5-14-2017

The Roberts Court Constitution of Freedom of Speech: Preferences, Principles, and the Study of Supreme Court Decision-making

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Abstract

Since the appointment of Chief Justice G. Roberts to the U.S. Supreme Court, political scientists and legal scholars have assessed the Court's behavior in a diverse array of cases and issue areas, including those touching on federalism, reproductive rights, voting rights, and economic liberty (cases involving businesses and corporations). Few issues have proven as vexing as the Court's constitution of the First Amendment's command "Congress shall make no law…abridging the freedom of speech…"

In light of the Court's ongoing constitution of the scope and coverage of the First Amendment, a narrative has emerged that paints the Court as distinctly conservative. In a number of widely publicized, controversial decisions, the Court under Chief Justice Roberts has incrementally dismantled federal and state efforts at campaign finance reform, made union fundraising more difficult, and restricted the availability of First Amendment protection for students, prisoners, and government employees. This explanation, however intuitive and prevalent, is complicated by another narrative. During the same period, the Court has issued incredibly speech-protective decisions in cases involving the distribution of videos depicting dog fights, violence in videogames, protesters at the funerals of fallen service members, lying about military awards, NGOs working abroad to address the AIDS epidemic, roadside signage, and even government employees. Adding another wrinkle to the fold is entire corpus of anti-speech claimant decisions that have been issued by a unanimous Court, or a Court divided in a way unexpected by the 'liberals versus conservatives' characterization of our nation's highest tribunal.

These dual storylines present a puzzle that motivate a set of interrelated research questions: What is the nature of the Roberts Court's constitution of freedom of expression? Is

judicial behavior within this politically salient issue area explained by the ideological preferences or attitudes of the justices? If not, what is the alternative explanation? And, more broadly, what are the limitations of the conventional means by which scholars study judicial behavior? This dissertation explores these questions through a set of conventional and innovative approaches to the study of judicial decision-making. It examines the entire universe of free speech decisions of the Roberts Court from external and internal approaches to the study of judicial decision-making. To do so, the dissertation employs a multi-method approach, including large and medium-N analyses of Roberts Court free speech decisions and qualitative tools of conceptual development and process tracing.

This project offers four key findings related to the effect of judicial attitudes on the constitution of protection for freedom of expression during the Roberts Era. First, as indicators have incrementally improved upon accurately measuring a key concept of interest – the ideological direction of decisions in freedom of expression cases – the bivariate relationship between judicial attitudes and ideological voting becomes more tenuous. This suggests the need for a continuing research program focused on conceptually valid operationalization of decision direction in freedom of expression cases and beyond. Second, with the Rehnquist Court Era as a comparison point, the effect of judicial attitudes across all votes during the Roberts Era is statistically significant – stronger conservatism scores correlate positively with a pro-speech decision. While this relationship does not exist for the Rehnquist Court, a conceptual typology of cases comparing the ordering of voting coalitions to the direction of decisions in those cases reveals that the Roberts Court is, in some ways, less ideological than the Rehnquist Court Era. Third, through the tool of process tracing and the use of "hoop tests," the Roberts Court is best understood as having a conservative orientation though not monolithically so – there is

considerable heterogeneity in terms of the ideological orientation and conceptions of the judicial role held by the justices that frequently result in unexpected voting alignments. Fourth, the Court's certiorari process in free expression controversies is better explained by jurisprudential concerns rather than ideological cues. However, once disaggregating the Court's certiorari docket by issue area, there is evidence for both the ideological and legal explanations for the Court's behavior in free expression decisions.

The central finding wrought from this project is that the judicial constitution of contemporary free expression protection in the U.S. cannot be reduced to single-cause explanations. The complex and often secret nature of various stages of judicial decision-making at the US Supreme Court, as well as the competing, longstanding epistemological approaches to understanding judicial behavior, strongly suggests that scholars must take care to question the assumptions of and examine behavior from both "internal" and "external" perspectives on Court behavior. Sacrificing the former at the altar of the latter leaves interested observers without a clear idea of the structure and language through which high politics is contested at the Court – a language that makes some claims possible and others untenable. The reverse is also problematic: Taking the justices at their word and assuming that fidelity to legal principles and sincerely-held conceptions of the judicial role explains judicial behavior ignores what appear to be patterns of partisan or ideologically driven voting. Beyond answering a substantive question of great interest for scholars, lawyers, litigants, and citizens alike, this research presents new directions for the study of judicial decision-making that have great potential for traveling to other issue areas and constitutional courts Syracuse University.

