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Can We Account For Human Error in Supreme Court Decision-Making?

The Behavioral Law and Economics View of the Court's Decision-Making in First Amendment Religion Clause Cases

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Abstract

During the Supreme Court's 2014 term, the Court held in *Burwell v. Hobby Lobby* that corporations both have the right to free exercise of religious beliefs but also the right to refuse to provide employees certain benefits on the grounds of those beliefs. This decision diverged from previous case precedents, adding legal rights for corporate persons and also requirements for free exercise accommodation by law. Following the decision, the public cried out, *The Economist* announced the decision with the subtitle "Believe it or not."

Rather than embodying legal principles of predictable process, the Supreme Court presents a puzzle of decision-making and judgment. Several theories have been presented by scholars of the Court ranging from a legal-institutional model which incorporates legal theory to the fact-attitudinal and utility-maximization models which incorporate rational-choice theory. Rational-choice theory is the motivation behind microeconomics analysis and the law and economics movement.

Relatively recently, the cognitive psychological insights into the flaws of microeconomics research have created a new field known as behavioral economics. Even though behavioral research has become a juggernaut of governmental policymaking, scholars have yet to apply the insights into Supreme Court decision-making. This research has undertaken an examination of the Religion Clauses and applied behavioral insights to traditional models of Supreme Court decision-making. Ultimately, this research has yielded a decision function grounded in Religion Clause law and the legal research pursued here.

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Chapter 1. Introduction

Is Supreme Court decision-making driven by law or by politics?[1] This is the foundational debate of the discipline of judicial politics. Despite being a frequent object of study, the Supreme Court of the United States has yet to yield any clear position as to how legal scholars and laypersons alike might consistently explain the Court's behavior. While some studies of Supreme Court decision-making behavior argue that the behavior follows no predictable pattern,[2] most scholars of the Court have fallen into two styles of theoretical model: legal and rational choice. Doctrinal legal research places legal principles such as laws, legal concepts, and case precedents as the basis of Supreme Court decision-making. Rational choice theories generally look at microeconomics-type assumptions about goals, motivations, and behavior. Rational choice research splits further into utility theories and attitudinal theories. Utility theorists posit judges as engaging in utility maximization behavior, while attitudinal researchers posit the justices as following personal policy preferences.

These three major theories, herein after referred to as the legal-institutional model, the fact-attitudinal model, and the utility-maximization model, all provide their own excellent evidence that they are the controlling decision-making procedure for Supreme Court justices. Legal-institutional

[1] Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 THE JOURNAL OF POLITICS 273–284 (2010) at 273.

[2] See, e.g., Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WILLIAM & MARY LAW REVIEW 329–351 (1993); Edward S. Adams et al., *At the End of Palsgraf, There is Chaos: An Assessment of Proximate Cause in Light of Chaos Theory*, 59 UNIVERSITY OF PITTSBURGH LAW REVIEW 507 (1998); and Vincent DiLorenzo, *Legislative Chaos: An Exploratory Study*, 12 YALE LAW & POLICY REVIEW 425–485 (1994).

models correctly assert the degree to which the justices are controlled by legal process, yet they fail to capture just how malleable legal precedents can be when the justices see some principled reason for taking a different course of action. Fact-attitudinal models help to fill the gaps in legal models in terms of helping us understand what motivates the justices to find principles which help them resolve conflicts in policy areas of interest, yet justices both purport not to and cannot fairly utilize personal preferences as their decisional rationale. The recently posited labor economics-based theory of judicial utility-maximization includes these dual considerations of policy preferences and legal constraints, yet utility maximization theories are ill-fit to the unique context of the Supreme Court justices. In spite of the excellent evidence and scholarship that makes up these three models, no model has yet been declared the singular presumptively valid model. It is the goal of this research to convince the reader that, at least within the narrow area of Supreme Court Religion Clause law, a utilization of analytical insights of cognitive and social psychological research that makeup the behavioral law and economics literature will incorporate the successful approaches of each model while mitigating the problematic areas. Utilizing these insights, this thesis will argue that the standard errors of human judgment and decision-making drive Supreme Court decision-making just as much as law, policy preferences, or utility maximization.

Human nature is subject to numerous flaws of judgment and decision-making that is entirely predictable. Within the complex world of the Supreme Court, the justices must often balance competing rights, interests, and precedents. Not infrequently, these competing rights, interests, and precedents may simultaneously suggest two mutually exclusive ways forward. To the lawyer, layperson, and Supreme Court justice alike these conflicts present an unpredictable and unanswered question. As we shall see from the evidence garnered in the area of Religion Clause law, the insights of cognitive psychology, behavioral economics, and the increasing body of decision sciences help to explain these moments of Supreme Court decision-making. Supreme

Court decision-making may even be inherently predictable if one takes into consideration these insights into human decision-making made in the last 50 years.

In order to assess Supreme Court decision-making, this research looks at the Religion Clauses of the First Amendment to the US Constitution and the case law surrounding them. This thesis will follow the theories discussed and analyze them utilizing insights from behavioral economics and the social sciences more generally. The aim here is to propose an alternative model of Supreme Court decision-making grounded in religion clause law. In the course of this chapter, we will look at Supreme Court decision-making generally and then examine the Religion Clauses specifically and the jurisprudence arising from the Clauses. Next, we will look at an overview of the research design, which will be taken up again in Chapter 2, and finally an overview of the prior models, which will be taken up in later chapters again. In the coming chapters, this research will review behavioral law and economics literature as it applies to the religion clauses. We will see how behavioral research improves on traditional law and economics analysis and further how it can both incorporate and improve on the existing legal-institutional, fact-attitudinal, and utility-maximization theories.

1.1 The Problem of Supreme Court Decision-Making

Although the Supreme Court is the highest body of judges in the country, with supreme authority over the judiciary and the mandate to take any cases it deems worth its time, the Court has only relatively recently become an influential independent actor in American politics. Prior to 1925, the Court merely acted as a court of last resort for appeals from the next tier of federal courts, lacking discretion to refuse to hear cases or to decide cases not yet appealed to their level. In 1925, Congress passed the Certiorari Act, thereby granting the Court discretion and power to

determine which cases it would hear during its limited time. This meant that the Court could dictate the legal discussion by issuing writs of certiorari (cert), an order to any lower court to assemble a case record and send it up to the Court.

With the institution of cert, as writs of certiorari are often abbreviated, the Court became an extremely powerful legal actor by taking up and deciding some of the most controversial and contested issues of their time.[3] Because of their authority and ability to change the course of United States law and history, the process of Supreme Court decision-making is of interest to any legislator, lawyer, politician, or citizen. The results of Supreme Court cases are at the center of a wide body of law, politics, and ideology.

While Supreme Court chaos theorists[4] offer what MIT neuroscientist David Marr describes as a Type 2 explanation,[5] i.e., a system which is in some sense its "own simplest description,"[6] that cannot be distilled into rules and models, this thesis will argue along with legal scholars, political scientists, and the general population for a Type 1 explanation. That the system of judicial decision-making involves both rules and processes which can be distilled into coherent models.

This thesis asserts, in keeping with the majority of social scientific research on Supreme Court decision-making, that the justices follow Type 1 system with a discoverable set of rules and models that appropriately explain and predict behavior. Examining and applying the set of theories about Supreme Court decision-making to Religion Clause case law will test the strength of the

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[3] See, e.g., *Marbury v. Madison* (1803); *McCulloch v. Maryland* (1819); *Gibbons v. Ogden* (1824); *Dred Scott v. Sandford* (1857); *Plessy v. Ferguson* (1896); *Korematsu v. United States* (1944); *Brown v. Board of Education* (1954); *Mapp v. Ohio* (1961); *Gideon v. Wainwright* (1963); *Miranda v. Arizona* (1966); *Roe v. Wade* (1973); *United States v. Nixon* (1974); *Texas v. Johnson* (1989); *Citizens United v. Federal Election Commission* (2010); *National Federation of Independent Business v. Sebelius* (2012); *United States v. Windsor* (2013); or *Hollingsworth v. Perry* (2013).

[4] See Note 2 *supra.*

[5] ARTIFICIAL INTELLIGENCE -- A PERSONAL VIEW, ftp://publications.ai.mit.edu/ai-publications/pdf/AIM-355.pdf

[6] *Id.* 2

various claims and principles contained in these theories. Utilizing these claims and principles in conjunction with the insights and improvements of behavioral economic theory, this work will ultimately yield a descriptive model of Religion Clause law with some predictive value in other areas.[7]

1.2.1 The Significance of Religion Clause Law: Historical Importance of Religion in American Society

Religion plays an important role in the cultural underpinnings of modern America. Many of the American colonies, starting with the Massachusetts Bay Colony, and continuing with Pennsylvania, Connecticut, Rhode Island, and others, built upon the principles of separation between church and state. The "Protestant work ethic"[8] played a role in the success of the American colonies. Yet most of the founding fathers of the American Republic were profoundly secular[9] and sought a federal boundary between church and state.[10] The historical conflict between the secularist aims of the founding fathers, beginning with Thomas Jefferson's bill guaranteeing equal treatment to all religions as Virginia Governor in 1779,[11] and various entanglements of church and state started a legal debate that remains influential today.

Religion Clause law is of particular importance due to its unique relationship to the political sphere. Religion as a legal issue defies the typical conservative-liberal ideological divide.

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[7] See Chapter 7 *infra*.
[8] MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Routledge Classics) (1930), http://www.d.umn.edu/cla/faculty/jhamlin/1095/The%20Protestant%20Ethic%20and%20the%20Spirit%20of%20Capitalism.pdf
[9] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME LAW REVIEW 371, 377–378 (1996)
[10] See e.g., Roger Williams, William Penn, James Madison, etc. Well-articulated by Thomas Jefferson in 1802: LETTER TO THE DANBURY BAPTISTS, http://www.loc.gov/loc/lcib/9806/danpre.html
[11] Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAGAZINE, Oct. 2010; See also, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS

Conservatives favor maximizing private autonomy, personal responsibility, and limited government. Meanwhile, liberals believe in governmental duty to solve private problems, alleviate social ills, and protect civil liberties. On the issue of religion, however, conservatives tend to favor religious presence in the government,[12] the incursion of the private sphere into the public sphere, and liberals tend to argue against entanglement between the government and religious issues,[13] a strict separation between the public and private spheres. The contradiction in ideological preference is precisely why religion clause law is of such interest. Each of these various aspects of American society underscore the importance of using behavioral economic analysis to understand judicial decision-making about religion clause law.

1.2.2 The Significance of Religion Clause Law: Religion Clause Jurisprudence 101

From the political process, to domestic and foreign policy, religion clearly plays an important role in many aspects of American society. These phenomena of society are extremely pertinent to the decision-making of legislative bodies and other elected officials; however, religion plays a decidedly different role in the judiciary. In this section, we will look at Religion Clause jurisprudence because understanding the basics of this area of the law is essential to understanding the legal principles discussed later on.

[12] See, e.g., vote of the Court in *Town of Greece v. Galloway*, 572 U.S. ____ (2014). The question in front of the Court was whether utilizing a prayer to open the legislative session violated the Establishment Clause. The Court answered that it did not violate the Establishment Clause by opening the session with a prayer through the votes (5) of the conservative justices (sorted by ideology): Kennedy, Roberts, Scalia, Alito, & Thomas, JJ.

[13] See, e.g., vote of the Court in *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1984), The question before the Court was whether Michigan programs authorizing publicly-funded teachers to teach courses in private, religiously-funded schools violated the Establishment Clause. The Court answered that public teachers in religious institutions did violate the Establishment Clause by the votes of the most liberal justices (at a time when J. O'Connor was the most conservative Justice) (sorted by ideology): Brennan, Marshall, Blackmun, Powell, & Stevens, JJ.

As set out by the Bill of Rights, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[14] This seems relatively clear guidance at first glance, yet the need for the Court to clarify these clauses have become increasingly common. Because the First Amendment's Free Exercise and Establishment clauses historically only limited the federal government from passing laws preventing or supporting religious activities, state-level cases would not have been within the Court's jurisdiction before the passage of the Fourteenth Amendment during the era of Reconstruction.[15] Further, many states readily established religions and mandated belief in God as prerequisite for holding office.[16] Despite the incorporation of previously federal-level-only rights into the requirements of state-level lawmaking,[17] it was not until the 1940s that Religion Clause law began to be taken up to the Court.

Although establishment of religion by states was not uncommon, we also saw that several states highly prized and touted their sense of free exercise of religion. This contributed to the latency period between the ratification of the Fourteenth Amendment and the two cases in the 1940s that officially made the Religion Clauses a subject of legal inquiry. The cases of *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947) mark major precedent in the Court. In *Cantwell*, two Jehovah's Witnesses, Jesse Cantwell and his son, were promoting their religious message in a predominantly Catholic neighborhood of Connecticut. They handed out pamphlets and spoke with any curious passersby. In addition, the Cantwells had a portable phonograph on which they played materials interpreted as disparaging to the Roman Catholic Church. After some locals became upset, the Cantwells were arrested for breaching the peace. The Court decided that the Cantwells had a right to proselytize by virtue of their right to

[14] U.S. Const. amend. I.
[15] See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947)
[16] MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (Aspen Publishers 2nd) (2006). E.g., Virginia, New Hampshire, Maryland, etc.
[17] See *Gitlow v. New York*, 268 U.S. 652 (1925)

free exercise of their religion. While the Court held that regulations on solicitation had legitimate purpose, the statute permitted the local officials to determine whether or not the cause was religiously motivated and thereby exempt from the statute. The Court found this particular aspect, and its application in the case of the Cantwells, clearly violated the First Amendment. On the strength of this ruling, seven years later, a New Jersey man questioned whether transportation reimbursements given to the parents of students who attended Catholic schools unnecessarily entangled the state in religious affairs, thereby violating the Establishment Clause. Although the Court ruled that this transportation reimbursement, which was disbursed to any parent sending a child via the public transportation system regardless of school attended, did not violate the Establishment Clause,[18] the case itself gave legitimacy to any future claims that some government regulation may unnecessarily entangle the state in religious matters.

Thus as religion became an issue for federal courts, the need for authoritative clarification became greater. The Court began to take up cases to hand down doctrine for use in lower courts and in everyday decision-making procedures for the legally informed. As *Cantwell*[19] and *Everson*[20] came down within a decade of one another, so did the next major doctrinal decisions: *Sherbert v. Verner*[21] and *Lemon v. Kurtzman* I[22] and II.[23] *Sherbert* is the major doctrinal decision regarding Free Exercise since the Cantwells first entered the Supreme Court's chambers.[24] Similarly, *Lemon* is the major doctrinal decision regarding Establishment since Everson brought his complaint

[18] Justice Black wrote that the services at issue were those elements so basic to the public good that they could not be involved in any kind of religious aspect. He cites other services such as police and fire protection which are necessary for the common good and therefore cannot be improperly entangling the state in religious affairs.
[19] 310 U.S. 296 (1940)
[20] 330 U.S. 1 (1947)
[21] 374 U.S. 398 (1963)
[22] 403 U.S. 602 (1971)
[23] 411 U.S. 192 (1973)
[24] Joseph A. Ignagni, *U.S. Supreme Court Decision-Making and the Free Exercise Clause*, 55 THE REVIEW OF POLITICS 511–529 (1993)

before the Court.[25] It is entirely unclear whether the nearly identical interval here (approximately 23 years between *Cantwell* and *Sherbert* and between *Everson* and *Lemon*) reflects design or coincidence; however, what is evident is that the Court began to develop consensus on the need for clarification of the relevant Constitutional provisions.

These four major cases yielded the four most important legal developments in the field of Religion Clause law. In the Free Exercise arena, *Cantwell* established that Free Exercise claims were appropriately addressed in courts. 23 years later, *Sherbert* established four criteria to determine if the government had violated an individual's right to religious free exercise. On the part of the individual, the court would need to determine: 1. whether the person has a claim involving a sincere religious belief, and 2. whether the government action is a substantial burden on the person's ability to act on that belief. If these are each determined to be the case, the government then must show that: 1. it is acting to further a "compelling state interest," and 2. that it pursued this interest in the least restrictive manner respective to religious exercise. By these criteria, courts can determine whether free exercise rights have been violated.[26]

In the area of Establishment Clause law, *Everson* established that claims of state and federal laws interfering with religious institutions, principles, and doctrines properly fell under First Amendment Establishment laws. 23 years later, *Lemon* established the go-to test of laws respecting establishment of religion. The test contained three parts: Entanglement, Effect, and Purpose. The Entanglement prong requires that a statute must not result in an "excessive government entanglement" with religious affairs. The Effect prong requires that the law neither advance nor

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[25] Joseph A. Ignagni, *Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions*, 36 JOURNAL OF CHURCH AND STATE 301–327 (1994)

[26] Limitations on this analysis stem from: *Employment Division. Department of Human Resources of the State of Oregon v. Smith*, 494 U.S. 872 (1990), holding that free exercise exemption was not required from generally applicable laws; Religious Freedom Restoration Act of 1993, 107 Stat. 1488; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

inhibit religious practice. Finally, the Purpose prong demands a secular legislative purpose for the statute. These landmark cases set the bar for legislation and also bar the entry of cases up to the Supreme Court level. Common Law jurisprudence determines that these cases have a controlling presumption when litigants raise new claims. Translated from legalese, this means that lower courts, as well as any potential litigants or claimants, will presume that these standards will determine how any given case will result.

The most unique element of the Common Law system, handed down from English jurisprudence and now incorporated into our constitutional democracy, is its basis of legal reasoning on analogies to past decisions.[27] Because the analogies made between present claims and past decisions does not always hold – and at the level of the Supreme Court, the Court grants cert precisely when the analogy does not hold – nuances are constantly added to past decisions. This marks the interesting aspect of judicial decision-making. How do Supreme Court justices determine which cases merit cert and which do not? How do the justices then deliberate and determine the appropriate course of action for the law moving forward? It is precisely these questions that this research seeks to answer while utilizing behavioral economics as a frame to understand the value of the numerous imperfect answers offered thus far.

1.2.3. The Significance of Religion Clause Law: Research Questions and Hypothesis

During our initial research phase for this project, a case of particular interest to me was still before the Court. *Burwell v. Hobby Lobby* (then "Sebelius v. Hobby Lobby, Conestoga Wood, et.

[27] John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 131 (2008) at 134.

al.")[28] was one of a suite of cases arising with the Affordable Care Act (ACA, or alternatively, Obamacare). Hobby Lobby stores, a series of craft stores owned by a family not dissimilar from the Waltons,[29] took issue with the ACA's coverage of contraceptive care.

The family-owners of Hobby Lobby stores argued that the choice issued by the ACA was too steep. Failing to provide contraceptive coverage for employees would result in a $270 million fine per year. They argued, however, that having to provide this coverage conflicted with their religious objection to "abortifacients," that is, the class of contraceptives which (intentionally) cause miscarriage, such as "Plan B." The claims made here were nothing unique or new: Hobby Lobby and the other companion claimants were not the first to suggest a religious objection to government mandated behaviors. For example, the Court previously rejected claims of this sort to greater public policy interests in the case of an Old Order Amish man who objected to paying and withholding from employees Social Security tax on the basis of religious objection.[30] On the strength of this analogy, logic dictated that the Department of Health and Human Services, with Secretary Burwell at its head, would prevail against Hobby Lobby et al.'s claim of religious objection to otherwise applicable laws.

Above,[31] we looked at the Supreme Court's revision of Free Exercise claims under *Sherbert* in *Employment Division v. Smith.* That case involved two Native Americans who worked as counselors at a drug rehabilitation program. As part of a religious ritual in the Native American Church the two claimants took peyote and were fired from their jobs. They filed for unemployment compensation and the Employment Division of the Oregon Department of Human Resources denied their claim by reasoning that ingesting peyote constituted work-related

[28] 573 U.S. ____ (2014)
[29] The small family that closely holds the Walmart empire.
[30] *United States v. Lee*, 455 U.S. 252 (1982)
[31] Note 26.

misconduct. After deciding that the Oregon Supreme Court ought to decide whether or not the ingestion of peyote violated Oregon's state drug laws. When the case returned to the Court with the answer from Oregon's Supreme Court that the law prohibited the use of illicit drugs for sacramental purposes, but, Oregon asserted, this prohibition violated the Free Exercise clause, the Court wrote that individual religious belief has never excused an individual from an otherwise valid law (Scalia, J.). Further, Justice Scalia wrote that allowing exceptions to any law affecting religion would "open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."[32]

In *Employment Division v. Smith,* the five most conservative Justices, as well as Justice Stevens, voted in line with Justice Scalia. The two most liberal Justices, Marshall and Brennan, as well as Justice Blackmun voted against this decision. Given the strength of this ruling, as well as the conservative support for the principle, the preponderance of evidence suggested that Secretary Burwell would prevail with the united support of the Court. Quite to the contrary, however, in a five-to-four vote, the conservative justices found in favor of Hobby Lobby. They reasoned, instead, that there existed a "less restrictive alternative," utilizing the second part of the governmental aspect of the *Sherbert* test.

What principled reason might justify such a stark contrast in reasoning? How could justices with the same ideological valence justify refusing employment benefits on the basis that granting the exemption would open the door to countless other claims while arguing twenty-four years later that less restrictive alternatives are possible? In *US v. Lee* and *Employment Division v. Smith*, as well as in any other case where the government burdens rights are there not less restrictive alternatives?

[32] *Employment Division, Department of Human Resources of the State of Oregon v. Smith*, 494 U.S. at 876.

Each of these questions reveals a larger point. What might be the basis on which the Supreme Court makes these decisions? Several prominent social scientists have proposed that judges proceed according to a fact-attitudinal model, which essentially maps onto ideological valences of conservative and liberal and their correlated policy preferences.[33] Does this kind of consideration fully explain why the conservative justices refused unemployment to a Native American who used drugs for a sacred rite, given that both entitlements and drug offenses are a favorite target of conservatives, while they found that mandating the generally valid coverage of contraceptive care to be overly restrictive, when religious involvement in law is encouraged and contraceptive freedom is discovered by conservatives? Certainly, it is not unpersuasive reasoning, yet this kind of basis defies both a legal conception of the justice system and our basic principles of what ought to be the basis of judicial decision-making. Given these descriptive and prescriptive concepts, what might reconcile our conception of what should be happening and what is actually happening?

The field of behavioral law and economics solves these problems. In part, behavioral law and economics looks to behavioral economics (and its underlying cognitive psychological basis) as a lens toward revising law and economics. Law and economics follows the assumptions of the Coase Theorem:[34] economists have asserted that in a pure free market economy private costs and social costs would be equal. In other words, negative externalities (unintended negative consequences of a process, e.g., pollution) are all cured by free market forces and the costs are distributed in the most efficient way.

[33] See, e.g., DAVID W. ROHDE & HOWARD J. SPAETH, SUPREME COURT DECISION MAKING (W. H. Freeman & Co. Paperback) (1975); JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005)

[34] THE COASE THEOREM ENCYCLOPEDIA OF LAW AND ECONOMICS 836–892

Underlying assumptions of the Coase Theorem have come into question. For instance, Coase Theorem requires a situation of perfect rationality, no transaction costs, and no legal impediments to bargaining. The concept that any person anywhere is purely rational is so absurd as to be a trope of inhumanity as seen in the character of Mr. Spock in the Star Trek series. The Spock character, who, it is worth noting, is half human,[35] rarely behaves irrationally or makes any mistake. If he does either of these things, the mistake, emotion, or irrationality is attributed to Spock's humanity. This is an apt analogy to behavioral economics. In some way, behavioral economics has sought to return the humanity into economic theory about human behavior.[36] One of the best proven and oft cited experiments of behavioral economics returning human error to economic transactions is the experiments which revealed the bias known as the "endowment effect."[37]

The endowment effect refers to an experiment wherein experimenters asked half of the participants what they would pay for a given object while the other half of the participants receive the object and must determine what they would accept in exchange for the object (in one study, the object for students at Cornell was a Cornell mug from the school store). The contrast here lies between the results predicted by price theoreticians and that of the cognitive psychologists behind behavioral economics research. Say student A is in the no mug condition and student B is given a mug. If A is willing to pay (WTP) $15 for one of the Cornell mugs, then price theory would predict that A would be willing to accept (WTA) exactly $15 (at a minimum). What happens instead is that when students are endowed with the right (i.e., the mug) they have a much higher

[35] And half Vulcan. For those unfamiliar with the series or its ubiquitous re-representations in popular culture, the Vulcans are a purely rational alien race, they often look down on Spock's humanity as a character flaw.
[36] See, e.g., DAN ARIELY, PREDICTABLY IRRATIONAL (Harper Perennial Revised and Expanded Edition) (2010)
[37] See, e.g., Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 JOURNAL OF POLITICAL ECONOMY 1325, 1327 (1990) (summarizing studies, table 1327).

WTA relative to the WTP of their fellow students. This is the endowment effect, the granting of a right increases the cost of the product without changing any intrinsic features of the product itself.[38]

The experiments and insights of behavioral economics offer a new perspective on Supreme Court decision-making. The field has been the subject of numerous imperfect attempts at modeling the behaviors. Most popular among lawyers is the legal model which follows the reasoning by analogy of the Common Law system.[39] Among social scientists, a political explanation has arisen referred to as the attitudinal or fact-attitudinal model.[40] The economically inclined, on the other hand, tend to follow the assumptions of the Coase Theorem and apply a utility-maximization model of decision-making.[41] Each of these models has strengths and weaknesses, the experimental results and organizational insights of behavioral economics has the potential to incorporate the strengths while mitigating the weaknesses all within a behavioral framework.

1.3. Overview of Methodology: Historical Research Design

In an attempt to reveal how Supreme Court Justices make decisions about Religion Clause cases, we have analyzed in depth approximately 100 cases. Each of these cases contained the official opinion and decision of the Court, some also had either concurring opinions, dissenting opinions, or both. These opinions represents the legal reasoning of the highest body of judges in the country. Each written opinion was qualitatively analyzed for trends in variables such as the

[38] This effect helps to explain why the House of Representatives' GOP members voted to repeal, significantly alter, or defang the ACA close to 60 times. Once the ACA went into effect, citizens would be endowed with the rights that go along with it, making it much more difficult to defund or repeal.
[39] See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 UNIVERSITY OF CHICAGO LAW REVIEW 877–919 (1996)
[40] See, e.g., JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005)
[41] See, e.g., *Political Science and Rational Choice*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 172

religion of the plaintiff or the status of the attorney. This data ultimately provided the evidence on which we make our claim of the applicability of behavioral economics to the various fact patterns, suggest doctrinal approaches, and altogether will provide a framework of the Religion Clauses.

This sort of historical research design, collecting, verifying, and synthesizing evidence as they relate to the behavioral law and economics hypothesis, has both advantages and disadvantages. Advantageously, historical research is not intrusive as some experimental designs may be.[42] For instance, within the context of behavioral economics several critics have suggested that the experimental contexts may in fact cause some of the evidence for the endowment effect.[43] Historical research designs facilitate trend recognition and analysis. Further, historical records can add important contextual background that may aid a researcher in understanding and interpreting their research problem.

