable to public opinion than are elected officials. According to William Mishler and Reginald

Sheehan (1993), even after accounting for membership change, public opinion affected Supreme Court decisions directly with a time lag of five years. A comment on the study argued that direct influence was not present and that the real path of public influence on the Court was indirect, mediated by presidential appointments to the Court (Norpoth and Segal, 1994). Summing up the literature on public influence on the courts, Baum noted that scholars have largely ignored the influence of the public, and 'that omission may do no great harm' (Baum, 2006, p. 71).

Interest groups possess resources to expend in litigation, either directly (as parties or sponsors of litigants) or by filing *amicus curiae* (friend of the court) briefs. Interest groups use these resources to frame arguments (Epstein and Koblycka, 1992) and bring new policy information and technical expertise to the justices.

There is some evidence that indicates that *amicus* briefs are influential. McGuire (1990) found that friend of the court briefs influenced the Supreme Court's obscenity decisions. Paul Collins Jr (2008) has provided the most exhaustive treatment to date of the influence of friend of the court briefs on the Supreme Court. In his review of previous studies, he found a few major flaws. Examining single issue areas limited the ability to generalize studies and may have obscured larger patterns. Using the outcome of the Court decision, rather than the individual justices' votes, as the dependent variable also served to limit the amount of insight generated into why *amicus* briefs would matter to the justices. Other problems included looking at short time periods and using inaccurate measures such as counts of justices' citations of friend of the court briefs (Collins Jr, 2008, pp. 6–10).

Collins examined the influence of *amicus* briefs on the Supreme Court from 1946 to 2001. He found that a larger number of *amicus* briefs increased the likelihood that a justice would file a separate opinion, because a larger number of briefs increased uncertainty about the law (Collins Jr, 2008, pp. 160–1). He also found that, as the number of *amicus* briefs increased, the justices' decision-making became more inconsistent, because the briefs raised new issues and persuaded 'the justices to adopt positions that are attitudinally incongruent' (Collins Jr, 2008, pp. 127–37). Looking at the influence of the number of liberal and conservative briefs on the justices' individual voting decisions, he found that as the number of liberal briefs increased, so did the likelihood of a liberal vote; likewise, a larger number of conservative briefs increased the likelihood of a conservative vote. For the most part, these results are not mediated by the justices' attitudes, so Collins found that his results supported a legal persuasion model, which posits that *amicus* briefs persuade the justices about how the law should apply (Collins Jr, 2008, pp. 106–14).

In our examination of the influence of the *Chevron v Natural Resources Defense Council* (467 US 837, 1984) jurisprudential regime on Supreme Court administrative law decisions, Herbert Kritzer, Joseph Smith and I found that the influence of *amicus* briefs varied depending on whether a case was decided before or after *Chevron*, and whether the brief advocated deference to or reversal of the agency decision (Richards et al., 2006). *Amici* advocating deference after *Chevron* showed the greatest likelihood of success, although we did not claim the jurisprudential regime was the cause of the justices' differential evaluation of the briefs (Richards et al., 2006, pp. 462–4). As I test jurisprudential regime theory in this book, I follow this approach and control for whether the influence of friend of the court briefs varies before and after the jurisprudential regime was established. I also evaluate the approach of Collins and examine whether the number of *amicus* briefs makes a difference.

Viewing parties through an attitudinal, strategic or legal lens

There are two categories of parties in free expression cases: speakers and the parties acting against the speakers.[2] Whether parties matter to the justices, and the manner in which they do matter, is open to interpretation. General attitudinal theory posits that attitudes operate in relation to attitude objects, such as the parties to a case. The justices' policy goals may influence the justices to vote for or against certain parties based on the justices' views of the parties' policy goals, or based on the policy effect of the vote on the parties. However, parties are also relevant to explanations that consider justices' goals of increasing personal reputation with Supreme Court audiences and maintaining good relationships with Court participants. Certain parties may be part of, or important to, the Court audiences that particular justices may be concerned with pleasing. Similarly, a goal of the justices' may be to maintain good relationships with frequent Supreme Court participants such as the federal government (Baum, 1997, p. 17). Justices may strategically take the preferences of Congress or other government actors into account. A third possible explanation is that parties who are repeat players or have significant resources possess an advantage in litigation before the Supreme Court, which is consistent with a strategic or legal persuasion model.

The justices' attitudes may shape their views toward particular types of speakers, such as racists, racial minorities, politicians, corporations, women, military protesters and socialists, as well as members of religious groups, the broadcast media and print media. If the justices are biased in favor of or against the ideas presented by particular speakers, this may influence the

2 By speakers, I mean the party that is claiming that its right to free expression has been violated. This term includes some parties, such as members of the print media, who are writing rather than speaking.

willingness of the justices to protect their civil liberties (Richards and Kritzer, 2002, p. 312). Critical legal studies scholar David Kairys (1998) suggested that the attitudes of Supreme Court justices varied regarding whether to support the free expression rights of dissidents such as communists and war protesters. Public opinion scholars found that the public does not consistently support protecting the civil liberties of all groups (Sullivan et al., 1979, p. 784). Critical race theorists Mari Matsuda, Charles R Lawrence III, Richard Delgado and Kimberlé Williams Crenshaw (1993) argued that racial attitudes may also influence free expression law. Of course, the Supreme Court's content-neutrality jurisprudence requires government to meet the strict scrutiny standard when regulating speech on the basis of content or viewpoint, so the law may undercut any biases.

When a speaker argues that his or her rights have been violated, there must be another party in the suit who is the alleged violator. The party acting against a speaker is typically some type of government entity, although private parties can also act against speakers. The justices' attitudes about government and private parties may play a role in their decision-making. Private parties are most often involved in civil litigation such as libel cases. It is quite possible that justices could view private parties differently than they do governments. Private parties typically lack the power, resources and repeat player status of governments. Such parties may lack the expert lawyer resources of government, and the government may more easily claim broad social interests that can outweigh free expression rights. On the other hand, the justices may see private parties as less of a threat to free expression and may be more sympathetic to their claims, especially when private figures have their reputations harmed by libel.

Exploring Marc Galanter's famous examination of 'why the "haves" come out ahead' (Galanter, 1974, p. 95) with respect to state supreme courts, Stanton Wheeler, Bliss Cartwright, Robert Kagan and Lawrence Friedman (1987) theorized that parties with resources advantages should come out ahead due to a normative bias in the law toward business and government interests, judicial bias toward those interests based on background, training and social networks, and the ability of such parties to pay for more experienced appellate litigators and more research. On the other hand, the authors noted that weaker parties may be expected to prevail due to the shift in many laws toward protecting the individual, the political accountability or political experience of judges, and the choice of smaller parties to harness their resources for more fruitful attempts to appeal, rather than reflexively appealing in order to delay as well-resourced interests tend to do. Finally, they noted, it is possible that there may be no systematic advantage toward either side. At the level of a state supreme court, as in their study, or the US Supreme Court, it would not be unusual for both the 'haves' and 'have nots'

to have access to expert attorneys (Wheeler et al., 1987, pp. 408–12). The authors did find that stronger parties exercised a net advantage over weaker ones in state supreme courts.

Adapting the theory and findings of Wheeler et. al to the US Supreme Court, Sheehan, Mishler and Donald Songer (1992) created a ranking of ten major types of parties based on expected resource status and likelihood of being a repeat player. The lowest ranking set of parties was poor individuals, with a rank of 1, and the federal government ranked highest, at 10. In between these two extremes, the rankings were minorities, individuals, unions, small businesses, businesses, corporations, local governments and state governments (Sheehan et al., 1992).

To control for the influence of parties in his research on friend of the court briefs and the Supreme Court, Collins Jr (2008, p. 103) adopted the Sheehan et al. ranking of litigants from 1–10 based on resource status, although he placed unions and interest groups in the same category. Collins explained the advantage of higher-status parties almost exclusively in terms of resources, despite the emphasis on the importance of repeat player status in the formulations of Galanter (1974), Wheeler et al. (1987) and Sheehan et al. (1992).

One problem with this approach is that the rankings appear to be somewhat subjective, and this suspicion is borne out in the empirical analysis. The union and interest group category could arguably be ranked higher than small businesses, and many corporations certainly have more resources than many local governments. When Sheehan et al. calculated a simple success rate, minorities and unions ranked second and fourth, respectively. They also came out in the top four for net advantage (Sheehan et al., 1992, p. 465). A later analysis of the US Courts of Appeals by Songer, Sheehan and Susan Brodie Haire used a simplified ordinal measure: individual, business, state government and federal government (Songer et al., 1999, p. 824). In addition, as Wheeler et al. noted at the state supreme court level, lower-status parties could rationally use resources to hire quality counsel and take advantage of a law firm's expertise, which could negate some of the advantage of going against an opponent with more resources (Wheeler et al., 1987, p. 412). Given the stakes at the US Supreme Court, this possibility should be even more likely. In Charles Epp's summary of contributions to a symposium on Galanter's theory, he noted that the 'have not' category is defined as either the truly poor, or 'nonwealthy "one shotters"'; although the 'haves' tend to prevail, the 'one shotters' have gained from 'organizational and legal services reforms suggested by Galanter' (Epp, 1999b, p. 1090).

Understanding the role of oral argument before the Supreme Court provides another way for scholars to observe how parties make a difference

to the justices. Timothy Johnson, Paul Wahlbeck and James Spriggs (2006) used Justice Blackmun's grades of the quality of attorneys' presentations at oral argument to better understand the role of parties. They found that Blackmun generally gave higher grades to experienced litigators, the solicitor general, federal government attorneys, attorneys who attended elite law schools, former court clerks, attorneys who were ideologically compatible with himself, and elite, private Washington DC lawyers. Turning to the influence of the quality of oral argument on the justices' votes, they observed that although the quality of oral argument was affected by the justices' ideological views of the parties, it also exerted a significant, independent effect (Johnson et al., 2006, pp. 107–10).

Taking the existing literature on parties as a whole, it is clear that there is some reason to expect that parties should make a difference before the Supreme Court, but it is not clear whether party influence supports a legal, attitudinal or strategic explanation. To the extent that the justices allow their policy preferences to shape their views of the parties, the oral argument presentations, or the outcome of the case on the parties, such an explanation is attitudinal. If the resources and repeat player status of the parties make a difference, this could be consistent with a strategic or legal persuasion model. A legal persuasion model would suggest that the resources of the parties allow them to make stronger, better researched and better presented legal arguments that are effective at persuading the justices; similarly, repeat player status gives some parties a longer time horizon, so they can develop the law over time.[3] A strategic model would contend that the justices may be inclined to defer to the preferences of powerful repeat players, especially the federal government; the solicitor general can participate as *amicus curiae* or as a direct party to the case. As repeat players with ample resources participate in the legal system, they push the law in various areas toward their ideal points. A study of the influence of parties' briefs on the merits filed during the 2004 term of the Supreme Court showed that the parties act strategically to maximize their gains by targeting the median justice (McGuire et al., 2007). Unfortunately, I do not have a solution for disentangling which model party influence supports, but the literature certainly requires me to consider whether the type of party matters to the justices.

Having examined the strategic side of neoinstitutionalism, I now turn to look at the interpretive and historical side, and how it relates to the jurisprudential regime theory that I use to guide my study of the Supreme Court's free expression decision-making.

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3 This is similar to one of Collins' interpretations of why friend of the court briefs matter.

Interpretive and historical institutionalism and jurisprudential regimes

Interpretive institutionalists question whether the focus of rational choice institutionalism is too narrow. Institutions may matter for reasons other than strategic bargaining. Interpretivists advocate that scholars examine how the justices take into account institutional norms, rules and legal principles. In addition, interpretive methodologies may be needed to discover strategic behavior. To ascertain whether the justices depart from pursuit of their sincere preferences, a scholar may need to know where those preferences came from and whether they were shaped by the justices' conceptions of roles, norms and the historical institutional context (Gillman, 1999, pp. 66–78).

Jurisprudential regime theory builds upon interpretive institutionalism in several ways. It posits that jurisprudential regimes are interpretive institutions and cognitive structures which were created by justices with particular attitudinal goals in mind, and in turn the justices use these regimes to establish the parameters of decision-making and provide guidance to themselves and other political actors who rely upon the law. It also examines how values are used to build support for jurisprudential regimes, and how groups like the NAACP and the civil rights movement influenced the development of the content-neutrality regime (see Chapter 3).

Interpretivists like Howard Gillman strive to take an internal view of politics and to see the justices' behavior based on how the justices understand their own institutional context. An institution becomes recognizable when it has a purpose or goal that becomes routinized within a particular historically contingent context (Gillman, 1999, p. 79). The Supreme Court is something more than just a small legislature. As Shapiro (1968) observed, the Court has aspects that are shared with other political institutions, but the importance of jurisprudence to the justices makes the Court unique. Gillman argued that the Supreme Court's mission is different from other political institutions in several respects. The Supreme Court strives to maintain coherent jurisprudential traditions, manage the judicial hierarchy (for example, by resolving splits in the federal circuit courts), limit its judicial power to actual cases and controversies, and maintain the legitimacy of the Court and the overall stability of the political system (Gillman, 1999, pp. 80–1).

Ideas matter. Interpretive institutionalism contends that institutions are not just physical buildings. Laws are political institutions; they are cognitive structures (Smith, 1988, p. 91). Of course, the laws consist of not only constitutions and statutes but also specific doctrines and broader notions about the proper role of the judiciary. Jurisprudential regime theory builds on Rogers Smith's argument that legal discourses provide justification for claims to authority and help to define the parameters of decisions (Smith, 2008, p. 48).

Some interpretive institutionalists push beyond the examination of particular doctrines to look more broadly at political societal ideologies and how those ideologies influence the development of law, as well as how the judicial process mediates and shapes those ideologies (Novkov, 2008). Although I have not gone as far as the political regime theorists in looking at the effect of political and policy coalitions on the development of law, my examination of the justifications of content-neutrality builds on the approach of the institutional scholars who examine values and ideology (see Chapter 3). Key political ideas, such as self-government, security, open debate and the equal protection of the laws, are examples of political values that map readily into jurisprudential space. It was no accident that the concept of equal protection was applied in the first amendment context; the NAACP and the civil rights movement had to fight for the speech rights that people take for granted today, and this struggle shaped the development of the content-neutrality jurisprudential regime.

Jurisprudential regime theory incorporates elements of both the interpretive and rational choice camps of institutionalism. Although I readily agree that there are some important differences between the approaches, there are also some significant areas of overlap. On the interpretive side, there seems to be some space for the two sides to work together, and Michael McCann (1999, pp. 91–2) has called for such collaboration. Gillman (1999) argued that interpretive methods could help to discover the justices' strategic actions. In addition, some of interpretive institutionalist Gillman's articulations of the role of ideas sound similar to the arguments of strategic institutionalists Epstein and Knight. All three of these scholars discussed legitimacy. Gillman (1999, p. 81) posited that part of the Supreme Court's mission is to maintain the legitimacy of the Court and adapt the Court to other institutions. This sounds rather strategic. Epstein and Knight (1998, pp. 165–72, 177) similarly point out that the justices may or may not sincerely believe in the norm – notice that strategic model scholars also discuss norms – of *stare decisis*, but the justices will be inclined to adhere to that norm in order to preserve the Supreme Court's legitimacy. Another example of overlap is that strategic model scholars sometimes employ historical and interpretive analyses that complement their rational choice methods (Epstein and Walker, 1995; Knight and Epstein, 1996a).

Some important differences remain. Interpretive and historical institutionalists generally avoid mathematical modeling of their explanations. Rational choice institutionalists tend to employ game theoretic or statistical models. This introduces the trade-off of generalizability versus complexity. Rational choice is a very broad theory with roots in the discipline of economics. The strategic model can both draw from and contribute to the expansive rational choice literature. This ability to be generalized is an important advantage of

the strategic model. Of course, interpretive institutionalists have also built on each other's findings, but the literature is not as broad. Interpretive institutionalists can claim, however, that their models are able to capture some of the subtlety and complexity that is a part of judicial decisions but is not easily modeled in a mathematical manner. This discussion is part of a larger debate regarding interpretivism versus positivism, which I address at the conclusion of this book. In a nutshell, jurisprudential regime theory strives to incorporate the theoretical insights of both interpretive and positive approaches and uses interpretive and statistical methods to test the theory, enabling the nuance and detail of interpretivism while also facilitating positivism's systematic testing and ability to be generalized.

Political and constitutional regimes

Regime theory is a type of neoinstitutional theory that looks at how party and policy coalitions shape the development of political institutions for a certain time period (Orren and Skowronek, 1998–1999). Regime theory integrates the goals of political actors with institutional considerations. Gillman (2008) cataloged the variety of ways in which scholars have applied regime theory to judicial politics. Many of these explanations are in tension with each other. Courts may work as policy-making partners in a political regime, but they sometimes can be independent policy-makers. In his examination of the use of regime theory by law school professors, Thomas Keck (2007a) noted that these scholars have tended to overstate the former influence, resulting in a view of courts as having little independent power, despite the efforts of regime theory scholars in the political science discipline to leave room for the independent agency of judicial institutions.

Another tension Gillman noted is that courts may serve political regimes by backing up the dominant coalition's commitments to constituents of the regime, but they can also help to stabilize regimes by allowing for potentially divisive issues to be pushed to the judicial realm. For example, Thomas Burke (2008) contended that the William Rehnquist Court's first amendment decisions regarding religion largely advanced the cause of Christian conservatives, but the free expression decisions built upon the key liberal rulings of the Supreme Court under Chief Justices Earl Warren and Warren Burger. With the exception of the free expression decisions that were used to limit campaign finance regulations, which pleased economic conservatives, many free expression decisions were contrary to the desires of Christian conservatives (Burke, 2008). Gillman (2008) also noted that courts can impose the agenda of the national political majority on regional majorities with different perspectives, but political regimes can also use the period in which power is held to stack the judiciary, which results in partisan judicial entrenchment

of the regime coalition that can outlast the regime's presence in the elected branches and make it harder for the new political regime to impose its agenda. Keck (2007a) observed that, as some law professors have used regime theory to contest the notion of the Court as a countermajoritarian institution, this has led to overstatement of the political character of Supreme Court decisions and the Court's consistency with the agenda of the dominant regime.

The idea of a constitutional regime is another application of regime theory that looks at fundamental time periods in constitutional history. Bruce Ackerman (1991) analyzed three constitutional regimes: the founding regime, the regime affiliated with Reconstruction, and the modern regime associated with the Supreme Court's shift from laissez-faire economics to the protection of civil rights and liberties. Mark Graber looked at the interaction of political and constitutional regimes as he presented judicial review in a complex context; after Chief Justice John Marshall established the power of judicial review in the founding period, that power was shaped by the political regime but also helped to constitute the political and constitutional regimes (Graber, 1999).

A jurisprudential regime is less sweeping than a political or constitutional regime. 'Jurisprudential' indicates that the analysis is limited to a particular area of law. Although jurisprudential regime theory takes into account external influences such as government, party and interest group participation, the theory does not examine a particular national partisan coalition that exists in multiple institutions. The analysis of time also differs between jurisprudential regime theory and political regime theory, with political regime theory focusing on particular political regime coalitions and/or the transition between those political regimes. By contrast, jurisprudential regime theory examines how a particular group of justices creates a key precedent in a particular area of law, and how those justices, as well as prior and subsequent justices, decide cases differently before and after the regime change. One advantage of political regime theory is that it has the ability to situate judicial change in a much broader political context, but the downside is that it may risk taking away agency and independence from the justices, and it may paint in such broad strokes that the influence of particular, case-specific factors is obscured.

It is possible to envision theories of political and jurisprudential regimes working together. For example, political regimes which gain control of the elected national institutions may staff the Supreme Court with justices who decide to create a new jurisprudential regime, or, as part of broad shifts in constitutional regimes, justices may create new jurisprudential regimes in particular areas of law. Graber noted that that new constitutional language and the understandings of those provisions can serve as a source of jurisprudential regimes; those regimes structure consequent debates, as the post-Civil War period demonstrated (Graber, 2008, p. 311). While there is nothing

in jurisprudential regime theory that specifically precludes the possibility of the interaction of political, constitutional and jurisprudential regimes, such approaches are beyond the scope of the explanation advanced in this book.

Having examined jurisprudential regimes at the institutional level, primarily a macro level analysis, I now turn to understanding how regimes function at the micro level. How and why do the justices use jurisprudential regimes?

How do jurisprudential regimes work? Language and persuasion

The justices use jurisprudential regimes in part because linguistic competency in the language of the law is a fundamental requirement for making tenable legal arguments. Murray Edelman was one of the first political scientists to examine the role of constitutive rules in various groups; these constitutive rules allow the use of language and symbols to carry meaning (Edelman, 1977; 1985). In order for the justices to reason about cases in ways that are plausible to their colleagues, the justices must be familiar with the language of the law and, in particular, jurisprudential regimes. These regimes are important for justices to understand because they provide an analytic framework, in part by identifying relevant case factors, such as facts or interpretive components. For example, arguing that a regulation of free expression is content-based uses a descriptive, interpretive phrase that means that the regulation is targeting the communicative impact or viewpoint of expression. In addition, jurisprudential regimes also indicate how the justices should weigh or balance the facts of the case. Competent use of balancing language enables the justices to make tenable arguments and persuade their colleagues.

The usage of language that I am discussing is so fundamental that it is easy to overlook. Justices cannot use jurisprudential concepts in any manner that they please. A very obvious example is that no justice argues that the constitutional requirement that the President cannot be younger than age 35 protects freedom of the press. Justices construct arguments that make sense within the context of the relevant jurisprudence. Justices reason about whether the government regulation of expression in the case before them is content-based or content-neutral, and, in order to make plausible arguments, the justices attempt to fit the facts of the particular case within the jurisprudential regime. Sometimes they do this by comparing the case at hand to other cases that have been declared content-based or content-neutral. Case factors such as whether a law is content-based mean something to the justices, and in this sense they possess a descriptive base (Brigham, 1978, p. 122).

Justices use the language of jurisprudential regimes because the language allows them to make arguments that are plausible to the other justices. If the

justices acted purely on the basis of their attitudes and ignored the language of the law, they would find it rather difficult to reason and communicate. John Brigham (1978), drawing on the works of Ludwig Wittgenstein and Peter Winch, explained that justices filter case situations through legal language (see, for example, Winch, 1958). An understanding of the language of the law is a prerequisite to judicial action (Brigham, 1978, p. 47). Law functions as an institution because justices act based on the meaning of the language of the law (Brigham, 1999). Lindquist and David Klein posited that judges who are motivated to pursue legally sound decisions are members of an interpretive community committed to evaluating legal arguments according to shared standards (Lindquist and Klein, 2006, p. 141).

The legal language of jurisprudential regimes, however, will not determine the outcomes of particular cases. The justices possess the discretion to use their own values and understandings of legal language in deciding cases. In this sense, knowledge of legal language enables creative argument, as long as those arguments are within the bounds of plausibility (Brigham, 1978, p. 45). Brigham's position fits well with Shapiro's political jurisprudence in two ways. Shapiro used political socialization and communication theory to see how judges approach legal issues similarly, even across jurisdictions (Kritzer, 2003, pp. 403–6). He also, however, saw *stare decisis* as a type of incrementalism that sets fundamental parameters but does not determine decisions (Kritzer, 2003, pp. 402–3; Richards and Kritzer, 2002, p. 306, citing Shapiro, 1968, p. 71).

In addition, the Supreme Court's institutional position as the highest appellate court reinforces the importance of legal language. Although the Court has the ability to define the issues to be argued in a case that it accepts, the parameters of most cases have already been defined as the cases go through the appellate process.

Seeing the role of language in Supreme Court decision-making exemplifies how interpretive approaches deepen understanding of the Court. To further explain how jurisprudential regimes work at the micro level, I turn to another interpretive approach, which entails understanding the role of reasoning in the justices' deliberations.

Reason and consistency in the operation of jurisprudential regimes

As the justices reason about cases, they consider their own point of view, but also attempt to state the reasons for their perspective in a general manner that appeals to other perspectives, including those of other justices. The institutional requirement that, to form a majority, a justice must gain the support of at least four other justices, points to the need for generalizable reason.

Research on the strategic behavior of the justices indicates that they engage in bargaining and accommodation with respect to the content of opinions, so there is evidence that the reasons justices offer in opinions do matter to the other justices (Wahlbeck et al., 1998). The justices do not justify their decisions by saying: 'I am a liberal, so I vote for the rights of the speaker.' Rather, they reason in a more general manner, which promotes consistency; using a jurisprudential regime is one example of generalizable reason. The justices attempt to make their decision fit within the analytic framework established by the jurisprudential regime that is relevant to the case. They can generalize from the particular facts of the case at hand to the more general, consistent analytic framework that has applied to similar cases.

This idea of promoting consistency by using legal reason in judgment to treat like cases similarly is expressed by Ronald Dworkin, who suggested that the 'gravitational force' of precedent is explained by the 'fairness of treating like cases alike' (Dworkin, 1978, p. 113). In other words, precedents are influential because the justices want to treat like cases consistently. Dworkin made this argument by referring to precedent. To the extent that I am correct in suggesting that the justices take jurisprudential regimes more seriously than ordinary precedent, I can expect that Dworkin's argument is even more applicable to regimes.

Justices want to treat like cases alike based not on the results of previous cases, but on the principles that justify those results. This contrasts with the position that precedents matter because they are like enacted pieces of legislation that support particular case outcomes (Dworkin, 1978, p. 112). Principles are requirements of morality, such as justice or fairness (Dworkin, 1978, p. 22). The type of moral argumentation that Dworkin discussed is similar to the concept of legal reasoning that I am elaborating here. The justices reason based not only on their own viewpoints, but also by attempting to generalize their arguments for the particular facts of the case at hand to applicable jurisprudential regimes. In this sense, the justices can appeal to the viewpoints of other justices, as well as promote fairness and consistency. Dworkin's theory stands in stark contrast to the attitudinal model, which suggests that justices use the law merely as a cloak to support conclusions that they reach based purely on their own point of view (Dworkin, 1978, p. 118).

I am not suggesting, however, that, in the process of reasoning about jurisprudential regimes and attempting to promote fairness and consistency, all justices will agree. The justices often decide very difficult cases, and it is inevitable that they will have different interpretations of how a regime applies in a particular case. Although they attempt to reason in a generalizable way, the justices can never entirely disregard their own perspective. My position, however, is distinct from the attitudinal model, which suggests that the only factors that matter in decision-making are the justices' attitudes. Dworkin

expressed a notion similar to mine in his discussion of how his ideal judge, Hercules, decides hard cases (Dworkin, 1978, p. 128).

As they reason about cases, justices cannot escape their point of view, but still take other viewpoints into account, in part by using jurisprudential regimes to reason about how the present case fits with the Supreme Court's prior treatment of similar cases. This idea is a different formulation of the research question from 'attitudes versus law'.

The either/or proposition of law versus attitudes does not adequately describe the process of judgment and legal reasoning. My discussion of Dworkin begins to elaborate how justices can, and indeed must, use their own perspective, but still reason in a generalizable manner that appeals to jurisprudential regimes and the points of view of other justices. To develop this point, I turn to a philosopher, Thomas Nagel. Nagel's philosophical arguments were not specifically focused on legal reasoning or Supreme Court decision-making, but I will apply them to these areas.

Nagel argued against subjectivists who contended that 'even the apparently most objective and universal principles derive their validity or authority from the perspectives and practices of those who follow them' (Nagel, 1997, p. 2). According to psychological subjectivists, for example, people believe in rights based on psychological motivations, not reason. Nagel contended that such subjectivist arguments attempt to rely on external perspectives that cannot be sustained. For example, psychological subjectivists contended that they could get outside of their own perspective and achieve an external perspective in order to observe that others' beliefs in rights are based on psychology, but the subjectivists overlooked the necessity of relying on reason that is found within. Nagel persuasively contended that it is impossible for anyone to make an argument from an entirely external perspective. In the attempt to debunk universal claims of reason from an external perspective, even subjectivists at some point must rely on internal forms of reason. When people make arguments about the way things are or should be, at some point they will rely on unconditional reason. Reason is not entirely external, but is found within. Nagel argued that one is unable to achieve an entirely external perspective as one attempts to debunk not only logical and mathematical reasoning, but also normative reasoning (Nagel, 1997, pp. 19–20).

This does not mean, however, that normative reasoning and reasoning about law is purely first-personal. It does not mean that a justice will vote for either a conservative or liberal outcome simply because his or her *inclination* is conservative or liberal. Generalizable reason is an important part of the process (Nagel, 1997, pp. 109–10). A justice will construct an argument that is persuasive to others looking at the same set of facts. When applying other-regarding reasons to a set of circumstances, individuals must go beyond subjective reactions and strive for judgment (Nagel, 1997, pp. 124–5).

Applying this logic to the Supreme Court, generalizable reason matters in Supreme Court decision-making in a way that renders incoherent the formulation of the issue as law versus attitudes. Rather, justices reason about both their own attitudes and the jurisprudential regime in a manner that is based neither on entirely first-personal inclinations (e.g. attitudes) or an entirely external perspective (e.g. a mechanistic view of law). As the justices engage in the process of judgment, they reason in a way that takes into account their own ideological policy goals, jurisprudential regimes, the facts of the case at hand and the views of other justices and political actors.

Even if the attitudinalists are correct in arguing that only a justice's ideology matters for his or her decision-making, it is not logical to argue that ideology matters only as an *inclination*. A justice uses reason to operate on that ideology. Reason is more than reason for a particular justice; the reasons offered must make sense to others. For example, even if a justice's conservative ideology was the only factor that mattered in decision-making, the conservative justice would still need to reason about how conservative policy goals are relevant to the particular case, and the justice would need to reason in a way that makes sense to others. If the attitudinalists do not concede that reason matters at least this much, then they are left with a purely psychological account of why the justices' ideological policy goals matter. A purely psychological explanation would strip the justices of agency and make them automatons, generating output based on psychological stimuli (Nagel, 1997, pp. 110–11).

If the attitudinalists concede that reason matters, which they must unless they want to fall back on a purely psychological explanation, then they open the door for something like jurisprudential regimes. As I mentioned in my discussion of Dworkin, jurisprudential regimes are an important way in which reasons, even reasons about a justice's policy goals, are generalized. A justice will be better able to reason in a way that makes sense to other justices if he or she can point to how his or her reasons fit with the key analytic factors that other justices have employed in deciding prior cases. Reasoning about how the case at hand fits with the relevant regime is a generalizable type of reasoning, reasoning that makes sense to other justices. This process of reasoning advances the goal of consistent treatment of like cases.

Of course, there will be disagreements among justices about whether a particular resolution of a case fits with the relevant regime, but the justices will strive to use reason to persuade other justices that their decision and rationale is the best fit. Although these disagreements are inevitable in some of the hard cases that the Supreme Court must decide, this in no way rejects reason as altogether impossible.

It is very difficult to defend a purely attitudinal position when the discussion of the role of law in Supreme Court decision-making is reconceptualized

by turning away from a debate about precedent versus attitudes, a debate that is stacked in favor of the attitudinalists. Jurisprudential regime theory generates a more complex and complete view of Supreme Court decision-making by considering that the justices *reason* about decisions, and they reason in a manner that strives to treat like cases alike. The justices reason about cases not only by taking their own ideological preferences into consideration, but also the views of other justices and jurisprudential regimes. Appealing to jurisprudential regimes helps the justices to reason in a generalizable manner that makes sense to other justices.

Criticisms of jurisprudential regime theory

Attitudinal regimes

As Kritzer and I anticipated (Richards and Kritzer, 2002, p. 316), the attitudinalists responded to jurisprudential regime theory by arguing that regimes were created on the basis of the justices' attitudes. Segal and Spaeth argued that jurisprudential regimes could actually be called 'attitudinal regimes' (Segal and Spaeth, 2003, p. 33). I acknowledge that it is next to impossible to completely disentangle the creation of jurisprudential regimes from the justices' policy goals, because the justices create regimes. As neoinstitutional theory posits generally, political actors create institutions with political goals in mind. This is why I acknowledge the justices' attitudes and explicate the political values behind the creation of the content-neutrality regime in Chapter 3. As Shapiro (1968) explained, political jurisprudence means that understanding politics is critical to understanding the judiciary. While I acknowledge Segal and Spaeth's point, this does not mean that all jurisprudential regimes are purely attitudinal in origin. I have observed that the regimes can matter even for the justices who did not create them, even after controlling for attitudes. Also, jurisprudential factors can play a role in the creation of regimes. In addition, the attitudinal model, because it assumes that the justices' attitudes are stable, cannot explain the shifts in the justices' voting patterns that I observe.

The biggest problem with this response of the attitudinalists is that it risks rendering the attitudinal model tautological. When the attitudinalists argue that jurisprudential regimes are solely attitudinal, they make it next to impossible to find any evidence that law matters. Essentially, the attitudinal position reduces to the tautological proposition that, because the justices have attitudes, jurisprudential regimes do not exist because they are created on an attitudinal basis. Everything is explained by attitudes, by definition.

Segal and Spaeth responded to the proposition that *stare decisis* matters by contending that 'because the need for legitimacy is real, the justices must cloak their policy preferences with legal doctrine' (Segal and Spaeth, 1996a, p. 1075). This argument referred to legitimacy among the justices and

external legitimacy. They also conceded that the need to obtain a majority may lead the justices to accept decisions that are suboptimal with respect to the justices' policy goals. These responses support my position that the justices reason in a manner that takes into account not only their own policy goals, but also jurisprudential regimes and the preferences of other justices. Segal and Spaeth tried to frame appeals to precedent as instrumental, but in making the argument that justices must maintain legitimacy with their colleagues and externally through appeals to precedent, they inadvertently conceded that *reasoning* about precedents *matters* to the justices, as I discussed above with reference to Dworkin and Nagel. Reasoning about jurisprudential regimes, as compared to ordinary precedents, should be an even better means of maintaining legitimacy.

To their credit, the attitudinalists did attempt to come up with a method to prove or disprove the influence of law in the form of precedent. The question of how to test for the influence of law is not without controversy.

Testing law by the change in view of dissenters

A second line of criticism that Segal and Spaeth made in response to jurisprudential regime theory was to dispute how to test law. They proposed that the appropriate test would be to show that a justice who opposed the use of a legal factor or test prior to the establishment of a regime actually favored the use of the test after the regime (Segal and Spaeth, 2003, p. 33). This argument is similar to the one made in their article on *stare decisis,* where they argued that the only valid measure of precedent would be for a justice who dissented from a key precedent to follow that precedent in subsequent cases (Segal and Spaeth, 1996b). Similarly, Kevin Scott (2006) argued that one flaw of jurisprudential regime methodology is that it did not isolate and measure the effect of the regime on the dissenting justices. To truly show the influence of a jurisprudential regime, one would have to demonstrate that a justice who dissented from the precedent followed it in subsequent cases, demonstrating a change in preference. Scott applied his method to a reanalysis of the search and seizure cases and found that the regime actually did affect the dissenting justices consistent with the regime (Scott, 2006).

These approaches assume that law is a mechanistic force that dictates to the justices how to decide cases. An initial problem, as Scott conceded, is that his method would not work for the content-neutrality regime because there were no dissenting opinions in *Mosley* (*Police Department of Chicago v Mosley*, 408 US 92, 1972) and only one, Justice Douglas, who dissented in part, in *Grayned* (*Grayned v City of Rockford*, 408 US 104, 1972; Scott, 2006, p. 384). The main problem with this approach is that it subscribes to a view of law that most scholars no longer believe in, certainly not at the level of the Supreme Court. The view of jurisprudential regimes advanced here is a more nuanced

understanding of law that recognizes attitudinal, strategic and jurisprudential factors. The attitudinalist view of law does not fit with how legal scholars discuss the effect of key precedents on future decisions of the Supreme Court. Legal scholars do not write of precedents predicting future outcomes or serving as a significant constraint on the justices. Instead, they write about legal concepts such as levels of scrutiny, government interests and how precisely legislation is tailored to achieve those government interests.

Legal scholars are also aware that the justices' policy goals affect the resolution of disputes. They are surely less concerned with explaining this in the detailed manner of political scientists who focus on Supreme Court decision-making, but in writing about the first amendment, scholars Rodney Smolla (1994), Franklyn Haiman (1981) and Lawrence Tribe (1988) all noted how various justices have treated issues differently throughout history, and pointed out how the personnel on the Court has affected how cases are decided. Tribe, as an attorney in first amendment (e.g. see ballot fusion case *Timmons v Twin Cities Area New Party*, 520 US 351, 1997) and other cases before the Supreme Court, is well aware of the difficulties of advocating clients' rights while attempting to appeal to the policy goals of the justices. In arguing *Bowers v Hardwick* (478 US 186, 1986), he pitched his arguments at Justice Powell, the swing vote at the time; Tribe framed Georgia's sodomy law as an issue of government power versus personal autonomy and noted the presumption of privacy in the home (O'Brien, 2008b, p. 1302). Smolla also acknowledged that the justices' views shape the law. He explained that the legal doctrines he elucidated 'have evolved through fits and starts over time through decisions of the Supreme Court' and 'are expressions of social policy and philosophy' that change with the personnel of the Court and history (Smolla, 1994, p. 2.11).

The work of Smolla, Tribe and Haiman expressed a more subtle view of law and attitudes than the attitudinal model. These scholars engaged in normative deliberation and interpretation of the Constitution and case law. To use the language of Dworkin, they made 'moral readings' of the Constitution. Dworkin's theory of the 'moral reading' allowed substantial room for the attitudes of justices to play a role in decision-making, but it also considered law quite important. Many constitutional clauses, including the free speech clause of the first amendment, declare individual rights in abstract language. In interpreting these clauses, justices and other legal actors 'apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice ... The moral reading therefore brings political morality into the heart of constitutional law' (Dworkin, 1996, p. 2). This 'political morality' is roughly compatible with the concept of the justices' political attitudes. Moreover, Dworkin (1996, p. 2) said that the moral reading *explains* what liberals and conservatives do when interpreting the Constitution.

When first amendment scholars write about case law, they are reasoning about cases in a way that takes into consideration normative policy goals as well as key precedents. In this sense, they are acting like the justices. In addition, they are aware that the justices' attitudes will influence the development of the law. Smolla, Tribe and Haiman share a fairly similar libertarian perspective on free expression, but there are other scholars with a very different normative orientation who also take a more nuanced view of law than the attitudinalists do.

Posner argued for an economic interpretation of the Constitution, including interpreting the economic rationality of constitutional design and the economic effects of constitutional doctrines. In Posner's view, judges are not free to interpret the Constitution to maximize economic welfare whenever they see fit. Rather, the starting point is interpretation of the structure, text and history of the Constitution and constitutional precedents. Some constitutional provisions, such as the presidential age requirement, are clear. Other provisions are less so, but judges should still typically follow *stare decisis*: 'The task of interpretation in light of general jurisprudential principles such as self-restraint and *stare decisis* is logically prior to the application of economic theory to constitutional adjudication.' (Posner, 1987, pp. 4, 37) This approach, however, is merely a starting point. According to Posner, judges should use economic analysis of the Constitution (a normative perspective), to clarify the economic costs and benefits at stake in a dispute, to reveal how different resolutions of the dispute will impact those costs and benefits, to reveal the economic consequences of established precedents, and to interpret constitutional clauses that have an implicit economic logic. For example, the first amendment guarantees a free marketplace of ideas, so economic analysis should be used to explain where censorship should be allowed, why commercial speech is treated differently and how the law may improperly weigh economic effects (Posner, 1986; 1987; but see Hammer, 1988). Posner, like Smolla, Tribe and Haiman, argued for a particular interpretation of the first amendment cases based on his normative perspective, but also took into account case law.

Legal scholars from a variety of normative perspectives do not write about the law as a mechanistic influence on the justices. The attitudinalist test for the influence of law does not fit with how legal scholars write about the law. Jurisprudential regime theory provides a better framework by integrating law and attitudes, along with strategic factors.

Limitations of jurisprudential regime theory

The primary limitation of jurisprudential regime theory is that it is a painstaking process to extend the theory to other areas of law. The attitudinal model is impressive because it sweeps so broadly in its ability to explain a

wide range of cases, such as the examination of all civil liberties and economics decisions from the start of the Vinson Supreme Court in 1946 through the end of the 1992 term (Segal et al., 1995). Jurisprudential regime theory has been tested on US Supreme Court decision-making in the areas of freedom of expression (Richards and Kritzer, 2002), establishment clause (Kritzer and Richards, 2003), search and seizure (Kritzer and Richards, 2005), confessions (Kritzer and Richards, 2010), equal protection (Marlowe, 2011, pp. 31–43; see also Graber, 2008, pp. 310–11), and administrative law (Richards, et al., 2006). This leaves a wide range of cases yet to be tested for a regime explanation and, of course, jurisprudential regime theory does not always constitute the best explanation even when tested, as seen in areas such as the fifth amendment confessions decisions.

A related question is whether jurisprudential regime theory is applicable to jurisdictions outside the United States. Kritzer and I conceptualized jurisprudential regime theory to be broad enough to account for a wide range of factors (including the preferences of judges and internal or external strategic factors) that could explain decision-making, so scholars have been able to apply it to judicial decision-making in other countries (Richards and Kritzer, 2002). For example, Keren Weinshall-Margel (2011) has applied our jurisprudential regime theory to a study of the Israeli Supreme Court. Beyond regime theory, there is an increased interest in neoinstitutional studies of judicial decision-making in Europe (Arold, 2006). Scholars have readily applied qualitative and/or quantitative strategic models to courts in countries such as Argentina (Helmke, 2005), Chile (Hillbink, 2007), China (Zhao, 2011) and Japan (Ramseyer and Rasmusen, 2003). However, a study which compared the European Court of Justice and the Andean Tribunal of Justice cautioned that self-interest and institutional structure have been overemphasized in explanations of the expansion of judicial law-making by international courts (Alter and Helfer, 2010). Increasingly, scholars are using both quantitative and qualitative methods to understand European courts, including the complex implementation of the European Convention on Human Rights by supranational and national courts (Vanberg, 2005; Keller and Stone-Sweet, 2008). David Law has argued that a combination of qualitative and quantitative methods is the best approach to studying a variety of empirical questions related to constitutions (Law, 2010).

The comparative literature on courts as institutions also indicates that institutional and legal structures matter, including foundational arrangements such as whether a country follows a common law system or whether a country's high court has judicial independence and the power of judicial review. As I discuss in Chapter 7, some of the comparative literature on freedom of expression law focuses on broad legal, institutional and cultural differences from country to country. Neoinstitutional theory is flexible enough to be

adapted to particular countries; jurisprudential regime theory indicates that the relative influences of jurisprudence, attitudes and strategic concerns could vary by country. For example, Weinshall-Margel and Sommer (2011) have developed a comparative measure of judicial political preference and applied it to a comparison of high courts in Canada, India, Israel, the Philippines and the US. Their comparative analysis of institutional structure indicated that three factors raise the likelihood that high courts act attitudinally: a contentious, political appointment process; larger panel sizes; and agenda-setting discretion. Attitudes need not only be conceptualized along the liberal–conservative dimension. As Weinshall-Margel (2011) illustrated, an alternative measure of judicial attitudes in Israel is whether a Supreme Court justice is religiously observant. The main attitudinal dimension on the European Court of Human Rights is whether a judge shows activism or restraint with respect to supranational interference in national affairs (Voeten, 2007). Whether a jurisprudential regime matters in a particular country or supranational jurisdiction is a question that is open to investigation. Can a jurisprudential principle that provides a guiding framework for an area of law be identified? Did the judges of a country's high court decide cases differently after the regime was established? Did the existence of a jurisprudential regime have any effect relative to attitudinal or strategic concerns?

At a fundamental level, the debate over which approach provides the best explanation is a debate of interpretivism versus positivism. While positivists argue that social scientists can accurately explain reality using precise, objective language, interpretivists respond that, given the importance of language in politics, explanations of political behavior should use the language of the group being studied. After presenting my empirical explanations using both statistical and interpretive methods, I will consider this debate in Chapter 7.

3
The Content-Neutrality Jurisprudential Regime

Jurisprudence is a critical component of Martin Shapiro's concept of political jurisprudence and is equally important to the construct of a jurisprudential regime. Content-neutrality is the key jurisprudential regime for freedom of expression law. In this chapter, I focus on the jurisprudential side of jurisprudential regime theory, tracing the origins, justification and development of the content-neutrality jurisprudence (Richards and Kritzer, 2002).

I first discuss strict scrutiny, and how the Supreme Court's application of it to the first amendment context fits with equal protection clause jurisprudence generally. I then turn to intermediate scrutiny, examining how the Court's application of this standard of review to content-neutral time, place and manner laws is consistent with the Court's application of intermediate scrutiny to regulations of general conduct that have incidental effects on freedom of expression.

Does content-neutrality apply to all free expression claims? Skeptics may note that the Court's treatment of speech such as obscenity is a major departure from the content-neutrality jurisprudence. Like any major area of jurisprudence, there are exceptions to content-neutrality, which I outline in this chapter.

