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"Such Inferior Courts . . ."

Compliance by Circuits with Jurisprudential Regimes

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Through its rulings, the U.S. Supreme Court makes clear what the Constitution means and how best to interpret congressional statutes. But, because Supreme Court rulings do not implement themselves, the Court is dependent on compliance by lower courts to effectuate its policies. Using the concept of jurisprudential regimes developed by Richards and Kritzer in 2002 and specifically the Establishment Clause jurisprudential regime they identified in 2003, we evaluate the extent to which the U.S. Courts of Appeals faithfully implement the Supreme Court's policy in this area of law. We find that decision making by court of appeals panels is indeed structured by the Supreme Court's Establishment Clause jurisprudential regime, even when taking into account the policy preferences of court of appeals judges. Furthermore we find that this attentiveness to legal factors is not a function of circuit court judges' fear of reversal.

Keywords: *U.S. Courts of Appeals; judicial compliance; judicial decision making; jurisprudential regimes; Establishment Clause*

Through its rulings, the U.S. Supreme Court makes clear what the Constitution means and how best to interpret congressional statutes. However, despite its enunciation of what the Constitution requires or the meaning of federal statutes, Supreme Court policies do not automatically implement themselves; rather the Court relies on compliance by, inter alia, the lower federal courts in effectuating its policies. Scholars never tire of exploring judicial compliance because the matter is fraught with meaning for understanding the Court's role in American politics and society. If a

definitive meaning for constitutional dictates or statutory meaning were to be completely absent, the democracy would, in many ways, be crippled. An ineffectual Court—one that handed down rulings only to be ignored by inferior tribunals—would be singularly enfeebled in the administration of justice. Furthermore, if there were no meaningful authority attached to the Court's rulings, the Court would sit at a hollow apex and perform little more than a ceremonial role. As a consequence, studies of federal law (as well as Congress, the president, and the states) would wisely ignore its decisions. It behooves us, then, to ascertain the extent to which the Court is efficacious in terms of its written policy.

In this article, we advance an innovative test of the degree to which the Supreme Court influences decision making by one of its relevant audiences (Baum, 2006), the U.S. Courts of Appeals, that expressly considers the role played by law in judicial decision making. Using the Supreme Court's Establishment Clause jurisprudence, we seek to determine whether the jurisprudential regime adopted by the Court, as denoted by the decision in *Lemon v. Kurtzman*,[1] structures decision making in the circuit courts, thereby adapting Kritzer and Richards's concept of jurisprudential regimes for use in measuring and explaining compliance (Kritzer & Richards, 2003, 2005; Richards & Kritzer, 2002; Richards, Smith, & Kritzer, 2006). A jurisprudential regime is a device that

> structure[s] Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors (i.e., weighting the influences of various factors). Justices then apply regimes in subsequent pertinent cases. (Richards & Kritzer, 2002, p. 305)

Here, we provide evidence that the compliance of the circuit courts with the Supreme Court is a function of the circuits' conscious attempt to make

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the most "legally sound" decision. Where a jurisprudential regime exists, reliance on it by lower courts constitutes good evidence that they are trying to produce "legally sound" rulings. That is, that they are complying with the Supreme Court's jurisprudence in the given area of law.

Why Comply?

As a concept, compliance lends itself to myriad meanings. In its most extreme incarnation, compliance with a superior court by an inferior court requires strict adherence on the part of the latter with the legal dictates of the former, with any deviation considered noncompliance. Such a rigid definition of compliance, however, exsanguinates the concept of any practical value given the indeterminacy of precedent, which can make it difficult for even the most faithful and attentive lower court to determine what is required based on existing precedent. At the other extreme is compliance as a concept that merely requires that a lower court avoid overt defiance—that is, explicitly asserting that it is not abiding by the superior court's rulings—perhaps by characterizing a seemingly relevant precedent as inapplicable due to some distinguishing factor, no matter how small. This loose definition is equally lacking in utility because it makes virtually every lower court decision a compliant one. More useful is to think of compliance as a matter of congruence between the decision making of superior courts and that of inferior courts: "In the judicial hierarchy, 'congruence' implies that an appeals court and the Supreme Court decide a case the same way, given the facts in the case" (Songer, Segal, & Cameron, 1994, p. 675).[2] If the same factors that matter in the Supreme Court's decision-making process matter in the lower court's decision-making process, the lower court can be considered compliant.

This way of thinking about compliance is particularly attractive in the context of compliance on the part of the U.S. Courts of Appeals with the U.S. Supreme Court. The courts of appeals are deliberately regional in nature, as evidenced by their geographic organization. This is no mere artifact of history but reflects the tension between advocates of increased national power and those who favored the devolution of authority to the state and local level (Richardson & Vines, 1970, p. 27). Although these courts may seek to contribute to uniformity in federal law, "The task to which the courts of appeals have called themselves is that of making the national law *as applied to their geographical territories*" (*emphasis* added; Carrington, 1999, p. 517). That is, they attempt to balance uniformity with necessary regional adaptation, which is reflected (albeit imperfectly) in the

decisions they issue (Songer, Sheehan, & Haire, 2000, pp. 121-123). As a consequence, the demands of a rigid concept of compliance simply do not reflect either the historical context of the creation of the U.S. Courts of Appeals or the reality of their decision making on the ground.

When it comes to the relationship between the U.S. Courts of Appeals and the U.S. Supreme Court, the Court is in a precarious position vis-à-vis the tools at its disposal for inducing compliance. The Supreme Court has nothing to do with staffing the circuit court, whether in screening, selecting, or firing appeals court judges. Accordingly, the Court cannot create more favorable conditions for compliance by selecting like-minded individuals to serve on those lower court benches.[3] Further the Court is simply too overburdened to seriously monitor the actions of the lower courts over which it exercises final authority. Although it is true that the Supreme Court is entrusted with the power to overturn subordinate court decisions, because of the Court's limited docket relative to the volume of cases heard by and appealed from the lower courts, the probability that any randomly selected case will be reversed is minimal. Furthermore, lower courts may be unlikely to fear reversal, even though they do sometimes get "caught" (Baum, 1980; but see Haire, Lindquist, & Songer, 2003; Klein & Hume, 2003).

Given the Supreme Court's lack of strong enforcement powers and the inability to choose its subordinates in the judicial hierarchy, we might expect there to be high levels of noncompliance with Court decisions. However, the empirical evidence demonstrates that, despite the absence of the usual accoutrements used to secure lower courts' faithful execution of the Supreme Court's will, there is considerable compliance on the part of lower courts (Benesh, 2002; Benesh & Martinek, 2002; Martinek, 2000; Reddick, 1997; Songer & Haire, 1992; Songer, et al., 1994). Perhaps this level of compliance is explained by the fact that the U.S. Supreme Court is formally and constitutionally the superior judicial body. However, scholars still remain somewhat puzzled as to the reasons for compliance, given the lack of motivations to do so (Benesh, 2002). Why would a judge cast aside his or her most sincerely preferred outcome merely to echo what the Supreme Court has said on point?

The answer may be that, though judges do not shed their politics on donning the black robe, neither are they merely legislators in black robes (Shapiro, 1964, 1968). In other words, rendering legally sound rulings is important to federal court judges (Benesh, 2002; Hettinger, Lindquist, & Martinek, 2006; Howard, 1981; Klein, 2002). Even though all precedential rulings are not necessarily perceived to be legally sound, ceteris paribus, adherence to the precedents articulated by a legal superior (the Supreme

Court) assists in rendering legally sound rulings. Such compliance, reluctant or willing, also assists in maintaining consistency and coherence in the law—a goal to which at least some judges profess adherence (Klein, 2002). McClurg and Comparato (2004) describe this perspective as follows:

> Some proponents . . . suggest that higher and lower courts seek to coordinate their behavior in such a manner that it produces coherent application of the law. The primary mechanism for implementing this coordination is the standards and guidelines embedded in precedent, particularly that issued by the United States Supreme Court. The idea here is not that lower courts are unthinking automatons that always make decisions that mimic the Supreme Court's, but that lower courts try to behave in a manner consistent with those decisions. (p. 6)

Therefore, circuit court judges may be the Supreme Court's willing agents insofar as abiding by precedents assists them in achieving legally sound decisions.

