

Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*

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Abstract

In contrast to the traditional political science view, which holds that justices on the left are more supportive of free speech claims than justices on the right, and in contrast to a newer view among legal academics that justices on the right are more supportive of free speech claims than justices on the left, we use in-group bias theory to argue that Supreme Court justices are opportunistic supporters of free speech. That is, liberal (conservative) justices are supportive of free speech when the speaker is liberal (conservative).

A two-level hierarchical model of 4,519 votes in 516 cases confirms the in-group bias hypothesis. Although liberal justices are (overall) more supportive of free speech claims than conservative justices, the votes of both liberal and conservative justices tend to reflect their preferences toward the speakers' ideological grouping, and not solely an underlying taste for (or against) the First Amendment.

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Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment

Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders.

—Sumner (1907, 13)

It’s an us-against-them world, or so economists and psychologists tell us. For decades now they have documented a manifestation of social identity known as in-group bias (e.g., Tajfel et al., 1971; Tajfel, 1981; Shayo, 2009).¹ The basic idea is that we humans tend to evaluate our own group or its members more favorably than outsiders. This holds regardless of whether the groupings are especially salient (such as race, class, and ideology) or seemingly inconsequential (a preference for paintings by Klee or Kandinsky) (Rand et al., 2009; Hewstone, Rubin and Willis, 2002).

Because judges are humans, it’s not altogether surprising that they too fall prey to in-group bias, as several studies examining religious, racial, and ethnic favoritism have shown (Abrams, Bertrand and Mullainathan, 2012; Shayo and Zussman, 2011). But what of *ideological* in-group bias? We know that ideology is a major driver of judicial decisions (Epstein, Landes and Posner, 2013; Segal and Spaeth, 2002). We also know that ideological or partisan in-group bias exists in the populace (e.g. Fowler and Kam, 2007; Motyl, 2014; Rand et al., 2009). What we don’t know is whether judges favor litigants who share their political or ideological commitments.²

We should. From a normative standpoint, many commentators contend that the rule of law requires even-handed treatment of both parties to a suit;³ in-group bias raises questions about whether judges can often or even ever meet this requirement. From a positive perspective, the possibilities for ideological in-group bias abound. Imagine two antitrust cases, one in which the

¹Sometimes called in-group favoritism or intergroup bias.

²As we explain in the next section, some existing research results are consistent with the presence of ideological in-group bias (e.g., Staudt, Epstein and Wiedenbeck, 2006; Epstein, Landes and Posner, 2013; Parker, 2011). But the idea remains highly underdeveloped in the literature on judicial behavior.

³This is even embedded in the oath of office that all justices must take: “I do solemnly swear that I will administer justice without respect to persons . . .”.

defendant is a business and the other, a union. Under standard ideological accounts of judicial behavior, we would expect conservative judges to vote in favor of the defendant, regardless of whether it is a business or union. Under in-group bias accounts, the defendant's identity would matter, with conservatives more inclined to support the business over government but the government over unions. The same might hold in First Amendment litigation. While political scientists assume that liberal judges are more likely to embrace free expression and conservatives, regulation, in-group bias suggests that attitudes toward the First Amendment may be less important than shared values with the speaker (expresser).⁴ On this account, conservative judges would be more inclined to sympathize with a pro-life advocate's complaint about restrictions on protests near abortion clinics than a student's claim of First Amendment protection to raise a "Bong Hits 4 Jesus" banner (and liberal judges, the reverse).⁵

We could provide many more examples; they arise that frequently. But it's the larger point that shouldn't be missed. Because scholars of judicial behavior have focused so intently on the ideological ordering of the disputes' underlying policy or facts, we don't know whether the ideological grouping of the litigants affects judicial decisions in precisely the way that economists and psychologists would predict.

We attempt to fill this void by considering judicial votes in the second of our examples—First Amendment litigation.⁶ From an examination of all Supreme Court cases (1953-2010 Terms) touching on freedom of expression, we learn that liberal justices aren't uniformly attached to the First Amendment and conservative justices aren't uniformly committed to regulation, as conventional theories would predict (e.g., Schubert, 1965; Rohde and Spaeth, 1976; Segal and Spaeth, 2002). Ideology, though, isn't entirely absent from the story the results tell. In line with theoretical expectations following from literature on in-group bias, the justices' votes tend to reflect their preferences toward the speakers' ideological grouping, and not solely an underlying taste for the First Amend-

⁴Throughout, we use the terms "speaker" and "expresser" interchangeably. For both, we mean the litigant whose expression the government is attempting to constrain.

⁵We refer here to the cases of *Madsen v. Women's Health Center* (1994) (among others) and *Morse v. Frederick* (2007), respectively.

⁶Here and throughout the paper, we focus exclusively on the First Amendment guarantees of speech, press, assembly, and association. We exclude the free exercise and establishment clauses from the analysis.

ment qua Amendment. Conservative justices are indeed more likely to support pro-life advocates than student promoters of marijuana; and vice versa for liberals.