Unfortunately, historical research is limited in its ability to provide controlled research conditions. External conditions frequently vary and, in addition, due to the nature of the Supreme Court's process of certiorari, new cases only come up to the Court which reflect different issues and attitudes on fact patterns than in the cases which came before. Thus, individual insights about the variables involved in the existing fact patterns will be limited to cases for which a good analogy exists; however, by constructing these into a larger framework of understanding decision-making procedure, the historical design can yield a more complete picture of the evidence.

After reviewing the Religion Clause cases, we began to abstract out a series of factual variables that were involved in these cases. This included factors like the religious denomination at

[42] According to pioneering research in physics by Heisenberg and others, the very act of observation in the moment changes the phenomenon being observed.

[43] See, e.g., Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NORTHWESTERN UNIVERSITY LAW REVIEW 1033 (2012) who also posit that experiments conducted in which participants are made aware of the problems of experimental conditions mitigate the results demonstrated by behavioral economists.

issue in the case. This might mean, as in *Cantwell*, the religious affiliation of the plaintiff, or, as in *Everson*, the religious affiliation of the beneficiaries of a public program. After identifying these variables, we began an operationalization process for each of the trends noted.

The operationalization process takes an approach first implemented by Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, and Robert W. Vishny (LLS&V)[44], a group of finance economists studying property rights for the World Bank. This process, designated leximetrics by LLS&V, attempts to evaluate "rule strength." Rule strength is a determination of the numerical value and rank of laws in a particular field. These economists then used these figures as a means of comparison of effective property protection in different countries. LLS&V utilized an independent assessment of rule strength to operationalize these rules into numbers. This tactic has been criticized by numerous individuals for a lack of transparent methodology;[45] however, they made a valuable addition to the literature in their attempts to quantify legal rules for the purpose of comparison.

In an attempt to make their leximetric analysis more robust, this research included considerations of "case salience." Case salience studies have measured the importance of so-called landmark cases as well as lesser cases on the basis of a number of criteria which signal their importance, or salience, within the legal and public spheres. In searching for an ideal measure of salience, Collins and Cooper[46] sought six characteristics: measurements of influence on behavior as a criterion of salience must be contemporaneous; measurements of salience must be replicable; measurements should be transportable across multiple subfields; measurements should reflect the

[44] Rafael La Porta et al., *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113–1155 (1998)
[45] John W. Cioffi & D. Gordon Smith, *Legal Regimes and Political Particularism: An Assessment of the "Legal Families" Theory from the Perspectives of Comparative Law and Political Economy*, 2009 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1501–1552 (2009)
[46] Todd A. Collins & Christopher A. Cooper, *Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure*, 65 POLITICAL RESEARCH QUARTERLY 396–407 (2012)

range of salience; the measurement should reflect that salience is important to judicial decision-making as a reification of the national mood; and any measurement must be free of systematic bias.[47] There are levels of agreement within examination of case salience. Ultimately, Collins and Cooper developed a new salience measure that acknowledges placement on the front page of the New York Times as indicative of salience more than any other individual measure, while including elements to satisfy more of the criteria listed above. They developed a case salience index (CSI) which looks at placement within four separate newspapers to eliminate regional bias and to demonstrate the continuous nature of placement in a newspaper (as opposed to the front page or not front page news binary). This CSI is included within the final decision model.

This research begins quantification of qualitative information related to the Relgion Clause cases in the Supreme Court. This quantification of qualitative information follows the two strategies utilized in this research. The first strategy follows along the qualitative analysis of trends and rules, by identifying both the factors most salient to the case and the rules taken from the case as its most important holding. The second strategy takes this qualitative data and seeks to assign values to individual rules while also measuring factors as independent variables affecting the outcome (dependent variable) of the case. Factors are organized into independent variables in these cases, such as the attorneys for each side, briefs written by friends of the Court (*amici curiae*), religion of plaintiff, subject matter of the case, and so forth. The comparison of these variables in the design provides the grounding for a behavioral picture of Supreme Court decision-making

[47] *Ibid.* 398-399

1.4. Underlying Theoretical Concepts

Utilizing this methodology in combination with a behavioral law and economics approach to try and explain how some rules seem to flip flop while others remain untouched (or even untouchable), this research examines in depth a series of approaches to Supreme Court decision-making. There have been various attempts to accurately describe and predict Supreme Court decision-making over the years. These attempts have fallen under three main models: legal-institutional, fact-attitudinal, and utility-maximizing. Each of these models brings important insights to the behavioral law and economics model argued here. In order to better understand how these models inform the behavioral model, we first look at each in turn and see the arguments of the models themselves. We will begin first with the legal-institutional model and then move through, ending with the utility model.

In order to understand why the ultimate aim of this thesis is to produce an improved model, we must first understand why models are used. The real world is extraordinarily complex. Some natural phenomena conform to beautiful and simple formulae like $E = mc^2$; however, formulating explanations for the entropy of human behavior is necessarily more complicated.[48] Enter models. Models are simplified representations of reality that attempt to describe reality in a way that makes it easier to understand and to navigate. Given the complexity of human behavior and the mysterious nature of decision making—even (especially) to the decision maker, any understanding of decisional behavior will necessarily be grounded in several theories and understandings simultaneously. The goal is to simplify this complex reality into a useful conception of decision-making procedure.

[48] JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005)

The pre-existing models of judicial decision-making, legal-institutional, fact-attitudinal, and utility-maximizing each suggest a distinct path for this goal. The legal model offers a simple proposition familiar to any lawyer in the United States. Essentially, legal models operate under the idea that decisions of the Court are substantially influenced by the facts of the case in light of the meanings of the Constitution or any applicable statutes, intent of the Framers, and/or precedent.[49] Thus the legal model requires a comprehensive understanding of how to think about, understand, and read Constitutional law. In addition, we must understand the important elements of judicial process involved in dealing with both the First Amendment and subsequent case law. Unfortunately, the legal model offers numerous instances in which precedents conflict with one another. Given this insufficiency, we look to a fact-attitudinal model to fill in gaps.

The fact-attitudinal model incorporates legal realism, political science, psychology, and economics into an explanation of Supreme Court decisions.[50] A simplistic understanding of this model can be described in terms of ideological leanings. Justice Ginsburg votes the way she does because she is very liberal. Justice Thomas votes the way he does because he is very conservative. The attitudinal model falls into the category of rational choice theory. This model is problematic due to the explicit contradiction by the legal system and by the justices themselves, thus we look to the judicial utility-maximization model.

Rational choice, utility-maximization models "apply and adapt the theories and methods of economics to the entire range of human political and social interaction."[51] William H. Riker illuminates the core of rational choice as attributing to actors the ability "to order their alternative goals, values, tastes, and strategies. This means that the relation of preference and indifference

[49] JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005) at 48
[50] *Id.* at 86
[51] *Id.* at 97

among the alternatives is transitive." Further, "actors choose from available alternative so as to maximize their satisfaction."[52] Each of these models will build an understanding of decision making that will inform both interpretation and evaluation of Supreme Court Religion Clause cases.

1.5. Summary

Ultimately, the goal of revealing patterns of Supreme Court decision-making on the issue of Religion Clause law remains the central focus of this thesis. There have been many attempts to define the Court's decisional process from the more traditional legal model to the social scientific attitudinal and utility-maximization models. Bearing these models in mind, we will explore their application to specific areas of Religion Clause law and ultimately utilize behavioral law and economics research as a lens to understand the Supreme Court decision-making process. First we will look at the principles of behavioral law and economics. Then we will see how behavioral law and economics improves on previous research through the concepts of bounded rationality, bounded willpower, and bounded self-interest. Finally, having seen these three concepts run through the previous models and point to their strengths and weaknesses, we will unite all of these strands into a decision function of Supreme Court decision-making in Religion Clause cases.

[52] *Political Science and Rational Choice*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 172

Chapter 2: Methodology & Design

Since this thesis attempts to utilize quantitative strategies to draw out decisional factors in Supreme Court opinions pertaining to the Religion Clauses of the First Amendment to the U.S. Constitution, this chapter explains the methodological processes involved in designing the research. By explaining the methodological efforts that went into developing a particular design to accomplish these goals, we hope to identify for the reader the leaps and assumptions made in selecting particular methods in order to facilitate both replication and criticism of our efforts.

This study involves a multi-method approach to empirical legal research. By combining a historical research design with quantitative methods, we seek to convey a more robust set of results and a more convincing case than might otherwise be possible within the limitations of historical research design. Thusly, we combined the more qualitative methodology of historical research design with quantitative methods more closely associated with statistical analysis and quantitative research designs than a historical design. The goal of this research is to offer evidence that behavioral law and economics forms the best theoretical understanding of Supreme Court decision-making in both its inclusion of many of the insights of the other popular models and in its exclusion of many of their failings.

2.1. Research Design

This research analyzed Religion Clause cases to discover how Supreme Court justices make their decisions and vote the way they do. Importantly, the goal of this work is the construction of a model of Supreme Court decision-making behavior grounded in real data, whether qualitative or quantitative. In order to accomplish this task, this research mixed several methods of empirical legal research. By mixing qualitative and quantitative strategies sequentially,[53] we first explored the available case law and precedents by virtue of historical case design and then looked for consistent patterns of judicial decision-making with a qualitative eye. This task yielded more questions than answers. Thus we switched to quantitative methods for evidence of Supreme Court decision-making patterns. In pursuing similar quantitative strategies to the numerous academics making models of Supreme Court decision-making, we based the decision model on evidence produced by peer-reviewed and well-accepted strategies. This section will examine the qualitative, quantitative, and analytical methods utilized throughout the course of this thesis.

2.2. Case Selection

As noted above, this research will deal with the entire universe of existing Supreme Court Religion Clause cases in existence. Though it would seem that such a number might be incomprehensible, only approximately 100 cases actually exist. Due to the doctrine of

[53] JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES (SAGE Publications Third) (2009) at 14

incorporation, the Supreme Court seldom, if ever, dealt with non-federal claims before ratification of the Fourteenth Amendment.[54]

Illustratively, in 1833, the Court handed down a decision in *Barron v. Mayor and City Council of Baltimore,* 32 U.S. 243, in which John Barron, a merchant who relied on the deep waters of Baltimore's harbor, attempted to raise a state-level claim to the federal court system. The city of Baltimore had begun to expand and sand rapidly accumulated in the harbor, preventing Barron from effectively operating within the city's harbor's shallow waters. He sued the city for compensation under the Fifth Amendment's prohibition of taking private property for public use without just compensation. Without even hearing argument from the Mayor and City Council, the Court voted unanimously in their favor: the Bill of Rights exclusively checked the Federal government in Washington, D.C., and thus, the Court lacked jurisdiction. The Bill of Rights never applied to the states until the Reconstruction-era Congress passed the Fourteenth Amendment, making federal law applicable on the states.

Prior to *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947), considered to be the seminal Establishment Clause case in the Court, there were actually two Establishment cases. The first, in 1899, *Bradfield v. Roberts*, 175 U.S. 291, concerned government funding for a Catholic hospital. The Court found for the government because the funding went toward the secular aim and purpose of healthcare rather than an explicitly sectarian goal. A second, in 1908, *Quick Bear v. Leupp*, 210 U.S. 50, concerned the funding of a Catholic school in American Indian Territory. The Court ruled that the Bill of Rights did not apply outside the sovereignty of the federal government. Importantly, these two precedents gave hints that the Court

[54] It must also be noted that no federal claims arose due to Congressional understanding of Constitutional boundaries.

would begin to limit both interference in free exercise of religion and prevent the unnecessary entanglement of the state in religious affairs.[55]

Beyond these early incorporation cases ranging from *Barron* to *Quick Bear,* selection became easy. The Supreme Court Database Project, begun by Harold J. Spaeth two decades ago and supported by the National Science Foundation, was designed to be "so rich in content that multiple users—even those with vastly distinct projects and purposes in mind—could draw on it."[56] In this, the Project undoubtedly suceeded, offering 247 different variables in six categories from identification and background variables to substantive and outcome variables. The Project has categorized all Supreme Court opinions issued since the 1946 term.[57][58]

Through the Project, we began case selection by using a substantive query which returned approximately 90 cases identified as primarily revolving around the Establishment or Free Exercise Clauses. To find the rest of the cases, we searched through several textbook-type resources on the Religion Clause cases and checked every case listed in the table of cases with a Supreme Court citation against our universe. Finally we gathered all of these cases together into one spreadsheet and proceeded to identify the salient variables from the Project that would be useful in this research and identified the gaps of knowledge that needed to be filled. By attempting to discover

[55] Under the prohibition against establishment.
[56] HOWARD J. SPAETH ET AL., U.S. SUPREME COURT JUDICIAL DATABASE (Washington University) (2014), supremecourtdatabase.org/about.php
[57] HOWARD J. SPAETH ET AL., U.S. SUPREME COURT JUDICIAL DATABASE (Washington University) (2014), supremecourtdatabase.org
[58] This dataset categorizes each opinion by the major issues of the case, indicates four separate citation methods, the term of the decision, the date of the decision, the Chief Justice of the Court at the time, the name of the case, the date argued, the date reargued, the petitioner, the respondent, the jurisdiction, the action appealed, the origin of the case, the reason offered for certiorari, the lower courts' disposition, the direction of the disposition, the winning party, the alteration to precedent (if any), the issue, the issue area, the decision direction, the dissent's decision direction, the authority supporting the decision, the type of law in question, the supplemental law involved, any minor laws concerned, the majority's opinion writer, the assigner of the majority opinion, whether the vote was split or not, and the vote count (majority-minority). Though this an undoubtedly valuable starting point, we added to the set in order to include an updated model and to draw causal conclusions.

connections between these variables, we hope to illuminate some new aspect of Supreme Court decision-making that previously went unnoticed.

2.3. Instrumentation

Because the phenomenon of law "consists of individuals, organizational settings, institutional fields, and the interactions among them,"[59] the complex, multi-level interplay requires a sophisticated understanding of the underlying processes if any predictive or comprehensive theory is to be gained. As noted above, the main attempt of this thesis is to ascertain the relationship between the fact patterns of the cases, the existing legislative history and case law, and attitudinal positions in the Court relative to underlying systematic judgment and decision-making processes. The research and analytical approaches to this goal are necessarily multiple.

The first methodological process is qualitative in nature. Historical research design begins by "collecting, verifying, and synthesizing evidence from the past to establish facts that [may] defend or refute a hypothesis."[60] Although historical designs do not follow a traditional interview or other ethnographic research pattern, in Religion Clause law cases, the historical design chosen offers a survey[61] of Supreme Court cases.[62] Through the systematic and critical document analysis of individual case opinions, this research examined each case opinion, including the "opinion of the Court," concurrences, and dissents. Thus we received a range of perspectives on the issue at hand in the text, an important aspect of the research because concurrences and dissents often form the

[59] THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (P. Cane & H. M. Kritzer ed., Oxford University Press Online) (2010), http://www.oxfordhandbooks.com.ezp-prod1.hul.harvard.edu/view/10.1093/oxfordhb/9780199542475.001.0001/oxfordhb-9780199542475 at p. 952

[60] Meredith Gall, *Historical Research in Marketing*, 44 JOURNAL OF MARKETING 52–58 (1980)

[61] In the sense of completeness. This study examines the population of Religion Clause cases rather than a sample.

[62] These methods are drawn from Laura Beth Nielsen's description of methods in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH, *SUPRA* AT 953-954

basis for alterations of precedent *post-facto* without doing damage to the lip service paid to *stare decisis*.

This process required a qualitative instrument to make examining approximately 100 cases without research assistance slightly more feasible. Through the qualitative analysis device program NVivo, we programmed nodes from a representative sample of cases. These nodes consisted of many of the concepts which will appear in the variables section (2.4.). Some of the nodes look at terms like "gave the opinion of the Court," the formulaic beginning of each case opinion; "free exercise;" "establishment;" "Christian;" "Jewish;" "public forum;" "school;" "government;" etc. These nodes serve as a means of comparing the trends in various cases and a basis for analysis of fact patterns and the nexus of certain trends. There are other nodes not related to fact patterns in the case itself, but that are instead facts which [ought to] have no bearing on outcomes, things like whether the Solicitor-General represents a party or has written an *amicus curiae* brief. These factors were measured because some have suggested that these things bring the great weight of the office of the legal representative for the United States.[63] Given these assertions, we utilized NVivo to gather information about the attorneys and briefs involved in each case. Ultimately, these nodes consist of the individual data points for qualitative analysis.

Having gathered the data during the qualitative phase of the project, we began a quantitative analysis following the operationalization process of Spaeth & Segal,[64] Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, and Robert W. Vishny (LLS&V),[65] and others. This discussion will first look at the operationalization process and then the instrumentation used in quantitative

[63] E.g, Lee Epstein & Tracey E. George, *On the Nature of Supreme Court Decision Making*, 86 AMERICAN POLITICAL SCIENCE REVIEW 323–337 (1992)
[64] JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005)
HOWARD J. SPAETH ET AL., U.S. SUPREME COURT JUDICIAL DATABASE (Washington University) (2014), supremecourtdatabase.org
[65] Rafael La Porta et al., *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113–1155 (1998)

processes. Following Spaeth & Segal, this research used the Supreme Court Judicial Database as the starting point in quantitative analysis. Following LLS&V, we assessed rule strength with some alterations. Following the academic practice of measuring how many times an article has been cited and by whom in order to give researchers a sense of the importance of a given article within its own academic community, we similarly operationalized the "importance" of individual cases by measuring the citations of the cases within the Federal Court system and terming this rule strength.

To add further robustness to the LLS&V operationalization of rule strength, we consider how the American common law system takes into consideration precedent as a guide for how cases ought to be decided. This means that courts assess the importance of decisions through their own operationalization. Quantitative assessment of rule strength is accomplished through a variety of means. Primarily, Google offers a federal citation search tool which identifies exactly how many times a case itself is cited overall, and then how different cases cite it as precedent.[6667] First, we measured the number of federal citations for each case, and then normalized this data through dividing each citation into today's date, thus figuring out the average number of citations per year. The next step is operationalizing the rules that each case gives rise to. Thus, we operationalize the rules in each case as being identified by lower courts. The reason to operationalize the rules in this way is that we lack the qualifications to be considered a legal scholar myself and thereby am not the proper agent to declare what a case stands for. Lower courts, on the other hand, are necessarily

[66] A common citation for a precedent will offer the case name, the citation, the year, and then, "holding that the rule counsel has argued does not apply in this case."

[67] We also utilized Shepard's Case Citations & FastCase. As a yet further check on this information we have utilized Fastcase and Shepard's, two professional legal research tool, which check citations. In addition, Fastcase and Shepard's analyze how rules have been dealt with by subsequent cases. Fastcase shows citations that quote a rule from the case while stating that the precedent itself was "reversed on other grounds." This will indicate the potency of the precedent and further illustrate how some rules have staying power even after the decision giving rise to them no longer has the force of law.

bound by the precedents set and therefore Federal judges are the best source to identify what each case stands for.

In order to simultaneously check this data, the Supreme Court Database maintains a salience measure feature encompassing both *Congressional Quarterly* and *The New York Times*. Lee Epstein and Jeffrey Segal, like Collins and Cooper, assessed the value of seven separate measures of case salience utilized elsewhere: (1) cases that have been reprinted in constitutional law textbooks, (2) cases that are included in the *Congressional Quarterly*, (3) cases included in *The Supreme Court Compendium*, (4) cases that generate substantial citations within five years of their decision date, (5) cases that generate eight or more law review articles within two years of their decision date, (6) cases headlined in the *Lawyer's Edition*, and (7) cases generating significant numbers of *amicus curiae* briefs.[68] In their complex treatment of these different features, they concluded that one salience measures seems to encompass and better represent the data than any other, that is, whether or not a case made it onto the front page of the *New York Times*. Their research further illustrates that case salience is a legitimate measurement when operationalized in this way.

Another method of operationalization of rule strength in this quantitative process will be through vote data. Not all decisions are unanimous. This should reflect the ideological and legal divisions of the Court in each case. Thus, by turning votes into a percentage based on the vote, more quantitative information can be gathered. Thus if the opinion passes on either a tie (plurality) vote, the case vote percentage is 50% and automatically affirms the lower court's decision. If the opinion passes on a 5-4 vote, then it becomes (5/9) or 55.55% and so on. This percentage ought to

[68] Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AMERICAN JOURNAL OF POLITICAL SCIENCE 66–83 (2000) at 69-70

have some meaningful relevance on the question of institutional consensus in the Court, a data point which may prove to be relevant to predictive rule strength.

This operationalization of each qualitative variable assists in the process of quantitative analysis. The ultimate aim of quantitative analysis is to make available for analysis the probabilistic connections between independent and dependent variables, to be addressed in the following section. To measure the evidence for these kinds of probabilistic connections, we examined the operationalized facts from qualitative analysis in the R programming language, within an instrument called R Studio. This instrument was the tool in which we performed logistical regressions of the data, comparing continuous data with binary dependent data (did a law or action violate one of the Religion Clauses, or not).

2.4. Variables and Probability

Some of the most important quantitative research that inform the modeling of this area of the law is this regression analysis between independent and dependent variables. These variables bear explicating for the purpose of better understanding the analysis below. In addition, these variables have been organized into an appendix for ease of reference.[69]

The first set of variables looks at the religious aspects of plaintiffs, or in Establishment cases, the religion allegedly benefitting or detracted from in the law at issue. These variables are operationalized in two different ways: the first is MARGINAL and refers to the population size of a religion's adherents. In this case, if a religion has only a marginal amount of followers in the United States, for instance Santeria, then the variable is coded a 1. If the religion concerned is

[69] See appendix 2

mainstream, then it receives a 0 for the MARGINAL variable. On the other hand, such cases will receive a 1 value for the MAINSTREAM variable. Mainstream religions will constitute the most popular forms of Judeo-Christianity in America according to the Pew Centers' religion studies.

The second set of variables looks at the Court itself. While looking at the Court, we look at several different factors that may bear on Religion Clause decisions. The first is ideological make up. Ideology in the Court has best been operationalized by Professors Andrew D. Martin and Kevin M. Quinn (University of Michigan and Berkeley School of Law, respectively). Martin & Quinn (hereafter Martin-Quinn) place each of the Supreme Court justices from 1937 to present along an ideological continuum in order to better understand politics in the Court.[7071] Martin-Quinn wanted to look at the assumption underlying attitudinal and other strategic explanations of judicial behavior that justices have policy preferences.[72] Utilizing these Martin-Quinn scores, we added an ideological variable that we have called IDEOLOGICAL_VALENCE with the suffix _JUSTICE for individual justices and _COURT for the combined policy preferences of the Court itself.

The final set of variables looks to the issues and the arguments made by the justices in their decisions. Naturally, the two first binary variables are FREE_EXERCISE and ESTABLISHMENT. In reflection of the historical importance of religious issues, we look at a binary variable called HISTORICAL_REFERENCE which looks into the opinion to see if and how the original intent or history of the First Amendment come into play. If they are invoked, the

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[70] Martin-Quinn scores estimate ideological points of justices via Markov Chain Monte Carlo (MCMC).

[71] Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POLITICAL ANALYSIS 134–153 (2002)

[72] Martin-Quinn use MCMC to fit a Bayesian measurement model of ideal points for all justices serving on the Supreme Court from 1953-1999. They looked especially at the dynamic aspect of judicial ideal points. They found that, contrary to claims that policy preferences are unchanging over time, "justices do not have temporally constant ideal point." Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POLITICAL ANALYSIS 134–153 (2002) 134

variable is coded 1, if not, then 0. We also looked at judicial perspectives on the Religion Clauses, whether ACCOMODATIONIST[73] or SECULARIST. In addition, we looked at a number of central "question" issues. A "question" issue is one which will be the central question of a case that the justices will ask and answer in the course of a decision. The variables include PUBLIC_OFFICE, looking at cases in which religious oaths took place in public, governmental settings; and CREATIONISM, looking at cases treating creationism as religious. We looked at a series of Establishment focused issue areas: *LEMON*, referencing the landmark *Lemon* test; ENDORSEMENT, in which the opinion looks at governmental endorsement of religion; COERCION_BROAD and COERCION_NARROW; NEUTRALITY_SUBSTANTIVE and NEUTRALITY_FORMAL; NONPREFERENTIAL; NONINCORPORATION; DIVISIVENESS; and AD_HOC. Further, we looked at cases involving school prayer: PRAYER_CLASSROOM, PRAYER_GRADUATION, PRAYER_VOLUNTARY, and PRAYER_PUBLIC_UNIVERSITY. We also looked at other public endorsement of religion: PRAYER_LEGISLATIVE; HOLIDAY_DISPLAY; INSCRIPTIONS_RELIGIOUS; and OATHS_PLEDGE_ALLEGIANCE. In addition, we looked at cases involving the government's financial support of religion: TAX_DEDUCTIONS, for religious institutions; PUBLIC_SUPPORT_DIRECT, for religious educational institutions; PUBLIC_SUPPORT_INDIRECT, for religious educational institutions; and TRADITIONAL_STANDARD_FRAMEWORK. Other issues areas included new standards like PAROCHIAID, AMENDMENTS_STATE, and RELIGIOUS_PUBLIC_SERVICE; government involvement in religious disputes like INVOLVEMENT and NEUTRAL_PRINCIPLES.

[73] i.e., in favor of supporting religion.

Variables for Free Exercise included the basics like REGULATION_MARGINAL_PRACTICE, RELIGIOUS_EXPRESSION, and RELIGIOUS_EXPRESSION_MILITARY. Also, areas where the Free Exercise clause acts as a sword, meaning government-mandated accommodation: ACCOMMODATION_EMPLOYMENT; ACCOMMODATION_GROUPS_INDIVIDUALS; and ACCOMMODATION_GENERAL_OBLIGATION. Finally, we looked at Free Exercise after *Employment Division v. Smith*. Variables include SMITH_NARROWING_ACCOMMODATION; SMITH_STATUTORY_RESPONSE; and SMITH_LIMITATIONS.

In order to evaluate the decisional processes at work, we utilize the concept of case salience to understand how previous cases ought to weigh on the minds of the justices. These measures help to inform the legal model on areas in which it fails to explain decision-making procedures. As discussed above, SALIENCE is one of the independent variables. The systematic analysis of these salience measures, such as case citations, media citations, ought to offer important knowledge about the meaning of the decision and its ripple into the media and lower courts. If these salience measures are properly contextualized, they ought to add some quantitative effect to the final decision function.

The dependent variable in this thesis is the outcome of the case. The outcome will be measured as to whether the finding goes in a conservative or a liberal direction. This data is collected directly from the Supreme Court Database Project as an independent source of the data, rather than our own personal analysis. It is our hope that the analysis attempted through this research will reveal valuable patterns of both correlation and causation between the independent variables tested and the dependent variable.

The use of this regression analysis to measure the relationship between each of the above independent variables against the dependent variable yielded evidence for the evaluation and deconstruction of the prominent models of Supreme Court decision-making. Several scholars have offered their own combined legal and non-legal probability models for decision making at the Court level.[74] Synthesizing the best of each of these models, we will use behavioral economics as a frame for understanding Supreme Court decision-making.

2.5. Summary

Because the approach taken here is one of grounded, mixed method research, we have described the various qualitative and quantitative methods utilized to approach the topic of Religion Clause case law in Supreme Court cases. Understanding the design utilized helps to indicate what other models have attempted and what can be expected out of a good model of Religion Clause cases.