This fusion of the legal and the political—the idea that judges both desire to get it right, legally speaking, and to enact their personal policy preferences—can be understood in terms of Shapiro's focus on "political jurisprudence" (1964, 1968). Shapiro argues that courts are both political and legal entities and that they ought to be understood as such. The persuasiveness of the scholarship demonstrating the importance of the political is undeniable (Cross & Tiller, 1998; Segal & Spaeth, 1993, 2002). But, as Richards and Kritzer (2002) note,

> Largely lost in these developments is the other half of Shapiro's concept: jurisprudence. Judges and justices are undoubtedly political, but are they also jurisprudential? Courts and judges are certainly part of the political world, but are they also part of a distinctive legal culture? [citations omitted]. (p. 305)

Perhaps lower courts define the law in terms of the regimes the Supreme Court has created. If this is so, even after controlling for coincident policy preferences, then we have evidence that compliance is legally driven via lower court respect for the law as the Court has articulated it and not driven solely by fear of reversal.

Jurisprudential Regimes

Interested in developing a more nuanced way to think about how the law might influence decision making on the Supreme Court, Richards and

Kritzer (2002) developed the notion of jurisprudential regimes (Kritzer & Richards, 2003, 2005; Richards et al., 2006). Richards and Kritzer were equally dissatisfied with the decision-making theory that portrayed the justices as mechanistically applying formulaic law (the legal model of Langdell) and the attitudinal model of decision making that saw the justices as deciding cases based solely on their personal policy preferences (Segal & Spaeth, 1993, 2002). Seeking a way between the Scylla of a mechanistic legal approach and the Charybdis of a reflexive attitudinal approach, Richards and Kritzer offered jurisprudential regimes as an alternative.

As noted earlier, by structuring decision making, the Court's opinions in cases that create a jurisprudential regime will enumerate the relevant factors, indicate how those factors should be weighted in future cases raising similar legal questions, and/or compute whether the sum of the factors in the present case exceeds some newly defined threshold value. This new calculus "reflect[s] core understandings of the bases on which cases should be decided, the interests or goals to which deference should be shown in situations of conflict, and the relevant roles of governmental institutions" (Richards & Kritzer, 2002, p. 307). In short, the jurisprudential regime is a newly-minted blueprint for deciding future cases within a delimited subject area.

Richards and Kritzer apply their notion of jurisprudential regimes in the areas of freedom of expression (2002), search and seizure (Kritzer & Richards, 2005), and the Establishment Clause (Kritzer & Richards, 2003).[4] They argue that these are apt areas of law to do so for a variety of reasons, including the fact that the attitudes of the justices might be expected to matter a great deal in each (and hence they serve as challenging tests of the jurisprudential regimes model). To identify potential jurisprudential regimes in these areas of law, Kritzer and Richards begin by identifying key precedents. This leads them to identify the relevant jurisprudential regimes as the principle of content-neutrality with regard to free speech,[5] the good faith exception in the area of search and seizure (per a series of cases during the Court's October 1983 term),[6] and the *Lemon* test[7] in Establishment Clause cases. After conducting an impressive set of statistical analyses on U.S. Supreme Court case factors, Richards and Kritzer (2002) conclude (in their article applying the jurisprudential regime concept to free speech decision making),

> the Supreme Court is not simply a small legislature. Law matters in Supreme Court decision making in ways that are specifically jurisprudential. Specifically, jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny the justices are to employ in assessing case factors. (p. 315)

They find similarly in the areas of the Establishment Clause (Kritzer & Richards, 2003) and search and seizure (Kritzer & Richards, 2005).

Although Richards and Kritzer have provided strong evidence that jurisprudential regimes matter for understanding the decision making of Supreme Court justices, we suggest that jurisprudential regimes may also be a useful tool for evaluating the influence of the Court on decisions of the federal courts of appeals. As Kritzer and Richards (2005) note, the justices may create these regimes "to provide guidance to other political actors and to themselves. The goal here is consistency, both for themselves and for other political actors" (p. 35). In fact, it may be that the utility of jurisprudential regimes for these external purposes exceeds that for the purposes of understanding Supreme Court decisions. The kinds of criticisms levied at Richards and Kritzer by attitudinalists—namely, that jurisprudential regimes are simply attitudinal constructs and, hence, provide no evidence of a distinctly legal approach to Supreme Court decision making (Segal & Spaeth, 2003, pp. 33-34)—do not apply when considering the influence of jurisprudential regimes instituted by the Supreme Court on the decision making of other courts. If law matters to the circuit courts, they will pay attention to Supreme Court decisions on point. If they do so in Establishment Clause cases, for example, they will consider the jurisprudential regime or set of case facts the Supreme Court continually highlights in nearly every Establishment Clause challenge—purpose, primary effect, and entanglement—as an instruction as to the *correct* way to apply the Constitution. They will use the Court's language in deciding cases in this area of law, considering as relevant the purpose of the legislation at issue, its primary effect, and the level to which it forces government to entangle itself with religion. If they rely on the factors from the regime that the Court seems to rely on in making decisions in similar cases, to a significant and substantial degree, even after controlling for their own attitudinal predispositions and their potential fear of reversal, they arguably must do so because that helps them to get their decision *right*. Compliance, then, in this context, involves considering those factors the Supreme Court deems relevant to the decision on whether to accommodate the intermingling of religion and government. We do not seek to test for the establishment of a Kritzer-Richards regime at the circuit court level; rather, we test compliance by the circuits with a regime established by the Supreme Court.

The Establishment Clause and the *Lemon* Regime

Cases involving the Establishment Clause of the First Amendment are useful in our present venture for several reasons. First, cases that challenge

mergers of religion and state action possess an ideological component sufficient to bring judges' personal policy preferences into the decision-making calculus (Kobylka, 1989; Wilcox, 1998). Indeed, empirical investigations have produced evidence of ideology's effect: conservatives are notably more accommodationist (that is, tolerant of commingled religious and government action) when it comes to state involvement in religion than are liberals (Kritzer & Richards, 2003). Given the demonstrated importance, to at least some extent, of personal values in decision making on the circuits (Benesh 2002; Hettinger et al., 2004, 2006), analyzing an area of law in which we expect raw attitudes to manifest some sort of influence provides an excellent means for comparing the relative utility of attitudinal versus legal (as in, jurisprudential regime) factors for understanding the decisions rendered.

Second, decisions made about the Establishment Clause directly affect a large number of people and generate significant public interest.[8] Most, if not all, people have some connection with the public school system or pay taxes to the government, thus raising the possibility that their tax money will be used to provide aid to religious groups. This salience of issue area ensures that decision making in this area of law on the circuits will not be as routine or "easy" as it is in other areas.

In addition, the *Lemon* case and its progeny appear to have motivated litigants to act on their Establishment Clause claims, prompting litigation that may not have been initiated without the Supreme Court's foray into this area. To wit, in the many years before *Lemon*, there were only nine circuit court decisions concerning the establishment of religion; after the *Lemon* decision, they became a relatively regular feature on the courts' docket, averaging around nine cases per year nationally.[9] In this area then, a reasonable speculation is that litigants were specifically seeking to capitalize on the decisions made by the Supreme Court. If this is the case, then understanding compliance in this context seems especially crucial.