How did the justices justify the content-neutrality jurisprudential regime? Where did content-neutrality originate, and how did the Supreme Court arrive at the modern formulation? I undertake an investigation of the origins of the content-neutrality jurisprudence, and trace development of the jurisprudence of the 1972 cases *Police Department of Chicago v Mosley* (408 US 92, 1972) and *Grayned v City of Rockford* (408 US 104, 1972) over time, discussing the key decisions that led to the Court's adoption of content-neutrality. I assess the major justifications the Court has used for the content-neutrality jurisprudence and examine how those justifications helped the justices to build consensus for content-neutrality. In doing so, I advance two claims. First, interpretive institutional scholars posit that political values can

influence the development of law, and the judicial process can mediate those values (Novkov, 2008). I contend that the justices used political values such as self-government, security, open debate and equality under the law to build consensus on the Court for content-neutrality. Despite the fact that by attitudinal measures the Court was evenly divided at the time of *Grayned* and *Mosley*, the justices had developed the justifications for content-neutrality in a way that built consensus for the decisions, in part because freedom of expression was justified by both security and liberty, but also because the values of open debate and equality served to protect the expression of everyone, regardless of political orientation. In addition, the National Association for the Advancement of Colored People (NAACP) and the civil rights movement contributed to building this consensus and developing the law by bringing equality and equal protection claims to the first amendment discourse, as the movement sought to use and develop freedom of expression law.

The second claim I advance is that content-neutrality serves as a limiting principle for freedom of expression. Freedom of expression can be justified via a variety of principles but these justifications raise the question of where the boundaries should be drawn. Content-neutrality provides a workable, if not perfect, answer. The justices will be very skeptical when the government regulates on the basis of content or viewpoint because to do so poses the greatest threat to freedom of expression. When the government regulates in a content-neutral manner, the justices will remain vigilant of the threat to free expression principles but allow the government more leeway to act. Content-neutrality helped to build consensus among the justices because it allowed the justices to draw limits on freedom of expression.

I apply the jurisprudential regime theory articulated in Chapter 2 to examine how the content-neutrality jurisprudence developed. My methodology is to use a close interpretive reading of the key precedents cited in *Grayned* and *Mosley*. I organize the precedents by normative justification and discuss how those justifications were used by the justices to develop critical aspects of content-neutrality. Although my primary focus is on the development of jurisprudence, I recognize that the justices' political attitudes help to shape the jurisprudence. Had the membership of the Court remained the same from 1953 to 1972, content-neutrality would not have developed in the same way, if at all.

Why use jurisprudential regime theory rather than an alternative explanation? For example, a macro-level explanation would be that, as African-Americans gained economic power in the 1900s, they gained political power and began to shift the law. The influence of civil rights jurisprudence on freedom of expression jurisprudence is merely one aspect of a broader change in law. My response adapts the work of Mark Tushnet (1987), who made a similar response with respect to the development of law leading to desegregation in

education. Although a macro-level, economic explanation could be supportive of the changes in legal development, an explanation of how the law actually developed at the level of the Supreme Court requires an examination of key cases and jurisprudence, the justices and parties involved in the cases and the values at stake.

Another alternative explanation would be purely attitudinal. This explanation would argue that the justices are solely motivated by their political attitudes and the establishment of the content-neutrality precedents was only a result of changing Court personnel. In this chapter, I illustrate that the relation between the justices' political views and the law is more complex. Certainly, the justices are politically minded and the jurisprudence they created had to appeal to particular values. The justifications for a content-neutrality regime are political; they are based on political values. However, the language of the law matters as well, as I illustrated in Chapter 2. The Court builds institutional capacity over time by learning from past decisions. The importation of equal protection jurisprudence to the first amendment enabled the justices to look at freedom of expression cases in new ways. In combination with levels of scrutiny, the construct of content-neutrality was used by the justices to elevate the protection of the core of freedom of expression while allowing a means for the government to regulate in a content-neutral way. This learning process is how jurisprudence is constructed. As Shapiro noted, legal development is an incremental process; who wins or loses is not as important as the content of a legal opinion (Kritzer, 2003, pp. 401–6).

There are two important pieces of jurisprudential regime theory that are *not* addressed in this chapter. While this chapter contains a theoretical discussion of the content-neutrality jurisprudential regime, I leave the question of empirical support for the proposition that such a regime exists to Chapters 4 through 6. In addition, I discussed the significance of jurisprudential regime theory in the context of the Supreme Court decision-making literature in Chapter 2, although I apply the theory at different points in this chapter.

Identifying a jurisprudential regime

There are four key steps to identifying a potential jurisprudential regime (Richards and Kritzer, 2002, p. 310). The question of whether the regime actually matters to the justices is a separate question that I address through statistical analysis in Chapter 4 and through qualitative analysis in Chapters 5 and 6. The first step is to discern the relevant analytic standard for an area of law, normally a standard that defines relevant case factors and sets a standard of review such as a particular level of scrutiny. For freedom of expression, it is the content-neutrality regime. This regime establishes strict scrutiny as the standard of review when the government regulates expression on

the basis of content or viewpoint and intermediate scrutiny as the standard when the government regulates in a content-neutral manner. The second step is to use an electronic case database like Findlaw, Lexis or Westlaw to trace the origin of the regime by checking citations to precedent and reading the cases to find the point in time at which the jurisprudence appeared in its modern formulation. I used Findlaw to discover that the regime was clearly established in the *Mosley* and *Grayned* companion cases (Richards and Kritzer, 2002, p. 310). These two cases did not suddenly materialize out of thin air. This line of jurisprudence developed over time, but these two cases stand out in comparison to the related cases that contributed to the development of this jurisprudential regime.[1] The third step requires consulting casebooks in the area of law to confirm that legal scholars agree on the key analytic standard. In our initial identification of the regime, Kritzer and I consulted four casebooks representing a variety of perspectives and all four recognized the importance of the content-neutrality jurisprudence to freedom of expression law (Richards and Kritzer, 2002, p. 310, citing Kmiec and Presser, 1998; Tribe, 1988; Smolla, 1994; Shiffrin and Choper, 1996). Finally, the regime-defining precedent should have been adopted by at least a five-member majority of the Supreme Court. This standard was easily met as the vote in *Mosley* was unanimous with three justices concurring and the vote in *Grayned* was 8:1 with Blackmun concurring in part and Douglas dissenting in part.

Strict scrutiny for content-based laws

Standards of review are analytic tests that courts use to evaluate legal issues. Jurisprudential regimes establish standards of review which the justices use to weigh various case factors such as government interests and effects of government regulations on liberty. At the time Justice Thurgood Marshall wrote his opinions in *Mosley* and *Grayned*, the Supreme Court had established two primary standards of review for equal protection clause issues. It took until 1976 for a majority of the Court to embrace a third standard of review in the equal protection context, which was intermediate scrutiny for gender discrimination (*Craig v Boren*, 429 US 190, 1976). Strict scrutiny is a very difficult test for the government to meet and is used when the government limits a fundamental right or employs a suspect classification such as race as the basis for legislation. There are two primary elements to the standard of review. The government must establish that there is a compelling interest to justify its limitation on the fundamental right, and that the challenged law is necessary to achieve the compelling interest. For example, in *Dunn v Blumstein* (405 US 330, 1972), cited by Marshall to support his

1 See discussion of the importance of *Mosley* and *Grayned* below.

application of strict scrutiny to the first amendment context in *Mosley* (1972, p. 101), the Court considered Tennessee's durational residency requirements for voters. By prohibiting citizens who had not lived in the state for a year and the county for three months from voting, Tennessee burdened the fundamental right to travel and absolutely took away the right to vote. The Court imposed strict scrutiny because these rights were limited (*Dunn*, 1972, pp. 336–9, 343). Applying strict scrutiny, the Court recognized that Tennessee had a compelling interest in preventing fraudulent voting. For example, Tennessee would rightly be concerned to prevent 'colonization', the practice of a group of nonresidents coming into a county and electing their own candidate (*Dunn*, 1972, p. 345).

Tennessee's law, however, failed the second part of strict scrutiny. The durational residency requirements were not 'necessary'. 'Necessary' means the government must use the least restrictive means to achieve its compelling interest (*Dunn*, 1972, p. 353). The Court recognized that Tennessee had less restrictive means at its disposal to deal with colonization or fraud, namely its existing bona fide residency requirement and various provisions that directly prohibited voter fraud (*Dunn*, 1972, pp. 353–4). The necessary component of strict scrutiny requires an element of precision. There must be a close fit between means and ends; the government must narrowly tailor its means to fit its compelling ends. Tennessee tried to claim that durational residency requirements would advance the goal of having knowledgeable voters, but the Court said the means were 'much too crude' to advance that goal, because Tennessee had effectively excluded some knowledgeable voters (*Dunn*, 1972, p. 360). The residency requirements failed the strict scrutiny standard of review, so the Court ruled that they were unconstitutional under the equal protection clause.

In the free expression context, strict scrutiny is very protective of freedom of expression. The justices will only consider allowing the government to restrict expression if the government can establish a compelling interest, which is the highest level of justification. What interests might the justices find compelling? How do the justices determine whether a government interest is compelling? It is much easier to find an answer to the former question. There is no established formula for determining whether a government interest is compelling, although there are certain types or categories of compelling interests: fulfilling fundamental government functions, protecting constitutionally protected rights, protecting national security, or protecting individuals from harm.

Constitutional rights are often considered to be compelling government interests. One is the right to a fair trial, which is considered when judges or parties to court cases attempt to limit media access or impose gag rules on media. At times the Supreme Court must balance freedom of expression

against the right to vote and related government obligations such as regulating elections. Other constitutional rights that might be deemed to be compelling include the protection of privacy in one's home, equal protection rights like stopping racial discrimination, and avoiding establishment clause violations. Finally, some cases involve competing free expression rights such as public access to the media, the right to buy campaign advertising, must-carry regulations for cable television, and copyrights.

Fundamental government functions include ensuring the orderly administration of justice, protecting confidentiality of judges under investigation, protecting property rights, regulating elections, gaining evidence for criminal investigations, regulating employees, ensuring officeholders properly perform duties, maintaining schools' missions, stopping racial discrimination in employment and by contractees, and limiting party influence in the civil service. National security includes regulation of foreign affairs.

Harm to individuals includes the government's compelling interests in preventing physical violence and maintaining prison security. Harm also includes serious financial harm, such as fraud, coercion, counterfeiting, unfair labor practices, anti-trust violations and copyright violations. There are also compelling interests in punishing fighting words and libel.

Assume that the government (or a private party in a libel case) asserts a compelling interest that falls into one of these categories. How do the justices, or other judges, determine whether that interest is actually compelling? Generally, the justices are willing to take the interest at face value provided there is a plausible basis for it. In a few instances, including commercial speech cases where the more lenient standard of intermediate scrutiny has been applied, the Supreme Court has specified that the government must show that the harms it seeks to prevent are 'real', and that the government's 'burden is not satisfied by mere speculation or conjecture' (*Edenfield v Fane*, 507 US 761, 770–1, 1993).

In assessing the must-carry rule for cable television, which required cable providers to carry local stations, the Court, applying intermediate scrutiny, stated that it scrutinizes federal legislation 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence' (*Turner Broadcasting System v FCC*, 512 US 622, 666, 1994). Specifically, the Court inquired 'whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry' (*Turner*, 1994, p. 665). In a 2006 decision permanently enjoining Michigan's attempt to regulate the sale of 'violent' video games to minors, US District Court Judge George Caram Steeh dismissed several medical and psychological studies, stating: 'Based on the research presented by the defendants, it cannot be said that the legislature enacted the law using "reasonable inferences" from scientific literature based

on "substantial evidence".' (*Entertainment Software Association v Granholm*, 426 F. Supp. 2d 646, 654, E.D. Mich., 2006, quoting *Turner* (1994, p. 655)

Often the Court will concede that the government stated a compelling interest in the abstract, but find that the government failed to show how the means it chose were the least restrictive means of achieving that interest. Where strict scrutiny becomes particularly strict is in the second element of the analytic test. In overturning the Communications Decency Act (CDA) of 1996 in *Reno v American Civil Liberties Union* (ACLU) (521 US 844, 1997), the first government attempt to regulate the availability to minors of indecent materials on the internet, the Supreme Court recognized that, in the abstract, there is a compelling government interest in protecting children from harmful materials. The justices struck down the CDA, however, because it was not the least restrictive means of achieving that interest. Justice John Paul Stevens explained that the interest in protecting children 'does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduce the adult population to only what is fit for children".' (*Reno*, p. 875, quoting *Denver Area Education Telecommunications Consortium v FCC*, 518 US 727, 759, 1996, in turn quoting *Sable Communications v FCC*, 492 US 115, 158, 1989, some internal quotations and ellipses omitted). Stevens continued by noting that, regardless of the strength of the government interest in protecting children, the first amendment does not permit the government to reduce the level of adult discourse to what is fit for a 'sandbox [sandpit]' (*Reno*, 1997, p. 875).

These types of arguments indicate that the challenged law has restricted too much expression. In striking down a Michigan law that made it a crime to make available any book that might corrupt the morals of youth, Justice Felix Frankfurter observed: 'Surely, this is to burn the house to roast the pig.' (*Butler v Michigan*, 352 US 380, 383, 1957) Justice Byron 'Whizzer' White adopted this language in the 'dial-a-porn' case, *Sable* (1989, p. 127), where the Court struck down a Federal Communications Commission (FCC) total ban on indecent telephone messages because the regulation restricted more speech than was necessary. In *Reno*, Justice John Paul Stevens advanced the metaphor, noting: 'In *Sable*, we remarked that the speech restriction at issue there amounted to "burning the house to roast the pig." The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.' (*Reno*, 1997, p. 882, quoting *Sable*, 1989, p. 127, internal citations omitted)

To say that a regulation is not the least restrictive means of achieving a government interest implies that less restrictive alternatives exist. Sometimes the justices articulate a hypothetical or actual less restrictive alternative. In *Sable*, Justice White noted that, prior to being forced by Congress to enact a total ban, the FCC had promulgated the less restrictive alternatives of credit

card payment, access codes and scrambled messages that required adults to purchase a descrambler. White argued that these alternatives could achieve the government's interest in limiting minors' access to pornographic messages while also preserving the speech rights of adults (*Sable*, 1989, p. 128).

The concepts of overbreadth and vagueness are closely related to the least restrictive means concept. Overbreadth and vagueness challenges are often made in free expression cases. Justice William Brennan articulated the basic principles related to overbreadth and vagueness in *NAACP v Button* (371 US 415, 1963). These challenges indicate that, even if the government has a persuasive interest that justifies some regulation of expression, there is a problem with 'sweeping and improper application' (*Button*, 1963, p. 433). Vagueness threatens freedom of expression when individuals have to guess whether they are in violation of the law. Overbreadth threatens to restrict more speech than is necessary to achieve the state's interest. What is unique about vagueness and overbreadth challenges is that they constitute exceptions to typical standing rules. The Supreme Court is concerned about the threat of legal sanctions, not just the actual application of the law, so it allows facial challenges and allows parties to assert potential applications to third parties. Since 1973, the Court has required substantial overbreadth for parties to be able to use the exception to typical standing laws (*Broadrick v Oklahoma*, 413 US 601, 1973). A focus on precision of application is shared by the vagueness, overbreadth, strict scrutiny and intermediate scrutiny standards. The core principle is that, even when the government is able to articulate strong reasons to restrict speech, the justices will remain vigilant to ensure that the government does not restrict more speech than is necessary to achieve its goals.

The content-based ordinance struck down in *Mosley*, as well as the identical ordinance struck down in *Grayned*, failed to pass the test of strict scrutiny. Although the Court conceded that providing a quiet atmosphere for student learning was a compelling interest, the ordinances restricted too much expression by selecting some types of picketing for punishment but exempting others. The discrimination on the basis of content is one indication of the burden these ordinances imposed on expression (see the quotations from Marshall's opinion in Chapter 1). The Court was concerned about the ability of the government to undermine robust debate. In addition, a less restrictive alternative was available. The second ordinance used by Rockford, prohibiting noisy protests while school was in session, was upheld as a content-neutral alternative that would achieve the interest in allowing for learning to take place at the schools, while also accommodating freedom of expression.

Content-based laws and regulations are subject to strict scrutiny, which is a very demanding standard for the government to meet. Content-neutral laws

are judged by a comparatively more lenient standard, although it is still quite demanding of government compared to a rational basis test.

Intermediate scrutiny for content-neutral laws

Content-neutral laws are assessed by the intermediate scrutiny standard of review. Laws must be narrowly tailored to achieve a substantial government interest. Intermediate scrutiny is much harder for the government to meet than the mere rationality standard that is employed for economic regulations in the fourteenth amendment equal protection context. The rationality standard requires only that the challenged regulation be reasonably related to a legitimate government interest.

There are two types of content-neutral regulations of speech: incidental regulations and time, place or manner regulations. An incidental or time, place or manner regulation that is content-based would remain subject to strict scrutiny. As the name implies, time, place or manner regulations regulate the time or location of the expression, or the manner in which it is expressed. A law could choose to address only one of these three dimensions.

In *Grayned*, the Rockford ordinance the Supreme Court upheld dealt with all three dimensions. The scope of its application was limited to the times a school was in session and the location of the school. Manner was addressed by the prohibition on noisy protests that disturb the peace of a school session or class.

In reviewing the ordinance, the Court noted that the city's interest in avoiding disruption of students' learning was compelling, and that the challenged ordinance achieved this interest in a narrowly tailored manner. Marshall noted that this ordinance addressed the disruptive activity directly, while avoiding unnecessarily broad prohibitions on expression. The ordinance also avoided discriminating on the basis of content, unlike the other ordinance in Rockford that was declared unconstitutional (*Grayned*, 1972, p. 119).

What do the justices mean when they use the term 'narrowly tailored', as Marshall did in *Grayned*? 'Narrowly tailored' means that the regulation must not restrict more speech than is necessary to serve the government interest that is offered in support of the regulation. A challenged regulation is not narrowly tailored if there is another regulation the government could have used which would be less restrictive of expression but still achieve the government interest. The term is sometimes used when the justices look at content-based or content-neutral laws. For content-based laws, the Court usually interprets 'narrowly tailored' as the least restrictive means of achieving the government interest. For content-neutral laws, the Court typically requires that the regulation must not restrict more expression than is necessary to achieve the government interest. As a means of providing guidance

to policy-makers, the least restrictive means interpretation under strict scrutiny implies less flexibility and less judicial deference than the interpretation under intermediate scrutiny, although the Court is not always absolutely precise or consistent in its usage and interpretation in cases falling into the content-based and content-neutral categories.

Grayned and *Mosley* do not explicitly consider content-neutral regulations of conduct that have an incidental effect on freedom of expression, but the Supreme Court treats these content-neutral laws in a manner virtually identical to how it evaluates content-neutral time, place or manner laws. The Court's standard in this area was established in *US* v *O'Brien* (391 US 367, 1968) and this precedent was cited in *Mosley* to support the requirement that the government not restrict more expression than necessary (*Mosley*, 1972, p. 102). The question presented in *O'Brien* was whether a government law that prohibited knowing destruction, mutilation or alteration of a Selective Service Registration Certificate violated the first amendment. O'Brien was convicted after burning his certificate in a public demonstration. The language of the law gave no indication that it was either focused on the content of speech or was a time, place or manner regulation. (The decision was widely criticized because it failed to take into account statements by the framers of the law that indicated it was targeted at quieting dissent, which would have made it content-based.) It was clear that the regulation had implications for speech, so the Court devised a new category: content-neutral regulations that have incidental effects on speech. The Court also established the analytic standards for such regulations.

> A government regulation is justified if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. (*O'Brien*, 1968, p. 377)

The second clause of the test indicates that the incidental regulation must be content-neutral. The first and third clauses require that the regulation must be narrowly tailored to serve a substantial government interest.

Compared to intermediate scrutiny, the rational basis test is an easy standard of review for the government to meet. *Williamson v Lee Optical* (348 US 483, 1955) is a textbook example of the rational basis test. Oklahoma law treated opticians differently from ophthalmologists and optometrists. Opticians were not allowed to put lenses into frames without a prescription (*Williamson*, 1955, p. 486). The rational basis test merely requires that the government interest is legitimate and that the challenged law bears a rational relation, or is reasonably related, to that interest. Of course, the government

is commonly involved in regulating health and safety, so there was no doubt that Oklahoma's interest was legitimate. Although there may have been better alternatives, the Court did not wish to second guess the Oklahoma legislature and determined the law to be a 'rational' means of achieving its interests. Justice William Douglas explained: 'The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.' (*Williamson*, 1955, p. 487)

The Court did not, however, choose the rational basis test for content-neutral laws. The importance of this observation is that, although the Court has chosen a standard of review that is less protective than that used for content-based laws, intermediate scrutiny is still rather protective of freedom of expression. The government must regulate precisely and requires a substantial interest to weigh against the intrusion on expression.

Significance of *Mosley* and *Grayned*

The *Mosley* and *Grayned* precedents allowed Justice Marshall, writing for the Supreme Court, to make several points critical to the development of the content-neutrality jurisprudential regime that governs much of freedom of expression law.[2] The government will have a difficult time sustaining laws that target the content of expression. In a closely related point, Marshall brought together the first and fourteenth amendments. The government must treat speakers equally and not discriminate on the basis of content. In addition, in upholding one of Rockford's ordinances, Marshall distinguished the category of content-neutral time, place or manner regulations. The distinction between content-based and content-neutral laws was also clarified by Marshall's categorization of the Chicago ordinance as content-based. Even though the ordinance addressed aspects of time, place and manner, the fact that it treated labor picketing differently meant that it was content-based (Smolla, 1994, s. 3, p. 34). These precedents set up two different tracks, to use Tribe's (1988) term, with the content-neutral category or second track establishing a more lenient but still rigorous standard of review. If the government acts in a content-neutral way, this may be a viable alternative for the government to achieve its interests, but the government must still avoid restricting more speech than is necessary. Although content-neutral laws will be judged by an easier standard (intermediate scrutiny) than content-based laws (strict scrutiny), intermediate scrutiny is still protective of freedom of expression (see also my discussion of *Grayned* and *Mosley* in Chapter 1).

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2 I am indebted to Donald Downs for initially pointing out the significance of *Mosley* and *Grayned*. See Downs, 1989, p. 5.

Jurisprudential regime theory recognizes that the attitudes of the justices can play an important role in the creation of a jurisprudential regime. At the time of *Grayned* and *Mosley*, there were six justices on the Court who had been appointed by Republican presidents – Harry Blackmun, Warren Burger, Brennan, Lewis Powell, Potter Stewart and William Rehnquist – and three justices who had been appointed by Democratic presidents – Douglas, Marshall and White. The Segal-Cover scores rated all the Republican appointees as conservative except for Stewart and Brennan, who were rated as liberal. Democratic appointees Douglas and Marshall were also rated as liberal. White was rated as a moderate, with a score of 0.0, exactly in the middle of the range (Segal et al., 1995, p. 816). By the measure of Segal-Cover scores, the Court was evenly divided with four liberals, four conservatives and one moderate. Interestingly, the voting patterns showed a high level of agreement among the justices. The voting pattern was 9:0 in *Mosley*, with Blackmun and Rehnquist concurring in the result but not writing a concurring opinion. Burger joined the majority opinion but wrote a one-paragraph concurring opinion clarifying the context of some language in the majority opinion. In *Grayned*, the voting pattern was 8:1, with Douglas dissenting in part because he also wanted to overturn Grayned's conviction under the antinoise ordinance as there was not sufficient evidence that Grayned actually made any noise. Blackmun joined the judgment of the Court and concurred with part II of the majority opinion, but did not write a separate opinion.

How was the Court able to forge a consensus in these two seminal cases? First, liberal and conservative attitudes must be applied in particular contexts and, in the area of freedom of expression, there are a number of broad political values implicated. In particular, the Court justified the content-neutrality jurisprudential regime by reference to values such as self-government, open debate, security and equality under the law. Appeals to these values helped to build consensus among the justices, in part because equality and open debate serve to protect the expression of everyone and in part because content-neutrality advances both security and liberty, values which are often in tension with each other on the liberal-conservative axis. Second, the Court delineated categories of government regulation, strongly protecting expression from content-based discrimination while allowing more flexibility for the government to regulate in a content-neutral manner. Content-neutrality served as a limiting principle, enabling the Court to define the limits of freedom of expression. After briefly looking at exceptions to the content-neutrality doctrine, I explore these two points in greater detail.

Although my discussion will show how the Court developed the law in an incremental manner over time, *Mosley* and *Grayned* stand out as the regime-defining opinions. Earlier cases like *NAACP v Button* articulated that the first amendment must apply equally to all, but the Court's opinion did

not articulate strict scrutiny as the standard of review and did not address how content-neutral regulations should be treated. The two *Cox v Louisiana* (379 US 536, 1965, and 379 US 559, 1965) cases showed a contrast between content-based and facially neutral regulations, but the Court's opinions did not clearly set out standards of review for content-based and content-neutral regulations.

Exceptions to content-neutrality

Although quite extensive in scope, content-neutrality does not apply to all first amendment claims. One important exception is what I call the threshold inquiry. In some cases, the Supreme Court considers whether the first amendment is even relevant to the inquiry. If there is no state action or free expression is not actually abridged, the inquiry ends there. These cases are relatively rare. For example, in *Steelworkers v Sadlowski* (457 US 102, 1982), the Court ruled that the first amendment didn't apply to a union's ban on union candidates taking outside money for a union election. In *Cammarano v US* (358 US 498, 1959), Cammarano argued that his first amendment rights were violated when the Internal Revenue Service refused to allow him a tax deduction for a particular expenditure regarding publicity on proposed legislation. The Court ruled that he had not presented a valid first amendment claim as there was no actual restriction of expression.

In addition, there are a number of exceptions to content-neutrality that I call the less protected categories (Richards and Kritzer, 2002, p. 311). The normal presumption against content-discrimination does not apply, although the Court does sometimes strike down laws in these categories. The Court has traditionally been more deferential to regulation of the broadcast media due to the need for licensing the scarce broadcast spectrum and the need to balance the public's right to receive information (*FCC v League of Women Voters of California* 468 US 364, 1984). The Court has been unwilling to treat commercial speech as equivalent to other forms of speech (*Central Hudson Gas & Electric Corp. v Public Service* Commission, 447 US 557, 1980). Other types of content that are treated differently by the Court include obscenity (*Miller v California*, 413 US 15, 1973) and libel against private figures (*Gertz v Robert Welch, Inc.*, 418 US 323, 1974). The forum of expression is another reason to treat some laws differently, such as regulations of expression in non-public or limited public forums, expression in schools (*Hazelwood v Kuhlmeier*, 484 US 260, 1988), picketing of secondary sites by labor unions (*Longshoremen v Allied International*, 456 US 212, 1982), and speech in private forums against the will of the owner of the property (*Hudgens v National Labor Relations Board*, 424 US 507, 1976). For example, in limited public forums, the Court permits content-based but not viewpoint-based regulations (*Perry Education*

Association v Perry Local Educators' Association, 460 US 37, 1983; see Chapter 6 for a discussion of the fine line between viewpoint-based and content-based regulations).

Justifications for the content-neutrality jurisprudential regime

How was the content-neutrality jurisprudential regime justified, and where did it originate? What are the origins of content-neutrality? Why I am trying to answer these questions simultaneously? The construction of free expression jurisprudence is a common-law process; through the use of the published opinions that serve as legal precedent, the justices evolve key principles over time (Strauss, 2002, p. 47). Precedent, then, is one means by which the justices justify their decisions. Ultimately, however, justifications must be based on some normative foundation. There must be a reason why the justices ought to apply the precedent in the way they have chosen. I contribute to the interpretive institutionalist literature on the role of political values in legal development (Novkov, 2008) by advancing the proposition that the justices used political values such as self-government, security, open debate and equality under the law to shape the development of free expression jurisprudence and justify content-neutrality. The justices' use of these political values is only part of the story, however. The relationships between law, values, the Supreme Court and civil rights groups fighting for legal change are complex (Epp, 1998; 1999a). The path of legal development and change is not a one-way street where the benevolent Supreme Court grants victories to the NAACP and bestows liberty upon the oppressed (Tushnet, 1987; Klarman, 2004). Activist groups can draw strength from values as they function in society and as they are situated in the discourse of Court rulings, but those groups can also shape values and influence legal development (McCann, 1999, pp. 72–9; Epp, 2009).

The NAACP and the civil rights movement drew upon these values and sought to change the discourse of free expression jurisprudence as the movement pursued its overarching goal of equality. As Nicholas Katzenbach, Attorney General under President Lyndon Johnson, explained, the Reverend Martin Luther King Jr, who had a tremendous influence in shaping the nonviolent free speech and protest tactics of the civil rights movement, was aware of the political significance of his tactics. To achieve broad public support and encourage the federal government to stand on its side, the civil rights movement showed respect for law and drew on values such as equality. Civil disobedience was applied only to unconstitutional laws, not laws in general (Katzenbach, 1970, p. 444). As federal judge Frank Johnson, who ruled on many key civil rights cases, explained, the Reverend King, despite his tactics of civil disobedience, showed respect for law by acting civilly and being willing

to accept the penalty for disobedience (Johnson Jr, 1968, p. 272). However, the civil rights movement did not only engage in civil disobedience. As the great first amendment scholar Harry Kalven explained in his book on freedom of speech and the civil rights movement (1966, p. 184), most of the civil rights demonstrations were exercises of the basic right of freedom of expression, not acts of civil disobedience. By bringing norms of equality and equal protection to the freedom of expression context, the civil rights movement helped the justices to establish the new jurisprudential regime of content-neutrality (Karst, 1975).

In addition, content-neutrality serves as a limiting principle for freedom of expression. The various justifications for freedom of expression raise the question of where the justices should draw the limits. If freedom of expression advances important values, such as self-government, open debate, security and equality, are there any limits on freedom of expression? Can expression only be limited when it conflicts with these values? Content-neutrality helps the justices to deal with these difficult questions because it enables the justices to draw boundaries on freedom of expression, even if those boundaries are not perfectly clear. When the government regulates on the basis of content or viewpoint, this poses the greatest threat to free expression, so the Court applies strict scrutiny, but the Court allows the government more leeway if the government regulates expression in a content-neutral manner. The content-neutrality jurisprudence serves as an effective limiting principle because it is justified in terms of protecting freedom of expression. In addition, the justices require balancing of the government interest with the degree of restriction of expression.

The essence of the content-neutrality jurisprudential regime is that, if the government targets the content of speech itself, the threat to liberty is greatest. This is why the justices apply two different standards of review to content-based and content-neutral laws. It is critical to bear in mind, however, that even intermediate scrutiny is rather protective of expression. The Court requires that the government restrict no more expression than is necessary to achieve the government interest; there must be a close logical nexus between the policy and the government's end in order to minimize the degree to which liberty of expression is restricted.

Even if one agrees that content-based regulations pose a greater threat to liberty than content-neutral regulations, that does not explain why one should care about the threat to liberty. To fully understand why content-neutrality is important, I must examine the justifications for freedom of expression and how they apply to content-neutrality.

Justice Louis Brandeis wrote a classic statement of the justifications for freedom of expression in his concurring opinion in *Whitney v California* (274 US 357, 1927). He noted four of the primary justifications. Freedom of expression

is an end in itself, it encourages development of the individual, advances truth and promotes political goals of deliberation and self-government while helping to maintain political stability.

> To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. (*Whitney*, 1927, pp. 374–5)

Brandeis framed his justification in terms of the beliefs of 'those who won our independence'. Although scholars have contended that contemporary free expression jurisprudence has evolved dramatically compared to the thoughts of the founders (Strauss, 2002), appeals to the founders have some persuasive value, so Brandeis was willing to make at least a passing reference to them. Brandeis also noted that liberty is both an end and a means. Most justifications of freedom of expression are instrumental; freedom of expression is valuable because it advances another value such as self-government. Ironically, such justifications can undermine the intrinsic value of freedom of expression and provide a normative framework that enables other values to trump freedom of expression when it conflicts with those other values. By positing that freedom of expression is also an end, Brandeis provided an alternative normative footing. Brandeis also noted that the liberty of expression promotes development of the individual. By exercising the right of expression, people develop their individual faculties. Brandeis continued by noting how freedom of expression advances truth and self-government.

> They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. (*Whitney*, 1927, p. 375)

Brandeis's truth justification appeared to follow the reasoning of John Milton and John Stuart Mill. No author has expressed the view of the relationship between freedom of expression and truth more eloquently than Milton in *Areopagitica* in 1644, who wrote:

> And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by Licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter? (Osborn, 2006, p. 65)

As John Stuart Mill explained in *On Liberty* in 1859, freedom of speech advances truth, but there is no justification for the suppression of falsehood. Unless censors are infallible, censorship risks silencing truths or partial truths. Drawing on Milton, he noted that the conflict between truth and falsehood makes the truth stronger, and if there were no contest between truth and falsity, the meaning of truth might be 'enfeebled':

> Even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. (Mill, 1974, pp. 115–16)

At the time Brandeis was writing, he could have easily referenced Milton or Mill. Instead, he cited President Thomas Jefferson's inaugural address in a footnote:

> If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. (*Whitney*, 1927, p. 375, fn. 3)

Of course, referencing Jefferson enabled Brandeis to make an American case for freedom of expression advancing truth, but it also connected the value of truth to the political justifications of security, deliberation, citizenship and self-government. The self-government justification was later developed by Alexander Meiklejohn (1948), who was cited by Marshall in *Mosley* (1972, p. 96). Freedom of expression promotes good citizenship, as it permits informed discussion. Indeed, such discussion is a duty of citizens and should be a principle of government; the idea that freedom of expression should serve the deliberative function of government has been refined by Cass Sunstein (1995). Part of the political justification is also security, a central concern of the founders. The uniqueness of Jefferson's thought then, as conveyed by

Brandeis, is that security is best achieved by protecting freedom of expression and working within the framework of deliberative self-government.

> They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. (*Whitney*, 1927, pp. 375–6)

My goal in discussing the major justifications of freedom of expression is to better understand the origins and justifications of content-neutrality, not to make a philosophical case for why we ought to believe in freedom of expression, as such a project is well beyond the scope of this book. With that caveat in mind, it is instructive to examine the limitations of the justifications offered thus far, as doing so will aid in explaining the development of content-neutrality. One difficulty is that nearly all of the justifications are instrumental, as freedom of expression is justified in terms of other values such as truth, citizenship or individual development. If citizenship is a paramount value, why not limit expression in situations where it does not advance the end of citizenship? If an oil painting is sexually provocative and not explicitly political, is it right to say that it can be censored because it does not directly promote citizenship? Should political speech be privileged over the arts and sciences? As Frederick Schauer (1989) observed, these justifications are underinclusive in some cases; they do not provide an adequate normative foundation to protect some forms of expression. A second limitation is that these justifications can also be overinclusive; they justify the protection of activities that are not related to freedom of expression (Schauer, 1989, pp. 6–9). For example, expression is not the only type of activity that develops human faculties. Hitting curveballs and hanging drywall also promote individual development, so how is a judge to distinguish expression as a uniquely protected activity?

An alternative justification for protecting freedom of expression grows out of Schauer's observation of the limitations of the typical justifications. Rather than justifying freedom of expression because it advances some other worthy end such as truth or individual development, Schauer justified freedom of

expression based on a distrust of government. He began with James Madison's oft-quoted line from Federalist 51, 'If men were angels, no government would be necessary', and noted that the same logic applies to the first amendment (Schauer, 1989, p. 1, quoting Madison, 1981, p. 160). The first amendment is, of course, a limitation on government power. Schauer conceptualized freedom of expression as being justified as a rule not based on aspirational ideals but instead because we distrust government. He wrote: 'Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers.' (Schauer, 1989, pp. 1–2) Even if one considers simply the recent history of book censorship (Foerstel, 2002), not to mention the continuing practice of government punishing or censoring expression on the basis of content (see Chapters 5 and 6), justifying the first amendment based on distrust of government officials is certainly not unwarranted, particularly considering the place of the first amendment in the overall constitutional structure, as a limitation on government power. The distrust of government rationale is consistent with an anti-paternalism rationale, which posits that the people should be allowed to judge the value of speech for themselves, rather than having government officials do it for them.

Returning to the question of why the principle of content-neutrality is justified and where it came from, whether one is speaking of anti-paternalism, truth, self-government, individual development, or freedom of expression as an end in itself, those rationales should apply equally regardless of the viewpoint of the speaker. As I delve into the origins of content-neutrality, I will consider the relevance all of these justifications in the development of the Supreme Court's jurisprudence.

Origins of content-neutrality jurisprudential regime

In searching for the origins of the content-neutrality jurisprudential regime, there are two main building blocks: the political justifications for freedom of expression as articulated by Brandeis and others and the intersection of equality and freedom of expression. In *Mosley*, Justice Marshall distilled the essence of the principle of content-neutrality: 'But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' (*Mosley*, 1972, p. 95) Immediately following this sentence, he cited *Cohen v California* (403 US 15, 24, 1971), *Street v New York* (394 US 576, 1969), *New York Times v Sullivan* (376 US 254, 269–70, 1964), *NAACP v Button* (1963, p. 445), *Wood v Georgia* (370 US 375, 388–9, 1962), *Terminiello v Chicago* (337 US 1, 4, 1949) and *DeJonge v Oregon* (299 US 353, 365, 1937). I will begin with the earliest cases and move forward in time, focusing on the political justifications first,

Table 1 Key precedents cited in *Police Department of Chicago v Mosley*

Precedent	Political accountability and/or self-government and/or development of citizens and/or anti-paternalism	Security	Open debate and/or diversity of ideas and/or truth	Equal application of first amendment	Discrimination against content or viewpoint	Standardless discretion	Equal protection clause
Whitney v California (1927), cited in *NYT v Sullivan*	x	x	x				
DeJonge v Oregon (1937)	x	x	x				
Terminiello v City of Chicago (1949)	x		x				
Wood v Georgia (1962)	x		x				
NYT v Sullivan (1964)	x	x	x				
NAACP v Button (1963)			x	x			
Street v New York (1969)			x	x	x		
Cohen v California (1971)	x		x	x	x	x	
Niemotko v Maryland (1951)					x	x	x
Edwards v South Carolina (1963)	x		x	x	x	x	
Cox v Louisiana (1965)	x		x	x	x	x	
Shuttlesworth v Birmingham (1969)					x	x	
Gregory v Chicago (1969)					x		

and then turning to the importance of equality and equal protection, examining some additional cases Marshall cited for support. My methodology is to make a careful interpretive reading of the key precedents cited by Marshall in order to find the main values used to justify the content-neutrality jurisprudence. In Table 1 (p. 64), I set out the seven major groups of principles and show which ones are present in each precedent. The first three are the traditional political justifications for freedom of expression; the last four relate to the concepts of equality and equal protection and will be further elaborated in the context of the particular precedents.

Although Marshall did not cite *Whitney* directly, after citing pages from *New York Times v Sullivan,* he added 'and cases cited' (*Mosley*, 1972, p. 95); the pages cited contain the lengthy passage from *Whitney*, which I discussed in the previous section. In the context of *Mosley* and *Sullivan*, *Whitney* stands for the proposition that freedom of expression promotes political truth, self-government and security. Even during turbulent times, discussion should be free and open so that dangerous ideas can be countered. In addition, the passage from *Whitney* quoted by Justice Brennan in *Sullivan* stands for the proposition that freedom of expression protects against the danger of tyranny of the majority, obviously a significant concern at the time Brennan and Marshall wrote their respective opinions.

DeJonge v Oregon is another early case that played a critical role in the development of content-neutrality. In 1937, the Supreme Court overturned DeJonge's conviction under Oregon's anti-syndicalism law. Chief Justice Charles Evan Hughes noted that DeJonge was essentially convicted for attending a meeting of the Communist Party, regardless of what was said at the meeting. There was nothing in the record to indicate DeJonge had advocated violence or illegal actions (*DeJonge*, 1937, pp. 361–2). The relevance of *DeJonge* to *Mosley* is the promotion of open discussion and its connection to security.

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. (*DeJonge*, 1937, p. 365)

In the 1949 case of *Terminiello v City of Chicago*, the Court overturned a conviction for disturbing the peace. Father Terminiello, a Catholic priest who had been suspended by his bishop (*Terminiello*, 1949, p. 14), had addressed

an assembly of 800 people at a meeting of Christian Veterans of America where he 'vigorously, if not viciously, criticized various political and racial groups' while a group of 1000 protested outside (*Terminiello*, 1949, p. 2). Writing for the Court, Justice Douglas refined *DeJonge* by noting that freedom of expression promotes a diversity of ideas, and this makes the US system of government distinct from totalitarian governments. Douglas also developed the political justification by connecting free discussion to the vitality of civil society and political accountability.

> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge v Oregon*, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. (*Terminiello*, 1949, p. 4)

In 1962, the Court overturned the politically motivated convictions of a sheriff for contempt in *Wood v Georgia*. In Bibb County, Georgia, a judge of the Bibb Superior Court, supported by two of his peers, charged a grand jury with investigating 'an inane and inexplicable pattern of Negro bloc voting' as well as rumors and accusations that 'candidates for public office have paid large sums of money to certain leaders of the Negro in an effort to gain their favor and get the Negro vote' (*Wood*, 1962, pp. 377–8). The judge had gathered the local media to announce the grand jury investigation, and it was initiated during a campaign season (*Wood*, 1962, p. 379).

The next day, James I Wood, an elected sheriff of Bibb County and a candidate in the upcoming election, issued a press release questioning the judges' decision to charge the grand jury with investigation. The press release condemned the judges' decision as 'one of the most deplorable examples of race agitation to come out of Middle Georgia in recent years', and compared the judicial intimidation to the physical intimidation of the Ku Klux Klan (*Wood*, 1962, p. 379). Wood also stated: 'It is shocking to find a Judge charging a Grand Jury in the style and language of a race baiting candidate for political office.' (*Wood*, 1962, p. 380) The press release concluded by stating: 'However politically popular the judges [*sic*] action may be at this time, they are employing a practice far more dangerous to free elections than anything they want investigated.' (*Wood*, 1962, p. 380) The next day, the sheriff delivered a letter for the grand jury to the bailiff stationed in front of the grand jury room. The letter argued that the allegations were false and that the grand jury should investigate the executive committee of the county's Democratic Party.

In response to Wood's statements, one month later he was cited for two counts of contempt of court for interfering with the grand jury and posing an imminent danger to the administration of justice (*Wood*, 1962, pp. 381–2). The sheriff then issued a press release repeating his previous allegations and asserting that he had spoken the truth. The judges then issued a third count of contempt, and one of the three judges involved in the original decision to initiate the grand jury investigation proceeded to convict Wood on all three counts, sentencing him to three 20-day jail sentences and $600 in fines, without making any findings or providing a rationale for his decision (*Wood*, 1962, pp. 381–3).

In overturning the convictions, Chief Justice Earl Warren, writing for the Supreme Court, noted that there was no factual support for the argument that Wood's statements posed a danger to the administration of justice. Instead, Warren wrote: 'The type of "danger" evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification.' (*Wood*, 1962, p. 388) Warren's reasoning drew heavily on *Thornhill v Alabama* (310 US 88, 1940) and its discussion of Brandeis' *Whitney* rationale regarding truth and of the founders' views of freedom of expression.

> 'Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political ... truth.' In *Thornhill* the Court also reiterated the thinking of the Founders when it said that a broad conception of the First Amendment is necessary 'to supply the public need for information and education with respect to the significant issues of the times ... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' (*Wood*, 1962, p. 388, quoting *Thornhill*, 1940, pp. 95, 102)

Going back to the original opinion in *Thornhill* provides two additional clarifications. One passage provides textual support for the *Thornhill* Court's description of the views of the founders.

> The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the 'five great rights' and said: 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers

> are shamed or intimidated, into more honourable and just modes of conducting affairs.' (*Thornhill,* 1940, p. 102, quoting Library of Congress, 1904, pp. 104, 108)

The other important point made by Justice Frank Murphy in *Thornhill* is that freedom of expression is necessary to maintain democratic institutions and allow correction of errors of popular government. He tied this point explicitly to the famous footnote 4 of *US v Carolene Products* (304 US 144, 1938). In *Carolene Products*, which was decided as the Court was beginning to adopt a much more deferential stance vis-à-vis regulations of the economy, Justice Harlan Stone wrote the footnote that anticipated the basic architecture of the Court's modern constitutional jurisprudence. The Court would be very deferential to government attempts to regulate the economy, but reserve a 'more exacting judicial scrutiny' for cases involving government restriction of the rights in the Bill of Rights, legislation targeted at religious or racial minorities, or legislation which 'restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation', such as restrictions on the right to vote or the dissemination of information (*Carolene Products*, 1938, p. 152). In *Thornhill*, decided just two years later, Justice Murphy followed that logic precisely.

> Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States v Carolene Products*. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. (*Thornhill,* 1940, pp. 88–9, citing *Carolene Products*, 1938, p. 152)

This passage describes very accurately what happened in *Wood v Georgia*. As the judicial system was being used to target and intimidate racial minorities as well as to stifle political candidates who had the courage to question whether the judicial system was being abused, the logic of *Thornhill* applied with even greater force.