[74] E.g., Lee Epstein & Tracey E. George, *On the Nature of Supreme Court Decision Making*, 86 AMERICAN POLITICAL SCIENCE REVIEW 323–337 (1992); JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005); Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 JOURNAL OF EMPIRICAL LEGAL STUDIES 556–586 (2011)

Chapter 3: Behavioral Economics and the Law, an Overview

3.1. Introduction

In the words of noted legal scholar Christine Jolls, "behavioral economics has gone from a small subfield of economics to a powerful force within American society" within the past quarter century alone.[75] The field of behavioral economics acts on classical economics like gravity. Classical economics focuses on a hypothetical and highly theoretical "homo economicus," This person makes perfectly rational decisions in an overwhelmingly self-interested fashion. Much of the assertions of classical economics rely on the hypothesization of such a person. Behavioral economics has forced the field of economics to begin analysis on how "real people actually behave."[76]

The founders of this behavioral movement in economics are the Israeli cognitive psychologists Daniel Kahneman and Amos Tversky. Kahneman and Tversky focused much of their work on the psychology of judgment and decision-making. Most importantly, Kahneman and

[75] Christine Jolls, *Behavioral Economics and the Law*, 6 FOUNDATIONS AND TRENDS IN MICROECONOMICS 171–263 (2011) at 174
[76] *Ibid.*

Tversky published a paper in 1979 called "Prospect Theory: An Analysis of Decision under Risk."[77] In this paper they critiqued the expected utility theory of classical economics.

An easily relatable example of their theory is the choice to go to war, especially in situations of asymmetrical power. If we look at any of the Afghan wars (British, Soviet, or American), the Afghan people are faced with incomparably more technologically advanced and powerful adversaries. It seems that the choice to participate in fighting, rather than simply surrendering, is disproportionately dangerous. People generally understand that by taking up arms it is probable (but not certain) that they will be killed in action, yet they do so anyway. Although occupation by a foreign power is certainly preferable to death, the certainty of occupation relative to the mere probability of death induces the choice to go to war. The "homo economicus" would certainly choose the low utility option of foreign occupation over the high probability of death (with zero or negative utility) because of the relative weights of the two. Kahneman and Tversky's experiments began to reveal these kinds of erroneous judgments, sparking a reconsideration of many of the assumptions of classical economists that lacked grounding in real decision-making behavior.

Today, behavioral economics has taken on a substantive policy role in the US government, as well as in some foreign governments. President Obama has consciously pursued behaviorally influenced policies and has appointed legal scholar and behavioral evangelist Cass Sunstein as Administrator of the White House Office of Information and Regulation. Sunstein has advocated for a behaviorally informed policy strategy which he has termed with co-theorist and behavioral economist Richard Thaler libertarian paternalism.[78]

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[77] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979)

[78] Libertarian paternalism was proposed by Thaler and Sunstein in 2003 in the *American Economic Review* where they suggested that policies ought to influence choices in a way that will make the choosers better off as judged by themselves. See also *Nudge*.

Behavioral economics has become a major force within both the economic academy and area of public policy and therefore merits study and application in this area. This chapter seeks to give the reader a broad enough overview of behavioral economic literature and of the field now called behavioral law and economics to evaluate the behavioral decision-making analysis later applied to Supreme Court Religion Clause cases. First, we will introduce the psychological insights raised by Kahneman and Tversky and the movement they inspired. The final two sections will look first at decision-making in the economic analysis of law and economics and then the behavioral revision of this traditional analysis.

3.2. Behavioral Economics and Psychological Insights

Briefly, the overly normative and aspirational field of microeconomics has traditionally followed a set of assumptions that have at this point fairly conclusively been proven inaccurate under real-world conditions. To problematize this inaccuracy, microeconomics is the basis for much of policymaking procedure and much of the everyday decision-making of life. Within the fields of legal analysis and judicial politics, the economic analysis of law proceeds along these same flawed assumptions. Much like the abovementioned processes, law and economics seeks to apply microeconomic analysis to legal problems. In this way, law and economics can be understood as a subfield of political economy or political science more broadly.

One of the earliest interactions between microeconomic theory, law and economics, and behavioral economics was Richard Thaler's work on perhaps the most well-established behavioral concept. Known as the endowment effect, Thaler's experiment had implications for the main underlying concept of microeconomic analysis and law and economics specifically. As a quick refresher on the endowment effect, we saw earlier how students given (endowed with) a Cornell

mug would (only) be willing to accept (WTA) more payment than they themselves would be willing to pay (WTP).

As mentioned, the endowment effect questions the very foundation of the Coase theorem. The Coase theorem suggests that "if trade in an externality is possible and there are sufficiently low transaction costs, bargaining will lead to an efficient outcome regardless of the initial allocation of property."[79] For instance, property might mean the right to pollute or the right to be free from pollution. Thus in a town with a factory in it, whether the law gives either the right to pollute or the right to be free from pollution, so long as transaction costs are low enough, will result in the most efficient outcome. That is, the appropriate parties will bear costs most efficiently. Importantly, the Coase theorem's centrality to the economic analysis of law has an enormous effect on law and economics' approach to normative analysis. In other words, Coase theorem and microeconomics more broadly work on assumptions that markets and other interactions self-correct.

How can such fallacious assumptions from the basis of microeconomics? The problem is that Coase theorem is not fallacious. When parties have the benefit of perfect knowledge, judgment, willpower, and rationality, i.e., when conditions are extremely controlled as in an experiment, Coase theorem holds. In a similar experiment to the Cornell mug experiment but with more tightly controlled circumstances, Kahneman et al.[80] told all participants the redeemable value of a token at the end of the experiment. Half of the participants then received a token. When participants subsequently were allowed to trade coins for money, etc., exactly half of the tokens are traded for money, in perfect accordance with the Coase theorem.

It may seem that this has no relevance to Supreme Court decision-making, but the comparison between behavioral economics and microeconomics illuminates their differences in

[79] THE COASE THEOREM ENCYCLOPEDIA OF LAW AND ECONOMICS 836–892
[80] 1990

thinking about decision-makers. The Coase theorem works in situations of perfect knowledge and rationality, much like the aspirational image of blindfolded Lady Justice and the myth of the impartial and ultra-rational judge. In real life, however, where people frequently behave irrationally and never have perfect knowledge, decision-makers often make poor choices that can be predicted and understood through the lens of behavioral economics.

3.3. Decision Theory

"Decision theory is the theory of rational decision making."[81] Decision theory, most broadly, seeks to identify the values, uncertainties, and other issues relevant to a particular decision, in addition to the rationality of the decision and whether or not the decision is optimal. In short, decision theory is "the analysis of rational decision-making."[82] Decision-theory looks at the decision-maker choosing an act from "a set of alternatives."[83]

Outcomes frequently depend on the state of the world, a condition seldom known to the decision-maker. Terms such as risk, ignorance, and uncertainty have important technical meanings. Decisions under risk are those where the decision-maker has an idea of the probability of possible outcomes. Decisions under ignorance are those where probabilities are either unknown or non-existent. Uncertainty may be used as a broader term referring to both risk and ignorance.[84] Further, decision theorists divide into the normative and the descriptive. Normative theories discuss terms of what decision-makers ought to do, while descriptive theories seek to explain and predict how people actually make decisions.[85] Through looking at the Supreme Court, we will

[81] MARTIN PETERSON, AN INTRODUCTION TO DECISION THEORY (Cambridge University Press) (2009) (Ch. 1)
[82] DECISION THEORY A DICTIONARY OF ECONOMICS
[83] MARTIN PETERSON, AN INTRODUCTION TO DECISION THEORY (Cambridge University Press) (2009)
[84] *Id.* at 1.3
[85] *Id.* at 1.1

attempt a descriptive decision theory about Court opinions, which are decisions made under uncertainty.

Decision theory typically relies on relating a decision-maker's objectives to a utility function or an expected utility to be gained from making a decision. Such a theory is problematic within the context of judicial decision-making. Because the justices are expected to be impartial like Lady Justice and make pure decisions, considerations of personal utility provide problems for thinking of the Supreme Court justices' decision-making process. Are we to think of judges as simply regular people making decisions according to personal utility preferences? How could such considerations result in a just legal process?

In answer to this conundrum, Judge Richard Posner,[86] an influential legal scholar and proponent of the economic analysis of law, in conjunction with Lee Epstein, a noted social scientific scholar of judicial decision-making, and William Landes, a legal scholar who has written on the application of quantitative methods to judicial behavior (amongst other issues), proposed a labor theory of judicial behavior. Posner et al. argue that judges are participants in a sort of labor market, i.e., workers.[87] Judge Posner further describes federal judges as participants in a particular sort of labor market, that as government employees they are government agents and the government is the principal.[88] Thus, Posner seeks to understand the incentives and constraints, "some personal and others imposed by the principal" underlying judicial behavior.[89]

The principal-agent relationship "encapsulates a tradition of rational choice modeling."[90] In the case of federal judges, the principal (here the government, and thereby a stand-in for the

[86] Judge of the United States Court of Appeals for the Seventh Circuit
[87] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (Harvard University Press) (2013) at 25.
[88] *Ibid.*
[89] *Ibid.*
[90] *Accountability and Principal-Agent Models, in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY

people generally) uses whatever actions available to provide incentives for the agent (here the Court) to make the decisions most preferable to the principal. Both principals and agents are subject to self-interested behavior. Further, responsiveness of the agent to the principal's goals is "mediated by actions available to each actor as well as institutional settings in which they interact."[91]

3.4. Behavioral Economics and Decision-Making

Normative decision theory focuses on rationality as an ideal. Behavioral economics revises many of the assumptions of what being rational might mean descriptively for a decision-maker. The revisions come in three major departures from traditional "homo economicus"-type assumptions. These departures are bounded rationality, bounded willpower, and bounded self-interest.

3.4.1. Bounded Rationality

Bounded rationality "consists of both judgment errors and departures from expected utility theory."[92] "Across a wide range of contexts, actual judgments show systematic differences from unbiased forecasts."[93] Particularly salient to the problem of Religion Clause law, behavioral law and economics has looked to implicit bias in perception of racial and other out-group members.[94] The word bias here means that a person believes, possibly consciously, more likely implicitly, that members of a group are somehow less worthy than one's own group. This issue pertains to conceptions of mainstream and marginal religions relative to the justices' religions themselves. That is, individuals will act according to biased information, rather than remaining perfectly

[91] *Ibid.*
[92] Christine Jolls, *Behavioral Economics and the Law*, 6 FOUNDATIONS AND TRENDS IN MICROECONOMICS 173–263 (2011) at 183.
[93] *Id.* at 184.
[94] Meaning members of groups a justice (e.g.) does not belong to.

rational. Given the extent of evidence showing such implicit bias in the law,[95] particularly the Implicit Association Test,[9697] we will find evidence below that the justices do use biases to make distinctions between cases like the one we saw above between *US v. Lee* and *Burwell v. Hobby Lobby*.

How does this concept operate cognitively? Implicit bias may act as a boundary on rationality by operating as a "form of mental shortcut,"[98] or in the behavioral literature, a "heuristic." This heuristic works through attribute substitution, where the decision-maker reads biased information into their reasoning, resulting in imperfect rationality. Kahneman and Frederick suggested in 2002 that this attribute substitution helps people answer difficult questions by substituting an easier one.[99] Rather than making decisions under risk by investigating the available statistics, they rather ask whether a relevant incident comes easily to mind.[100] This problem of implicit bias introduces the literature most key to the behavioral economics research begun by Kahneman and Tversky: the literature of heuristics and biases which will be discussed at greater length in the next section.

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[95] See e.g., *Antidiscrimination law's effects on implicit bias*, *in* BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION; Christine Jolls & Cass R. Sunstein, *The law of implicit bias*, 94 CALIFORNIA LAW REVIEW 969–996.

[96] The Implicit Association Test looks at two separate conditions: stereotype-consistent and stereotype-inconsistent. When participants are asked to reinforce stereotype-consistent pairs (for example, black and unpleasant being shared by the left key and white and pleasant shared by the right key – participants are asked to press the left key if something is either black or unpleasant, and the right if either white or pleasant) vs. stereotype-inconsistent pairs (black-pleasant and white-unpleasant), implicit bias is revealed by the considerably faster categorization of black and unpleasant than when black and pleasant are paired. The IAT reveals "significant evidence of implicit bias, including among those who assiduously deny any prejudice." (See *infra* note 93)

[97] See social psychological literature e.g., S. L. Gaertner & J. P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOCIAL PSYCHOLOGY QUARTERLY 23–30 (1983); and A.G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1464–1480 (1998)

[98] Christine Jolls, *Behavioral Economics and the Law*, 6 FOUNDATIONS AND TRENDS IN MICROECONOMICS 173–263 (2011) at 185.

[99] *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT

[100] Christine Jolls, *Behavioral Economics and the Law*, 6 FOUNDATIONS AND TRENDS IN MICROECONOMICS 173–263 (2011) at 185-186.

3.4.2. Bounded Willpower

The literature on bounded rationality asks the question if these biases, like the implicit racial bias discussed previously, affect decision-making behavior and action more generally or if they are merely flawed methods of thinking that have no effect on decisions. This led behavioral economists to look at real willpower.

Bounded willpower examines at individuals who spend rather than save, consume desserts rather than salads when trying to lose weight, and go to a movie instead of the gym "despite all of their best intentions."[101] One possible explanation of bounded willpower looks back to the experiments showing the endowment effect. Like the endowment effects of receiving a Cornell mug, perhaps the reason people often spend rather than save is that they underweight the possible future benefits of saving rather than the certainty of benefits at buying a new item immediately. While bounded willpower does not bear directly on questions of Religion Clause law, it does bear on the bounded rationality of the justices and whether or not they possess the willpower to overcome boundaries in rationality rather than succumbing to flawed reasoning and patterns of thinking. The literature overwhelmingly demonstrates that they do not possess this willpower.

3.4.3. Bounded Self-Interest

Above we looked at the "homo economicus" model of the perfectly rational and self-interested individual. To resolve the problems between such an unrealistic, normative (rather than descriptive) model of decision-making process, Judge Posner suggested his principal-agent analysis of the federal judge as a special kind of worker. This model begins to explain how judicial self-interest works but requires a clearer picture of institutional interests to help reveal the behavioral insights about Supreme Court decision-making.

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[101] Christine Jolls, *Behavioral Economics and the Law*, 6 FOUNDATIONS AND TRENDS IN MICROECONOMICS 173–263 (2011) at 189.

Traditionally, economic analysis makes room for variation in understanding preferences in the definition of self-interest.[102] For instance, self-interest may include preferences giving "significant weight to fairness."[103] Such weights will come into play as we look at legal-institutionalist models of Supreme Court decision-making and the concept of institutional preferences. We will look at Posner's model of judges participating in a labor market in the context of these institutional preferences.

3.5. Summary

The behavioral law and economics movement has been building an impressive body of experimental and theoretical evidence since rising with the body of literature stemming from cognitive psychology. The implementation of these theories into governmental policy and their infiltration into academia demonstrates the general acceptance among the public community that behavioral economics validly describes real situations and accurately describes and predicts actual behavior rather than making a normative guess. It is with this body of knowledge that the many theories of Supreme Court decision-making will be reinterpreted and updated in the proximal sections.

[102] Christine Jolls, *Behavioral Economics and the Law*, 6 FOUNDATIONS AND TRENDS IN MICROECONOMICS 173–263 (2011) at 190.
[103] *Ibid.*

Chapter 4: Introducing Behavioral Economics to Supreme Court Decision-Making

4.1. Introduction

In this chapter, we will introduce some of the most interesting insights made by behavioral economics. This chapter includes a broad overview of these concepts and references for the reader to investigate further if any concept requires further proof. Looking at these concepts will then form a lens on which we will look at an overview of the three main models of Supreme Court decision-making: legal-institutional, fact-attitudinal, and utility-maximizing. Between these established models and the evidence of bounded rationality, willpower, and self-interest established by the numerous behavioral experiments in psychological, economics, and other social scientific literature, we will construct a descriptive behavioral law and economics approach to Supreme Court decision-making at least insofar as it applies to the Religion Clauses of the Constitution.

In the next several chapters, we will build on this conception of behavioral law and economics. Next we will look at institutionalism and legal-institutional preferences as a key understanding of Supreme Court self-interest. The chapter following this institutional theory will look at fact-attitudinal approaches as they relate to behavioral insight. Finally, we draw this together

into a decision function made by reinforcing the strengths and mitigating the weaknesses of the previous models synthesized into a behavioral law and economics approach.

4.2. Prior Models

Legal-institutional models have evolved considerably since the late nineteenth and early twentieth century. During that period, legal models typically followed a mechanical approach to jurisprudence.[104] As mentioned in Chapter 1, the key element of any legal model is that decisions of the Court primarily utilize the facts of the case as understood through the meaning of the Constitution, original intent, and/or precedents. Importantly, "the life of the law has not been logic; it has been experience."[105] The justices themselves are human beings who exercise discretionary authority with a policymaking role. The justices cannot "mechanically apply rules to facts to yield a decision"[106] and thus "fall back on intuitions of policy ... often ... generated by ideology."[107]

The generation of policy from ideology yields the popular understanding of the justices and judges generally as following political ideology as we might understand it in the legislative branch. The attitudinal model of Supreme Court decision-making, best expounded by Spaeth and Segal,[108] binds legal models, political science, psychology, and economics. The attitudinal model is also referred to as the fact-attitudinal model.[109] Segal and Spaeth's analysis argues that the Supreme Court "decides disputes in light of the facts of the case vis-à-vis their ideological attitudes and

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[104] Mechanical jurisprudence argues that there is a single correct answer to all legal questions that judges are tasked with finding.
[105] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881)
[106] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (Harvard University Press) (2013) at 28.
[107] *Ibid.*
[108] JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005)
[109] EXPLAINING AND PREDICTING SUPREME COURT DECISION-MAKING: THE ESTABLISHMENT CLAUSE CASES, 1970-1986

values."[110] The evidence produced by Segal and Spaeth and others[111] have produced clear and convincing numerical evidence of "the overwhelming importance of the justices' attitudes and values."[112]

Similar to the attitudinal model's successful application of political science methods to Supreme Court decision-making behavior, the judicial utility-maximization model applies the methods of economics. The common assumptions among rational choice models are that: "1. Actors are able to order their alternative goals, values, tastes and strategies. This means that the relation of preference and indifference among the alternatives is transitive..." and "2. Actors choose from available alternatives so as to maximize their satisfaction."[113] Utility-maximization modeling insists on mathematical and logical deductions.[114] Further, utility-maximization modeling employs game theoretical insights and Nash equilibria to look at interactions. Economic-type analysis has emphasized the role of the judge as rational actor and a maker of rational choices.[115] Meanwhile, Posner et al. propose a model of judicial behavior as a function of a judicial utility. Their model looks at attitudinal and legal choices as a rational response to preferences and aversions.

These three models will form the basis for a behavioral law and economics revision of Supreme Court decision-making theory. In the next section, we delve into the heuristics and biases

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[110] JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005) at 86.
[111] E.g., Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 JOURNAL OF EMPIRICAL LEGAL STUDIES 556–586 (2011)
[112] *Id.* at 97.
[113] *Political Science and Rational Choice*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 172
[114] E.g., Fred Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 THE AMERICAN POLITICAL SCIENCE REVIEW 1–12 (1957); Jonathan P. Kastelbec, *The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 202–230 (2010).
[115] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (Harvard University Press) (2013) at 29.

literature of behavioral economics. The following section will begin to apply these concepts to Supreme Court decision-making behavior.

4.3. Heuristics and Biases

Just as Daniel Kahneman and Amos Tversky began to explore the assumptions of prior psychological studies, numerous others in the burgeoning field of cognitive psychology also began to look into the study of judgment and decision-making. These cognitive psychologists studied performance in mental tasks, estimation of probability, and judgments of statistical properties. These examinations yielded an evaluation of the then-popular principle that people made assumptions following conservative Bayesian probability.[116] Kahneman and Tversky analyzed this evidence and concluded that people do not follow Bayesian analysis "at all."[117] Instead, Kahneman and Tversky proposed that people "make probability judgments by using a heuristic, a rule of thumb."[118]

The cognitive psychologists brought an important innovation to judgment and decision-making theory: a distinction, between normative and descriptive theory. This innovation revealed, through experimental evidence applied to real world situations, that as a rule people *systematically departed from optimal judgments and decisions.*[119] It is precisely this systematic departure that we will look at in analyzing Supreme Court decision-making procedure. In this section, we first explicate a number of important heuristics and biases that bear on the Court's decision-making procedure. This is crucial to any understanding of Supreme Court decision-making because where

[116] That is, hypotheses are updated as more evidence becomes available and theoretical probabilities are changed.
[117] Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOLOGY 430–454 (1972) at 450.
[118] *Heuristics and Biases*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 3–26 at 3.
[119] *Ibid.*

Posner et al.'s judicial utility-maximization model incorporates legal and attitudinal considerations into a judicial utility function based on a normative picture of humanity, we will look at how the "very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations."[120]

The ubiquitous error of human judgment and decision-making can be seen in the following selection of six heuristics and biases: anchoring, availability, representativeness, fluency, framing, and hindsight. Each of these methods of reasoning, selected from the behavioral economics literature, will first be described, illustrated by experimental evidence, and finally instantiated by Supreme Court decision-making.

4.3.1. Anchoring

Anchoring is an appropriate initial point to begin discussing heuristics and biases because it refers to a tendency to adjust situations based on an initial value. In an experiment asking subjects to estimate the fair market value of a property, people will use the initial value of the list price to "anchor" their final estimate.[121] This function comes from an assumption that initial numbers convey some relevant information about final numbers, as the list price of a piece of property ought to correlate with fair market value. Problematically, people rely too heavily on these anchor.

Even when anchors do not provide relevant information, they still influence judgment.[122]In an experiment where initial figures clearly provided no relevant information, Tversky and Kahneman asked participants to estimate the percentage of African countries in the UN.[123] Before allowing participants to answer, they informed participants that the number would either be larger or smaller than a spin of a wheel of fortune-type wheel. This wheel was rigged to land on either 10

[120] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL LAW REVIEW 777 (2001) at 780
[121] Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) at 1128-30.
[122] Guthrie et al. *Supra*, at 788.
[123] *Ibid.*

or 65. When the wheel landed on 10, participants provided a median estimate of 25%.[124] When it landed on 65, however, participants provided a median estimate of 45%.[125] Despite the triviality of the initial numbers provided, participants anchored their responses relative to these numbers.[126]

Anchoring, therefore, affects judgment "by changing the standard of reference that people use when making numeric judgments."[127]

> Anchors induce people to consider seriously the possibility that the real value is similar to the anchor, thereby leading them to envision circumstances under which the anchor would be correct. Even when people conclude that an anchor provides no useful information, mentally testing the validity of the anchor causes people to adjust their estimates upward or downward toward that anchor.[128]

Within the judicial context, "litigation frequently produces anchors."[129][130] In Guthrie et al.'s study of judicial anchoring, several experiments found that civil cases could be biased by misleading anchors such as a litigant's request for damage awards, and criminal cases can be biased by prosecutorial or defense sentencing recommendations.

In another experiment, Guthrie et al. tested judges in a personal injury case where the defendant was a major package carrier and the plaintiff had been hit by one of the company's trucks whose breaks had failed at a red light. The judges are told that the plaintiff was hospitalized for several months and lost the ability to walk, he could no longer make a living as an electrician and sought damages for the accident. The judges were placed in two different conditions, one half in a no anchor condition, and the other in an anchor condition based on a motion to dismiss for failure to meet the minimum jurisdictional amount of $75,000 in damages. Each group was asked

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[124] *Ibid.*
[125] *Ibid.*
[126] The experiment was repeated with different conditions replicating the same effect. *Ibid.*
[127] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL LAW REVIEW 777 (2001) at 788.
[128] *Ibid.*
[129] *Id.* at 789.
[130] "In five separate studies, researchers have found that plaintiffs' lawyers' damage requests influenced mock jurors' assessments of the appropriate amount of damages to award in civil suits. In one study, for instance, mock jurors awarded slightly more than $90,000 when the plaintiff's lawyer requested $100,000 in damages; but when the plaintiff's lawyer requested $500,000 in damages in the very same case, mock jurors awarded nearly $300,000." *Id.* at 789-790.

how much they would award the plaintiff. In the anchor condition, only 2% granted the motion, meanwhile the no anchor judges awarded an average of $1,249,000 while the anchored judges awarded an average of $882,000.[131] The mere suggestion by a motion to dismiss that damages had not exceeded $75,000 significantly reduced the average award.

When looking at Religion Clause cases, and in reviewing petitions for certiorari generally, the first things the justices see is the decision of a lower court. By analogy, these previous decisions act as a numerical anchor, giving some kind of qualitative information of the ruling or holding created by the case. In this way, lower court opinions anchor Supreme Court decision-making. We can call these either cert effects or procedural anchors. Once this anchor is set, the new judgment merely adjusts away from the initial point. Thus, the Supreme Court decides in reference to an initial point of judgment and is biased and reactive relative to these lower court opinions.

4.3.2. Availability Heuristic

The availability heuristic is a cognitive rule of thumb "through which the frequency of probability of an event is judged by the number of instances of it can readily be brought to mind."[132] The availability heuristic encourages biased or incorrect judgments. In an experiment participants were asked if the English language contained more words beginning with the letter K or with the letter K as the third letter of the word. Participants overwhelmingly said words beginning with the letter K because of the ease of coming up with instances, yet any typical text contains twice as many words with K as the third letter.[133]

In the landmark *Bowers v. Hardwick*,[134] which upheld an anti-sodomy law, Justice Powell had struggled in his decision-making process. Justice Powell's swing vote ultimately turned the

[131] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL LAW REVIEW 777 (2001) 789-792.
[132] AVAILABILITY HEURISTIC A DICTIONARY OF PSYCHOLOGY
[133] Daniel Kahneman & Amos Tversky, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207–232 (1973) at 211-212.
[134] 478 U.S. 186 (1986).

majority toward upholding the ban. Because he did not believe he had ever met a homosexual person, he thus did not think of the Georgia sodomy ban as particularly harmful. Ironically, one of the Justice Powell's clerks at the time was homosexual. Rather than basing his decision on pure reasoning or objective facts or even the claim of harm by the defendant, Justice Powell could not come up with any mental examples and therefore failed to see the harm.

4.3.3. Representativeness Heuristic

In close connection with the availability heuristic, the representativeness heuristic is also used when making judgments under uncertainty. In 1972, Kahneman and Tversky defined representativeness as "the degree to which [the event under consideration] (i) is similar in essential characteristics to its parent population and (ii) reflects the salient features of the process by which it is generated."[135] That is to say that people estimate likelihood of certain events by comparing them to a prototypical event in their own minds. This prototype becomes the most salient and typical example of the event.