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DISSERTATION

Submitted in partial fulfillment of the requirements for degree of Doctor of Philosophy in

Political Science

Syracuse University

May 2017

Acknowledgements

I would like to sincerely thank Thomas Moylan Keck, Keith James Bybee, and James R. Alexander Jr. for their unfailing support and guidance throughout my graduate career at Syracuse University. Their contributions have been legion, and without them this dissertation simply would not be possible. Tom, Keith, and Jim read and provided feedback on too many drafts of this project to count over the last six years. I could not ask for nor imagine better mentors and confidants, and they have reminded me that patience truly is a virtue. I am a better teacher-scholar and person for knowing and collaborating with them, and in particular, Tom. Tom has been my advisor since my first year at Syracuse University, and continually helped channel my research, teaching, professional, and personal development in too many ways to list and describe here. I am incredibly appreciative. In addition, I want to convey my appreciation for the mentoring provided by committee members Colin Elman (particularly at the research design stage), Grant Reeher (in many forms during the writing of this project and during my time at the Campbell Public Affairs Institute at Syracuse University), and Dimitar Gueorguiev (especially for comments and critiques related to the structure of Chapter Five). As well, special thanks to David M. Driesen of the Syracuse University College of Law for agreeing to chair the committee, as well as the opportunity to explore judicial decision-making from a fresh perspective. Finally, the critical insights, support, and friendship of G. David Arceneaux, Sonu Bedi, Matt Cleary, Chris Faricy, Shana Gadarian, Jon Hanson, Seth Jolly, Helen Knowles, Steven Lichtman, Quinn Mulroy, Pedram Maghsoud-Nia, Glyn Morgan, Richard Price, and Logan Strother have also brought needed clarity and purpose to a veritable morass of information.

Additionally, I wish to express special thanks to Maeva Marcus, Robert Gordon, and the participants of the Jordan Saunders Seminar in Constitutional History at Stanford University for comments and insights that encouraged me to think about law, history, and politics in a different light. Similarly, I am thankful for the comments offered by the graduate students and faculty of the Political Science Research Workshop at Syracuse University, as well as Jeb Barnes and other attendees of the research design workshops at the 2015 meeting of the Institute for Qualitative and Multi-method Research. I am also grateful for unfailingly kind and professional assistance of Candy Brooks, Jacquie Meyer, and Sally Greenfield at the Political Science Department of Syracuse University, and Kelley Coleman, Bethany Walawender, and T.J. Wells of the Campbell Public Affairs Institute at Syracuse University.

The constituent parts of this project were presented at various professional conferences as well – many thanks to the participants at the 2012 and 2014 meetings of the Northeast Political Science Association, the 2013 meeting of the New York Political Science Association, the 2014 meeting of the Midwest Political Science Association, and the 2016 meeting of the American Political Science Association. At Syracuse University, Michael Pasqualoni and the staff at the Syracuse University College of Law and Bird Libraries have been extremely helpful in tracking down various resources, including the CQ Almanac collection. Finally, I wish to thank the anonymous reviewers for various peer-reviewed journals for their incisive comments on portions of this dissertation submitted for publication. Collectively, those mentioned are responsible for whatever success this endeavor has wrought; I alone am responsible for the deficiencies that remain.

The support of family and longstanding friends has been essential and unwavering throughout graduate school, despite my tendency to vanish for extended periods of time. My

appreciation, thanks, and gratitude to Blaise and Brittany Metroka, Ryan Metroka (and Christen!), Riana Metroka (and the new member of the family, Brydon!), "Jackson-Jackson," Robert & Sue Metroka, Gary & Kathleen Nastase, Dylan & Dalton Silko, and Sean & Cynthia Rose Skiles for your ongoing support, encouragement, and companionship (in addition to all of the laughs). Kathleen and Cynthia merit special mention as they continue their battles against breast and pancreatic cancer. Additionally, I want to thank Francis D. Anzalone, Jesse (and Courtney!) Dorchak, Andrew P. Griffin, Mike and Tracey Henry, Zachary Huitink, Ben K. Keathley, and Stephen J. Kilgore for their support at various stages of this process. Finally, to Robert & Lisa Matson and Charlie & Donna Bower: I will never be able to repay the kindness, hospitality, and generosity you have extended to me over the last six years. You were good enough to invite me into your families and I would not have finished the first leg of this race without you.

Last but not least, a number of individuals have sustained me as this project was written. This dissertation is dedicated to them, as I cannot overstate how much they have meant to me. We are all born into families and support networks, but these individuals have *willingly* shared their lives - an incredibly gracious situation. A full chronicle of their respective roles merits a separate volume, but I will try to avoid mincing words here. To Adam E. Brnardic (and Katie!), Zachary R. Cacicia (and Kayla!), Ron J. Gathagan, Stephen J. Krestar Jr., Brandon M. Miller, Jason A. Piccone, and especially Brad S. Penrose: Thank you all for the joy and enthusiasm, for the laughs and keeping me honest, for the decency and encouragement, for the authenticity and integrity, and, above all else, for inviting me into your lives. You are without question the best human beings I have been privileged to know, trust, and love in the course of my travels. I thank you for and wish you and your loved ones the very best of everything.

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Chapter 1

In the Vanguard?

Introduction

On December 6, 2005, the United States Supreme Court heard oral arguments in No. 04-1152, *Rumsfeld v. Forum for Academic and Institutional Rights* (FAIR). The case involved an association of law schools and faculty who argued that provisions of the federal Solomon Amendment requiring military recruiter access equal to the access allowed by other professional recruiters violated FAIR's First Amendment rights of speech and association.[1] Under the law, denial of equal access to military recruiters would result in a forfeiture of federal funding. According to FAIR's brief, compliance with the federal law "conflict[ed] with law schools' longstanding and evenhanded policies of refusing to assist employers that invidiously discriminate against their students."[2] Specifically, the respondent law schools and faculties protested the military policy of "Don't Ask, Don't Tell," authorizing enlistment and retention distinctions made on the basis of sexual orientation of soldiers, airmen, seamen, marines, and other members of the U.S. Armed Forces.