In *New York Times v Sullivan*, the Court grappled with the issue of claimed libel against public officials. Sullivan was a city commissioner in Montgomery, Alabama who sued the *New York Times* for libel for running an advertisement by a group of civil rights advocates known as the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. None of the content in the advertisement mentioned Sullivan by name (*Sullivan*, 1964,

pp. 256–7). In overturning the judgment against the *New York Times*, the Court established the actual malice standard, designed to be protective of freedom of expression (*Sullivan*, 1964, p. 280).

Justice Brennan offered several justifications for freedom of expression in the two pages of the opinion that were cited by Marshall in *Mosley*. Starting with the political justifications, he noted the first amendment was designed to promote the open exchange of ideas in order to hold government accountable and allow the people to bring about social change. In articulating anti-paternalism and truth rationales, he quoted Judge Learned Hand, who stated that the first amendment 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' (*Sullivan*, 1964, p. 270, quoting *US v Associated Press*, 52 F. Supp. 362, 372, S.D. NY, 1943) He also incorporated the security rationale, quoting extensively from Brandeis' concurring opinion in *Whitney*. The meaning of the decision is crystallized in this statement of Brennan, which draws on *Terminiello* and *DeJonge*:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (*Sullivan*, 1964, p. 270)

Kalven (1966, p. 64) called this 'a splendid sentence, possibly the most felicitous expression on free speech yet'. Ultimately, the *Sullivan* decision highlights not only the Court's but also the nation's commitment to a vigorous and unshackled first amendment. In his recent book, titled *Uninhibited, Robust and Wide-Open* after the phrase from the *Sullivan* opinion, Lee Bollinger (2010, p. 66) recognized the significance of the decision, noting that at a time when the broadcast networks and papers like the *New York Times* were becoming national media, it was of critical importance for the Court to create a legal framework that would protect the new media structure. In the context of the Court's citation of *Sullivan* in *Mosley*, the precedent provides essential support for content-neutrality. If the first amendment is to be wide open and robust enough to advance its political functions, it must protect speech regardless of content.

Looking at the pattern in Table 1 (p. 64), the first five cases listed, which are the cases discussed to this point, are all justified based on the classical political rationales for freedom of expression. As I move to the next group, the decisions are also justified based on values that are somewhat unique to content-neutrality. The first amendment must apply equally to different types

of speech, even provocative speech, and the government may not discriminate against the content of expression. Of course, political justifications can be relevant as well. Content-neutrality can be supported by the need for open debate, a diversity of ideas, anti-paternalism and self-government.

Developing the principle of content-neutrality

NAACP v Button, decided in 1963, is a case that invoked the political justification for freedom of expression and contributed significantly to the development of the principle of content-neutrality. Justice Brennan clearly articulated the principle of neutrality when he wrote: 'For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.' (*Button*, 1963, pp. 444–5) *Button* involved a NAACP challenge to Virginia statutes regulating the improper solicitation of legal business. In 1956, Virginia had expanded the definition of individuals or organizations that could be considered to be improperly soliciting legal business. The Virginia Supreme Court of Appeals ruled that the activities of the NAACP, the NAACP's Legal Defense and Education Fund and NAACP lawyers fell within the reach of the amended statute and also violated the American Bar Association's Canon of Professional Ethics. The court ruled that the NAACP was fomenting and soliciting legal business to which it was not a party, enriching its own lawyers and leaving the litigants with no control (*Button*, 1963, pp. 423–7).

In reversing this ruling, Justice Brennan noted that the NAACP's litigation campaign was a 'form of political expression' (*Button*, 1963, p. 429). Providing open access to the courts is particularly important when minority groups are obstructed at the ballot box. Brennan also reaffirmed the right 'to engage in association for the advancement of beliefs and ideas' (*Button*, 1963, pp. 430–1, quoting *NAACP v Alabama*, 357 US 449, 460, 1958). Although not as refined as the *Mosley* analytic formulation, the Supreme Court's reasoning took a form similar to strict scrutiny. Brennan took notice of the state's interest and the breadth of the regulation; he wrote: '[T]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed.' (*Button*, 1963, p. 444)

In developing the concept of content-neutrality, Brennan explained that the content of the NAACP's speech was constitutionally irrelevant to the Court's decision, and the first amendment applies equally to all speakers, regardless of content: 'The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse

our society against the objectives of the petitioner.' (*Button*, 1963, p. 444) To support this proposition, he referenced three key precedents: *Terminiello*, as well as *Near v Minnesota* (283 US 697, 1931*)* and *Kunz v New York* (340 US 290, 1951*)*.

Terminiello advanced the concept that the first amendment protects a diversity of ideas, even including Terminiello's racist remarks. In *Kunz*, the Court overturned the conviction of Carl Jacob Kunz, a Baptist minister, for holding a religious meeting without a permit. In 1946, Kunz had obtained a permit good for one year from the city police commissioner of New York, but it was revoked later that year after a hearing determined he had ridiculed and denounced other religions. His requests for permits in 1947 and 1948 were denied, with no reason provided. He was arrested in 1948 in for speaking in Columbus Circle without a permit (*Kunz*, 1951, pp. 291–3). In overturning the conviction, Chief Justice Fred Vinson noted that the ordinance contained no criteria for determining when a permit request should be rejected. The ordinance vested the city police commissioner with considerable discretion to limit in advance the right to speak. In effect, this constituted a prior restraint (*Kunz*, 1951, p. 293). In addition, the Court noted the history of strong protection of the use of public streets and parks for expression (*Kunz*, 1951, p. 293, citing *Hague v CIO*, 307 US 496, 515, 1939). Vinson concluded: 'It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.' (*Kunz*, 1951, p. 295)

In *Near*, the Court was faced with a Minnesota statute that allowed county prosecutors to seek to enjoin the operation of 'malicious, scandalous and defamatory' periodicals as public nuisances (*Near*, 1931, pp. 701–2). *The Saturday Press* had printed articles alleging that 'a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis' and that the Minneapolis chief of police was engaged in graft, had illicit associations with the gangsters and was neglectful of his duties. The articles alleged that the county attorney and the mayor were lax in their duties to act against the gangsters. The articles also explained that one of the original defendants in the suit against the paper had been shot by the gangsters after one of the first articles on the topic was printed, and the paper called for a grand jury and special prosecutor to investigate the attempted assassination (*Near*, 1931, p. 704).

In response to the articles, the Hennepin county prosecutor filed a complaint stating that on nine occasions the paper had printed 'malicious, scandalous, and defamatory' articles regarding the chief of police, the mayor, other public officials, a member of a grand jury and the 'Jewish race'. The prosecutor won a permanent injunction against the paper; the injunction prevented the paper from operating in a scandalous or defamatory manner under the name *The Saturday Press* (*Near*, 1931, pp. 703–6).

In overturning the judgment against the paper, Chief Justice Hughes reasoned that the judgment constituted a prior restraint and noted the protection afforded to the press by the first amendment. In addition, Hughes made a point of significant relevance to the concept of content-neutrality that Brennan was developing in *Button*. Hughes explained that the judiciary had an obligation to protect comments that may be publicly scandalous, because this sort of expression is what the first amendment is designed to protect. Even if such comments disturb the peace, they are protected because the first amendment was designed to create an external check on the operation of government. Free and open discussion promotes political accountability.

> Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. (*Near*, 1931, pp. 721–2)

To buttress this point, Hughes incorporated the writings of James Madison. Madison counseled against limiting unfavorable sentiments against the government, as the effect would be to curtail public discussion and create a shield of protection for the government. In Madison's view, the government must be held accountable when it is deserving of public contempt, even if the expression of unfavorable sentiments actually excites the public.

> To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct. (*Near*, 1931, p. 722, citing Madison, 1800, p. 549)

How is this relevant to the Supreme Court's decision in *Button*? The NAACP was not making scandalous or defamatory allegations. Recall Brennan's point that the content of the NAACP's expression was constitutionally irrelevant to the Court's decision. The first amendment applies equally, regardless of content. Surely, if it protects a Baptist minister criticizing other religions in

Kunz, the racist speech of a newspaper alleging government complicity with Jewish gangsters in *Near,* and a suspended priest criticizing racial groups in *Terminiello*, it protects the NAACP mounting a litigation campaign against segregation. The first amendment protects controversial expression against government action.

Burning an American flag is one of the most controversial forms of expression, and the Court considered this issue in *Street v New York* in 1969. Street burned his American flag in response to the shooting of civil rights leader James Meredith. Street stated: 'If they let that happen to Meredith we don't need an American flag.' (*Street*, 1969, p. 579) The Supreme Court overturned Street's conviction for acting to publicly 'defy ... or cast contempt upon (any American flag) by words' (*Street*, 1969, p. 590, parentheses and ellipsis in original).

In his written opinion, Justice John Marshall Harlan reasoned that offensiveness was not a valid justification for restricting expression. Here Harlan contributed to the development of content-neutrality jurisprudence. He wrote: 'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.' (*Street*, 1969, p. 592) Harlan continued by quoting from *Board of Education v Barnette* (319 US 624, 1943), a ruling that struck down a policy compelling students to salute the American flag. He adapted the ruling to encompass not only the right to avoid compelled allegiance but also the right to express controversial opinions.

> We have no doubt that the constitutionally guaranteed 'freedom to be intellectually ... diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous. (*Street*, 1969, p. 593, quoting *Barnette*, 1943, pp. 641–2)

Two years after *Street*, the Court again addressed controversial speech and continued to develop the concept of content-neutrality in *Cohen v California.* Cohen had been convicted of disturbing the peace for offensive conduct because he had worn a jacket bearing the words 'Fuck the Draft'. Harlan wrote for the majority in this decision as well. Referring back to the concurring opinion of Brandeis in *Whitney*, he articulated the self-government rationale, noting: 'The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours.' (*Cohen*, 1971, p. 24) He continued by noting the right was designed to allow public discussion free from government restraints, which helps to develop citizens and the polity, while allowing for the 'individual dignity and choice' necessary for self-government (*Cohen*, 1971, p. 24). He strongly opposed paternalism and clearly tied

anti-paternalism to the argument that the first amendment applies equally to expression regardless of content.

> That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities ... come under the protection of free speech as fully as do Keats' poems or Donne's sermons ...'. (*Cohen*, 1971, p. 25, quoting *Winters v New* York, 303 US 507, 528, 1948)

The Court's opinion in *Cohen* stands out for its assertive stance against paternalism, but also for its connection of that stance to the developing concept of content-neutrality. The government was not able to articulate a principled distinction for singling out this particular offensive expression. As governments typically have problems doing so, Harlan explained that this is one of the reasons for the right of freedom of expression. Individuals can instead choose to decide what is offensive, free from fear of government sanction. Harlan wrote: '[I]t is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.' (*Cohen*, 1971, p. 25) He also explained that governments have a tendency to overreach when censoring, and when given the ability to do so will use that power to suppress unpopular views (*Cohen*, 1971, p. 26).

The *Cohen* opinion is also distinctive because it makes clear that the first amendment protects the emotive aspects of speech as well as the cognitive. The first amendment is neutral as to cognitive and emotive content. The manner in which a message is articulated may convey emotive force which may even be more important than the cognitive content of expression. Harlan connected this to the self-government rationale by explaining that freedom of expression includes the right to criticize the government, 'and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation' (*Cohen*, 1971, p. 256, quoting *Baumgartner v* US, 322 US 665, 673–4, 1944).

Like *Mosley* and *Grayned*, cases decided a year later, *Cohen* developed modern free expression jurisprudence in the sense that the opinion used a precise, analytic standard of review that was more protective of expression than the previous standards. Harlan used the occasion to significantly revise the fighting words standard of *Chaplinsky v New Hampshire* (315 US 568, 1942), stating that fighting words are 'those personally abusive epithets

which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction' (*Cohen*, 1971, p. 14). The Court acted similarly in the *Brandenburg v Ohio* decision from 1969 (395 US 444) which refined the standard regarding advocacy of illegal action to be more precise and speech-protective, limiting state punishment to situations 'where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action' (*Brandenburg v Ohio*,1969, p. 447). Although these four decisions are similar in their precise, analytic and speech-protective standards of review, *Cohen* and *Brandenburg* are limited to particular categories, albeit important ones, while *Mosley* and *Grayned* apply more broadly to any content-based or content-neutral regulations of expression.

Content-neutrality and the equal protection connection

In *Mosley*, Justice Marshall brought together the first amendment protection of freedom of expression with the equal protection clause of the fourteenth amendment. Chicago had attempted to make an exception for peaceful labor picketing under its statute, but Marshall pointed out that, if Chicago were to do this, it would also have to exempt all types of peaceful picketing, regardless of what subjects were being addressed:

> 'Peaceful' nonlabor picketing, however the term 'peaceful' is defined, is obviously no more disruptive than 'peaceful' labor picketing. But Chicago's ordinance permits the latter and prohibits the former. Such unequal treatment is exactly what was condemned in *Niemotko v Maryland*. (*Mosley,* 1972, p. 100, citing *Niemotko v Maryland*, 340 US 268, 272–3, 1951)

Niemotko, decided in 1951, arose out of a city council's refusal to grant permits to use a city park for Bible talks. When Niemotko and Kelly, members of the Jehovah's Witnesses, proceeded to hold meetings in the park, they were arrested for disorderly conduct (*Niemotko*, 1951, p. 270). The city had no standards for when permits should be issued or denied, so, as in *Kunz*, the Court condemned the practice of city officials exercising discretionary control over expression with no standards to use for guidance. Chief Justice Vinson wrote: 'No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served.' (*Niemotko*, 1951, p. 272)

Not only were there no standards, but it was clear to the Court that the city's power had been abused:

> Indeed, rarely has any case been before this Court which shows so clearly an unwarranted discrimination in a refusal to issue such a

> license ... The only questions asked of the Witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. (*Niemotko*, 1951, p. 272)

In the Supreme Court's view, the city's decision was based on the content of the speakers' expression, as Vinson explained: 'The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views.' (*Niemotko*, 1951, p. 272) The Court concluded by noting that the city had run afoul of both the first amendment and the equal protection clause: 'The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.' (*Niemotko*, 1951, p. 272)

The connection between equal protection and equality under the first amendment is made plain in the Supreme Court's opinions in *Mosley* and *Niemotko*. Looking at Table 1 (p. 64), *Niemotko* is the only case in which the majority explicitly ruled on both first amendment and equal protection grounds. Another pattern which emerged was the concern for standardless discretion, which tends to give rise to discrimination on the basis of content. This concern was present in *Cohen* and *Niemotko*. In addition, the civil rights movement led to a series of decisions that helped to develop the modern free expression jurisprudence that is crystallized in *Mosley* and *Grayned*. In this next set of cases, the Court was consistently concerned with discrimination against the content of expression and often raised the standardless discretion argument. More traditional political justifications for freedom of expression were sometimes present as well.

Civil rights and the development of content-neutrality

Wood v Georgia, NAACP v Button, New York Times v Sullivan and *Street v New York* are four important civil rights cases cited in *Mosley* that I discussed in the context of the political justifications for content-neutrality. In *Wood*, decided in 1962, Sherriff Wood stated in public his opposition to a judge's efforts to use the grand jury process to investigate African-American voters and political activists; Wood saw the efforts as race-baiting and judicial intimidation. The Supreme Court protected the speech rights of Wood by overturning his convictions for contempt of court, noting that freedom of expression serves to hold government accountable. In 1963, *Button* protected the NAACP's first amendment expression and association rights and helped to develop content-neutrality by noting that the first amendment applied to all speakers equally, regardless of content. In 1964, *Sullivan* established that the Court was

committed to keeping public debate robust and uninhibited, and protected the *New York Times* from libel claims for running an advertisement of a civil rights group. Although the 1969 *Street* decision was focused on an individual's protest of the shooting of James Meredith rather than a broader NAACP initiative as found in *Button*, the decision was important because it established that first amendment protections extend to controversial and offensive content. In addition to these cases, there are two groups of civil rights cases that contributed to the development of content-neutrality. The first set involves protests and the second set deals with freedom of association.

In *Edwards v South Carolina*, decided in 1963, the Supreme Court reversed the convictions of 187 black students who had been protesting for civil rights at the South Carolina State House. The students had carried placards such as 'Down with Discrimination'. When a crowd of 200 to 300 onlookers gathered, the protesters were ordered to disperse. The students responded by listening to a religious speech and singing patriotic and religious songs. They were arrested 15 minutes after the order was given when they refused to disperse (*Edwards v South Carolina*, 372 US 229, 231–2, 1962).

The Court noted: 'The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views.' (*Edwards*, 1962, p. 237) Justice Stewart proceeded to cite *Terminiello* to support the principle that the first amendment protects controversial expression. Stewart also noted that this was not a case where the protesters were convicted under a precisely drawn statute targeted at conduct, such as a traffic law or a restriction on the times the grounds of the State House were open to the public. The statute was vague and it was not clearly applied in an evenhanded manner (*Edwards*, 1962, p. 236–8).

In 1965, the Supreme Court decided two related cases named *Cox v Louisiana*, overturning convictions for breach of peace and obstruction of a public passageway in one case (*Cox*, 1965, p. 536), but ruling in the second case that a law prohibiting demonstrations on the grounds of a courthouse was not facially unconstitutional (*Cox*, 1965, p. 559).

Twenty-three students from a historically black college in Baton Rouge were arrested for picketing stores that had segregated lunch counters. They were placed in the jail on the third floor of the local courthouse. The next day, Reverend B Elton Cox, a field secretary of the Congress for Racial Equality, led 2000 students in a peaceful march toward the courthouse. The police insisted they confine their protest to the west side of the courthouse. They stayed in an orderly formation. One hundred to three hundred onlookers gathered across the street, with 75 police between them. The protesters carried signs and sang 'We shall overcome' and 'America the beautiful'. The jailed students responded by singing from inside the jail. Cox gave a speech urging the protesters to sit in at segregated lunch counters, which produced

some grumbling from the white crowd. The sheriff viewed the remarks as inflammatory and ordered the demonstration broken up. The demonstrators refused and the police exploded tear gas shells, forcing the gathering to break up (*Cox*, 1965, p. 538–44).

The Supreme Court overturned Cox's conviction for breaching the peace, disputing the state's characterization of the record. Justice Arthur Goldberg noted that the whole protest had been entirely orderly, and the only violent action came on behalf of the police. This case became an important precedent in the area of hostile audiences as the Court established that the police have the obligation to protect the rights of the protesters.

The decision contributed to the development of content-neutrality in several ways. The Court noted that the breach of the peace statute was vague and overbroad. Observing factual parallels to *Edwards*, the Court cited the *Terminiello* precedent in support of the need to protect provocative, controversial speech. Open discussion is a critical tenet of democracy (*Cox*, 1965, p. 551–2). In his concurring opinion, Justice Black also connected equal protection to the first amendment. By allowing labor picketing but in this case attempting to punish civil rights picketing, Louisiana was violating the equal protection clause. It is not permitted to allow some types of protests but not others; Marshall later cited this portion of Black's opinion in *Mosley* (*Cox*, 1965, p. 580–1; *Mosley*, 1972, p. 98). As Kalven later explained the significance of *Cox*, governments would not be allowed to pick and choose which types of speech to allow. 'Equal protection may, therefore, require freedom for the parade we hate', Kalven (1966, p. 210) wrote. The Court also struck down Reverend Cox's conviction for obstructing a public passageway because the ordinance vested unfettered discretion in the hands of officials, running the risk of suppression of speech based on viewpoint (*Cox*, 1965, p. 557–8). In the second *Cox* decision, the Court rejected the argument that a law that prohibits picketing near courthouses is facially unconstitutional, although it overturned Cox's conviction under this statute as well (*Cox*, 1965, p. 561–4).

The *Cox v Louisiana* decisions began to clarify that freedom of expression in public could be limited by time, place or manner (1965, p. 558), if done in a properly drawn way with a limited range of administrative discretion, although it was not until *Grayned* and *Mosley* that the Court made the standards of review formal and more clearly distinguished content-based and content-neutral regulations. In both *Cox v Louisiana* opinions, the Court cited two cases that gave an even earlier formulation of the idea of 'time, place and manner'. In 1941, in *Cox v New Hampshire* (312 US 569), the Court unanimously upheld a permitting ordinance that required a permit to use the city streets for any type of procession. Chief Justice Hughes reasoned that the ordinance limited administrative discretion to issues of time, place and manner with respect to the use of city streets, but his opinion did not set up a standard of review (*Cox v New Hampshire*, 1941, p. 576). In 1953, in

Poulos v New Hampshire (345 US 495), the Court upheld an ordinance requiring a permit to hold a religious meeting in a public park; Justice Stanley Reed argued that the first amendment did not extend to holding a meeting at any place or time (*Poulos*, 1953, pp. 405–7). Reed cited two other cases which referenced time, place and manner and help to illustrate the early construction of the concept. *Lovell v Griffin* (303 US 444, 451, 1938) stated that the ordinance being challenged was extreme in scope as it prohibited 'distribution of literature of any kind, at any time, at any place, and in any manner'. *Cantwell v Connecticut* (310 US 296, 306–7, 1940) was cited for the proposition that the state may limit the time and manner of solicitation.

Dissenting in *Poulos*, Justices Black and Douglas pointed out that the majority had overlooked the content-based difference between requiring a permit for the use of city streets and for holding a religious meeting (*Poulos*, 1953, pp. 421–6). The dissenting opinion reveals the crude state of this early jurisprudence on time, place and manner. Judged by the standards of *Grayned* and *Mosley*, the Court would have found that the ordinance discriminated on the basis of content by singling out religious speech.

In *Mosley*, the Supreme Court also cited the civil rights cases *Gregory v Chicago* (394 US 111, 1969) and *Shuttlesworth v Birmingham* (394 US 147, 1969) in support of the arguments that picketing involved protected expression, and that the state attempts to discriminate in excluding demonstrators from public forums would be carefully scrutinized (*Mosley*, 1972, pp. 98–9). In *Shuttlesworth*, the Court overturned civil rights marchers' convictions for demonstrating without a permit. When the Reverend Fred Shuttlesworth sent a representative to apply for a permit for a Good Friday march, Birmingham commissioner Bull Connor replied: 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail.' (*Shuttlesworth v Birmingham*, 1969, p. 157) The Court noted that the permit had been denied without a basis or standard, expressed concern that the city was acting in a discriminatory manner and affirmed the right of the group to assert its first amendment right to demonstrate in defiance of the unconstitutional permit law. The majority opinion in *Gregory* was very brief. The Court overturned the convictions of civil rights protestors when the Court found that the demonstration, which included a march from city hall to the mayor's home, was orderly. The demonstration was clearly protected by the first amendment and the protestors could not be punished for holding a peaceful demonstration.

There are two additional civil rights decisions which are relevant to the Court's opinion in *Mosley*, although perhaps not as central to the development of content-neutrality as the others discussed here. Both dealt with freedom of association. *Shelton v Tucker* was cited in *Mosley* to support the requirement that the government act in a narrowly tailored manner, even if pursuing a substantial state interest (*Mosley*, 1972, pp. 101–2, fn. 8, citing

Shelton v Tucker, 364 US 479, 488, 1960). The Court struck down an Arkansas statute requiring teachers to disclose their membership in every organization over the past five years, arguing that the law swept too broadly into associational freedom. Such an inquiry was not necessary to achieve the state's goal of assuring the fitness and qualifications of teachers (*Shelton*, 1960, pp. 488–90). *NAACP v Alabama* was not cited directly in *Mosley* but was cited in *Button* to explain that freedom of expression is not only an individual right, but also includes the freedom to associate with others to make advocacy effective (*Button*, 1963, p. 452, citing *NAACP v Alabama*). In the course of pursuing an injunction to keep the NAACP from doing business in Alabama, the state demanded that the NAACP disclose the names of all of its members and agents in Alabama. The NAACP complied with the state's request for documents except for the membership lists, which it argued were constitutionally protected under freedom of association. The trial court found NAACP in contempt and assessed a $100,000 fine. The NAACP persuaded the Supreme Court to reverse. Justice Harlan wrote: 'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.' (*NAACP v Alabama*, 1958, p. 462)

Overall, this final group of civil rights cases contributes to the development of the content-neutrality jurisprudential regime as expressed in *Grayned* and *Mosley* in several important ways. It makes clear that discrimination against the content of speech is a significant and recurring problem, and the Supreme Court has a special role to guard against it. The self-government justification of freedom of expression can be undermined when minority voices are suppressed. These cases also point to the need for carefully tailored legislation. Although the government may enact content-neutral time, place and manner regulations in support of substantial interests, the Supreme Court will not tolerate vague statutes which vest standardless discretion in the hands of city officials, as such laws are prone to abuse. These precedents also help to situate *Grayned* and *Mosley* in the important historical context of the civil rights movement. The discrimination against the protesters in Chicago and Rockford were not isolated incidents. Similar to *Brown v Board of Education* (347 US 483, 1954), these landmark free speech precedents did not come out of thin air. It was through the continued struggle and litigation of civil rights activists that the precedents and groundwork were built to enable the landmark rulings (Tushnet, 1987).

Conclusion

In this chapter I have examined the origins, development and justification of the Supreme Court's content-neutrality jurisprudential regime. In the *Grayned*

and *Mosley* opinions, the Court established that content-based laws will be judged by strict scrutiny. The Court allows the government more leeway when it regulates in a content-neutral manner, but the Court still applies intermediate scrutiny, which is fairly protective of expression. To understand the development and justification of content-neutrality, my primary method was a close, interpretive examination of the key precedents cited by Marshall. The traditional political justifications for freedom of expression such as self-government, anti-paternalism and open debate mattered to the justices as they developed and justified the content-neutrality jurisprudential regime. In addition, a range of civil rights and other cases helped to establish that the first amendment protects even provocative speech, the Court needs to be suspicious of government attempts to discriminate on the basis of content, and the risk of discrimination grows when laws lack clear standards and criteria and are not narrowly tailored.

Building on the interpretive institutionalist literature, I found that the development of the content-neutrality jurisprudential regime came about through the actions of Supreme Court justices, acting in part on the basis of their political attitudes, who justified the regime in terms of political values such as self-government, anti-paternalism, security, open debate and equality. These values can be viewed in terms of liberalism and conservatism but an attitudinal 'liberal versus conservative' analysis does not provide an accurate picture. As the justices framed the justifications for freedom of expression, they noted that freedom of expression advanced both security and liberty, as well as values such as self-government, truth and equality. The concept of content-neutrality helped to build consensus by emphasizing that the first amendment protected the expression of everyone; content-neutrality protected free and open debate and promoted equality under the law. These broad political values that justified content-neutrality meant that, by the time of *Grayned* and *Mosley,* a Court that was divided as measured by attitudinal scores adopted a jurisprudential regime with a high level of agreement among the justices. The NAACP and the civil rights movement played important roles in the development of the content-neutrality regime by bringing arguments about equality and equal protection to the first amendment context. By examining the development of law, the network of precedents and the various justifications used by the justices, it becomes apparent that the content-neutrality jurisprudential regime did not suddenly materialize in *Grayned* and *Mosley* but developed through a process of interaction between the justices, broad political values that found a home in legal discourse, and key parties such as the NAACP and other participants in the civil rights movement.

In addition, content-neutrality appealed to the justices because it served as a limiting principle for freedom of expression. Content-neutrality

jurisprudence meant that government discrimination on the basis of content posed a grave threat to freedom of expression and, by implication, content-neutral government action was preferable, provided that the government justified its regulation of expression and ensured that it did not restrict more speech than necessary. Content-neutrality enabled the justices to draw the boundaries of freedom of expression law. Of course, less protected categories of expression serve as additional boundaries.

To this point, I have focused primarily on the jurisprudential aspect of jurisprudential regime theory. Next I turn to the empirical chapters where I show how the justices took into account jurisprudential and strategic factors, as well as their own political attitudes, in deciding the freedom of expression cases.

4
Statistical Methodology and Results

In the preceding chapters, I have argued that the justices of the US Supreme Court are likely to take into account a variety of factors as they decide the free expression cases: content-neutrality, their own political attitudes, the level of government that is party to the case or participates as a friend of the court (*amicus curiae*), the identity of the speaker and the type of legal action taken against the speaker. How can these factors be measured and modeled in a theoretically and statistically meaningful way? Do these factors actually matter? And how much do they matter? These are the questions to which I now turn.

Methodology

I set out the four steps for identification of a potential jurisprudential regime in Chapter 3, while in this chapter I seek to explain the votes of the justices and evaluate whether the content-neutrality regime actually makes a difference to them. To understand the votes of the justices and to test the jurisprudential regime hypothesis, I use four primary methods. First, I detail the various potential factors such as attitudes, parties and jurisprudential factors that the justices are likely to consider. Based on those factors, I create a logistic regression model. The advantage of regression models is that they can isolate the effect of each independent variable; regression models effectively ascertain the influence of individual variables while holding everything else constant. Logistic regression is used because the dependent variable is binary, either a zero or a one.

Jurisprudential regime theory acknowledges that attitudinal, strategic and jurisprudential factors may all matter to the justices, but in order to show that a jurisprudential regime matters, the second step requires testing of hypotheses pertaining to jurisprudential variables, via the multiple regression model. In order to evaluate whether the content-neutrality regime matters

in particular, I hypothesize that the justices will treat laws that are coded as either content-based or content-neutral differently after the content-neutrality regime is established. It is of critical importance that the changes in the justices' votes make theoretical sense in light of the jurisprudential regime (Kritzer and Richards, 2010). Due to the elevated level of scrutiny for both content-based and content-neutral laws after the regime is established, I expect a higher level of protection for expression regulated by each type of law after the regime is established, as compared to how the justices treated these cases before the regime. In addition, because the justices established through the jurisprudential regime that they should apply strict scrutiny to content-based laws but only intermediate scrutiny to content-neutral laws, I expect that after the regime, the justices will show a greater level of support for expression in cases involving content-based laws compared to those involving content-neutral laws.

The third method I use is to control for change in personnel. The attitudinal model suggests that changes over time are most likely caused by changes in Court personnel, which is evidence that attitudes matter (Baum, 1992). All of the statistical tests are done once with all justices and a second time with the justices on the Supreme Court at the time of *Grayned* and *Mosley* (*Grayned v City of Rockford*, 408 US 104, 1972; *Police Department of Chicago v Mosley*, 408 US 92, 1972). This method enables me to hold personnel change constant.

The final method is to use a Chow test and General Linear Hypothesis test to generate Chi-square statistics to examine differences in regression results across sets of data (Hanushek and Jackson, 1977; Kritzer and Richards, 2010). Essentially, these tests allow me to ascertain whether the justices evaluate the jurisprudential variables in different ways before and after *Mosley* and *Grayned*. The corresponding sensitivity analysis examines whether those before/after differences are unique to *Mosley* and *Grayned* (Richards and Kritzer, 2002, p. 316). I will explain these methods in greater detail below, but I first turn to specifying the variables that make up the model.

The goal of the statistical analysis is to ascertain which factors influence the justices in their decision-making with respect to freedom of expression cases. The goal is not to prove that the jurisprudential regime matters to the justices. Jurisprudential regime theory is open to attitudinal, jurisprudential and strategic factors. The second, third and fourth methods can help to disentangle the relative influence of attitudes and jurisprudential factors.

Votes

As my overall goal is to provide an explanation of why the justices vote as they do in freedom of expression cases, the dependent variable is the justices' votes. 0 corresponds to a pro-expression rights vote; 1 corresponds

to an anti-expression rights or pro-government vote. A pro-expression rights vote supports the right of the speaker over the government or private party attempting to limit the expression. An anti-expression rights vote indicates support for the government or private party seeking to limit expression over the speaker. In interpreting the results, negative coefficients indicate these variables are associated with pro-expression votes, while positively signed coefficients are associated with anti-expression votes.

Attitudes

How do we know the political attitudes of the justices? The simplest answer is to look at how they have voted in past cases. Of course, the problem is that the dependent variable is the votes of the justices, so if I use their votes to represent the independent variable of attitudes, I will have a circular model. I cannot use votes to explain votes.

The key criterion in selecting a measure of the justices' attitudes is that the measure be independent of their votes on the Supreme Court. The best way to insure this is to use a measure that is based on information that existed prior to a justice's service on the Court; this was done by performing content analysis of newspaper editorials prior to a Court nominee's confirmation (Segal and Cover, 1989). Paragraphs in editorials were coded as liberal, moderate or conservative and then placed on a scale of –1 (conservative) to +1 (liberal). The Segal-Cover scores have several advantages. Each justice's score is independent of and prior to any votes cast at the Supreme Court level by the justices. This avoids the circular argumentation that occurs when scholars measure ideology based on votes. In addition, there was information available for all justices from the Earl Warren Court era through the John Roberts Court. There is less information available for the Frederick Vinson Court justices, but there were still at least four editorials per justice.

This approach is not free of shortcomings, however. One obvious problem is that the measures are based on perceived, not actual, attitudes (Segal and Spaeth, 1993). It is highly unlikely that this problem will ever be overcome at the Supreme Court level. Newspaper editorializing about nominees varies by time and by the political controversy surrounding a particular justice's nomination. Jeffrey Segal, Lee Epstein, Charles Cameron and Harold Spaeth extended the original Segal-Cover scores of Segal and Albert Cover to include justices nominated by Presidents Franklin Delano Roosevelt and Harry Truman, as well as the two nominees of President George H W Bush (Segal et al., 1995). (Segal (2012) also updated the scores to include the justices of the John Roberts Court.) The scholars were forced to add two additional papers to make up for the small amount of editorials about the Roosevelt and Truman justices. This produced a range of four editorials for Vinson,

Tom Clark, Sherman Minton and Frank Murphy to 11 for Hugo Black. For later nominees, there was a range of two editorials for Charles Evans Whittaker, Thurgood Marshall and Arthur Goldberg to 47 for Clarence Thomas. Due to the amount of political controversy surrounding the Thomas nomination, editorial coverage was much more extensive (O'Brien, 1996).

Looking to changes in the type of coverage over time, Segal et al. (1995) noted that editorials about the Roosevelt and Truman justices tended to focus on economic issues, largely to the exclusion of civil liberties issues. It is no surprise then that the measures for the justices appointed from President Dwight Eisenhower to President George H W Bush correlate better to civil liberties votes (R=0.8) than to economics votes (R=0.61). The measures for the Roosevelt-Truman justices correlate worse for both civil liberties votes (R=0.47) and economics votes (R=0.31) (Segal et al., 1995). Despite the theoretical problems with this measure, I utilize it in my analysis because it is better than the alternatives.

One alternative attempt to incorporate other relevant information into a general measure of attitudes is Segal and Spaeth's factor analysis of the newspaper editorial scale, the party identification of the appointing president, and the judicial ideology of the appointing president (Tate and Handberg, 1991; Segal and Spaeth, 1993). To some extent, this approach is problematic. Presidents' judicial ideologies and party identifications do not always correlate with the ideologies of nominees. Eisenhower's nominations of William Brennan and Warren stand out as the most obvious examples. President Eisenhower later referred to 'his appointment of Warren as "the biggest damnfooled mistake" he had ever made' (O'Brien, 1996, p. 93). David Souter's voting pattern has been more liberal than George H W Bush's ideology and other George H W Bush and Ronald Reagan nominees.

Alternatives to these two approaches are not encouraging. Confirmation testimony given by nominees before the Senate judiciary committee occurs prior to confirmation. However, the content of the testimony may vary according to the ideological orientation of the Senate committee and may not indicate the sincere preferences of nominees. Robert Bork appeared to repudiate many of his policy positions in his testimony before the Senate judiciary committee (O'Brien, 1996, p. 100). In addition, changes in confirmation procedures over time also call into question the consistency of testimony across nominees. Not all nominees have appeared before the committee. Clark and Minton did not appear in 1949. Hearings for five nominees from 1957 to 1970 lasted only one day. The contemporary format, including televised broadcasts, and the formal style of the contemporary hearings have only existed since the 1980s (Watson and Stookey, 1995).

Alternative measures based on speeches and writings of the justices, or their activity in lower courts, are not suitable. Speeches, writings and lower court

voting records are not available for all justices. In addition, justices have written and spoken on subjects of differing political content and controversy (Segal and Cover, 1989).

The Segal-Cover scores assume attitudinal stability over time. As an alternative, Andrew Martin and Kevin Quinn developed measures of the justices' preferences that allowed the justices' ideal points to vary over time (Martin and Quinn, 2002b). I chose, however, to use the Segal-Cover scores instead for three reasons. First, the Segal-Cover scores are more commonly used and I am, to some extent, challenging the attitudinal model, so I need to employ the standard attitudinal model methodology. Second, the Martin-Quinn scores violate the primary criterion for selecting an independent measure of votes, as their measure of attitudes is based on votes. The authors noted: 'Of course, these are vote-based measures, and thus cannot be used *per se* as explanatory variables for studies of voting on the Supreme Court.' (Martin and Quinn, 2002a, p. 18) Third, in my work with Joseph Smith and Herbert Kritzer, we compared Martin-Quinn scores with Segal-Cover scores and found almost no differences (Richards et al., 2006).

Case selection

I coded all cases that presented a free press, free expression, or free speech issue. I used a combination of Lexis, Westlaw and the US Supreme Court Judicial Database (Spaeth, 1999) to identify the issues. I tried to cast as wide a net as possible in order to include cases where free expression issues were present, even if the justices did not decide a case on those grounds. I did not want the Court's refusal to address controversial first amendment issues to bias the dataset to cases for which jurisprudential regimes were more likely to matter.

I coded all such cases from the start of the 1953 term, which was the beginning of Earl Warren's tenure as Chief Justice, to the end of the 2011 term, which concluded on 28 June 2012. I selected all orally argued cases for which the Court issued written opinions, including *per curiam* opinions, and excluded cases with tie votes. I mainly used US Supreme Court opinions, but in a few *per curiam* cases where there was little information provided, I used lower court opinions as supplements.

Jurisprudential variables

Every case that raises a free expression issue is assigned to one of four possible jurisprudential variables. The jurisprudential variables are based on my discussion in Chapter 3 of the major categories of the Court's jurisprudence. I wrote coding rules and coded according to those rules, after reading all

majority, plurality, concurring and dissenting opinions in each case; I did not simply code according to what a majority of justices wrote in their opinion. I provide a basic explanation of the coding rules immediately below.[1] In some cases, I coded the government's regulation of expression as content-based even when the majority did not make such a determination. This approach was necessary in order to ensure consistency in coding and to enable me to assess changes in the influence of the jurisprudential variables over time. For example, the statistical analysis shows that the content-based category made little difference to the justices before *Mosley*. In many of the anti-communist cases before *Mosley*, the Court's majority overlooked the free expression issue and the government's content-based regulation in order to support the government. In *Barsky v Board of Regents* (347 US 442, 1954), the majority upheld the six-month suspension from the practice medicine of Dr Edward Barsky. Barsky had traveled to Spain during the Spanish Civil War to head an American hospital for Loyalists who had been injured. Upon his return Barsky became involved with the Joint Anti-Fascist Refugee Committee, which had been established to assist refugees from Francisco Franco's authoritarian government (*Barsky*, 1954, p. 457, Black dissenting). Upon the advice of counsel, Barsky refused to turn over the records of the committee to the House Un-American Activities Committee (HUAC), and was consequently sentenced to serve six months in jail (*Barsky*, 1954, p. 468, Frankfurter dissenting; p. 474, Douglas dissenting). As a result of that conviction, the Medical Committee on Grievances of the New York Education Department suspended Barsky for six months, a decision upheld by the Board of Regents of the State University of New York (*Barsky*, 1954, p. 446–7). In upholding the suspension, the majority did not address any first amendment issues. Despite the majority's resolution of the case, I would code such a case as content-based. Looking at Justice William Douglas's dissent helps to understand why I did so. Douglas, joined by Justice Black, noted the doctor's right to practice medicine was suspended 'because he had certain unpopular ideas' and was an officer of the committee (*Barsky*, 1954, p. 473, Douglas dissenting). He went on to eloquently note the absurdity of the treatment of Barsky.

> Neither the security of the State nor the well-being of her citizens justifies infringement of fundamental rights. So far as I know, nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently ... When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look

1 My codebook is available upon request. An abbreviated version of the coding rules is contained in Richards and Kritzer (2002, pp. 317–18).

> critically at the neurosis that has possessed us. (*Barsky*, 1954, p. 474, Douglas dissenting)

The two key variables are content-based and content-neutral. If a case does not fall into either the threshold not met or less protected category, the action taken against the speaker is evaluated for whether it is *content-based* (1 if so, 0 if otherwise) or *content-neutral* (1 if so, 0 if otherwise).

To ascertain whether a regulation is content-based, I examined whether the regulation of expression is justified by or focused on the communicative impact or the substance of the expression. The easiest type of content-based law to identify is viewpoint discrimination. Chicago's differential treatment of *Mosley*'s protest against racial discrimination compared to the exemption provided for labor picketing is a prime example of viewpoint discrimination. There are other types of content-based regulations that do not involve discrimination against a particular viewpoint. For example, in *Buckley v Valeo* (424 US 1, 17, 1976) the Court declared that regulations of campaign contributions and expenditures are content-based regulations of expression, not content-neutral regulations of conduct. Although the government argued that there is a risk of corruption from the conduct of giving money or spending money, the majority reasoned that the conduct and content of expression are intertwined, as making a contribution or an expenditure communicates a message. As a result, the Federal Election Campaign Act was content-based, because the government could not regulate the harm of corruption without regulating the content of expression itself. Although the Act applied equally to all viewpoints, it was still content-based. Another example of a viewpoint-neutral but content-based law was New York's law restricting a criminal's financial gain from published works about crimes, which was struck down in *Simon & Schuster, Inc. v New York State Crime Victims Board* (502 US 105, 1991; see Chapter 5).

Content-neutral regulations cover four types of content-neutral regulations: time, place, and manner laws, and general regulations that have an incidental effect on expression. Content-neutral regulations do not focus on, and are not justified by, the content or communicative impact of expression. If a regulation is content-based, it cannot be content-neutral, even if it is a time, place, manner or incidental regulation.

The Rockford ordinance that was upheld in *Grayned* is a good example of a content-neutral time, place and manner regulation. It regulates time because it applies only during school hours. It regulates place because it applies only to the area immediately adjacent to the schools, and it covers manner because it prohibits noisy demonstrations that disrupt the order of the school. Obviously, the time and place regulations are relatively easy to identify. Other examples of manner regulations include limits on the number of participants in a demonstration, limits on the size or number of signs used, and bans on the use of amplification devices.

The remaining category of content-neutral laws covers general laws that have an incidental effect on expression. For example, a law against trespassing is not targeted at the content or viewpoint of speech, nor is it a time, place or manner regulation. Despite its content-neutral character, when applied to protestors in a private location, the trespassing law has incidental effects on speech (*Hudgens v National Labor Relations Board*, 424 US 507, 1976). Similarly, when a government requires all citizens to respond to grand jury subpoenas, this requirement has incidental implications for freedom of expression as applied to newspaper reporters (*Branzburg v Hayes,* 408 US 665, 1972).

The next jurisprudential variable is *less protected*, which encompasses the eight less protected categories: commercial speech, broadcast media speech, obscenity, expression in non-public forums, expression in schools, speech in private forums, libel of a private figure where the suit is not for presumed or punitive damages, and labor union picketing of secondary sites (see Chapter 3). If a case meets the threshold of first amendment protection but falls into one of the less protected categories, it receives a value of 1, 0 if otherwise. This variable serves as the baseline category for comparison in the regression model; the influence of cases coded as threshold not met, content-based, or content-neutral, is assessed relative to less protected expression.

Threshold not met means the case fails to meet the threshold for protection of freedom of expression (1 if so, 0 if otherwise). Cases in which there is no government action or there is no abridgment of speech do not invoke the protection of the first amendment. For example, there is no government action present in a case involving a non-public union controlling the use of outside money in a union election (*Steelworkers v Sadlowski*, 457 US 102, 1982).

Parties

I coded for a variety of parties acting against the speaker: *federal*, *state* and *local* governments, educational institutions such as a school board, school or university (*education*), and private parties (coded as 1 if involved, 0 if not). Private parties appear in libel cases and where a private party seeks to enjoin a speaker from speaking. In refining my regression model, it became clear that private parties were nowhere close to being statistically significant, so I omitted this variable from the final model.

The adversarial legal system requires two sides in a case. As I examined the speaker side, I coded for a variety of identities, but found that many of them were not in the ballpark in terms of statistical significance. Variables omitted from the model include business, politician, political candidate, feminist, racist, educator, alleged communist, military protestor, and labor

union member. I omitted the alleged communist variable because it did not come close to significance in the period before *Mosley* and there were very few observations in the period after *Mosley*. I left out the business variable because almost all such observations correlated with the less protected categories of commercial speech or obscenity.

The speaker identity variables included in the model are: *person of color, religious speaker, print media,* and *broadcast media* (coded as 1 if involved, 0 if not).

I chose not to employ a resource-based ranking of parties (Sheehan et al., 1992, p. 465; Collins Jr, 2008, p. 103) due to my concerns with the accuracy and validity of the rankings (see Chapter 2). Regardless, the dummy variables I used should be effective at capturing the influence of a particular type of party's participation without having to make assumptions about the influence of resources.