Put more generally, justices are opportunistic free speakers. Just as the in-group bias literature would predict, they are willing to turn back regulation of expression when the expression conforms to their values and uphold it when the expression and their preferences collide. The importance of this finding for research on judging is obvious. At least in their work on the First Amendment (and, we speculate, in many other areas as well), scholars should account for a dimension beyond the ideology of the underlying facts: the ideological identify of the parties to the suit. Our findings ought also lead legal specialists to consider doctrines that could tame in-group bias in light of assertions that neutrality is a condition of the rule of law. Finally, our work may have implications for studies assessing the ideology of citizens, elites, and organizations because judicial specialists are hardly the only political scientists who embed a commitment to the First Amendment in their definitions of liberalism.

1 In-Group Bias & Judging

Of all the manifestations of social identity, in-group bias (or favoritism) may be among the most central—and best documented. More than four decades ago, social scientists noticed the tendency of individuals to favor members of their own group over outsiders (Tajfel et al., 1971; Tajfel, 1981). And today there is a burgeoning literature on the subject (see Hewstone, Rubin and Willis, 2002; Wells, 2005).) Economists and other social scientists have now supplied an impressive array of experimental and observational evidence showing that people tend to be more helpful, more willing to allocate resources, and more supportive of policies advocated by members of their own groups (also referred to as enclaves, clusterings, matrices, or even teams).

This holds for “real-world salient groupings, such as ethnicity, religiosity and political affiliation and has also been artificially manufactured in the laboratory using trivial groupings” (Fu et al., 2012, 1). To provide just a few examples reflecting our interest in ideological groupings: Motyl (2014) demonstrates how in-group bias drives people to live in “ideologically segregated enclaves” (or communities) and explores both the advantages and disadvantages of this phenomena; Haidt (2012, xvi) explains why and how “people bind themselves into political [liberal and conservative] teams,” which ultimately leads them to “become blind” to alternative worlds; and Fowler and Kam

(2007) and Rand et al. (2009) show that people are more generous toward those who share their political or ideological commitments, and downright hostile toward members of the outgroup.

Whether these and other forms of in-group bias result from classic economic motives or are rooted in social, psychological or evolutionary mechanisms remains a puzzle (compare Shayo, 2009; Fowler and Kam, 2007; Wells, 2005). Either way, we have no reason to suspect that judges are immune. Quite the contrary. Long ago, Spaeth (1972) offered a version of in-group bias when he hypothesized that Supreme Court votes reflect not only the justices' attitudes toward the primary issue in the case (the "situation") but also toward the parties (the "object").

Though largely neglected by political scientists, bits and pieces of evidence suggest that Spaeth's hypothesis has merit. Studies demonstrate that female appellate judges are more likely to rule in favor of (the mostly female) plaintiffs in sex discrimination cases, (e.g. Boyd, Epstein and Martin, 2010; Peresie, 2005), that white trial judges give lighter sentences to white defendants (e.g., Abrams, Bertrand and Mullainathan, 2012), and that Jewish small claims judges in Israel favor Jewish litigants, and Arab judges, Arab litigants (Shayo and Zussman, 2011). Beyond the groupings of race and ethnicity, Staudt et al.'s (2006) research on taxation shows that neither liberal nor conservative justices systematically favor one side or the other. In corporate cases, though, liberals are far more likely to vote with the government and conservatives with corporate taxpayers. There is also work suggesting differences between the treatment of defendants accused of committing white-collar versus ordinary offenses based on the judge's ideology. (Epstein, Landes and Posner, 2013; see also Parker, 2011 on federalism).

2 Relating In-Group Bias to the First Amendment

These findings, though hardly conclusive,⁷ are consistent with the existence of "us-against-them" judging. We aim to extend and build on them by conducting (as far as we can tell) the first full-blown test of ideological in-group bias in the judicial context.

While we suspect this bias could manifest itself in many areas of law—and the studies above suggest as much—we focus on the the First Amendment. Several considerations guided our choice, not the least of which is considerable tension in the literature on free expression. On the one side are

⁷In part because in-group bias was not on their radar screen, much less their primary concern. Shayo and Zussman (2011) is the exception.

(mostly) political scientists who have long equated liberal judges with a commitment to the First Amendment guarantees of speech, press, assembly, and association (e.g., Pritchett, 1948; Schubert, 1965; Rohde and Spaeth, 1976, and too many others to list). It is no exaggeration to say that almost every empirical study conducted since the 1940s (from Pritchett, 1941 to Epstein, Landes, and Posner, 2013) characterizes judges, votes, and outcomes in First Amendment cases (and all others) as falling along a single left-right dimension (see, e.g., Schubert, 1965; Groffman and Brazill, 2002; Martin, Quinn and Epstein, 2005), such that “liberal” is associated with a reading of the First Amendment that limits the regulation of expression and conservative, with restrictions on expression.