Among other arguments, E. Joshua Rosenkranz's brief for FAIR claimed that the "Solomon Amendment requires law schools to give military recruiters more than just 'access to campus' and more than just 'access to students' on campus…the Solomon Amendment requires law schools to suspend their anti-discrimination policies…the Solomon Amendment requires law schools to collaborate with military recruiters in an effort - discriminatory recruiting - that the schools consider fundamentally unjust."[3] While not among the collection of speech-protective

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[1] Freedom of Association is a derivative right of the US Constitution's First Amendment Freedom of Speech clause.
[2] Brief for Respondents, 2004 U.S. Briefs 1152, i (2005).
[3] 2004 U.S. Briefs 1152, 34-35 (2005).

decisions cited in the brief, FAIR's First Amendment argument could easily have cited Justice Robert Jackson's famous dicta in *West Virginia v. Barnette* (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us (319 U.S. 624, 642 (1943)).

Beyond the important substantive issues of law presented by the case – a confluence of the values of liberty and equality –*FAIR* is notable for being the first substantive free expression case heard by Chief Justice John Roberts, who was confirmed as 17th Chief Justice on September 29, 2005 (Babington and Baker 2005). Shortly after oral arguments in *FAIR* but prior to the Court's decision, Justice Samuel Alito was confirmed by the U.S. Senate to the Associate Justice position vacated by the retiring Sandra Day O'Connor, long thought to be at the ideological center of the Court (Keck 2004, 199-203). The twin appointments of Roberts and Alito marked the end of an 11-year period of stasis on the Court, and signaled a transition from the Rehnquist to the Roberts Court. Writing for *The New York Times*, correspondent David Stout noted that the appointment of Alito (following Roberts) was "a triumph for the conservative movement, whose adherents have longed to tilt the balance of the Court to the right." (Stout 2006).

First Amendment claims have long occupied an important position on the Court's docket (Lewis 2010; Perry 1991, 262), though the magnitude and ideological tenor of free expression votes and jurisprudence have varied over the years. Scholars have found that while the Court under Chief Justice Earl Warren was remarkably protective of freedom of expression (Powe 2009; Epstein and Segal 2011, 6), the Burger and Rehnquist Courts were considerably less willing to rule in favor of free speech claimants. In addition, Justice O'Connor's role as the

swing vote on the Court during the Rehnquist Era often resulted in "minimalist" decisions (Bybee 2001, 943-944); in the free expression context it was O'Connor (and sometimes Rehnquist) who were willing to uphold campaign finance regulations against First Amendment challenges (Keck 2004). Spectators of the Court gained their first glimpse of the Roberts Court approach to freedom of expression on March 6, 2005, with the announcement of the Court's unanimous opinion in *Rumsfeld v. FAIR* (547 U.S. 47 (2006)).

Writing for the Court, Chief Justice Roberts held that the Solomon Amendment's requirement of equal access for military recruiters did not violate the First Amendment. In dispensing with FAIR's free expression claims, Roberts noted that "The Solomon Amendment neither limits what law schools may say nor requires them to say anything," that the recruiting assistance mandated by the Solomon Act "is a far cry from the compelled speech in *Barnette*…plainly incident to the Solomon Amendment's regulation of conduct," and that "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." Concluding the Court's opinion, the Chief Justice opined that "FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."

While the Court's unanimous holding in *FAIR* was an inauspicious start to the Roberts Court's constitution of free expression, the Court has since demonstrated a willingness to deliver surprisingly robust protections of speech in a number of cases. "Speech Rights Triumph as U.S. High Court Limits Government Power," read the headline at the conclusion of the Roberts Court's 2010 term. Greg Stohr, Supreme Court Reporter for *Bloomberg News*, noted a series of speech protective decisions that prohibited state governments from restricting big pharmaceutical

companies' access to prescription information (*Sorrell v. IMS Health* (131 S.Ct. 2653 (2011)) and minors' access to violent videogames (*Brown v. Entertainment Merchants Association* (131 S.Ct. 2729 (2011)). The article also noted decisions striking down a jury verdict for punitive damages resulting from the intentional infliction of emotional distress in a case pitting the Westboro Baptist Church of Topeka, KS against the father of a marine killed in the line of duty in Iraq (*Snyder v. Phelps* (131 S.Ct. 1207 (2011)) and a series of decisions striking down state and national limitations on election campaign financing (*Citizens United v. FEC* (558 U.S. 310 (2010)) and *Arizona Free Enterprise Club's Freedom PAC v. Bennett* (131 S.Ct. 2806 (2011)). Stohr summarized the Roberts Court record on protecting freedom of speech as follows: "Whether the topic was violent video games, pharmaceutical marketing campaigns or political contributions, the justices cast a skeptical eye toward government regulation of speech as they closed out their year with a flurry of First Amendment rulings" (Stohr 2011).