Action

Another set of control variables regards the type of action taken against the speaker. I coded for the following actions, all of which receive a value of 1 if present, 0 if otherwise. The variables included in the final model are *civil* (civil injunctions or libel suits), *deny benefit* (denial of a material benefit such as a passport, tax deduction, bar membership, ballot access, or zoning location), *firing* (loss of government job or contract) and *regulate* (agency regulations and rulings, and other regulations). The variables for criminal action and denial of opportunity to speak were omitted from the final model because they failed to come close to being statistically significant, and disciplinary action was omitted because it was mainly comprised of disciplinary actions against lawyers for advertising, which is highly correlated with the less protected category of commercial speech.

Friends of the court

I also examined participation of interest groups and governments as friends of the court (*amicus curiae*). Friend of the court briefs were coded according to the following categories: number of pro-speech, number of anti-speech, number of indeterminate, federal government pro-speech, federal government anti-speech, state and local government pro-speech, state and local government anti-speech, American Civil Liberties Union (ACLU) and National Association for the Advancement of Colored People (NAACP). I tried a variety of different approaches to modeling participation as *amicus*, including modeling the number and type of briefs, and found that nearly all of the variables were not close to being statistically significant. I chose to retain two variables

in the model: federal government anti-speech (Friend of court, *federal*) and state or local government anti-speech (Friend of court, *state or local*). Each received a value of 1 if present, 0 if otherwise. Although I did collect data on the number of state and local governments that signed on to *amicus* briefs, it was almost always the case that there was just one brief joined by multiple states and localities, so I decided to use the simple binary measure of whether any state or local government participated in the case as *amicus*.

Reliability and validity

In undertaking a major coding project, one question is whether the coding can be done reliably. I did all of the coding myself in order to increase the reliability. However, I also had another scholar recode approximately 10 per cent of the cases, randomly selected using SPSS, in order to provide an external check on reliability. I had no cause to be concerned about reactivity or changes over time in the phenomena being observed, so I chose the retest method (Carmines and Zeller, 1979). The rate of agreement for all 3836 items was 93 per cent (Richards and Kritzer, 2002, pp. 316–17). By type of variable, the rate of agreement was 98 per cent for speakers, 93 per cent for level of government, 92 per cent for action and 87 per cent for jurisprudential variables. These results show a reasonably high level of reliability. For example, the reliability measures for the Supreme Court Database Project ranged from 80 to 100 per cent (Gibson, 1996).

Validity in this context refers to whether a variable is a valid measurement of a theoretical concept. Specifically, I am concerned about whether Supreme Court opinions provide valid measures of the independent variables. Are the data gathered independent of the decision and independent of the influence of law? Of course, this concern would be greater for lower court than Supreme Court opinions, so I used Supreme Court opinions, except in six Supreme Court *per curiam* cases, where the content of the Court's opinion was minimal, I turned to the opinion of the next highest court.

To assess validity, five months after I finished the original coding, I used the written opinion of the highest court below the Supreme Court to recode a randomly selected 10 per cent of the decisions. (This analysis excluded lower court opinions that were not reported and the Supreme Court *per curiam* opinions that I had already supplemented with lower court opinions.) I then compared the rate of agreement for the two sources, which ranged from 99 per cent for speaker and government variables to 100 per cent for jurisprudential and action variables; with a total rate of agreement of 99 per cent, based on 3515 items, this is certainly a high level of validity (Richards and Kritzer, 2002, pp. 316–17). My subjective impression from this exercise is that US Supreme Court opinions typically contain more information than the

Table 2 All justices

	All cases			Before			After		
Variable	**B**	**RSE**	**Sig.**	**B**	**RSE**	**Sig.**	**B**	**RSE**	**Sig.**
Attitude	–1.04	0.09	***	–1.35	0.16	***	–1.00	0.10	***
After *Mosley*	–0.44	0.14	**						
Jurisprudential			***			***			***
Content-based	–0.56	0.12	***	–0.16	0.26		–0.71	0.15	***
Content-neutral	0.76	0.23	**	1.98	0.41	***	0.48	0.25	
Threshold not met (less protected)	1.79	0.41	***	3.58	0.58	***	1.42	0.45	**
Government parties									
Federal	–0.09	0.30		0.39	0.46		–0.34	0.39	
State	–0.52	0.31		–0.37	0.46		–0.63	0.40	*
Local	–0.37	0.29		–0.17	0.48		–0.50	0.37	
Education	–0.57	0.38		–0.06	0.64		–0.72	0.48	*
Speaker parties									
Print media	–0.29	0.23		–1.25	0.46	**	–0.18	0.27	
Broadcast	–0.35	0.33		0.77	0.62		–0.64	0.39	
Religious	–0.40	0.27		–0.51	0.65		–0.49	0.32	
Person of color	–0.38	0.22		–0.24	0.27		–0.62	0.54	
Action									
Civil	0.28	0.20		0.14	0.32		0.44	0.25	
Deny benefit	0.85	0.17	***	0.70	0.25	**	0.87	0.25	***
Firing	0.68	0.21	**	0.30	0.32		1.04	0.30	***
Regulation	0.62	0.31	*	0.27	0.83		0.84	0.34	*
Friend of court									
Federal	0.56	0.21	*	a			0.52	0.22	*
State or local	0.20	0.14		0.12	0.59		0.24	0.15	
Constant	0.32	0.33		–0.09	0.51		0.10	0.39	
N	**5024**			**1718**			**3306**		
% Correctly predicted	68.1			72.8			67.2		
Nagelkerke R square	0.222			0.212			0.227		
Chow test	26.04, 3 df, ***								
Chi-square									
GLH Chi-square	15.17, 3 df, **								

Notes
Vote is coded so that 1=anti-expression rights and 0=pro-expression rights.
'a' indicates parameter could not be estimated due to lack of variation.
RSE represents robust standard error, to account for clustering.
B represents unstandardized logistic regression coefficients.
'df' represents degrees of freedom.
GLH represents general linear hypothesis
Sig. represents significance: *=p<.05; **=p<.01; ***=p<.001 (two-tailed).

Table 3 Justices on Court at time of *Mosley* and *Grayned*

	All cases			Before			After		
Variable	**B**	**RSE**	**Sig.**	**B**	**RSE**	**Sig.**	**B**	**RSE**	**Sig.**
Attitude	–1.22	0.09	***	–1.62	0.27	***	–1.20	0.09	***
After *Mosley*	–0.05	0.18							
Jurisprudential			***			***			
Content-based	–0.70	0.16	***	–0.19	0.39		–0.78	0.19	***
Content-neutral	0.68	0.30	*	2.17	0.50	***	0.43	0.31	
Threshold not met (less protected)	1.22	0.49	*	3.66	1.02	***	0.81	0.54	
Government parties									
Federal	0.16	0.34		0.94	0.84		–0.11	0.40	
State	–0.38	0.36		0.11	0.84		–0.58	0.43	
Local	–0.30	0.33		–0.01	0.86		–0.46	0.39	
Education	–0.78	0.47		0.59	0.98		–1.12	0.53	*
Speaker parties									
Print media	–0.63	0.26	*	–2.33	0.70	**	–0.50	0.28	
Broadcast	–0.11	0.38		1.06	0.89		–0.32	0.42	
Religious	–0.30	0.38		–0.82	0.94		–0.18	0.47	
Person of color	–0.45	0.31		–0.08	0.34		–0.95	0.64	
Action									
Civil	0.59	0.21	**	0.34	0.40		0.70	0.25	**
Deny benefit	0.94	0.23	***	0.69	0.37		0.95	0.29	**
Firing	0.75	0.27	**	–0.10	0.54		1.13	0.33	**
Regulation	0.65	0.48		0.81	0.89		0.69	0.53	
Friend of court									
Federal	0.36	0.31		a			0.34	0.33	
State or local	–0.03	0.20		–0.09	0.91		0.01	0.21	
Constant	–0.07	0.39		–0.73	0.90		0.10	0.41	
N	**2672**			**761**			**1911**		
% Correctly predicted	72.1			78.7			70.6		
Nagelkerke R square	0.298			0.294			0.292		
Chow test	18.17, 3 df, ***								
Chi-square									
GLH Chi-square	12.57, 3 df, **								

Notes
Vote is coded so that 1=anti-expression rights and 0=pro-expression rights.
'a' indicates parameter could not be estimated due to lack of variation.
RSE represents robust standard error, to account for clustering.
B represents unstandardized logistic regression coefficients.
'df' represents degrees of freedom.
GLH represents general linear hypothesis
Sig. represents significance: *=p<.05; **=p<.01; ***=p<.001 (two-tailed).

opinions of lower courts. In particular, the fact that there are nine justices who frequently write concurring and dissenting opinions tends to provide more information. However, when it comes to coding the basic variables used in my models, there is not a significant difference in data sources.

Results

The results of the logistic regression analysis are reported in Tables 2 and 3 (pp. 93–4), with Table 2 including all justices on the Supreme Court from the 1953–2011 terms; the 2011 term ended 28 June 2012. In the model reported in Table 3, I controlled for change in personnel by restricting the analysis to the justices on the Court at the time of the *Mosley* and *Grayned* decisions. This group includes Chief Justice Warren Burger and, ordered by experience, Justices Douglas, Potter Stewart, Marshall, Brennan, Byron 'Whizzer' White, Harry Blackmun, Lewis Powell and Rehnquist. I controlled for change in personnel to test whether the changes over time that I observe in the jurisprudential factors are influenced by attitudes. There are three sets of columns in each table. The first includes all cases, the second all cases before *Mosley*, and the third all cases after *Mosley*. The *Mosley* and *Grayned* decisions were omitted from all models. Tables 2 and 3 include robust standard errors (RSE) to account for clustering of standard errors by case. I also accounted for clustering by justice, but this made little difference in the results so I reported the RSEs by case.

The attitudinal variable is a strong predictor in every model. The more liberal a justice is, the more likely he or she is to vote in favor of freedom of expression, and the more conservative a justice is, the more likely he or she is to support the government and vote against the speaker.

Turning to the jurisprudential variables, when the government regulated in content-based manner before *Mosley*, it made no difference to the justices, as the coefficient is not statistically significant. This is consistent with my hypothesis, and my qualitative analyses in Chapters 3 and 5 help to better explain these results. Although the content-neutrality regime was beginning to develop, there were also many cases where a majority of the justices turned a blind eye to freedom of expression concerns. Overall, the lack of systematic treatment by the justices shows up as a statistically insignificant result in the before period. After *Mosley*, the justices were likely to strike down content-based regulations; this observation helps to confirm that the jurisprudential regime matters. The pattern is the same when I control for change in personnel, so the before/after change is not explained by attitudinal factors.

Breaking the results into separate columns for before and after the regime change, as I have done in Tables 2 and 3 (pp. 93–4), is one way to see

before/after differences in particular variables, but doing so does not tell us whether those before/after differences themselves are statistically significant. To further evaluate the before/after differences, I estimated models with interaction terms for each variable interacting with the variable representing whether a case was decided before or after *Grayned* and *Mosley*. These statistical tests mostly confirm the before/after difference in the content-based variable, although the coefficient in the model that controls for personnel change and clustering by case did not quite reach the p=0.05 threshold of statistical significance. I used RSEs to account for clustering by case and by justice, with one-tailed p-values due to directional hypotheses. In the model with all justices, the coefficient is –0.52 (p=0.045 by case and p=0.003 by justice); controlling for personnel change, the coefficient is –0.60 (p=0.08 by case, which is over the 0.05 threshold, but is under the 0.10 threshold, and p=0.02 by justice). Given this qualification in the model that limits the analysis to the justices on the Court at the time of *Mosley* and controls for clustering by case, both attitudinal and jurisprudential factors play roles in the changes in the evaluation of content-based regulations post-*Mosley*.

When the government regulated in a content-neutral way before *Mosley* and *Grayned*, the justices were very sympathetic to the government, with large, positive and significant coefficients. After *Mosley*, the coefficients are again positive but smaller, and they are not significant. The coefficient is 1.98 before and 0.48 after (p=0.05, which means it just missed the p<0.05 threshold) in the model with all justices, and 2.17 before and 0.43 after in the model which controls for personnel change. To further clarify, I again tested interaction terms. These tests confirmed a statistically significant difference in how the justices treated content-neutral cases before and after *Grayned*. I again used robust standard errors to account for clustering by case and by justice. The coefficient for the interaction of the content-neutral and after *Grayned* variables is –1.62 (p=0.001 by case and p=0.000 by justice, one-tailed); when I controlled for change in personnel, results were very similar, with a coefficient of –1.74 (p=0.002 by case and p=0.000 by justice, one-tailed). This difference is expected because in *Grayned*, the justices elevated the standard of review for content-neutral regulations to intermediate scrutiny; this constitutes additional evidence in support of the hypothesis that the jurisprudential regime matters.

Of course, intermediate scrutiny is not as protective of freedom of expression as strict-scrutiny, so it is also important to consider the differences between content-based and content-neutral regulations in the after period. As the jurisprudential variables are a categorical set, the less protected category served as the necessary baseline for comparison. Relative to cases that fell into the less protected category, the justices were highly protective of expression

when the government regulated in a content-based manner, but this was not the case when the government restricted expression in a content-neutral manner. To ensure that the results were robust, I also tested a model where the content-based and content-neutral variables were not part of a categorical set but were tested relative to the constant. The results were remarkably similar to the results in Tables 2 and 3 (pp. 93–4).

Overall, the results for the jurisprudential variables are consistent with my hypotheses for change related to the adoption of the content-neutrality regime. It is also not surprising that, when the threshold of first amendment protection was not met, the justices typically voted for the government.

I now turn to the remaining variables, including government parties, speaker parties, action and friend of the court participation. I am not claiming that legal change drives the before/after changes in attitudinal, party, action, or friend of court variables. If there are differences between Tables 2 and 3 (pp. 93–4) for variables other than the jurisprudential variables, it does not mean that those differences are not meaningful. Such differences are likely driven by attitudes, in the form of the changing composition of the Court.

Are there differing rates of success among different levels of government? Do the government parties have more or less success after *Mosley* and *Grayned*? In the overall model as well as the period before *Mosley*, none of the government variables are statistically significant.

After *Mosley*, the coefficients for educational institutions and state governments are signed negatively, which means the justices were more likely to vote for the speaker when these governmental bodies were parties. When I controlled for personnel change, the state government coefficient was not statistically significant. Using interaction terms, I do not see significant before/after differences for the government parties consistently across models that include all justices and ones that control for personnel change.

Turning to the speaker variables, only the print media variable matters. Before *Mosley*, the justices tended to favor the print media. Interaction terms confirm that the print media were more likely to win in the before period. In the model with all justices, the coefficient is 1.07 (p=0.043, accounting for clustering by case; I used a two-tailed test as I did not have a directional hypothesis); controlling for change in personnel it is 1.83 (p=0.014, by case).

Next I turn to the action variables. I see similar results in Tables 2 and 3 (pp. 93–4) for the deny benefit, firing and regulation variables; in the models with all cases and in the period after *Mosley*, the justices tended to vote against the speaker when any of these actions were taken against the speaker. In the period before *Mosley*, the only variable that is significant is deny benefit, with the justices supporting the government in this instance, but this result was not significant when I controlled for change in personnel. In the model that controls for personnel change, the civil variable is

significant for all cases and after *Mosley*. When I checked for before/after differences by testing interaction terms, I did not find any significant results for any of the action variables.

Finally, I assess the role of the federal, state, or local governments participating by filing friend of the court briefs. In the before period, the federal government never filed an *amicus* brief, so there is no coefficient reported in the table. Among all justices in the overall model and in the after period, the justices tended to support the federal government when it filed an *amicus* brief. For the *Mosley* justices, this variable is not significant. State or local participation via a friend of the court brief is not statistically significant either. I did not find any significant before/after differences for the friend of the court variables. I tested the influence of friend of the court briefs in a variety of other ways but none of the results even came close to statistical significance. In particular, variables such as NAACP and ACLU participation did not matter. In addition, contrary to the findings of Collins, the number of briefs filed did not make a difference. It is possible that freedom of expression law may be a unique area for the influence of friend of the court briefs, as Collins' model spans across issue areas.

Chi-square statistics and sensitivity analysis

Jurisprudential regime theory posits that the jurisprudential factors should change after the content-neutrality regime is established. To this point, I have seen that the content-based and content-neutral variables do have differing influences before and after the *Mosley* and *Grayned* decisions, as demonstrated in Tables 2 and 3 (pp. 93–4) and as shown by the interaction of the after *Mosley* variable with these variables. To ensure that these results are robust, I employed additional statistical methods.

The Chow test assesses the significance of differences in regression results across sets of data, so it is well suited for assessing whether the differences in the jurisprudential variables as a set are significant before and after the regime is established. I want to know whether the before/after differences in the influence of the jurisprudential variables stand out compared to the basic model and any before/after differences in the other variables. To do this, I estimated a model involving all cases in three steps: first, I used the model as reported in the first column of Table 2 (p. 93); second, I also tested interaction terms that interacted the after *Mosley* variable with all variables except the jurisprudential variables; third, I included the interaction terms for after *Mosley* and the jurisprudential variables as a set, which produces a Chi-square statistic, labeled Chow test in Table 2. This statistic is significant, and when I replicate the analysis while controlling for personnel change, the statistic remains significant, as seen in Table 3 (p. 94).

Clustering of errors by case or justice has the potential to affect the Chow test. To account for this, in Stata, the variance-covariance matrix for the estimators can be requested and used to assess a general linear hypothesis (GLH) (Kritzer and Richards, 2010). Using this method to isolate the effect of the significant differences coming from including jurisprudential variables in the model provides further support, with significant Chi-square statistics in models with all justices and controlling for personnel change; these statistics are labeled GLH Chi-square in the tables. The content-neutrality regime makes a significant difference to the justices.

At this point, I know that the differences in the jurisprudential variables before and after *Mosley* and *Grayned* are significant, but what if I tested for before/after differences in those variables in other years? Would there be larger differences in other years? Most importantly, when I control for personnel change, does the Chow test for before/after *Mosley* stand out compared to Chow tests for other years? This sensitivity analysis is reported in Figure 1. The black line indicates the tests that controlled for personnel change. The Chow test Chi-square statistic for before/after *Mosley* is indeed the largest, 18.17, with the other large Chi-squares clustered around the time of *Mosley* (1968, 1971 and 1972). This is additional confirmation that the content-neutrality regime matters. (Chi-square statistics with a value of less than 5 in this figure are not statistically significant. This analysis terminates in 1995 because the statistics continue to be insignificant after that year.)

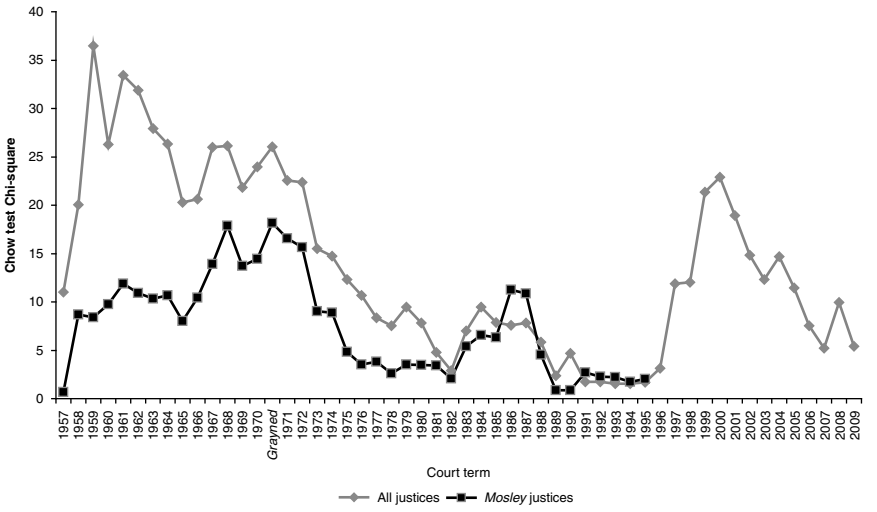

Figure 1: Sensitivity analysis

Looking at the gray line in Figure 1, which represents the sensitivity analysis where I did not hold personnel change constant, I see that the *Mosley* Chow test result is quite large, but there are larger Chi-square statistics for the years 1959–1964. This indicates that the justices' attitudes shaped how they viewed the jurisprudential variables before and after these dates. This is not surprising, as this was a period of significant personnel change, hence a significantly different attitudinal composition of the Supreme Court. In addition to appointing Warren to replace Vinson as Chief Justice in 1953, President Eisenhower appointed four associate justices from 1955–1958. John Marshall Harlan replaced Robert Jackson in 1955, and Brennan took the place of Minton in 1956. Whittaker was appointed to replace Stanley Reed in 1957 and Stewart replaced Harold Burton in 1958. In 1962, President John F Kennedy appointed White to replace Whittaker and appointed Goldberg to replace Felix Frankfurter (Encarta, 2006). As this model was designed to allow personnel change to vary, it is not unexpected to see that the shifting membership of the Court did make a difference. As I noted in Chapter 3, had the personnel of the Court not changed, the content-neutrality jurisprudential regime would not have been established. The Court took some time to build the precedents leading to *Grayned* and *Mosley*. However, this observation does not undercut the findings of the sensitivity test that holds personnel change constant, because that test indicates that, even controlling for attitudes, the *Grayned* justices did change their evaluation of the jurisprudential factors after the regime was established.

Methodological criticisms of jurisprudential regime theory

Accounting for clustering

Jeffrey Lax and Kelly Rader raised questions about the methodology that Kritzer and I have used to test for evidence of regime change. They claimed that, because we did not account for clustering of errors by case or justice, we were overconfident in identifying significant before/after differences in individual variables, and the Chow tests were overconfident in identifying significant differences in the groups of jurisprudential variables (Lax and Rader, 2010). At the time of our earlier articles, judicial scholars did not commonly control for clustering, although in my 2006 article with Smith and Kritzer, we did start to take into account clustering (Richards et al., 2006). For this book, I made several changes in response to the critique of Lax and Rader, and these results are reported in this chapter. I controlled for clustering by both case and justice to improve my tests of individual variables. In looking at the influence of the group of jurisprudential variables, I controlled for clustering and used a GLH test, which confirmed the findings of the Chow tests. In response to the critique of our earlier articles by Lax and Rader, Kritzer and I took similar

steps in reanalyzing the data from those articles. Our revised methodology sometimes confirmed the findings generated by Lax and Rader's methodology, but their randomization test also misses some significant differences that were associated with regime change (Kritzer and Richards, 2010).

In addition, Kritzer and I pointed out that Lax and Rader, by focusing on the Chow tests, missed the importance of two other steps we required to confirm the presence of a jurisprudential regime. First, we require that the statistical changes in individual variables we observe make theoretical sense (see the methodology section at the start of this chapter). Using interpretive methods, we examine the development of law, look for key changes in jurisprudence such as changes in levels of scrutiny or analytic tests, and trace the point in time at which those changes are first expressed in particular precedents adopted by a majority of the justices. In our research, we have sometimes found statistical differences that did not make sense in terms of the jurisprudence, so we did not continue to pursue those inquiries. Second, we look to the Chow tests (and now GLH tests as well) to confirm significant differences in a group of jurisprudential variables. Finally, we recognize that, even if there are significant differences associated with a particular year, there could also be significant differences if we chose other years. This is why we employ a sensitivity analysis, to look at the size of the differences in every possible year, and then assess whether the differences associated with the year of the new jurisprudential regime stand out. Each of these steps contributes additional verification of the existence of a regime (Kritzer and Richards, 2010).

Segal raised a related methodological question about the sensitivity analysis. He pointed out that, although Kritzer and I claim the sensitivity analysis indicates that the change in first amendment law occurred in 1972, there are additional years that also show significant before/after differences, some even larger than the differences associated with 1972, so the results do not mean that the change occurred in 1972 (Segal, 2008, p. 23). I agree with Segal that there can be differences associated with other years. This is the reason we perform the sensitivity analysis. Although there were a few years that were larger in our initial analysis of the free expression cases, they were clustered around the time *Grayned* and *Mosley* were decided. In addition, our interpretive examination of the development of the jurisprudence of content-neutrality tells us that, although elements of the jurisprudence began to emerge prior to this, *Grayned* and *Mosley* stand out as the regime-defining cases. Although this may be a bit imprecise and open to interpretation, issues of interpretation are always present in any methodological analysis (Kritzer, 1996). In the analysis presented here, while controlling for personnel change, the Chi-square statistic associated with *Grayned* and *Mosley* stands out as the largest.

The interpretation of precedent and the development of law

Thomas Hansford and James Spriggs included my 2002 article with Kritzer as an example of a study of the influence of precedent that may produce spurious results. If past behavior is associated with current behavior, it is not clear whether that relationship is causal or spurious. It could be spurious because 'unobserved and unmeasured forces' affect both past and current Supreme Court behavior (Hansford and Spriggs II, 2006, pp. 11–12).

My first response is that it is somewhat difficult to argue against unobserved and unmeasured forces. The best that political science can do is to attempt to identify and measure these forces, as I have done. In addition, the point of jurisprudential regime theory is to look at how jurisprudential factors, attitudes and other control variables change before and after the precedent. By using statistical tools such as logistic regressions, I am able to isolate the causal effect of jurisprudential factors. Although the statistical tests of jurisprudential regime theory are best suited to identifying major breaks in the law, the theory is open to an understanding of the development of law that is more incremental, such as the approach of Hansford and Spriggs.

Conclusion

Overall, the statistical analyses confirm my expectations. The justices' attitudes are a necessary part of the explanation of why they vote as they do, but attitudes do not comprise the entire picture. There are significant differences before and after *Grayned* and *Mosley* in how the justices look at jurisprudential factors, such as whether the government regulates in a content-based or content-neutral fashion. Even after applying the rigorous Chow test, GLH test and the sensitivity analysis, these results remain significant. In terms of strategic considerations, such as the influence of parties or friend of the court briefs, most variables did not make a difference, although the print media as party and the federal government as *amicus* did have some success. Of course, as any lawyer will attest, the devil lies in the details. It is to those details that I now turn. In particular, I will first consider the Supreme Court's changing treatment of content-based cases before and after *Mosley* and *Grayned*.

5
The Changing Treatment of Content-Based Cases

The story of the development of the content-neutrality jurisprudential regime is not a linear narrative of progress. As Chapter 3 reveals, the justices established some important precedents prior to 1972 that helped to justify the creation of the content-neutrality regime in *Mosley* and *Grayned* (*Police Department of Chicago v Mosley*, 408 US 92, 1972; *Grayned v City of Rockford*, 408 US 104, 1972). In the period prior to 1972, however, there were also many cases in which a majority of the justices turned a blind eye to government discrimination against the content of expression. For example, despite the protests of Justices Hugo Black and William Douglas, there was a series of cases in which the Supreme Court allowed the government to discriminate against alleged communists in a content-based manner. After 1972, the justices used the content-neutrality regime to protect freedom of expression from the government's content-based discrimination, but even after 1972, there were cases in which a majority of the justices chose to allow content-based regulation of expression. In this chapter, I use an interpretive lens to qualitatively analyze key examples of how the justices treated content-based cases before and after the content-neutrality regime was established.

My interpretive methodology involves considering these questions as I discuss the cases: What role did the political attitudes of the justices play? Did the opinion of the Court categorize the case as content-based or content-neutral? What standard of review did the justices apply? How did they apply the standard? Was there a compelling or significant government interest? Did the government regulate expression in a least restrictive or narrowly tailored way? For each case, were there dissenting or concurring opinions? Did those opinions express disagreement over how to categorize the case, which standard of review to apply, or how the standard of review applied? Did the differing opinions reflect political differences on the Court? Did the case raise any unique or new issues? Was it a problematic fit for the jurisprudence? Did any of the opinions anticipate future developments in the law, even incremental

ones, and did any of the opinions contribute to the development of jurisprudence in this area? This interpretive methodology is based on jurisprudential regime theory. As I detailed in Chapter 2, jurisprudential regime theory draws on the theories of political jurisprudence and interpretive institutionalism.

Cases prior to the start of the content-neutrality regime

In Chapter 3 I discussed a variety of important victories for freedom of expression prior to 1972 which helped to develop the content-neutrality regime. However, I do not wish to give the impression that the justices were continually becoming more protective of expression over time. To provide the necessary corrective, here I will focus on some important examples of cases before 1972 in which the government discriminated on the basis of content or viewpoint, but a majority of the Supreme Court still ruled in favor of the government.

The 1959 decision *Barenblatt v US* involved the refusal of a citizen, who was formerly a graduate student at the University of Michigan and an instructor at Vassar College, to testify before a subcommittee of the House Committee on Un-American Activities (*Barenblatt v US*, 360 US 109, 134, 1959). Barenblatt objected to the power of the Committee to inquire into his religious and political beliefs and associations, arguing he was protected on the basis of the first, ninth and tenth amendments, as well as the separation of powers and the prohibition on bills of attainder; he did not raise a fifth amendment objection (*Barenblatt*, 1959, pp. 109, 114). He specifically declined to answer questions regarding his membership of the Communist Party, whether he knew a particular person to be a member of the Communist Party, and whether he was a member of the University of Michigan Council of Arts, Sciences and Professions (*Barenblatt*, 1959, p. 114). He was convicted of a misdemeanor violation of the US Code for refusal to answer a pertinent question that was the subject of inquiry of a house of Congress (*Barenblatt*, 1959, p. 109). The Court split 5:4 in upholding the conviction, with Justice John Marshall Harlan writing the majority opinion, joined by Justices Felix Frankfurter, Tom Clark, Charles Whittaker and Potter Stewart. The majority was quite dismissive of Barenblatt's first amendment arguments. Harlan applied a deferential balancing test, inquiring 'whether the investigation was related to a valid legislative purpose' (*Barenblatt*, 1959, p. 128). He noted that Congress clearly had the power to investigate the Communist Party and that power rested on the 'ultimate value' of 'self-preservation' (*Barenblatt*, 1959, pp. 127–9, citing *Dennis v US*, 341 US 494, 509, 1951). He cited the extensive web of precedents that had been built by 1959. Those precedents permitted prosecution for those advocating illegal action against the government, established the unique threat posed by the Communist Party compared to other

political parties, and allowed the government to require disavowal of support for radicalism by public officials (*Barenblatt*, 1959, pp. 127–9). Harlan rejected the argument that Congress was motivated to punish alleged communists through exposure; he responded that the Court's role was not to inquire as to motive and that Congress was clearly acting within the bounds of its constitutional authority. He concluded that the balance had to be cast in favor of government interests (*Barenblatt*, 1959, pp. 133–4).

Justice William Brennan wrote a brief dissenting opinion. He noted his agreement with Black and argued that the first amendment protected Barenblatt. He also contended that the exposure of individual behavior overstepped the limits of congressional authority by serving as a type of adjudication (*Barenblatt*, 1959, p. 166).

Justice Black also wrote a dissenting opinion, joined by Chief Justice Earl Warren and Justice Douglas. Black argued that the conviction was invalid on three grounds. One was that the congressional inquiry had the effect of exposing, stigmatizing and punishing alleged communists, which was a power reserved for the courts, not a legislative body (*Barenblatt*, 1959, pp. 136–7). His other arguments focused on the first and fifth amendments.

Rule XI, which created the authority of the Committee to investigate 'un-American propaganda' was vague and excessively broad under the first amendment and the due process clause of the fifth amendment (*Barenblatt*, 1959, pp. 136–40). 'Propaganda' was an incredibly broad term which could include any of a person's thoughts, expressions and associations, and 'un-American' was 'equally vague' (*Barenblatt*, 1959, p. 138). Black rejected the majority's argument that the scope of inquiry was limited to communism. Congress failed to state its purpose clearly and unequivocally in advance of the questioning of Barenblatt, and Barenblatt did not know at the time of his interrogation that the Committee's need for his replies was so compelling as to override his freedom of association rights (*Barenblatt*, 1959, pp. 139–40).

Black also contended that Congress had violated the freedoms of speech and association. He argued that the congressional inquiry abridged freedom of speech through 'exposure, obloquy and public scorn' (*Barenblatt*, 1959, pp. 140–1). He then made an argument that anticipated the development of part of the content-neutrality jurisprudential regime. He argued that the balancing of government and individual interests was inappropriate except in cases where the government was primarily regulating conduct, such as regulating the time, place and manner of use of public streets. Balancing was not appropriate when a legislative body abridged freedom of expression 'merely because of hostility to views peacefully expressed in a place where the speaker had a right to be'. He continued by noting that Rule XI, which authorized the Committee to investigate communists, 'attempts inquiry into beliefs, not action – ideas and associations, not conduct' (*Barenblatt*, 1959, p. 141). Black's

approach in this case was to argue that regulations targeting the speech, press and association (what the Court would later call content-based regulations) should not be subject to balancing, in contrast to laws which primarily regulated conduct, or the time, place and manner of expression. This argument shares some commonalities with the Court's content-neutrality regime. After the Court developed the content-neutrality regime, however, the justices still chose to apply balancing to content-based regulations, although the balancing standard they used (strict scrutiny) was very protective of expression. Black argued that balancing was inappropriate because according to James Madison, the Bill of Rights was to serve as an 'impenetrable bulwark' against legislative or executive intrusion (*Barenblatt*, 1959, p. 143, quoting Madison, 1789, p. 439).

For the sake of argument, even if balancing were appropriate, the majority incorrectly weighed the individual right by ignoring the 'the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves' (*Barenblatt*, 1959, p. 144). Black pointed out that a greater defense against communism than laws would be for individuals to be exposed to communist arguments and then reject them. He emphasized that this was even more important in the universities, where the experimentation in ideas produced benefits for society. As the majority conducted its balancing test, it looked only to Barenblatt's particular interests and not the broader societal interests in freedom of speech, press and association (*Barenblatt*, 1959, pp. 144–5).

On the other side of the balancing test, the majority erred in its argument that the investigation was justified by security concerns. Black challenged the assumption of the government that security can be preserved by restricting freedom of expression. He flipped the security concern on its head by citing *DeJonge v Oregon* (299 US 353, 365, 1937) for the proposition that it is freedom of expression that actually preserves security (*Barenblatt*, 1959, pp. 145–6).

Finally, Black directly confronted the argument that the treatment of the Communist Party was somehow exempted from normal constitutional limits because it was a criminal gang, focused on overthrowing the government. He argued that in a free country, a political party could not be outlawed, and that to do so would threaten any group. Even Thomas Jefferson's party was attacked as a threat to the government. He explained that public officials cannot prescribe a political or religious orthodoxy. A person is free to join a group and later reject the beliefs of that group. Association with a group does not mean that an individual agrees with all of the positions of that group. As a result of the Supreme Court's decisions, communists or alleged communists had been shut out of a wide variety of occupations. The consequence of this particular ruling is that communists 'are singled out and, as a class, are

subjected to inquisitions which the Court suggests would be unconstitutional but for the fact of "Communism"' (*Barenblatt*, 1959, pp. 146–53).

As he and Douglas so often did in the many cases involving communists or alleged communists, Black methodically debunked the government's claims and also used policy and normative arguments to point out that the government was ignoring constitutional principles and, ironically, making the country less safe and more like the totalitarian governments that the US was fighting against in the Cold War. His opinions contributed to the development of the content-neutrality jurisprudential regime.

The voting pattern in the case shows evidence of attitudinal divisions on the Court. Dissenters Warren, Black, Douglas and Brennan were the four most liberal justices at the time; Black and Douglas were appointed by Democratic President Franklin Delano Roosevelt, while Warren and Brennan had been appointed by Republican President Dwight Eisenhower. The majority was made up of Clark, who had been appointed by Democratic President Harry Truman, Roosevelt appointee Frankfurter, and Eisenhower appointees Harlan, Whittaker and Stewart. The attitudinal pattern is complicated somewhat by the Segal-Cover attitudinal scores, which rated Harlan and Stewart as liberal and Frankfurter in the range of moderate to liberal; these three did not vote to protect expression in this case. Clark and Whittaker were both scored as moderates, exactly in the middle of the range of liberal to conservative (Segal et al., 1995, p. 816). Although the attitudinal differences do not fall precisely on the lines of partisan affiliation or the Segal-Cover ratings, the voting pattern was common for this time, with the four dissenters typically being the most supportive of freedom of expression in cases involving alleged communists.

In the 1961 decision *Scales v US* (367 US 203, 1961), the Court upheld the conviction of Junius Scales under the Smith Act of 1940 (Alien Registration Act) for being a member of an organization that advocated violent overthrow of the US government. The voting alignment showed the same attitudinal divisions as in *Barenblatt*, with Harlan writing the majority opinion joined by Frankfurter, Clark, Whittaker and Stewart. Warren, Black, Douglas and Brennan dissented. The Court rejected Scales' argument that a portion of the Internal Security Act of 1950, which stated that membership in the Communist Party was not a per se violation of any criminal statute, repealed the membership clause of the Smith Act (*Scales*, 1961, p. 219). The majority also quickly dismissed Scales' first amendment arguments regarding freedom of speech and association. Harlan referred to *Dennis v US* for the proposition that advocacy of illegal action was not protected under the first amendment and extended that to membership in a group which advocated illegal action, provided that the government could prove that the individual knew of the advocacy (*Scales*, 1961, pp. 228–30, citing *Dennis*). Harlan argued that

the Smith Act did not restrict the first amendment more than was necessary and, in support of this argument, he pointed out that in *Noto v US*, decided the same day, the Court overturned Noto's conviction because of a lack of evidence that the defendant had knowingly intended to violently overthrow the government (*Scales*, 1961, pp. 229–30, citing *Noto v US,* 367 US 290, 299, 1961).

Black, Douglas and Brennan each wrote dissenting opinions. Brennan focused on the statutory interpretation issue and argued that the Internal Security Act revised the Smith Act's membership clause (*Scales*, 1961, pp. 278–81). Black agreed with Douglas and Brennan and wrote separately to argue that the law was unconstitutionally vague. He also reiterated his concerns from *Barenblatt* about the majority's balancing test, stating: 'This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress First Amendment freedoms.' (*Scales*, 1961, pp. 259–62)

Years of dissenting in first amendment cases sharpened the wit and writing of Justices Douglas and Black, who often made literary and historical references, as exemplified by the opening paragraph of Douglas's dissent:

> By allowing a six year prison sentence for membership, we make a sharp break with traditional concepts of First Amendment rights and make serious Mark Twain's light-hearted comment that 'It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.' (*Scales*, 1961, pp. 262–3, quoting Twain, 1903, p. 198)

Douglas continued by arguing that a conviction under the membership clause of the Smith Act went even further than the notorious Alien and Sedition Acts of 1798. There was no charge of conspiracy, and Scales was not being charged with a single act. Instead, the membership clause conviction was a crime of guilt by association (*Scales*, 1961, pp. 263–5).

Douglas proceeded to make a normative case for the importance of freedom of speech and belief, making references to Spinoza, the history of English jurisprudence, Montesquieu, Madison, Jefferson and Lincoln, among others. He argued that punishing thought and speech was problematic because governments have historically done it to suppress competing or different ideas. Although communist beliefs were 'unpopular and to most of us revolting', they were protected by the first amendment (*Scales*, 1961, pp. 266–8).

He noted that a revolutionary spirit had informed the Declaration of Independence and the thinking of Jefferson and Lincoln. Although the government was allowed to respond to acts of insurrection or violence, the first amendment did not permit it to punish revolutionary speech, thoughts

and beliefs (*Scales*, 1961, pp. 268–70). Jefferson expressed in a letter to Madison the philosophy that ultimately, security would be better achieved by educating the people about the advantages of peace and order, as the people would then work to preserve both liberty and order. Douglas wrote: 'This is the only philosophy consistent with the First Amendment. When belief in an idea is punished as it is today, we sacrifice those ideals and substitute an alien, totalitarian philosophy in their stead.' (*Scales*, 1961, pp. 273–4)

Similar to Black's dissent in *Dennis*, Douglas concluded his dissenting opinion by recognizing that the majority's decision was a product of the times, and that the rightful place of the first amendment would later be re-established. He wrote: 'What we lose by majority vote today may be reclaimed at a future time when the fear of advocacy, dissent, and nonconformity no longer cast a shadow over us.' (*Scales*, 1961, p. 275)

Thinking about the Supreme Court's decision in light of the content-neutrality jurisprudence that would be firmly established in 1972, the membership clause of the Smith Act was a content-based regulation. It targeted individuals who were members of groups that advocated a particular viewpoint, albeit an unpopular one. In addition, by failing to make a distinction between abstract advocacy of illegal action and incitement to imminent and likely illegal action (a jurisprudential requirement that came about in 1969 in *Brandenburg v Ohio*, 395 US 444), the law was not the least restrictive means. The knowing intent distinction of the majority opinion actually offered scant protection for freedom of expression compared to strict scrutiny or the more speech protective standard of *Brandenburg*. Although prosecutions under the Smith Act began to decline in the late 1950s (*Scales*, 1961, p. 274, fn. 8), the Cold War assault on freedom of expression continued in other ways (*Scales*, 1961, p. 275). In *Zemel v Rusk*, decided in 1965 (381 US 1), a narrow majority of the Court held that the Secretary of State's restrictions on who may travel to Cuba did not violate the first amendment. The dissenting opinions pointed out that the Secretary of State was exercising the discretion to judge whether a person's travel was in the best interests of the US but was not doing so with clear authorization from Congress. In addition, the right to travel was protected by the first and fifth amendments; people had the right to interact with people from different cultures and learn about varied phenomena, but the Secretary's guidelines did not show the precision required by the first amendment (*Zemel*, 1965, pp. 21–40).

Although Chapter 3 illustrates that there were a series of free expression decisions involving the civil rights movement in the 1960s that contributed to the development of the content-neutrality jurisprudential regime, the Court did not always rule in favor of civil rights protestors. In 1967 in *Walker v Birmingham* (388 US 307, 1967), a majority of the Court overlooked content-based discrimination against civil rights protestors, based on a concern for

judicial process. The case grew out of the same 1963 Good Friday and Easter Sunday civil rights demonstrations in Birmingham, Alabama, that were part of the 1969 *Shuttlesworth v Birmingham* (394 US 147) decision discussed in Chapter 3. *Shuttlesworth* contributed to the development of the content-neutrality regime by striking down convictions for demonstrating without a permit, based on first amendment concerns about a standardless permitting system that was applied in a discriminatory manner. In *Walker*, Stewart, joined by Black, Clark, Harlan and Byron 'Whizzer' White, upheld convictions of civil rights protestors for violating a temporary injunction. The injunction against protesting had been issued because the protestors, African-American ministers, had violated a Birmingham ordinance that required a permit for street demonstrations. Stewart conceded that the permit requirement may have raised constitutional issues, but reasoned that the petitioners failed to properly raise the constitutional challenges in court. Instead, the protestors proceeded with their demonstration in defiance of the injunction (*Walker*, 1967, pp. 316–21).

Warren, Douglas and Brennan each wrote dissenting opinions, with Abe Fortas also casting a dissenting vote. Warren began by recounting the facts of the case. Public safety commissioner Eugene 'Bull' Connor had refused to grant a permit in any circumstance, which led the ministers to announce that they would proceed with the planned protests. Connor twice denied the permit request, despite the fact that the city had routinely granted such permits to all other applicants. The city then obtained an injunction against the protests; the injunction was based on the language of the ordinance. The protestors then violated the injunction and challenged it on first amendment grounds in court, but the court found them in contempt and ruled that they had waived their right to raise a free speech challenge when they violated the injunction. Warren pointed out that the petitioners had acted similarly to individuals who violate a statute in order to obtain standing to sue (*Walker*, 1967, pp. 324–7). He also noted that the ordinance was facially unconstitutional, that the injunction constituted a sweeping prior restraint, and that the city had acted in a discriminatory manner (*Walker*, 1967, pp. 327–30). In addition, there was no particular need for the court to buy time with an injunction in order to resolve a complex, underlying issue. Warren concluded by noting that a state did not have 'the power to nullify the United States Constitution by the simple process of incorporating its unconstitutional criminal statutes into judicial decrees' (*Walker*, 1967, pp. 333–4).

Douglas wrote separately and largely covered the same ground as Warren, although he also pointed out that a demonstration is a uniquely important form of expression for those who are not wealthy. He emphasized that people have a right to defy laws that are facially unconstitutional violations of freedom of expression because the timing of protests and assemblies are of critical

importance; waiting to challenge the law in court before holding a demonstration could render the demonstration 'futile or pointless' (*Walker*, 1967, pp. 335–6). He also supported Warren's point that the city had discriminated against the protestors, stating that his reading of the record led to the conclusion that 'these people were denied a permit solely because their skin was not of the right color and their cause was not popular' (*Walker*, 1967, p. 337).

Brennan wrote a separate dissent, and he emphasized that the Supremacy Clause meant that a state interest in requiring respect for judicial orders could not override the first amendment (*Walker*, 1967, pp. 343–4). In particular, Brennan noted that the implication of the majority's ruling was that the city could insulate its unconstitutionally vague and overbroad ordinance from challenge by having a judge copy the words of an ordinance into an injunction, an injunction 'obtained invisibly and upon a stage darkened lest it be open to scrutiny by those affected' (*Walker*, 1967, p. 346). Of course, two years later, when a majority of the Court agreed to evaluate the constitutionality of the convictions on the merits in *Shuttlesworth*, the justices did overturn the convictions.