On the other side is a contemporary body of descriptive literature (mainly in the law reviews) suggesting that support for the First Amendment is no longer a lodestar of liberalism; nor, for that matter, is support for regulation a badge of conservatism. The punchline in studies by Volokh (2011), Epstein and Segal (2006), and Sullivan (1992), among others, is that an ideological realignment of sorts has occurred, such that conservatives judges are now more likely to embrace free expression and liberals, regulation. *Boy Scouts v. Dale* (2000) provides an example. The five conservative justices (Rehnquist, O’Connor, Scalia, Kennedy, and Thomas) held that requiring the Boy Scouts to admit a gay male violated the group’s First Amendment rights. The Court’s liberals (Stevens, Souter, Ginsburg, and Breyer) dissented.

Dale is but one of many cases legal academics invoke to illustrate the seeming ideological reversal on free expression; the series of abortion protest cases is another.⁸ In *Madsen v. Womens Health Center* (1994), for example, the majority upheld an injunction prohibiting pro-life groups from protesting within 36 feet of an abortion clinic. Three of the Court’s most *conservative* members (Scalia, Kennedy, and Thomas) dissented, claiming that the zone was “profoundly at odds with First Amendment precedents and traditions.” Then again, it would be just as easy to summons cases supporting the traditional political science perspective. Two of many include *Morse v. Frederick* (2007), in which the five conservatives permitted school officials to prohibit students from displaying a banner with the message “Bong Hits 4 Jesus;” and *Garcetti v. Ceballos* (2006), asking whether

⁸Campaign finance is another area that figures prominently in these accounts. See, e.g., *Citizens United v. Federal Election Commission* (2010) in which the conservative wing voted to strike down restrictions and the liberals, to uphold them.

the First Amendment protects an employee in the district attorney’s office who blew the whistle on a sheriff for misrepresenting facts in a search warrant request. The four liberals voted in favor of the speech claim and the five conservatives, against it.

This is where in-group bias enters the picture—as a possible means for resolving the real tension in the First Amendment literature. Rather than modeling cases along the standard left-right dimension that political scientists continue to use but that legal academics reverse (or outright reject), in-group bias commends adding a second dimension: the litigant’s ideological grouping. Relating this dimension to the context of freedom of expression,⁹ leads to the hypothesis that judges engage in opportunistic behavior following from litigant favoritism. That is, their votes are neither reflexively pro- or anti-the First Amendment but rather pro- or anti- the speaker’s ideological enclave.

Table 1 supplies the basic schematic. Under conventional political science thinking, the *Liberal* row should produce the same vote (Pro-Expression) regardless of whether the justice agrees with the speech. Under theories of in-group bias, however, the speaker’s ideological team should matter.

		Speaker’s Ideological Grouping	
		<i>Liberal</i>	<i>Conservative</i>
Justice’s Ideology	<i>Liberal</i>	Pro-Expression (1)	Anti-Expression (2)
	<i>Conservative</i>	Anti-Expression (3)	Pro-Expression (4)

Figure 1: Reconceptualizing Judicial Votes in the First Amendment Context, with Predictions from In-Group Bias Accounts.

A few examples should suffice to make the point. Turning first to cell (1), consider a liberal justice confronting the *Morse* (“Bong Hits”) case. Because the justice’s ideology and the speaker’s ideological grouping are liberal, both in-group bias and political science accounts would predict a pro-expression vote. Cell (2) is where the divergence between the two accounts becomes evident. Again, suppose the justice is liberal but this time confronts a conservative speaker, say, the Boy Scouts who don’t want to admit gay members (the *Dale* case). Standard political science work

⁹As the existing research suggests, we think the social identity literature has even wider application. We develop some ideas in the paper’s conclusion.

would continue to predict a pro-expression vote, while in-group bias theory offers the opposite prediction: because the speakers’ enclave is right of center, the liberal justice should cast an anti-expression vote.

For conservative justices, the predictions work in much the same way—only, of course, in reverse. Let’s start with cell (3), using *Garcetti* as an example. The speaker was a whistle blower (and one who blew his whistle on a law enforcement official no less!) and so in-group bias would predict an anti-expression vote. Political science accounts would offer the same prediction but only because the justice is conservative, and not because the speaker is in a liberal cluster. For cell (4) the expectations depart as the *Madsen* (pro-life protest) case illustrates. A conservative justice, under political science theory, should vote against the expression claim. In light of in-group bias, though, the possibility of a pro-expression vote looms large, as the speaker’s conservative grouping and the justice’s conservative ideology converge.