Conferring the ringing distinction of "pro-speech" on the Roberts Court blinks at reality, however, as the narrative exists alongside competing portraits of the Court as "not a free speech Court" (Chemerinsky 2011), or one only willing to uphold free expression claims in "slam-dunk" cases (Youn 2011). Ten years into the Roberts Court era, the Court's decisions in *Walker v. Sons of Confederate Veterans* (135 S.Ct. 2239 (2015)) and *Reed v. Town of Gilbert, Arizona* on June 18, 2015 reinforced the Janus-faced nature of the contemporary Court's record on free expression. In the former case, the Court through Justice Stephen Breyer held that Texas' decision to reject a proposed license plate message did not violate the First Amendment rights of the Sons of Confederate Veterans because license plates constitute government speech, which is insulated from First Amendment suits. In the latter case, a unanimous – but fractured in rationale – Court (through Justice Clarence Thomas) held that the Town of Gilbert's differential regulation

of temporary signs was sufficient to infer impermissible content-based regulation, which remains the dominant categorical mode of analysis in free expression cases.

The result in *Sons of Confederate Veterans* was anti-expression, while the result in *Reed* was pro-speech. In the former, the Justices split on ideological lines, with one notable defection – Justice Thomas (considered to be one of the Court's most conservative members) joined Breyer's majority opinion, along with Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. In the latter, while all Justices voted for Reed, the majority rationale (delivered by Thomas) was joined by Chief Justice Roberts and Justices Antonin Scalia, Anthony Kennedy, Samuel Alito Jr., and Sonia Sotomayor. Justices Breyer and Kagan each filed concurring opinions that disagreed with Thomas' rigid categorical analysis, which read more like dissents than concurrences (Denniston 2015). The former case result appears more consistent with models of judicial decision-making that give primacy to the unobserved ideological values and preferences of the justices as key causal variables, while the latter appears to be less easily explained by these conventions. And, in *Sons of Confederate Veterans*, the voting alignment was marked by a notable defection – Justice Clarence Thomas – drawing attention to the link between aggregate measures examining the effect of judicial values across a large number of votes and the observed voting alignments in decisions on the merits. Are such defections the product of deeply held ideological convictions, or are they attributable to tough legal questions resulting from the facts of each case?

Explaining Contemporary Freedom of Expression

How is it that a conservative majority Court has gained the title – albeit disputed – of the most pro-speech Court in history, despite the long pedigree of First Amendment jurisprudence as

a “lodestar of liberalism” (Epstein and Segal 2006)? Why do some decisions appear consistent with the idea that ideological or partisan considerations dictate the votes of the justices, while still others suggest that a broad commitment to protecting unpopular speech from legislative or executive encroachment is shared by all justices – liberal and conservative? Do these decisions appreciably differ from the prior Rehnquist Court – characterized as the most activist in history (Keck 2004) – and what is the nature of that difference? And what, if anything do jurisprudential considerations have to do with the decisions issued by this conservative majority Court? This dissertation is an effort to answer these questions, by contextualizing modern free expression decisions in broader scholarly debates about the nature of ideological and legal (doctrinal) influences on Supreme Court decision-making.

In this dissertation, I describe and explain the scope and coverage of contemporary freedom of expression protection in the United States through behavioralist and historical institutional lenses, with a focus on the votes of the Justices of the Supreme Court of the United States from the 2005 through the 2014 terms. The central, substantive claim of this dissertation is that the free speech agenda of the Roberts Court Era cannot be explained by externally-imposed ideological preferences alone. An accurate, systematic explanation of the Robert’s Court’s constitution of freedom of expression is possible only by expanding the scope of inquiry beyond aggregations of individual judicial votes on the merits. In addition to the conventional ideological scoring of case factors and judicial preferences, judicial decision-making studies attempting to explain this area of normative importance for journalists, scholars, and the average citizen alike can and should take account of the following: the measurement of the concept of ideology when scoring indicators for the direction of a decision, the composition of the voting coalitions (rather than aggregated, individual votes) in merits decisions, the interaction among

jurisprudential structures and different conceptions of the judicial role held by justices within and across cases, and patterns appearing in the decision to grant or deny certiorari. By examining each of these aspects of the Court's behavior from varying epistemological perspectives, I assess the dimensions and overall veracity of the claim that the current Court's record on freedom of expression can be explained by reference to the conservative, political preferences of a majority of the justices.

This dissertation also builds on the study of judicial decision-making by pushing back against single-method driven research. Voting patterns can and should be contextualized within the broader historical traditions and legal structures that constitute judicial decision-making. In examining contemporary free speech from these various methodological and epistemological perspectives, I find that variance in the Roberts Era free expression agenda is explained by a combination of non-monolithic ideological preferences, contested jurisprudential structures, and divergent conceptions of the judicial role. Correlations between values and votes alone cannot explain the development of US free expression law; nor can this acontextual approach reveal how this area of law is constituted by competing jurisprudential and philosophical ideals that intersect with conceptions of the judicial role and ideological values of the justices. Simply put, the explanation is incomplete without attending to the ways in which the values of the justices, understood to be revealed in voting patterns across cases, are constituted by conventional legal structures. The answer to the question of whether it is preferences or principles that explain free expression decision-making in the contemporary era is "both."