The *Walker* case illustrates in part the difference that a jurisprudential regime can make. Had the Supreme Court declared Birmingham's actions content-based and applied strict scrutiny, the Court would have explicitly considered whether the state interest was compelling and whether the injunction was the least restrictive means. It seems unlikely that the injunction would have been upheld under this standard of review. There are elements of the dissenting opinions that anticipate elements of the content-neutrality regime. Warren, Douglas and Brennan all noted that the city was discriminating against the protestors based on their views, and Douglas also observed the motivation of racial discrimination. Brennan's opinion also showed a rudimentary anticipation of the balancing required by a strict scrutiny standard; he weighed the state interest against the excessive intrusion on the first amendment.

Walker shows an attitudinal pattern similar to the one in *Barenblatt* and *Scales*. Liberals Warren, Douglas, Brennan and Fortas dissented. Fortas had been appointed by Democratic President Lyndon Johnson and was rated liberal by the Segal-Cover scores. Although the typical liberal coalition had been buttressed by the addition of Fortas, Black chose to defect. He joined the majority in ruling against freedom of expression, along with Stewart, Clark, Harlan and White. White had been appointed by Democratic President John F Kennedy and was rated as a moderate by the Segal-Cover scores (Segal et al., 1995, p. 816). Black was persuaded that the concerns for judicial process trumped the free speech arguments in this case, but he voted in favor of freedom of expression in later striking down the convictions in *Shuttlesworth*.

To this point I have discussed cases decided prior to the start of the jurisprudential regime in which a majority of the Court upheld a content-based

regulation of expression. I have done so in order to provide a contrasting perspective to Chapter 3, in which I showed how, in a series of cases, the Court developed the content-neutrality regime. The Court established that the first amendment should apply equally, regardless of viewpoint. It should advance the values of self-government, security and open debate, and it should be used to strike down permit regulations that lack precise standards. The Court eventually distinguished content-based regulations from content-neutral regulations that focused on conduct or the time, place or manner of expression. In this pre-regime period, the Court occasionally confronted cases that involved regulations close to the sometimes fine line dividing content-based from content-neutral, such as the 1968 case of *US v O'Brien* (391 US 367), which revolved around the issue of expressive conduct. The majority viewed the federal law against destruction or mutilation of a draft card to be a content-neutral regulation of conduct, while the dissenters saw it as content-based as it had been applied to O'Brien, who had burned his draft card in a public demonstration. After the regime was established, cases involving expressive conduct continued to divide the Court, such as the cases involving flag-burning, nude dancing and a sleep-in protest on National Park Service grounds. I will look at these difficult cases involving expressive conduct in Chapter 6, but for now, I focus on how the justices used the content-neutrality regime to protect freedom of expression from content-based laws.

Striking down content-based laws

The Supreme Court struck down a wide variety of content-based laws after the content-neutrality regime was established in 1972 in *Police Department of Chicago v Mosley* and *Grayned v City of Rockford*. The Court protected words spoken to a police officer that did not rise to the level of 'fighting words' in *Lewis v City of New Orleans* (415 US 130, 1974). The Court protected expressive conduct from content-based regulation in *Spence v Washington* (418 US 405, 1974) when Washington tried to punish an individual for displaying a US flag upside down with a peace symbol taped to it, and in *Texas v Johnson* (491 US 397, 1989) when Texas tried to criminalize the burning of the flag. In *Carey v Brown* (447 US 455, 1980), the Court applied *Mosley* to a similar situation, striking down a law against certain types of picketing. In 1982 the Court protected a National Association for the Advancement of Colored People (NAACP) boycott from an injunction and a finding of liability in *NAACP v Claiborne Hardware* (458 US 886, 1982). The Court also extended the content-neutrality regime to the media context, striking down part of a federal law that prohibited publishing photos of US currencies but allowed exceptions for newsworthy and other purposes in *Regan v Time* (468 US 641, 1984). The justices also struck down a magazine tax in *Arkansas Writers Project v Ragland*

(481 US 221, 1987), and New York's law restricting a criminal's monetary gain from published works about crimes in *Simon & Schuster, Inc. v New York State Crime Victims Board* in 1991 (502 US 105). Content-neutrality was central to the Court's decision restricting public figures' suits for intentional infliction of emotional distress in *Hustler Magazine v Falwell* (485 US 46, 1988), as it was in a decision restricting the ability of a deceased soldier's father to recover damages from the Westboro Baptist Church for the church's picketing of a private funeral in *Snyder v Phelps* (131 S. Ct 1207, 2011). The Court also applied the content-neutrality regime to protect electronic media, as when it struck down regulations of offensive material on the internet in *Reno vAmerican Civil Liberties Union* (ACLU) (521 US 844, 1997) and *Ashcroft v ACLU* (542 US 656, 2004), on cable television in *US v Playboy Entertainment Group* (529 US 803, 2000), and a law targeting 'violent video games' in *Brown v Entertainment Merchants Association* (131 S. Ct 2729, 2011). The Court also protected offensive expression in striking down a federal law regulating depictions of animal cruelty in *US v Stevens* (130 S. Ct 1577, 2010). In a highly controversial decision, the Court also used the content-neutrality regime to strike down federal electoral speech law that had restricted the ability of corporations to spend money on elections directly from their corporate treasuries in *Citizens United v Federal Election Commission* (130 S. Ct 876, 2010). Although I will not cover all of these cases, I will examine the *Carey, Claiborne Hardware, Simon & Schuster, Hustler, Snyder, Reno, Ashcroft, Playboy, Entertainment Merchants Association, Stevens* and *Citizens United* cases to give a sense of the range of applications of the content-neutrality jurisprudential regime and how the politics of the justices varied in different cases.

At first glance, *Carey* looks very similar to *Mosley*, and that was how the Court's majority framed the case, but the dissenters pointed out that the statute at issue was different in some legally significant ways. Both sides were very much in agreement that the content-neutrality jurisprudence that had been established by the *Mosley* and *Grayned* precedents provided the framework for analysis, although the dissenters saw the statute as being more like the content-neutral ordinance upheld in *Grayned*, while the majority compared it to the content-based ordinance that was struck down in *Mosley*. Justice Brennan wrote the majority opinion, joined by Justices Stewart, White, Thurgood Marshall, Lewis Powell and John Paul Stevens. Stewart wrote a brief concurring opinion to emphasize the free speech aspects of the case (*Carey*, 1980, pp. 471–2).

Members of the Committee Against Racism ended a march at the home of the Mayor of Chicago, Michael Bilandic. They were convicted of violating an Illinois statute which had prohibited picketing of residential dwellings, unless the residence was used as a place of business, employment, or for a meeting related to the public interest. If a residence was used as a place of employment,

labor picketing was allowed (*Carey*, 1980, p. 457). Brennan found this similar to the Chicago ordinance struck down in *Mosley*, which had banned all picketing at schools except for labor picketing. Both regulations discriminated on the basis of content, which required the application of strict scrutiny under the Court's intertwined first amendment and equal protection jurisprudence (*Carey*, 1980, pp. 458–63). Brennan found that, although the state's interest in protecting residential privacy might be considered compelling, the statute failed to pass constitutional muster because it was not narrowly tailored to achieve that interest. Exempting labor picketing did nothing to advance the state's interest in protecting residential privacy, and the state was not allowed to privilege the content of one type of expression over others (*Carey*, 1980, pp. 464–9).

Justice William Rehnquist dissented, joined by Chief Justice Warren Burger and Justice Harry Blackmun. He did not question the jurisprudence of *Mosley*, but distinguished *Mosley* on the grounds that the ordinance at issue in *Carey* was different. Illinois had restricted picketing at residences unless the residence was used for a purpose that restricted the owner's privacy interests, including using the residence as a place of business, a place of employment, or a location for a meeting or assembly to discuss matters of public interest. In addition, homeowners were allowed to picket their own homes. All of the exceptions dealt with place, particularly uses of place that diminished privacy interests. In Rehnquist's view, the statute was best analyzed as a time, place and manner regulation, not a law that was content-based (*Carey*, 1980, pp. 473–4). Illinois had a substantial interest in protecting residential privacy. There was no less restrictive alternative, and the statute was not overbroad. In fact, by making the exceptions it did, Illinois ensured that that it had not restricted more speech than was necessary to achieve the interest in residential privacy (*Carey*, 1980, pp. 475–81).

The voting in the case reflects some attitudinal divisions, with Burger, Rehnquist and Blackmun, all appointees of Republican President Richard Nixon, dissenting. All three were rated conservative by the Segal-Cover scores. The majority was comprised of three appointees of Republican presidents, Brennan and Stewart, who had both been appointed by Eisenhower, and Stevens, a Nixon appointee. They were joined by White and Marshall, who had been appointed by Democratic Presidents Kennedy and Johnson, respectively. Looking at the majority from the perspective of the Segal-Cover scores, there were three liberals (Brennan, Stewart and Marshall), one conservative (Stevens) and one moderate (White) (Segal et al., 1995, p. 816). (Even though Stevens and Blackmun were rated as conservative, their political reputations in free expression cases became more liberal over time as a result of their votes.) Although there were attitudinal differences, the content-neutrality jurisprudential regime served as the framework for

the disagreements. Rehnquist quoted extensively from *Mosley* and *Grayned*. Rehnquist's dissent focused on whether the majority properly characterized the statute as content-based. He noted that the one aspect of the statute that dealt with content – labor – was tied to the use of the house as a place of employment (*Carey*, 1980, p. 484). He argued that the law was best regarded as a narrowly drawn, content-neutral, time, place and manner regulation. Rehnquist's opinion took seriously the other side of the content-neutrality coin: the possibility that the content-neutrality jurisprudence can be used to draw a boundary on the first amendment that allows for government to regulate expression in a content-neutral manner. The legal policy effect of the majority's opinion was complementary to Rehnquist's goal. If governmental decision-makers were to protect residential privacy, they had to be certain to do it in a content-neutral manner, without making any distinctions based on the type of protests. In *Frisby v Schultz* (487 US 474, 1988), a majority of the Court upheld an ordinance that prohibited any picketing at a single residential dwelling. A six-justice majority held that it was a content-neutral ordinance that passed intermediate scrutiny. Brennan, Marshall and Stevens dissented, arguing that the ordinance restricted too much expression.

New applications: boycotts, outrageous speech and the writings of criminals

Of course, not all cases involving content-based regulations of expression involved such a close comparison to *Mosley* and *Grayned*. At times the Supreme Court has addressed new questions which have pushed the limits of first amendment jurisprudence and required the justices to think about how to apply the jurisprudence to new situations. The 1982 case *NAACP v Claiborne Hardware* grew out of a NAACP boycott of white-owned businesses in Claiborne, Mississippi, from 1966–1972. The Mississippi Supreme Court rejected the NAACP's first amendment claims, declared the boycott illegal, and upheld the NAACP's liability for damages to the merchants' earnings for the entire period of the boycott, based on a common-law tort for malicious interference with the businesses (*Claiborne Hardware*, 1982, pp. 886, 891, 895). The US Supreme Court ruled unanimously in favor of the NAACP. Justice Stevens wrote the majority opinion, and was joined by Chief Justice Burger and Justices Brennan, White, Blackmun, Powell and Sandra Day O'Connor. Justice Rehnquist concurred but did not write a separate opinion.

Stevens noted that the boycott involved actions such as meetings, speeches and pickets, and the non-violent aspects of the boycott were protected by the first amendment freedoms of speech, assembly, association and petition (*Claiborne Hardware*, 1982, pp. 911–12). Although the state has the power to regulate economic activity, the Court decided against analyzing the case according to the *O'Brien* framework, as a regulation of economic conduct

with incidental implications for the first amendment. Instead, Stevens wrote that the state could not directly 'prohibit peaceful political activity', because such expression is critical to self-government and because the first amendment embodied a commitment to protect robust and open debate (*Claiborne Hardware*, 1982, pp. 912–13, citing *Carey*, 1980, p. 467; *Garrison v Louisiana*, 379 US 64, 74, 1964; and *New York Times v Sullivan*, 376 US 254, 270, 1964). Although states could impose liability for business losses due to violence, Stevens wrote: 'When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded.' Specifically, he proceeded to look closely at the grounds for liability and who could be held liable (*Claiborne Hardware*, 1982, pp. 916–17, quoting *NAACP v Button*, 371 US 415, 438, 1963). To impose liability on account of association with a group, it would have to be shown that 'the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims' (*Claiborne Hardware*, 1982, p. 920). Requiring such a finding would ensure that the state did not restrict more first amendment freedoms than necessary to achieve its interest.

Applying this standard, Stevens addressed the arguments that the NAACP was liable because of the acts of violence by some members and the advocacy of violent action by Charles Evers. Any participants in the boycott who committed violent acts could be held liable for the consequences of those actions provided the judgment was tailored to their particular actions (*Claiborne Hardware*, 1982, p. 926). However, liability could not be imposed for membership in the NAACP or attendance at NAACP meetings. Members could not be held liable under a theory of 'guilt by association' because the NAACP had not planned illegal action; to find liability would be to follow a theory of 'guilt for association' that was not permitted under the first amendment (*Claiborne Hardware*, 1982, p. 925). With respect to the speeches of Charles Evers, Stevens applied the *Brandenburg* standard and found that Evers' speeches fell short of incitement to imminent illegal action and therefore were protected (*Claiborne Hardware*, 1982, p. 927–8).

Claiborne Hardware is an example of a case that pushes the limits of jurisprudence. Although the Court had not been presented with this precise question in the past and the case did not fit exactly into the Court's content-neutrality jurisprudential framework, Stevens was able to draw on a web of precedents and jurisprudence to frame the analysis in the case. As the judgment of the Mississippi Supreme Court targeted expression more than conduct, Stevens rejected an *O'Brien* approach that would have focused on the judgment as a content-neutral regulation of conduct. Instead, he applied a type of strict scrutiny, ensuring that any finding of liability would be narrowly drawn to protect first amendment freedoms. The application of *Brandenburg* to the speeches of Evers was also consistent with strict scrutiny, distinguishing

abstract advocacy of illegal action from actual incitement. Although it was a novel question, the Court ruled unanimously in the case, which shows that attitudes did not play a significant factor in this decision.

Another novel constitutional question dealing with torts and the first amendment was resolved by the Court in the 1988 case *Hustler Magazine v Falwell*: under the first amendment, may a public figure recover damages against a publisher for intentional infliction of emotional distress? Campari Liqueur had run a series of advertisements in which celebrities talked about their 'first times' with Campari. Playing on the double entendre of 'first time', *Hustler Magazine* had published a parody of a Campari Liqueur advertisement in which minister and leader of the Moral Majority, Jerry Falwell, talked about his first time with Campari; the advertisement indicated that Falwell stated his '"first time" was during a drunken incestuous rendezvous with his mother in an outhouse'. The magazine contained two disclaimers stating the advertisement was a parody (*Hustler*, 1988, p. 48).

The Court ruled unanimously in favor of *Hustler Magazine*, denying Falwell's claim for intentional infliction of emotional distress. Rehnquist wrote the majority opinion, joined by Brennan, Marshall, Blackmun, Stevens, O'Connor and Antonin Scalia. White wrote a concurring opinion. Although this was not a case in which the Court applied the content-neutrality jurisprudence in a formulaic way, the presumption against content-based regulations of expression weighed heavily in the Court's reasoning. Rehnquist's opinion justified freedom of expression in terms of the same values that had been used to support the content-neutrality jurisprudence. He wrote that the first amendment promoted a free flow of ideas, including false ideas. The first amendment advanced truth through open competition in the marketplace of ideas. Rehnquist argued for a vision of the first amendment that promoted open and robust debate and referenced *New York Times v Sullivan* for the proposition that public officials were subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks' (*Hustler*, 1988, pp. 50–1, quoting *Sullivan*, 1964, p. 270). Rehnquist extended the actual malice standard of *Sullivan* to suits by public figures or officials for intentional infliction of emotional distress, stating that such plaintiffs could only recover for damages if a false statement was made with either knowledge of falsity or reckless disregard for whether it was true (*Hustler*, 1988, p. 56). Falwell was a public figure and the jury had concluded that the advert parody did not purport to describe actual facts, so the magazine was protected under the actual malice standard. This left Falwell with the claim that the speech was so 'outrageous' that he could recover for damages (*Hustler*, 1988, p. 57). Rehnquist rejected the argument, noting that to rule otherwise would have a chilling effect on political cartoons, which often intended to injure the subject and could be caustic, graphic, distortive and exaggerative. Moreover, whether speech was 'outrageous' or more

extreme than a conventional political cartoon was subjective, and to award damages on the basis of outrageousness would violate the Court's long-standing tradition against awarding damages 'because the speech in question may have an adverse emotional effect on the audience' (*Hustler*, 1988, p. 55). Rehnquist continued his deconstruction of the outrageousness standard by emphasizing key aspects of the content-neutrality regime. The offensiveness of speech to society cannot be a reason for government to censor. Instead, it means that such speech must be afforded constitutional protection: 'For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.' (*Hustler,* 1988, pp. 55–6, quoting *Federal Communications Commission* (FCC) *v Pacifica*, 438 US 726, 745–6, 1978)

The *Hustler Magazine* decision shows a repeated pattern similar to *Claiborne Hardware*. In both cases, the Court was confronted with new legal questions pertaining to torts and the first amendment. The Court used content-neutrality jurisprudence, broadly construed, to shape the framework of analysis in a new area and to justify the protection of freedom of expression. In addition, both decisions were unanimous, despite existing attitudinal differences among the justices.

The John Roberts Court was presented with a similar question in the 2011 case *Snyder v Phelps*. The dispute began when the Westboro Baptist Church, under the leadership of Fred Phelps, picketed the funeral of Marine Lance Corporal Matthew Snyder, who had died while in service in Iraq. The Westboro Baptist Church believed that God hated the United States in part because the US military was tolerant of homosexuality. The church protested at three locations including one on public land that was 1000 feet from the location of the funeral. The protesters displayed signs such as 'God Hates the USA/Thank God for 9/11', 'Thank God for Dead Soldiers', 'God Hates Fags' and 'You're Going to Hell'. Albert Snyder, father of Matthew, successfully sued the church for 'intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy' based on those torts and was awarded over $10 million in damages. The Court ruled 8:1 that the first amendment shielded Phelps and the church from tort liability. Roberts wrote the majority opinion and was joined by Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan. Breyer also wrote a concurring opinion. Samuel Alito was the lone dissenter (*Snyder*, 2011, pp. 1212–14).

In the view of the majority, the church's protest took place in public and was on a matter of public concern. Roberts referenced *New York Times v Sullivan* for the proposition that, under the first amendment, debate on public issues should be 'uninhibited, robust and wide-open' (1964, p. 270, cited in *Snyder*, 2011, p. 1215). The content of the church's expression was protected by the first amendment. The location of the protest was equally

important. Although the Court has ruled in favor of buffer zones to enable access to abortion clinics and has upheld content-neutral laws limiting picketing at individual residences, such a law was not at issue in *Snyder*. (The Court implied that laws prohibiting targeted picketing at funerals would be permissible if they were written in a content-neutral manner.) The chuch's protest took place in a public space, which is traditionally protected under the first amendment. In addition, Roberts noted that the jury had been instructed to find Phelps liable if the speech was 'outrageous'. In light of *Hustler*, such a jury instruction was clearly impermissible (*Snyder*, 2011, pp. 1215–19).

Alito, dissenting, argued that the tort of intentional infliction of emotional distress was quite narrow and did not infringe upon the first amendment. In his view, the speech of the church was a 'vicious verbal assault' that was targeted at Matthew Snyder and his family. The church attacked Matthew Snyder not only due to his military service but also because he was Roman Catholic. Thus, the protests were not merely speech on matters of public concern, and the location of the protests should not have exempted the church from liability (*Snyder*, 2011, pp. 1222, 1226–7).

As in *Hustler*, the Court showed a high level of agreement that bridged the attitudinal divisions on the Court. Although the Court did not reach a unanimous decision, Alito was the only dissenter, and the majority was comprised of three liberals (Democratic appointees Ginsburg, Sotomayor and Kagan), one moderate (Democratic appointee Breyer) and four conservatives (Republican appointees Roberts, Scalia, Kennedy, Thomas). According to the updated Segal-Cover scores, Roberts and Alito, appointees of Republican President George W Bush, were conservative, while Sotomayor and Kagan, who had been appointed by Democratic President Barack Obama, were liberal (Segal, 2012). The majority opinion showed a straightforward application of the content-neutrality principles that had been set out in precedents such as *New York Times v Sullivan* and *Hustler*.

The Court unanimously struck down New York's 'Son of Sam' law (New York Executive Law 632-a of 1977) in the 1991 case *Simon & Schuster*. The law dealt with the income generated from the sales of works written by accused or convicted criminals who described their crimes. The law required that, when a criminal produced such a work, the income was to be turned over to the Crime Victims Board, placed in an escrow account and 'made available to victims of the crime and the criminal's other creditors' (*Simon & Schuster,* 1991, p. 108). Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia and David Souter, while Justices Blackmun and Anthony Kennedy wrote concurring opinions. Blackmun wrote separately to briefly note that the statute was underinclusive (*Simon & Schuster,* 1991, pp. 123–4). Kennedy argued that the application of strict scrutiny was unnecessary when the government censored on the basis of content, as such laws

were categorically unconstitutional under the first amendment (*Simon & Schuster,* 1991, p. 128).

New York's law had been passed shortly after serial killer David Berkowitz, also known as the Son of Sam, had been apprehended, in order to ensure that he did not profit from his crimes (*Simon & Schuster,* 1991, p. 108). The dispute in this case centered on the book *Wiseguy: Life in a Mafia Family*, which told the story of organized crime figure Henry Hill; the book served as the basis for the award-winning film, *Goodfellas* (*Simon & Schuster,* 1991, pp. 111–12, 114, referring to Pileggi, 1985). In her opinion for the majority, Justice O'Connor reasoned that the statute imposed a financial burden based on the content of expression, and that it was presumptively unconstitutional under the first amendment, citing *Mosley,* among other cases (*Simon & Schuster,* 1991, pp. 115–16, citing *Mosley*, 1972, p. 95). As the law was content-based, it could only be justified if it was 'necessary' and 'narrowly drawn' to achieve a compelling government interest (*Simon & Schuster,* 1991, p. 118). Applying this standard of review, O'Connor conceded that the government had 'a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims' (*Simon & Schuster,* 1991, p. 119). The statute, however, was not narrowly tailored. It was overinclusive in two senses. It applied to any work, no matter how tangentially related to a crime, and it applied to anyone who admitted to committing a crime, regardless of whether the state had obtained a conviction. As a result, the law could have been applied to such diverse and noted authors as Augustine, Emma Goldman, Martin Luther King Jr, Thoreau and Malcolm X (*Simon & Schuster,* 1991, pp. 121–2).

Supporting freedom of speech when the viewpoint being expressed is popular is easy. The real challenge to content-neutrality is whether the justices will support it when the viewpoint or content of expression is unpopular, as in cases involving communism or the burning of a flag, or outside of the range of moral values supported by elected officials, as in the case of pornography. It is not a stretch to say that a book written from the perspective of a criminal is not the type of speech that would receive widespread political support, although it might attract commercial interest. O'Connor's opinion showed how the content-neutrality jurisprudential regime requires consistent application of the first amendment. The Court was careful not to set a precedent that, while seemingly inconsequential in terms of the value of the expression at issue in the particular case, would have had broad implications for similar expression or for the first amendment more generally. The unanimous opinions of the Court in *Simon & Schuster, Claiborne Hardware* and *Hustler Magazine* showed the justices' commitment to the content-neutrality jurisprudence and showed how the justifications for the jurisprudential regime that I elaborated in Chapter 3 helped to build support for the regime that overcame

ideological divisions. By the time of *Simon & Schuster* in 1991 the Court had added O'Connor, Scalia and Kennedy, all appointees of Republican President Ronald Reagan, as well as Souter, an appointee of Republican President George H W Bush. Counting President George H W Bush's appointee Clarence Thomas, who had just joined the Court but did not participate in the decision, the Court was comprised of eight appointees of Republican presidents, with White being the only Democratic appointee. The Segal-Cover scores rated nearly all of the justices conservative, with White as a moderate and O'Connor, Kennedy and Souter in the moderate to conservative range (Segal et al., 1995, p. 816). Contrary to the predictions of the attitudinal model, the Court had ruled unanimously in favor of freedom of expression.

Cable, internet and video games

Technological developments can lead the justices to apply an existing jurisprudential regime to a new form of media. In the 1997 case *Reno v ACLU,* the Supreme Court addressed the regulation of indecent material on the internet. The Communications Decency Act of 1996 (CDA) was a federal law that sought to protect minors from such material by making it a crime to knowingly transmit obscene or indecent material to minors, or to send or display patently offensive material to minors. The law contained affirmative defenses for website publishers who tried to restrict minors' access to such material via age or credit card verification (*Reno,* 1997, pp. 859–61).

The Court extended the content-neutrality jurisprudence to the internet, ruling in a 7:2 decision that the CDA violated the first amendment. Justice O'Connor wrote a separate opinion, concurring and dissenting in part, joined by Chief Justice Rehnquist. Justice Stevens wrote the majority opinion, joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer.

Stevens discussed the development and operation of the internet, the presence of sexually explicit material on the internet and the technical challenges of age verification (*Reno,* 1997, pp. 850–7). He addressed the question of whether the CDA was content-based. He rejected the government's claim that the law was properly analyzed as a type of content-neutral zoning regulation. Instead, he found that the law was content-based because it attempted to protect children from patently offensive and indecent expression; the law regulated the communicative impact of expression because it focused on the effect on the audience, which was a sure indication that the law was content-based (*Reno,* 1997, pp. 868–9). Stevens also considered whether some lower level of constitutional protection should apply given the nature of the medium. He rejected the government's comparison to the Court's *FCC v Pacifica* decision that had upheld the FCC ruling that a terrestrial radio station's broadcast of George Carlin's 'Filthy Words' monologue during daytime hours was indecent. Unlike broadcast media, the internet

did not require the government to license scarce broadcast frequencies. There was no tradition of government regulation of the internet, unlike the traditionally less protected broadcast media. In addition, the likelihood that a listener would accidently encounter indecent material was not the same on the internet as it would be with broadcast media; the internet was less invasive compared to changing stations on a television or radio, and it required readers, listeners and viewers to actively seek out material. Moreover, the impact of the CDA on freedom of expression was much more extensive than the FCC ruling in *Pacifica* (*Reno,* 1997, pp. 866–70, citing *Pacifica*).

Stevens found that the CDA was unconstitutionally vague and facially overbroad under the first amendment, and that the government's purpose of protecting children from exposure to harmful material would be better achieved by a less restrictive alternative. The CDA was vague because one section used the term 'patently offensive' while another section used 'indecent'. This would invite confusion among those people trying to ascertain the meaning of the law. Individuals could not be certain that the law would not criminalize the serious discussion of topics such as birth control or homosexuality. The statute was overly broad because it could reach such protected expression. The CDA also lacked any specification of what material would be regarded as patently offensive (*Reno,* 1997, pp. 871–4).

Stevens appeared to accept for the sake of argument that the government had a compelling interest in protecting children from exposure to harmful material, but he noted that the law restricted too much adult speech. He quoted *Bolger v Youngs Drug Products Corp*. (463 US 60, 74–5, 1983): '[T]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox [sandpit].' (*Reno,* 1997, p. 875) The government's interest could be achieved by a more narrowly tailored statute. The government failed to consider less restrictive alternatives such as requiring the tagging of material to enable parental control and making exceptions for work of literary, artistic or scientific value. The CDA did not take into account differences between the commercial and other uses of the internet. The government did not meet its burden to show that the CDA was necessary; there were no government findings on the extent of the problem or the necessity of the CDA (*Reno,* 1997, p. 879). Stevens also dismissed the government's argument that the CDA's affirmative defenses meant that the statute was not burdensome on freedom of expression. Advancing the metaphor that the government should not burn down the house (violate the first amendment) to roast the pig (achieve its compelling interest), Stevens remarked: 'The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.' (*Reno,* 1997, p. 882, citing *Sable*, 1989, p. 127)

In her opinion noting a partial concurrence and partial dissent, Justice O'Connor, joined by Justice Rehnquist, agreed with the Court that the CDA was unconstitutionally overbroad as it applied to adult expression, but disagreed when the only recipients were minors. She analogized the CDA to a zoning ordinance, arguing that it had attempted to create adult zones on the internet. Situations in which the adult sender knew that minors were the only recipients would be outside of the adult zone, so O'Connor wanted to uphold the provisions of the CDA prohibiting the transmission of indecent material or the sending of patently offensively material, but only if the sender knew the recipient was a minor (*Reno,* 1997, pp. 887–95). Using her zoning analogy, she followed much of the Court's overbreadth analysis, but she did not find the CDA overbroad with respect to the speech of minors (*Reno,* 1997, pp. 895–6).

Although *Reno* dealt with a new and radically different form of media, the Court was able to adapt the content-neutrality jurisprudential regime. In addition, the Court showed a high level of agreement with seven justices in the majority and even partial dissenters O'Connor and Rehnquist concurring in the result with respect to some applications of the CDA. Although attitudes played a role in the decision, this case also shows that the jurisprudential regime made a difference, as it provided the framework for the majority's analysis and seven of the justices applied that frame of analysis. The majority coalition crossed partisan lines, as it was made up of five Republican appointees plus Ginsburg and Breyer, the two new appointees of Democratic President Bill Clinton. Ginsburg was rated as moderate to liberal by the Segal-Cover scores, and Breyer was moderate (Segal et al., 1995, p. 816).

When the Court revisited the issue in 2004 with respect to the successor to the CDA, the Child Online Protection Act of 1998 (COPA), the Court again struck down the federal law, but only by a vote of 5:4. In *Ashcroft v ACLU*, Kennedy, joined by Stevens, Souter, Thomas and Ginsburg, affirmed a district court injunction of COPA because the ACLU was likely to prevail on the merits with its claim that COPA violated the first amendment. Kennedy emphasized the burdens of COPA on freedom of expression and the existence of filtering software as a less restrictive alternative. Scalia, who had been a member of the majority in *Reno*, dissented in this case (*Ashcroft*, 2004, pp. 665–8). The difference for him was that COPA restricted its reach to the commercial web, so he saw the COPA regulations as prohibiting only the pandering of commercial pornographic material, a category of expression he found entirely unprotected by the first amendment (*Ashcroft*, 2004, p. 676). Breyer, another member of the *Reno* majority, also dissented. He was joined by Rehnquist and O'Connor. Acting consistently with the content-neutrality jurisprudence, Breyer applied a strict scrutiny framework, but found that there were no less restrictive alternatives to achieve the government's

compelling interest (*Ashcroft*, 2004, p. 677). Breyer did not find the provisions of COPA to be excessively burdensome on expression, and he doubted the viability of filtering software as a less restrictive alternative due to its expense, ineffectiveness and because it was not a legislative alternative (*Ashcroft*, 2004, pp. 678–89).

Although the 5:4 vote indicated more attitudinal differences than in *Reno*, the dissenters comprised a unique coalition of conservatives, Scalia and Rehnquist, and moderates, O'Connor and Breyer; Breyer was the only Democratic appointee. The majority was comprised of Ginsburg, a Democratic appointee, and four Republican appointees. By this time, Stevens and Souter were considered to be liberal to moderate on first amendment issues, while Thomas was usually a conservative ally of Scalia and Rehnquist, and Kennedy was often in the middle with O'Connor. The attitudinal voting patterns were somewhat mixed as the justices were not neatly arrayed from most liberal to most conservative. The content-neutrality jurisprudential regime mattered to the justices, as seen by the fact that eight of the nine justices agreed to apply strict scrutiny to a content-based regulation of expression, although they disagreed as to whether COPA was likely to pass that level of scrutiny.

This same group of justices voted in a similar manner in the 2000 case *US v Playboy*. The same five-justice majority struck down a federal statute which had attempted to regulate children's exposure to signal bleed of indecent cable television programming. Signal bleed was a result of primitive cable television technology that only partially scrambled the video and audio signals of scrambled channels. Federal law required sexually explicit channels to be either fully blocked or shown only from the hours of 10 pm to 6 am (*Playboy*, 2000, p. 806). Kennedy found the law to be content-based and applied strict scrutiny (*Playboy*, 2000, pp. 811–13). He struck down the law because federal law already offered a less restrictive alternative. Upon the request of a cable subscriber, a cable provider was required to fully block any offending channels. The government failed to carry its burden to prove that the time-blocking method would be more effective and less restrictive (*Playboy*, 2000, pp. 823–7). Scalia dissented based on his theory that pandering was not protected expression, which was the same theory he later followed in *Ashcroft*. In *Playboy* he also agreed with Breyer that the statute could pass strict scrutiny. In *Ashcroft*, however, Scalia argued that the Court should not apply strict scrutiny (*Playboy*, 2000, pp. 831–2). Breyer dissented, joined by Rehnquist and O'Connor, and, as he later did in *Ashcroft*, applied the same standard of the review as the majority but found that the statute passed strict scrutiny (*Playboy*, 2000, pp. 836, 847). The overall decision-making pattern in *Playboy* was nearly identical to the pattern in *Ashcroft*, with the same mixed-up coalitions of liberals, moderates and conservatives on both sides of the case. In *Playboy*, all nine justices agreed that the law should be analyzed under the

strict scrutiny standard, which showed that the justices were at least following the jurisprudential regime in the sense that they were asking the same analytic questions, even if they were reaching different conclusions.

Video games were certainly not new technology in 2011, but they were an evolving technology, and the Supreme Court had not previously addressed whether they were protected by the first amendment. In *Brown v Entertainment Merchants Association*, the video game industry challenged a California law which imposed criminal penalties on the sale of what the state called 'violent video games' to minors. California also required such games to be labeled '18'. The Court struck down the law by a vote of 7:2. Scalia wrote the majority opinion and was joined by Kennedy, Ginsburg, Sotomayor and Kagan. Alito wrote a concurring opinion and was joined by Roberts. Thomas and Breyer each wrote dissenting opinions (*Entertainment Merchants Association*, 2011, pp. 2732–3).

According to the majority opinion of Scalia, the case involved a straightforward application of the content-neutrality jurisprudence. The state was attempting to regulate video games on the basis of their content, so strict scrutiny applied. The content of the video games was alleged to be harmful to minors. In addition, California singled out video games for stricter regulation than it applied to books, movies or television (*Entertainment Merchants Association*, 2011, pp. 2738, 2740). Applying strict scrutiny, Scalia argued that the state lacked a compelling interest. The psychological studies the state had offered to support its argument that video games caused harm to minors showed only correlation, not causation. In addition, the correlative effects were 'minuscule' and they were limited to children 'feeling more aggressive' in a laboratory setting. These feeling were substantiated by measures such as whether children filled in the blank letter in 'explo_e' with a 'd' rather than an 'r' (*Entertainment Merchants Association*, 2011, p. 2739).

California was also unable to show why video games needed to be treated differently from other media. The psychological studies could not distinguish any alleged effects of video games from effects of other media. California argued that video games were more harmful because they were 'interactive'. Scalia, drawing on an early, influential opinion on the topic by Judge Richard Posner (*American Amusement Machine Association v Kendrick*, 244 F. 3d 572, 577, 2001) pointed out that literature is also interactive. Scalia wrote: 'Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones.' Scalia concluded that California's law was underinclusive, so it did not serve to achieve the compelling government interest in preventing harm to minors that California had asserted. The law was also underinclusive because it exempted games purchased by parents, aunts or uncles (*Entertainment Merchants Association*, 2011, pp. 2737–40).

Scalia also rejected California's argument that the law would advance a compelling interest in reinforcing parental authority to decide what games their children should play. The Entertainment Software Review Board (ESRB) had already established a detailed ratings system with a wide range of age categories and content descriptors. The ESRB ratings combined with retailers' voluntary enforcement of those ratings served as to advance parents' interests in making informed decisions about what their children should play without burdening the first amendment. The California law was overinclusive and not narrowly tailored because it paternalistically assumed that all parents did not want their children under the age of 18 to purchase what the state called 'violent video games' (*Entertainment Merchants Association*, 2011, pp. 2740–1).

Alito wrote a concurring opinion, joined by Roberts, in which he agreed that the California law was unconstitutional, but for a different reason. He argued that the law was impermissibly vague under the first amendment and the due process clause of the fourteenth amendment (*Entertainment Merchants Association*, 2011, p. 2743). He raised some questions about the majority opinion of Scalia. He questioned whether Scalia was right to dismiss California's argument that video games are more harmful because they are interactive. To support his argument, he described some of the most extreme depictions of violent and offensive video game content. He raised the possibility that the majority's vigorous defense of the first amendment as applied to video games could foreclose the ability of elected officials to address social harm in an area where technology is continuing to develop (*Entertainment Merchants Association*, 2011, pp. 2742, 2748–51).

Thomas's dissenting opinion failed to attract the support of any other justices. He offered a lengthy analysis of the historical understanding of parents' power over children. He concluded that framers of the first amendment would not have considered that it protected the right to speak to children (*Entertainment Merchants Association*, 2011, pp. 2751–61). Scalia easily refuted this argument by pointing out that there is no tradition of prohibiting speech to minors without the prior consent of minors; in addition, the California law enhanced state authority, not parental authority (*Entertainment Merchants Association*, 2011, p. 2736).

Justice Breyer's dissenting opinion would have found that the law was constitutional. In his view, it was not unconstitutionally vague. He agreed with the majority that the law was content-based and the correct standard of review was strict scrutiny. In his view, however, the law passed strict scrutiny, in a similar way to how he would have upheld COPA in *Ashcroft*. He found the state's interests to be compelling. The law was not particularly burdensome on speech because adults could still buy video games for

children, and children were allowed to play regulated games. There were no less restrictive alternatives, as industry self-regulation was not equally effective (*Entertainment Merchants Association*, 2011, pp. 2765–71).

There is one other aspect of the case that merits a separate analysis, because California made an argument that threatened to undermine the Court's content-neutrality jurisprudence. Justice Scalia spent a considerable portion of his opinion addressing California's argument that 'violent video games' were not protected by the first amendment. California attempted to draw an analogy to material that was obscene to minors, following *Ginsburg v New York* (390 US 629, 1968). Video games were considered to be 'violent' if they depicted violence against the image of a human being and met a three-part test. California regulated games which appealed to 'the deviant or morbid interest of minors', were patently offensive and lacked serious value for minors (*Entertainment Merchants Association*, 2011, pp. 2732–3, citing Cal. Civ. Code Ann. §§ 1746). In California's view, 'violent video games' constituted a category of speech that was completely unprotected by the first amendment.

In effect, California was trying to avoid the strict scrutiny that normally applies to content-based regulations by carving out a content-based exception to the first amendment for 'violent video game' expression directed to minors. Scalia pointed out three main problems with this approach. First, the analogy of violence in video games to obscenity was inapposite. Obscene speech is unprotected for adults according to *Miller* v *California* (413 US 15, 1973), so of course New York could regulate material that was obscene to minors, as the Court permitted in *Ginsburg*. Second, there was no such tradition of the first amendment permitting government regulation of 'violent' expression for adults or minors. In fact, minors have long been exposed to depictions of violence through books such as *Grimm's Fairy Tales*, Dante's *Inferno* or Homer's *The Odyssey*. Throughout US history, social reformers have identified dime novels, movies, comic books, television and rock music as targets for censorship due to their alleged harm to minors (*Entertainment Merchants Association*, 2011, pp. 2736–7).

Third, in 2010, the Court had just rejected the approach of carving out new content-based exceptions to the first amendment in *US v Stevens*. *Stevens* involved a facial challenge to a federal law prohibiting depictions of animal cruelty. The statute was written to target animal fighting videos or animal 'crush' videos, sexual fetish videos in which helpless animals are crushed, sometimes by women in high heels. However, the statute was overbroad because it went so far as to criminalize the sale or possession of depictions of animals being wounded or killed; this meant the statute could criminalize videos depicting legal hunting. The Court struck down the law by a vote of 8:1, with Roberts writing the majority opinion and only Alito dissenting.

The government had argued that depictions of animal cruelty should be exempted from first amendment protection as a category. According to the government, if the social costs of a category of expression exceeded its value, it should be unprotected. Roberts called this approach 'startling and dangerous'. He noted that the first amendment did not subject categories of expression to ad hoc balancing but instead reflected a judgment of the American people that the benefits of the first amendment's 'restrictions on the Government outweigh its costs' (*Stevens*, 2010, p. 1585). Instead, the categorical exceptions to first amendment protection include categories of speech such as defamation, incitement, obscenity and fraud and are traditional, historical and well-defined (*Stevens*, 2010, p. 1584).

Scalia's majority opinion in *Entertainment Merchants Association* indicated that *Stevens* controlled the Court's response to California's argument that 'violent video games' sold to minors constituted a categorical exception to the first amendment. California could not use the *Ginsburg* precedent because violent expression is different from obscenity. The state, Scalia wrote, does not possess 'a free-floating power to restrict the ideas to which children may be exposed' (*Entertainment Merchants Association*, 2011, pp. 2734–6).

The opinion coalitions in *Entertainment Merchants Association* were politically mixed. The majority was comprised of conservative Scalia, moderate conservative Kennedy and liberals Ginsburg, Sotomayor and Kagan. Conservatives Roberts and Alito also voted to strike down the law, although their reasoning was different. Thomas, a conservative, wrote one dissenting opinion. Breyer, a moderate, wrote the other. Six of the justices considered the regulation to be content-based and applied strict scrutiny in the case, although Breyer came to a different conclusion from the majority. Concurring justices Alito and Roberts did not foreclose the possibility that a similar law could be struck down under strict scrutiny; instead they chose to strike down the law on the narrower ground of vagueness.

The justices' treatment of California's argument that the expression at issue should be wholly unprotected did show a substantial level of commitment of the Roberts Court to the principle of content-neutrality. None of the justices accepted California's rationale. Thomas argued that the expression at issue was wholly unprotected, although that was based on his historical understanding of the right of adults to speak to children, not the ad hoc balancing advanced by California. In *Stevens*, the Court also showed a solid commitment to content-neutrality; the Court strongly opposed creating new categorical exceptions to first amendment protection. Only Alito dissented in that case, and the majority was comprised of three liberals (Stevens, Ginsburg and Sotomayor), one moderate (Breyer) and four conservatives (Roberts, Scalia, Thomas and Kennedy).

Lies and honors

In the 2012 case *US v Alvarez* (132 S. Ct 2537), the Court struck down the Stolen Valor Act of 2005, which had made it a federal crime to lie about the receipt of military honors. Kennedy wrote the plurality opinion and was joined by Roberts, Ginsburg and Sotomayor. Breyer and Kagan concurred, and Scalia, Thomas and Alito dissented. Kennedy reasoned that the statute was content-based. The government found it hard to counter this point but argued that false expression was unprotected under the first amendment. Kennedy engaged in an extensive discussion of the extent to which lies were protected. Although he noted some examples of false expression such as libel and fraudulent representations that were not protected, he observed that false speech did not constitute a general category of less protected or unprotected expression. In light of the recent *Entertainment Merchants Association* and *Stevens* decisions, he emphasized that the Court did not lightly go about creating new categories of expression exempt from the protection of the first amendment, and it would not do so in this case (*Alvarez*, 2012, pp. 2537–47).

Moreover, the way the Act was written showed why the Court was skeptical of content-based laws. In particular, there were no limits on the setting in which the lie took place or whether the lie was made for material gain. It would apply equally regardless of time, place or audience, 'whether shouted from the rooftops or made with a barely audible whisper' (*Alvarez*, 2012, p. 2547).

Applying strict scrutiny, Kennedy agreed with the federal government that it had a compelling interest in preserving the integrity of the military honors system, but did not agree that the Stolen Valor Act was necessary to achieve that interest. He rejected the argument that false claims would dilute public perception of military honors. The remedy for false claims was truthful speech. Phony claims could be exposed. A less restrictive alternative to a new federal criminal law would be to make publicly available via the internet a searchable database of medal winners; in fact, such a database of Congressional Medal of Honor winners already exists (*Alvarez*, 2012, pp. 2549–51).

Breyer and Kagan concurred because they agreed that the law restricted more speech than was necessary to achieve the government interest. In his concurring opinion, Breyer refused to address whether the law was content-based. Instead, he decided to eschew a categorical approach and chose to apply intermediate scrutiny because he wanted some flexibility to balance free expression rights against some of the valid reasons government has for wanting to restrict false speech (*Alvarez*, 2012, pp. 2551–6).

Alito wrote the dissenting opinion. His central argument was that lies about military honors have no intrinsic value and are therefore unprotected by the first amendment. He argued that this was consistent with the Court's

treatment of other false expression. In addition, the Act was limited in several respects. It was viewpoint-neutral, applied only to verifiable factual claims, and the government would have to prove that the speaker knew the claim was false. In addition, the law was not substantially overbroad. The claims of Kennedy about not wanting to set a precedent that could allow Congress to regulate other types of lies were inapposite as Congress recognized that preservation of the military honors system was a unique concern (*Alvarez*, 2012, pp. 2556–65).