Representativeness becomes an interesting mental shortcut to look at in the context of the inaccurate *Burwell v. Hobby Lobby* prediction. As we saw in *US v. Lee* and *Employment Division v. Smith*, the Supreme Court ruled that rights to freely exercise one's religion did not exempt one from otherwise applicable laws. Hobby Lobby sought a preliminary injunction to prevent enforcement of tax penalties on failing to provide contraceptive and other health coverage for employees. The district court denied this injunctive relief. The district court's decision was affirmed by a two judge panel of the 10th Circuit Court of Appeals. The Court also denied this relief. In an *en banc* hearing of the 10th Circuit, the court reversed the earlier two-judge panel and ruled that corporations were persons with Free Exercise clause rights. The Supreme Court then

[135] Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOLOGY 430–454 (1972)

found that the Hobby Lobby corporation could deny health coverage to its employees for religious reasons.

Justice Ginsburg, in a biting dissent, argued that the majority's decision had been precluded by *Employment Division*'s ruling that the Free Exercise clause was not violated where the infringement on that right was merely an incidental consequence of an otherwise valid statute. Further, the conservative justices agreed with Ginsburg's analysis of the neutral applicability and governmental interests. What, then, explains this split and the conservative wing of the Court's votes for Hobby Lobby stores after an earlier denial of injunctive relief? Justice Ginsburg missed, in her dissent, that the Court had utilized the representativeness heuristic in their decisions in both *Employment Division* and *Hobby Lobby*.

In *Employment Division*, plaintiff Smith complained that his employment and benefits had been terminated over a religious ceremony. In *Employment Division* (I), the Court remanded the case to the Oregon Supreme Court to answer whether Smith's use of peyote at a religious ceremony violated Oregon's drug laws. Oregon ruled that it did violate the state's drug laws, but the state's drug laws therefore violated the Free Exercise clause and they therefore had to find for Smith. The US Supreme Court then took the case up and ruled that Smith's Free Exercise rights did not pre-empt otherwise applicable laws and found for the Employment Division.

Similarly, in *US v. Lee*, the Court found against a Free Exercise claimant on the basis that the law was otherwise applicable. So how can representativeness resolve Justice Ginsburg's confusion? By placing the cases within a mental context. *Employment Division* concerned an individual who consumed illegal drugs. *Lee* looked at an individual objecting to the idea of having to pay taxes. Within the context of moderate conservative ideology, neither of these individuals bears a strong ideological claim; the Hobby Lobby stores, however, fought for a cause which has broad conservative support.

That is to say, the conservative wing of the Court did not support either personal objection to social security taxes nor "sacramental" usage of illicit drugs, and thereby did not find that the Free Exercise clause supported those claims. Justice Ginsburg employed legal-institutionalist type thinking. She reasoned the legal precedents held similar fact-patterns to Hobby Lobby's claim and therefore believed the Court should deny the sought relief;[136] however, the conservative wing of the Court found merit in their argument. Because the relief sought raises an objection from the moral and religious concern surrounding the abortion debate, the majority finds merit in the objection. Thus, the Court employs an ideologically-aligned representativeness heuristic to determine the merit of objections to otherwise applicable laws.

4.3.4. Fluency Heuristic

The fluency heuristic refers to a particular experimental design in which participants' familiarity with certain objects relative to others predicted the kinds of inferences that they would make.[137] Fluency in experiments refers specifically to an alternative more quickly recognized than any other. The consequences of recognizing alternatives more quickly than others is that these alternatives are perceived as having "higher value with respect to the criterion of interest."[138] In making inferences, experiments found that two-thirds to three-fourths of inferences made followed the fluency results of an fMRI.[139] If we think about case precedents and our previous conversation about case-salience, the numbers collected no longer refer to an arbitrary measurement of strength. That measurement of strength should have actual bearing on how the justices decide cases. In fact,

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[136] 573 U.S. ____ (2014), Ginsburg, J. dissenting.
[137] See, e.g., Ralph Hertwig et al., *Fluency Heuristic: A Model of How the Mind Exploits a By-Product of Information*, 34 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 1191–1206 (2008)
[138] Kirsten G. Volz et al., *It just felt right: The neural correlates of the fluency heuristic*, CONSCIOUSNESS AND COGNITION AT 829.
[139] Ralph Hertwig et al., *Fluency Heuristic: A Model of How the Mind Exploits a By-Product of Information*, 34 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 1191–1206 (2008)

we find that justices will only deal with the most salient cases when they find the law needs major revision.

4.3.5. Framing Effects

The framing effect is a cognitive bias in which the presentation of a particular choice matters for how decision-makers choose. Decision-makers often categorize options according to a salient reference point, such as the status quo.[140] In an experiment where judges were the subjects, Guthrie et al. tested how judges looked at an intellectual property settlement. Half of the judges looked at a decision of whether to settle from the plaintiff's position, the other half from the defendant's position. The settlement offers and estimated court costs were identical (although they were framed differently). 39.8% of judges looking at the plaintiff's numbers (the certainty of getting a settlement amount vs. the risk of getting nothing at trial) believed the plaintiff should settle, while only 25% of the judges believed the defendant should settle.[141] Even though the judges had identical information beyond the framing of plaintiff's side as potential gains and the defendant's as a choice between potential losses.[142]

We saw a similar situation in *Hobby Lobby*. The Court denied injunctive relief to the Hobby Lobby stores as a corporation until the 10th Circuit heard an appeal and ruled *en banc* that the Hobby Lobby corporation was a "person" for the purpose of assigning rights. After having the question framed in this way, Hobby Lobby prevailed in the Court. As we have already seen, once the Court had the problem phrased as a "person" fighting in the name of "personal" religious beliefs and being forced to provide contraceptive coverage to employees, the Court reversed its

[140] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL LAW REVIEW 777 (2001) at 794.
[141] *Id.* at 797.
[142] *Id.* at 798.

earlier denial of injunctive relief. By reframing the question before the Court, Hobby Lobby stores managed to change the way the Court thought about the case itself.

In fact, framing effects play very heavily in whether the Justices will vote to grant Cert. In a logistic regression comparing numerous factors, Profs. Black and Owens find a number of factors that heavily weight the Court's decision to grant or deny review:

Figure 4.3.5.1 Black & Owens Model of Granting or Denial of Review

Factor	Coefficient	Robust S.E.
Policy improvement probability (*PI*)	0.437	0.301
Net legal factors (*NLF*)	0.486	0.113
Policy improvement probability x net legal factors	0.288	0.191
Legal conflict alleged (*LCA*)	0.354	0.199
US supports review (*S*)	1.020	0.220
US opposes review (*O*)	-0.221	0.197
Lower court reverse trial court (*LCR*)	0.270	0.162
Dissent in lower court (*LCD*)	0.273	0.202
En banc lower court opinion (*LCEB*)	-0.011	0.354
Constant	-2.317	0.242
Observations (Dockets)	3,024	
LLR	-1,643.631	

Source: *Supreme Court Agenda Setting: Policy Uncertainty and Legal Considerations, in* NEW DIRECTIONS IN JUDICIAL POLITICS 144–166

Their work yields a framing equation for the granting or denial of cert. *C = .437(PI) + .486(NLF) + .288(PIxNLF) + .354(LCA) + 1.020(S) - .221(O) + .270(LCR) + .273(LCD) - .011(LCEB) – 2.317.* Although their log-likelihood does not indicate a particularly good fit of this model to reality, it gives at least a starting point to think about how cases are framed before the Court.

The justices made both decisions of *Hobby Lobby* within their frame to either maintain or slightly improve the status quo. In the first instance where Hobby Lobby came before the Court, the Court considered the implications of allowing corporations to have religious objections to

various laws, taxes, and other public policies. Such an allowance would open endless doors to litigation on the part of corporations, an undoubtedly negative policy. In consideration of that fact, the Court sought to maintain the status quo and therefore denied Hobby Lobby injunctive relief. Once the 10th Circuit Court, sitting *en banc*, had ruled that a closely held corporation like Hobby Lobby had person-hood enough to have religious rights. Within this frame, the conservative wing of the Court attempted to subtly improve (to their minds) the status quo by allowing a religious objection to public policy involving contraceptive coverage.

4.3.6. Hindsight Bias

The hindsight bias looks to the ubiquitous overstatement of ability to have predicted events now past. Essentially, people learn of outcomes and then use these outcomes to update their set of beliefs. They then generate hindsight predictions subconsciously based on having learned the outcome. Courts are particularly susceptible to hindsight bias because they often evaluate events after the fact. In light of the many contexts in which hindsight bias interferes with judicial decision-making and judgment, hindsight bias is an important consideration in Supreme Court decision-making analysis due to a claim by Guthrie et al. that "hindsight bias is a threat to accurate determinations in many areas of law" as one of the "most robust cognitive illusions."[143]

In Supreme Court decision-making generally, the Court frequently deals with issues which have gone through either state or federal courts before being litigated before it. Guthrie et al. set up another experiment with judges as the subjects. They assigned a fact pattern common in all elements, except the higher court in one-third of the patterns lessened sanctions, affirmed in one-third, and vacated in one-third. Whatever the fact pattern identifies as the action of the appeals court, the judges reliably identify this as the "most likely" option in significantly larger numbers

[143] Guthrie et al. *Supra* at 801.

than their peers in the other conditions. In sum, the judges' "judgments in hindsight were influenced by knowledge that they could not have had in foresight."[144] This information systematically skews judicial decision-making because judges cannot sort out information that they could not have had without knowing the outcome of the situation and being biased by procedural history.[145] Like the anchoring effects of procedural anchoring, we can see how the judicial mind is influenced by the hindsight bias.

4.4. Supreme Court Decision-Making as a Function of Proposed Models

Within the model proposed here, the Supreme Court justices follow a pattern of ordinary human decision-making. Behavioral economics and the cognitive psychological research begun by Herbert Simon and others have had an enormous influence on social science, public policy, and, now, our understanding of judicial politics. Simon, in his work the *Models of Man*, demonstrates that individuals lack unlimited computational powers and resources to behave as the perfect "homo economicus." Ultimately, the justices are subject to the same bounded rationality, willpower, and self-interest as the rest of us.

In making decisions, the justices therefore are forced to satisfice. Satisficing is another heuristic where decision-makers eschew optimal decision-making and instead reach an acceptable threshold in decisions. Ultimately, the justices constantly search for an optimal decision and can never have perfect certainty of completing this search.

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[144] *Id.* at 803

[145] *The Hindsight Bias and the Law in Hindsight*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 354–373 at 360-361.

4.5. Summary

Within the realm of Religion Clause law, we have seen numerous errors in judgment. What does this say about Supreme Court decision-making generally? That the decision-making process is subject to many of the same kind of cognitive errors at the Supreme Court level as at any other level of decision-making. Between prior decisional models and the heuristics and biases brought into the picture by cognitive social scientific research and the behavioral picture of judicial politics, we have begun to look at a fully considered picture of Supreme Court decision-making through the lens of cognitive improvements in social science.

Chapter 5: Legal-Institutional Constraints on Supreme Court Decision-Making

5.1. Introduction

The Supreme Court is an institution. It is the highest level of the judiciary branch of the US government. As such, it is subject to a very specific context. We looked at the previous history of the Supreme Court's ability to hear petitions for certiorari and take a discretionary workload. We also looked briefly at the previous models of Supreme Court decision-making. In this chapter, we will look at legal-institutional norms in the Supreme Court and how they affect the decision-making process. As a key aspect of the legal-institutional norms of the Supreme Court, we will look at the previous models of Supreme Court decision-making and the behavioral aspects introduced here, combining all of these aspects into a coherent model of the Court's decisional procedure.

5.2. Supreme Court as Legal-Institution and the Juridical Heuristic

The justices of the Supreme Court, like the rest of the judges in the federal court system, inhabit an environment of institutional norms that significantly impact behavior. None of the theorists looking at Supreme Court decision-making behavior have claimed that judges decide according to free personal whims; however, the important unspoken aspect of institutions is the

norms imposed on institutional actors. The justices must work within the institutional context to decide cases.

The institutional context of the Supreme Court and the judiciary more generally bears very specific norms and rules that govern judicial behavior and limit their ability to make decisions. The influence of such norms can be seen in such details as judicial robes. There exists a limited body of literature within the field of nursing regarding the influence of uniforms on self-image. This body of literature suggests that the very act of putting on a professional uniform increases professionalism and professional behavior.[146] In this same way, when the justices put on their judicial robes, legal-institutional constraints suggest that they feel the pressures and expectations of the Court.

Thus we look to a neo-institutionalist theory of the judiciary and how this informs a behavioral picture of Supreme Court decision-making. Neo-institutionalists have convincingly argued that the institution of the Supreme Court "itself shapes judges' positions."[147] Legalist models argue that the justices make decisions on the facts of the case in light of the meanings of the Constitution or any applicable statutes, intent of the Framers, and/or precedent.[148] These legal-institutional norms of meanings, intent, and precedent limit the ability of judges to make decisions according to personal ideological beliefs, as in the attitudinal model, or even according to unbound reason, as in the utility-maximization model.

Further, not only does the legal-institutional model limit the ability to decide according to either pure ideology or pure reason, but the institutional norms influence judicial objectives and

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[146] See, e.g., Kate Shaw & Stephen Timmons, *Exploring how nursing uniforms influence self image and professional identity*, 110 NURSING TIMES 7 (2014).
[147] Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 JOURNAL OF EMPIRICAL LEGAL STUDIES 556–586 (2011) at 558.
[148] Note 50 *supra.*

preferences.[149] It bears mentioning that the judicial utility-maximization model of Supreme Court decision-making also agrees that institutional norms substantially affect the justices' abilities to decide cases. Each of these considerations looks into the "*law itself as an institution.*"[150] Thus, judicial policy considerations include legal values and views into personal preferences.

The juridical heuristic proposed here reframes the legal-institutional model from a combination of facts in light of meaning, intent, and precedent into a juridical mindset. The juridical mindset acts more like the heuristics, or mental rules of thumb described earlier, than any type of posited legal model. In chapter 7, these concepts will become part of a behavioral model of Supreme Court decision-making that incorporates the three major prior models, legal-institutional, fact-attitudinal, and utility-maximizing. In the next section we will look at evidence for this "juridical heuristic."

5.3. Evidence of a Juridical Heuristic: The Origin and Principles of *Stare Decisis* and the Legal Model

5.3.1. The Common Law

The American common law system, a regional variant of the British legal system of the colonies, entails the principle that it is unfair to decide cases with similar sets of facts differently.[151] American common law begins in statutory language,[152] but as cases are decided, precedent becomes the law of the land. Common law gives great weight to precedent in deciding new cases. These

[149] Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel,* 8 JOURNAL OF EMPIRICAL LEGAL STUDIES 556–586 (2011) at 558.
[150] *Ibid.*
[151] E.g., *US v. Lee, Employment Division v. Smith,* and *Burwell v. Hobby Lobby Stores.*
[152] i.e., Legislation, the laws written by the peoples' representatives.

precedents give indication of how a lower or equal court ought to decide the case by providing a stable authoritative source.

Precedent and the principle of *stare decisis*[153] hold authoritative sway in most lower federal courts, whether regional district courts or circuit courts of appeal, insofar as an issue has conclusively been decided before, the precedent will hold. Yet at the Supreme Court level, previous decisions hold only as much sway as the Justices give to them. As Justice Brandeis illuminated: "*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right...But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (Brandeis, J., dissenting).

The instability of common law practice at the Supreme Court level offers us a clear justification for describing a set of evolving rules and a cohesive model for Religion Clause cases. The point of this system is that, in fact, such a set of rules and model already exists within the law, but as Professor Schauer points out, when "one rule suggests answer A...another suggests answer B"[154] to the lay reader and the legal practitioner alike, the answer remains unclear or the rule itself seems null. Through this study, we have begun the examination of some rules that apparently conflict in this way and utilized behavioral insights to explain how the Courts came to different conclusions and what conclusions we can draw from these reasons. The common law system itself will form the basis for measuring the strength of various precedents as a legitimate measure in our model.

[153] Latin, "to stand by things decided," essentially the common law principle of following precedents.
[154] Schauer *infra*.

5.3.2. *Stare Decisis*

The legal-institutional norm of *stare decisis* "directs judges to follow legal rulings from prior cases that are factually similar to ones being decided."[155] Lawyers, judges, and scholars alike all recognize *stare decisis* as "the most critical piece of American judicial infrastructure."[156] From 1791 to 1815, over 50% of Supreme Court decisions cited English Common Law rather than decisional precedent from the US or pure statutory language. As time went on, what was only 4.3% Supreme Court citations became nearly 100% of sources of authority. In fact, Johnson et al. find that as the Supreme Court faces more challenges from the executive and legislative branches of government, it relies more explicitly on its precedent to strengthen and enhance its own legitimacy.[157]

5.3.3. The Legal-Institutional Model and the Juridical Heuristic

What considerations drive the judicial decision-making process? Legal model researchers posit that judges follow legal doctrines within the common law framework. The principle of separation of powers would suggest that the judiciary has no role in making laws, only in interpreting laws already made according to rules set out previously, yet in the 20th century, legal realists began to understand that judges generally, and the Supreme Court justices specifically, must occasionally exercise a legislative role in deciding cases.[158]

The legislative role arises when the analogizing process of common law ruling fails. The principles explicated above mandate that judges base opinions on the doctrine of *stare decisis,* but legal models must answer the question of how judges are to make appropriate considerations when

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[155] *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, *in* NEW DIRECTIONS IN JUDICIAL POLITICS AT 167.
[156] Lee Epstein & Jack Knight, *The Norm of Stare Decisis*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 1018–1035 (1996)
[157] *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, *in* NEW DIRECTIONS IN JUDICIAL POLITICS
[158] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (Harvard University Press) (2013) at 26-27.

no proper analogy exists. Without the guidance of previous regimes or case law, or the insight that such previous doctrine is inappropriate in a new situation, judges must move beyond what is termed by scholars as mechanical jurisprudence.[159] The pattern of reasoning by example here follows three steps: "(1) observation of a similarity between cases, (2) announcement of the rule of law inherent in the first case, and (3) application of that rule to the second case."[160]

These steps describe a mutually agreed upon normative approach within the legal community, but legal-institutional models argue beyond the normative aspect that, in fact, judges *do* proceed according to these steps. The failure of such a model to predict actual behavior has been clearly shown previously in this thesis, not solely in *Burwell v. Hobby Lobby*.[161] Thus, such a model bears more use as a juridical heuristic. That is, *stare decisis* is a rule of thumb that can be overruled in the reasoning process.

The juridical heuristic, like the other heuristics, is a rule of thumb, a practical methodology not guaranteed to be optimal or perfect but sufficient for short-term goals. The juridical heuristic therefore, follows the normative element of the legal model. Rather than describing how judges always make decisions, the juridical heuristic suggests that the legal model and its insights into the legal-institutional process and how this affects preferences and the judicial ability to act is a preliminary line of decision-making process for the justices. That is to say, the juridical heuristic will always be a Supreme Court justice's first formulation of legal process. The Court, as a constraining institution, will guide the justice towards keeping with prior case law in the first instance: as we saw with Hobby Lobby's first petition for certiorari after a two-judge panel of the

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[159] See, e.g., Lee Epstein & Tracey E. George, *On the Nature of Supreme Court Decision Making*, 86 AMERICAN POLITICAL SCIENCE REVIEW 323–337 (1992) at 324.
[160] *Ibid.*
[161] Where my reading of the similarity between the case and previous cases denying religious exemption to generally applicable laws misled me to believe that the Court would issue a similar ACA ruling as they had in either *US v. Lee* or in *Employment Division v. Smith*

10th Circuit Court of Appeals denied injunctive relief for the "religious beliefs of a private corporation." Not until the question became reframed in the form of should the Court enjoin the provision if a corporate "person" has a religious objection did the Court grant cert.

These kinds of alterations in reasoning occur because of the many heuristics and biases discussed earlier, which interfere with the juridical heuristic and the judicial mindset.

5.4. The Juridical Heuristic and Bounded Rationality

We have just presented an argument that the juridical heuristic better explains Supreme Court decision-making than the descriptive formulation of normative legal modeling. Although *Burwell v. Hobby Lobby* presents excellent evidence for this argument, it is indeed a singular case. Further, this case's variation from the pre-existing case law has been looked at as an example of a conservative iteration of the representativeness heuristic[162] and the change from denial of cert to granting cert as an example of the framing effect of changing the question from religious objection of a corporation to the religious objection of a "corporate person."[163] It is Herbert Simon's work on the psychology of bounded rationality,[164][165] that will help to explain the juridical heuristic's addition to these previously established behavioral insights.

Limitations of the legal-institutional system that the Supreme Court inhabits, as well as limitations on rational decision-making, have a particular bearing on Supreme Court decision-

[162] *Supra*, we looked at how the conservative wing saw no Free Exercise exception to an applicable law for drug use, but saw objection to contraceptive coverage as a salient and legitimate reason to object.
[163] *Supra*, we saw how once the 10th Circuit Court of Appeals ruled that Hobby Lobby did have standing as a corporate person to hold religious views and to raise Free Exercise Clause objections.
[164] E.g., Herbert A. Simon, *A behavioral model of rational choice*, 69 QUARTERLY JOURNAL OF ECONOMICS 99–118 (1955) and Herbert A. Simon, *Rational decision-making in business organizations*, 69 AMERICAN ECONOMIC REVIEW 394–403 (1979)
[165] Which gave rise to Kahneman and Tversky and numerous others besides them.

making. Without the juridical heuristic, which incorporates the insights of the legal-institutional model into a behavioral approach, any behavioral approach to Supreme Court decision-making fails to capture true legal thinking. Legal-institutional limitations and the juridical heuristic are a powerful influence on Supreme Court decision-making. If we are to consider only the issue of precedent and how this prevents the justices from formally, i.e. nominally, altering precedent, then we can see just how powerfully a juridical heuristic affects the ability to make decisions, or alternatively, at least the preferences of Supreme Court justices. From the 1946 Supreme Court term through the 2009 term, the Court decided a total of 7,184 cases. Of these cases, only 149 formally altered precedent. This is a total of 2.07% of the cases. Further, of these, only 22.1% altered precedents unanimously.

Figure 5.4.1. Formal Alteration of Precedent in the Supreme Court, 1946-2009

	Cases	**Percentage**
Precedent Altered	149	2.07%
Precedent Not-Altered	7,035	97.93%
Total	**7,184**	**100%**

Source: HOWARD J. SPAETH ET AL., U.S. SUPREME COURT JUDICIAL DATABASE (Washington University) (2014), supremecourtdatabase.org

Figure 5.4.2. Supreme Court Decisions by Unanimity, 1946-2009

	Altered Precedent		**Non-Altered Precedent**	
	Cases	Percentage	Cases	Percentage
Unanimous	33	22.1%	2,017	28.7%
Non-Unanimous	116	77.9	5,018	71.3%
Total	**149**	**100%**	**7,035**	**100%**

Source: HOWARD J. SPAETH ET AL., U.S. SUPREME COURT JUDICIAL DATABASE (Washington University) (2014), supremecourtdatabase.org

Figure 5.4.2 demonstrates that when precedents are formally altered, there is less unanimity than in decisions that do not alter precedents (6.6% more non-altering decisions are unanimous). Thus,

as we have seen previously, the juridical heuristic is not always controlling. In fact, although we have seen that the juridical heuristic has a powerful influence on formal alteration of precedent (limiting the percentage to 2.07% in total case law), these numbers fail to take into consideration that the Court must frequently interpret and re-interpret that law which it has laid down itself to clarify various points.

5.5. Summary

The juridical heuristic, like the legal-institutional setting that facilitates and encourages its development, follows a legal pattern of reasoning within the realm of common law, *stare decisis*, and the court system. Such a heuristic must always be a first consideration in looking at the decision-making procedure of the Supreme Court, for the Court will always seek to pay lip service to this method of thinking. From a litigant's perspective, knowledge and consideration of the juridical heuristic will play an important role in effective framing of and advocating for one's cause. Further, we have seen that the legal-institutional limitations of a juridical heuristic on judicial decision-making insofar as the juridical path might provide an unsatisfactory answer. As we move into what drives dissatisfaction with the juridical avenue, we will begin to discuss the problems of ideology and the attitudinal model.

Chapter 6: The Attitudinal Bias and the Justices' Ideologies

6.1. Introduction

In judicial politics research one of the most popular explanations of Supreme Court decision-making is the fact-attitudinal model. As previously discussed, the fact-attitudinal model looks at personal ideology and preference as the key aspect in Supreme Court decision-making. Important scholars in the field have included Rohde, Spaeth, and Segal, amongst many others. These scholars have looked the ideal points[166] of various justices and investigated the influences of these preferences on their decision-making. The attitudinal model incorporates more social scientific nuance than the legal model. Attitudinal approaches incorporate rational choice insights that Court decisions "depend on goals, rules, and situations."[167]

6.2. The Fact-Attitudinal Model

The fact-attitudinal model looks at facts cases before the Court. The fact-attitudinal model looks at moments of precedent shifts and seeks to explain major reversal of precedent and other

[166] i.e., ideological perspectives.
[167] JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge University Press) (2005) at 92.

alterations as a function of the ideological preferences of the justices with regards to certain facts. One particular scholar, Prof. Joseph A. Ignagni, has looked at the Establishment and Free Exercise Clauses through the lens of the fact-attitudinal model. Within the realm of Free Exercise, Prof. Ignagni looks at the historical landmarks of the field. In *Reynolds v. United States*[168] the Court divided Free Exercise into belief and action. The Court upheld restriction on polygamy although many members of the Mormon Church held polygamy as a religious belief and practice of the faith. The ruling stated that the First Amendment absolutely guaranteed the right to believe but not necessarily the right to act upon the belief. In *Cantwell v. Connecticut,*[169] the Court added that the right to act would be protected in some circumstances. The landmark case of *Sherbert v. Verner*[170] and its relation to the precedent of *Braunfeld v. Brown*[171] and its reformation in *Wisconsin v. Yoder*[172] indicated doctrine strongly protective of action based on religious belief.

Ignagni argues that *Employment Division v. Smith*[173] marks a major departure from this Free Exercise protection of action. Even though this marks a major shift in Free Exercise legal precedent and doctrine, his fact-attitudinal model supports the notion that the Court has "remained basically consistent in its decision-making."[174] The attitudinal model suggests that the consistency of Supreme Court decision-making is found in the "goals, rules, and situations" of the Court's cases.[175] Thus, a thorough examination of policy preferences, beliefs, attitudes, and values of the justices will yield an explanatory model of how the justices will decide their cases.[176]

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[168] 98 U.S. 145 (1878).
[169] 301 U.S. 296 (1940).
[170] 374 U.S. 398 (1963).
[171] 366 U.S. 599 (1961).
[172] 406 U.S. 205 (1972).
[173] 494 U.S. 872 (1990).
[174] Joseph A. Ignagni, *U.S. Supreme Court Decision-Making and the Free Exercise Clause*, 55 THE REVIEW OF POLITICS 511–529 (1993) at 514.
[175] *Id.* at 516.
[176] *Id.* at 517.

In looking at Free Exercise Clause cases through the fact-attitudinal lens, there are three major hypotheses. First, when a challenged law or regulation can be described as non-ideological, general, or a welfare service, it will be found constitutional. Second, when the challenged rule appears to be facially neutral,[177] it is more likely to be upheld. Third, if the challenging religious practice has a long history then it is more likely to prevail.[178] In addition, the Court can be said to be influenced by the involvement of the federal government in a case and so the participation of the US Solicitor General's office either as party or *amicus curiae* will influence outcomes.