This chapter provides a broad overview of the contemporary free expression agenda in the United States, reviewing recent work at the intersection of judicial decision-making, free expression, and political science and contextualizing this project in broader scholarly debates

about the study of judicial behavior. I explain how this project not only explains an important outcome of interest for a specific period of the Court's history, but also engages with broader theoretical arguments in the study of judicial decision-making by linking "external" and "internal" perspectives on judging (Feldman 2005). Chapters two through five represent the substantive portions of the project, each concerned with a specific aspect of the judicial process and epistemological assumptions concerning how and which data are best analyzed for the question at hand. In the remaining sections of this chapter, I provide an introduction to the content and study of freedom of expression in America. I begin by contextualizing free speech as an important component of pluralist democracy in America. I also provide a general overview of debates about freedom of expression within the broader agenda of the Roberts Court, as well as the findings and limitations of recent research designs that inform the questions asked and methods employed by this dissertation.

The remainder of this chapter summarizes the road ahead, offering general theoretical and research design components which will be elaborated upon within each specific chapter.

Free Expression as Social, Legal, and Ideological Commitment

Near the end of his career, Anthony Lewis noted that while the Supreme Court has wavered on rights-based claims in the areas of privacy and equality (citing decisions in the aftermath of *Roe v. Wade* and *Bowers v. Hardwick*), "Since the middle of the twentieth century, the idea of the First Amendment has acquired a powerful hold on the American imagination. Even conservatives, who had been found on the repressive side of speech controversies, now join in exaltation of freedom of expression. People invoke 'the First Amendment' as if those words would settle whatever issue was being debated" (Lewis 2010, 169). True to form, Americans

have invoked the free expression guarantees of the First Amendment in contemporary controversies ranging from the anti-marriage equality stance articulated by the founder of Chick-Fil-A (Bomboy 2012), to comments made by Phil Robertson of *Duck Dynasty* fame (Curry 2013), to a ban on the sale of Confederate Flags in the state of California (*LA Times* Editorial Board 2016). The First Amendment has also been invoked recently in the higher education context, with the revocation of a job offer by the University of Illinois Urbana-Champaign to Professor Steven Salaita for social media comments critical of Israel, as well as the perception that college campuses are ground zero for "political correctness" and regulating "microaggressions;" policies that may or may not be in tension with commitments to free inquiry and ideological diversity (Lukianoff and Haidt 2015).

The ingrained commitment to the First Amendment among Americans parallels the right to free expression's preferred place in the constellation of constitutional freedoms. Because of its relationship to the democratic process – ensuring the continually refined search for truth in an abstract "marketplace of ideas" or furthering the ideal of "self-government" in a democracy – the free speech protections of the First Amendment to the U.S. Constitution are unlike other valuable though ultimately inapposite protections of the Bill of Rights. Freedom of speech is central to the American system of government in a way that the other protections are not. One need not be the subject of criminal charges, incarcerated, or an ongoing trial to draw upon the protections of the First Amendment – it has application to the displaying of signs on public property, voicing displeasure with government policies, public works of art, depictions of sexual activity, videogames, door-to-door solicitation, economic advertising – even the location of newspaper racks.

Put another way, ten words of the United States' most exalted legal document's First (and originally, Third) Amendment permeate an incredible amount of the day-to-day components of society, and function as a barrier to government conduct that calls into action other important safeguards – being secure in one's papers and possessions, protection against cruel and unusual punishment, a speedy and fair trial by jury, and the like. It is prior to the protections afforded to citizens in the face of government prosecution, the freedom that makes liberty in a republican democracy possible, the lynchpin of the ideal pluralist system that locates the common good in a process whereby organized interests compete to gain resources, from institutions of government (Feldman 2008; 2013). In the words of Laurence Tribe and Joshua Matz, "Speech is powerful. It's the lifeblood of democracy, a precondition for the discovery of truth, and vital to our self-development" (2014, 122).

Understanding the Roberts Court record on freedom of speech, then, is not just another arena for a strawman assessment of whether it is law *or* politics that best explains the motivations of justices: It has important empirical and normative implications for scholarly understandings of the nature of the democratic process in America. When scholars like Anthony Lewis point to the Court's First Amendment tradition of protecting free expression and question whether the Court has generally favored speech claimants – from institutions such as corporations and unions to the traditional soapbox orators of the "dissent" tradition of free expression (Shiffrin 1999) – there is at least an implicit concern with the functioning of the democratic system. In other words, there is a presupposition of a guarantee that must be available to all Americans wishing to speak on matters of political concern, to contribute to the free trade in ideas, and to foster self-realization and fulfillment of the idea of individual autonomy.

Broader Theoretical Debates

> The political behavior orientation is not a substitute for other perspectives, but supplements the approaches to knowledge which have been and continue to be the hallmark of more traditional workways. All research into politics and government in the final analysis shares a common goal, i.e. to give meaning to the political phenomena which we experience. This is no less true of the traditional approaches with their focus on events, ideologies, institutions, and structures than of the behavioral orientation which features the analysis of personal and group behavior in a political context. (Ulmer 1960; cited in Bradley 2003, 109).