Alvarez was a case that pushed the Court to define the limits of the content-neutrality jurisprudence. The facts of the case were not a neat fit for precedent, so Kennedy, Breyer and Alito all wrote extensively about the extent to which false expression is or is not protected. The plurality opinion was the only one which considered whether the law was content-based, and found it to be so. However, five justices refused to even evaluate whether the law was content-based.

Attitudes played some role in the decision, but the pattern was somewhat complicated. The three most conservative justices, Scalia, Thomas and Alito, dissented, which shows some of the attitudinal divisions on the Court. The plurality was mixed, with moderate conservative Kennedy joined by conservative Roberts and liberals Ginsburg and Sotomayor. The concurring justices were moderate Breyer and liberal Kagan.

Corporate electoral expression

The Court's content-neutrality jurisprudence is a framework, not a straightjacket, which helps to explain why it has endured. Even when applying the same jurisprudence to the same issue area, different coalitions of justices can produce different conclusions. This pattern was recently illustrated in the Court's 2010 decision *Citizens United v Federal Election Commission*. Citizens United was a non-profit group that challenged the provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibiting electioneering communication by a corporation during the 30-day period prior to a primary election and the 60-day period prior to a general election. Citizens United wanted to make its film *Hillary: The Movie* available via on-demand cable televison and also wanted to run advertisements for the film during the 30-day period. There were five written opinions in the case totaling 107 pages. Here, my focus is on the decision of the majority to overturn two precedents while staying within the framework of the content-neutrality jurisprudence. Kennedy, Thomas, Scalia, Roberts and Alito agreed that the first amendment protected the rights of corporations to make independent campaign expenditures with money from their corporate treasuries; this section of Kennedy's opinion overturned *Austin v Michigan Chamber of Commerce* (494 US 652, 1990). Stevens, Ginsburg, Breyer and Sotomayor dissented from this portion

of Kennedy's opinion. All of the justices except for Thomas voted to uphold the disclaimer and disclosure requirements of the BCRA.

Austin had established that corporations were not allowed to engage in independent political expenditures. Corporations had the ability to amass wealth that was not necessarily correlated with public support for the views of the corporations. This accumulated wealth posed a danger of corruption and had the ability to distort the political marketplace of ideas, so the government had a compelling interest to prohibit corporate independent expenditures. Corporations were required to spend campaign money via Political Action Committees (PACs) (*Austin*, 1990, pp. 659–60). *Austin* was decided by a vote of 6:3. The majority was made up of an ideologically diverse coalition. Liberal Marshall wrote the opinion for the Supreme Court. He was joined by conservative Rehnquist, liberals Brennan, Blackmun and Stevens, and moderate White. The dissenters were moderate conservatives O'Connor and Kennedy and conservative Scalia.

In the view of the *Citizens United* majority, *Austin* needed to be overturned because the rationale was flawed. Kennedy viewed the BCRA as content-based discrimination against political speech that took place in corporate form. In short, the government was discriminating against corporate speakers. Applying strict scrutiny, Kennedy found the electioneering communication of the BCRA to be unconstitutional because the government lacked a compelling interest (*Citizens United*, 2010, pp. 898–9). The Court argued that the anti-distortion rationale of *Austin* made little sense as any money spent on politics must have been accumulated in the the economic marketplace. The amount of wealth accumulated was of no consequence, as the law applied equally to small non-profit corporations and large for-profit corporations. The danger of the rationale was that the government could use it to prevent corporations from publishing books about politics and prohibit media companies from expressing political views. In addition, independent expenditures did not pose a risk of corruption (*Citizens United*, 2010, pp. 905–9).

In his partial dissent, Stevens noted a long tradition of state and federal regulation of campaign-related speech by corporations that was buttressed by numerous Supreme Court precedents. In his view, the government's interests in regulating independent corporate expenditures were more than sufficient. In addition, the majority oversimplified the content-neutrality jurisprudence in order to read the BCRA as discriminating on the basis of corporate identity. Under the BCRA, corporations were still permitted to engage in political speech via PACs, so the restriction of the electioneering communication provision on their first amendment rights was not burdensome (*Citizens United*, 2010, pp. 942–79).

Austin and *Citizens United* presented similar questions. The justices on both sides agreed that the precedent was relevant, but the majority chose

to overturn it. What explains the difference? The decision in *Citizens United* showed clear divisions along attitudinal lines. Moderate conservative Kennedy was joined by conservatives Scalia, Thomas, Roberts and Alito to overturn the *Austin* precedent. The four most liberal justices, Stevens, Ginsburg, Breyer and Sotomayor, would not have overturned *Austin*. However, it is worth noting that in one respect, the outcome is exactly the opposite of what the attitudinal model assumes for a freedom of expression case, as liberals voted to support the government and conservatives voted in favor of freedom of expression.

When the government regulates protected expression in a content-based manner, the Court normally applies strict scrutiny and strikes down the law, as cases like *Entertainment Merchants Association* and *Citizens United* demonstrate. There are instances, however, in which the Court upholds content-based regulations of expression.

Upholding content-based regulations

Although my quantitative analysis indicates the justices were likely to strike down content-based regulations in the period after the creation of the content-neutrality regime, this was not always the case. When the Supreme Court upheld content-based regulations of expression during this period, it sometimes did so by overlooking content-based treatment of expression. For example, the Court acted based on national security concerns in *Snepp v US* (444 US 507, 1980), a case involving a book written by a former Central Intelligence Agency (CIA) agent, and in the 2010 decision *Holder v Humanitarian Law Project* (130 S. Ct 2705), which involved the regulation of material support to terrorist organizations. In *National Endowment for the Arts* (NEA) *v Finley* (524 US 569, 1987), a majority of the Court was willing to permit content-based distinctions in funding for the arts based on a judgment that the burdens imposed on freedom of expression were slight. In the 1994 case *Turner Broadcasting System v FCC* (512 US 622), the Court held that the provisions of federal law requiring cable television operators to carry local broadcast stations were content-neutral, despite the strong dissent of four justices who argued that the regulations were clearly content-based. At other times, the Court recognized laws as content-based but found that the government was able to justify its regulations nonetheless. For example, in *Buckley v Valeo*, the Court found that at least one important part of a content-based law actually passed the equivalent of strict scrutiny (424 US 1, 1976).

Campaign finance

Buckley, decided in 1976, dealt with the Federal Election Campaign Act of 1971 (FECA). The Court upheld limits on campaign contributions but struck down

limits on expenditures by individuals, candidates and campaigns. *Buckley* was a complex decision that dealt with many different provisions of FECA, but for my purposes here, I will focus mainly on the limits on an individual's contributions to a candidate's campaign. Six of the eight justices (Brennan, Stewart, White, Marshall, Powell and Rehnquist) agreed that the federal limits on contributions were constitutional, while Burger and Blackmun would have found them unconstitutional. The *per curiam* opinion rejected a characterization of contribution and expenditure limits as content-neutral regulations of conduct or content-neutral time, place and manner regulations. Instead, the Court found that FECA's contribution and expenditure limits directly limited political expression and association, and were based on the assumption that the expression itself was harmful (*Buckley*, 1976, pp. 16–18).

Although the Court did not apply strict scrutiny in a formulaic manner, it noted that it was applying a 'rigorous standard of review' to the limitations on contributions (*Buckley*, 1976, p. 29). It found that the 'weighty interest' of preventing the 'actuality and appearance of corruption resulting from large individual financial contributions' was 'constitutionally sufficient' (*Buckley*, 1976, pp. 26–7). In other words, this interest looked much like what later Courts would label a compelling interest, and the Court also found that the interest was achieved using the least restrictive means. The Court reasoned that the $1000 limitation on contribution 'focuses precisely' on the problem of large contributions, as such contributions posed the greatest risk of real or perceived corruption. By allowing smaller contributions, FECA did not burden 'the potential for robust and effective' political discussion, and the limitations were not overbroad. There were no less restrictive alternatives because disclosure laws were only a partial solution and bribery laws only targeted the most extreme forms of corruption (*Buckley*, 1976, pp. 27–31).

The *per curiam* opinion held that the limitations on campaign expenditures by individuals, candidates or campaigns burdened too much expression and did not directly advance the government interest (*Buckley*, 1976, pp. 39–57). In their partial dissents, Burger and Blackmun argued that the majority was unable to clearly distinguish contributions from expenditures, so the limitations on contributions were also unconstitutional. Both contributions and expenditures contain elements of expression, and contributions to campaigns enable campaign expenditures (*Buckley*, 1976, pp. 241–6, 290).

The voting pattern on contributions limits showed some attitudinal divisions on the Court, with Nixon appointees Burger and Blackmun dissenting. However, conservatives Burger and Blackmun dissented in favor of freedom of expression, arguing that the contribution limits should also have been struck down. The majority was made up of a mixed coalition of Democratic appointees White and Marshall, and Republican appointees Brennan, Stewart, Powell and Rehnquist. According to the Segal-Cover scores, conservatives

Burger and Blackmun split from their conservative brethren in the majority, Powell and Rehnquist, who were joined in the majority coalition by liberals Marshall, Brennan and Stewart and moderate White. Later campaign finance cases such as *McConnell v Federal Election Commission* (540 US 93, 2003), which upheld restrictions on soft money contributions, produced results contrary to what the attitudinal model would predict for a freedom of expression case. In *McConnell*, the four most conservative justices (Rehnquist, Scalia, Kennedy, and Thomas) dissented in favor of freedom of expression while moderate O'Connor joined with the four most liberal justices (Stevens, Souter, Ginsburg and Breyer) to uphold the government regulations. (Here I use the terms most liberal and most conservative based on their typical voting pattern relative to each other in free expression cases at the time, not Segal-Cover scores, which estimated Stevens and Souter to be more conservative than they usually voted.) By contrast to cases like *McConnell* and *Citizens United*, *Buckley* showed a more attitudinally diverse coalition in the majority.

The jurisprudential regime certainly mattered to all of the justices, despite their differences as to how it applied. None of the justices argued that the contribution limits were content-neutral; the justices recognized that the law directly limited expression. They all applied a very rigorous standard of review. The main disagreement with respect to contribution limits was whether they were actually the least restrictive means of achieving the government interest. In *Buckley*, the Court upheld portions of the law based on the government interest in preventing corruption. In other cases, the Court was persuaded that national security concerns justified restrictions on freedom of expression.

National security

Snepp v US, decided in 1980, involved a dispute between former CIA employee Frank Snepp III and the CIA. The Supreme Court denied Snepp's first amendment challenge and affirmed the authority of the judiciary to impose a constructive trust on the profits generated from Snepp's book, as Snepp had failed to submit his book for prepublication review by the CIA in order to avoid disclosure of classified information. This clearance was required by his signed employment agreement. The *per curiam* opinion of the Court essentially ignored the first amendment issue. The only attention it received was in a footnote in which the Court argued that the employment agreement was a reasonable means of advancing the government's 'compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service' (*Snepp v US,* 1980, p. 509, fn. 3).

Stevens wrote a dissenting opinion, joined by Brennan and Marshall. Stevens pointed out that, although Snepp had not submitted his book for

review, the government had conceded that it contained no classified information (*Snepp v US,* 1980, p. 516). Stevens applied a balancing test that would 'preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information' (*Snepp v US,* 1980, p. 521). Stevens found the imposition of a constructive trust on profits to be unnecessary to preserve the government's interests as Snepp was not publishing any classified information. Even if the CIA had reviewed the book, the book would be no different. To the extent that the government asserted an interest in censoring information that was not classified but would be harmful to national security, such censorship would be a 'wide-ranging prior restraint' incompatible with the first amendment (*Snepp v US,* 1980, p. 522). Stevens noted: '[T]he Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government.' (*Snepp v US,* 1980, p. 526)

Snepp presented a new question to the Court, but the *per curiam* opinion did not apply the content-neutrality jurisprudence. The six justices making up the majority were Burger, Stewart, White, Blackmun, Powell and Rehnquist, with moderate White being the only Democratic appointee. Stevens, along with his frequent liberal allies Brennan and Marshall, recognized that the imposition of a constructive trust for publication of unclassified information did constitute a direct prior restraint that could be used to prevent the publication of information that the government deemed harmful. In that sense his opinion was consistent with two of the main justifications of the content-neutrality jurisprudence: the need for self-government and free and open debate. Given the government interest in national security and the Court's unwillingness to give much attention to the first amendment argument, this case looks more like the pre-regime, early Cold War era decisions which had overlooked the rights of alleged communists based on national security concerns than a post-regime decision. The attitudinal pattern is somewhat complicated by the presence of Stewart and Blackmun in the majority. Stewart was rated as liberal by the Segal-Cover scores. Although Blackmun was rated as conservative, he often supported freedom of expression (Segal et al., 1995, p. 816). It is possible that strategic concerns also influenced the majority, as the justices deferred to the federal government out of respect for national security concerns.

A majority of the Roberts Court also showed a willingness to defer to the federal government in a 2010 case involving national security issues, *Holder v Humanitarian Law Project*. The Humanitarian Law Project challenged the federal material-support statute, which prohibited the knowing provision of 'material support or resources' to a foreign terrorist organization (*Holder*, 2010, pp. 2707, 2712, citing 18 USC § 2339B(a)(1)). The Humanitarian Law Project, along with a physician and other non-profit groups, wanted to provide

support to the Kurdish Workers' Party and/or the Liberation Tigers of Tamil Eelam. In 1997 the Secretary of State had drafted a list of 30 terrorist organizations; these two groups were on the list. The Humanitarian Law Project, a human rights organization, claimed that it merely wanted to provide training to these groups to use international law to peacefully achieve their goals and to engage in political advocacy (*Holder*, 2010, pp. 2713–14, 2731–2).

Chief Justice Roberts wrote the opinion for the majority coalition of six justices. He was joined by Stevens, Scalia, Kennedy, Thomas and Alito. Roberts first rejected the Humanitarian Law Project's argument that the material-support statute should be interpreted to require the government to prove any offending parting intended to further illegal terrorist activities. Roberts responded that the statute plainly prohibited the knowing provision of material support to a group designated as a terrorist organization; as long as the donor knew the group was a terrorist organization, the question of whether the donation or support was intended to advance terrorism was irrelevant (*Holder*, 2010, pp. 2717–18). After rejecting a fifth amendment vagueness challenge, Roberts proceeded to the first amendment issue.

Although he ended up issuing a ruling that was favorable to the government overall, Roberts rejected the government's argument that the case should be analyzed according to the *O'Brien* intermediate scrutiny standard. The government had argued that the material-support statute regulated conduct and that any effects on expression were merely incidental. Roberts recognized that the statute was content-based. He argued that the material-support statute was more like the statutes challenged in *Cohen v California* (403 US 15, 1971) and *Texas v Johnson*, as the government was claiming that it was regulating conduct but was actually regulating expression. Roberts stated: '[A]s applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.' (*Holder*, 2010, p. 2724) Accordingly, Roberts declared that the Court needed to apply a more stringent standard of review than intermediate scrutiny.

The parties did not dispute the importance of the government interest in combating terrorism, but they did debate whether the material-support statute was necessary to the achievement of that interest. The Humanitarian Law Group argued that it was not necessary for the government to regulate its speech or association, as it was only providing support for the legitimate activities of the two designated terrorist organizations. The Court rejected this argument for several reasons. Congress and the State Department found that any material support to a designated terrorist organization helps to advance that organization. Money can be used for multiple purposes and terrorist organizations do not maintain financial firewalls between humanitarian and terrorist functions. Any type of material support for a terrorist group can harm the nations' diplomatic relations with allies, which can serve

to undermine the fight against terrorism. In addition, Congress took two steps to minimize the impact of the law on freedom of expression. Congress regulated only material support to designated foreign terrorist organizations and did not regulate independent advocacy on behalf of the organizations or their causes (*Holder*, 2010, pp. 2727–30).

Justice Breyer wrote a dissenting opinion and was joined by Justices Ginsburg and Sotomayor. The dissenters, like the majority, did not find the law to be unconstitutionally vague. Breyer argued that the expression of the Humanitarian Law Group was core political speech, and the government had failed to show that its interpretation of the statute was necessary to achieve the government's compelling interest. In Breyer's view, the coordination that the government was prohibiting was actually protected under the first amendment as freedom of association. He rejected the argument of the majority that any type of coordination could advance terrorism, noting that teaching the terrorist groups how to petition the United Nations for political change could not actually be redirected toward terrorism in the same way that money or other material support could. Breyer offered several responses to the government's argument that coordinated speech could help terrorist groups to gain legitimacy. First, that argument would apply equally well to regulations of independent speech, which Congress had expressly chosen not to regulate. Breyer's other responses drew on the Court's reform of the jurisprudence dealing with the speech and membership activities of alleged communists. *Brandenburg v Ohio* protects even abstract advocacy of illegal action, so long as the individual does not engage in incitement of imminent illegal action that is likely to occur. Merely associating with a designated terrorist organization and engaging in coordinated advocacy of peaceful change constitutes activity protected by the first amendment. Breyer then argued that the statute could be saved from infringing upon freedom of expression and association via statutory interpretation. In his view, the government should be required to prove that 'defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims' (*Holder*, 2010, pp. 2731–40).

The voting pattern in *Holder* provides fairly strong support for the attitudinal model. Roberts, supporting the government, was joined by fellow conservatives Scalia, Thomas and Alito and moderate conservative Kennedy. All were Republican appointees, as was Stevens, the other member of the majority. However, Stevens was certainly commonly regarded as one of the more liberal justices on the Court at this time, which somewhat complicates the attitudinal explanation. The dissenting coalition was comprised of Democratic appointees Breyer, Ginsburg and Sotomayor.

Although, upon first glance, this may appear to be another case in which a majority of the Court overlooks first amendment rights in the interest of

national security, *Holder* is a considerably closer legal question with stronger arguments for the government than were presented in *Snepp*. The majority certainly did show deference to the government in both cases, but in *Snepp*, the majority almost completely disregarded first amendment concerns while in *Holder*, the Court strictly scrutinized the law and make a plausible argument why the law was permissible under the first amendment.

Cable operators must carry local broadcasters

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act, which required cable system operators to carry local broadcast stations. *Turner Broadcasting System v FCC* involved a first amendment challenge to this law. In the 1994 *Turner* decision, a narrow majority of the Supreme Court determined that the must-carry provisions were content-neutral and should be judged according to intermediate scrutiny. The Court vacated the summary judgment in favor of the government and remanded the case for further consideration. In 1997, the case returned to the Court and it upheld the must-carry provisions.

The portion of Kennedy's opinion holding the provisions to be content-neutral was joined by Rehnquist, Blackmun, Stevens and Souter. Kennedy reasoned that the must-carry rules applied across the board and did nothing to regulate or alter the programming content of the cable operators. The distinction between broadcasters and cable operators was not based on the content of their messages but on the manner in which their messages were transmitted. In passing the law, Congress was not trying to favor one type of speaker over another. Rather, Congress was attempting to ensure the survival of the local broadcast media. If cable operators did not carry local broadcasters, local broadcasters could disappear, which would deny access to free televison for viewers who were only able to view local broadcast stations (*Turner*, 1994, pp. 644–7).

O'Connor dissented from this portion of Kennedy's opinion, and she was joined by Scalia, Thomas and Ginsburg. In the dissenters' view, the must-carry provisions were content-based because forcing the cable operators to carry broadcast stations was analogous to forcing content selection upon a bookstore, movie theater or publisher. Given limited bandwith, reserving space for local broadcasters meant that cable operators could not carry other channels. Congressional findings indicated that Congress had acted on content-based concerns such a preserving a diversity of programming and making available valuable local news, public affairs and sports programming (*Turner*, 1994, pp. 675–6). Kennedy responded by saying that just because Congress recognized the value of local broadcasters did not mean that Congress was showing a preference for these broadcasters (*Turner*, 1994, p. 648). O'Connor, however, pointed out that Congress was still acting based on content.

Looking at the case from a jurisprudential perspective, Kennedy's opinion that the rules were content-neutral is quite a stretch. Preserving the viability of the broadcast media, which would be a means of promoting freedom of expression, is certainly a weighty government interest. It would have been more straightforward for Kennedy to acknowledge that the rules were content-based, but then attempt to justify them under strict scrutiny by arguing that they were the least restrictive means of achieving the government's compelling interest in promoting freedom of expression and preserving the broadcast media. That would not have changed the political dynamics of the voting in the case, however, as the dissenters did not think that the provisions could pass strict scrutiny or intermediate scrutiny.

The political coalitions in the case were quite mixed, with moderate conservative Kennedy joined in the majority by conservative Rehnquist and three Republican appointees who at this time were among the most liberal justices on the Court, Blackmun, Stevens and Souter. The dissenters were politically diverse as well, with moderate conservative O'Connor joined by the Court's two most conservative members, Scalia and Thomas, along with liberal Ginsburg.

Arts funding

The 1998 case *National Endowment for the Arts v Finley* was another case in which the majority did not perceive much of a burden on freedom of expression. It involved a congressional amendment to an NEA funding reauthorization bill. The amendment had resulted from a political controversy over NEA funding of a display of Robert Mapplethorpe photography, which included homoerotic images, and Andres Serrano's 'Piss Christ', which was a photograph of a crucifix in urine. The amendment required grants to be evaluated according to artistic excellence and merit, 'taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public' (*Finley*, 1987, p. 572). Karen Finley and three other performance artists, who had also applied for grants before the law was amended, challenged the amendment on first and fifth amendment grounds. The Court ruled that the amendment did not violate either the first or fifth amendment. O'Connor wrote the majority opinion, joined by Rehnquist, Stevens, Kennedy and Breyer. Ginsburg joined all but one part of O'Connor's opinion. Scalia wrote a concurring opinion, joined by Thomas, while Souter dissented.

With respect to whether the law was content-based, O'Connor briefly noted that content-based distinctions were inherent in arts funding (*Finley*, 1987, p. 585). In her view, the more important concern was whether the law constituted a form of viewpoint discrimination. Through a rather loose interpretation of the law, she concluded that it did not. She argued that the

criteria were mere considerations but not strictly binding requirements, and they were open to a variety of interpretations, helping to ensure that no viewpoints would be singled out for exclusion. She also did not reject the NEA's argument that it had implemented the requirements by establishing grant funding panels comprised of diverse personnel who would take into account these advisory considerations (*Finley*, 1987, pp. 581–3). O'Connor also pointed out that there was no evidence that any of the performance artists had been denied funding because of their particular viewpoints (*Finley*, 1987, p. 586).

O'Connor found the law to be permissible under the first amendment because it did not directly regulate speech or impose a criminal penalty. (Ginsburg did not join O'Connor on this particular point.) The only effect of the law was that the NEA would fund some projects rather than others (*Finley*, 1987, pp. 587–8). In addition, O'Connor did not find the law vague under either the first or fifth amendment, as the government was acting as patron, not sovereign, and the funding process had been subjective even before Congress passed the amendment (*Finley*, 1987, pp. 589–90).

In his concurring opinion, Scalia, joined by Thomas, found the amendment to be content-based and viewpoint-based. He rejected O'Connor's loose interpretation of the law. Scalia argued that the law was not merely advisory but required the NEA to consider decency and respect for Americans' values; even if it did not categorically rule out all funding of projects that did not meet these criteria, the amendment was still discriminatory (*Finley*, 1987, pp. 591–3). However, this did not mean that the law was unconstitutional. Scalia reasoned that the text of the first amendment prohibits Congress from abridging freedom of expression, but the law did not abridge expression, so the first amendment was not applicable. The decision not to grant funding was not the same as the punishment of a particular viewpoint. In that respect, the vagueness challenge was also immaterial (*Finley*, 1987, pp. 595–600).

Souter, in dissent, also found the amendment to be viewpoint-based, but would have held it to be unconstitutional. Like Scalia, he rejected O'Connor's argument that the amendment was merely advisory. The requirements of the amendment could not be met merely by staffing funding panels with diverse personnel; those panels would have to take into account the language of the amendment. He also pointed out that the decency requirement of the amendment conflicted with numerous precedents striking down government regulations of indecency because they discriminated on the basis of viewpoint. In addition, the requirement that the NEA consider whether proposals showed respect for the diverse values and beliefs of the American public meant that the NEA would be biased against any proposals that offended a significant part of the public (*Finley*, 1987, pp. 605–7, 609).

Souter also addressed the presumption of the rest of the Court that the law was permissible because it involved the government acting as speaker or buyer, not as regulator. The government was not speaking through the NEA, and it was not buying anything for the government. Instead, the government was acting as patron, funding the arts. Souter found the case to be similar to *Rosenberger v Rector and Visitors of University of Virginia* (515 US 819, 1995), in which the Court ruled that, even in a limited public forum set up to provide funding for student publications, the university could not discriminate against particular viewpoints such as religion in its funding decisions (*Finley*, 1987, pp. 610–14, citing *Rosenberger*). Souter would have found the law substantially overbroad in violation of the first amendment. The law would have a chilling effect because it would require controversial artists to either alter their work to comport with the decency and respect requirements or forego NEA funding (*Finley*, 1987, p. 621).

With only one dissenting opinion in the case, the voting pattern does not appear to be primarily based on the justices' attitudes. Souter was not able to pick up the votes of any of his usually liberal allies like Stevens, Ginsburg and Breyer, so the majority was comprised of a diverse array of justices. In their concurring opinion, Scalia and Thomas took positions that were more liberal (the amendment was viewpoint-based) and more conservative (the amendment did not abridge expression at all) than the majority.

NEA v Finley is an example of a case that is a tough fit for the content-neutrality jurisprudence. The issue of government funding of art is unique. Any competitive grant awarding process means that the government is not going to be able to fund all proposals. Funding the arts, as O'Connor pointed out, inherently requires the members of the funding panels to make subjective determinations. The government could refuse to fund the arts at all, which would be a viewpoint-neutral policy, but doing so would diminish support for the arts. The argument that was dispositive for most of the justices was that denial of funding was not a significant burden on expression.

Conclusion

Although the statistical patterns described in Chapter 4 show that the justices were not likely to uphold content-based regulations of expression in the period after the creation of the content-neutrality regime, here, I have discussed a range of cases that illustrate why the justices would actually do so. Sometimes, content-based regulations of expression may actually pass a strict standard of review, if they are the least restrictive means of achieving the government's interest, as in *Buckley*. However, the contrasting outcomes in electoral speech cases *Buckley* and *Citizens United* show that the content-neutrality jurisprudence provides guidelines to the justices, not

a straightjacket. In other cases, a majority of the justices refused to apply the content-neutrality jurisprudence based on a concern for national security, as in *Snepp* and *Holder*. Another pattern was that the justices were likely to uphold content-based laws when they perceived little burden on expression, as in *Finley*, where they upheld an amendment requiring the NEA to consider factors such as decency in making arts funding decisions.

Overall, the Supreme Court has changed in its treatment of content-based laws before and after the content-neutrality jurisprudential regime was established. In the 1950s and 1960s, a majority of the justices were often willing to overlook content-based discrimination against alleged communists, as in *Barenblatt* and *Scales*, and at times even civil rights protesters, as in *Walker*. After the creation of the regime, the justices were more likely to strike down content-based discrimination. They did so to protect the speech of civil rights protesters in cases like *Carey* and *Claiborne Hardware*. They showed a willingness to protect politically unpopular speech as they did in striking down New York's law dealing with works written by criminals in *Simon & Schuster.* The justices also extended the reach of the content-neutrality jurisprudence to new areas. In *Hustler,* they protected biting satire from suits for damages by public figures. The Court protected highly offensive speech in *Stevens* and *Snyder*. The justices protected cable television from content-based regulation of 'indecency' in *Playboy,* and similarly protected the internet in *Reno* and *Ashcroft* and video games in *Entertainment Merchants Association*. The political attitudes of the justices were often a factor in their decisions, but the unanimity of the Court in decisions like *Claiborne Hardware, Simon & Schuster* and *Hustler* showed that the justices could put aside their political differences and use jurisprudence to make reasoned decisions.

Of course, the justices were not always so harmonious. Cases involving expressive conduct, such as the burning of a draft card, the burning of flag or nude dancing have often divided the Court. In Chapter 6, I turn to an examination of the Court's treatment of content-neutral cases before and after the regime was established, as well as cases where the content-neutrality distinction begins to break down, such as those involving expressive conduct. Certainly, there are fine-grained distinctions regarding whether a law is content-based or content-neutral, so readers may question why a case is considered in Chapter 5 rather than Chapter 6, or vice versa. Such questions are appropriate; one rationale for looking at the problematic cases is to emphasize that these are close questions that highlight attitudinal divisions on the Court.

6
The Contours and Limits of the Content-Neutral Cases

Chapter 6 continues my interpretive examination of cases, with a look at content-neutral laws, following the same interpretive methods I set out at the start of Chapter 5. In Chapter 4, my statistical analysis showed two patterns for content-neutral laws that are consistent with my expectations for the content-neutrality jurisprudential regime. The first is that after the content-neutrality regime was established, the justices were more likely to uphold content-neutral laws than content-based laws. Content-neutral laws were not given a free pass, however. Since 1972, such regulations of expression have been subject to intermediate scrutiny, which is a fairly demanding standard of review for the government to meet, so the second pattern is that the justices were more likely to uphold content-neutral laws prior to the content-neutrality regime being established in 1972 than they were after 1972.

I examine key examples of content-neutral laws that have been upheld and ones that have been struck down, and I also explore areas in which the distinction begins to break down. The justices often disagree over whether a law is content-based or content-neutral and whether regulations restrict more expression than necessary. The area of expressive conduct, behavior that has an expressive component, has proven to be particularly vexing for the justices. For example, is regulation of nude adult dancing content-neutral due to government's focus on the conduct of appearing nude, or does fully nude dancing contain a particular expressive component that is missing if erotic dancers are required to wear some minimal amount of clothing? Is a city regulation controlling the volume and mix of music at a bandstand content-neutral, or does it have the potential to be a standardless regulation of musical expression? Are National Park Service regulations prohibiting camping at some National Parks content-neutral, or do those regulations unnecessarily burden freedom of expression when applied to a sleep-in demonstration that attempts to raise public awareness of the plight of the homeless. As I will relate, there are no easy answers to these questions, but covering the

problematic cases provides a more complete picture of the effects and limits of jurisprudential regimes. I also emphasize, in keeping with the findings of Chapter 4, that the political attitudes of these justices are always present in these cases. I first look at the justices' treatment of content-neutral cases before 1972, and I then treat the post-1972 cases in three main sections: content-neutral laws that are upheld; content-neutral laws that are struck down; and cases that are especially difficult from a jurisprudential perspective. However, even for cases that are not particularly problematic, I observe that the justices frequently disagree. Consistent with my theory of jurisprudential regimes, I find that the justices decide cases in light of the regime while also taking their own political attitudes into account. Jurisprudential regime theory incorporates the insight of the attitudinal model that the justices' politics matter, but also leaves room for the justices' interpretations of law (Richards and Kritzer, 2002). In this chapter, I aim to illustrate in an interpretive manner some of the statistical patterns that I observed in Chapter 4.

Content-neutral laws prior to the regime

Before the Supreme Court established the content-neutrality regime in 1972, the jurisprudential concept of content-neutral regulations of expression was not a construct that the justices used formally, but in this early period, I observed some cases that could be content-neutral as judged by the post-regime jurisprudence.[1] In some of the early cases, the Court looked at required payment of fees or dues and found no violation of the first amendment. Later the Court developed the concept that regulation of conduct or time, place or manner can be permissible under the first amendment.

In the 1956 case *Railway Employees' Department v Hanson* (351 US 225, 1956), the justices faced the question of whether a union shop agreement violated the first amendment. Non-union employees challenged the union shop agreement on multiple grounds, but the first amendment challenge focused on a 1951 amendment to the Railway Labor Act (originally passed in 1926) which authorized union agreements that require non-union members to pay union dues or fees. Writing for the Court, Justice William Douglas noted that a first amendment question could be raised if the imposition of dues were to be used 'as cover for forcing ideological conformity', but he observed that such facts were not present in this case (*Railway Employees' Department*, 1956, p. 238). This case is an early example of how the Court was alert to the potential issue of compelled speech, but since there was no evidence that compulsion was taking place, the Court unanimously upheld the law as a

1 In order to analyze the effect of the change in the justices' treatment of these jurisprudential concepts over time, I employed coding rules that required me to identify whether a case was content-based or content-neutral regardless of the time the case was decided. See Chapter 4.

straightforward regulation of conduct with little to no implication for freedom of expression. The Court did not apply a standard of review. Given the Court's unanimity, it does not appear that attitudes played a significant role in the decision. The Court extended this ruling in *Lathrop v Donohue* (367 US 820, 1961). The Court upheld the requirement that members of the Wisconsin State Bar pay a $15 annual membership fee. A plurality of the Court reasoned that there were not enough factual details necessary to resolve the first amendment challenge, but the Court was deeply divided. Two concurring justices found that the first amendment question was present in the case and voted to uphold the law, while dissenting Justices Hugo Black and Douglas voted to strike down the law on first amendment grounds.

In the two 1965 *Cox v Louisiana* opinions (379 US 536, 379 US 559), the Court discussed the idea of a time, place and manner category, although the government actions in both cases had aspects that meant they were not content-neutral (see Chapter 3). In the first *Cox* decision, Justice Arthur Goldberg, in his majority opinion, stated that there was no dispute that 'appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials' provided that the officials treated applications equally (*Cox*, 1965, p. 558). However, the ordinance at issue in the case did not properly limit administrative discretion and was struck down. In the second case, the Court held that a law that prohibits picketing near courthouses is constitutional on its face as a limited exercise of discretion concerning 'time, place, duration, and manner', but the Court overturned Reverend Cox's conviction based on how the law was applied (*Cox*, 1965, pp. 561–4, 569). The Court also used the concept of manner when it upheld the antipicketing law at issue in *Cameron v Johnson* (390 US 611, 1968).

Mississippi implemented an antipicketing law that prohibited 'picketing ... in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any county ... courthouses' (*Cameron*, 1968, p. 611). The law had been applied to demonstrators for voting rights at a county courthouse. The picketers challenged the law as vague and overbroad and sought an injunction to prevent Mississippi from enforcing the statute in any criminal prosecutions. Justice William Brennan wrote the majority opinion. He held that the law was narrowly drawn, was not overbroad and that an injunction would not be appropriate. Brennan recognized that elements of conduct and expression were intertwined, but saw the law as regulating the manner of demonstration while not targeting the expression of the picketers. The law would allow picketing unless it interfered with access to a courthouse, which was an issue of conduct. Furthermore, he agreed with the district court that the picketers were being prosecuted for their violation of the picketing law, not because officials were targeting them for exercising their constitutional

rights (*Cameron*, 1968, pp. 612–19). Brennan's opinion was joined by a diverse coalition of justices, at least as judged by the party of their nominating president. The majority was comprised of Democratic appointees Black and Thurgood Marshall, and Republican appointees Earl Warren, Brennan, John Marshall Harlan, Potter Stewart and Byron 'Whizzer' White. The Segal-Cover scores indicate the majority was made up of liberals Brennan, Warren, Black, Harlan, Marshall and Stewart and moderate White (Segal et al., 1995, p. 816).

This decision was not without controversy, however, as liberal Justices Abe Fortas and Douglas dissented. The dissenters pointed out that the demonstrations for voting rights at the courthouse had been going on for months prior to Mississippi passing the antipicketing law, at which point the law was immediately enforced. The demonstrations that occurred prior to the law being passed were orderly and there was no evidence of interference with access to the courthouse. The dissenting justices also questioned the conclusion that the pickets that took place after the law was passed interfered with access. They argued that the arrests were made for the purpose of putting an end to the demonstrations (*Cameron*, 1968, pp. 623–7). Although the dissenting justices raised some points that indicate that the arrests could be judged as content-based, the significance of the case is that the justices were becoming attentive to the limits of freedom of expression with respect to the situations involving the fine line of expression which is intertwined with conduct. They recognized that just because expression was intertwined with conduct did not mean that the law could not reach that conduct. For example, in *Colten v Kentucky* (407 US 104, 1972), the Court upheld a conviction for disorderly conduct. An individual was pulled over for an expired license plate; a friend stopped and was convicted under the disorderly conduct statute for interference with enforcement of traffic laws when he refused to leave the roadside despite repeated requests by the law enforcement officer. In fact, four years later in *Grayned*, Justice Marshall cited *Cameron* as an example of a precisely drawn statute and as precedent for upholding the Rockford ordinance prohibiting any noisy, disruptive demonstration at a school during school hours (*Grayned v City of Rockford*, 408 US 104, 112, 120–1, 1972). This illustrates the point that content-neutrality (in the form of regulations of conduct, or regulations of time, place or manner) serves as a limiting principle for freedom of expression. Of course, it was not until 1972 that the jurisprudence regarding content-neutrality matured.

Why are content-neutral laws upheld post-1972?

Although the Supreme Court's content-neutrality jurisprudence has developed to protect freedom of expression, particularly when the government

discriminates against speakers on the basis of content or viewpoint, the flipside of the jurisprudential regime is that, in the post-*Grayned* period, the justices were more likely to uphold governmental regulations that are content-neutral, compared to those that are content-based. One example of such a case is *Members of City Council v Taxpayers for Vincent* (466 US 789, 1984), in which the justices upheld a Los Angeles ordinance restricting the posting of signs on public property.

Taxpayers for Vincent were a group of supporters of Roland Vincent, a candidate for Los Angeles City Council. The group contracted with a political sign service company, Candidates' Outdoor Graphics Service (COGS), to hang cardboard signs stating 'Roland Vincent – City Council' on wires hanging from utility poles. Over 48 signs were removed by city street maintenance workers during a one-week period. The group of Vincent supporters, along with COGS, sought a declaratory injunction against enforcement of the ordinance, as well as damages (*Taxpayers for Vincent*, 1984, pp. 792–3).

The Court reviewed the ordinance as applied to the activities of the Vincent supporters and COGS and upheld the ordinance by a vote of 6:3. Justice John Paul Stevens, writing for the majority, followed the principles of the content-neutrality regime in his reasoning. He began his inquiry by noting that the law was certainly content-neutral.

> For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral – indeed it is silent – concerning any speaker's point of view, and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner. (*Taxpayers for Vincent*, 1984, p. 804)

As in many cases where the Court found the law to be content-neutral, Stevens used the intermediate scrutiny framework of *US v O'Brien* (391 US 367, 1968, see Chapter 3).

O'Brien is a complicated precedent due to the conflicting interpretations of the justices as to whether the law at issue in the case, a federal law punishing the destruction of draft cards, was content-neutral on its face and whether it was applied in a content-neutral manner. Later in the chapter I will discuss the controversies involved with this case when I turn to a discussion of how the content-neutrality regime breaks down. For now, I note that the analytic formula of *O'Brien* is fairly straightforward and essentially the same as the intermediate scrutiny that the justices apply to content-neutral laws. Such laws must be narrowly tailored to achieve an important or substantial

government interest. In *O'Brien*, the Court formulated 'narrowly tailored' as requiring that the restriction on expression be 'no greater than essential' to the achievement of the government interest, and the Court required that the government interest be important or substantial. *O'Brien* is intended to be applied to content-neutral laws, as expressed by the requirement that 'the government interest is unrelated to the suppression of free expression' (*O'Brien*, 1968, p. 377).

Applying the precedent, Stevens found that the state interest requirement was satisfied, noting that 'the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit' (*Taxpayers for Vincent*, 1984, p. 807). With the government interest inquiry satisfied, Stevens turned to whether the law was narrowly tailored. Citing *Grayned* and *Mosley* (*Police Department of Chicago v Mosley*, 408 US 92, 1972) among other cases, Stevens noted that the ordinance focused precisely on prohibiting posted signs on public property, and such signs were the source of the problem the government was attempting to remedy. He distinguished the case from the Court's ruling in *Schneider v State* (308 US 147, 1939) that struck down a total ban on distribution of handbills; Stevens observed that an anti-littering statute could have prohibited the problem in *Schneider* while still permitting speech, but in *Taxpayers for Vincent*, the posted signs were the cause of the visual blight (*Taxpayers for Vincent*, 1984, pp. 808–10). He concluded that the Los Angeles 'ordinance curtails no more speech than is essential to accomplish its purpose' (*Taxpayers for Vincent*, 1984, p. 810). In addition, Stevens rejected a number of arguments to the contrary. He noted that, if the city were to make exceptions for political campaign signs, it would risk engaging in the content-discrimination prohibited by *Mosley*. Exceptions such as permitting a certain size of sign or permitting signs at particular types of locations would undermine the state interest in preventing visual blight. He also rejected the argument that lampposts and utility poles constituted public forums similar to city streets and parks, noting differences in the character of the property, the content-neutrality of the statute and the existence of alternative channels of communication (*Taxpayers for Vincent*, 1984, pp. 812–15).

Justice Brennan wrote a dissenting opinion in the case and was joined by Justices Marshall and Harry Blackmun. He agreed that the majority had applied the correct standard of review, but disagreed with how they applied it. He reasoned that reviewing courts should be skeptical of aesthetic justifications for restrictions on expression unless the government demonstrates that it is addressing aesthetic interests in a comprehensive manner and is using means that do not restrict speech. Los Angeles had made no other efforts to address its aesthetic concerns other than banning the posting of signs

throughout the entire city. He characterized the city's ordinance as a total ban on a medium of communication and disagreed with the majority's point that alternative channels of communication were available. Private property may not be available for the posting of signs, especially if the message is unpopular. Distributing handbills is more costly and time-consuming. The city did not make designated kiosks available for posting signs (*Taxpayers for Vincent*, 1984, pp. 818–31). 'It is only when aesthetic regulation is addressed in a comprehensive and focused manner that we can ensure that the goals pursued are substantial and that the manner in which they are pursued is no more restrictive of speech than is necessary', Brennan concluded (*Taxpayers for Vincent*, 1984, pp. 830–1).

The decision showed some evidence of attitudinal divisions within the Court. Two Democratic appointees, Marshall and Brennan, along with a Republican appointee, Blackmun, dissented. Marshall and Brennan were rated as liberal by the Segal-Cover scores. Although Blackmun and Stevens were rated as conservative, they often voted liberally in freedom of expression cases. Here, they did not agree, as Stevens wrote the majority opinion. He was joined by conservatives Warren Burger, Lewis Powell, William Rehnquist and moderates White and Sandra Day O'Connor, as rated by the Segal-Cover scores (Segal et al., 1995, p. 816). With the exception of White, all of the justices in the majority were Republican appointees. The voting shows that three of the Court's four most liberal justices dissented in favor of freedom of expression.

This case is a fairly typical example of a content-neutral law that is upheld by the Court. As is usually the case, the Court applied intermediate scrutiny to a content-neutral ordinance. In this instance, the Court chose the *O'Brien* formulation of intermediate scrutiny, which the dissenting justices agreed was the proper standard of review. This is an example of the justices following the jurisprudential regime by at least asking the same questions and agreeing that the law was a content-neutral regulation of expressive conduct. Of course, not all of the justices agreed whether the law was constitutional under this standard. In the view of the dissenters, the ordinance restricted more speech than is necessary. When content-neutral laws are struck down, it is usually because they are overly restrictive of expression.

Why are content-neutral laws struck down?

Content-neutral laws are not given a free pass. Since *Grayne*d and *Mosley*, content-neutral laws have been treated according to intermediate scrutiny. Content-neutral laws can be struck down if the government lacks a substantial interest or restricts more speech than is necessary to achieve its interest. In addition, *Mosley* reinforced the idea that laws which may appear to

be content-neutral can be judged to be content-based, which would trigger a stricter form of review. For example, the Chicago ordinance looked like a time, place and manner regulation, but it was ruled to be content-based because it treated Mosley's expression differently than it would have treated speech on labor issues.

The justices tend to strike down content-neutral laws when the laws restrict more speech than is necessary to serve the government interest. It is not overly difficult for the government to articulate a substantial interest behind challenged legislation, but, if the law sweeps too broadly, the justices are likely to declare it unconstitutional. One such example is *Bartnicki v Vopper* (532 US 514, 2001). The dispute arose in the context of negotiations between the Pennsylvania State Teacher's Union and the local school board. Gloria Bartnicki, the union's chief negotiator, made a mobile phone call to local union president Anthony Kane Jr. The call was intercepted by an anonymous third party, who recorded Kane stating: 'If they're not gonna move for three percent, we're gonna have to go to their, their homes ... To blow off their front porches, we'll have to do some work on some of those guys.' After a pause, Kane continued: 'Really, uh, really and truthfully because this is, you know, this is bad news.' (*Bartnicki*, 2001, pp. 518–19, internal citations omitted)

Frederick Vopper was a local radio host who received a tape-recording of the conversation from Jack Yocum, the head of a local taxpayers' group. Yocum's group was known for opposing the union's demands in the negotiation. Yocum had found the tape in his mailbox and disclosed it to several school board members as well as Vopper. Vopper and other members of the media repeatedly conveyed the contents of the tape to the public. Bartnicki and Kane brought a suit for damages under state and federal law against Yocum, Vopper and other members of the media. The suit alleged that Vopper 'knew or had reason to know' that the conversation was illegally intercepted, in violation of state and federal wiretapping laws (*Bartnicki*, 2001, pp. 519–20). Federal code, as well as Pennsylvania law, prohibited the disclosure of electronic conversations when one knows or has reason to know that the conversation was illegally intercepted (*Bartnicki*, 2001, p. 524).