6.2.1. Findings of the Fact-Attitudinal Model

In an examination of the 57 Free Exercises cases that took place during the span of the Warren, Burger, and Rehnquist Courts, a free exercise claim was upheld (25/57) 44% of the time. It is worth noting that as the Court's ideological valence changed, so did the success of claims. During the Warren Court, 6 of 10 claimants prevailed (60%). Under Burger, only 15 of 34 claims succeeded (44%), while under Rehnquist only 4 of 13 succeeded (30%). Under the consideration of a number of variables for this years, Ignagni's fact-attitudinal model of Free Exercise cases succeeds in predicting cases 82% of the time.

[177] i.e., "giving no indication of favoritism or discrimination based upon religious belief." (Ignagni 1993)
[178] Joseph A. Ignagni, *U.S. Supreme Court Decision-Making and the Free Exercise Clause*, 55 THE REVIEW OF POLITICS 511–529 (1993) at 521.

Figure 6.2.1.1 Ignagni's Probit Estimation of Supreme Court Free Exercise Decisions

VARIABLE	MLE	S.E.	MLE/S.E.
MARGINAL	1.69	0.87	1.95*
EMPLOYMENT	2.56	0.96	2.66**
EDUCATION	2.37	1.21	1.96*
TAX	-3.49	1.49	-2.34*
GEN.GOVT.	0.95	0.53	1.78*
NEUTRAL	-3.54	1.23	-2.87**
HISTORY	1.99	0.99	2.01*
SG	0.92	0.37	2.53*
BURGER	-1.15	0.74	-1.55
REHNQUIST	-2.57	1.21	-2.12*
CONSTANT	0.74	0.71	1.03
	-2xLLR	**37.80****	
	% correct	**82.46**	
	% modal	**56.14**	
	N	**57**	

Source: Joseph A. Ignagni, *U.S. Supreme Court Decision-Making and the Free Exercise Clause*, 55 THE REVIEW OF POLITICS 511–529 (1993) at 526

* Significant at .05

** Significant at .01

MLE =df. Maximum Likelihood Estimate

S.E. =df. Standard Error

LLR =df. Log-Likelihood Ratio[179]

[179] The fact-attitudinal model utilizes a log-likelihood ratio test to compare the fit of two models, one is null, and the other is the alternative. This figure expresses how many times more likely the data are under one model than the other.

These results are important. They indicate that, at least within Religion Clause law, facts have statistical significance in predicting how the Court will decide cases. We see that if a claimant is the adherent to a marginal religion, this claim is more likely to succeed.

Problematically, the fact-attitudinal model has a variable success rate in predicting Supreme Court decision-making. In a breakdown by Court terms, the Warren Court decisions were each perfectly predicted.[180] The Rehnquist Court's decisions, too, were fairly accurate.[181] The Burger Court, which tackled the majority of cases under consideration in this thesis (N = 34), had a more variable success rate under the fact-attitudinal model.[182][183] Thus, we cannot think of Supreme Court decision-making as entirely fact-attitudinal, but rather as a partial function of judicial attitudes that function within the legal-institutional framework of the juridical heuristic.

6.3. The Attitudinal Bias

Fact-attitudinalism clearly plays an important and statistically significant role in Supreme Court decision-making, yet personal preferences fail to predict the behavior of all Supreme Court justices and ideological Courts. Fact-attitudinalism follows the psychological study area of cognitive biases. These biases are "widespread and persistent psychological tendencies detrimental to objectivity and critical thinking."[184] These biases lead to systematic deviations from rational decision-making behavior.

[180] 10 out of 10, or 100%.
[181] 12 of 13, or 92%.
[182] 23 of 34, or 68%.
[183] All figures can be found in Table 2, Ignagni 1993 at 528.
[184] JOE Y. F. LAU, AN INTRODUCTION TO CRITICAL THINKING AND CREATIVITY: THINK MORE, THINK BETTER (John Wiley & Sons) (2011) Ch. 20.

Figure 6.3.1 Supreme Court Justices 1937-2009, Ranked from Most to Least Conservative

Martin-Quinn Scores			
Justice	Score	Justice	Score
Thomas	3.840	White	0.440
Rehnquist	2.850	Reed	0.360
Scalia	2.730	Hughes	0.090
McReynolds	2.660	Stone	-0.080
Sutherland	2.050	Blackmun	-0.120
Butler	1.960	Byrnes	-0.190
Burger	1.840	Sotomayor	-0.230
Alito	1.770	Brandeis	-0.530
Roberts, J.	1.700	Goldberg	-0.790
Harlan	1.630	Souter	-0.830
Roberts, O.	1.600	Breyer	-1.010
Whittaker	1.250	Ginsburg	-1.160
Minton	1.100	Warren	-1.170
Burton	1.300	Fortas	-1.200
Vinson	1.000	Rutledge	-1.390
Powell	0.930	Stevens	-1.520
O'Connor	0.890	Murphy	-1.600
Kennedy	0.830	Cardozo	-1.760
Jackson	0.740	Black	-1.760
Stewart	0.560	Brennan	-1.940
Frankfurter	0.530	Marshall	-2.830
Clark	0.490	Douglas	-4.120

Source: ANDREW D. MARTIN & KEVIN M. QUINN, MARTIN-QUINN SCORES (Berkeley Law/University of Michigan) (2014), mqscores.berkeley.edu/index.php

Looking at Martin-Quinn scores for the Justices of the Court from 1937 on suggests that certain justices have extreme views on the ideological spectrum that should predict consistent ideological votes. In Table 6.3.2, which looks at these same Martin-Quinn scores (M-Q) compared with liberal and conservative votes in Religion Clause cases, we find surprising ideological variations. Justice Thomas, by far the most conservative of the justices in the last century, has a liberal to conservative vote ratio of only 1:2. i.e., for every two conservative votes, Justice Thomas votes liberal. On the other hand, the next two most conservative justices, Justices Rehnquist and Scalia have a liberal to conservative ratio of 1:6 and 1:3, respectively. Meanwhile, a far more liberal justice, Justice White,

Martin-Quinn Scores & First Amendment Votes				
Justice	M-Q Score	Lib. Votes	Con. Votes	Total Votes
Thomas	3.840	8	16	24
Rehnquist	2.850	9	56	65
Scalia	2.730	10	28	38
McReynolds	2.660	{0}	{0}	{0}
Sutherland	2.050	{0}	{0}	{0}
Butler	1.960	{0}	{0}	{0}
Burger	1.840	11	28	39
Alito	1.770	3	2	5
Roberts, J.	1.700	4	2	6
Harlan	1.630	8	11	19
Roberts, O.	1.600	{0}	{0}	{0}
Whittaker	1.250	2	4	6
Minton	1.100	4	2	6
Burton	1.300	6	2	8
Vinson	1.000	5	3	8
Powell	0.930	20	18	38
O'Connor	0.890	23	24	47
Kennedy	0.830	12	19	31
Jackson	0.740	4	4	8
Stewart	0.560	22	16	38
Frankfurter	0.530	10	4	14
Clark	0.490	10	9	19
White	0.440	20	45	65
Reed	0.360	4	4	8
Hughes	0.090	{0}	{0}	{0}
Stone	-0.080	{0}	{0}	{0}
Blackmun	-0.120	38	17	55
Byrnes	-0.190	{0}	{0}	{0}
Sotomayor	-0.230	3	2	5
Brandeis	-0.530	{0}	{0}	{0}
Goldberg	-0.790	3	2	5
Souter	-0.830	18	1	19
Breyer	-1.010	23	6	29
Ginsburg	-1.160	17	3	20
Warren	-1.170	8	8	16
Fortas	-1.200	3	1	4
Rutledge	-1.390	2	0	2
Stevens	-1.520	47	13	60
Murphy	-1.600	1	1	2
Cardozo	-1.760	{0}	{0}	{0}
Black	-1.760	18	10	28
Brennan	-1.940	54	14	68
Marshall	-2.830	42	11	53
Douglas	-4.120	33	4	37

has a ratio of slightly more than 1:2. When comparing Martin-Quinn scores of these four justices,[185] we can see that an attitudinal model can be misleading; however, they are not without valuable insight.

An attitudinal bias informs Supreme Court decision-making modeling by emphasizing the non-rational aspects of deliberation in the Court. Thus far, we have sought to proceed according to the assumptions of an informed picture of bounded rational choice. The hypotheses of the attitudinal bias reveal personal policy preferences that have a distinct effect on judicial decision-making. The justices, as influenced by the legal-institutional context that creates their juridical heuristic, act according to cognitive insights. In cases where their decisions cannot be predicted merely by these previously discussed heuristics, the attitudinal bias describes how the Supreme Court justices make their decisions in light of "competing priorities and available choices."[186]

6.4. Summary

Beginning with the rational choice modeling of Harold Spaeth and David Rohde and moving into the revisited attitudinal model of Spaeth and Jeffrey Segal, convincing evidence has been presented regarding ideological preferences of Supreme Court justices as a basis for judicial decision-making. Even so, in looking at the ideal points estimated by Profs. Martin and Quinn and the Religion Clause specific fact-attitudinal model generated by Prof. Ignagni, an attitudinal model fails to completely predict judicial decision-making. Thus, we propose an attitudinal bias as predictive but not controlling of interpretation and behavior. At the end of the day, a human

[185] Justice Thomas: 3.840; Justice Rehnquist: 2.850; Justice Scalia: 2.730; and Justice White: 0.440
[186] John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 131 (2008) at 132.

picture of Supreme Court decision-making must comprehend that the justices are capable of both rational *and* non-rational decision-making. In the next section, we finally propose a unified theory of Supreme Court decision making.

Chapter 7: Rational and Non-Rational Decision-Making and a Unified Theory

7.1. A Rational (Non-Rational) Decision-Making Theory

The arguments proceeding this section have posited that legal-institutional, fact-attitudinal, and utility-maximizing models have valuable insights into the decision-making process. Legal-institutional models posit the real contexts in which the Supreme Court justices decide the Religion Clause cases. This situation includes the common law norms of American jurisprudence, e.g., *stare decisis*, and the process of petitioning for certiorari. Institutional norms constrain the actions of Supreme Court decision-making. While the fact-attitudinal model utilize quantitative analysis to demonstrate that the justices make reliably predictable choices with regard to specific types of facts and policy-areas, the justices are ultimately restrained by the institutional requirements of the Court; however, these restraints fail to prevent the Court from on the rare occasion altering precedents[187] or from expanding their judicial authority.[188] Given the notion that actors possess goals, values, preferences, and strategies and may alternatively order these goals[189] or be

[187] E.g., *Employment Division v. Smith* to *Sherbert v. Verner*.
[188] As the Court did in *Everson* and *Cantwell*.
[189] *Supra* note 55.

unconsciously influenced by them[190] and the legal-institutional constraints of the Court, the models are respectively incomplete and offer one another helpful information in understanding Supreme Court decision-making. Thus, each model both limits and improves on the other.

The one model this study has not yet examined in depth is the utility-maximization theory posited by Epstein, Landes, and Posner, in their study of federal judicial behavior. The utility-maximization model of judicial behavior looks at the justices and judges more generally as a special kind of participant in the labor market: "the theory...of judicial behavior that [Epstein, Landes, & Posner proposed] is rational in the economic sense" and "is opposed to the conventional theory of judicial behavior in which judges decide cases strictly in accordance with orthodox norms of judicial decision-making."[191] What is most useful about this microeconomics approach to judicial decision-making is the insight it brings into offering a theoretical model. Their approach provides a basis on which to model decision-making behavior in a conceptual mathematical equation. That is, they offer a utility function that expresses their theory into a more concise format.

Epstein, Landes, and Posner follow, however, a homo economicus approach to decision theory.[192] In their study, they argue that judges make purely rational decisions within the framework of their labor market constraints. While they argue that justices are bounded by the particular constraints of their labor market and their principal-agent relationship with the government, this study has demonstrated how the justices, like all ordinary decision-makers, are prone to bounded rationality,[193] bounded self-interest,[194] and bounded willpower.[195] Utilizing the insights from cognitive psychology and the research of behavioral economics, this thesis will in the proximal section

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[190] *Supra* Chs. 4, 6.
[191] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (Harvard University Press) (2013) at 50.
[192] See 3.3. *supra*.
[193] See 3.4.1. *supra*.
[194] See 3.4.2. *supra*.
[195] See 3.4.3. *supra*.

incorporate the legal-institutional and fact-attitudinal models into a utility-maximization style decision-function, drawing together the principal strands from the previous chapters of discussion into a unified model of Supreme Court decision-making with evidence from religion clause cases.

7.2. The Unified Theory of Supreme Court Decision-Making

Epstein, Landes, and Posner propose a "judicial utility function,"[196] which is as follows:

$$U = U(S(t_j), EXT(t_j, t_n), L(t_j), W, Y(t_{ij}), Z).$$

This equation posits judicial utility (U) as function of time, internal and external satisfaction and other considerations. Like rational choice theories more broadly, this model oversimplifies judicial decision-making, distilling decisions into utility. Counter to this, and in light of the previously examined information, this research suggests instead a decision function.

The judicial decision function will take into account the numerous insights we have derived previously and synthesize them into one coherent model. This decision model (D) will include the various concepts we have discussed. What has been discussed so far is not meant to capture the totality of factors involved in these kinds of decisions. Rather, this research is intended as a useful first step in determining the totality. Regression modeling always includes an "error term" that represents factors not considered by the model. The error term is assumed to have a net zero effect. We find no persuasive evidence that it should be the case that only one item has an effect at any given time.[197] Thus, we welcome any improvements to the decision model posited here.

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[196] Epstein et al. at 48.

[197] As an example, if we look to voting and the various criteria used to determine whether a voting method is fair or not, we find that there exist concepts such as the following, entitled the independence of irrelevant alternatives criterion. This is a criterion of fair voting systems that involve ranking candidates according to preference. The criterion demands that if the election is held and a winner is declared, this winner should remain the winner in an identical election in which some losing candidate(s) drops out. By analogy here, I mean to suggest that error terms may not have a net zero effect because irrelevant alternatives may not in fact be independent.

Supreme Court decision-making in the area of Religion Clause law, according to this research, is most accurately modeled by the following decision function:

$$D = \int (BLE, B, D)$$

D refers to the decision of an individual justice. Per this function, the decision of the individual justices depends on the sum of the information from the pre-existing behavioral law and economics research and analysis (*BLE*), and the added attitudinal bias (*B*) and juridical heuristic (*J*). Each of these variables is made up of constituent parts.

7.2.1. *BLE*

For instance, $BLE = \int (A, V, R, L, F, H)$. These six variables represent the six behavioral insights we addressed in chapter 4: anchoring effects, or making estimates based on irrelevant starting points, (*A*); the availability heuristic, or predicting events based on how easily examples come to mind, (*V*); the representativeness heuristic, or ignoring important background statistical information in favor of reduction to prototypical information, (*R*); the fluency heuristic, or assigning salience based on how quickly a policy alternative comes to mind, (*L*); framing effects, or treating relevant factors different based on initial presentation contexts, (*F*); and hindsight bias, or perceiving past events as more predictable than they actually were, (*H*).[198] *BLE* here represents the cutting edge of our understanding of human decision-making. These concepts must be a starting place in analyzing decision-making behavior.

A, our starting point, refers to the anchoring effects discussed in section 4.3.1. The justices will always be anchored by what is termed in legalese "the opinion below." In plain English, they will be anchored by the decision of whatever lower court they may be granting a petition for review from. In addition, whatever parties ask for in their briefs and in oral argument and what *amici*

[198] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL LAW REVIEW 777 (2001)

curiae write in their briefs often bias the justices' decisions relative to those anchors. These briefs, particularly of certain *amici curiae* who offer up conjecture, polemics, and pseudo-science up as truth for the justices, are functionally irrelevant to the legal mission of looking at the facts of the case vis a vis the meanings of statutes, case law, and other legal principles.

In one of the best samples of *amicus* briefs, 72 Nobel laureates wrote a brief opposing the teaching of creationism in public schools in *Edwards v. Aguillard.*[199] Such a powerful statement of scientifically prestigious people gives the presumption of validity, yet, because the brief is not by a party, an opposing party does not have the chance to answer the claims made by *amici curiae*. How could one argue that the testimony of so many Nobel laureates? Though that brief may be an instance where the existence of the *amicus* institution worked really well, *amicus* briefs as an anchor can be extremely problematic. The Court is often "inundated with eleventh-hour, untested, advocacy-motivated claims of factual expertise."[200] The justices listen and cite to the briefs as authorities rather than the underlying "sources" of facts. Because *amicus* briefs are often submitted at the last possible moment and are not issued by parties, they often are not subjected to (and certainly need not be subjected to) rebuttal from opposing parties. The insight of how anchoring works helps to explain what is happening in the Court's use of these briefs as expert authority.

V refers to the availability heuristic discussed in section 4.3.2. The availability heuristic is a rule of thumb whereby the frequency of an event is judged by the ease with which one can come up with an example. In *Bowers v. Hardwick*, Justice Powell believed he did not know any homosexuals and so did not see the harm of an anti-sodomy law. Further, the rationale for sequestering juries is that media exposure and inference of guilt from media assertions operates to convince a given juror that whomever the case is concerning is either guilty or falsely accused

[199] 482 U.S. 578 (1987).
[200] Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VIRGINIA LAW REVIEW 1757 (2014)

(depending on media representations). Similarly, we would suggest that the amount of media coverage surrounding any case that is granted cert must have at least some minimal effect on the justices. The availability heuristic also has some interplay with the confirmation bias, where decision-makers have the tendency to judge the reliability of evidence via the availability of examples in the decision-makers mind.

R refers to the representativeness heuristic discussed in section 4.3.3. This refers to a cognitive strategy whereby events are compared with prototypical events in their mind. This prototypical event becomes the most salient point of comparison regardless of its actual relation to the event in question. In *US v. Lee* and *Employment Division v. Smith*, we saw that the prototypical events were someone who felt they did not have to pay taxes (in *Lee*) and someone who did drugs and claimed some legitimate purpose (in *Smith*). Although conservative justices typically want less government involvement in daily life and want to protect libertarian values, the prototypical events in those cases did not evoke the same kind of motivation as the conservative religious claim in *Hobby Lobby*.

L refers to the fluency heuristic written about in section 4.3.4. The fluency heuristic comes into play in that whatever alternative may come to a justice's mind first will be taken as having the highest value with respect to the criterion of interest. This particular heuristic has a strong relationship with concepts like case salience, rule strength, and other similar criteria. This particular heuristic helps to explain how justices actually choose between available alternatives when rules are unclear. Rather than offering an attitudinal perspective where justices decide according personal policy preferences, we see the justices actually respond according to an irrational inner process that may in fact mimic or be identical to the attitudinal position in effect. That is to say, fluency reflects inner salience and the more versed a justice is in a case precedent, legal principle, or relevant ruling, the more likely that justice is to believe that their own fluency

reflects higher value. This would not be terribly dissimilar from a confirmation bias.[201] That is to say, in the conflict between rule A and rule B, as we discussed earlier, where the rule is unclear or they seem to cancel one another out, whichever alternative the justice has higher familiarity with, whether by virtue of having written the opinion in one of the rules or simply just having more experience in seeing that rule properly utilized than the other more obscure rule, the familiar rule will seem to be higher value. Thus it is not policy or political preferences that cause the choice, but simply the justice's fluency in a particular alternative.

F refers back to the framing effects discussed in section 4.3.5. Framing occurs when cases are presented to the Court, typically via a petition for writ of certiorari. As we saw in *Hobby Lobby*, the Court at first denied review of the 10th Circuit Court of Appeal's decision not to enjoin the ACA at Hobby Lobby's request. That is, until the court reviewed the denial *en banc*, essentially reframing the claim as validated by a panel of 10th Circuit judges. Further, the 10th Circuit panel stacked the deck in Hobby Lobby's favor by rephrasing the question as whether or not corporate "persons" have the same religious rights as natural persons.

In another interesting instance of framing, *Employment Division v. Smith* came before the Court twice: first in 1988, then again in 1990. Two counselors at a private drug rehabilitation facility, hereinafter Smith, were fired for sacramental use of peyote, a long standing tradition of the Native American Church of which he was a member. Smith was denied unemployment benefits and appealed. The Oregon court of appeals reversed the employment board's denial of benefits and the State Supreme Court affirmed their decision, arguing that under *Sherbert v. Warner* denial of benefits would overburden Smith's right to exercise his religious beliefs. The Oregon Supreme Court (S. Ct. Ore.) left aside the issue of legality of peyote, finding it irrelevant to the

[201] I.e., when the subject actively looks for information that supports a position already held rather than evaluating all evidence rationally and impartially.

issue of denying benefits over a proper exercise of religious freedom. When the Court (U.S. S. Ct.) granted cert, it remanded the case to the S. Ct. Ore. to answer whether the sacramental use of peyote violated Oregon's state drug laws.

It is no stretch to imagine that when the S. Ct. Ore. affirmed the Court of Appeal's decision to grant unemployment benefits on the strength of a free exercise claim and U.S. S. Ct.'s remanding on the basis of evaluating state drug laws in relation to sacramental use of peyote rather than reversing the granting of benefits and remanding for a decision along that basis, this suggested the U.S. S. Ct. wanted to see the S. Ct. Ore. evaluate, clarify, and if necessary adjust the state drug laws to prevent future issues. What S. Ct. Ore. found was that the sacramental use of peyote did violate the state's drug laws, and they invalidated the drug laws insofar as they did not comport with *Sherbert v. Verner*. The U.S. S. Ct. then took up the case to reverse S. Ct. Ore. and to find that there was no reason to grant religious exception to generally applicable laws. In this case, if the U.S. S. Ct. had properly framed their remand request there would never have been an *Employment Division* (1990) altering the *Sherbert* test and requiring Congress to pass the Religious Freedom Restoration Act (RFRA) to return to the *status quo ante*. That U.S. S. Ct. did not overturn S. Ct. Ore. in 1988 suggests they had struggled with the *Sherbert* precedent and wanted S. Ct. Ore. to come to the 1990 conclusion on their own. Perhaps had the U.S. S. Ct. framed the remand as a suggestion to either the S. Ct. Ore. or to the Oregon legislature to nullify the case before it got to the point of offering exceptions to drug counselors using drugs, then perhaps they would not have needed to address the issue again and to overturn *Sherbert v. Verner*.

H refers to the hindsight bias discussed in section 4.3.6. Hindsight bias is particularly pernicious for any actors with a fiduciary duty to another party. In the case of a government or other fiduciary that "knew, or should have known" about some negative consequence or externality, hindsight bias can significantly affect judicial judgment. *In re Chamberlain,* 156 A. 42

(N.J. Prerog. Ct. 1931), a trustee was held liable for failing to sell stock before the great stock market crash of 1929.[202] The hindsight bias is concerning in numerous other instances, such as search and seizure cases where judges are "expected to ignore their knowledge of the outcome of the search for purposes of determining whether the police had probable cause to conduct the search."[203]

Although these kinds of instances are uncommon in religion clause case law, considerations of hindsight bias are important as a consideration of how the justices might think about new cases that come before them. If we return to Justice Powell and his deciding vote in *Bowers v. Hardwick*, we saw how the justice succumbed to the availability heuristic and assumed that homosexuals were such a minority that if a state had a rationally based interest in banning sodomy, very few would be affected. When Justice Powell left the bench, he began teaching at New York University Law School. In 1990, only four years after the decision, the former justice Powell singled out *Bowers* as having probably been "a mistake."[204] It was in hindsight that he realized how harmful the decision had been to the LGBTQ community and regretted having made the decision. If his clerks at the time had not been forced by social norms not to mention their sexual orientation, then perhaps the justice would have been able to see at the time of the decision how harmful it really could and would be.

7.2.2. *B*

B represents the previously discussed attitudinal bias. The attitudinal bias attempts to incorporate the insights of both of the rational choice theories, attitudinal and utility-maximizing, and to mitigate any flaws. This variable might best be represented by the equation:

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[202] Guthrie et al. *supra.*
[203] *Id.* at 805.
[204] Linda Greenhouse, *The Legacy of Lewis F. Powell Jr.*, THE NEW YORK TIMES, Dec. 4, 2002

$$B = \int (IP, FAB, PP, U).$$

The attitudinal bias is a function of the sum of the justice's ideal-point (*IP*), fact-attitudinal behavior (*FAB*), their policy preferences (*PP*), and their particular sense of judicial utility (*U*). Ideal-points can be estimated via Markov-Chain Monte Carlo as in Martin-Quinn scores, or via other attitudinal means.[205] Fact-Attitudinal Behavior can be estimated by a comparison of existing case precedents in a given area as has been done here.[206] The comparison between various fact-based independent variables and the decision as a dependent variable yields a clue to judicial attitudes toward various facts. In this study, we have not spent time conjecturing on reasons for the connections between these facts and decisions. Instead, this study exposes these connections as a means for understanding overall Supreme Court decision-making. Although this study did not look specifically at policy preferences in individual justices, there are numerous that have.[207]

7.2.3. *J*

The variable *J* represents the juridical heuristic discussed above in-depth in Chapter 5. Even in that chapter, the development of juridical heuristic could take up an entire thesis by itself. In the equation for *J,* we will include a number of legal concepts that have instead been moved to an appendix for the reader's reference if so desired.[208] In addition, we would like to preference discussion of a juridical heuristic with the disclaimer that it would be significantly improved by working further with legal scholars who may have suggestions on what can be improved. With this disclaimer in mind, the research concluded on Religion Clause Supreme Court decision-making suggests that the juridical heuristic is a function of legal precedents, constitutional theory, method

[205] See section 2.4., *supra*.
[206] See 6.2. *supra*.
[207] See, e.g., Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 261 (1996); David Danelski, *Values as Variables in Judicial Decision-Making: Notes Toward a Theory*, 19 VANDERBILT LAW REVIEW 721 (1966); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AMERICAN POLITICAL SCIENCE REVIEW 557 (1989); etc.
[208] See Appendix 5.

of interpretation, judicial scrutiny required, and the ubiquitous but silent institutional norms, i.e., the following equation:

$$J = \int(LP, CT, MoI, JS, IN).$$

As mentioned, J represents the proposed juridical heuristic. LP represents the concept of legal precedent crucial to our understanding of common law jurisprudence. As we discussed, however, legal precedents do not control cases where the comparison by analogy fails in some aspect. Thus, legal precedent is a function of the rule strength (RS) of a given case (here rendered *pc* for precedential case) multiplied by the strength of the analogy of the particular holding relative to the case at hand (*cah*):

$$LP(pc) = \int[RS(pc)\ x\ (\frac{pc}{cah})].$$

The division in function at hand compares the question of the *pc* and of the *cah.* If the questions are identical, then the holdings ought also to be identical, subject to the strength of the previous holding. To instantiate this, let's take the question and holding of *US v. Lee* (1982): the question before the Court was whether the tax imposed on employers to support the Social Security System violated the Free Exercise Clause. The Court held that it does not violate the Free Exercise Clause due to its uniform application and accomplishment of an overriding governmental interest. The question and holding of *Burwell v. Hobby Lobby* asks whether HHS regulations pursuant to the ACA substantially burdens the exercise of religion under the Religious Freedom Restoration Act (a response to the precedent change of *Employment Division*, returning to the *status quo ante* of *Sherbert v. Verner*). The Court held that while the regulation was uniformly applicable and accomplished an overriding governmental interest, but that the regulation was not "the least restrictive" means of doing so. Thus, the Court saw this as a way in which the analogy did not

hold.[209] To return to the legal precedent function, if we are asking how *US v. Lee*[210] controls *Hobby Lobby*, then we must first evaluate the rule strength of *Lee*: it has a vote count of 9-0, has been cited 3154 times since 1982, and has not been treated negatively since this time. Undoubtedly, this *pc* is strong, but the comparison of the *pc* to the *cah* (*Hobby Lobby)* yields a realization that the Court believes the question to be whether the government can only burden religion by the least restrictive means available, while *Lee* never dealt with this question. Thus, the analogy is significantly weakened, and so is the strength of *Lee* as a controlling precedent.