The Roberts Court speech docket also speaks to the longstanding but still relevant debate among scholars concerning the behavior of justices. The First Amendment is a substantial component of the civil liberties docket considered by the U.S. Supreme Court, and civil liberties has been a flashpoint for the ongoing debate concerning the influence of law and politics on the decision-making of justices. While the attitudinal model of judging (discussed in greater detail in chapters two and three) has demonstrated a high degree of correlation between the conservative and liberal values of justices and their subsequent votes on the merits in civil liberties cases (Segal and Cover 1989; Segal, Epstein, Cameron, and Knight 1995; Segal and Spaeth 2002, 320-323; Gillman 2003, 14), some scholars have argued that free expression is an exception to this general association. To build upon the previous section, this project is valuable not only for its substantive importance, but also because a single-issue area (the free speech clause of the First Amendment) decided by the same set of judges appears to defy the dominant forms of the attitudinal paradigm of US Supreme Court decision-making.

In an extended discussion of *U.S. v. Alvarez* (132 S.Ct. 2537 (2012)), a decision striking down The Stolen Valor Act of 2005 as unconstitutional, Mark Tushnet (2013) noted that "In many First Amendment cases the justices don't line up according to the dominant 'conservative versus liberal' narrative. You need doctrinal background to understand *U.S. v. Alvarez*" (217).

Tushnet is not alone in suggesting that free expression is something of an exception to conventional attitudinal explanations: Lucas "Scot" Powe noted that despite the general conservatism of the post-Warren Court years, "The First Amendment continued to enjoy prominence in the justices' hearts, and with modest recalibrations, the Court continued on the liberal path of the Warren years" (2009, 284).

Later, in discussing the landmark decision of *Texas v. Johnson* (491 U.S. 397 (1989)), striking down a Texas flag desecration law as unconstitutional under the First Amendment) and *U.S. v. Eichman* (496 U.S. 310 (1990)), striking down a federal flag protection law enacted in response to the Court's *Johnson* ruling) Powe commented,

> There is something about flag burning. Reagan appointees Antonin Scalia and Anthony Kennedy were in the majority protecting the act, while Rehnquist was a dissenter. The two cases, like an earlier one from the Warren Court, produced splits along no discernible ideological lines. On all other constitutional issues, however, conservatives stayed conservative and liberals remained liberal" (289).

These comments resonate with Keck's analysis of the Rehnquist Court, who found in an assessment of all decisions where that Court invalidated federal statutes, the free expression cases of that particular era were often decided by voting coalitions not predicted by the attitudinal model of judging (2007). Other scholars, even those as critical of the "free market Constitution" historically articulated by the Court as Timothy Kuhner, discerned a willingness on the part of liberal and conservative justices to reach a surprising, compromise decision in the landmark campaign finance decision of *Buckley v. Valeo* (424 U.S. 1 (1976); discussed in Kuhner 2014, 33-39). Finally, in an eclectic edited volume on differing judicial philosophies in the area of free expression, Helen Knowles and Steven Lichtman (2015) note the erratic voting alignments in Roberts Court free speech cases and surmise that there is more to the story of

judging (at least in the realm of the First Amendment) than the political preferences of judges (239-243).

On the other hand, a different perspective on the Court's free expression record suggests that these decisions – like other civil liberties decisions – can be explained by partisan or ideological commitments of the judges. Cornell Clayton and Lucas McMillan, zeroing in on the Court's much maligned and unpopular campaign finance decisions, have argued that "Campaign finance and the First Amendment is another area clearly reflecting the conservative movement in constitutional law, if not the even more immediate electoral interests of the GOP" (2012, 139).[4] David Gans of the Constitution Accountability Center, specifically reviewing Chief Justice Roberts' record after a decade on the Court, narrated that "At the same time that Chief Justice Roberts and his conservative colleagues have substantially expanded First Amendment protections for corporations, the Court's conservative majority has also reinterpreted the First Amendment to gut long-recognized protections for unions, striking a serious blow against organized labor" (2015, 10). Political explanations are suggested in work by Youn (2011) and Chemerinsky (2011), who have both pointed to decisions striking down campaign finance laws and making union fundraising more difficult as evidence for the claim that the Roberts Court is generally conservative, and freedom of speech is not an exception to the attitudinal rule.

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[4] A national survey conducted by Pew Research from Aug. 27 to Oct. 4, 2015, found broad bipartisan support for the idea that campaign finance laws "would be effective in reducing the role of money in politics." (DeSilver and Van Kessel 2015). A previous Pew Research survey conducted from Jan. 11-16, 2012 found that of those respondents aware of the *Citizens United* ruling, 60% of self-identified Republicans, 63% of Democrats, and 67% of Independents agreed that the decision was having a negative impact on the 2012 Presidential campaign (Pew Research Center 2012). A nationwide poll by the Gallup organization conducted from Oct. 1-2, 2009 - shortly after oral arguments in *Citizens United* – found that while majorities of Democrats (62%) and Republicans (64%) and a plurality of Independents (48%) agreed that "campaign contributions are free speech," 61% of those surveyed also agreed that "government should be able to place limits on how much money individuals can give to a political candidate," and 71% agreed that "government should be able to place limits on how much money corporations or unions can give to a political candidate." When asked directly to prioritize either "placing limits on campaign contributions" or "protecting right to support campaigns," 54% of Democrats, 53% of Independents, and 49% of Republicans prioritized limits on campaign spending (Saad 2010).