3 Data and Methods

Just as there is some evidence consistent with in-group bias in existing studies (again, see, e.g., Boyd, Epstein and Martin, 2010; Abrams, Bertrand and Mullainathan, 2012; Staudt, Epstein and Wiedenbeck, 2006), suggestions in the journalistic and legal literature provide some basis for the idea that justices tend to limit speakers they loathe. Bazelon (2011) writes of Alito’s “empathy” to “people who are . . . like him”— the father burying his son amid Westboro Baptist Church protestors or the law students who want to exclude gay students from their club.¹⁰ Winkler too critiques the Roberts Court for “strongly protect[ing] speech that it likes, while allowing regulation of speech it disfavors” (quoted in Stohr, 2011). To our knowledge, though, these ideas—reflective of in-group bias—have yet to be explored systematically.

In an effort to do so, we use the U.S. Supreme Court Database to identify all suits implicating the First Amendment that the Court resolved (after argument) between the 1953 and 2010 terms.¹¹ This amounts to 516 cases, or 4,519 votes cast by 33 justices (from Hugo Black to Elena Kagan).

¹⁰*Snyder v. Phelps* (2011) and *Christian Legal Society v. Martinez* (2010), respectively

¹¹To select the cases, we used the `lawSupp` variables. For `issue`: ≥ 30010 & `issue` ≤ 302000 , excluding 30160, 30170, and 30180 (religion issues). For `lawSupp`: 200, 201, or 204.

For each case, we (re)coded the justice’s vote—the dependent variable in our study—as for (=1) or against (=0) the free expression claim. For many cases, our coding accords with the Database’s `direction` variable but there are notable exceptions.¹² Consider *Boy Scouts v Dale*. Because the Database characterizes it as a Civil Rights dispute,¹³ the `decisionDirection` code is “conservative,” even though the outcome is pro-speech (“liberal”) on the First Amendment issue. To ensure consistency with our First Amendment concerns, we rechecked the coding of all votes and made alterations as necessary—e.g., changing *Dale* from a conservative Civil Rights case to a pro-speech First Amendment decision. Table 1 provides the summary statistics

Table 1 also lists the independent variables, which come in three flavors. At the justice-level, we measure ideology via the Segal-Cover scores (Segal and Cover, 1989).¹⁴ The case-level variables are also mostly self-explanatory.¹⁵ E.g., `Pro-Expression Lower Court`, a standard variable in the judicial behavior literature, captures the justices’ tendency to reverse the decision of the court below. The variables `Federal` through `As Applied Challenge` are controls for case facts designed to facilitate statistical comparisons.¹⁶

¹²For 92.5% of the 4,519 votes (n=4,181), a liberal vote was also a pro-speech vote.

¹³Our search nevertheless picked it up because the legal provision is “First Amendment (speech, press, and assembly).”

¹⁴We also estimated the models using Martin-Quinn scores (Martin and Quinn, 2002) stripped of the First Amendment cases in our model. Substituting these scores for the Segal-Cover scores leads to no major changes in the interpretation of the results. (Results with the Martin-Quinn scores are available on our website.)

¹⁵In the analysis presented in Table 2 we treat the Chief Justice era dummies as case-level variables and estimate two-level models (justice- and case-level). To assess robustness, we reestimated the models with three levels, treating the Chief Justice dummies as a third level (justice-, case-, and time-level). For the variables of interest, the results are the same.

¹⁶`Federal Law` controls for the Court’s tendency to defer to the federal government (and Solicitor General) (e.g. Black and Owens, 2012), relative to state and local governments. `Expressive`, `Written`, and `Association` attend to the possibility that (at least some) justices will be more protective of forms of expression explicitly mentioned in the First Amendment. The final control, `As Applied`, encodes whether the claim is that an otherwise valid law is being unconstitutionally enforced (=1) or that the law is facially unconstitutional (=0).

Variable & Coding	Mean (Std. Dev.)
Dependent Variable	
Vote: For (=1) or against (=0) expression claim	0.548 (0.498)
Justice-Level Independent Variable	
Ideology: Segal-Cover (0=most conservative; 1=most liberal)	0.511 (0.334)
Case-Level Independent Variables	
Liberal Speaker: Liberal (=1); conservative (=0)	0.759 (0.428)
Liberal Law: Yes (=1); No (=0)	0.083 (0.276)
Conservative Law: Yes (=1); No (=0)	0.600 (0.490)
Burger Court: Yes (=1); No (=0)	0.387 (0.487)
Rehnquist Court: Yes (=1); No (=0)	0.264 (0.441)
Roberts Court: Yes (=1); No (=0)	0.055 (0.228)
Pro-Expression Lower Court: For (=1) or against (=0) expression claim	0.420 (0.494)
Federal Law: Yes (=1); No (=0)	0.362 (0.481)
Expressive Speech: Yes (=1); No (=0)	0.201 (0.401)
Written Speech: Yes (=1); No (=0)	0.283 (0.451)
Association Claim: Yes (=1); No (=0)	0.256 (0.436)
As Applied Challenge: Yes (=1); No (=0)	0.571 (0.495)
Ideological Interactions	
Justice Ideology \times Liberal Speaker	
Justice Ideology \times Liberal Law	
Justice Ideology \times Conservative Law	

Table 1: Description of Variables. N=4,519. The omitted categories are: for Court, Warren; for Law, Neutral; and for Speech, Verbal.