This estimation of rule strength in *Lee* is only a rudimentary attempt. As mentioned, this thesis sought to add robustness to LLS&V's concept of rule strength and leximetrics and therefore we propose the addition of a series of concepts that would modulate and act as an objective check and remedy to accusations of overly subjective measurements of strength. These improvements included the case salience index (***CSI***),[211] vote count ratios (***VC***),[212] considerations of the ruling's placement on a rule-standard continuum (a rule-standard continuum score or ***RSCS***),[213] and a consideration of the negative treatment by later courts (***NT***, with a subscript of $_Q$ to recognize that negative treatment includes a quality of reversal, sometimes cases may be cited as "reversed on other grounds" in recognition of the valuable *dicta* contained within the overruled precedent).[214] Thus, rule strength itself can be represented by the following function:

$$RS(pc) = \int\{CSI(pc) + VC(pc) + RSCS(pc) - \left(NT_Q(pc)\ x\ VC_{nt(pc)}\right)\}.$$

[209] Justice Ginsburg notes in her dissent that RFRA only intended to return to the *status quo ante Employment Division v. Smith* and that both the Senate and House reports on RFRA specifically mentioned that RFRA "should not be construed more stringently or more leniently than pre-*Smith*" precedents. (*Burwell v. Hobby Lobby,* dissent pg. 11)
[210] (1982)
[211] See 1.3. *supra*.
[212] See 2.2. *supra*.
[213] See A5.5. "Doctrinal Forms" for a discussion of the different types of rules, standards, and the hybrid combinations of the two, *infra*.
[214] See 2.3. *supra*.

Returning to the juridical heuristic *J, CT* here represents the constitutional theory behind the justice's jurisprudence.[215] By way of summary, constitutional theory refers to a justice's conception of what the Constitution ought to be in terms of its relationship to cases at hand and to American life more generally. Proximally, *MoI* refers to a justice's method of interpretation when it comes to Constitutional provisions.[216] In addition, we must consider the level of judicial scrutiny indicated by the area of conflict of the case at hand prescribed by law and by case precedents (represented by *JS*).[217]

Ultimately, a juridical heuristic will include the most influential and limiting aspects of the bench on the decisions of the justices. This is embodied by *IN* or institutional norms.[218] Institutional norms include those factors of jurisprudence that psychologically limit the actions of Supreme Court justices and further those instances where institutional rules prevent the Court from acting in a manner it might otherwise prefer to. For instance, there is every indication that the conservative wing of the Court might today prefer to reverse *Roe v. Wade* and yet due to the institutional norm of *stare decisis*, their proverbial hands are tied. The literature of institutional norms in the Supreme Court is vast and need not be addressed in depth here.[219] The institutional practice of the Court significantly constrains judicial behavior for the justices. Institutional practice both does constrain and ought to constrain judicial behavior for the sake of predictability of legal process, the limitation of "activist" justices,[220] and for the coherence of the American legal system and Constitutional law more specifically.

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[215] For a discussion of modern constitutional theory and the concepts of justices see, briefly, 2.2. *supra*, and in depth appendix 5.3. *infra*.
[216] See appendix 5.4. *infra* for a selection and discussion of methods of interpretation and how they influence judicial approaches to cases before them.
[217] See appendix 5.6 *infra* for discussion of judicial scrutiny.
[218] See chapter 5 generally, *supra*.
[219] For an excellent and relevant article on the effect of institutional norm on Religion Clause law in the Supreme Court I would direct the reader to Ronald Kahn's *Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion, in* SUPREME COURT DECISION-MAKING 175–198.
[220] i.e., justices who follow personal policy goals instead of legal process.

7.3. Summary and Closing Considerations

Sketching Supreme Court decision-making practice in one particular area of law is an enormously difficult task. In this study, we have only begun to scratch the surface of the various flaws of judgment that could be uncovered. Further, the proposed model of decision-making pertains strictly to the Religion Clauses specifically and therefore may contain significant flaws as a decision model for other areas of law. Given these limitations, however, we have sought to present a picture of the justices as ordinary decision-makers, subject to the same kinds of limitations as other decision-makers.

Because we have not directly examined the justices of past, present, and future ourselves, we cannot argue with complete certainty that the justices would either possess the self-reflection necessary to recognize these flawed methods of reasoning in their judgment themselves or that experimental examination would allow one to discover their presence even without the knowledge of the justices themselves. Nevertheless, we have seen that all people are subject to these flawed methods of judgment and decision-making and there is no reason to propose that Supreme Court justices possess some extraordinary perfect reasoning, judgment, or decision-making process.

Therefore, we must review what has been argued in the preceding pages. We have presented the argument that, first and foremost, cognitive psychology and the behavioral law and economics movement significantly improve on previous methods of reasoning through Supreme Court decision-making. We have shown experimental evidence of these flawed methods in both ordinary people and in judges specifically. Further, we have forensically identified these methods in many Supreme Court Religion Clause landmark cases specifically. While we would not posit that this evidence is incontrovertible, it is both thought provoking and persuasive.

The foregoing examination has also reviewed the legal-institutional and fact-attitudinal models of Supreme Court decision-making. The first has argued that Supreme Court justices follow the law as laid down by jurisprudential regimes inspired by constitutional law, statutes, and legal principles. In the first half of the twentieth century, legal realists emphasized the "role of personal choice in judging," but fact-attitudinal theorists like Ignagni, Segal, & Spaeth have argued instead that the "law has little or no influence over the case votes of Supreme Court justices."[221] We have shown how each has its own body of persuasive evidence for their respective conclusions. Further, we have shown how each of these lacks enough elements to significantly limit their ability to accurately describe Supreme Court decision-making.

In light of the strengths and limitations of each of these approaches, we have described here a model that posits decisions as a function of all three factors. *BLE, B,* and *J* in the decision function above represent these three perspectives and has sought to include each in a way so as to introduce a flexible approach. That is to say, in areas where cases are anchored by certain arguments before the Court, we should expect to see the decision affected by anchor in a way that an experiment presenting the case without the anchoring details would not be. Further, in areas where the justices have strong ideological preference for certain arguments (e.g., religious objection to providing contraceptive coverage), we can expect the justices to find a legally justified principle to support the ideological preference. In cases where legal precedents fail to offer a convincing analogy or are only weakly decided, then we can expect the fact-attitudinal bias to control decision-making. When ideological preference might dictate a certain outcome, but legal precedent dictates an opposing outcome, we can expect legal-institutional judicial decision-making rather than fact-attitudinal decision-making.

[221] Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 THE JOURNAL OF POLITICS 273–284 (2010) at 273.

Chapter 8: Summary and Conclusion

This thesis began with the perplexing area of Religion Clause law and decision-making in the Supreme Court. After conducting all this research and attempting to evaluate various decision-making models, we came to the conclusion that behavioral law and economics provided the tools to create a better model of Supreme Court decision-making. Like Mr. Spock, whose errors were attributed to his humanity, we looked to cognitive psychology and the new understandings of human errors in judgment to interpret the Court's decision-making. Ultimately, the understanding of these judgment and decision-making errors through this literature yielded excellent explanations of Supreme Court Religion Clause law. Importantly, we saw that people, as a rule, systematically depart from optimal judgment and decisions. The justices are no exception to this rule.

Behavioral economics revised traditional microeconomics assumptions by demonstrating boundaries on rationality, willpower, and self-interest. It is these revisions that we sought to include on the examinations of Supreme Court decision-making. We looked first to the legal-institutional model as a key boundary on rational decision-making. Legal-institutional constraints intended to regulate judicial behavior and provide predictability such as the common law, *stare decisis*, and other institutional norms prevent judges from performing a legislative function. As we saw, however, these constraints only prevented this legislative function in certain situations. In recognition of the frequent exercise of a legislative role, we replaced a legal-institutional model with a "juridical heuristic." Such a heuristic must always be a first consideration in looking the decision-making process of the court, for the Court will always seek to pay lip service to this method of

thinking. While this juridical heuristic is still the Supreme Court justice's first line of legal reasoning, by incorporating legal and institutional norms, behaviors, and concepts into a rule of thumb, we can conceptualize both the times when juridical reasoning is used and when it is not.

Filling the juridical gap is the fact-attitudinal model's insights into personal preferences and goals of the Supreme Court justices. The enormous amount of quantitative evidence for this model cannot be refuted. Yet, given the extent of the lip service paid to legal-institutional models and the intense focus on whether or not a potential justice relies on ideological motivation and the potential justice's refusal to admit such motivation, these two models cannot be mutually exclusive. An attitudinal bias represents the bounded willpower described earlier. Supreme Court decision-making based on ideology and policy preferences rather than legal concepts is like the person who gets dessert instead of going to the gym.

Ultimately, self-interest is bounded by these concepts: legal-institutional (and behavioral) constraints on rationality and fact-attitudinal issues with willpower. Posner et al.'s judicial utility-maximization model includes this concept of bounded self-interest but lacks the cognitive errors revealed by the behavioral law and economics literature. We saw how an integrated behavioral law and economics model improved on each of these models by integrating strengths and mitigating weaknesses. The approach taken offers a realistic picture of the human error inherent in all decision-making processes and by doing so offers a more complete picture of Supreme Court decision-making.

Through the course of this thesis we drew together all of these various concepts with an aim toward providing more predictability. Do the models expose here help to provide a degree of predictability for future cases? Perhaps the model presented here in the area of Religion Clause law will present a starting point for future research in other areas of Supreme Court decision-making. The utility of this work is not only here, but also in helping to understand some cases

which otherwise may make no sense as we saw with *Hobby Lobby* and *The Economist*'s "believe or not" subtitle. In addition, this behavioral law and economics approach may aid lawyers preparing their cases before the Supreme Court by allowing them to gain a better understanding of the judicial mind. At bare minimum, the model exposed here gives us a new lens with which we can view puzzling cases already decided.

Given that our starting point was merely a list of cases and a question as to how the Court looked at the area of law, this work has been successful. An area of further study here may be to begin toying with the decision function as proposed. Such a function may be more practical (i.e., less purely theoretical) if processed via a neural network-type computer program with a researcher training the model through connectionist learning. This approach might yield a more quantitatively based model with actual fit to the area of law, but in sum, the more complete version of Supreme Court decision-making offered here is something that has yet to be offered anywhere else in the behavioral law and economics literature. It is our aim that this work will be picked up and carried on by future researchers determined to include the considerations of the unavoidable aspect of human error in decision-making models.

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Appendix 1

Ideological Voting Information by Case				
Case Name	Vote	Ideal Pt.	Justices in Maj.	Justices in Min.
Everson v. Board (1947)	5-4	C	Black, Reed, Douglas, Murphy, & Vinson	Frankfurter, Jackson, Rutledge, & Burton
McCollum v. Board (1948)	8-1	L	Black, Douglas, Murphy, & Vinson; Frankfurter, Rutledge, & Burton; & Jackson	Reed
Niemotko v. Maryland (1950)	9-0	L	Reed, Douglas, Jackson, Burton, Vinson, Clark, & Minton; Black, & Frankfurter	
Kunz v. New York (1951)	8-1	L	Reed, Douglas, Burton, Vinson, Clark, & Minton; Black, & Frankfurter	Jackson
Zorach v. Clauson (1952)	6-3	C	Reed, Douglas, Burton, Vinson, Clark, & Minton	Black, Frankfurter, & Jackson
Kedroff v. St. Nicholas (1952)	8-1	L	Reed, Burton, Vinson, Clark, & Minton; Douglas; Black & Frankfurter	Jackson
Fowler v. RI (1953)	9-0	L	Black, Reed, Douglas, Burton, Vinson, Clark, & Minton; Frankfurter & Jackson	
Poulos v. NH (1953)	7-2	C	Reed, Jackson, Burton, Vinson, Clark, & Minton; Frankfurter	Black & Douglas
Kreshik v. St. Nicholas (1960)	9-0	L	Black, Frankfurter, Douglas, Clark, Warren, Harlan, Brennan, Whittaker, & Stewart	
McGowan v. Maryland (1961)	8-1	C	Black, Clark, Warren, Brennan, Whittaker, & Stewart; Frankfurter & Harlan	Douglas
Gallagher v. Crown Kosher (1961)	6-3	C	Warren, Black, Clark, & Whittaker; Frankfurter & Harlan	Douglas, Brennan, & Stewart

Two Guys v. McGinley (1961)	8-1	C	Black, Clark, Warren, Brennan, Whittaker, & Stewart; Frankfurter & Harlan	Douglas
Braunfeld v. Brown (1961)	5-4	C	Warren, Black, Clark, & Whittaker; Harlan	Frankfurter, Douglas, Brennan, & Stewart
Torcaso v. Watkins (1961)	9-0	L	Black, Douglas, Clark, Warren, Brennan, Whittaker, & Stewart; Frankfurter & Harlan	
Engel v. Vitale (1962)	6-1	L	Black, Clark, Warren, Harlan, & Brennan; Douglas	Stewart
Arlan's v. Kentucky (1962)	8-1	C	Black, Clark, Warren, Harlan, Brennan, Stewart, White, & Goldberg	Douglas
Abington v. Schempp (1963)	8-1	L	Stewart, Black, Clark, Warren, & White; Douglas, Harlan, Brennan, & Goldberg	Stewart
Sherbert v. Verner (1963)	7-2	L	Black, Clark, Warren, Brennan, & Goldberg; Douglas & Stewart	Harlan & White
Chamberlin v. Dade (1964)	8-0	C	Clark, Warren, Harlan, Brennan, White, & Goldberg; Black, Douglas	Stewart (as to jurisdiction)
Cooper v. Pate (1964)	9-0	L	Black, Douglas, Clark, Warren, Harlan, Brennan, Stewart, White, & Goldberg	
Solomon v. SC (1965)	6-1	C	Black, Clark, Warren, Harlan, White, & Fortas	Douglas; Brennan & Stewart (as to jurisdiction)
Board v. Allen (1968)	6-3	C	Warren, Brennan, Stewart, White, & Marshall; Harlan	Black, Douglas, & Fortas
Epperson v. Arkansas (1968)	9-0	L	Douglas, Warren, Brennan, White, Fortas, & Marshall; Black, Harlan, & Stewart	
Presbyterian v. Hull (1969)	9-0	L	Black, Douglas, Warren, Brennan, Stewart, White, Fortas, & Marshall; Harlan	

Walz v. Tax Comm'n (1970)	7-1	C	Black, Stewart, White, Marshall, & Burger; Harlan & Brennan	Douglas
Dewey v. Reynolds (1971)	4-4	C	Black, Douglas, Brennan, Stewart, White, Marshall, Burger, & Blackmun	
Lemon v. Kurtzman (1971)	8-0	L	Harlan, Stewart, Burger, & Blackmun; Black & Douglas; Brennan & White	
Tilton v. Richardson (1971)	5-4	C	Burger, Harlan, Stewart, & Blackmun; White	Black, Douglas, Brennan, & Marshall
Cruz v. Beto (1972)	8-1	L	Douglas, Brennan, Stewart, White, Marshall, & Powell; Burger & Blackmun	Rehnquist
Wisconsin v. Yoder (1972)	7-0	L	Marshall, Burger, & Blackmun; Brennan, Stewart, & White; Douglas	
Lemon v. Kurtzman (1973)	5-3	C	Burger, Blackmun, Powell, & Rehnquist; White	Douglas, Brennan, & Stewart
Levitt v. CPERL (1973)	8-1	L	Stewart, Burger, Blackmun, Powell, & Rehnquist; Douglas, Brennan, & Marshall	White
Hunt v. McNair (1973)	6-3	C	Stewart, White, Burger, Blackmun, Powell, & Rehnquist	Douglas, Brennan, & Marshall
Sloan v. Lemon (1973)	6-3	L	Douglas, Brennan, Stewart, Marshall, Blackmun, & Powell	White, Burger, & Rehnquist
CPERL v. Nyquist (1973)	6-3	L	Douglas, Brennan, Stewart, Marshall, Blackmun, & Powell	White, Burger, & Rehnquist
Wheeler v. Barrera (1974)	8-1	C	Brennan, Stewart, Burger, Blackmun, & Rehnquist; Powell; White & Marshall	Douglas
Meek v. Pittenger (1975)	6-3	L/C	Stewart, Blackmun, & Powell; (Douglas, Brennan, & Marshall/White, Burger, & Rehnquist)	White, Burger, & Rehnquist/Douglas, Brennan, & Marshall

Serbian v. Milivojevich (1976)	7-2	L	Brennan, Stewart, Marshall, Blackmun, & Powell; White; Burger	Rehnquist, Stevens
Roemer v. Board (1976)	5-4	C	Blackmun, Burger, & Powell; White & Rehnquist	Brennan, Stewart, Marshall, & Stevens
Parker Seal v. Cummins (1976)	4-4	L	N/A	N/A
Wooley v. Maynard (1977)	6-3	L	Brennan, Stewart, Marshall, Burger, Powell, & Stevens	White, Blackmun, & Rehnquist
Wolman v. Walter (1977)	7.5-1.5	C	Stewart & Blackmun; White, Burger, Powell, Rehnquist, & Stevens/Marshall	Brennan &/Marshall
New York v. Cathedral Academy (1977)	6-3	L	Brennan, Stewart, Marshall, Blackmun, Powell, & Stevens	White, Burger, & Rehnquist
McDaniel v. Paty (1978)	8-0	L	Burger, Powell, Rehnquist, & Stevens; Brennan, Stewart, White, & Marshall	
Jones v. Wolf (1979)	5-4	L	Brennan, Marshall, Blackmun, Rehnquist, & Stevens	Stewart, White, Burger, & Powell
CPERL v. Regan (1980)	5-4	C	Stewart, White, Burger, Powell, & Rehnquist	Brennan, Marshall, Blackmun, & Stevens
Stone v. Graham (1980)	5-2	L	Brennan, White, Marshall, Powell, & Stevens	Stewart & Rehnquist; Burger & Blackmun (as to jurisdiction)
Thomas v. Review Board (1981)	8-1	L	Brennan, Stewart, White, Marshall, Burger, Powell, & Stevens; Blackmun	Rehnquist
Heffron v. Int'l Society for Krishna Consciousness (1981)	5-4	C	Stewart, White, Burger, Powell, & Rehnquist	Brennan, marshall, Blackmun, & Stevens
Widmar v. Vincent (1981)	8-1	L	Brennan, Marshall, Burger, Blackmun, Powell, Rehnquist, & O'Connor; Stevens	White
U.S. v. Lee (1982)	9-0	C	Brennan, White, Marshall, Burger, Blackmun, Powell, Rehnquist, & O'Connor; Stevens	

Larson v. Valente (1982)	5-4	L	Brennan, Marshall, Blackmun, & Powell; Stevens	White, Burger, Rehnquist, & O'Connor
Larkin v. Grendel's Den (1982)	8-1	L	Brennan, White, Marshall, Burger, Blackmun, Powell, Stevens, & O'Connor	Rehnquist
Mueller v. Allen (1983)	5-4	C	White, Burger, Powell, Rehnquist, & O'Connor	Brennan, Marshall, Blackmun, & Stevens
Marsh v. Chambers (1983)	6-3	C	White, Burger, Blackmun, Powell, Rehnquist, & O'Connor	Brennan, Marshall, & Stevens
Lynch v. Donnelly (1984)	5-4	C	White, Burger, Powell, & Rehnquist; O'Connor	Brennan, Marshall, Blackmun, & Stevens
Scarsdale v. McCreary (1985)	4-4	L	N/A	N/A
Wallace v. Jaffree (1985)	6-3	L	Brennan, Marshall, Blackmun, & Stevens; Powell; O'Connor	White, Burger, & Rehnquist
Jensen v. Quaring (1985)	4-4	L	N/A	N/A
Estate v. Caldor (1985)	8-1	L	Brennan, White, Burger, Blackmun, Powell, & Stevens; Marshall & O'Connor	Rehnquist
Grand Rapids v. Ball (1985)	5-4	L	Brennan, Marshall, Blackmun, Powell, & Stevens	White, Burger, Rehnquist, & O'Connor
Aguilar v. Felton (1985)	5-4	L	Brennan, Marshall, Blackmun, & Stevens; Powell	White, Burger, Rehnquist, & O'Connor
Witters v. Washington Dept. of Services for the Blind (1986)	9-0	C	Brennan, Marshall, Blackmun, & Stevens; White, Burger, Powell, & Rehnquist; O'Connor	
Goldman v. Weinberger (1986)	5-4	C	Burger & Rehnquist; White, Powell, & Stevens	Brennan, Marshall, Blackmun, & O'Connor
Bender v. Williamsport (1986)	5-4	L	Brennan, Blackmun, Stevens, & O'Connor; Marshall	White, Burger, Powell, & Rehnquist
Bowen v. Roy (1986)	8-1	C	Burger, Powell, & Rehnquist; Brennan, Marshall, Blackmun, Stevens, & O'Connor	White

Hobbie v. Unemployment Appeals Comm'n of FL (1987)	8-1	L	Brennan, White, Marshall, Blackmun, O'Connor, Scalia; Powell & Stevens	Rehnquist
O'Lone v. Shabazz (1987)	5-4	C	White, Powell, Rehnquist, O'Connor, & Scalia	Brennan, Marshall, Blackmun, & Stevens
Edwards v. Aguillard (1987)	7-2	L	Brennan, Marshall, Blackmun, & Stevens; Powell & O'Connor; White	Rehnquist & Scalia
Church of JCLDS v. Amos (1987)	9-0	C	White, Powell, Rehnquist, Stevens, & Scalia; Brennan, Marshall, Blackmun, & O'Connor	
Lyng v. Northwest Indian Cemetery Protective Assoc. (1988)	5-3	C	White, Rehnquist, Stevens, O'Connor, & Scalia	Brennan, Marshall, & Blackmun
Employment Division v. Smith (1988)	5-3	C	White, Rehnquist, Stevens, O'Connor, & Scalia	Brennan, Marshall, & Blackmun
Bowen v. Kendrick (1988)	5-4	C	White & Rehnquist; O'Connor, Scalia, & Kennedy	Brennan, Marshall, Blackmun, & Stevens
Texas Monthly v. Bullock (1989)	6-3	L	Brennan, Marshall, & Stevens; White, Blackmun, & O'Connor	Rehnquist, Scalia, & Kennedy
Frazee v. IL Dept. of Employment Security (1989)	9-0	L	Brennan, White, Marshall, Blackmun, Rehnquist, Stevens, O'Connor, Scalia, & Kennedy	
Allegheny v. ACLU (1989)	5-4	L	Blackmun; Brennan, Marshall, Stevens, & O'Connor	White, Rehnquist, Scalia, & Kennedy
Jimmy Swaggart v. Board of Equalization of CA (1990)	9-0	C	Brennan, White, Marshall, Blackmun, Rehnquist, Stevens, O'Connor, Scalia, & Kennedy	
Employment Division v. Smith (1990)	6-3	C	White, Rehnquist, Stevens, Scalia, & Kennedy; O'Connor	Brennan, Marshall, & Blackmun
Board v. Mergens (1990)	8-1	C	White, Blackmun, Rehnquist, & O'Connor;	Stevens

			Brennan, Marshall, Scalia, & Kennedy	
Nathan Bishop v. Weisman (1992)	5-4	L	Kennedy; Blackmun, Stevens, O'Connor, & Souter	White, Rehnquist, Scalia, & Thomas
Steigerwald v. Center Moriches Union (1993)	9-0	L	White, Blackmun, Rehnquist, Stevens, O'Connor, & Souter; Scalia, Kennedy, & Thomas	
Church of Lukumi Babalu Aye v. City of Hialeah (1993)	9-0	L	White, Stevens, Kennedy, & Thomas; Rehnquist & Scalia; Blackmun, O'Connor, & Souter	
Zobrest v. Catalina Foothills School Dist. (1993)	5-4	C	White, Rehnquist, Scalia, Kennedy, & Thomas	Blackmun, Stevens, O'Connor, & Souter
Kiryas Joel v. Grumet (1994)	6-3	L	Souter; Blackmun, Stevens, O'Connor, & Ginsburg; Kennedy	Rehnquist, Scalia, & Thomas
Capitol v. Pinette, Carr, & KKK (1995)	7-2	C	Rehnquist, Scalia, & Kennedy; O'Connor, Souter, Thomas, & Breyer	Stevens & Ginsburg
Rosenberger v. UVA (1995)	5-4	C	Rehnquist, Scalia, & Kennedy; O'Connor & Thomas	Stevens, Souter, Ginsburg, & Breyer
Agostini v. Felton (1997)	5-4	C	Rehnquist, O'Connor, Scalia, Kennedy, & Thomas	Stevens, Souter, Ginsburg, & Breyer
Boerne v. Flores (1997)	6-2	C	Rehnquist, Kennedy, Thomas, & Ginsburg; Stevens & Scalia	O'Connor & Breyer; Souter (as to jurisdiction)
Santa Fe v. Doe (2000)	6-3	L	Stevens, O'Connor, Kennedy, Souter, Ginsburg, & Breyer	Rehnquist, Scalia, & Thomas
Mitchell v. Helms (2000)	6-3	C	Thomas, Rehnquist, Scalia, Kennedy; O'Connor & Breyer	Stevens, Souter, & Ginsburg
Good News v. Milford (2001)	6-3	C	Rehnquist, O'Connor, Kennedy, & Thomas; Scalia & Breyer	Stevens, Souter, & Ginsburg
Watchtower Bible v. Stratton (2002)	8-1	L	Stevens, O'Connor, Kennedy; Souter, Ginsburg, & Breyer; Scalia & Thomas	Rehnquist