In sum, this debate about the Roberts Court's constitution of free expression is yet another manifestation of a longstanding, broader theoretical debate concerning the motivations of judges. Arguments critical of the Court's record on free speech often boil down to claims that it is the conservative ideologies or "attitudes" of the justices that explains the Court's record on free expression, while those focusing on the Court's willingness to protect liars, unpopular religious minorities, distributors of videos alleged to promote animal cruelty, and recognize videogames as artistic expression either explicitly or implicitly suggest that something other than traditional liberal or conservative ideological commitments is motivating the justices in First Amendment free expression cases.

Competing and Disparate Explanations

The Roberts Court has proven a slippery concept for scholars of judicial decision-making. Calling to mind the observation that the "Cases you choose affect the results you get" (Geddes 1990), scholars have looked at the contemporary Court from a diverse collection of ontological assumptions and methodological approaches in order to gain traction on explanations of the Court's votes and decisions. For example, Marcia Coyle (2013) singled out four key areas of the Roberts Court's agenda in constructing a narrative of a conservative Court muscularly flexing the power of judicial review to, among other things, recognize a 2nd Amendment right to own a firearm for self-defense in one's home in *D.C. v. Heller* (554 U.S. 570 (2008)), and in short order incorporating that right against state and local governments in *McDonald v. Chicago* (561 U.S. 742 (2010)), dismantling federal and state campaign finance laws in *Citizens United v. FEC* (558 U.S. 310 (2010)) and *Arizona Free Enterprise Club's Freedom PAC v. Bennett* (564

U.S. 721 (2011)), and narrowly upholding the individual mandate of the Patient Protection and Affordable Care Act while striking down its Medicaid expansion conditions imposed on the states in *National Federation of Independent Business v. Sebelius* (132 S.Ct. 2566 (2012)).

In another account of the Roberts Court Era, Mark Tushnet raised the important insight that sometimes a Justice may deviate from his or her "core" liberal or conservative inclinations, though his treatment ultimately focuses on a sliver of the Court's docket. This observation is not to accuse these scholars and others of purposefully cherry-picking cases to reach a foregone conclusion: Tushnet is explicit in that he intentionally focuses on the portion of the docket with politically salient overtones, or "most-likely" cases for the political Court argument. Such case selection strategies, however, paint an incomplete picture of the Court and may unintentionally bias findings, whether they are in constructing a narrative of the Court as conservative, liberal, or the result of a complex mixture of ideology, jurisprudence, long-term strategic considerations, or deviations from ideological expectations. Even Laurence Tribe and Joshua Matz (2014), who recognize a "dizzying array of considerations" affecting the decision-making calculus of the justices, ultimately reject the utility of "deep explanations," or those that tend to look for patterns of the effect of ideology or a particular jurisprudential regime across cases (4). Instead, the authors provide richly detailed, contextual narratives of a number of cases across nine areas of law on the Roberts Court agenda in making the claim that the state of the law is mired in a level of uncertainty.

While there is nothing inherently wrong about these approaches, they are not without key epistemological and methodological limitations. In other words, it is difficult to know the nature of the Court without attending to matters of case selection. Limiting assessments of the Court's political dimension to those cases deemed "politically salient" (Tushnet 2013) and subsequently

finding that ideology or politics matters is not a difficult bar to jump. The highly interpretive nature of these studies does not lend itself well to the sort of hypothesis testing associated with more systematic requirements of social science.

Recognizing the tradeoff between more parsimonious, cut-and-dried *effects-of-causes* research efforts - which typically look at the effect of one or two key variables of interest across a large number of cases - and richly detailed, interpretive *causes-of-effects* research - which typically examines the relationship among a number of relevant variables within a small number of cases (Goertz and Mahoney 2012), some scholars have attempted to study judicial decision-making from a middle ground of sorts. For example, Diana Kapiszewski (2011) conducted an analysis of "26 politically crucial cases decided by the STF [Brazilian Supreme Federal Tribunal] between 1985 and 2004" so as to systematically facilitate "detailed analysis of each case and augmented the study's internal validity" (473-474). Similarly, Keck's analysis of judicial coalitions in all 53 cases where the U.S. Supreme Court invalidated a federal statute from 1981 to 2005 was structured by a medium-N approach to case selection and analysis, a "methodological choice [providing] a universe of cases large enough to look for patterns across decisions, but small enough to present some context and detail for each case" (2007, 324).