More novel are, first, the law variables (**Liberal Law** and **Conservative Law**). These follow from the insight, developed in the literature on judicial self-restraint, that at least since the 1950s the justices have been neither uniform activists nor committed restraintists. Rather, their votes to strike (and uphold) statutes tend to reflect their political preferences toward the policy content of the law, and not an underlying preference for restraint (or activism). That is, liberal justices tend to invalidate conservative laws and conservative justices, liberal laws (see, e.g., Lindquist and Cross, 2009; Epstein and Landes, 2012; Epstein and Martin, 2012; Howard and Segal, 2004). For our study (as in all the others), conservative laws are actions taken by government that tend to restrict liberal speakers (e.g., restrictions on flag burning); liberal laws are the reverse (restrictions on anti-union expression).¹⁷ The omitted category is neutral laws—those that apply equally to liberal and conservative speakers, such as restrictions on campaign financing.¹⁸

Second, and more relevant to our concerns is the **Liberal Speaker** variable. The idea here is to assess the ideological grouping of the speaker—such that anti-gay or pro-life expressers, to provide two examples, are coded as “conservative” speakers (=0). This variable is liberal (=1) if the speakers were students espousing liberal causes, war protestors burning American flags, or donors providing support to or associating with left-wing organizations, and so on.

From this variable, we should be able to gain some leverage on judging the First Amendment. For example, a negative sign on **Liberal Speaker** would suggest that conservative justices are less likely to support speech when a member of a liberal enclave is doing the speaking than when a conservative is the expresser. Of even greater importance is the interaction of **Justice Ideology** × **Liberal Speaker**. From an empirical standpoint, a positive coefficient would indicate that any gap between liberal and conservative justices in their support for free expression grows when the

¹⁷To assess reliability, the first two authors independently coded **Liberal Speaker**, **Liberal Law**, and **Conservative Law** for the Roberts Court terms (2005-2010). There was almost no disagreement in their codings. For **Liberal Law** and **Conservative Law** that were implicated in federal cases, we also examined the partisan/ideological composition of the Congress that passed them. This turned out to be a mostly futile exercise because of the large number of bipartisan laws (likely due to the many passed in the name of national security or framed to protect children from obscenity), omnibus legislation, and the fact that many of the cases challenged specific sections of acts that were likely not the centerpiece of congressional debates (such as giving the Postmaster the power to monitor communist mailings in a postal service salary act).

¹⁸Recoding campaign finance laws as “liberal” (rather than as “neutral”) yields results that are very close to those displayed in Table 2. The only difference of note is that the constituent term for **Ideology** is slightly larger (and statistically significant), meaning that conservative justices are more likely to support speech that is conservative and violates a neutral law. This calls for no change in our interpretation of the results.

speaker belongs to a liberal cluster. This would be consistent with the presence of in-group bias.

4 Estimation and Results

Because our observations are individual justice votes (i) nested within specific cases (j) we deploy a multilevel model. This is a useful method for attending to any unobserved heterogeneity between cases. While it is true that we account for many case-level variables, there may be unmeasurable characteristics of cases that influence voting. This would mean that the individual votes are not independent from one another, creating significant correlations between the errors for individual observations. A multilevel model can attend to any unobserved case factors and allow for the intercept to vary between cases. Since we predict that the effect of ideology will depend on case-level variables, this method also allows for the coefficient on `Justice Ideology` to vary due to cross-level interactions.

The structure of our model is as follows. (1) is the Justice-Level equation and (2) and (3) are the Case-Level equations.

$$\Pr(\text{Pro-speech vote})_{ij} = \beta_{0j} + \beta_{1j}\text{ideology}_i + \varepsilon_{ij} \quad (1)$$

$$\begin{aligned} \beta_{0j} = & \gamma_{00} + \gamma_{01}\text{liberal speaker}_j + \gamma_{02}\text{liberal law}_j + \gamma_{03}\text{conservative law}_j + \\ & \gamma_{04}\text{Burger Court}_j + \gamma_{05}\text{Rehnquist Court}_j + \gamma_{06}\text{Roberts Court}_j + \\ & \gamma_{07}\text{pro-speech LC}_j + \gamma_{08}\text{federal law}_j + \gamma_{09}\text{expressive speech}_j + \\ & \gamma_{010}\text{written speech}_j + \gamma_{011}\text{association}_j + \gamma_{012}\text{as applied}_j + \mu_{0j} \end{aligned} \quad (2)$$

$$\beta_{1j} = \gamma_{10} + \gamma_{11}\text{liberal speaker}_j + \gamma_{12}\text{liberal law}_j + \gamma_{13}\text{conservative law}_j + \mu_{1j} \quad (3)$$