Finally (and pragmatically), the Establishment Clause is one of the areas in which Kritzer and Richards have identified a significant jurisprudential regime.[10] Kritzer and Richards's (2003, pp. 828-831) *Lemon* regime is the basis on which we test our contention that Supreme Court regimes affect decision making on the courts of appeals.[11] According to Kritzer and Richards (2002), "The key to validating the existence of jurisprudential regimes is change by the Supreme Court in basic factors associated with decision making in a particular legal area" (p. 309). Relying on Ignagni (1994a, 1994b), Kritzer and Richards use a fact-based model to determine whether differences between pre-*Lemon* and post-*Lemon* decision making

exist on the Supreme Court. They find substantial support that they do. Among their results, they find that whether a challenged statute or practice had a secular purpose was irrelevant for understanding the Court's rulings pre-*Lemon,* as was whether a challenged statute or practice was neutral toward different religions, but that both were meaningful post-*Lemon* and meaningful as one would expect based on the *Lemon* decision. As further evidence in support of *Lemon* as a jurisprudential regime, Kritzer and Richards note that, although the fact that a law required government monitoring enhanced the likelihood of an accommodationist (conservative) outcome prior to *Lemon,* post-*Lemon* such a finding decreased that likelihood. Additionally, although the Court was more likely to issue an accommodationist (conservative) ruling if a challenged statute or practice involved a general government service and/or was supported by historical practice, in the post-*Lemon* era neither of these factors matter. In addition, variables that matter before *Lemon* (whether the aid being challenged is for a general government service and whether the law is supported by historical practice) no longer matter after *Lemon.*[12] This suggests, according to the authors, that law matters as a heuristic for decision making and that "jurisprudential regimes structure the decision-making process by establishing through law the parameters that justices, and other actors, should take into account in deciding cases" (Kritzer & Richards, 2003, p. 839; Table 1 summarizes their key findings.)

Indeed, *Lemon* represented the synthesis of a string of cases dealing with the Establishment Clause[13] resulting in the "*Lemon* test," which set out three criteria (or prongs) to be used in the evaluation of challenges to statutes or governmental practices, each derivative of the Court's earlier work on point. First, *Lemon* requires that the statute or practice in question have a secular purpose. Second, it prohibits the statute or practice from either advancing or inhibiting religion as its principal or primary effect. And, third, it prohibits the statute or practice from fostering an excessive entanglement between church and state.[14] The lower courts are expected to use this tripartite test (if they are compliant), all three prongs of which must be satisfied, to assess the validity of government actions challenged on Establishment Clause grounds.

We seek to determine whether this *Lemon* regime did in fact structure decision making in the U.S. Courts of Appeals. If so, then we have evidence of one means by which the law matters for the U.S. Courts of Appeals, as well as evidence of a legal motivation for compliance.

Table 1
Summary of Kritzer and Richards's Findings for U.S. Supreme Court Decision Making Under the *Lemon* Regime

Case Characteristic	Post-*Lemon*
No secular purpose	Accommodationist outcome *less* likely
Neutral toward different religions	Accommodationist outcome *more* likely
Government monitoring required	Accommodationist outcome *less* likely
General government service involved	No effect
Aid to colleges/universities involved	No effect
Supported by historical practice	No effect

Hypotheses, Data, and Measures

Using all cases raising a challenge based on the Establishment Clause decided by the U.S. Courts of Appeals from 1972 to 1999, we seek to determine whether the *Lemon* regime structures decision making on the circuit courts.[15] We suggest, in applying the jurisprudential regimes concept to the measurement of circuit court compliance, that those variables that matter to the Supreme Court once the *Lemon* regime is established should also matter for circuit court decisions with regard to the Establishment Clause cases that come after the *Lemon* ruling and, further, that those that do not matter to the Supreme Court post-*Lemon* should be similarly irrelevant to the circuit courts. Though evaluating compliance in the sense of a change in a lower court's decision making after the Supreme Court has established a new regime (i.e., responsiveness) is a valuable exercise,[16] we note that our purpose here is to evaluate compliance via congruence and, to that end, the period we examine includes cases from the advent of *Lemon* to *Mitchell v. Helms*, a definitive case in the Court's movement away from (if not explicit overruling of) *Lemon* (see Note 10 for further discussion).

In the context of our analysis, we specifically advance the following hypotheses:

Hypothesis 1: When the challenged practice or law is *not* found to have a secular purpose, the likelihood of an accommodationist (conservative) outcome will be *diminished.*

Hypothesis 2: When the challenged practice or law is found to be *neutral* toward different religions, the likelihood of an accommodationist (conservative) outcome will be *enhanced.*

Hypothesis 3: When the challenged practice or law involves government *monitoring* or surveillance, the likelihood of an accommodationist (conservative) outcome will be *diminished.*

In light of Kritzer and Richards's finding that whether a challenged practice or law involved the provision of a general government service does not manifest an effect in Supreme Court decision making post-*Lemon*, we have no expectation that it will matter for court of appeals decision making either. Likewise with regard to whether the challenged practice or law involves aid to colleges or universities (as opposed to elementary schools) or is supported by historical practice.

As has been amply demonstrated in the extant literature on decision making in the U.S. Courts of Appeals (e.g., Benesh, 2002; Goldman, 1966, 1975; Hettinger, et al., 2004, 2006; Reddick, 1997; Songer, 1982; Songer & Davis, 1990; Songer & Haire, 1992), the preferences of court of appeals judges are likely to matter as well as any jurisprudential regime established by the Supreme Court (assuming the attitudinalists are correct). Pursuant to past research, then, we hypothesize as follows:

Hypothesis 4: The more *conservative* the court of appeals panel, the *greater* the likelihood of an accommodationist (conservative) outcome.

To operationalize our concepts, we rely on the coding scheme developed by Luse (2005) in her study of Establishment Clause cases involving schools, the rubric used in Ignagni's (1994a, 1994b) study of Supreme Court decisions in Establishment Clause cases, and Kritzer and Richards's (2003) development of the Establishment Clause jurisprudential regime. To test circuit court compliance with the Supreme Court in this area of law, we coded cases for a variety of factors as detailed below.

The unit of analysis is the decision reached by the U.S. Courts of Appeals panel. We argue that compliance is an institutional feature; that is, *panels* comply or do not comply. Individual judges, while voting either in line with the Supreme Court or against it, are not directly relevant to the compliance question, due to their inability to singularly set policy. Although we see analysis of individual-level votes in this area as a potentially fruitful line of inquiry (i.e,, are individual judges differentially influenced by the decisions of the Supreme Court?),[17] we think the institutional focus we take here speaks more broadly to questions pertaining to interinstitutional relations.

The dependent variable reflects whether the decision of the panel favored the accommodation of religion (a conservative outcome) or church/state separation (a liberal outcome); that is, either the court decides that there has been a violation of the Establishment Clause (liberal) or there has not been such a violation (conservative; Ignagni 1994a, 1994b). The variable is coded as "1" when the decision promotes a conservative outcome,

which allows for the intermingling of church and state and "0" when the decision takes a liberal stance, which supports the separation of church and state. Some examples of cases that would be coded as accommodationist (conservative) would be cases affirming the loaning of nonreligious textbooks used in the public schools to students in parochial schools, providing public school bus transportation to parochial school, allowing the erection of a 10-foot cross on a public square adjoined to a state Capitol Building, permitting the erection of a crèche on public property that also contains nonsecular holiday objects such as reindeer and a Santa Clause, providing tax exemptions to religious institutions for real property, granting exemptions to religious institutions for Title VII practices, holding prayers before the beginning of a legislative session, and recognizing holidays such as Thanksgiving and Christmas as national holidays.

Of course, not all of the Court's Establishment Clause decisions have permitted religious accommodation. Examples of cases that would be coded as liberal or as favoring the separation of church and state, include preventing a nondenominational prayer before a graduation ceremony, prohibiting a moment of silence for meditation or prayer before school, forbidding student-led prayer before a high school football game, and striking down a law that demands that creationism be taught whenever evolution is also taught.

In sum, the Court's rulings in the Establishment Clause cases are conventionally characterized as either accommodationist or separationist. On the standard liberal–conservative ideological dimension, the former correspond to conservative outcomes whereas the latter correspond to liberal outcomes.

