Do Justices Defend the Speech They Hate?

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1   Preliminaries

1. Existing answers to this question are mixed. The traditional political science view is that liberal Justices are more supportive of free speech (even speech they hate) than conservative Justices. On the other hand, more than a few legal academics claim that a reversal of sorts has occurred, such that Justices on the right are more supportive of free expression than Justices on the left.

2. In line with some existing commentary,[1] we posit that Supreme Court Justices are opportunistic supporters of the First Amendment. On this account, conservative Justices are 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 Justices, the reverse).[2]

3. The data suggest support for this account. While 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 ideological grouping of the speaker, and not solely an underlying taste for (or against) the First Amendment.

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[1]Bazelon 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 (*Snyder v. Phelps*, 131 S. Ct. 1207 (2011) and *Christian Legal Society v. Martinez,* 130 S. Ct. 2971 (2010) respectively.) Winkler too critiques the Roberts Court for "strongly protect[ing] speech that it likes, while allowing regulation of speech it disfavors."

[2]We refer here to *Madsen v. Women's Health Center,* 512 U.S. 753 (1994) (among others) and *Morse v. Frederick* 551 U.S. 393 (2007), respectively.

2   Data and Methods

1. We used the U.S. Supreme Court Database to identify all cases implicating the First Amendment that the Court resolved (after argument) between the 1953 and 2010 terms.[3] This amounts to 516 cases, or 4,519 votes cast by 33 Justices (from Hugo Black to Elena Kagan).

2. For each case, we (re)coded the Justice's vote—the outcome variable in our study—as for or against the free expression claim.[4]

3. The ideology of the Justices and the speakers are the two key inputs in our study. We used the Segal-Cover scores (derived from an analysis of newspaper editorials before the Justice was appointed to the bench) to measure each Justice's ideology. As for the ideological grouping of the speaker, we treat anti-gay or pro-life expressers as "conservative" speakers, to provide two examples. "Liberal" speakers are students espousing liberal causes, war protestors burning American flags, or donors providing support to or associating with left-wing organizations, and so on.

4. In addition to the Justices' and speakers' ideologies, we control for other factors that may affect the Justices' support for free speech. A list is available here.

5. To estimate the model we use Bayesian simulation via Markov Chain Monte Carlo.

3   Basic Results

1. The results from the statistical model are available here.

2. Figure 1 provides a way to visualize the statistical results. It shows the predicted probability of conservative, moderate, and liberal Justices voting in favor of free speech based on whether the speaker is liberal (the blue circles) or conservative (the red circles).

   - When the speaker is liberal the results match predictions from the standard political science model: liberal Justices are highly likely defend the speech ($\cong 0.90$ predicted probability) while conservative Justices are highly likely to support regulating it ($\cong 0.15$ predicted probability)

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

[4]For many cases (92.5% of the 4,519 votes), our coding accords with the Database's `direction` variable but there are notable exceptions. Consider *Boy Scouts v. Dale*, 530 U.S. 640 (2000). Because the Database characterizes it as a Civil Rights dispute, the `decisionDirection` code is "conservative," even though the outcome is pro-speech ("liberal") on the First Amendment issue. (Our search nevertheless picked it up because the legal provision is "First Amendment (speech, press, and assembly).") 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.

- Crucially, though, this pattern does not hold when the speaker is conservative. The most liberal Justices are only slightly more likely to support the speech over the restriction on speech ($\cong 0.58$ predicted probability), and vice versa for the most conservative Justices ($\cong 0.47$ predicted probability). (Compare the spacing between the blue and the red circles.)

- This significantly smaller gap suggests that when the Justices 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 substantial weight on the latter.
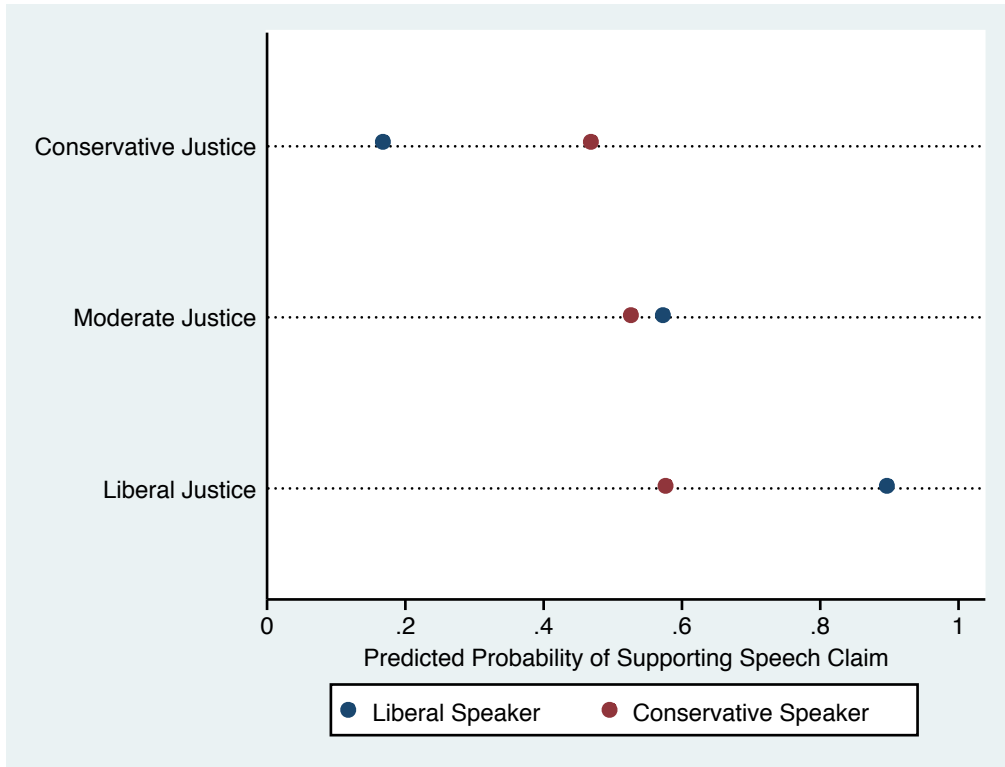

Figure 1. Changes in the predicted probability of a Justice voting in favor of free expression based on the speaker's ideological grouping.