We employ Bayesian simulation via Markov Chain Monte Carlo to estimate the model.¹⁹ This method entails estimating the posterior distribution of the parameters as a function of prior distributions and the data. Uninformative priors were specified so that the data would dominate the posterior distribution. To obtain the posterior distributions of the parameters and the predicted probabilities we used WinBUGS 3.0.3 (Spiegelhalter et al., 2004). We ran three parallel Markov Chains of 60,000 iterations for the simulation; and determined convergence of the chains via the

¹⁹Using a maximum likelihood approach does not change the results.

Gelman-Rubin diagnostic (Gelman and Rubin, 1992, see also Gelman and Hill, 2007). The first 30,000 iterations were used as a burn in, so the results are based on 90,000 samples.

Table 2 displays the posterior distributions. Note that in summarizing them, we provide means, standard deviations and Bayesian credible intervals that are roughly analogous to the coefficients, standard errors, and confidence intervals estimated in classical statistics.

Variable	Mean	S.D.	Bayesian 95%	
Justice Level				
Ideology	0.446	0.495	-0.752	1.250
Case Level				
Liberal Speaker	-1.502	0.354	-2.213	-0.819
Liberal Law	-0.431	0.491	-1.399	0.531
Conservative Law	-0.302	0.324	-0.949	0.325
Burger Court	0.372	0.286	-0.185	0.934
Rehnquist Court	0.796	0.341	0.129	1.469
Roberts Court	-0.017	0.552	-1.102	1.067
Pro-Expression Lower Court	-1.067	0.241	-1.545	-0.600
Federal Law	-0.479	0.227	-0.924	-0.035
Expressive Speech	-0.360	0.321	-0.987	0.268
Written Speech	-0.104	0.286	-0.669	0.454
Association Claim	-0.581	0.288	-1.148	-0.022
As Applied Challenge	-0.252	0.222	-0.689	0.183
Constant	0.544	0.466	-0.345	1.489
Ideology Interactions				
Liberal Speaker	3.381	0.476	2.49	4.356
Liberal Law	0.519	0.666	-0.848	1.843
Conservative Law	0.722	0.433	-0.074	1.715
Level 2 Variance Components				
(μ_{0jt}) – Intercept	3.884			
(μ_{1jt}) – Ideology	1.153			
R-Squared				
Intercept	0.199			
Ideology	0.710			
Pooling Factors				
Intercept	0.006			
Ideology	0.008			
PCP	0.795			
PRE	0.547			

Table 2: Two-Level Model of Pro-Expression Votes in First Amendment Expression Cases, 1953-2010 Terms

Starting with model fit, the statistics show, first, that 79.5% of the votes are correctly predicted (PCP), corresponding to a 54.7% reduction in error (PRE). Next, the high R-squared value for the random coefficient `Ideology` implies that the in-group bias approach does a good job explaining how the effect of `Ideology` changes based on case facts. The suggestion here is that unobserved attributes of the cases influence the likelihood of a pro-free speech vote (though, we hasten to note, they will explain only the baseline probability of support for speech in a case, and not the between-justice differences in voting). Finally, the fact that the pooling factors are all close to zero indicates very little between-case pooling in the intercept or in the effects of ideology on votes. This suggests that the multilevel approach we took is more appropriate than a pooled logit analysis.

Turning to the estimates of primary interest, observe that `Ideology` is not a significant predictor of votes—implying that there is no meaningful difference between liberal and conservative justices for conservative expression. The gap only emerges when the speaker is in a liberal grouping, as indicated by the positive `Ideology × Liberal Speaker`. That is, the difference between liberal and conservative justices grows larger when the speech emanates from a liberal enclave. Note too the negative and significant `Liberal Speaker`, suggesting that conservative justices are less likely to support liberal speech than they are to support conservative speech.

Of course, as with many statistical analyses, the coefficients themselves do not provide a complete picture of the nature of the effects. To examine their magnitude, we display, in Figure 2, the changes in the predicted probability of a justice voting in favor of free speech based on the ideological direction of the challenged law as well as the speaker’s ideological grouping.