To evaluate the utility of the *Lemon* jurisprudential regime in understanding decision making in the courts of appeals, we began by coding those case facts that correspond to elements of the *Lemon* test. There is more than one basis for coding case facts. In our case, we rely on whether the lower court expressly mentioned the categorical criteria identified in the *Lemon* regime (e.g., whether the court engaged in an analysis of the law's purpose; whether the court discussed the need for government surveillance). As previously noted, our theory predicts that lower courts will be cognizant of the facts that the Supreme Court has identified as important to its Establishment Clause jurisprudential regime. Whether there exists, for example, an objectively secular purpose is immaterial for our purposes. We seek only to assess whether the lower court adopts the same analytic framework as the Supreme Court by paying attention to the criteria identified by the Court. This approach avoids the necessity of an independent (and hence subjective and perhaps even intractable) indicator of the presence of relevant facts.[18]

To code for the presence of these facts, we employ the use of a pair of dummy variables for each fact; one taking into account the fact that the lower court noted the *presence* of a given fact, and the other taking into account the fact that the lower court noted the *absence* of a given fact. We chose to use this coding scheme in order to be able to measure not only the presence of a certain fact, but also to measure the effect of a fact when it is mentioned as not being present in a case. Indeed, the latter set of dummies allows us to continue to consider compliance with regimes even when the case facing the lower court has none of the attributes noted by the Supreme Court; if they mention their absence in furtherance of explaining their decision, this suggests that they are indeed considering the Supreme Court's guidance on what ought be considered in these cases.

That said, we coded for the *Lemon* test (purpose, primary effect, government entanglement), as well as level of educational institution, history, and general governmental service, consistent with Kritzer and Richards (2003) and other studies of Establishment Clause jurisprudence at the U.S. Supreme Court level (Ignagni 1994a, 1994b). *Secular purpose* is coded "1" if the U.S. Court of Appeals decision indicated that the law or practice in question had a secular purpose, "0" otherwise. *Lack of secular purpose* is coded "1" when the circuit noted the lack of a secular purpose, "0" otherwise. *Neutral* is coded "1" when the U.S. Court of Appeals decision indicated that the law or practice in question was neutral toward different religions (i.e., it did not have the effect of advancing or promoting one religion over another), "0" otherwise. *Not neutral* is coded "1" when the circuit mentions that the legislation was not neutral (i.e., it promoted a religion), "0" otherwise. *Entanglement* is coded "1" if a challenged statute or practice required governmental surveillance,[19] "0" otherwise. *No entanglement* is coded "1" if the circuit mentioned that no substantial or extensive governmental surveillance was necessary, "0" otherwise. *Higher education* is coded "1" when the court of appeals mentions that the aid or practice at issue concerns an institution of higher education, "0" otherwise. *Elementary education* is coded "1" when the circuit mentions that the aid or practice concerns elementary or secondary schools, "0" otherwise. *General government service* is coded "1" when there is one at issue,[20] "0" otherwise. *No general service* is coded "1" when the circuit mentions that the service was not a general governmental one, "0" otherwise. Finally, *historical practice* is coded "1" when the circuit court mentions that the law or practice is consistent with historical practice, "0" otherwise, and *not historical* is coded "1" when the circuit mentions it is not, "0" otherwise.

To measure the ideology of judges rendering court of appeals decisions on panels, we employ the measure developed by Giles, Hettinger, and

Peppers (2002). In recognition of the fact that selecting judges for the circuit court bench requires joint action on the part of the president and the Senate and the special influence of home-state senators in that process,[21] Giles and his colleagues drew on the prior work of Poole (1998) in which he derived ideology scores for members of Congress (including senators) and presidents that are comparable with one another. Using these scores, Giles et al. (2002) derived ideology scores for circuit court judges that take on the NOMINATE score of the president when there are no home state senators of the president's party at the time the nomination is made, the NOMINATE score of the home state senator when there is one such senator of the president's party at the time the nomination is made, and the average of both home state senators' scores when there are two such senators of the president's party at the time the nomination is made. The resulting scores are scaled such that negative values are liberal (with larger negative values indicating more liberal judges) and positive values are conservative (with larger positive values indicating more conservative judges). For our analysis, we use *median ideology*, which is the median Giles–Hettinger–Peppers (GHP) ideology score for those judges in the majority participating in each case and use it as the measure of the aggregated preferences of the decision-making panel.[22]

To determine whether fear of reversal helps explain circuit attempts to comply with the Supreme Court, we include *Supreme Court ideology*, based on Epstein, Martin, Segal, and Westerlands's (2007), "Judicial Common Space" scores.[23] In particular, we include the median ideology score among the members of the Supreme Court at the time of each court of appeals decision. This measure is on the same metric as the GHP scores, with larger negative values indicating a more liberal ideology and larger positive values indicating a more conservative ideology.

We also include *mean circuit ideology*, to take into account the likelihood that circuit court panels think of the circuit as a whole and as a principal as well. Circuit court panels not only must follow the dictates of the Supreme Court when making decisions, but also their own circuit court because it is possible that their cases could be reheard *en banc*.[24] It is possible that judges who are in the majority on a particular panel view the possibility of being reviewed *en banc* in the same way as they view being reviewed by the Supreme Court (Hettinger et al., 2006). Research examining *en banc* review by the circuit courts indicates that circuit court judges strategically anticipate whether or not the full circuit will review their

decisions *en banc* (Giles, Hettinger, Peppers, & Zorn, 2006), in order, presumably, to avoid being reversed or perhaps merely to maintain the consistency of circuit law. We take into account this possibility by including the mean ideology of the circuit court as a whole. This variable is measured using the GHP scores and is simply the mean of the ideology scores for all active judges on each circuit for each year.[25]

Before proceeding to estimate our model, there is one important control variable to take into account. The U.S. Courts of Appeals overwhelmingly affirm lower court decisions (see, e.g., Hettinger et al., 2006; Howard, 1973; Songer et al., 2000). This is not surprising given that they possess mandatory jurisdiction (i.e., they must hear all cases properly before them). Certainly, each appeal is important to the individual litigants, but only a select few appeals that are filed with the U.S. Courts of Appeals raise issues that have broad social, political, or legal importance. In short, many are routine in nature and have straightforward dispositions. In addition, legal norms imply deference to the trial courts. Accordingly, ceteris paribus, a panel decision is more likely to be an accommodationist (conservative) one if the decision of the lower court (for example, the U.S. District Court) was also accommodationist (conservative). We control for this in the models discussed below by including a variable for the nature of the *lower court decision*, coded as "1" if the lower court ruling was accommodationist (conservative) and "0" if, alternatively, the lower court ruling was separationist (liberal).

Table 2 reports relevant summary statistics for the complete set of variables included in the analyses that follow. Over the period under study—1972 to 1999—the U.S. Courts of Appeals decided 249 Establishment Clause cases. Only a very few were decided in any given year immediately subsequent to *Lemon* but, after a spike of 22 cases decided in 1980, the number of cases per year has averaged between 11 and 12 throughout the 1980s and 1990s, as can be seen in Figure 1. Overall, 60% of the court of appeals cases have been decided in an accommodationist fashion (that is, in a conservative direction). As Figure 2 illustrates, however, there is considerable fluctuation from year to year in terms of the percentage of accommodationist (as opposed to separationist) outcomes. The average number of Establishment Clause cases per circuit over the 1972 to 1999 period is roughly 21 but, as depicted in Figure 3, the distribution is by no means equal across circuits. Whereas the U.S. Court of Appeals for the District of Columbia handled a mere 7 such cases, 3 circuits (the 7th, 8th, and 9th) handled more than 30 cases.