Zelman v. Simmons-Harris (2002)	5-4	C	Rehnquist, Scalia, & Kennedy; O'Connor & Thomas	Stevens, Souter, Ginsburg, & Breyer
Locke v. Davey (2004)	7-2	L	Rehnquist, Stevens, O'Connor, Kennedy, Souter, Ginsburg, & Breyer	Scalia & Thomas
Cutter v. Wilkinson (2005)	9-0	L	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, & Breyer; Thomas	
Van Orden v. Perry (2005)	5-4	C	Rehnquist & Kennedy; Scalia & Thomas; Breyer	Stevens, O'Connor, Souter, & Ginsburg
McCreary County v. ACLU (2005)	5-4	L	Stevens, Souter, Ginsburg, & Breyer; O'Connor	Rehnquist, Scalia, Kennedy, & Thomas
Gonzales v. O Centro Espirita (2006)	8-0	L	Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, & Roberts	
Salazar v. Buono (2010)	5-4	C	Kennedy, Roberts, & Alito; Scalia & Thomas	Stevens, Ginsburg, Breyer, & Sotomayor
CLS, UC Hastings v. Martinez (2010)	5-4	C	Ginsburg, Breyer, & Sotomayor; Stevens & Kennedy	Scalia, Thomas, Roberts, & Alito
Hosanna-Tabor v. EEOC (2012)	9-0	L	Scalia, Kennedy, Ginsburg, Breyer, Roberts & Sotomayor; Thomas, Alito, & Kagan	
Town of Greece v. Galloway (2014)	5-4	C	Kennedy & Roberts; Scalia & Alito; Thomas	Ginsburg, Breyer, Sotomayor, & Kagan
Burwell v. Hobby Lobby Stores (2014)	5-4	L	Scalia, Thomas, Roberts, & Alito; Kennedy	Ginsburg, Breyer, Sotomayor, & Kagan

Appendix 2

Independent Variables		
Variable	Sample Cases	Brief Explanation
MARGINAL	E.g., *Church of the Lukumi Babuli Aye v. City of Hialeah*, 508 U.S. 520 (1993).	Population size of religion's adherents is small (in the US)
MAINSTREAM	E.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961).	Population size of religion's adherent is large (in the US)
IDEOLOGICAL_ VALENCE		Ideological valence
" " _JUSTICE		Of a particular justice
" " _COURT		Of the Court on average
GENDER_MAKEUP		Gender balance on the Court
FREE_EXERCISE	E.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).	Concerning Free Exercise
ESTABLISHMENT	E.g., *Everson v. Board*, 330 U.S. 1 (1947)	Concerning Establishment
HISTORICAL_ REFERENCE	E.g., *Everson v. Board*, 330 U.S. 1 (1947)	Case refers to historical aspect
ORIGINAL_INTENT	E.g., *Wallace v. Jaffree,* 472 U.S. 38 (1985)	Decision refers to original intent of the clauses
ACCOMODATIONIST		Opinions accommodate religious practice
SECULARIST		Opinions strictly separate government from religion
PUBLIC_OFFICE	*Torasco v. Watkins*, 367 U.S. 488 (1961)	Refers to required religious oaths for public, governmental settings
CREATIONISM	*Epperson v. Arkansas*, 393 U.S. 97 (1968)	Cases which treat creationism as a religious theory
LEMON	*Lemon v. Kurtzman*, 403 U.S. 602 (1971)	Cases referencing *Lemon*

ENDORSEMENT	*Lynch v. Donnelly*, 465 U.S. 668 (1984)	Opinion looks at perceived governmental endorsement of religion
COERCION_BROAD	*Lee v. Weisman*, 505 U.S. 577 (1992)	Regulation is considered broadly coercive
COERCION_NARROW	*Lee v. Weisman*, 505 U.S. 577 (1992)	Regulation is considered narrowly coercive
NEUTRALITY	*Mitchell v. Helms*, 530 U.S. 793 (2000)	Approach offers "neutrality" analysis
DIVISIVENESS	*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)	Potential for religious divisiveness as an element of entanglement in *Lemon*
AD_HOC	*Van Orden v. Perry*, 545 U.S. 677 (2005)	Opinion abandons prior doctrine in favor of ad hoc solution
PRAYER_CLASSROOM	*Engel v. Vitale*, 370 U.S. 421 (1962)	Case deals with prayer in the class
PRAYER_GRADUATION	*Lee v. Weisman*, 505 U.S. 577 (1992)	Case deals with prayer at graduation
PRAYER_VOLUNTARY	*Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)	"Voluntary" prayer at public school events
PRAYER_LEGISLATIVE	*Marsh v. Chambers*, 463 U.S. 783 (1983)	Prayer at the open of legislative session
HOLIDAY_DISPLAY	*County of Allegheny v. ACLU*, 492 U.S. 573 (1989)	Displays on public property
INSCRIPTIONS_ RELIGIOUS	*McCreary County, KY v. ACLU of KY*, 545 U.S. 844 (2005)	"In God We Trust," the Ten Commandments, etc.
OATHS_PLEDGE_ ALLEGIANCE	*Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1 (2004)	Case concerns compulsory pledge of allegiance
TAX_DEDUCTIONS	*Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970)	Tax deductions for religious institutions
PUBLIC_SUPPORT_ DIRECT	*Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)	Governmental support of religious institutions

PUBLIC_SUPPORT_ INDIRECT	*Mueller v. Allen*, 463 U.S. 388 (1983)	Indirect governmental support
TRADITIONAL_ STANDARD_ FRAMEWORK	*School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)	Contains fears of religious inculcation, endorsement, or subsidy
PAROCHIAID	*Agostini v. Felton*, 521 U.S. 203 (1997)	Government aid to religious schools
AMENDMENTS_STATE	*Locke v. Davey*, 540 U.S. 712 (2004)	State limits on financial aid to religion
RELIGIOUS_PUBLIC_ SERVICE	*Bowen v. Kendrick*, 487 U.S. 589 (1988)	Provision of public services through religious institutions
INVOLVEMENT	*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)	Prohibition against government entanglement
NEUTRAL PRINCIPLES	*Jones v. Wolf*, 443 U.S. 595 (1979)	Neutral approach to religious issues
REGULATION_ MARGINAL_PRACTICE	*Reynolds v. United States*, 98 U.S. 145 (1879)	Regulation of unusual practices
RELIGIOUS_ EXPRESSION	*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)	Religious expression and free exercise
" _ " _MILITARY	*Goldman v. Weinberger*, 475 U.S. 503 (1986)	Symbolic expression in the military
ACCOMMODATION_ EMPLOYMENT	*Sherbert v. Verner*, 374 U.S. 398 (1963)	Accommodation of religious practices in employment
ACCOMMODATION_ GROUPS_INDIVIDUALS	*Church of Latter Day Saints v. Amos*, 483 U.S. 327 (1987)	Conflicts between accommodating groups and individuals
ACCOMMODATION_ GENERAL_ OBLIGATION	*Wisconsin v. Yoder*, 406 U.S. 205 (1972)	Free Exercise as a defense to general legal obligations
SMITH_NARROWING_ ACCOMMODATION	*Employment Division v. Smith*, 494 U.S. 872 (1990)	Narrowing of accommodation by *Smith*

SMITH_STATUTORY_ RESPONSE	*City of Boerne v. Flores*, 521 U.S. 507 (1997)	Statutory response to *Smith*
SMITH_LIMITATIONS	*Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)	"Neutral and generally applicable" requirements

Appendix 3

Pre-Existing Decision-Making Models		
Legal-Institutional	Fact-Attitudinal	Utility-Maximizing
The legal-institutional model follows the principles of legal realism. Legal realism is an evolution of mechanical jurisprudence, an outmoded theory of legal process whereby judges made mechanical decisions evaluating facts in light of case precedents and legal principles. Legal realists began the realization process that judges also utilized personal judgment to decide cases. Institutional norms constrain the justices from deciding according to non-legal reasoning.	The fact-attitudinal model asserts that judges decide cases to reach the outcome they prefer based on their ideological attitudes and biases. These attitudes and biases are shaped partly by the prevailing views of the judge's background. The use of political reasoning rather than legal reasoning asserts that certain facts can be significantly correlated to ideological viewpoints even if they do not necessarily map onto the standard conservative-liberal divide.	The utility-maximization model asserts that judges are self-interested, rational actors like anyone else. They act on preferences, as in the fact-attitudinal model, but they are bound by the legal-institutional context they inhabit. Within this framework, judges are assumed to be rational, with clear preferences, who are tasked with making a choice to find the best possible alternative in their task of judicial dispute resolution.

Appendix 4

Table of BLE Heuristics & Biases	
Name	Explanation
Anchoring	Tendency to rely too heavily on the first piece of information offered when making decisions.
Availability Heuristic	Mental shortcut that relies on immediate examples that come to a person's mind when evaluating a specific topic, concept, method or decision.
Representativeness Heuristic	Tendency to believe that because an event seems more representative then it is more likely, organizing based around category prototypes.
Framing Effects	People react to a particular choice in different ways depending on how it is presented (e.g., as a loss or as a gain).
Fluency Heuristic	If an object is processed more fluently, faster, or more smoothly than another, the mind infers that this object has the higher value with respect to the criterion being evaluated.
Hindsight Bias	Inclination, after an event has occurred, to see the event as having been predictable regardless of any objective basis for making the prediction.

Appendix 5

Addendum: Introduction to the Legal Model

A5.1. Introduction

Because the legal model will constantly operate in reference to the First Amendment, we offer here a treatment of the legislative history that is important to judicial understanding of the Religion Clauses. We will first give the text of the Amendment as a point of reference, then I will describe the so-called legislative history of the First Amendment, finally we will discuss the incorporation of the First Amendment onto the states.

a. First Amendment to the US Constitution

- Text of the Amendment

  "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..."[222]

b. Legislative History

The lore of the Bill of Rights is well-known to any middle-schooler who took an American civics class: the story goes that anti-Federalists feared a tyrannical federal government and so the Federalists proposed the Bill of Rights as a means to protect certain civil liberties and to soothe the anti-Federalist concerns. This information does not provide the evidence needed to begin to ascertain what the text of the religion clauses listed above truly intended, either interpretively or textually. To determine these origins and intents of the First Amendment, we must look to the rebellion against the British Empire and the Empire's religion, "by law established."

[222] U.S. Const. amend. I

By 1668, the Church of England had long been the official religion of the Empire, and had pervaded all of the southern colonies as the official established religion as well. The middle colonies of Pennsylvania, Delaware, Rhode Island, and much of New York had no such established religion, however. The New England colonies outside of Rhode Island all established religion on a town-by-town basis. If each region had decided on their own methods of establishing official religion, what import might it be to make the very first right in the Bill of Rights be religion?

The English system of establishment of religion consisted of some features that help to explain this amendment. This system consisted of four main elements: governmental control of religious doctrine and leadership, the original impetus for the departure from Catholicism; public suppression of alternative faith,[223] an understandably concerning aspect; political entanglement of the Church,[224] including required testaments of faith to hold public office; and compelling attendance and support of the Church. Because these elements were in place, and because of close ties between the established Anglican Church and the Crown, Anglicanism fell out of favor as an established religion following the Revolutionary War.[225] The Constitution of Massachusetts, written in 1780, stated in Article II:

> It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.

This marks the beginning roots of free exercise, although it was combined with (in Article III) a form of noncoercive establishment. The Massachusetts Constitution simultaneous encouraged

[223] The crown forbade any public preaching with particularly severe punishments for Catholics.
[224] Coronation ceremonies were held in churches and the King was crowned by the Archbishop of Canterbury in a symbolic show of who was actually in charge of whom.
[225] Anglican ministers tended to be loyalists, for obvious reasons.

religious practice as a fundamental element of good society and created protections for dissenting religious views and providing support for one's own religion, regardless of the church of one's town. This model looked like a possible path forward for US religious law prior to the writing of the Bill of Rights and its application on the states.

At the drafting of the Constitution, no protection was included for religious free exercise or non-establishment. George Mason had recommended this provision be added but it was rejected due to the tardiness of his recommendation. During the process of garnering support for the Constitution, the Baptist General Committee opposed the Constitution on the sole basis that it did not include a provision "for the secure enjoyment of religious liberty." To remedy this situation, Virginia proposed an amendment modeled on its own Declaration of Rights.[226] Ultimately, the above amendment was drafted and incorporated into the Bill of Rights, passed in its own right in 1791. The Bill of Rights limited government power by ensuring the natural civil liberties considered the basic right of all persons.

A5.2. Introductory Jurisprudence

Jurisprudence, the study and theory of law, marries social theory, philosophy, ethics, and legal reasoning into a systematic understanding of legal systems and institutions. General jurisprudence deals primarily in two topics: legal validity and legal normativity. These two areas reflect an intuition about what ought to be understood about the law, i.e., when the law is the law, and when the law ought to be the law. Without understanding these two discrete areas, law

[226] See Ch. I, *supra*.

becomes the mere *dicta* of the sovereign state, followed for no more legitimate reason than Austin's Command Theory of Law.[227]

These areas of study reflect two important values and an important conflict in the study of law. The distinct jurisprudential schools of when a law is a law and when a law ought to be a law may be referred to by two popular movements in jurisprudence: legal positivism[228] and natural law.[229] Natural law reflects an ancient intuitive jurisprudential tradition[230] of understanding a somewhat ephemeral body of values or order of what is right and good, normatively requiring laws to be in keeping with this order. In a way, natural law asks what ought the law to be. On the other hand, legal positivism rejects the necessity of a connection between the concepts of law and justice. Rather, positivists argue that legal validity hinges on the procedure followed to create the law.

These two schools illustrate how jurisprudence divides and reunites through their various interpretations: the natural law tradition, on the one hand, deals with what the law ought to be and utilizes ought as a criterion for legitimacy. Legal positivism, on the other hand, deals with what the law is and utilizes process as a criterion for validity. Stepping back from these schools, we can see that both what the law is and what the law ought to be are essential to the very nature of jurisprudence and the law itself. Without the one, you could not have the other. This duality will help understand the two main Constitutional theories: process-based and morality-based. These

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[227] In *The Province of Jurisprudence Determined*, Austin, a close intellectual companion to Jeremy Bentham, offered a utilitarian explanation of law as the commands of a sovereign to his or her subjects. The sovereign is seen as the only force with the power to see that subjects habitually obey its commands – where there is no habit of obedience, there is no law. Austin further defines a command as a desire backed by sanctions: "If you cannot or will not harm me then the expression of your wish is not a command, though you may say it in the imperative." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Weidenfeld and Nicolson) (1965) at 14.

[228] See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Press) (1948); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Weidenfeld and Nicolson) (1965); H.L.A. HART, THE CONCEPT OF LAW (Oxford University Press Third) (2012).

[229] See, e.g., Aristotle, Thomas Aquinas, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard University Press) (1977), JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (Oxford University Press 2) (2011), LON FULLER, THE MORALITY OF LAW (Yale University Press 2nd) (1969), JOSPEH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (Clarendon Press 2nd) (1980)

[230] PLATO *Gorgias* (484) and *Timaeus* (83e) etc.; ARISTOTLE *Politics* III 15 1286a - IV 4 1292a

areas, in turn, will help us to understand how the Supreme Court will interpret religious clause Constitutional cases. Next, we will examine the major schools of interpretative methodology in order to build a fuller understanding of how the Court might read these clauses and the case law. Having established these methodologies, we will look at doctrinal forms in order to understand a decisions of the Court on a continuum rather than a binary basis. Finally, we will look at levels of scrutiny and judicial review involving cases which limit the most fundamental freedoms in this country.

A5.3. Constitutional Theories

Constitutional theories offer us a heuristic with which we can understand the Constitution as well as to understand how the Supreme Court Justices operate in their decision making process. For instance, Bruce Ackerman, Sterling Professor of Law and Political Science at Yale Law, in *We the People*, argues that the Supreme Court's role in history has been to synthesize periods of constitutional transformation, such as the period of reconstruction following the Civil War, and past practices. Thus, under Ackerman's theory, a controversial decision such as *Lochner v. New York*, 198 U.S. 45 (1905),[231] demonstrated the justices "exercising a preservationist function, trying to develop a comprehensive synthesis of the meaning of the Founding and Reconstruction out of the available legal materials."[232] These two main theories of the Constitution will later be instrumental in interpreting motives for decisions, and further, we will attribute motives in opinions of the Court, concurrences, and dissents to one of these two methods of reading the Constitution.

[231] Holding that New York's regulation of the number of hours a baker could work each day to no more than 10 per day or 60 per week violated bakers' right to contract freely guaranteed by 14th Amendment.
[232] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (Harvard University Press) (1991) at 101

By understanding process theory and the moral reading of the Constitution, we can later compare the theory applied in each opinion of the Court with the decision reached, whether liberal or conservative. Such patterns may yield a theory of the Court on the Religion Clause cases, or more pragmatically, it may yield a strategy for council in oral argument in the Court. As we enter into the portion of analysis concerning the interplay of process- and morality-based readings, a table will be available as a quick refresher in the main points of comparison worth noting.

A5.3.1. Process-Based Theory

Process-based Constitutional theory borrows, not surprisingly, from legal positivism. Much of process-based theory developed in the 1950s and 1960s contemporaneously with H.L.A. Hart's reformation of legal positivism in *The Concept of Law.*[233] Among the foundations of this theory of law is a famous footnote in the decision of *United States v. Carolene Products*,[234] known as "Footnote Four." Footnote Four drew a distinction between economic legislation and social-welfare legislation. The Court's opinion, written by Justice Harlan Stone,[235] suggested that the presumption of constitutionality of legislation ought to be "subjected to more exacting judicial scrutiny[236] under the general prohibitions of the Fourteenth Amendment." The Footnote raised concerns about legislation which limited the political process, sparking a movement reading the Constitution as the ultimate protection of political process.

[233] 1961
[234] 304 U.S. 144, (1938)
[235] There is some discussion as to whether Footnote Four was written by Justice Stone's clerk at the time, Louis Lusky, who went on to become influential in the field of civil rights law.
[236] Scrutiny is addressed in D.

Professors Herbert Wechsler,[237] Henry Hart[238], Albert Sacks,[239] and especially John Hart Ely[240] became the most influential proponents of this theory. The legal process school sought middle ground between the schools of legal formalism[241] and legal realism.[242] Professor Ely, in *Democracy and Distrust*, argued that the Constitution is primarily concerned with process and structure rather than the preservation of specific substantive values,[243] such as freedom of religion and other liberties. Rather, Ely and the process-based theory of Constitutional law read open-ended provisions of Constitution law such as the Fourteenth Amendment's requirement of equal protection of the law to protect the political process only and not any specific liberty. If Constitutional law is viewed in this way as furthering process-based goals then judicial review can be seen as "enhancing, rather than frustrating democratic governance."[244]

John Hart Ely looks at the Constitution's dealings with slavery and interprets it both times through the process lens. In the institutionalization of slavery as representing 3/5s of a person,[245] the Constitution is addressing only the questions of representation and not the normative aspects of slavery, something the founders left to later legislatures to try (and fail) to resolve. Further, he

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[237] See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD LAW REVIEW 1–35 (1959), HENRY M. HART & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (R. H. Fallon, Jr. et al. ed., Thomson Reuters/Foundation Press 6th) (2009)

[238] See, e.g., HENRY M. HART & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (R. H. Fallon, Jr. et al. ed., Thomson Reuters/Foundation Press 6th) (2009), HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Foundation Press 1st) (1994)

[239] HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Foundation Press 1st) (1994)

[240] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press) (1980)

[241] Legal formalism was a re-formulation of positivist thought, asserting that questions of justice in law are questions for the legislature not the Judge to address.

[242] Legal realism introduced the social sciences into jurisprudence for predictive purposes.

[243] Justice Louis Brandeis would suggest otherwise: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurrence)

[244] Ely *supra*

[245] U.S. Const. Art. III § x

forces the Thirteenth Amendment "into a 'process' mold."[246] Arguing that, because slaves did not "participate effectively in the political process,"[247] the document legitimately outlaws it as a violation of its process goals. He admits, however, too that it clearly embodies a judgment that slavery is morally intolerable. He finds slavery to be "one of the few values the original document singled out for protection from the political branches; [and] *non*slavery is one of the few values it singles out for protection now."[248]

Interestingly, Ely also looks historically at the amendments made to the Constitution since Reconstruction. He notes that no amendments were made between 1870 and 1913, and that eleven have been made since then, five of which extended franchise: the Seventeenth created direct election of US Senators, the Nineteenth instituted universal suffrage, the Twenty-Third gave the vote to residents of Washington, D.C., the Twenty-Fourth abolished the poll tax conditional on Federal elections, and the Twenty-Sixth lowered the voting age to 18.[249] In addition, three other amendments, the Twentieth, Twenty-Second, and Twenty-Fifth, deal with eligibility for the White House and succession in case of death.[250] The Sixteenth Amendment further empowered the Federal government to levy an income tax, a means of making the government more effective and an expansion of the original powers listed in the Constitution. This list leaves only two amendments that do not deal with process in some form or another: the Eighteenth Amendment, which made institutionalized temperance and put it beyond the reach of legislatures. This, of course, was repealed with the Twenty-First Amendment. Ely proposes that this illustrates that at least now, if not in the past, the Constitution must be read as attempting to further process goals

[246] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press) (1980) (97-101)
[247] *Ibid.*
[248] *Ibid.*
[249] *Id.* 100
[250] *Ibid.*

mainly and to understand that any substantive values protected by the Constitution (e.g., the right to bear arms, right to freedom of religion) function mainly as furthering process goals by protecting the people against tyrannical governments[251] or by protecting insular minorities to make their own choices.[252]

Ely does clarify, however, that although his process-based theory interprets all of these provisions in the Constitution as attempting to develop a more efficient, egalitarian, and inclusive political machine, he does not deny that the Constitution seeks to preserve liberty. He merely argues that the Constitution preserves liberty by furthering process-based goals rather than making any specific moral judgments which may be subject to later revisions (as the Eighteenth Amendment was). He argues that any Constitutional provisions which do not conform to the pattern of furthering process, as we saw with the Second Amendment, are "the understandable products of particular historical circumstances" and not an overall reflection of the underlying goals of the Constitution.[253] In summation of his theorem, Ely offers the words of Justice Linde: "'As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times.'"[254]

Process-based theory is not without its critics,[255] for obvious reasons. Process theory is simply not the common popular understand of the purpose or meaning of the US Constitution. Although Ely argues that the First Amendment protects insular minorities in the political process,

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[251] The original intent of the Second Amendment

[252] Ely submits that the First Amendment acts like the Equal Protection Clause by protecting the Amish, Seventh Day Adventists, and Jehovah's Witnesses (amongst others) from being forced to follow majoritarian will against their own personal religious beliefs.

[253] 101

[254] *Ibid.*

[255] See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 59 YALE LAW JOURNAL 1063 (1980)

the enshrinement of free exercise and anti-establishment goals represent plainly substantive goals rather than pure political process aims. Critics suggest that it is no mystery that many of the goals the founding fathers had revolved around substantive values such as religious freedom, antislavery, and private property. Further the interpretation of these values as concerned predominantly with process and not substance might be troubling if we ignore the past beneficial effect of the protection of these substantive values and move forward as though they are mere process concerns and not substantive concerns.

In fact, the biggest problem with process theory is its neutrality. If one is to assume pure neutrality in law and ignore any substantive goal one loses a great deal of the procedural value in the Constitution. Laurence Tribe points out in his article "The Puzzling Persistence of Process-Based Constitutional Theories" that though we can admit that much of the Constitution does deal with process, whether adjudicative or representative, and the subject in these cases is clearly procedural in nature, one cannot say that "the *meaning* and *purpose* of the Constitution's prescriptions on each such subject are themselves merely procedural."[256] Further, he writes, "there is no reason to suppose that 'constitutive' rules[257]... can or should be essentially neutral on matters of substantive value."[258] The biggest takeaway from this critique is that without substantive values, process-based theory falls flat. That is to say, process-based theory requires a commitment to underlying substantive values such as which groups need protections (insular minorities, etc.) and which values hinder process and which enhance it.

A5.3.2. Morality-Based Approaches

[256] *Id.* 1063
[257] Rules defining the basic structure of political and legal relations
[258] *Ibid.*

The morality-based approach embodies a more popular conception of the Constitution: a document that embodies fundamental moral principles like equality, fairness, and justice. Clearly, where process-based theory takes more from the Legal Positivist school of thought, morality-based approaches take from Natural Law theory. Ronald Dworkin, a major proponent of the morality-based approach, argues that constitutions declare individual rights against the government in "broad and abstract language" and that judges, lawyers, and citizens must "interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."[259] While process-based theory suggests that judicial review acts to enhance the political process rather than frustrate it,[260] the morality-based approach seeks to deal with the difficult questions that lie behind judicial review and the prominent decisions in the course of American history.

The moral reading of the Constitution ultimately puts powers in the hands of judges and the Justices of the Supreme Court to read and interpret the morals found in the Constitution. Some argue that such an interpretation puts power in the hands of the judiciary, and the Supreme Court especially, to have absolute power to impose moral convictions on the public.[261] This fails to acknowledge that underneath vague and abstract principles protecting the "right" of free speech and so forth there must be underlying moral principles that the law seeks to reveal. It seems easy to interpret the actions of judges as being either liberal or conservative, but when understanding that there are underlying moral grounds to Constitutional provisions, we can see that conservative judges object to affirmative action on moral grounds opposed to placing one race against another. Similarly, liberal judges approve of this same policy on egalitarian moral grounds. Thus the

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[259] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (Harvard University Press) (1996) (2)

[260] *Supra*

[261] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (Harvard University Press) (1996) 3

problematic disagreement about the right way to "restate these abstract moral principles."[262] Rather than reading their own moral convictions into the Constitution, judges must decide in a way that is consistent with the document as a whole and with the "dominant lines of past constitutional interpretation by other judges... [regarding] themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality... [taking care] to see that what they contribute fits with the rest."[263]

A5.3.3. Synthesis and Supreme Court Decision-Making

Like legal positivism and natural law theory, both of these approaches deal with the same topic, Constitutional interpretation. Like that dispute, process-based theory and morality-based approaches are two sides of the same coin. As critics of process-based theory have pointed out, even interpreting the Constitution as a document intended to further mostly process goals, an underlying set of values must define which groups need protection in the political process. Morality-based approaches provide this set of values but lacks the overarching goal set forth by process-based theory.

In reading the Constitution's First Amendment throughout the course of this paper, we will be bearing in mind this review of theory in order to understand how Supreme Court justices are thinking about the religion clauses of the Constitution. Does the Court see the religion clauses as enhancing American democracy? Or simply an essential moral element of the normative political aspects of the Constitution owing to long forgotten conversations in smokey revolutionary taverns and parlors about the virtues of Lockean liberty[264] as compared with Rousseau-inspired uniformity.[265]

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[262] *ID.* 4
[263] *Id.* 11
[264] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Hackett Publishing Co.) (1980)
[265] JEAN-JACQUES ROUSSEAU, ROUSSEAU: "THE SOCIAL CONTRACT" AND OTHER LATER POLITICAL WRITINGS (Cambridge University Press 2nd) (1997)

A5.4. Constitutional Interpretation

So while our understanding of process- and morality-based theories of the Constitution will help to understand how the Court thinks about the First Amendment, the way they interpret the Constitution may offer some predictive value in terms of having a theory of judicial practice. As we saw with the above theories, both suffer from problems of coherent interpretation: Process-based theory on the one hand requires an underlying system of values that delineate which groups need the most protection in the political process. Morality-based approaches, on the other hand, require a consistent view of case law and the underlying document when making decisions. This is yet another framework that must be understood in order to read and interpret case law relating to the Religious Clauses. In exploring methods of interpretation, we will first look to historical approaches which view the document through the lens of history, and then we will look to more modern interpretations that see the Constitution as capable of evolution. When we begin to analyze these methods of interpretation, a table will be made available to remind the reader of an overview of these methods.