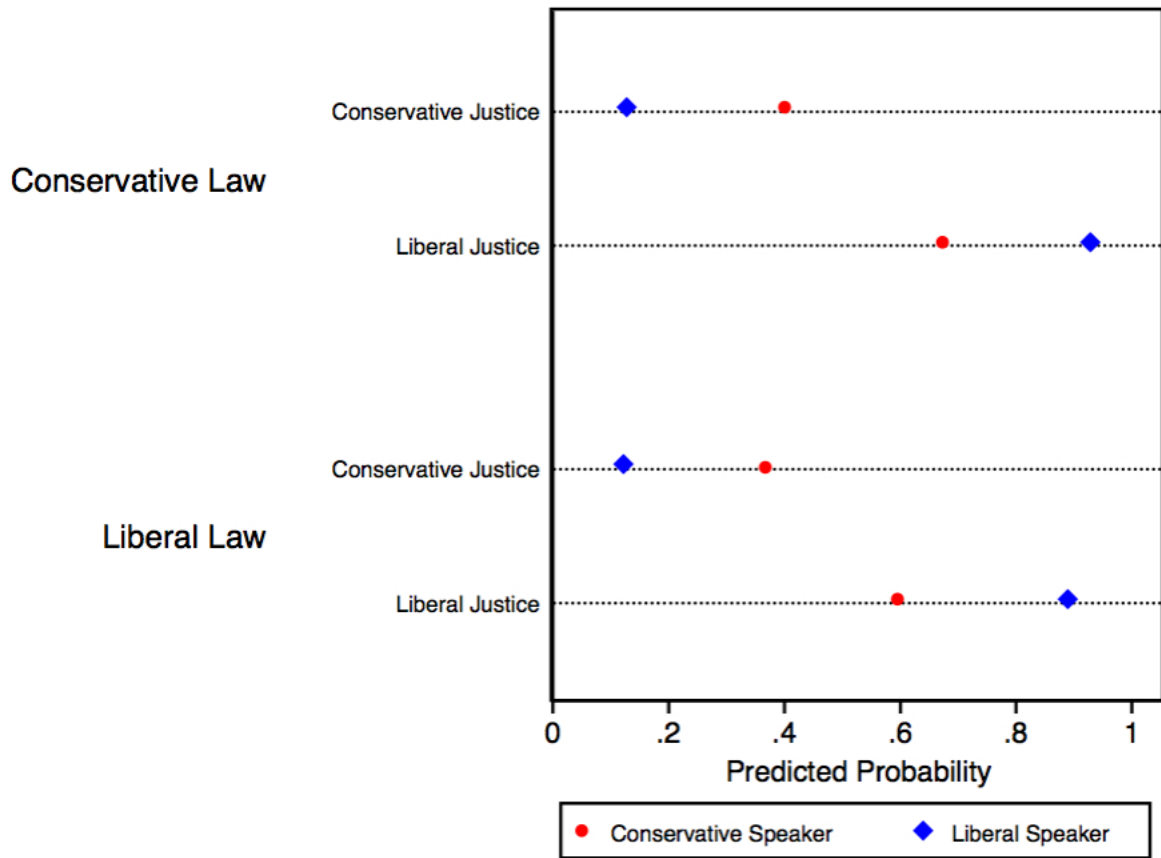


Figure 2: Changes in the predicted probability of a justice voting in favor of free expression based on the law’s ideological direction and the speaker’s ideological grouping.

Note that regardless of whether the law is liberal or conservative, when the speaker belongs to a liberal enclave (the diamonds), the effects match predictions from the standard political science model: liberal justices are highly likely to defend the speech while conservative justices are highly likely to support regulating it. But, crucially, this pattern does not hold when the speaker is conservative (the circles). The most liberal justices are only slightly more likely to support the speech (0.60) over the regulation (0.40) and vice versa for the most conservative justices (about 0.40 versus 0.60). This significantly smaller gap between liberal and conservative justices suggests that when they face a conflict between their standard (political science) ideological positions on the First Amendment and their preferences regarding the speaker’s ideological grouping, they place significant weight on the latter. This is precisely the result in-group bias accounts anticipate.

5 Robustness Checks

We took a number of steps to check the findings: substituting the Martin-Quinn measures for the Segal-Cover scores (see note 14), recoding campaign finance laws as liberal laws (see note 18), omitting the Chief Justice dummies, adding a civil liberties dummy and subtracting the case-fact variables, estimating a three- instead of two-level model (see note 15), and so on. In all models, the `Liberal Speaker` and `Ideology × Liberal Speaker` yield values in line with those displayed in Table 2.

In other words, none of these procedures calls for a change in the basic interpretation of the results. Nor did a final check: reestimating the models separately for each Chief Justice era. Although there are suggestions in the legal literature that liberals have become more supportive of regulation since the 1970s, this we do not find.²⁰ During the liberal Warren Court and the conservative Rehnquist Court, there are substantial gaps in the probability of liberal and conservative justices supporting liberal enclave expression, but much smaller—and sometimes even reverse—gaps when the speaker is in a right-of-center grouping. Simply, the results for the first and the third eras match the pooled analysis.

For the last era—the Roberts years—`Liberal Speaker` and `Ideology × Liberal Speaker` are correctly signed (and in line with Table 2) but insignificant. This likely reflects the relatively small number of votes cast by the Roberts Justices (N=248, from 28 cases).