Table 2
Summary Statistics

Case Characteristic	Mean	Mode	*SD*	Minimum	Maximum
Accommodationist outcome	0.602	1	0.490	0	1
Secular purpose present	0.566	1	0.497	0	1
No secular purpose present	0.133	0	0.340	0	1
Neutral toward religion present	0.518	1	0.501	0	1
Not neutral toward religion present	0.269	0	0.444	0	1
Government monitoring present	0.193	0	0.395	0	1
No government monitoring present	0.438	0	0.497	0	1
General government service present	0.028	0	0.166	0	1
No general government service present	0.060	0	0.238	0	1
Aid to colleges/universities present	0.044	0	0.206	0	1
Aid to elementary/secondary schools present	0.365	0	0.483	0	1
Historical practice present	0.008	0	0.089	0	1
No historical practice present	0.020	0	0.141	0	1
Median panel ideology	–0.026	—	0.292	–0.573	0.568
Mean circuit ideology	0.094	—	0.069	0.000	0.345
Median Supreme Court ideology	0.071	—	0.090	–0.105	0.021
Accommodationist ruling in lower court	0.560	1	0.497	0	1

Note: *SD* = standard deviation.

Figure 1
U.S. Court of Appeals Establishment Clause Cases by Year, 1972-1999

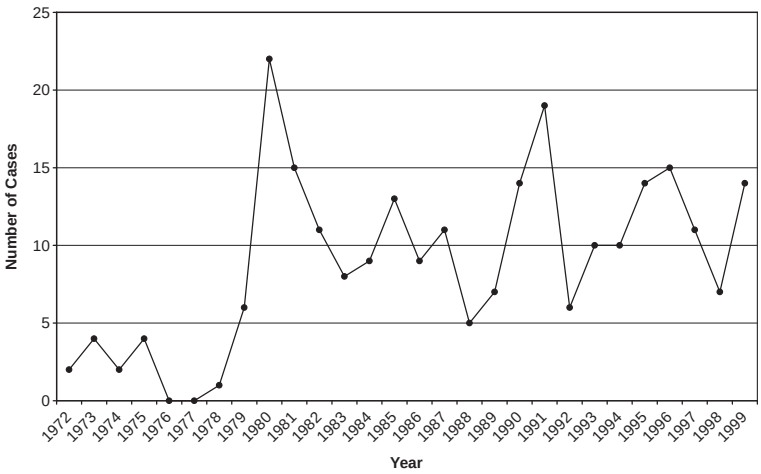


Figure 2
U.S. Court of Appeals Establishment Clause Cases by Outcome, 1972-1999

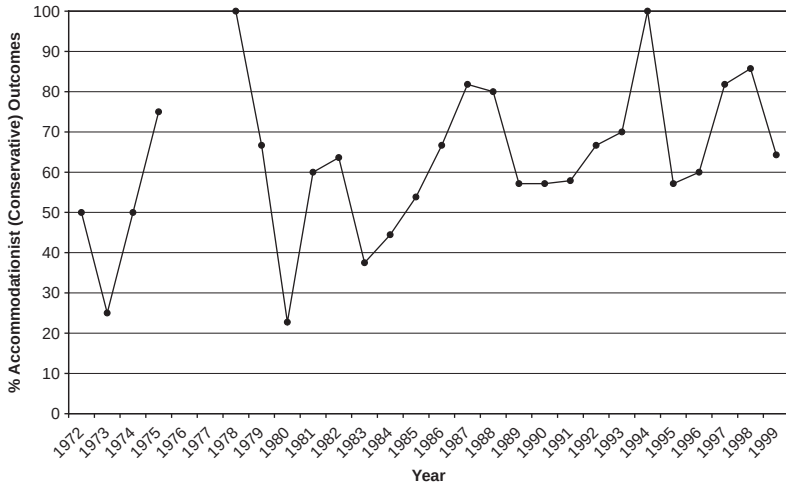
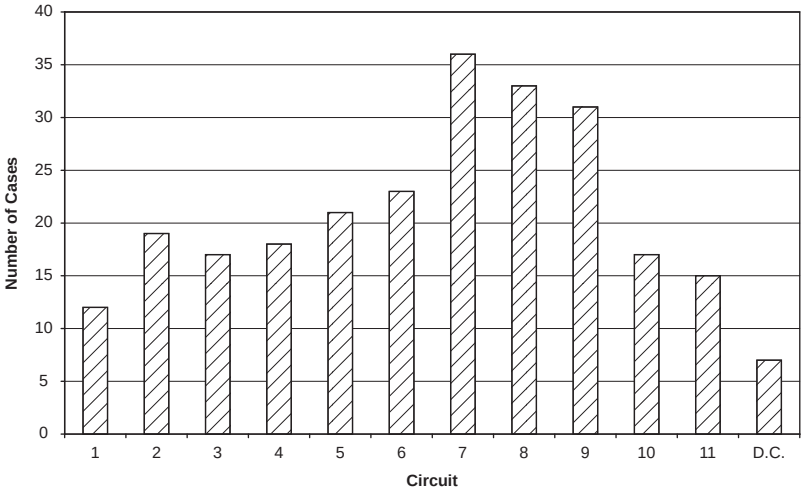


Figure 3
U.S. Court of Appeals Establishment Clause Cases by Circuit, 1972-1999



Circuit Decision Making in Establishment Clause Cases

As noted earlier, our unit of analysis is the court of appeals decision, given that we are interested in compliance in the institutional sense (that is, are the U.S. Courts of Appeals *qua* courts influenced by the decisions of the U.S. Supreme Court?).

Table 3 reports the results of three models: one in which the case outcome is modeled as a function of relevant case facts (including those that represent the elements of the *Lemon* test) and the lower court decision only (Model 1); one in which the case outcome is modeled as a function of ideology and the lower court decision only (Model 2); and, one in which the case outcome is modeled as a function of case facts, ideology, and the lower court decision (Model 3). Given that our dependent variable is dichotomous in nature, we opted to estimate our model using logit (Aldrich & Nelson, 1984). Recall that our dependent variable is whether the court opinion was accommodationist/conservative (coded "1") in nature or separationist/liberal in nature (coded "0"). Accordingly, a positive parameter estimate indicates that the variable is associated with a greater likelihood of an accommodationist (conservative) outcome whereas a negative parameter estimate indicates that a variable is associated with a greater likelihood of a separationist (liberal) outcome (i.e., a lesser likelihood of an accommodationist outcome).

The key set of findings reported in Model 1 is that each component of the *Lemon* test matters and matters as the U.S. Supreme Court's ruling in *Lemon* suggests it should. In fact, in the absence of a secular purpose, the lower court never votes to accommodate.[26] Likewise, the likelihood of an accommodationist (conservative) outcome is diminished when government monitoring is required whereas that likelihood is enhanced when the challenged statute or practice is found to be neutral toward different religions. The absence of entanglement enhances the likelihood of a conservative vote and the absence of neutrality diminishes it. This is consistent both with the Supreme Court's ruling in *Lemon* and post-*Lemon* decision making by the High Court. Also, as found by Kritzer and Richards (2003), whether a challenged statute or practice involves a general government service or whether the legislation is supported by historical practice does not matter at all.[27]

One important difference emerges between the results reported by Kritzer and Richards (2003) with regard to the Establishment Clause decision making on the Supreme Court in the post-*Lemon* era and the results reported here for decision making by the courts of appeals. First, recall that Kritzer and Richards (2003) reported that whether a case involved aid to colleges or universities made an accommodationist outcome more likely

Table 3
Decision Making of the U.S. Courts of Appeals in Establishment Clause Cases[a]

Variable	Model 1[b]	Model 2	Model 3
Lack of secular purpose (–)	Predicts failure perfectly	—	Predicts failure perfectly
Secular purpose (+)	–0.351	—	–0.783
	(0.823)		(0.905)
Neutral (+)	2.572	—	3.083
	(0.965)***		(1.074)***
Not neutral (–)	–5.247	—	–5.176
	(1.519)***		(1.594)***
Entanglement (–)	–3.857	—	–3.597
	(1.247)***		(1.284) ***
No entanglement (+)	3.365	—	3.600
	(1.145)***		(1.180)***
General government service (0)	0.697	—	1.753
	(2.761)		(3.011)
No general service (0)	0.774	—	1.287
	(2.330)		(2.755)
Higher education (0)	8.067	—	8.494
	(2.635) ***		(2.819)***
Elementary education (0)	–0.845	—	–1.278
	(0.917)		(0.979)
Historical practice (0)	Predicts success perfectly	—	Predicts success perfectly
Not historical (0)	Predicts success perfectly	—	Predicts success perfectly
Median ideology (+)	—	1.588	2.322
		(0.501)***	(1.368)**
Lower court decision (+)	2.170	1.453	2.375
	(0.738)***	(0.284)***	(0.782)***
Intercept	–0.716	–0.278	–0.932
	(0.621)	(0.199)	(0.650)
Log likelihood	–30.768	–147.348	–29.231
LR χ^2	199.80***	38.12***	202.87***
Pseudo R^2	0.765	0.115	0.776
Correctly predicted	95.28%	69.35%	94.18%
ROC	0.983	0.722	0.987
N	212	248	212