A5.4.1. Interpretivism & Non-Interpretivism

Part of the historical approach to Constitutional interpretation are the two schools of interpretivism and non-interpretivism. These two schools both look at decisions such as *Griswold v. Connecticut*[266] and *Roe v. Wade*[267] and question the due process analysis offered in those cases on the basis of norms and values not found in the language or structure of the Constitution.

[266] 381 U.S. 479
[267] 410 U.S. 113

Interpretivists take a four-corners approach to these decisions, arguing that decisions utilizing unlisted values are illegitimate.[268] The pure interpretive model, exemplified by the opinions of Justice Hugo Black, forces judges deciding constitutional issues to "confine themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution."[269] The interpretivists put forward this argument as a theory of appropriate powers of adjudication. They argue that such a policy promotes judicial neutrality and prevents judicial policymaking. Interpretivists like Robert Bork[270] condemn the non-interpretivist approach on the basis of separation of powers. The theory holds that adjudicatory reliance on values not found explicitly in the Constitution amounts to an undemocratic imposition of values.

Non-interpretivists, on the other hand, argue that the Court should go beyond the four-corners of the Constitution to enforce "values or norms that cannot be discovered within...the document."[271] While they hold the view that judges may rely on values not explicitly listed in the Constitution's formal language,[272] non-interpretivists see the Constitution as a starting point for the principles of liberty and justice. Further, they recognize that the Supreme Court has historically enforced these principles along with their extensions which may not be directly traceable to language in the Constitution. Taking a strict interpretivist position would roll back much of the settled Constitutional law from American history.[273]

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[268] JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, MODERN CONSTITUTIONAL THEORY (West Group Fourth) (1999) 399

[269] John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 INDIANA LAW JOURNAL 399–448 (1978)

[270] See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA LAW JOURNAL 1–35 (1971), Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, WASHINGTON UNIVERSITY LAW QUARTERLY 695–701 (1979), Robert H. Bork, *The Struggle Over the Role of the Court*, 34 NATIONAL REVIEW 1137–1139 (1982)

[271] John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 INDIANA LAW JOURNAL 399–448 (1978) 399

[272] JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, *Supra*

[273] E.g. *Griswold* and *Roe, supra.*

Because of this undesirable result, any scholar must accept the premise of the non-interpretivists that there are and should be values and norms outside the Constitution's direct language that ought to be recognized by the Court. Plainly, the course of history has proven, as social fact at the least, that judicial decisions which recognize rights within penumbrae[274] of Constitutional provisions are the law. Conservative Constitutional scholars have claimed an originalist perspective as the method of first instance of reading the Constitution, that is to say, that plain[275] meaning of the text controls understanding. Where there is no plain meaning, the original understanding of the text is controlling. Undoubtedly, such a perspective offers a legitimate authority for judicial interpretation, but it is also inadequate. Professor David Strauss at University of Chicago Law School argues that this perspective "owes [its] preeminence not to [its] plausibility but to the lack of a coherently formulated competitor."[276] There are, however, rising successors used in the decisions of the Court that are worth examining.

A5.4.2. Textualism

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[274] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD LAW REVIEW 1–35 (1959)
[275] i.e., Obvious.
[276] David A. Strauss, *Common Law Constitutional Interpretation*, 63 UNIVERSITY OF CHICAGO LAW REVIEW 877–919 (1996) at 878
[277] 381 U.S. 479
[278] 410 U.S. 113
[279] JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, MODERN CONSTITUTIONAL THEORY (West Group Fourth) (1999) 399

of Justice Hugo Black, forces judges deciding constitutional issues to "confine themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution."[280] The interpretivists put forward this argument as a theory of appropriate powers of adjudication. They argue that such a policy promotes judicial neutrality and prevents judicial policymaking. Interpretivists like Robert Bork[281] condemn the non-interpretivist approach on the basis of separation of powers. The theory holds that adjudicatory reliance on values not found explicitly in the Constitution amounts to an undemocratic imposition of values.

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[282] John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 INDIANA LAW JOURNAL 399–448 (1978) 399
[283] JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, *Supra*
[284] E.g. *Griswold* and *Roe, supra.*

social fact at the least, that judicial decisions which recognize rights within penumbrae[285] of Constitutional provisions are the law. Conservative Constitutional scholars have claimed an originalist perspective as the method of first instance of reading the Constitution, that is to say, that plain[286] meaning of the text controls understanding. Where there is no plain meaning, the original understanding of the text is controlling. Undoubtedly, such a perspective offers a legitimate authority for judicial interpretation, but it is also inadequate. Professor David Strauss at University of Chicago Law School argues that this perspective "owes [its] preeminence not to [its] plausibility but to the lack of a coherently formulated competitor."[287] There are, however, rising successors used in the decisions of the Court that are worth examining.

A5.4.3. Translation

A strong theme running through sections a. and b. is the desire for fidelity to the Constitution. Ideally, all constitutional law will remain faithful to the Constitution, as the purpose of the judiciary is to clarify and interpret law rather than to make it. Translation, a more modern method of interpretation, offers a metaphorical understanding of how to interpret the Constitution. Lawrence Lessig, in *Fidelity and Constraint*,[288] builds the translation heuristic on linguistic translation, or the plain meaning of translation. He argues that translation involves transposition from one context to another. In translating any foreign-language text to our native tongue, or vice-versa as the case may be, we adapt the text to the new context to best fit the original meaning to the new purpose. Rather than literally translating idioms from one language to another, we find a similar idiom or seek to offer the underlying message of the idiom rather than sticking literally to the text itself. Similarly, Lessig argues, when we hear any "contextually distant" text, we translate

[285] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD LAW REVIEW 1–35 (1959)
[286] i.e., Obvious.
[287] David A. Strauss, *Common Law Constitutional Interpretation*, 63 UNIVERSITY OF CHICAGO LAW REVIEW 877–919 (1996) at 878
[288] Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM LAW REVIEW 1365–1431 (1997)

into a more familiar context so that it may be better understood.[289] Lessig offers convincing argument as regards the superiority of the translation method relative to originalism:

> The Constitution doesn't speak much about televisions or airforces. The First Amendment speaks of the freedom of the "press"; and Article I speaks of the "army" and "navy." How should these words—"press," "army," "navy"—be read today?... The originalist might [say]..."the text of the First Amendment makes no distinction between print, broadcast, and cable media, but we have done so." The translator, however, can well understand this apparent anomaly...At the time all three ("press," "army," and "navy") were written, all three marked out the full range of each kind. There were no televisions, but likewise, there was no device of publication in 1791 that was not within the reach of "the press."[290]

The translation captures the concept that the Constitution seemingly intended to include every thus far conceived and conceivable method of conveying information and every known military force. Thus, in the second step of re-formulating the original rule in the new context, it is no stretch to suggest that the Constitution protected the freedom of broadcast and cable television or authorized the funding of an Air force. In sum, translation captures all of the best elements of textualism (which in turn captures from interpretivism) and adds the metaphorical aspect as an explanatory mechanism illustrating why it is not only acceptable, but normatively desirable for courts to adapt text from their original contexts and re-interpret them in their current context.

Each of these methods offers an interesting aspect to watch for in the case data and to see if there exists any correlation between method elected and other independent variables and if any conclusions may be drawn from those facts. Part of the greatest challenge for offering a

[289] *Id* at 1365
[290] *Id* at 1376

model of these cases will be the translation of original text and precedents into a simplified form. In modeling this law, we will translate a convoluted and mixed set of decisions[291] into a new, more consistent context that explains why some cases yield result A, while other facially similar cases yield result B.

A5.5. Doctrinal Forms

When judges write their opinions they have a range of doctrinal approaches available to them. These approaches exist on a continuum ranging from the rigid bright-line rule to the more malleable balance of interests standard.[292] Naturally, the doctrinal approaches taken by courts greatly vary according to specific situations and jurisprudential styles. The approaches reflect the complex, indeterminate legal frame that plaintiffs and defendants ask judges to clarify. Rules, on the one hand, are easier to apply, while standards, on the other, offer a flexible response to unique circumstances. Yet the divide between these policies is not by any means binary. This review will seek to illuminate some of the strategies taken to soften the rigidity of rules, as well as to clarify the

[291] See Frederick Schauer, *Easy Cases*, 58 SOUTHERN CALIFORNIA LAW REVIEW 399–431 (1985): "Even if a rule seems plainly applicable, and even if that application is consistent with the purpose behind a rule, it may be that two or more rules, dictating different results, will be applicable. If one rule suggests answer A to the question, and another suggests answer B, then it is as if no answer had been provided. In the calculus of rules, too many rules are no better than none at all."

[292] To clarify the conflation of these two distinct doctrinal valences from rules to standards, we can compare a more concrete, narrow example in the two basic liability regimes for accidental injuries: strict liability and negligence. Like a bright-line rule, strict liability sets out a rule under which there may be no mitigating circumstances. For example, if one causes an accident while driving under the influence, then one is liable for the damage caused by that accident regardless of whether one drove under the influence in some extreme emergency. For instance if in a black out (no cell or landline service), a party needed emergency medical treatment and only a person under the influence of alcohol was present and able to drive that party to a hospital. The negligence standard, on the other hand, suggests that all people must act within a certain standard of care and attention in order to avoid liability. For instance, in a rear end accident there is a different level of care given if in one case the rear-ender slides into a car due to black ice on the roads and blizzard conditions, or if the rear-ender has their head down while they check their texts. While the comparison of these levels of care seems to render an obvious judgment, the strength of a standard is that it involves judicial review and discretion in order to determine whether a reasonable person might have acted similarly and also been unable to avoid the accident, or whether a reasonable person might not have been texting while driving.

specific tests of standards. We will proceed from pure bright-line rule to pure balancing test and finally toward more conclusory standards.

A5.5.1. Rules

Pure Bright-Line Rules

Chief Justice Warren Burger instituted a rigid constitutional rule in *I.N.S. v. Chadha* 462 U.S. 919 (1983). The case involved deportation hearings of Jagdish Rai Chadha who was born in the then-British colony of Kenya to Indian (non-UK) parents. Following Kenya's independence in 1963, Chadha's status as a citizen or resident of Kenya lapsed. In addition, because he was born in Kenya, he was not recognized as a citizen of the UK. Similarly, India also did not recognize Chadha as one of their citizens. When his student visa expired in the US, all three countries refused to accept him on their territory, making him, officially, a stateless person. When the INS initiated deportation proceedings against Chadha, he requested and was granted a suspension of his deportation. This was referred to the House of Representatives according to the statute governing suspension of deportation proceedings. The House vetoed the suspension and INS resumed deportation proceedings. The Attorney General appealed on behalf of Chadha and ultimately the case rose to the Supreme Court. Chief Justice Burger, speaking for the Court, ruled that the House of Representatives could not issue a statute granting itself a legislative veto over the actions of the executive branch because it is inconsistent with the principles of bicameralism and the Presentment Clause of the Constitution (Art. I §7).

Though *INS v. Chadha* invalidated the Congressional Veto and sought to prevent legislative interference in executive actions, it failed to achieve either of these. Congress merely came up with newer, more discrete methods by which they could veto executive action. Rather than having open vetoes, Congress changed policies to require agencies to notify it before making certain decisions and provided funding while stipulating to "appropriation reports" on how money

should be spent.[293] Rather than having a public vote on certain issues, Congress now used backchannels to encourage agencies who wanted "continued appropriations, political support, and benign oversight.[294]" That the bright-line rule in *Chadha* failed is indicative of the issues with archetypal rules rather than hybridized rules and standards.

Double Rules

Sometimes the rule-making doctrine manifests in the making of a double-level rules, as it did in *US v. Florida East Coast Railway Co.,* 410 US 224 (1973). The case itself involves a complex effort to reduce a freight-car shortage by the Interstate Commerce Commission (as empowered by Congress) which followed the informal rules rather than the formal rules set out by the Administrative Procedure Act (APA). Florida East Coast Railway Co. raised objections to the new rules put in place by the ICC on the grounds that they had been heard only in writing and were denied an opportunity to offer oral argument. The APA provided that parties would not be prejudiced by an agency's decision to receive submissions of evidence. Further, the APA allowed for two different forms of hearings, one being formal and the other being more informal and clear. The Court set out two rule which echoed this dual structure of formal vs. informal hearings in the APA.

Escape Hatches

Another form of relief from strict bright-line rulemaking is the "escape hatch.[295]" Justices often utilize the escape hatch as a means of providing opportunity for future judicial review when rules no longer become practicable or fail to imagine certain scenarios in which the rule ought not

[293] LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (University Press of Kansas 5th Revised) 183 (2007)
[294] CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION (Yale University Press) (1988)
[295] James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZONA STATE LAW JOURNAL 773, 778 (1995)

to apply. In the case of *Nixon v. US*, 506 US 224 (1993), a federal court judge claimed that when the Senate impeached him without conducting a hearing in front of the entirety of the Senate, they had acted outside of Constitutional guidelines. Chief Justice Rehnquist held that all claims surrounding impeachment are nonjusticiable[296]. Justice Souter, in a concurrence, offered the escape hatch: "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss...judicial interference might well be appropriate.[297]" The formal doctrine of nonjusticiability becomes one of extreme deference, more so than the "rational basis test," which is the lowest level of scrutiny, yet it is not the completely inflexible rule made by C.J. Rehnquist in this case.

A5.5.2. Hybrids

Wilson offers five distinctions to assist in categorizing hybrid rule/standard variants: (1) is the hybrid dealing with a hypothetical or realized situation? (2) Does the hybridization of the rule/standard conflict with or support the purposes of the underlying rule? (3) Does the new hybrid variant offer more or less predictability? (4) What purposes does the hybrid form fulfill? and (5) What are the effects of the different forms?"[298] These five questions should be born in mind while considering each of the following hybrid doctrinal forms.

i. Exceptions

In cases regarding burning of the American flag, while the majority found that this particular expression was protected by the First Amendment, Chief Justice Rehnquist dissented in an illustration of the conception of exceptions. C.J. Rehnquist essentially argues for a narrow, bright-line exception to a bright-line general rule. He argues that rules against suppression of

[296] *id.* at 227-240
[297] *Id.* at 253-254 (Souter, J. concurring)
[298] James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZONA STATE LAW JOURNAL 773, at 796 (1995)

political speech on ideological ground ought to apply except for the burning of the American flag. This is how the Chief Justice sought to resolve the convergence of two rules, the first being the First Amendment, and the second being the sacred symbolic status of the American flag.

ii. Extensions

Rule formalism can also be tempered by the application of extensions. As a doctrinal form, extensions function in precisely the opposite way that exceptions do. H.L.A. Hart offers an example of the problems of rule formalism in the following way: "A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?[299]" Following *Chadha*, the US Circuit Court for the DC Circuit ruled that although Congress had resolved the bicameralism issue of *Chadha* in a new law, they had maintained an unconstitutional legislative veto. The circuit court extended the *Chadha* decision to a new issue where bicameralism had been satisfied but presentment had not. As per the example, formalism might suggest that administrative regulation and executive orders ought to be struck down for failing to comply with bicameralism, but that would be an unacceptable application of the formal rule created by *Chadha*.

iii. Multi-Factor Tests

Such problems as failure to apply with the principle of bicameralism in the executive branch are limited by the Factor Test doctrine. Factor Tests limit how related cases can reasonably be claimed to be while also constraining judicial discretion – making the law more predictable. The case of *Ward v. Rock Against Racism*, 491 US 781 (1989) concerned an annual concert in Central Park's Naumberg Bandshell known as Rock Against Racism (RAR). In previous years, the city had

[299] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593, 607 (1958)

received complaints about the noise from users of a designated quiet area nearby, other park goers, and the residents in the surrounding areas. RAR ignored requests from the city to lower the volume at one of its concerts and ultimately had to resort to cutting the power, after which the audience became unruly and disruptive. In response to this event, as well as several others featuring inadequate equipment or unskilled sound technicians, the city adopted a Use Guideline for the bandshell specifying that the city would provide high quality sound equipment and an independent sound technician. RAR sought a declaratory judgment striking down the guideline. Justice Kennedy utilized a three factor test to hold that the guideline was: 1. Content neutral, that is, justified without reference to the content of the regulated speech. 2. Narrowly tailored to serve significant governmental interests. And 3. Left open ample alternative channels of communication[300]. This demonstrates the advantage of the factor test: the doctrine helps future litigants to determine which facts they need to prove.

iv. Definitions

Similarly, definitions establish a limited set of criteria that parties must satisfy in order to pursue the litigation. In the First Amendment incitement case *Brandenburg v. Ohio*, 395 US 444 (1969), the Court defined unprotected "incitement" as: "such advocacy [of the use of force or violation of the law] that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[301] Although Brandenburg, a local KKK leader, had made reference to revenge on African Americans and Jews, he merely announced plans for a march on Washington and did not directly advocate any imminent violence. We can see that the function of the definition form is identical to that of the factor test: lay out the various specific criteria that must

[300] *Ward v. Rock Against Racism*, 491 US 781 (1989)
[301] *Brandenburg v. Ohio*, 395 US 444 at 447 (1969)

be met to utilize this precedent; however, the form of definition is different in that it sets out exactly what must be proven rather than degrees to which certain steps have been taken.

A5.5.3. Standards

Pure Balancing Tests

Beyond factor tests and definitions is the form of the pure balancing test. Balancing tests weight two competing sets of facts or norms against one another. The balancing test called "strict scrutiny" compares fundamental rights with compelling state interests. This was the level of scrutiny utilized to develop the factor test in *Ward*. One form of the pure balancing test is the Rational Purpose test. This test nearly always results in victory for the government. Though it appears to weigh a plaintiff's interests against governmental interests, the Rational Purpose test generates almost as bright of a line as any of the previous methods.

Step Tests

Another form of balancing test is the step test. The step test establishes doctrinal hurdles that must be satisfied in order to apply the precedent. In *Central Hudson Gas & Electric Corporation v. Public Service Commission,*[302] the Court determined that commercial speech fell within the protection of the First Amendment 1. if the speech considered concerns lawful activity and is not misleading; 2. if the governmental interest is substantial; 3. If the regulation directly advances the interest; and 4. If the regulation is not more extensive than necessary to serve the interest. The list of steps helps to determine how the doctrine might apply in a future case. For example, if the commercial speech contains speech that might otherwise be prohibited, the Court will not defend it under the precedent. The court concerned would then have to evaluate the government interest in substance, execution, and scope. The multiple steps involved open future

[302] 447 U.S. 557 (1980)

courts up to considerable judicial discretion (for instance, determining whether or not regulation *directly* advances an interest).

The step test illustrates the complexity of constitutional doctrine, within one case the Court considers numerous factors and sets hurdles that must be cleared to reach the particular result. This aims to create a particularity of the precedent without creating an overly general rule that results in sub-optimal results.

Totality of the Circumstances Tests

The Totality of the Circumstances Test resolves a particular paradox within constitutional law: sometimes laws comply with every constitutional rule, but still substantially violate the intent of these protections. Such was the case in *Church of the Lukumi Babuli Aye v. City of Hialeah*.[303] The case, whose rules will be addressed later, dealt with a municipal ordinance that prohibited ritual animal sacrifice as a means to limit the practice of Santeria. The ordinance did not mention Santeria specifically, did not glaringly discriminate, had effects on very few people, and had a high likelihood of prosecuting all individuals who violated the ordinance's provisions. Thus, the plaintiffs could not show a pattern of discriminatory enforcement under *Yick Wo v. Hopkins*.[304] Nor could petitioners show a sufficient sample size to demonstrate disparate impact. Because the Court had recently upheld[305] a statute banning peyote for American Indian religious practice even though only American Indians would violate the ban, petitioners could not argue that the application to their religious practice was inequitable.

Thus the totality of the circumstances test authored by Justice Kennedy helped to illuminate the impermissible purpose of the ordinance: that it was truly designed to target and

[303] 508 U.S. 520 (1993)
[304] 118 U.S. 256 (1886)
[305] *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)

suppress the central element of Santeria worship. This test did not require incredible efforts, a previous resolution sought to ban similar acts "inconsistent with public morals, peace, or safety" while exempting Jewish ritualized killings and any non-religious killing of animals. The totality of the circumstances test is used to evaluate laws which go to extraordinary lengths (as so many do) to avoid using "constitutionally suspect terms but nevertheless violate constitutional norms."[306] In this way, the totality of the circumstances test works as a rule designed for the case where other rules fail but intuition intimates that the insufficiency of precedent creates a normatively undesirable result.

Conclusory Standards and Equity Exceptions

Finally, two forms of doctrine which offer very little in the way of understanding the common law. The first, called the conclusory standard, is a non-doctrine of simply stating a conclusion on a specific set of facts with no forward predictability or upward correctness. In *Morrison v. Olson*, the Court upheld special prosecutors because they did not impermissibly interfere with Presidential authority. Such a standard is obvious, no court would allow an impermissible interference. It is possible that over time the Court will develop the *Morrison* precedent and offer opinion on what is and is not an impermissible interference with Presidential authority, but for the decision itself, the standard offers no meaningful rules.

Equity exceptions, similarly, offer little in the way of upward correctness. Rather, the appeal to equity in law represent the last resort (or go to plea) of a plaintiff. To instantiate this, in the above case of *Morrison*, the President's council might argue the following: that the special prosecutors do impermissibly interfere with Presidential authority, and even if they do not, they should not be allowed in the immediate case because allowing them would bring an inequitable

[306] Wilson, *supra*, at 816.

result. Equity exceptions offer little to nothing in the way of predictability and often rely solely on the personal values and views of the judge. Decisions hinging on equity exceptions will fail to explain any meaningful rules in terms of the common law, though they may represent some underlying principle that one might be able to take into consideration in pursuing litigation under the same grounds.

A5.5.4. Evaluation of Doctrine: "Neutral Principles"

In 1959, Professor Herbert Wechsler gave the Holmes lecture at Harvard Law that proved to develop into one of the most influential articles of that decade.[307] Professor Wechsler argues that the only legitimate constitutional decisions are those which are "genuinely principled."[308] Genuinely principled decisions are those that rest on reasons transcending the immediate result of the case and that the judge would willingly apply to other cases with similar fact patterns.

Professor Mark Tushnet offers several formulations of the "neutral principles" approach.[309] He characterizes Wechsler's theory as neutrality of "judicial indifference"[310] as to outcome. Tushnet quickly dismisses Judge Robert Bork's extension of Wechsler's neutrality into content[311] as an impossibility of judicial practice. Tushnet asserts that substantive theory is required to provide the principles worth ruling on. Rather than guiding content of principles, as Judge Bork suggests, neutrality can guide the selection, justification, and application of principles.[312] From Tushnet's criticism of Bork and of what he describes as prospective application, retrospective application, and craft interpretation,[313] we can develop three separate extensions of the neutrality principle.

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[307] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD LAW REVIEW 1–35 (1959)
[308] *Id.* at 11
[309] Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARVARD LAW REVIEW 781–824 (1983)
[310] *Id.* at 781
[311] E.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA LAW JOURNAL 1–35 (1971)
[312] Tushnet, *supra*.
[313] See Tushnet, *supra* 805-824 for more in depth criticism.

Borrowing from logic proofs,[314] we can apply the ideas of upward and downward correctness in assessing doctrinal soundness.[315]

A5.6. Judicial Scrutiny

In order to assess whether laws are consistent with the process due, courts need a system to assess legislation and regulation. This regime of review is known, somewhat obtusely, as scrutiny. The lowest level of scrutiny is known as rational basis review. Rational basis review developed in *US v. Carolene Products Co.*, 304 U.S. 144 and offers the presumption of constitutionality to the governmental action in question. The presumption of constitutionality results from the requirement that the person challenging the law, rather than the government, bear the burden of

[314] See MERRIE BERGMANN ET AL., THE LOGIC BOOK (McGraw-Hill 6th) (2013)

[315] In sentential logic, the concept of upward correctness refers to decomposition of complex sentences via the "tree method." A rule is called upwardly correct if a fact pattern which makes the decomposed sentence true also makes the original complex sentence true. In neutrality, upward correctness will reference Wechsler's concept of neutrality as a judge's willingness to apply the rule they make in this case to other similar cases. This criterion means that a judge must consider their ruling and theoretically apply it to cases not yet in existence. The resultant principle ought to be acceptable as a rule for the future.
In sentential logic, a rule is also tested for downward correctness. That is to say that a fact pattern that makes the complex sentence true, must also make the decomposed sentence true. In neutrality, we will utilize the metaphor of downward correctness to refer to consistency with past precedential principles. Given the common law tradition of American law, we will take downward correctness for granted in a theory of neutrality.
So, in summary, downward correctness is the formal embodiment of common law practice. Downward correctness is a reasonable starting place for any model of rules, mostly because we will be looking at the common law to seek the rules reified by its relation to the specific issues at hand in this thesis. Upward correctness, on the other hand, is Wechsler's innovative idea of judicial practice where judges must think forward beyond the immediate facts to consider the general principle being created by a new rule. Finally, to bring the concept of neutral principles of law back to the specific realm of this thesis, I will propose the following revision of Tushnet's craft interpretation criticism: Because Tushnet rightly criticizes the problematic fact in both upward and downward correctness that judges can merely wisely select precedent or emphasize differences of fact patterns to avoid following these rules of soundness, the third rule of soundness will be that judges must consider hard, empirical evidence when crafting decisions. Only in cases where following these rules would result in an inequitable result, based on sound principles, can a judge break from upward and downward correctness. To rephrase this, when a fact pattern is similar to decided case law, pulling mostly unseen precedents from other cases to justify a personally held belief is decidedly inconsistent and results in the above problem of answers A and B. When judicial craft is restrained empirically, as this thesis seeks to do in the narrow instance of Religion Clause cases, the rules of consistency become significantly more rigid and Tushnet's craft interpretation problem diminishes significantly.

proof that either 1. The government has no legitimate interest in the action, or 2. There is no reasonable, rational link between the government's stated interest and the challenged action. Rational basis review deals strictly with Constitutionality and not at all with wisdom. As Justice John Paul Stevens remarked in a concurrence in *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, "as we recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.'"

The next level of review is known as intermediate scrutiny. Intermediate scrutiny is used when cases concern gender or sex[316] and other Equal Protection Clause concerns. Intermediate scrutiny is moderately more onerous for the government than rational basis review in that the burden of proof is on the government to proof that the action challenged serves an important government objective and is substantially related to achieving that objective. The Court has ruled that intermediate scrutiny requires an "exceedingly persuasive justification" in order to allow legitimate use of sex-based classifications.

The highest level of review is referred to as strict scrutiny. Strict scrutiny is the most difficult level of review for a governmental action to defeat and thus is imposed in cases where the most prized individual liberties hang in the balance, as in discrimination on the basis of race, national origin, religion, or citizenship status. Any legislation or governmental action discriminating on these bases that are challenged on an equal protection basis require a governmental showing that the challenged policy or action represents a *compelling* state interest, and is narrowly tailored to achieve its result.[317] In the analysis phase, we will examine how these three levels of scrutiny are correlated with the various forms of doctrine and whether or not they have some relation to the religion, gender, state of residence, or some other characteristic of the plaintiff.

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[316] See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976)
[317] See *Ward v. Rock Against Racism*, *supra*.

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