In his opinion for the majority, Stevens, joined by O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer, assumed that Vopper had violated the statute and that Bartnicki was entitled to sue for damages; the legal question was whether, in the context of suits for damages, the statutes violated the first amendment. In reviewing the facts, Stevens noted three facts that made the case unique: the respondents in the case were not responsible for intercepting the conversation; they had received it in a legal manner; and the conversation was a matter of public concern. Turning to the reasoning for the Court's decision, Stevens observed that the federal

wiretapping statute was content-neutral. The aim of the law was to protect the privacy of communications regardless of the content of those communications (*Bartnicki*, 2001, pp. 525–6).

The Court agreed that there were substantial interests supporting the statute, but questioned whether applying the statute to individuals not involved in the initial intercept would be too restrictive of expression. The statute served to take away the motivation to intercept conversations and to minimize the harm to individuals whose privacy had been invaded. These interests were directly advanced by enforcement of the statute against the interceptor, but application of the statute to a third party would not be as effective in achieving those interests (*Bartnicki*, 2001, pp. 529–32). Moreover, even if applying the statute to third parties could help advance privacy concerns, doing so would restrict more speech than necessary because the conversations were a matter of public concern. Stevens invoked many of the foundational cases for content-neutrality, including *DeJonge v Oregon* (299 US 353, 1937), *Terminiello v Chicago* (337 US 1, 1949), *Wood v Georgia* (370 US 375, 1962), *NAACP v Button* (371 US 415, 1963) and *New York Times v Sullivan* (376 US 254, 1964) in emphasizing the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' (*Sullivan*, 1964, p. 270, quoted in *Bartnicki*, 2001, p. 534). Stevens noted that the debate over teachers' pay 'may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney v California* but it is no less worthy of constitutional protection' (*Bartnicki*, 2001, p. 535, internal citations omitted).

Justices Breyer and O'Connor joined the majority opinion but Breyer wrote a concurring opinion, joined by O'Connor, to emphasize the narrowness of the Court's ruling. The majority ruling was limited to the facts of the case and did not imply a broad immunity for the media (*Bartnicki*, 2001, pp. 535–6).

In keeping with jurisprudential regime theory, I wish to emphasize that the politics of the justices are often present in these cases, and the justices can disagree over the application of key legal concepts. This case took place during a period (1994–2005) of unusual stability in personnel. The three most conservatives justices were Rehnquist, Antonin Scalia and Clarence Thomas, all Republican appointees. The four most liberal justices were Republican appointees Stevens and Souter and Democratic appointees Ginsburg and Breyer. The two justices normally in the middle and often acting as swing voters were Republican appointees O'Connor and Kennedy. Although the Segal-Cover scores rated Stevens as conservative, Souter as moderate to conservative and Breyer as moderate, these three, along with Ginsburg, were more liberal in most freedom of expression cases than their peers (Segal et al., 1995, p. 816).

The majority was comprised of a diverse range of justices including the liberal coalition plus O'Connor and Kennedy. However, the Rehnquist

Court's most conservative justices, Rehnquist, Scalia and Thomas, dissented. Rehnquist agreed with the Court that the laws were content-neutral and that privacy concerns were a substantial government interest, but accused the majority of tacitly applying strict scrutiny by giving insufficient weight to the privacy interest and being overly strict in its application of the narrowly tailored prong.

> These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. (*Bartnicki*, 2001, p. 548)

Rehnquist noted that the majority's ruling would undermine enforcement of the statute by providing a greater demand for illegally intercepted information (*Bartnicki*, 2001, p. 551). He also observed that the Court's decision would be counterproductive for freedom of expression. The ruling would produce a chilling effect on speech because electronic communication is widespread and people would fear their privacy interests were not sufficiently protected. It is interesting to note that in this case both liberals and conservatives believed that they were supporting freedom of expression. The simplifying assumption of the attitudinal model that liberals support and conservatives oppose freedom of expression proves simplistic when both opposing parties support freedom of expression, which can also happen in media access cases involving Federal Communications Commission (FCC) requirements like the fairness doctrine (*Red Lion v FCC*, 395 US 367, 1969), or requirements for television stations to accept political advertising (*FCC v CBS,* 453 US 367, 1981).

To this point I have provided illustrative examples of content-neutral laws that were upheld and struck down. Jurisprudential regime theory contends that, when the justices adopt a jurisprudential regime, their political attitudes still matter. This can be observed to some extent in the cases I have examined to this point. In the remainder of this chapter, I develop this point in more detail, by looking at ways in which the justices disagree over the content-neutral category.

The limits of the content-neutral category

It is no surprise that the Supreme Court takes difficult cases. Given the limited number of cases the Supreme Court decides each year, the justices

are unlikely to take cases in which the law is very clear. Many cases that the justices seek to resolve require fine lines to be drawn. Here I aim to highlight two sets of particularly troublesome cases. Both sets involve questions of whether challenged laws are content-based or content-neutral. The justices look at this question generally in the first set and deal with expressive conduct or symbolic expression in the second group. In addition, the justices may disagree over whether the laws are narrowly tailored to achieve a substantial government interest.

In these close cases, there can be disagreement among the justices over whether a regulation is content-neutral. Is a zoning law dealing with adult businesses content-based? Is a law which allows a city to control the mix at an outdoor concert a manner regulation that is content-neutral, or does it have the potential to be a standardless regulation of musical expression? Is an injunction creating a buffer zone at an abortion clinic so that protestors cannot shut down access content-neutral? Does the injunction remain content-neutral if it allows a limited number of protestors to enter the buffer zone to talk to an individual leaving or entering the clinic but requires them to leave upon request of the individual?

Cases involving expressive conduct or symbolic expression create conceptual difficulties for the justices. If a law addresses expressive conduct, is that law content-based or content-neutral? The answer may hinge on whether a justice finds that the law is targeting conduct or speech. Drawing this line can be difficult in cases involving expressive conduct such as burning a draft card, burning a flag, staging a sleep-in demonstration at a national park, or dancing in the nude.

Less protected expression and the limits of content-neutrality

It is appropriate for me to note here that debates among the justices about the limits of the content-neutrality category can also be marked by some cases that fall into the less protected categories, such as obscenity, non-public forums, limited public forums, and expression in schools (See Chapter 3 for a discussion of less protected expression). In *Miller v California* (413 US 15, 1973), which held that obscenity was beyond the protection of the first amendment and established an analytic test for determining whether expression was obscene, Douglas dissented, noting that the majority had turned the concept of content-neutrality on its head.

> The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle

> for dispensing tranquilizers to the people. Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment. (*Miller*, 1972, pp. 44–5)

Although perhaps not as dramatic as the discussion over the limits of content-neutrality in *Miller*, the justices have also disagreed in cases involving non-public forums. In *United States Postal Service v Council of Greenburgh Civic Associations* (453 US 114, 1981), the council challenged a portion of the federal code that prohibited placing unstamped materials into individuals' letterboxes. There was a five-justice majority, but there were also two separate concurring opinions and two separate dissenting opinions. Rehnquist wrote the majority opinion and held that the regulation was content-neutral, but refused to apply intermediate scrutiny because he reasoned that mailboxes, while public property in the sense that they are part of the nationwide postal system, are not public forums. As long as the law was content-neutral, it needed only to be reasonable (*Council of Greenburgh Civic Associations,* 1981, pp. 128–34). Brennan wrote separately and contended that a mailbox is a public forum and that the law should be treated as a content-neutral time, place and manner regulation and analyzed according to intermediate scrutiny, but found the law constitutional under that standard (*Council of Greenburgh Civic Associations,* 1981, pp. 135–41). White concurred and argued that the public forum analysis was irrelevant to the case as a mailbox becomes a public forum only if one is willing to pay for postage (*Council of Greenburgh Civic Associations,* 1981, p. 142). Marshall dissented. He agreed with Brennan on the public forum question and the standard of review, but found that the law restricted more speech than was necessary (*Council of Greenburgh Civic Associations,* 1981, pp. 142–52). Stevens dissented as well. While he argued that a mailbox was not a public forum, he agreed with Marshall that the law restricted mailbox owners from receiving desired information (*Council of Greenburgh Civic Associations,* 1981, pp. 152–5).

In a limited public forum, the Supreme Court allows the government to make content-based, but not viewpoint-based, distinctions. For example, if a university chose to host a conference on US foreign policy toward Latin America, conference organizers would be able to make a content-based distinction to exclude participants who chose to focus on US foreign policy toward Africa. However, conference organizers who chose to exclude any participants who wished to *defend* US foreign policy toward Latin America would be discriminating against viewpoint, in violation of the first amendment. In the 2010 case *Christian Legal Society v Martinez* (130 S. Ct 2971), the Christian Legal Society (CLS) student group challeged the 'all-comers' policy

of the University of California Hastings College of the Law; the policy required that registered student organizations keep membership open to all students. Moderate conservative Kennedy chose to join the four most liberal members of the Court, Stevens, Ginsburg, Breyer and Sonia Sotomayor, to form a narrow majority.[2] In her opinion for the majority, Ginsburg first pointed out that both parties had stipulated that the school's non-discrimination policy required student organizations to accept any students. She then observed that the law school's Registered Student Organization (RSO) system constituted a limited public forum. The all-comers policy was viewpoint-neutral, because it based membership on whether an individual was a member of the law school and had nothing to do with the views of potential members (*Christian Legal Society,* 2010, pp. 2984, 2993). Samuel Alito dissented, and was joined by fellow conservatives Scalia, Thomas and John Roberts (see Segal, 2012, for attitudinal scores for the recent appointees Roberts, Alito, Sotomayor and Elena Kagan). In his view, the law school's position had shifted over time so the stipulation regarding the all-comers policy was irrelevant. Initially the law school had indicated that the CLS's bylaws were inconsistent with the law school's non-discrimination policy as it related to sexual orientation and religion. The law school's decision to deny RSO status to the CLS constituted viewpoint discrimination. The CLS was formed around a religious viewpoint, so forcing the group to admit students who did not share the group's views constituted viewpoint discrimination (*Christian Legal Society,* 2010, pp. 3003, 3010).

Expression in the school setting has also led to divisions among the justices over what constitutes viewpoint discrimination. In *Hazelwood v Kulhmeier* (484 US 260, 1988), the Court found no first amendment violation when a principal censored and removed from a high school student newspaper articles about teen pregnancy and divorce. The five-justice majority reasoned that the school paper was not a public forum and that the principal's actions needed only be 'reasonably related to legitimate pedagogical concerns' (*Hazelwood*, 1988, pp. 267–70, 273). Brennan dissented, joined by Marshall and Blackmun. He noted that the articles were not disruptive of the school's mission and that the principal's purported concerns to teach a pedagogical lesson and protect impressionable students from exposure to sensitive topics were actually 'brutal censorship' and viewpoint discrimination (*Hazelwood*, 1988, pp. 288–9).

The Roberts Court also found itself divided over a case in the public high school setting when it split 5:4 in *Morse v Frederick* (551 US 393, 2007). A public high school in Juneau, Alaska, invited students to view the Olympic Torch Relay off the school campus site. Frederick held a banner at the event that read 'BONG HiTS 4 JESUS'. Morse, who was the principal of the high

2 Stevens and Kennedy also wrote concurring opinions.

school, suspended Frederick for 10 days and Frederick challenged the suspension as a violation of his first amendment rights. Chief Justice Roberts wrote the majority opinion and was joined by fellow conservatives Scalia, Kennedy, Thomas and Alito. According to Roberts, the suspension was constitutionally permissible because the banner advocated illegal drug use. The principal had the authority to protect the other students from this expression (*Morse*, 2007, pp. 396–9). Stevens wrote a dissenting opinion, joined by Souter and Ginsburg. He interpreted Frederick's sign as a nonsensical attempt to attract the attention of a national television audience; it did not advocate illegal drug use to fellow students. Regardless of the meaning of the sign, he argued that the majority's rationale invited 'stark viewpoint discrimination' and it could be used to censor other political views of students (*Morse*, 2007, p. 437).

Certainly then, the justices disagree over whether cases may constitute exceptions to the content-neutrality regime, as I have described briefly here in the contexts of less protected categories of expression such as obscenity and expression in non-public forums and schools. For the remainder of this chapter, I will focus on disagreements over whether laws are content-based or content-neutral, and whether those laws are constitutional.

Content-based or content-neutral?

In *Young v American Mini Theatres* (427 US 50, 1976), the Court examined Detroit's zoning ordinances dealing with adult theaters. The ordinances limited adult theaters from being located within 500 feet of a residential area or within 1000 feet of two other 'regulated uses', a category which included bars, hotels and cabarets (*American Mini Theatres,* 1976, p. 53). The Supreme Court was divided, and produced a plurality opinion written by Stevens and joined by Chief Justice Burger, and Justices White and Rehnquist, with Justice Powell joining in part and writing a separate concurring opinion. Four justices dissented. One key question which divided the justices was whether the ordinances were content-based. Stevens argued that they were content-based, but not viewpoint-based; Detroit was regulating the location where sexually explicit films could be shown, but was not regulating the particular messages conveyed by the films. Considering the limited societal value of the films compared to political speech, Detroit's interest in preserving the character of its neighborhoods was sufficient to justify the minimal intrusion on the first amendment. Playing on Voltaire's commitment to defend freedom of speech to the death, Stevens commented: 'But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.' (*American Mini Theatres,* 1976, pp. 70–2)

Powell declined to join this portion of Stevens' opinion. Instead, he took an approach which foretold the Court's future approach to zoning cases.

Powell argued that the ordinances were content-neutral zoning regulations which had incidental implications for freedom of expression. They were content-neutral because Detroit did not attempt to censor the films or regulate their content in any way, nor did Detroit attempt to limit the ability of patrons to view the films. He found that Detroit had a substantial interest in preserving the character of neighborhoods, and that the city had restricted no more speech than was necessary to accomplish that interest (*American Mini Theatres,* 1976, pp. 79–82).

In his sharply worded dissent, Stewart accused Stevens of turning Voltaire's comment on its head, reminding Stevens that the first amendment was designed to protect against the tyranny of the majority. The ordinances were content-based as they selected adult speech for differential treatment because it was deemed to be offensive or distasteful. The plurality opinion conflated obscenity and sex; sex is a vital topic of human interest and certainly a topic of value. Regardless of whether the speech was of little value, the Court had an obligation to protect it. Although unpleasant speech 'will enter the marketplace of ideas ... that is the price to be paid for constitutional freedom'. The Stevens opinion was a 'drastic departure from established principles' and an 'aberration' (*American Mini Theatres,* 1976, pp. 84–8). Stewart was joined by Brennan, Marshall and Blackmun. Blackmun wrote another dissenting opinion, joined by the other dissenters, which argued that the Detroit laws were unconstitutionally vague. The attitudinal pattern was somewhat mixed, with Democratic appointees Marshall and Brennan joined by Republican appointees Blackmun and Stewart in dissent. Stewart was rated as liberal by the Segal-Cover scores despite being a Republican appointee. Blackmun and Stevens would eventually gain reputations for being fairly liberal Republican appointees, but they were on opposing sides in this case. Although for the most part the dissenters were more liberal than the justices in the winning coalition, the presence of Stevens and moderate White in the plurality means that the attitudinal divisions were not completely apparent.

The question of whether such zoning regulations are content-neutral has persisted. In the 1986 decision *Renton v Playtime Theatres* (475 US 41), a majority of the Court ruled that the zoning regulation of adult businesses was content-neutral because it was aimed at the secondary effects of adult businesses; this is an argument similar to Powell's concurring opinion in *American Mini Theatres,* which shows that Powell's concurrence contributed to the development of law. Rehnquist's opinion was joined by five other justices, and Blackmun concurred. The majority acknowledged that at 'first glance' the zoning ordinance did not 'fit neatly into either the "content-based" or "content-neutral" category'. but the focus of the ordinance on secondary effects meant that the law was properly analyzed according to intermediate scrutiny (*Renton,* 1986, pp. 46–50). Dissenting Justices Brennan and Marshall,

the most liberal justices on the Court at this time, argued along the lines of Stewart's opinion in *American Mini Theatres* that the zoning ordinance regulated adult movies so it could not be content-neutral.

In 2002 in *City of Los Angeles v Alameda Books* (535 US 425), the same debate once again produced a fractured Court. In examining Los Angeles's revisions to its zoning ordinance, Rehnquist, O'Connor, Scalia and Thomas formed a plurality which followed *Renton* strictly and argued that the zoning ordinance was a content-neutral regulation because it was targeted at the secondary effects associated with adult businesses. In Souter's dissenting opinion, which was joined by Stevens, Ginsburg and Breyer, he argued that these zoning laws 'occupy a kind of limbo between full-blown content-based restrictions' and content-neutral ones and deserve their own category of 'content correlated' (*Alameda Books*, 2002, p. 457). Kennedy wrote a concurring opinion in which he noted that, although he agreed with the plurality that the law was constitutional, he also agreed with the dissenters that the law was not content-neutral. Twenty-six years after being unable to form a majority on the issue in *Young v American Mini Theatres*, the Court was once again fractured and unable to form a majority to answer the question of whether zoning laws are content-based. In this case, the attitudinal pattern was fairly common for a case which took place during the 1994–2005 period of stable Court personnel, with the four liberals dissenting and Kennedy occupying the middle and writing a concurring opinion. Often during this period, O'Connor or Kennedy would cast the crucial fifth vote needed to form a majority.

At first glance, city regulations allowing the city to control the volume and mix at an outdoor bandshell in Central Park look like content-neutral manner regulations. In 1989 in *Ward v Rock Against Racism* (491 US 781), a majority of the Court ruled this to be the case, but the dissenting justices raised questions about whether the regulations were actually neutral. Kennedy, joined by Rehnquist, White, O'Connor and Scalia, with Blackmun concurring, found the regulations to be content-neutral. Originally, New York City had required that sponsors of the various events should bring their own sound amplification equipment, but later passed regulations to control the volume of concerts at the bandshell, based on a concern for noise in the adjacent Sheep Meadow part of Central Park (a quiet zone), as well as in neighboring residential neighborhoods. In reaction to past problems with inadequate equipment and unruly and disappointing crowd reactions, the city also aimed to ensure good sound quality at events. Rock Against Racism sponsored various events at the bandshell and had been involved in a series of incidents regarding excessive volume. Prior to the adoption of the city guidelines, Rock Against Racism had been warned, fined and even had its power cut at one event, which resulted in an abusive crowd reaction. After the city adopted its new regulations, the group sought to have them declared facially invalid. As

part of the suit, in 1986 Rock Against Racism obtained a preliminary injunction to allow the group to provide its own equipment. Kennedy reasoned that the city's justifications of noise control and adequate amplification and mix were content-neutral. He also noted that the city had decided to provide high-quality equipment and employ an independent sound company. The guidelines gave the sponsors autonomy over the mix; the sound company's technicians were required to consult with the sponsors and were expressly forbidden from adjusting the mix or volume based on the content of the message of the performers. In addition, all the various groups using the city's system in 1986 were pleased with the system and services (*Rock Against Racism*, 1989, pp. 784–95). Kennedy went on to find the regulations constitutional under the intermediate scrutiny standard of review and noted that the 'narrowly tailored' requirement of intermediate scrutiny was not as strict as the 'least restrictive means' test of strict scrutiny (*Rock Against Racism*, 1989, pp. 798–9).

Marshall dissented and was joined by fellow liberals Brennan and Stevens. His primary arguments were that the majority was too deferential in its application of intermediate scrutiny, effectively taking the teeth out of the narrowly tailored requirement, and that the regulations were improper prior restraints. My interest here is with respect to how the category of content-neutral begins to break down. Interestingly, Marshall agreed that the regulations were content-neutral and should be judged according to intermediate scrutiny, but, in the context of attacking the regulations as an impermissible prior restraint lacking proper safeguards, criticized the regulations for a lack of neutral standards. He pointed out that, despite its purported neutral justifications, the city utilized undefined standards of 'best sound' or 'appropriate sound quality' (*Rock Against Racism*, 1989, p. 809). Marshall noted the testimony of the city's bandshell manager that sound quality refers to tone and mix, but Marshall rebutted this with references to music and sound system texts, arguing that tonality and mixing are creative parts of musical expression. Marshall wrote: 'Because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself, government control of the sound-mixing equipment necessitates detailed and neutral standards.' (*Rock Against Racism*, 1989, pp. 809–10) To support his argument, in a footnote Marshall brilliantly quoted from Nicolas Slonimsky's *Lexicon of Musical Invective: Critical Assaults on Composers Since Beethoven's Time*: 'New music always sounds loud to old ears. Beethoven seemed to make more noise than Mozart; Liszt was noisier than Beethoven; Schoenberg and Stravinsky, noisier than any of their predecessors.' (Slonimsky, 1953, p. 18, quoted in *Rock Against Racism*, 1989, p. 810, fn. 7) In response to the city's argument that performers using its system had been satisfied because the city always adhered to the performers' wishes, Marshall questioned why the city then had to

maintain control over the mixing board and raised the point that, if the city always had to maintain control, it would not be heeding all of the performers' wishes. He also observed the need for immediate control by performers: 'During the performance itself, the technician makes hundreds of decisions affecting the mix and volume of sound. The music is played immediately after each decision. There is, of course, no time for appeal in the middle of a song.' (*Rock Against Racism*, 1989, p. 811, internal citations omitted)

What do the written opinions in this case tell us about how the content-neutral category begins to break down? This case is an example of the justices judging regulations to be primarily content-neutral and agreeing on the standard of review as intermediate scrutiny (showing some guidance of the jurisprudential regime), but disagreeing (along attitudinal lines) about whether the regulations are constitutional under that standard, in part because of a disagreement over whether the regulations are applied in a manner that is truly neutral. Although Marshall did not argue that the regulations should be judged according to the strict scrutiny standard of review normally reserved for content-based regulations, he had serious questions about whether the city could be neutral in application, especially without more detailed, neutral standards further specifying concepts such as sound quality. The majority, by contrast, found that the regulations were sufficiently clear in prohibiting content-based discrimination and that the city-provided independent sound company had been accommodating of performers' preferences in application. This case proved to be particularly complicated because of the problematic nature of trying to regulate music for noise and sound quality, which seems to be an almost inherently subjective endeavor. With respect to Marshall's reference to the relative noise of Beethoven compared to Mozart, it is hard to imagine noise complaints about either a Mozart or Beethoven concert at the Central Park bandshell, but a hip-hop or rock concert might invite such complaints. At around the same time that the *Rock Against Racism* case was decided, the now legendary New York hip-hop act Public Enemy (1998) conveyed how 'noise' could be music in the song 'Bring the Noise'. Public Enemy paid homage to the artistry of the pioneering New York DJ Jam Master Jay of Run-DMC, with Chuck D rapping: 'Run-DMC first said that a DJ could be a band.' In other words, a DJ scratching records could make music. Although Marshall's opinion did not carry the day, it invites some interesting questions about purported attempts to regulate concert 'noise' in a neutral fashion. Would a Public Enemy show be more likely than a Mozart performance to invite noise complaints? Is there an objective difference between Public Enemy and Mozart? Is the mixing board or turntable any less of a creative tool than a violin or piano? More importantly, should the state decide these questions, especially in light of the Supreme Court's typical fear of paternalism with respect to expression? If the government is allowed to

decide, how carefully tailored should standards be to avoid restricting more expression than is necessary? The observations I take away from this case are that the more the Court treads on subjective ground, or allows the government to tread on subjective ground, the greater is the risk of censorship and the less is the likelihood of building a cross-ideological coalition on the Court.

The next case is similar in that the dissenting opinion writer focuses on a particular aspect of application that raises questions about whether the injunction in question is truly content-neutral. In *Schenk v Pro-Choice Network of Western New York* (519 US 357, 1997), the Court had to assess the constitutionality of a preliminary injunction. The injunction grew out of a series of blockades and protests, some of which involved pushing, grabbing and spitting, at various clinics that provided abortions in western New York. Some of the blockades shut down or severely limited access to the clinics through sit-in demonstrations and related methods. Initially, a group of doctors, clinics and the not-for-profit corporation Pro-Choice Network (a group working for access to abortion services) sought a temporary restraining order against Operation Rescue and other groups sponsoring the protests and blockades. The protestors complied with the restraining order for the most part, but the district court found five violations that resulted in civil contempt citations, and the court then issued a preliminary injunction. The injunction set up fixed buffer zones of 15 feet in front of clinic entrances, doorways and driveways. The injunction also set up floating buffer zones of 15 feet around any persons or vehicles entering or exiting the facilities. Finally, the injunction allowed an exception for two sidewalk counselors to enter the buffer zones to engage in conversation with people entering or leaving the clinic. If the targeted individuals did not want to speak or have sidewalk counseling, the sidewalk counselors were required to cease and desist (*Schenck*, 1997, pp. 361–7).

Rehnquist wrote the majority opinion, upholding the fixed buffer zones and sidewalk counseling provision, but striking down the floating buffer zones. All of the justices except Breyer agreed that the floating buffer zones were unconstitutional. Uncertainty over compliance with the buffer zones risked restricting more speech than was necessary to achieve the government interest to maintain access to the clinics. Breyer argued that the injunction did not establish floating buffer zones and was just further clarifying that protesters were not to approach persons or vehicles within the fixed buffer zones. Scalia, joined by Kennedy and Thomas, dissented with respect to the majority's arguments on state interests and the constitutionality of the fixed buffer zones. Stevens, O'Connor, Souter, Ginsburg and Breyer joined Rehnquist in finding that the fixed buffer zones were constitutional as they directly advanced the interest in maintaining access to the clinics (*Schenck*,

1997, p. 357). This majority was composed of an interesting coalition of the four most liberal justices, along with conservative Rehnquist and swing justice O'Connor.

Looking at the case in terms of how the justices disagree over the meaning of content-neutrality, the primary disagreement was based on how to evaluate the sidewalk counseling provision. The protestors attempted to argue that the provision was content-based, because it conditioned a protestor's right to speak on the reaction of the listener to the content of that speech. Rehnquist and the majority responded that it had to be evaluated within the context of the necessity of the fixed buffer zones; the buffer zones were created based on the conduct, not the message, of the protestors, and the sidewalk counseling provision was an effort to enhance speech rights within the buffer zones. Rehnquist wrote: 'The District Court's extra effort to enhance defendants' speech rights by allowing an exception to the fixed buffer zone should not redound to the detriment of respondents.' (*Schenck*, 1997, pp. 381, fn. 11, 384–5) By contrast, Scalia dissented because he saw the injunction as a significant violation of expression rights. He noted that the district court went too far in attempting to create a right to be left alone in the protest zones. The majority's effort to characterize the provision as an effort to enhance speech rights was irrelevant. The fixed buffer zone should have been evaluated in light of the problematic requirement that sidewalk counselors cease and desist if the targeted individual wished to be left alone. Scalia stated: 'There is no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics.' (*Schenck*, 1997, p. 386) He argued that the cease and desist provision undermined the majority's claim of enhancing speech. Rehnquist drew from *Boos v Barry* (485 US 312, 1988), a case striking down a Washington DC ordinance that had attempted to prohibit display of a sign that was detrimental to the reputation of a foreign government within 500 feet of an embassy. Scalia reiterated the quotation from *Boos* that Rehnquist had used and explained that the majority was not actually adhering to the principle that 'in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment' (*Boos v Barry*, 1988, p. 322, quoted in *Madsen v Women's Health Center, Inc*., 512 US 753, 1994, quoted in *Schenk*, 1997, p. 386).

As in *Ward v Rock Against Racism*, the content-neutrality category can create controversy among the justices due in part to a dispute over the proper level of analysis. If a law is primarily content-neutral but has aspects that may not be neutral, the justices may disagree as to how to weigh those different aspects. In *Rock Against Racism*, Marshall had serious reservations about endorsing the city's noise regulations without some neutral standards, while the majority saw these concerns as trivial given the overall neutrality of the regulations. Similarly, in *Schenck*, Scalia's doubts about the requirement that

sidewalk counselors cease and desist turned him against the fixed buffer zone, while Rehnquist and the majority found that the sidewalk counselor provision was meant to enhance speech within the buffer zone. The justices in the majority were not troubled by the potential content-based aspects. These differences in interpretation among the justices can fall along attitudinal lines, although in *Schenck*, Rehnquist differed from his usual conservative allies Scalia and Thomas. The justices also differ over the meaning of content-neutrality when judging regulations of conduct that have an incidental effect on freedom of expression.

In addition, the Court tends to assume that regulation of place is content-neutral, but *Schenk* indicates that there are aspects of the injunction that impinge upon content. When an injunction targets a particular group at a particular location, there can be a risk of regulation of content. Targeting of a group, allegedly for reasons related to conduct at a particular place, can also happen through legislation. In *Hill v Colorado* (530 US 703, 2000), the Court, by a 6:3 vote, used *Schenck* to justify upholding Colorado's law establishing a 100-foot buffer zone in front of health facilities and an 8-foot bubble around anyone entering or leaving such a facility. The majority viewed the law as a content-neutral regulation of place and manner, but Scalia, in dissent, argued that the law was content-based because it targeted anti-abortion protesters. Legal scholar Timothy Zick (2006) made a persuasive case that what he called 'spatial tactics' are actually used to control speech. As I argued in Chapter 2, part of the appeal of content-neutrality is that it serves as a limiting principle on freedom of expression; there is a risk, however, that intermediate scrutiny is not taken seriously or that the courts are too willing to accept the government's argument that it is regulating in a content-neutral manner. While speech-free buffer zones have been designated at abortion clinics, what are perceived to be content-neutral zones made specifically *for speech* have been designated at university campuses and major events such as national political party conventions. While created ostensibly to facilitate expression, the spaces can isolate protestors and make them look more like alleged terrorists than citizens. For example, the speech zone at the 2004 Democratic National Convention appeared to be a fenced-in cage, featuring concrete barricades with chain-link fences and razor wire. Zick argued that the courts need to recognize space as 'distinctly expressive' and be less willing to defer to government as to the interests government claims for regulating place and the boundaries and means that the government uses (Zick, 2006). As I move to the next section on expressive conduct, I will revisit this issue in light of a dispute over using the national parks for a sleep-in demonstration to protest homelessness.

Expressive conduct

Judging whether regulations of expressive conduct or symbolic expression are content-neutral can be complicated. Justice Hugo Black was known for

his literal reading of the first amendment requirement that 'Congress shall make no law' restricting freedom of expression, which he took to mean that the first amendment protection of freedom of expression is nearly absolute, as expressed in his concurring opinion in the Pentagon Papers case involving the publication of leaked, classified reports about the Vietnam War (*New York Times v US*, 403 US 713, 1971).

Black would in some cases back away from his nearly absolutist interpretation by arguing that a case involved conduct, not speech. For example, in the same month that the Pentagon Papers case was decided, in *Cohen v California* (403 US 15, 1971), he dissented from the majority's ruling overturning Cohen's conviction for breaching the peace for wearing a jacket bearing the words 'Fuck the Draft'. Black signed on to Blackmun's dissenting opinion which stated: 'Cohen's absurd and immature antic, in my view, was mainly conduct and little speech.' (*Cohen*, 1971, p. 27) If one of the strongest supporters of the first amendment struggled with drawing the line between conduct and speech, this should indicate that the issue is conceptually complex.

US v O'Brien is commonly cited as the key precedent in cases involving regulation of conduct which has an incidental effect on freedom of expression. O'Brien was convicted after burning his Selective Service Registration certificate in a public demonstration at a courthouse. In 1965, Congress had amended the federal code to prohibit knowing forgery, destruction, mutilation or alteration of a Selective Service Registration. The case is controversial because it is not clear that O'Brien was treated in a content-neutral manner, but the analytic formula of the case as set out by Chief Justice Earl Warren is still commonly used.

Warren noted that the regulation did not fit neatly into either the content-based category or the time, place and manner category, but the regulation of conduct did have implications for freedom of expression. The Supreme Court created a new standard of review that was essentially intermediate scrutiny for incidental regulations of expression. The first clause is superfluous; certainly anything the government claims it has the power to do must be within the constitutional power of the government. That is the point of the basic structure of the Constitution, enumerated powers and federalism. The third clause, 'unrelated to the suppression of expression', clarifies that the regulation in question must be content-neutral (*O'Brien*, 1968, p. 377). Assuming these two conditions are met, the remaining clauses leave us with intermediate scrutiny that is essentially identical to what would be applied to a content-neutral time, place and manner regulation. The government may not restrict more speech than is essential to achieve a substantial government interest.

Although the standard of review is straightforward, the factual circumstances of the case led to different interpretations. Warren argued that the law

prohibiting knowing destruction, mutilation or alteration of draft card certificates was not content-based. On its face, the law regulated conduct that was not 'necessarily expressive'. The law did not single out public destruction, nor did it distinguish between public and private destruction. The government interest behind the law, ensuring the smooth and efficient functioning of the Selective Service System, was content-neutral. 'In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct.' (*O'Brien*, 1968, pp. 375, 380–2)

The Court of Appeals and O'Brien took a much different view, as Warren explained. The Court of Appeals had reasoned that prior to the 1965 amendment, there was already a portion of the federal code that required registrants to keep their Selective Service certificates in their personal possession at all times, so that court ruled that, because the 1965 amendment was targeting individuals who were destroying their draft cards in public demonstrations, it violated the first amendment (*O'Brien*, 1968, p. 371). O'Brien also attempted to persuade the justices that they should inquire into the motive behind the passage of the 1965 amendment, referring to reports of the Senate and House Armed Services Committees that showed concern with defiant destruction of cards and the possibility for encouragement of others to do so. The majority refused to examine the motive behind the legislation and, as indicated above, reasoned that the amendment was justified on neutral grounds (*O'Brien*, 1968, pp. 382–6).

To lend some context, it is instructive to compare the registration certificate law to the anti-flag-burning regulation struck down in *Texas v Johnson* in 1989 (491 US 397). Both cases involved burning of an object for symbolic expression. In the flag-burning case, Texas law prohibited, among other things, the knowing desecration of a state or national flag where '"desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action' (Texas Penal Code Ann. 42.09, 1989, quoted in *Texas v Johnson*, 1989, p. 400, fn.1). The majority noted that Johnson's conviction was clearly content-based. He would not have been convicted for burning a tattered flag in private, as this is a proper method of disposal. Instead, his conviction was based on the offensiveness of his burning of an American flag in a public demonstration. Justice Brennan wrote for the majority: 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' (*Texas v Johnson*, 1989, p. 414) Although a justice's position on whether O'Brien was treated in a content-based manner may have hinged on how willing that justice was to look at motive, it is at least fair to say that *O'Brien* was a closer case from a jurisprudential perspective than *Texas v Johnson*.

Although the Court ruled against O'Brien with only Douglas dissenting, the Court did clarify that expressive conduct or symbolic expression receives some level of protection under the first amendment. While denying that the government regulated content, Warren's opinion at least recognized that the amendment regulating O'Brien's conduct had implications for expression, so it had to be judged by intermediate scrutiny. In cases involving expressive conduct, even the justices who vote against the first amendment claim are likely to grant that there is at least an aspect of expression that merits review. When conduct is closely intertwined with expression, justices are likely to disagree over whether the government is regulating in a content-based manner, as in the next two cases, which involve nude dancing.

Two nude-dancing establishments, Glen Theatre and the Kitty Kat Lounge, brought a first amendment challenge to Indiana's public indecency law. The Supreme Court rejected the challenge in *Barnes v Glen Theatre* (501 US 560, 1991). Indiana's public indecency law indicated that, to avoid being in a state of nudity, the state required dancers to wear at least a fully opaque covering of the female nipple and male or female genitals, pubic area and buttocks (*Glen Theatre*, 1991, p. 569). To avoid violating the law, dancers at the two establishments wore pasties and G-strings, but the proprietors wanted to offer fully nude dancing, so they challenged the law. Rehnquist could only convince two justices, O'Connor and Kennedy, to join his plurality opinion, holding that: 'The Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and a G-string does not violate the First Amendment.' (*Glen Theatre*, 1991, p. 564) Scalia and Souter concurred in the judgment but each wrote separate opinions. Rehnquist conceded that nude dancing is expressive conduct that is 'marginally' within the 'outer perimeters' of the first amendment (*Glen Theatre*, 1991, p. 566). He applied the *O'Brien* test, arguing that the law was content-neutral. The government interest in protecting public order and morality was not related to the suppression of expression because Indiana was prohibiting all public nudity, not the message conveyed by erotic dancing. He reasoned that protecting public morality is a substantial government interest and that the law did not restrict more speech than is necessary to achieve the government interest. Indiana merely imposed the very minimal requirement that dancers wear pasties and G-strings. This requirement allowed the dances to be erotic, even though somewhat less graphic. Rehnquist concluded his written opinion: 'It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.' (*Glen Theatre*, 1991, p. 572) (Incidentally, I will assume that the Chief Justice's use of the terms 'narrowly tailored', 'modest' and 'bare minimum' in a sentence discussing pasties and

G-strings was sincere and impassive; if not, it was the written equivalent of deadpan delivery.)

Scalia, apparently attempting to avoid the subjective minefields of whether the statute was content-neutral and whether morality was a substantial government interest, wrote a separate concurring opinion. He argued that because the law targeted the conduct of nudity and not expression, it was 'not subject to First Amendment scrutiny at all' (*Glen Theatre*, 1991, p. 572).

> Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct. (*Glen Theatre*, 1991, p. 574)

Scalia refused to apply the *O'Brien* test or intermediate scrutiny. He also chastised the plurality for claiming that morality was a substantial government interest when the cases they cited stood only for the proposition that morality was a legitimate government interest, suitable for passing the rational basis test but not enough to pass intermediate scrutiny. In any event, the morality rationale was enough to satisfy Scalia, who wrote: 'Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case, no more than that is needed.' (*Glen Theatre*, 1991, p. 580, internal citations omitted)

Souter also concurred in the Court's judgment, but wrote separately to sidestep the issue of whether morality was a substantial government interest. He agreed that the *O'Brien* test was the standard of review, but used the secondary effects rationale of *Renton*. He argued that the petitioners had justified enforcement of the indecency statute against adult establishments by reference to a desire to prevent prostitution, sexual assault and other criminal activity, which are substantial government interests according to the frameworks of *O'Brien* and *Renton*. Similar to the plurality, he found that the statute did not restrict more speech than was essential to achieve this interest (*Glen Theatre*, 1991, pp. 582–5).

White wrote a dissenting opinion joined by Marshall, Blackmun and Stevens. The voting pattern in the case reflects attitudinal differences, with the dissenters being four of the most liberal justices on the Court at this time. Souter often voted liberally in support of freedom of expression but he concurred and voted against freedom of expression in this case. White reasoned in his dissent that the Indiana statute was content-based, so the appropriate standard of review was strict scrutiny. Although he conceded that the state interest in preventing nudity in many public places was to prevent offense to others, this rationale could not apply in an adult establishment where the viewers were consenting adults and paying customers. 'The purpose

of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates', he wrote (*Glen Theatre*, 1991, p. 591). White also pointed out that nudity is a key part of the expression conveyed by the dancers, so the plurality was incorrect to view the law as a regulation of conduct. The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental 'conduct' (*Glen Theatre*, 1991, p. 592).

Interestingly, the plurality implicitly conceded this point when they argued that requiring dancers to minimally cover themselves makes the dances less graphic. Another reason that the statute was content-based was that the state argued it applied to dancing at adult establishments but not ballets, plays, operas or theatrical productions. The plurality's view on the artistic merits of nude dancing should not be relevant. Why should nudity in large-scale theatrical productions or ballets be acceptable, but nudity in bar-room dancing be prohibited? The anti-paternalism rationale for freedom of expression states that individuals, not governments, should be the judges of what they can and cannot see. This rationale led the dissenters to conclude that the state lacked a compelling interest to protect consenting adults from viewing fully nude dancing (*Glen Theatre*, 1991, pp. 590, 594).

Scalia chose to respond to this part of the dissenting opinion in two ways. In response to the point about consenting adults, he argued that the indecency law would be violated even if '60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another' because doing so would still be immoral and prohibited like other immoral activities such as 'sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy'. Scalia also argued that the law was a general law targeted at conduct, not at any particular form of expressive conduct or communicative aspects of conduct (*Glen Theatre*, 1991, pp. 575–6). White responded that, even if Indiana could prohibit the Hoosier Dome example, the state would still need to justify why the law applied to consenting adults in adult establishments, which could only be done based on the content-based rationale to 'prevent their customers from being exposed to the distinctive communicative aspects of nude dancing'. This rationale meant that this statute was an example of a law that should be unconstitutional according to Scalia's standard: a law that targets communicative aspects of conduct (*Glen Theatre*, 1991, pp. 595–6).

White also argued that the statute was not narrowly tailored. Less restrictive alternatives included targeting prostitution and criminal activity directly, imposing restrictions requiring a minimum distance between dancers and spectators, imposing zoning restrictions limiting the locations of nude

dancing establishments and limiting hours of operation. By contrast, Indiana banned an entire category of expressive activity (*Glen Theatre*, 1991, p. 594).

Nearly a decade later, the Court revisited the issue in *City of Erie v Pap's AM* (529 US 277, 2000). The City of Erie, Pennsylvania, enacted an ordinance in 1994 which made it a crime to appear in public in a state of nudity. The city council prefaced the ordinance with a preamble stating that it was written for the purpose of addressing an increase in nude dancing in the city. Females, ages ten and above, would have to wear at least pasties and a G-string to avoid being in a state of nudity. Pap's AM, the operator of Kandyland, a nude-dancing establishment, sought a declaratory judgment that the ordinance was an unconstitutional infringement on its first amendment freedom of expression rights (*Pap's AM*, 2000, pp. 284, 290). The Court again ruled in favor of the government and again was fractured and unable to produce a majority opinion. O'Connor wrote the plurality opinion, joined by Rehnquist, Kennedy and Breyer. The plurality again applied the *O'Brien* test because it viewed the law as a content-neutral regulation of conduct which had an incidental effect on expression. Applying the *O'Brien* test, O'Connor upheld the law based on a secondary effects analysis of the type Souter had argued for in the *Glen Theatre* case. The plurality abandoned the morality rationale of the *Glen Theatre* plurality (*Pap's AM*, 2000, pp. 282–302). This move by O'Connor illustrates how the law can develop over time, with the seeds of a secondary effects analysis first expressed by Powell in *American Mini Theatres* later adopted by a majority in *Renton* (applying to zoning of adult businesses), then adapted to nude dancing by Souter in his concurring opinion in *Glen Theatre* and applied by the plurality in *Pap's AM*.

Scalia wrote a concurring opinion joined by Thomas that reiterated Scalia's position in the previous decision that the case did not implicate the first amendment at all. Souter agreed that *O'Brien* was the correct standard of review, but thought that the city failed to provide enough evidence to prove its claim under the secondary effects test, and he dissented from the plurality opinion on that issue (*Pap's AM*, 2000, pp. 302–17).

Stevens and Ginsburg dissented as well. They noted that, unlike the Indiana statute, the Erie regulation was not focused on nudity or public indecency in general. The city council made it clear that the ordinance was targeted at nude-dancing establishments, and the city stipulated that the ordinance would not apply to theatrical productions involving nudity, so the ordinance was content-based. Stevens also argued that the plurality misapplied the secondary effects test. Previously, the secondary effects test had been limited to zoning cases such as *Renton*. The Erie ordinance was not a zoning ordinance; moreover, it was a total ban on a message or means of expression. The secondary effects concept was not intended to be used to justify a complete ban on a message or means of expression. Rather, it was intended to justify

regulation of the location of adult businesses (*Pap's AM*, 2000, pp. 317–32). Finally, Stevens noted that requiring pasties and G-strings would hardly counter secondary effects.

> In what can most delicately be characterized as an enormous understatement, the plurality conceded that 'requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects.' To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. (*Pap's AM*, 2000, p. 323)

My interest in the case here is to again illustrate disagreement over the meaning of the content-neutrality category. In *Barnes v Glen Theatre*, a non-attitudinal interpretation of the justices' behavior would be that there was an honest disagreement over the level of analysis to be used in discerning whether the law was content-based. The plurality looked at a law targeting the general conduct of nudity and found it to fit best in the *O'Brien* framework, while the dissenters looked at the law at a more detailed level, noting concern about the law being applied to nude dancing but not theatrical productions or ballets. There was also an honest disagreement over how critical full nudity was to the message being conveyed and the bearing that had on whether the statute was content-neutral. An attitudinal reading of the case would be that the underlying political fractures were already present and the justices were primarily acting on their political attitudes, resulting in the fractured Court and a lack of a majority opinion.