Note: LR = likelihood ratio; ROC = receiver operating characteristic.
a. Dependent variable: Accommodationist (conservative) outcome = 1, Separationist (liberal) outcome = 0.
b. Standard error in parentheses
*$p < .10$, **$p < .05$, ***$p < .01$; all tests one-tailed when expectation noted, two-tailed otherwise.

prior to *Lemon* but did not matter in the post-*Lemon* era. In contrast, we find that the level of educational institution involved in a court of appeals case does matter, with an accommodationist outcome more likely, when the aid in question is to a college or university. Although this suggests a certain level of noncompliance with Supreme Court decision making, it is of an interesting type: the lower courts continue to apply a rule the Supreme Court once favored but no longer considers. Because the Supreme Court did not overturn this rule, though, it hardly seems problematic that the lower courts continue to differentiate between aid to elementary and secondary educational institutions and aid to colleges or universities (though when the court specifically notes that the aid is to elementary or secondary schools, that fact is not significant, though correctly signed).

As to the lower court ruling, an accommodationist outcome in the lower court is associated with a higher likelihood of an accommodationist outcome in the U.S. Courts of Appeals. This outcome, which was anticipated, is unsurprising given the mandatory dockets of the courts of appeals.

Turning to Model 2, which considers panel ideology and the lower court ruling only, we find that ideology does matter, with more conservative panels more likely to render accommodationist outcomes.[28] And, as expected, a lower court accommodationist ruling makes a court of appeals accommodationist (conservative) ruling more likely. Of particular interest, however, is the relative utility of the case-fact-only (Model 1) and ideology-only (Model 2) models. On several measures of goodness of fit, the former considerably outperforms the latter. Whereas the pseudo R^2 associated with Model 1 is a respectable 0.765, the pseudo R^2 associated with Model 2 is a paltry 0.115. Furthermore, the receiver operating characteristic (ROC) associated with the case-fact-only model is a very impressive 0.983 compared with 0.722 for that associated with the ideology-only model.[29] This is intriguing in that it speaks to the efficacy of attitudinal factors relative to legal factors in structuring decision making in the U.S. Courts of Appeals. As Spaeth, one of the two most prominent contemporary attitudinal theorists, has observed, "Lower courts do operate in an environment distinctly different from that of the Supreme Court. These differences may cause lower-court judges to decide on bases other than their personal policy preferences" (1995, p. 313). To wit, although the U.S. Courts of Appeals are constitutionally subordinate to the Supreme Court and subject to its supervision, the latter occupies the apex of the judicial hierarchy and is subject to no such supervision by a higher court. Accordingly, the fact that the U.S. Court of Appeals decisions are better predicted by the legal factors

deriving from *Lemon* and otherwise relevant cases in the context of the Establishment Clause than by the attitudes of the appeals court jurists involved in making those judgments, should come as no surprise.

Of course, a better means of evaluating the relative utility of fact-versus ideology-based measures is to allow them to compete for influence in the same model. Model 3 reported in Table 3 is just such a model.[30] With regard to the case factors representing the three prongs of *Lemon*, the results in the integrated model are virtually the same as in the model of case facts only. The lack of secular purpose again predicts accommodationist outcomes perfectly, and the necessity for governmental monitoring depresses the likelihood of an accommodationist outcome. Religious neutrality enhances that likelihood when it is present and depresses it when it is not. With regard to the non-*Lemon* case facts, if the aid is to an educational institution of higher learning, it is more likely to be upheld, although neither historical tradition nor government service matters to the outcome. Ideology continues to matter, though it is less significant, once case facts are introduced.

However, we still have not, with this analysis, answered the question, "why comply?" Table 4 documents our further attempts to do so. Arguably, the main rival explanation that competes with our hypothesis that circuit courts comply with the Supreme Court because they wish to make sound legal decisions is fear of reversal on the part of court of appeals jurists. To explore this explanation, we elaborate on our integrated model by adding the measure of the Supreme Court policy preferences and a measure of circuit overall ideology, each defined earlier.

If court of appeals jurists are, in fact, leery of reversal by the Supreme Court or the circuit *en banc*, then they should be attentive to the ideological preferences of both and, as a consequence, the more conservative the Supreme Court, the more likely we should be able to see conservative (i.e., accommodationist) rulings in the court of appeals; the more conservative the circuit as a whole, the more likely any given panel will be to decide the case conservatively (in an accommodationist fashion). As reported in Model 4 in Table 4, however, there is no discernible evidence that the ideological predisposition of the Supreme Court or the circuit as a whole influences the lower court in its decisions in Establishment Clause cases. In short, fear of reversal receives scant empirical evidence, at least in the case of the Establishment Clause. On the other hand, the pattern of effects with regard to the legal factors, especially the prongs of the *Lemon* test, remains consistent with Model 3 in Table 3. The effect of court of appeals ideology likewise remains consistent with those reported in Model 3.

Table 4
Compliance as a Function of Reversal Avoidance[a]

Variable	Model 4
Lack of secular purpose (–)	Predicts failure perfectly
Secular purpose (+)	–1.174
	(1.002)
Neutral (+)	3.558
	(1.274)***
Not neutral (–)	–4.920
	(1.586)***
Entanglement (–)	–3.919
	(1.365)***
No entanglement (+)	3.734
	(1.211)***
General government service (0)	1.478
	(3.794)
No general service (0)	1.106
	(2.558)
Higher education (0)	8.149
	(2.538)***
Elementary education (0)	–1.617
	(1.086)
Historical practice (0)	Predicts success perfectly
Not historical (0)	Predicts success perfectly
Median ideology (+)	2.656
	(1.472)**
Lower court decision (+)	2.543
	(0.839) ***
Mean circuit ideology (+)	–0.078
	(6.442)
Supreme Court ideology (+)	–7.024
	(5.337)
Intercept	–0.223
	(1.121)
Log likelihood	–28.227
LR χ^2	204.88
Pseudo R^2	0.784
Correctly predicted	95.28%
ROC	0.987
N	212

Note: LR = likelihood ratio; ROC = receiver operating characteristic.
a. Dependent variable: Accommodationist (conservative) outcome = 1; Separationist (liberal) outcome = 0.
b. Standard error in parentheses.
*$p < 0.10$, **$p < .05$, ***$p < .01$.

Conclusions and Directions for Future Research

Compliance on the part of lower courts, with the dictates of the Supreme Court, is of perennial interest to academics, legal observers, political commentators, and even (at times) the public because the normative and practical implications are so important. Adherence on the part of lower courts to the dictates of the Supreme Court fosters uniformity in terms of the meaning and scope of the Constitution, contributes to stability in the legal system, and provides a framework on which both public officials and citizens can rely when making decisions. The study of compliance also affords students of judicial behavior an opportunity to contribute to the ongoing scholarly debate about the relative contributions of attitudes and legal factors in judicial decision making,[31] because surely the precedents articulated by the Supreme Court are appropriately considered legal factors for decision making by lower court judges.