4   Justice-By-Justice Results

1. The results we just described are from a statistical model that takes into account votes cast by all the Justices, along with characteristics of the individual Justices (such as their ideology).

2. Here we turn to the percentage of votes each Justice cast *supporting* free speech when

the speaker is liberal and when the speaker is conservative.[5] Table 1 displays the results for the Justices of the Roberts Court (ordered from most conservative to most liberal); results for all the Justices are in the Appendix. We exclude Kagan and Sotomayor because they cast too few votes for meaningful analysis and because of a lack of variation in the speakers.

3. An ∗ indicates a statistically significant difference ($p \leq .05$) between support for the free expression claim when the speaker is liberal versus conservative.

4. Note that the four most conservative Justices are significantly more likely to support the free expression claim when the speaker is conservative (or espousing a conservative message) than when the speaker is liberal. Although we cannot estimate the full statistical model for Roberts and Alito, the results for Scalia and Thomas are quite revealing. The probability of Scalia voting in favor of a liberal speaker is about .22; for conservative speakers, it's .62. This is a statistically significant and substantively large difference—the largest in our dataset. (For Thomas, the probability is .28 for liberal speakers and .58 for conservatives.)

5. Justices O'Connor and Kennedy, highly influential Justices for much of the Rehnquist and Roberts Court eras, also fit the general pattern. As moderate conservatives, they were more likely to support the conservative over the liberal speaker but the gap is smaller than it is for the extreme conservatives. (And in Kennedy's case, not significant in the full model.)

6. The four liberals present a more complex story. Although all support the free expression claim more often when the speaker is liberal, the difference is statistically significant only for Stevens. And for Breyer, the percentage point difference is negligible.

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[5]For Justices who cast fewer than 100 votes it would be imprudent to estimate individual statistical models.

Justice	% Support for Free Expression Claim		Number of Votes
	Liberal Speaker/Speech	*Conservative Speaker/Speech*	
Thomas	23.1*	65.4	104
Scalia	20.7*	65.2	161
Alito	9.1*	53.9	24
Roberts	15.4*	64.3	27
Kennedy	43.2*	67.7	143
O'Connor	30.6*	50.7	190
Breyer	40.0	38.1	87
Souter	60.3	51.1	103
Ginsburg	53.2	40.0	92
Stevens	62.8*	46.9	260

Table 1. Percentage support for the free expression claim based on the ideological grouping of the speaker, for Roberts Court Justices (ordered from most conservative to most liberal based on the Martin-Quinn Scores). Excludes Kagan and Sotomayor due to small Ns and a lack of variation in the speakers. An ∗ indicates a statistically significant difference in support for the liberal versus conservative speaker at $p \leq .05$.

5   Discussion

1. We humans tend to evaluate our own group or its members more favorably than outsiders. Because judges are humans, it's not altogether surprising that they too fall prey to this bias.[6]

2. One implication for judging the First Amendment is straightforward. The Supreme Court (and its members) can appear more or less supportive of free expression depending on whether it decides cases with speakers left or right of center. This may explain differing accounts of the Roberts Court's relative support for the First Amendment.

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[6]Our study shows evidence of ideological bias. Several studies demonstrate religious, racial, and ethnic favoritism in judging. See, e.g., Shayo & Zussman.

Appendix

Justice	% Support for Free Expression Claim		Number of Votes
	Liberal Speaker/Speech	*Conservative Speaker/Speech*	
Alito	9.1*	53.9	24
Black	87.6*	64.3	183
Blackmun	46.2*	60.9	263
Brennan	84.7*	68.7	381
Breyer	40.0	38.1	87
Burger	27.5	41.0	199
Burton	41.9	0.0	33
Clark	35.3	50.0	130
Douglas	97.2*	63.2	236
Fortas	79.0	33.3	41
Frankfurter	52.2	28.6	74
Ginsburg	53.2	40.0	92
Harlan	42.0	50.0	176
Kennedy	43.2*	67.7	143
Marshall	85.2*	65.1	266
O'Connor	30.6*	50.7	190
Powell	41.3	41.9	169
Rehnquist	18.1*	34.1	295
Roberts	15.4*	64.3	27
Scalia	20.7*	65.2	161
Souter	60.3	51.1	103
Stevens	62.8*	46.9	260
Stewart	62.2	54.1	259
Thomas	23.1*	65.4	104
Warren	83.8*	42.9	150
White	38.4	50.0	340
Whittaker	42.9	40.0	54

Table 2. Percentage support for the free expression claim based on the ideological grouping of the ppeaker, 1953-2010 Terms. Excludes Goldberg, Jackson, Kagan, Minton, Reed, and Sotomayor due to small Ns or a lack of variation in the speakers. An $*$ indicates a statistically significant difference in support for the liberal versus conservative speaker (at $p \leq .05$). For Justices with 100 or more votes we estimated the full model. The difference for Black was insignificant and borderline for Blackmun and Kennedy. It was also borderline for Ginsburg ($p= .08$), whereas the difference between her raw percentages is not statistically significant.