Regardless of how the first case is characterized, by the time the Court revisited the issue in *Pap's AM*, the honest disagreements had turned into plain political disputes. In other words, *Pap's AM* cannot be read as anything other than support for the attitudinal model. One problem that the *Glen Theatre* plurality left to a later Court was the erroneous assertion that morality was a substantial government interest. The precedents cited did not support that proposition, and the *Pap's AM* plurality was forced to abandon that approach. In doing so, the new plurality was forced to shoehorn a non-zoning case to fit with the secondary effects precedents that had been previously reserved for zoning cases. The zoning cases had been controversial from the start. As a result, Stevens, author of the majority opinion in the 1976 *Young v American Mini Theatres* case on zoning and a member of the majority coalition in the *Renton v Playtime Theatres* decision on zoning, dissented from the plurality's ruling in *Pap's AM* and was prompted to write sharply about the plurality's departure from precedent. Given that the Court could not get five justices to agree to one opinion in *Renton* or *Pap's AM*, both pluralities' somewhat tortured reasoning in light of precedent, Scalia's dogmatic concurrences

refusing to even consider applying the first amendment and the sharp dissents, the justices seem very much like political actors as they are characterized in books like *Closed Chambers* by former Supreme Court clerk Edward Lazarus (2005) and *The Nine* by Jeffrey Toobin (2007). The evidence in support of the attitudinal model is strong in these cases.

As I have observed to some extent already, these disputes are not simply about whether a case is content-based. Cases involving symbolic expression can also invite disagreements among the justices over whether a law restricts more speech than is necessary to achieve a substantial government interest. Even when the justices agree that the challenged law is content-neutral and properly judged according to intermediate scrutiny, they may disagree about whether the law is narrowly tailored or whether there is a substantial government interest to support the law. In *Clark v Community for Creative Non-Violence* (468 US 288, 1984), the justices confronted the question of whether the National Park Service's regulations and refusal to grant a permit for a sleep-in demonstration against homelessness violated the first amendment. The Community for Creative Non-Violence was granted a permit to stage a demonstration, including the erection of a tent city, at Lafayette Park, across from the White House and the Mall, between the Lincoln Memorial and the Capitol. Both properties are under the control of the National Park Service, which refused to grant a permit for the protestors to sleep inside the tents as it did not permit camping in those parks. White, writing for a seven-justice majority, assumed that the sleep-in was expressive conduct entitled to some protection and reasoned that the regulations were content-neutral, whether they were judged as time, place and manner regulations or regulations of symbolic conduct. The Park Service permitted camping, and by implication, sleeping, in some National Parks, but not others. The government had a substantial content-neutral interest in preserving the condition of the parks for the enjoyment of visitors, and this interest was incompatible with camping at the two sites in question. The Park Service's regulations were narrowly tailored to achieve this interest. The Park Service was willing to permit the demonstration to take place, including the erection of the two tent cities. Despite the ban on sleeping and camping, the demonstrators were still allowed to convey their message, so the government was not restricting more speech than necessary to achieve its interest (*Community for Creative Non-Violence*, 1984, pp. 288–99).

Marshall dissented, joined by Brennan. Marshall agreed with the majority that the regulations and actions of the Park Service were content-neutral and properly analyzed under intermediate scrutiny, but thought that the government restricted too much expression. Similar to the point he would make later in the *Rock Against Racism* case, he argued that the majority was too deferential in its application of intermediate scrutiny, especially given the

propensity for government to overregulate expression in public forums and the risk of political concerns influencing bureaucratic decisions. He emphasized the symbolic locations that the protestors chose for their demonstrations, both sites of historic demonstrations. In Marshall's view, sleep was an integral part of the demonstration. If the demonstrators were willing to sleep outside in winter, this showed that were quite serious about the issue. It also underscored that homelessness is a severe and even life-threatening problem. It was a novel method of symbolic expression, and one that would gain media attention. The Park Service's decision not to allow the sleep-in was underinclusive, as it was willing to permit feigned sleeping during the demonstration. How would actual sleep cause any greater amount of wear and tear on the property? The importance of sleep to the demonstration and the underinclusive Park Service decision meant that the Park Service decision was restricting more speech than was necessary to achieve a substantial government interest (*Community for Creative Non-Violence*, 1984, pp. 301–16). In this case the two most liberal justices dissented, while the majority included conservatives (Burger, Rehnquist and Powell), moderates (White and O'Connor) and Republican appointees coded as conservative by the Segal-Cover scores who later turned out to often vote in support of freedom of expression (Blackmun and Stevens). Although all of the justices asked the same questions according to the content-neutrality jurisprudence, they disagreed about whether the Park Service regulations passed the intermediate scrutiny standard.

Cases involving issues of expressive conduct are not always so divisive, as the decision of the Roberts Court in the 2006 case *Rumsfeld v Forum for Academic and Institutional Rights* (547 US 47) indicated. The Forum for Academic and Institutional Rights (FAIR) was an association of law schools that challenged the Solomon Amendment as a violation of their rights of expressive association. The Solomon Amendment required law schools receiving federal funding to provide the same level of access to military recruiters as other recruiters. At the time, the military discriminated against gays and lesbians, so the law schools argued that compelling access was a regulation of expressive conduct and forced them to associate with a view in conflict with their anti-discrimination policies, which was a violation of their freedom of expressive association. The Supreme Court ruled 8:0 against the law schools. Chief Justice Roberts wrote the opinion of the Court and was joined by Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer. Roberts reasoned that the Solomon Amendment was a content-neutral regulation of conduct. Under the *O'Brien* test, providing access to recruiters was not 'inherently expressive', unlike the flag-burning at issue in *Texas v Johnson* (*Forum for Academic and Institutional Rights*, 2006, p. 66). The incidential burden on expression was minimal and necessary to achieve the government's interest in supporting the military. Roberts also rejected the argument that the Solomon

Amendment violated the expressive association rights of the law schools. He observed that allowing access for recruitment hardly constituted association and the law school, faculty and students were still free to associate for the purposes of stating their opposition to military policies (*Forum for Academic and Institutional Rights*, 2006, pp. 65–70). The Court's unanimous resolution of this dispute indicates that not all cases involving expressive conduct lead to divisions among the justices.

Conclusion

In this chapter I have analyzed a range of different laws that were content-neutral. Although jurisprudence matters and guides the justices' decisions and reasoning, jurisprudential regime theory, drawing on the attitudinal model, recognizes that justices may disagree over how legal categories apply, and these disagreements can fall along political lines. Justices may differ over whether a law is content-based, content-neutral, or falls into one of the less protected categories. Even when justices agree that a law is content-neutral and properly evaluated according to intermediate scrutiny, they may disagree whether the law achieves a substantial government interest without restricting more speech than is necessary. Cases involving symbolic expression or expressive conduct like nude dancing or burning a draft certificate can be divisive because the justices may disagree over whether the laws are properly characterized as regulations of conduct or expression.

7
Conclusion

In writing this book I have endeavored to illuminate the Supreme Court's decision-making in freedom of expression cases from 1953, the start of the Earl Warren Court, to the June 2012 decisions of the John Roberts Court. In seeking to advance this goal, I have made a range of theoretical and empirical claims, which I will summarize here. In this chapter, I also situate the US in comparative context, comparing the US to Canada, Germany, Japan and the UK. I explore whether the US is exceptional and whether institutional and jurisprudential factors can facilitate comparisons across countries. In addition, because the jurisprudential regime theory I employed to explain the Court's decision-making uses both statistical and interpretive methods, I will explore what the theory has to tell us more broadly about the debate between positivism and interpretivism.

Jurisprudential regime theory

A jurisprudential regime is a critical precedent that enables the Court to structure decision-making in an area of law by establishing key case factors and balancing tests for evaluating those factors. In Chapter 2, I explained how the theories of political jurisprudence and neoinstitutionalism enable me to incorporate attitudinal, strategic and jurisprudential approaches in a coherent model. The justices are politically motivated and at times may consider internal and external strategic considerations, but I theorize that jurisprudential regimes also matter to the justices. A jurisprudential regime can be seen as an institutional construct. Like other institutions that have political origins, although the regime may have been created by justices who acted on the basis of political attitudes, the institution makes a difference once it has been established; the justices begin to look at cases differently.

The justices use jurisprudential regimes because they are attentive to legal language. Regimes serve as analytic frameworks that provide guidance to the

justices and other people and institutions that rely upon the law. Consistent with historical and interpretive institutionalists, I contend that the language of jurisprudential regimes enables the justices to make plausible arguments but it does not determine the outcome of cases. The justices also use regimes because they wish to treat similar cases consistently by following the legal principles of regimes. Content-neutrality is a strong principle that indicates the government should not discriminate against speakers based on content or viewpoint. Following the regime enables the justices to enforce this jurisprudential principle as well as the broader goal of using legal reasoning to promote consistency and fairness.

The attitudinal model of decision-making has been rather successful in providing a statistical, empirical explanation of why the justices vote as they do. The model posits that the justices vote on the basis of their attitudes (policy preferences). In civil liberties cases, the theory expects that liberals will tend to support the individual and conservatives will support the government. Although jurisprudential regime theory refutes the claim of the attitudinal model that attitudes constitute the only systematic explanation of Supreme Court decision-making, jurisprudential regime theory does incorporate insights of the attitudinal model. The justices can create regimes with attitudinal preferences in mind. In addition, regime theory recognizes that, even after the justices adopt a jurisprudential regime, attitudes continue to play a role in the justices' decisions.

Jurisprudential regime theory also draws upon and contributes to rational choice neoinstitutionalism. A jurisprudential regime can be seen to advance the norm of *stare decisis* by acting on community expectations that decisions should be rooted in law, and the justices can also use jurisprudential regimes to help reinforce legitimacy in the community. Jurisprudential regime theory posits that the justices may take into account potential external strategic considerations such as the type of party or the level of government involved in the case, as well as the participation of government and interest groups through friend of the court briefs. In addition, jurisprudential regime theory highlights how regimes can help the justices to overcome internal strategic problems such as coordination.

Development of the content-neutrality regime

In Chapters 1 and 3 I discussed the origins and development of the content-neutrality regime. The Court's written opinions in *Police Department of Chicago v Mosley* (408 US 92, 1972) and *Grayned v City of Rockford* (408 US 104, 1972), decided on the same day in 1972, established the content-neutrality jurisprudential regime for freedom of expression law. The Court strictly scrutinizes government attempts to regulate the content or viewpoint of expression,

but allows the government more flexibility to restrict expression through content-neutral time, place and manner regulations. At the time of *Mosley* and *Grayned*, the Court was divided, according to attitudinal measures, with four liberals, four conservatives and one moderate, but the justices built consensus for the regime by justifying content-neutrality in terms of political values such as self-government, security, open debate and equality. I used an interpretive approach to look at the development of these concepts in the foundational precedents for content-neutrality that were cited in *Mosley* and *Grayned*. Looking at these cases also illustrates an important part of the explanation which involves the interaction of the Court, societal groups, political values and jurisprudence. In particular, the National Association for the Advancement of Colored People (NAACP) and the civil rights movement brought equality and equal protection claims to the first amendment in a series of cases and shaped the development of the content-neutrality jurisprudence.

In Chapter 3, I also advanced the claim that content-neutrality serves as a limiting principle on freedom of expression. Considering the normative justifications for freedom of speech raises the question of how to draw limits on freedom of expression. If freedom of expression advances such values as important as self-government, security and equality, can it be limited? Using content-neutrality as a limiting principle helped to create consensus among the justices by protecting the core of freedom of expression – freedom from regulation of the basis of content or viewpoint – while enabling the justices to draw boundaries on freedom of expression by allowing the government to regulate in a content-neutral way.

The difference a regime makes

In Chapter 4, I statistically analyzed my dataset of all cases that raised a free expression issue from 1953 to 2012. I consistently found that the justices' political attitudes were an important part of the explanation of their decisions, but I also found confirmation of three hypotheses associated with the content-neutrality jurisprudential regime. First, after 1972 when the regime was established, the justices were more likely to strike down content-based laws after the regime due to their application of strict scrutiny to such laws. Second, after the regime, the justices were more likely to uphold content-neutral laws than content-based laws, because the intermediate scrutiny that was applied to content-neutral laws was less protective of speech than strict scrutiny. Third, comparing the treatment of content-neutral laws before and after the regime, the justices were more likely to uphold content-neutral laws before 1972, because the intermediate scrutiny standard adopted in 1972 for review of content-neutral laws took away the high level of deference the

government received in such cases before 1972. These findings indicate that, although attitudinal factors do play a role, there is substantial evidence that the justices took the jurisprudential regime seriously.

In Chapter 5, I used a qualitative approach to analyze how the justices treated content-based cases before and after the content-neutrality regime was established. My qualitative approach led me to consider the following questions as I examined examples of various cases: What role did attitudes play? Did the justices categorize the regulation of expression in the case as content-based, content-neutral or something else? What standard of review did the justices apply? If there were concurring or dissenting opinions, did authors of those opinions differ on whether the regulation was content-based or on which standard should be applied? Did the justices agree on how the standard was applied? Did the case raise any unique issues or was it problematic for the jurisprudence? Did any of the opinions anticipate or contribute to the development of law?

Although there were decisions prior to 1972 that contributed to the development of the content-neutrality jurisprudence and protected expression, the justices often permitted content-based regulations of expression prior to 1972. This pattern was particularly common in cases involving government discrimination against alleged communists in the 1950s and 1960s, although Justices Hugo Black and William Douglas often dissented. In the post-regime period, the justices used strict scrutiny to protect speakers when the government regulated on the basis of content or viewpoint, but there were exceptions to the general pattern. Of course, the attitudes of the justices played an important role both before and after the justices established the regime.

In Chapter 6, I applied the same interpretive method to the justice's treatment of content-neutral laws before and after the regime was established. The intermediate scrutiny standard the justices applied to such content-neutral regulations after 1972 is more flexible and more deferential to the government than strict scrutiny. Although the justices sometimes upheld laws they reviewed under this standard, they also struck down laws, especially when the law restricted more expression than necessary to achieve the government interest. In this chapter, I also looked at areas where the line between whether a law is content-based or content-neutral was blurred. The justices disagreed in cases involving zoning of adult businesses, regulations regarding the volume and mix at a city bandshell and buffer zones around abortion clinics. In addition, the justices often disagreed in cases involving expressive conduct, also known as symbolic expression. In cases involving the expressive conduct of flag-burning, nude dancing and sleep-in demonstrations on National Park Service properties, the justices disagreed over whether the regulations were properly characterized as content-based regulations of expression

or content-neutral regulations of conduct. These divisions among the justices often reflected attitudinal differences.

The comparative politics of freedom of expression

Looking at the development of content-neutrality jurisprudence from a comparative perspective, several questions emerge. Is this just another case of Louis Hartz's (1955) American exceptionalism? Are there comparative factors that help to explain why the US Supreme Court developed the law as it did? Is the US case instructive for other countries? Elements of Hartz's explanation seem to fit the case. Namely, the content-neutrality jurisprudence emerged through the hard-fought struggle of African-Americans to gain civil rights and liberties. However, Rogers Smith (1993) cautioned against a narrative of liberal progress; the liberal tradition exists alongside republicanism and ascriptivism. In addition, neoinstitutional scholars like Martin Shapiro and Smith argued that institutional factors also help to explain legal development.

How does the US case compare to other nations? A variety of scholars have examined freedom of expression from comparative or international perspectives. For example, Ronald Krotoszynski (2006) has provided a comparative empirical account of freedom of speech in Canada, Germany, Japan, the US and the UK. Ian Cram (2006) has taken an applied legal philosophical perspective in examining restrictions on freedom of speech in liberal democracies. Vincenzo Zeno-Zencovich (2008) used a pragmatic, policy-oriented perspective to examine contemporary freedom of expression issues arising in Europe. The edited volume of Ivan Hare and James Weinstein (2009) compared the treatment of extreme speech in various democracies.

Although these comparative scholars have rejected the argument for a universal conception of freedom of expression (see Dworkin, 2009, for the proposition that freedom of expression is a universal right) and appropriately recognized the distinctive aspects of each nation's legal system, such as parliamentary supremacy in the UK or constitutional recognition of multiculturalism in Canada, they have also identified several bases for comparison. Institutional features include judicial independence and the power of judicial review. The existence and phrasing of a constitutional protection for freedom of expression helps to define a nation's approach; a constitution could encourage balancing of freedom of expression versus other values (Krotoszynski, 2006, pp. 214–20). The development of a nation's jurisprudence and the values underlying freedom of speech, such as individual autonomy or self-government, also matter (Cram, 2006).

In the US, these conditions were favorable for the development of a fairly robust protection of freedom of expression. The first amendment protects freedom of expression and does not encourage balancing against other values.

The judiciary is rather independent. In particular, Supreme Court justices are appointed for life and are largely unaccountable. Of course, the judiciary possesses the power of judicial review.

Of course, these factors only allow for a broad basis of comparison. A full application of comparative jurisprudential regime theory would require a detailed analysis of multiple cases from various countries, which is beyond the scope of this book. For my purposes here, I will focus on the approach of the highest courts in four countries: Canada, Germany, Japan and the UK. These countries provide a range of variation with respect to each of the factors that comparative scholars have identified for comparison. Like the US, they are all mature democracies. For countries in democratic transition, the experience with freedom of expression is likely to be very different, especially when there is an absence of a tradition of representative democracy and free and open debate (Zeno-Zencovich, 2008, pp. 93, 125). In comparing the development of freedom of expression jurisprudence in different countries, the ideal approach is to recognize distinctive characteristics while keeping an eye open for similar patterns or areas for differentiated comparison.

Canada

In Canada, s. 2 of the Canadian Charter of Rights and Freedoms provides clear protection for freedom of expression. Although s. 2 does not explicitly call for balancing, s. 27 of the Charter indicates that the Charter should be interpreted in light of Canada's multicultural heritage. In addition, s. 1 allows for the state to sustain challenges to laws that violate s. 2 if the government can demonstrate that a law advances important societal values and is not too burdensome on freedom of expression. In practice, the Supreme Court of Canada has not subjected alleged s. 2 violations to a very rigorous level of review and the provincial and national governments have been successful in justifying laws such as anti-hate speech statutes by framing them as advancing equality (Krotoszynski, 2006, pp. 26–7, 41–51).

The Canadian judiciary is independent and does exercise the power of judicial review, but s. 33 of the Canadian Charter gives the Parliament and provincial legislatures the ability to override laws found to violate s. 2. An override lasts for a period of five years and can be renewed. However, this provision is rarely invoked due to problems of political legitimacy or the idiosyncrasies of particular cases (Cram, 2006, pp. 30–5; Krotoszynski, 2006, pp. 37–41). If an Act of Parliament is struck down as a violation of the Charter, this action invites a dialogue in society and among the people's elected representatives. The Parliament has the options of doing nothing, enacting an override, or modifying the law in question so that it does not violate the charter (Cram, 2006, pp. 33–5).

Germany

Germany's Basic Law, which has constitutional status, provides protection for freedom of expression, especially via Article 5, which protects freedom of expression and prohibits censorship. It specifically protects freedom of expression in the context of arts, sciences, research and teaching. However, it explicitly requires balancing against other laws, the protection of youth and personal honor. Other aspects of freedom of expression are covered by Article 8, which protects freedom of assembly, and Article 9, which recognizes freedom of association (Krotoszynski, 2006, pp. 93, 96–9). The German judiciary, at both state and federal levels, enjoys a high degree of independence (Seibert-Fohr, 2006). The Federal Constitutional Court and various state constitutional courts in Germany possess the power of constitutional review. As the research of Georg Vanberg (2005) demonstrated, the justices of the Federal Constitutional Court take into account their own policy preferences as well as jurisprudential and strategic concerns, so the justices are careful to defer to the legislature when the public opinion and legislative majorities align, but when the justices enjoy public support and transparency is high, the Federal Constitutional Court can constrain the legislature.

Under the Basic Law, human dignity is the paramount value, as established by Article 1. The Basic Law explicitly prioritizes human dignity and personal honor over freedom of expression. As the Basic Law was initially formed post-World War II, it reflects a commitment to ensure that the atrocities of the Nazi regime would not be repeated, as well as a commitment to democracy and civility (Krotoszynski, 2006, pp. 93–6). In practice, the Federal Constitutional Court struck the balance against freedom of expression when it allowed recovery of damages for harm to reputation due to a fictional interview of a public figure. The Federal Constitutional Court also used the protection of individual dignity to uphold a prior restraint on the distribution of a television movie that told the true story of a gay robber. Although some decisions have allowed for protection of freedom of expression, the Federal Constitutional Court has drawn the line at targeted personal insults and has not protected insults directed at public officials (Krotoszynski, 2006, pp. 107–14).

Krotosyznki (2006, pp. 118–30) observed that the Federal Constitutional Court has embraced viewpoint-based discrimination in several ways. The court permitted the banning of the Socialist Reich and Communist Parties because they espoused anti-democratic views (see also Cram, 2006, pp. 48–50); Articles 9, 18 and 21 show the Basic Law's strong commitment to the democratic order, which helped to justify banning the anti-democratic parties. The Federal Constitutional Court also allowed a local government to threaten criminal action against the public articulation of denial of the Holocaust; the court reasoned that false claims of fact were not protected

by Article 5, especially when the statements harmed dignity and reputation. The Federal Constitutional Court also protected the use of Nazi symbols and Hitler imagery because the expression employing the symbols was derisive of Hitler and the Nazis. Although the decision ostensibly protected expression, if use of such symbols had been used to support the Nazis the expression would have been prohibited on the basis of viewpoint. Under the strong commitment of the Basic Law to democracy, such restrictions on expression were not only permissible but required. Although such a decision stands in marked contrast to the US content-neutrality jurisprudence, the balancing of free expression versus values such as democratic order, reputation and human dignity is explicitly required by the Basic Law (Krotosyznski, 2006, pp. 118–30). Germany is not alone with respect to its approach. The European Court of Human Rights has denied the extension of the protection of Article 10 of the European Convention on Human Rights (ECHR) to pro-Nazi expression, and several European countries have prohibited Holocaust denial (Cram, 2006, pp. 123–6).

Japan

In Japan, the Supreme Court is mostly independent. Justices are subject to a mandatory retirement age of 70. They are appointed by the Prime Minister and Cabinet. Although the justices can be held accountable to voters via a removal election, no justice has ever come close to being removed (Ramseyer and Rasmusen, 2003, pp. 15–16). However, the biggest limit on judicial independence is the path that career judges and politicians must follow to prove party loyalty. Ramseyer and Rasmusen (2003) demonstrated that, when judges deviated from government positions on politically salient issues, their career development suffered.

The Constitution of Japan explicitly gives the power of judicial review to the Supreme Court, but it is very rarely exercised, and the court has never struck down a law as a violation of freedom of expression. Article 21 protects freedom of expression broadly, and does not mention the need to balance it against other values. Why has the Supreme Court been so reluctant to exercise the power of judicial review to protect freedom of expression? First, freedom of expression does not exist in isolation and often conflicts with other societal or constitutional values. Although neither the first amendment in the US nor Article 21 in Japan is phrased to encourage balancing, the Supreme Courts of both the US and Japan have engaged in balancing (Krotoszynski, 2006, pp. 139–45). Second, Article 12 of the Constitution of Japan does require that the people do not abuse their rights; this provision encourages balancing. Third, the system of career development and appointment has produced Supreme Court justices who have been deferential to the ruling party, which has mainly been the Liberal Democratic Party (Ramseyer and Rasmusen,

2003). With the Prime Minister being a member of the Democratic Party since 2009, it is possible that more conflict will result.

Focusing solely on the exercise of judicial review overlooks how the Supreme Court has developed freedom of expression as a political value in Japan. The Supreme Court articulated the meaning of freedom of expression in its written opinions and interpreted legislation and administrative orders in a manner that promoted freedom of expression. The Supreme Court articulated a vision of freedom of expression that fits with Meiklejohn's theory of self-government and balanced freedom of expression against democracy and community. For example, the Supreme Court allowed localities to require permits for demonstrations, but required that the permits be granted unless the government could show a clear and direct danger to public safety. In upholding a national law aimed at restricting violent protests, the Supreme Court narrowed the reach of the law to individuals who showed a high likelihood of engaging in violence, and it justified its ruling by recognizing the fundamental importance of the rights of assembly and expression in a democratic society. Although the Supreme Court has not exercised the power of judicial review to protect freedom of expression, the government has mostly been respectful of freedom of expression (Krotoszynski, 2006, pp. 142–55, 178–80).

UK

In the UK, judicial independence has recently been strengthened by the Constitutional Reform Act 2005, which led to the formation of the Supreme Court of the UK; formerly, the Lords of Appeal in Ordinary (also known as Law Lords) were the highest-ranking judicial officials and were members of the House of Lords (Hazell, 2007). Of course, the UK adheres to the principle of parliamentary sovereignty, so the Supreme Court still lacks the power of judicial review. Freedom of expression issues arise from the incorporation of Article 10 of the ECHR to UK law via the Human Rights Act 1998, as well as under statutory and common law. Certainly, recognition of freedom of speech in the UK did not begin in 1998. John Milton famously argued against licensing of the press in the 1600s. In the modern era, freedom of expression has been significantly protected since the late 1970s (Merris, 2002). Under the Human Rights Act, first the Law Lords and later the Supreme Court obtained the power to issue declarations of incompatibility which trigger the government to amend the challenged law. The UK Supreme Court is also obligated to interpret primary and secondary legislation to be compliant with the ECHR, although how that should be done has been subject to considerable debate (Cram, 2006, pp. 40–5). David Feldman (1998, p. 157) explained that Article 10, s. 2, makes for a very different experience in the UK (and Europe) compared to the US, because it defines which government interests

are legitimate and then asks courts to balance whether restrictions are necessary in a democratic society (for a more general discussion of the ECHR across Europe, see Zeno-Zencovich, 2008, pp. 89–98). As with Canada's s. 1, ECHR Article 10 makes the protection of freedom of expression less rigid and allows greater protection for minority rights. Feldman also pointed out that the UK is distinct from the US in terms of the values that underlie the interpretation and development of freedom of expression jurisprudence. In particular, the UK is less individualistic and more open to experimentation, which fits well with parliamentary sovereignty and the flexibility of Article 10 (1998, pp. 169–70).

Feldman (1998) concluded that the UK would not be wise to adopt a jurisprudence of content-neutrality. Although the normative propriety of the content-neutrality jurisprudence for the UK is well beyond the scope of this project, the empirical aspects of the response of Ivan Hare (2005) to Feldman are of interest. Hare argued that Parliament and the courts have adopted much of the content-neutrality approach, but it has not been articulately developed. He claimed that the US content-neutrality jurisprudence has provided more protection for expression than the approach used in any comparable legal system, and its use should be made more explicit in the UK (Hare, 2005, pp. 57, 79). Thinking comparatively, he agreed with Feldman that the US is distinct from other countries. He concluded that the US approach emerged from a need to overcome the early failure of first amendment balancing approaches, especially with respect to communist dissent and the reactions to it (see Chapter 5). Content-neutrality stood out because it provided clear guidance for lower courts in light of the unique political history of the US involving not only communism but later developments which protected civil rights and war protests (Hare, 2005, pp. 85–6).

Comparisons

Based on the comparison of the US to Canada, Germany, Japan and the UK, it is apparent that none of the main factors alone shapes the development of a country's freedom of expression jurisprudence; as jurisprudential regime theory posits, a combination of factors must be considered. First, all of the high courts have a fair degree of judicial independence. Second, the power of judicial review has increased the likelihood of protection of freedom of expression in the US, Germany and Canada. Japan stands out as an obvious exception, as the Japanese Constitution gives the courts the power of judicial review but the Supreme Court is quite hesitant to exercise it, choosing instead to protect expression through narrowing constructions of statutes. The UK provides a fascinating contrast, as the judiciary lacks the power of judicial review due to parliamentary supremacy, but historically the Law Lords used common law and statutory interpretation to protect freedom of expression.

With the passage of the Human Rights Act, the Law Lords, and later the UK Supreme Court, gained the ability to issue declarations of incompatibility. Third, whether and how their countries' constitutions encourage or require balancing influences how the various high courts shape their jurisprudence. Freedom of expression is balanced against equality in Canada and against human dignity in Germany.

To this point, the discussion has focused on the factors that have shaped the development of free expression jurisprudence in Canada, Germany, Japan and the UK. Whether a jurisprudential regime actually exists in a country and whether the justices of a nation's highest court voted differently after the regime was established is a question that is beyond the scope of this book. However, scholars like Vanberg (2005) have demonstrated the fruitful application of an approach that considers policy preferences, strategy and jurisprudence to countries beyond the US. In addition, Weinshall-Margel (2011) has applied jurisprudential theory to Israel. Therefore, it seems plausible that jurisprudential regime theory could lend insights to high court decision-making in the countries discussed here, but the empiricial proof remains to be seen.

Some possibilities for candidate regimes would include challenges to freedom of expression based on equality in Canada and reputation or human dignity in Germany. In Japan, the simple coding of votes as constitutional or not would be insufficient to create variation. Instead, the dependent variable would have to be whether the Supreme Court showed protection of free expression via narrowing statuory constructions. Qualitative analysis would also be necessary to understand the content of the judicial opinions. It is possible that the Japanese jurisprudential regime is based around the protection of free expression only when it advances self-government. In the UK, possible dependent variables would be the presence or absence of protection of freedom of expression via statutory interpretation or common law, or whether a declaration of incompatibility was issued. A researcher could test whether the adoption of the Human Rights Act in the UK and/or the establishment of the Supreme Court made a difference. Other questions to be be answered include: Do high court justices vote differently after the establishment of a regime? Can a clear starting-point even be identified? Do the justices allow their political views to influence their decisions? Do they defer to the preferences of government, as might be expected in Japan (Ramseyer and Rasmusen, 2003), or the public, as might be expected in Germany (Vanberg, 2005)?

Is the US exceptional? This is one of the questions that initiated this comparative discussion. Although I would shy away from a Hartzian explanation that suggests the linear ascent of liberalism, I agree with Feldman (1998), Hare (2005) and Weinstein (2009) that the US is unique in that

content-neutrality has provided a higher level of protection for freedom of expression. However, I would emphasize that the factors which explain the US system also provide insights into other countries, especially judicial review, judicial independence, the phrasing of a country's constitution and the articulation and balancing of values at stake in freedom of expression cases. There may be variation in the presence of these factors in different countries but that does not mean the factors themselves are completely unique to the US.

I would also issue five qualifications to any claim of US exceptionalism. First, there is considerable variation by justice in the US, due to attitudinal motivations. Second, there are cases which constitute exceptions to content-neutrality. There are areas of law such as obscenity or expression in non-public forums that the Supreme Court has deliberately exempted from the content-neutrality jurisprudence, as I discussed in Chapter 3. These are also cases in which political motivations such as deference to national security cause the justices to depart from the jurisprudence (see Chapter 5), or cases in which the line of content-neutrality is difficult to draw (see Chapter 6). Third, there are important cases in which the US Supreme Court has engaged in balancing of equality and freedom of expression. The *RAV v St Paul* (505 US 377, 1992) decision, in which the Court applied the content-neutrality requirement to hate speech and fighting words, has been cited as an example of how the Court has been doctrinaire in applying the content-neutrality requirement, resulting in a higher level of protection for hate speech as compared to other countries (Weinstein, 2009, pp. 85–6, 91). The majority coalition that agreed to apply content-neutrality to hate speech was comprised of conservatives William Rehnquist, Antonin Scalia and Clarence Thomas, and moderate conservatives Anthony Kennedy and David Souter, according to Segal-Cover estimates of the justices' attitudes (over time, Souter became known as more liberal to moderate on freedom of expression cases). However, in some later decisions related to hate speech, the Supreme Court showed a greater willingness to advance equality over freedom of expression. In *Wisconsin v Mitchell* (508 US 476, 1993), the Court unanimously allowed the enhancement of sentences for crimes committed on the basis of race. In *Virginia v Black* (538 US 343, 2003), six justices agreed that Virginia could criminalize cross-burning that was done with the intent to intimidate. On that issue, the coalition was ideologically diverse, as it was made up of conservatives Rehnquist, Scalia and Thomas, moderate conservative Sandra Day O'Connor and moderate liberals John Paul Stevens (Stevens' Segal-Cover score was conservative but over time, he gained a reputation as being more liberal) and Stephen Breyer.

My fourth qualification is that the content-neutrality jurisprudence is a double-edged sword. It serves to limit expression when the government is able to regulate in a neutral manner. Fifth, with respect to the argument that Canada and the ECHR prioritize equality over freedom of expression

compared to the US, it is worth bearing in mind that the US Supreme Court's content-neutrality jurisprudence was shaped heavily by the values of equality and equal protection that were applied to the free expression context by the NAACP and the civil rights movement.

Interpretivism versus positivism

Is a statistical model the correct approach to studying the Supreme Court? Considering that the justices spend much of their time interpreting law and are adept at making incredibly fine distinctions, political scientists of the interpretive school criticize statistical approaches for missing the role that ideas and language play. To paraphrase Howard Gillman (1999, p. 65), the Supreme Court is an idea, not just a building or a game. On the other hand, the positivists who favor statistical approaches for their analytic rigor and consistency might counter that interpretive approaches muddle causal connections and take into account so many details that their explanations are post-hoc, idiosyncratic and over determined.

Jurisprudential regime theory has aspects of both interpretive and positive theories, but can it meet the challenges that each side sets out? Interpretivists emphasize the role of language in politics and stress that the language should be viewed from the internal perspective of a group (Brigham, 1978), rather than an external, positivist perspective where the group's behavior is expressed in the objective language of the scholar not the language of the group (Hughes, 1990, pp. 16–34). Positivists assume that precise, objective language can accurately capture the underlying reality (Shively, 1990, pp. 30–60), but interpretivists respond that, if language has its own constitutive rules that vary from group to group, it should be interpreted in its own way (Winch, 1958).

Social movements, for example, use international norms, including norms based on international law, to spur collective action, according to Sanjeev Khagram, James Riker and Kathryn Sikkink (2002). Through the process of framing, these social movements share meanings, present arguments and take actions for change in the context of international norms (Khagram et al., 2002). Michael McCann argued for using a dispute-centered approach to understand how social groups use legal norms and discourse to advance their goals. The law has a constitutive power; legal decisions can create new opportunities for legal claims, and social groups also revise and adapt to the norms expressed through legal opinions (McCann, 1993, pp. 730–5). Although these examples are a bit distant from an examination of the role of language in the justices' decisions, other scholars have applied interpretive concepts to Supreme Court decision-making. Brian Pinaire (2008) analyzed the Court's opinions through concepts such as frames and schemata. Stefanie Lindquist

and David Klein theorized that legally motivated judges, including Supreme Court justices, are members of interpretive communities who strive to make decisions according to shared legal standards; when judges describe how they decide cases, they express a desire to decide in a professionally responsible manner (Lindquist and Klein, 2006, pp. 137, 141). What these four examples share in common is an interpretive approach. These scholars focus on meaning internal to the groups they study.

The interpretivism versus positivism debate tends to map neatly onto the interpretive institutionalism versus behavioralism (including both rational choice and attitudinal models) debate. Interpretive scholars like Brigham, Gillman and Pinaire are more attentive to language and strive to provide explanations that fit with the legal meanings the justices lend to the law. Attitudinal and rational choice behavioralists typically emphasize mathematical and statistical modeling as the best ways to explain judicial behavior.

Some scholars prefer positivist methods because such approaches are systematic and generalizable. Although Thomas Hansford and James Spriggs focused on how the interpretation of precedent influences the development of law, they noted that they were not able to capture the nuances of how precedents change with later interpretations. To do so would require case studies, but they chose positivist methods because they wanted to test their approach on a wide range of cases over time, which allowed for generalizations to be drawn. To their credit, they tested over 6000 cases decided over a span of 56 years (Hansford and Spriggs II, 2006, pp. 13–15, 133). Similarly, in his treatment of the influence of friend of the court briefs on the Supreme Court from 1946–2001, Paul Collins (2008, p. 11) argued that the ability of his approach to be generalized 'more than compensates' for the loss of detail that studies of single issue areas provide.

By looking for statistical patterns, positivists may miss the explanation of events from the perspective of the participants and overlook the role of language in judicial decision-making. In response, positivists point out that interpretive models are not subject to verification or falsification and are therefore subjective. For example, the interpretive institutionalist Ronald Kahn argued that the *Planned Parenthood v Casey* (505 US 833, 1992) plurality decision on abortion was not based on the justices' policy preferences but, instead, on principles about rights and the role of the Court, such as respect for precedent and maintenance of legitimacy (Kahn, 1999, pp. 176–9). With no systematic, statistical testing of this argument, it is easy to dispute it as a subjective interpretation. The fact that Justice O'Connor's opinion explicitly took into account the cost to the Court's legitimacy of overturning *Roe v Wade* (410 US 113, 1973) is strong evidence in support of an external strategic explanation, and even Kahn conceded that the influence of attitudes could not be ruled out (Kahn, 1999, p. 180).

A key question for jurisprudential regime theory is whether the challenges of both positivists and interpretivists can be met. When an approach is dismissed as subjective, it risks simply preaching to the converted, especially considering the sometimes doctrinaire divisions in the political science subfield of judicial politics and public law. Because jurisprudential regime theory challenges the attitudinal model as being too simplistic, it is appropriate to challenge the attitudinal model on its own grounds by establishing statistical models that can be replicated, re-examined and challenged. It is much harder to dismiss a systematic analysis of hundreds of cases than a detailed account of a few. Even though jurisprudential regime theory advocates statistical modeling, the theory also pays close attention to interpretivist concerns regarding the role of language, avoiding a mechanistic view of law and maintaining the justices' agency. Ultimately, it is possible to attempt to address the methodological concerns of interpretivists, attitudinalists and advocates of the strategic model alike, but it takes consciousness regarding methodological choices and discipline regarding the use of language. When writing about statistical models, it is easy to fall into the trap of writing 'factor X caused the justices to vote differently' rather than 'the justices considered factor X differently'. Being conscious of interpretive concerns, I try to write in a way that retains the justices' agency and makes it clear that the justices, not variables, are deciding cases. Approaching a research question from multiple methodological perspectives can also help to bridge the divide between interpretivists and followers of the attitudinal and strategic models. The interpretive chapters in which I examine how the various attitudinal, strategic and jurisprudential factors matter to the justices augment the statistical chapter, and the statistical chapter provides some systematic evidence that overcomes concerns about subjectivity that might emerge if I were to only use interpretive methods.

Another way to put the question is to ask whether a better explanation emerges from using both interpretive and positivist methods. McCann (1999, pp. 91–2) argued that interpretivist and positivist methods can complement each other. Making a case for a jurisprudential regime explanation requires both types of methods as interpretivism is needed to make sense of the statistical model of case factors. Interpretive methods are required at the outset to immerse oneself in the case law, identify key jurisprudential factors, trace the origin of those factors to the regime-defining case, and then ascertain whether legal scholars confirmed the expected importance of the regime-defining case. These interpretive insights are used to construct coding rules. Coding for jurisprudential factors is an interpretive endeavor; jurisprudential factors, such as whether a law is content-based, require interpretation. Finally, interpreting the model results requires a combination of interpretive and positivist approaches. Observing changes in key jurisprudential factors that

do not make sense in terms of the jurisprudential regime cannot be regarded as evidence that supports a jurisprudential regime explanation. For example, Herbert Kritzer and I analyzed fifth amendment confessions and first amendment obscenity cases. In both areas of law, our Chow tests indicated statistically significant differences after the regimes were established, but the results for individual variables did not make theoretical sense in light of the changes in jurisprudence, so we did not conclude that the results confirmed the existence of a jurisprudential regime (Kritzer and Richards, 2010).

As someone who has read every Supreme Court opinion on freedom of expression since 1953, I appreciate the role of ideas and language; Kritzer and I created jurisprudential regime theory to capture the role of law as an institutional construct that shapes how the justices view cases. Looking at it from the interpretive perspective, I admit that applying the concept of content-neutrality to the coding of every case that raises a free expression claim and then modeling the impact statistically smacks of brute empiricism; surely there are more fine-grained distinctions that could be made. I have attempted to overcome this problem by using interpretive methods in Chapters 3, 5 and 6 to get at the incremental, nuanced development of law and to show the variation in how the justices treat different cases, including how the content-neutrality concept begins to break down.

There is something to be gained from the statistical approach as well. It enables me to speak to both sides of the interpretivism versus positivism debate. It allows me to cover more cases. Finally, although it may be crude, the advantage of examining every case through the lens of content-neutrality, rather than merely describing cases, is that it enables me to observe legal change. For example, in looking at a case in the 1950s where a majority of the Court may have ruled that the firing of a government worker for past communist affiliation did not raise a first amendment issue, as a coder I could apply the criterion of content-neutrality and see that the government did act in a content-based way. Of course, at some point content-neutrality does begin to matter, and the statistical approach allows me to see where. As the classic example of increased ice-cream sales correlating with higher crime rates shows, statistical analysis without theory can be misleading. Interpretive first amendment scholars recognize the importance of content-neutrality, so by modeling its effect while incorporating attitudes and other key factors, I can also speak to the positivists and provide a more complete picture. What I have tried to do is bring together the advantages of interpretive and statistical methods, using each where appropriate.

It is possible that some adherents of one camp may simply refuse to consider other types of evidence. My response is that the political science discipline is a science. Scientists are capable of considering different methodological approaches and scientists are professionally obligated to keep an

open mind toward the application of logic, data and evidence to a research hypothesis. (Of course, this is not to say that political scientists should not challenge the methods and findings of any theory.) Lawrence Baum made a strong case for theoretically complex approaches. He acknowledged that simplified, elegant models can facilitate analysis, but argued that if models are unrealistic, they 'depict a world of judging that is simpler than the real world'. The consequences are that the models will become 'less satisfying'. This will lead scholars to want to explore the conditions that affect the likelihood of strategic behavior. Baum's examination of the role of personal audiences as motivations for judicial behavior does just that (Baum, 2006, p. 175). Similarly, Lindquist and Klein (2006, pp. 135–62) combined interpretive and statistical methodologies to explain how the Supreme Court resolves circuit court conflicts.

In discussing the advantages and disadvantages of positivism and interpretivism it is important to emphasize that, although interpretive scholars are attentive to norms and the role of language, this does not mean that they are taking explicitly normative stances on judicial issues. For example, in his detailed treatment of electoral speech law, Pinaire used interpretive methods to investigate this area of law, but avoided making normative or prescriptive judgments about how the Court should decide electoral speech cases (Pinaire, 2008, pp. xiii–xiv). He showed how concepts like the marketplace of ideas and regulation of democratic processes helped to constitute the Court's construction of the law (Pinaire, 2008, 21–38). He observed that the justices interpret the marketplace of ideas in different ways (Pinaire, 2008, pp. 39–74). He looked at the rhetorical modes the justices employ and examined elements of cognition such as frames and schemata (Pinaire, 2008, pp. 75–124). He then used the components of his conceptual framework to explain four significant decisions of the Court, following the cases through the judicial process (Pinaire, 2008, pp. 127–224). In short, interpretive methods can be explanatory methods.

It is unfair to make normative criticisms of an explanatory model that constitute blaming the messenger for the message. Whether the approach is positivist or interpretivist, making normative critiques of it is unwarranted when the approach is merely seeking to provide an explanation. Of course, this claim is not meant to foreclose broader inquiries such as those made of early pluralism, a behavioralist school of thought: Is it possible to provide an objective explanation of politics? Are scholars asking the appropriate questions? Did pluralists fail to examine disparities of power (Farr, 1995, pp. 216–19)? Such a sweeping inquiry is beyond the scope of this book. By contrast, my point here is rather limited. Unlike some of the early normative attacks on behavioralism, interpretive institutionalism has focused on issues of explanation. Interpretivists want to focus on norms and language in order

to improve explanation, not to explicitly introduce normative debate over the proper role of the Supreme Court.

Finally, scholars must recognize that the methodological debate of interpretivism versus positivism does not necessarily map to explanatory findings of law versus attitude. As Keck pointed out, there are examples of interpretive methods that find support for attitudinal explanations (Keck, 2007b, p. 324). Systematic, large N studies like this book, the work of Lindquist and Klein (2006), and the many other positivist approaches to modeling law discussed in this book, have found support for attitudinal, institutional and legal explanations.

Although I have argued for an integrated approach, debates such as positivism versus interpretivism or attitudinalism versus interpretive institutionalism actually help to promote academic learning and development. The subfield of judicial politics has benefitted tremendously from the attitudinal model, in part because the model prompted those who held opposing views to be more refined and systematic in developing their responses, and in part because there is strong evidence in support of the argument that the justices' attitudes figure prominently in their decision-making. However, more and more evidence has emerged that has enabled scholars to reject the hypothesis that the justices' attitudes are the only systematic factor in Supreme Court decision-making. It is my sincere hope that this book has challenged scholars of Supreme Court decision-making to take jurisprudential regime theory seriously, which means recognizing that attitudes, strategy and jurisprudence may all play important roles. I also hope that I have encouraged scholars on both sides of the positivism versus interpretivism divide to be willing to learn from each other.

Conclusion

I hope that I have also done justice to my goal of providing a better understanding of this incredible story of the development of first amendment content-neutrality jurisprudence and the role that it played in the justices' first amendment decisions, which has resulted in considerably more protection for freedom of expression when the government has discriminated on the basis of content or viewpoint. Through the efforts of civil rights protesters like Richard Grayned and Earl Mosley, the NAACP and the civil rights movement more generally, the Supreme Court reconceptualized its understanding of freedom of expression, bringing to the forefront the principle that expression should be treated equally, that government should not discriminate against content or viewpoint, in order to promote the vigorous, free and open debate that is the hallmark of the US political system.

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