In this regard, adapting the concept of jurisprudential regimes developed by Richards and Kritzer (2002) is especially well suited to this task. As they note, "The jurisprudential regime approach . . . provides a new empirical method for assessing whether law matters. To date, researchers have had difficulty finding statistical support for legal models, due in part to a focus on law as mechanistically dictating outcomes" (p. 316). Though Richards and Kritzer were specifically concerned with and writing about the influence of legal factors on decision making by the Supreme Court, their point about the difficulty associated with conceptualizing law as a mechanistic (i.e., deterministic) process is equally apropos of decision making in the courts of appeals. Assessing whether a particular Supreme Court ruling influences court of appeals decision making requires determining whether components of a relevant precedent structure circuit court decisions by making particular outcomes more or less likely, consistent with those components. This is what we have done here.

We take the fact that the U.S. Courts of Appeals do pay heed to the criteria established by *Lemon* when deciding Establishment Clause cases as evidence that compliance is driven in a meaningful way by legal factors (a legal desire to "get it right"), though some role for the ideology of lower court judges remains. In contrast, however, the fact that neither the ideological preferences of the Supreme Court nor the ideological preferences of the circuit manifest influence on court of appeals decision making suggests that compliance is not a function of lower court judges' worries about reversal by a higher court. In some ways, this may not be considered to be a remarkable (non)finding. Elevation is unlikely for any particular court of appeals jurist given the total number of court of appeals judges and the

small size of and membership stability on the Supreme Court bench, and so, it would not be entirely rational for judges to worry over the damage high reversal rates might do to their chances of elevation (Hettinger et al., 2006, pp. 23-24). Reversal, however, remains associated with reputational costs that court of appeals judges are unlikely to welcome. In particular, judges may "fear that their professional audience, including colleagues, practitioners, and scholars, will disrespect their legal judgments or abilities" (Caminker, 1994, p. 77).[32] Regardless, the evidence we offer here is not consistent with fear of reversal as a motivating factor (at least if we equate the consideration of higher court ideology with the likelihood of reversal), perhaps due to its extreme rarity.

We think the approach we have taken here is a useful and interesting direction to take the compliance literature, which has not experienced a major innovation in some time.[33] Two obvious steps in further developing this application of the jurisprudential regimes concepts and assessing its utility for understanding compliance are, one, to consider the effect of other established jurisprudential regimes (for example, free speech, search and seizure) and, two, to evaluate the behavior of other courts (for example, state courts of last resort). Clearly, doing one or the other (and preferably both) would do much to enhance the generalizability of the findings we report here. If, as Richards and Kritzer (2002) note, not "all substantive policy areas are necessarily suitable [for the development of a jurisprudential regime] because a given policy area may raise very different legal or jurisprudential concerns" (p. 316), then it is also unreasonable to assume that jurisprudential regimes will be uniformly efficacious across issue areas in terms of structuring lower court decision making. But, where other well-established jurisprudential regimes do exist, it will undoubtedly prove useful to investigate the extent to which they are as influential in securing lower court compliance as the jurisprudential regime established by the Supreme Court in *Lemon.* Indeed, we expect them to be even more determinative given the Court's retreat from its *Lemon* regime over time.

Perhaps even more attractive is the notion of examining to what extent jurisprudential regimes established by the nation's highest court influence decision making by the states' high courts. The particular desirability of this proposed line of inquiry stems from the institutional and contextual variation associated with state courts of last resort. As Hall and Brace (1999) have observed,

> Within state supreme courts are individual decision makers with highly diverse backgrounds, experiences, and values . . . State supreme courts also present a wide array of institutional features and configurations, both in terms of structures and in terms of external and internal rules and procedures. [And]

> . . . the American states, the environments within which state supreme courts operate, are diverse politically, economically, and culturally. Therefore, within the context of state supreme courts, the influence of all major forces on judicial politics and behavior identified to date can be evaluated comparatively. (pp. 292-293)

An extensive literature has amply demonstrated how this panoply of variation among the states matters for understanding decision making in their high courts.[34] Aspects of that variation may well condition the influence of a Supreme Court jurisprudential regime on decision making by state courts of last resort, too. To take but one example, variation in the method by which state supreme court jurists are retained in office may compromise their fidelity to the legal dictates of the U.S. Supreme Court if those dictates are in conflict with the preferences of those who make the decision regarding their retention (i.e., voters in the case of retention via popular election, governors, and/or legislators in the case of retention via appointment). Existing work by Brace and Hall (1997; Hall & Brace, 1996) is informative but not definitive on this point, making the use of the jurisprudential regime approach to assessing compliance we use here all the more inviting.

Notes

1. 403 U.S. 602 (1971).

2. Compliance can also be profitably considered in terms of responsiveness, which is "the degree to which agents change their behavior as the desires of principals change" (Songer, Segal, & Cameron, 1994, p. 674). Due to data limitations discussed below (see Note 9), we are unable to test for this type of compliance on the part of the U.S. Courts of Appeals in the area of Establishment Clause jurisprudence.

3. In the language of principal-agent theory, which some have used to excellent effect to conceptualize this relationship (e.g., Benesh, 2002; Benesh & Martinek, 2002; Brent, 1999, 2003; Songer, Segal, & Cameron, 1994), the Supreme Court faces an extreme form of "adverse selection."

4. With an additional coauthor, Richards and Kritzer also apply this concept to deference to administrative agencies (Richards, Smith, & Kritzer, 2006).

5. Per the companion cases *Chicago Police Department v. Mosley*, 408 U.S. 92 (1972), and *Grayned v. Rockford*, 408 U.S. 104 (1972).

6. The cases include *Illinois v. Gates*, 462 U.S. 213 (1983); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *United States v. Leon*, 468 U.S. 902 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Nix v. Williams* 467 U.S. 431 (1984); and *Segura v. United States*, 468 U.S. 796 (1984).

7. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

8. The public furor attendant with the recent refusal of Alabama Supreme Court Chief Justice Roy Moore to comply with orders issued by federal courts to remove a monument of the Ten Commandments from the state judicial building illustrates this perfectly (Hart, 2004; Hoffman, 2004).

9. Before *Lemon*, according to our searches, which included searching Lexis-Nexis using the search term "establishment clause," followed by a search in West's Decennial Digest under the West key "constitutional law" then under "religious liberty" and "freedom of conscience," along with a subsequent search on Westlaw Campus using the following search language: 92K84 /P Establishment-Clause (Establish! +3 Clause Religion), there were only 9 circuit cases total; after *Lemon* was decided and through our cutoff date of 1999, there were 249 cases. Hence, although it would be valuable to compare decision making by the courts of appeals before and after *Lemon* to evaluate the extent to which the courts of appeals *change* their decision making proclivities in light of U.S. Supreme Court rulings, the circuit courts simply were not deciding cases in this area of the law very often until after the Supreme Court's landmark decision in *Lemon.* Therefore, our focus here is on conformance on the part of the circuit courts with Supreme Court precedent and we leave to another study of another issue area the interesting task of determining the extent to which the lower court changes its behavior in response to a major change from the Supreme Court.

10. The Supreme Court's Establishment Clause jurisprudence has, in more recent times, come under fire from sitting justices who believe the *Lemon* test to be unworkable. Stone, Seidmen, Sunstein, Tushnet, and Karlan (2005) comment, "The so-called *Lemon* test has not been formally repudiated by the Supreme Court. [However, a] majority of the justices sitting in 2005 have criticized it, and it has not been relied on by a majority to invalidate any practice since 1985" (p. 1501). The justices' criticism of *Lemon* casts doubt on the degree to which the Court presently follows its *Lemon*-derived jurisprudential regime. Doubts over the *Lemon* test might have implications for the Supreme Court's compliance with its own previous rulings. If the Court is eschewing *Lemon,* then we might expect a new jurisprudential regime to develop once a majority forms around a new standard. Because we are not, for present purposes, concerned with the Court's compliance with its own regimes, *Lemon*'s questionable future largely is immaterial to our analysis of lower court compliance. We recognize the possibility that lower courts are attuned to the questionable status of the *Lemon* regime, however. To account for this possibility we ended our data collection with cases argued in the U.S. Courts of Appeals in 1999. Following that year, the Supreme Court's doubts over *Lemon* reached an apogee; *Mitchell v. Helms*, 530 U.S. 793 (2000), a case with significant similarities to *Lemon* itself, produced a sharply divided plurality opinion that reveals how far the Court strayed from its *Lemon* regime. With its predecessor case *Agostini v. Felton,* 521 U.S. 203 (1997), *Mitchell* provides clear evidence that the Court has undermined the authority of a *Lemon*-style analysis. We are thus less confident that our compliance theory applies to post-1999 Establishment Clause cases.