We are thus left with the Burger Court era. For these years, we see some effects based on the nature of the expression but they are much more muted. More to the point, the justices behave as political scientists would predict: with liberals supporting free speech and conservatives, regulation and a much smaller decrease in the size of the gap based on the speaker’s ideological grouping.

One possible explanation is that the Burger Court, relative to Warren and Rehnquist eras, resolved suits with less polarizing First Amendment issues. The Warren Court took a large number of cases dealing with the free speech rights of suspected communists and anti-war protestors during the Red Scare of the 1950s and the highly volatile 1960s. Similarly, the Rehnquist Court’s First Amendment agenda included the free speech rights of anti-abortion and gay rights protestors, regulations on child pornography, and campaign finance restrictions. By contrast, the Burger

²⁰The project’s website houses the full set of results.

Court heard a substantial number of cases in the murkier area of obscenity laws regulating material involving, and sold to, consenting adults.

Whatever the explanation, the important point for our purposes is with the exception of the Burger Court the results by Chief Justice era are not only similar in flavor to those depicted in Table 2; they are also not especially supportive of any purported change in “us-against-them” judging over time.

6 Discussion

In recent years, scholars have offered two seemingly competing views of First Amendment adjudication: the traditional account embedded in the political science literature and the liberal-conservative reversal story recounted in legal scholarship. Our analysis points to a third possibility: opportunistic behavior following from a form of in-group bias. We find that the justices are much less apt to protect expression rights when the expresser is from the opposing ideological team. We also learn that this isn’t a new phenomenon; opportunism traces at least back to the Warren years.

Of course, discerning motives from observational data is difficult—and the justices will never make it any easier by participating in experiments. But even with this constraint, we are left with strong evidence that the justices act, at the very least, *as if* they are motivated by in-group bias.

This evidence relates most directly to judging in the free expression context but our study’s implications may be broader. For one thing, it’s hard to imagine that the in-group bias we identify here is cabined to the First Amendment. And, actually, the studies we mentioned earlier examining race, gender, and ethnicity suggest that it is not (e.g. Abrams, Betrand and Mullainathan, 2012; Shayo and Zussman, 2011). We could say the same for research on taxation (Staudt, et al. 2006), criminal procedure (Epstein, Landes and Posner, 2013), and federalism (Parker, 2011).

These studies and now ours suggest the need to attend to what Spaeth called the case’s “object” because the justices do seem fall prey to a form of in-group favoritism. This is so despite the carving on the main portico of their building promising equal justice under law; and it’s despite legalistic claims about the justices’ broader concern with following and building precedent (seemingly difficult to do when they reach dissimilar decisions in suits differentiated only by the nature of the parties).

More generally, we can’t help but circle back to assertions that the rule of law requires judges to dispense justice without regard to the parties. Because this condition is difficult to satisfy in the

face of in-group bias, our findings may provide some fodder for commentators who prefer bright-line legal rules, relative to more flexible standards, in law governing freedom of expression (and perhaps in other areas too).²¹ A traditional contention in favor of standards is that they “result in more precise application of underlying norms because they can be applied to the particular facts of a case, in contrast to rules, which apply to the generality of cases” (Kaplow, 1992, 622). If in-group bias is rampant, however, the rule of law may be better served by a focus on the general rather than the specifics of the dispute—including the parties.

A second set of implications moves beyond the literature on judicial behavior and toward research seeking to evaluate the ideology of many other actors—from elites to the citizenry, from the political branches to political organizations. To the extent that the definitions and measures of liberalism in these studies rest on a commitment to free expression, they require reevaluation. This is already evident on many policy issues including limits on campaign contributions, which Democrats favor at rates at least as high, if not higher, than Republicans.²² But it may also hold for less obvious matters, such (in)tolerance of certain kinds of speakers.²³ Either way, scholars should consider building into their approaches perceptions of the nature of the expression or expresser. This is what in-group bias accounts suggest and what our findings on the justices, assuming they hold for other humans, counsel.

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²¹In law, the debate over standards versus rules is old and on-going. As one law scholar noted, “As members of the legal community, we are forever involved in making arguments for or against rules or standards (Schlag, 1985, 379).

²²When asked whether they “would vote for or against a law that would put a limit on the amount of money candidates for [Congress] can raise and spend on their political campaigns,” 82% of Democrats and 78% of the Republicans responded that they would vote for the law. Gallup Poll, June 15-16, 2013, at: <http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx>.

²³To provide but a simple example, when asked in 2012 whether a person who believes that Blacks are genetically inferior should be allowed to teach at a university or college, 50.2% of the liberals said yes, as did 48.8% of the conservatives) ($p = .17$). But when asked about whether they would allow a man who admits that he is a homosexual to teach, 91.8% of the liberals responded positively; the figure for conservatives was 80.9% ($p < .01$). Calculated from the General Social Survey.

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