11. Choper (1995) and Levy (1994) each offer comprehensive and engrossing treatments of both the Establishment Clause and the Free Exercise Clause of the First Amendment as well.

12. These results are generally robust in an analysis that considers only those justices who served on the Court both before and after *Lemon.*

13. *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Walz v. Tax Commission*, 397 U.S. 664 (1970).

14. The first two criteria were used by the Court to dispose of *Engle* and *School District of Abington Township.* The third was first crafted by the Court in *Walz.*

15. See Note 9 regarding the strategy we employed for identifying the universe of relevant cases.

16. See Note 9 on the inability to measure responsiveness in the Establishment Clause cases.

17. See Gibson (1999) and Giles and Zorn (2000) for an excellent discussion of the choice of unit of analysis in the analysis of judicial behavior.

18. Of course lower court judges, including court of appeals judges, may mask noncompliance by couching their decisions in precedential language drawn from relevant Supreme Court opinions (e.g., *Lemon*). But, as we have already noted, in the case of particular factors

or case characteristics on which the Court has focused, reference to such factors by itself denotes a de minimis cognizance of and attention to precedent on the part of lower courts. More importantly, for our purposes in this article, however, is the fact that there is little disagreement among circuit court judges (as manifested by separate opinions), suggesting that there is a great deal of intersubjective agreement among judges when it comes to determining whether, for example, there is a secular purpose to a challenged practice or a challenged practice entails excessive entanglement between church and state. This should ameliorate (though not necessarily eliminate) concerns about the coding of case facts from the court of appeals opinions themselves.

19. Monitoring includes such things as reporting requirements, regulations, on-site inspections, and record auditing.

20. These include, for example, fire protection, police protection, school transportation, school lunches, loaning of textbooks, standardized testing, and ensuring school attendance.

21. Senatorial courtesy is the norm by which the president consults with senators of his party who represent the state for which the nomination is being made (Goldman, 1967). Although senatorial courtesy is most pronounced with regard to the selection of individuals nominated for the federal district court bench (Chase, 1972, pp. 43-44; Sheldon & Maule, 1997, p. 184), senatorial courtesy remains influential in the selection of nominees for the circuit court bench, with senators who are of the president's party and who represent the state to which the seat has traditionally been allotted exercising considerable influence (see Carp, Stidham, & Manning, 2004, p. 134; but see Scherer, 2005).

22. In those instances in which the ideology score for a participating member of the decision making panel was unavailable—for example, the judge was appointed to the bench prior to the availability of Poole's scores—we identified the panel's median ideology score based on the individual scores that were available. As an alternative measure of ideology, we used the mean ideology score of the judges in the majority and, although they both perform relatively well, the median performs slightly better and is a superior measure of the potential for ideology to influence outcomes (see, in general, Black, 1958).

23. The Judicial Common Space scores use the court of appeals ideology scores developed by Giles, Hettinger, and Peppers (2002) and the Supreme Court ideology scores developed by Martin and Quinn (2002), transforming the latter such that they are mapped on to the same ideological space as the former. The Judicial Common Space scores are available at http://epstein.law.northwestern.edu/research/JCS.html.

24. Whenever a decision is made by a three-judge panel, the losing party can petition the full circuit court asking for his case to be reheard in order to examine the decision of the three-judge panel. When a circuit court hears a case *en banc* all the judges on the circuit rehear the case of an individual three-judge panel to determine if the decision made by the panel was correct (except on the 9th Circuit, which uses a limited *en banc* procedure).

25. Unlike the panel ideology measure, we deem the mean to be more informative here, as judges would likely consider the overall ideology of the circuit rather than calculate the pivotal judge on the circuit for each year. In addition, in the 9th Circuit, membership on the *en banc* panel is randomized, so the mean is more meaningful there. As a robustness check, we did try the median as an alternative and obtained largely similar findings; neither operationalization reaches statistical significance, but the mean of the circuit is at least in the expected direction.

26. Because this operationalization results in perfect prediction, we tried an alternative specification of the model, measuring *Lemon's* effect as either promoting an accommodationist decision, or lessening the likelihood of such a decision when any one of the *Lemon* prongs were violated. Hence, a variable that takes a value of "1" when the statute has a secular purpose OR (operations Research) is neutral among religions OR does not engender an excessive

entanglement, "0" otherwise (*pos_Lemon*) and a variable that takes a value of "1" when there is no secular purpose OR the legislation promotes one religion over another OR the legislation results in an excessive entanglement between religion and state, "0" otherwise (*neg_Lemon*) were used in lieu of the dummies representing the three prongs. These variables are extremely significant and drastically improve the fit of the model. They depress significance of all other variables except for higher education and lower court decision, which remain significant and correctly signed. When these variables are used in Model 3, they also render insignificant the ideology measure we use (though higher education and lower court decision remain significant). There is some basis from the circuits to prefer this specification over our individual fact specification; namely, the courts sometimes note that, because a given statute violates one prong of *Lemon*, they need go no further in their analysis (see, e.g., *Valente v. Larson*, 637 F.2d 562, 569 (1981 8th Cir.) where the court says, "In light of our conclusion that the classification made in Minn. Stat. § 309.515(1)(b) significantly burdens some religious groups and has no secular purpose, we need not examine the exemption for excessive government entanglement with religion . . ." and *Grendel's Den v. Goodwin*, 662 F.2d 102, n. 11 (1981 1st Cir.), where the court says, "Our conclusion regarding primary effect obviates the need to consider whether section 16C also causes excessive entanglement with religion." However, because we wish to as closely as possible approximate the jurisprudential regime noted by Kritzer and Richards, we employ the fact-based operationalization in the text. We note, however, that our findings regarding panel ideology are surely tentative.

27. We draw this conclusion based on the fact that either the presence or the absence of historical practice perfectly predicts an accommodationist decision; hence, it does not matter at all.

28. An auxiliary estimation using the mean panel ideology, rather than the median, produced substantively identical results. See Note 22 for more information.

29. The receiver operating characteristic (ROC) statistic is relied on extensively in medical research. It plots sensitivity (the percentage of correct predictions when a dichotomous dependent variable takes on a value of 1) and specificity (the percentage of correct predictions when a dichotomous dependent variable takes on a value of 0). The closer the area under the curve is to 1, the better the predictive value and, conversely, the closer the area under the curve is to 0.5, the worse the predictive value (Afifi & Clark, 1996; Iaryczower, Spiller, & Tommasi, 2002).

30. The results reported for Model 3 in Table 3 are unchanged as to most variables if we substitute mean panel ideology for median panel ideology, though mean ideology fails to meet conventional levels of significance. Again, because we think median ideology is a better theoretical measure of the influence of ideology on decision making on the circuits, we prefer it regardless of its statistical significance or insignificance.

31. An excellent example of this debate can be found in the symposium appearing in the November 1996 issue of the *American Journal of Political Science*, which takes as its point of departure an article by Segal and Spaeth (1996) purporting to demonstrate the disutility of the doctrine of *stare decisis*—"a crucial component of the legal model" (p. 987)—for understanding decision making by members of the Supreme Court. See also Spaeth and Segal (1999) and Gillman (2001).

32. See, more generally, Baum (2006) regarding judges' concern with the judgments of others.

33. There are, of course, some excellent recent contributions to the compliance literature (for example, Comparato & McClurg, 2007; Westerland, Segal, Epstein, Comparato, & Cameron, 2006).

34. That literature is too voluminous to recount here but representative examples include Brace and Hall (1990), Hall and Brace (1999), Kilwein and Brisbin (1997), and Langer (2002).

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