The Roberts Court free speech agenda has been the subject of sustained attention for political scientists working within a more positivist, large-N epistemological tradition as well. In 2006, Lee Epstein and Jeffrey Segal suggested that the winds of freedom of speech had shifted – that the longstanding "liberal" right to free expression was quickly becoming a lodestar of conservatism (Epstein and Segal 2006). The authors found support for the claim that the justices use free speech claims to instrumentally advance other ideological or political goals, noting that the Court's liberal justices were more likely to vote against free speech claims when they

conflicted with another ideological commitment, such as the right to privacy. In a follow-up effort, Epstein, Parker, and Segal (2013) found evidence that the justices tend to support free speech claims argued by members of their own ideological in-group – particularly the Court's conservative justices – though the authors' conclusions have been subject to criticism (Pettys 2014; 2015). In both efforts, the authors examined the effect of judicial attitudes across a large number of cases.

During the same period, Monica Youn of the Brennan Center found that the Roberts Court ruled in favor of free speech claims in only 44% of the cases granted certiorari and argued on the merits. Epstein and Segal (2011), conducting a similar study, came to a similar conclusion in simply examining the outcomes of Roberts Court free speech cases. The focus on judicial attitudes as the key explanatory variable for free speech decisions has not been limited to large-N studies. By 2014, Chemerinsky dedicated a portion of a book-length condemnation of the Supreme Court's historical performance to the Roberts Court's oft-maligned campaign finance decisions (Chemerinsky 2014). Similarly, Tribe and Matz (2014) argued that while "Well-defined categories of intensely protected speech can occasionally constrain judges in ways that matter" (146), ideological divisions on the Court go a long way in explaining the Roberts Court's interpretation of the First Amendment: "Partly because of rulings like *Brown* [striking down a California law restricting the sale of violent videogames to minors] and *Snyder* [finding the Westboro Baptist Church of Topeka, KS could not be sued under the tort of Intentional Infliction of Emotional Distress (IIED)], the Roberts Court enjoys a strong "pro-speech" reputation. Appearances deceive" (152).

Many of these accounts have been less than comprehensive and at times fairly impressionistic, while others have facilitated very narrow inferences (though see Collins 2013).

Youn's brief 2011 study (similar in method and style to Epstein and Segal's brief 2011 report), , reduced the question to one of whether the Court was a free speech "maximalist" one (Volokh 2002). Eugene Volokh, a noted First Amendment scholar, simply coded each vote in Rehnquist Era free expression decisions as pro- or anti-First Amendment – with fractional values assigned to indicate when concurring opinions were more or less protective of speech than the majority in a particular case. According to Volokh, such conceptual trade-offs may be necessary in order to protect against subjective biases: "Injecting my views about whether the Justices were right or wrong, and from subdividing the cases along categories (for example, government-as-sovereign vs. government-as-funder, sexually themed speech vs. political speech) that would ultimately just reflect my own biases" (Volokh 2002). Tribe and Matz's recent contribution, citing the Court's opinions in *Morse v. Frederick* (551 U.S. 393 (2007), upholding the suspension of a high school student for the display of a banner reading 'BONG HiTS 4 JESUS"), *Garcetti v. Ceballos* (547 U.S. 410 (2006), upholding the transfer of a Los Angeles area DA for comments related to corruption in a criminal trial), *Brown v. Entertainment Merchants Association* (564 U.S. 786 (2011)), and *Alvarez*, note that a number of cases rejecting free speech claims have split the Court along ideological lines (2014, 153). However, the authors attribute the broader agenda to the Court's general categorical approach to First Amendment cases, where "speech is either fully protected by the First Amendment or entirely excluded" (153). Similarly, Tushnet argues that the pattern of free speech decisions can be attributed to "a desire for simple rules," while "politics doesn't explain much" (2013, 215).

In sum, legal scholars have faced difficulty in gaining traction on the Roberts Court as a concept, at once finding the Court is deeply polarized and divided, conservative while also producing rights-based rulings favoring liberal causes, often united yet still producing sharply

split voting coalitions that fracture along ideological cleavages. One contributor to the apparent slippery nature of the contemporary Court appears to be the case selection strategies selected by scholars, which go a long way in producing the results of scholarly inquiry. Some have focused on a narrower range of cases thought to be particularly crucial or important for assessing hypotheses about the Court's behavior. Given the multitude of factors thought to influence the decision-making of justices, other scholars have attempted to gain traction on Court behavior through the methodological choice of Medium-N analyses – allowing for examination of patterns of influence of key variables of influence across many cases, while also leaving room for more fine-grained, detailed analyses of individual cases that demonstrate how multiple causal factors produce an outcome. Still others have studied correlations between judicial preferences and case outcomes across entire populations of votes to gain inferential leverage. Each of these orientations is not without limits, however, and fail if a necessary condition for the "big picture" understanding of Court behavior is comprehensiveness in case selection *and* description.

Beyond Dichotomies

Behavioral studies based upon quantitative aggregation of the votes of individual justices continue to emphasize parsimony over richer, multi-dimensional understandings of the motivations of justices. During the 2014 Jordan Saunders Seminar in Constitutional History at Stanford University, legal scholar Robert Gordon noted that, "Political Scientists have always been more interested in the bottom line," while practitioners and law school professors continue to emphasize doctrinal norms, precedent, and the culture of judging over "counting votes" (Whittington 2000; Feldman 2005; Tamanaha 1996). Going back to at least 1988 with Rogers

Smith's influential article on incorporating the social, cultural, and legal context of judging to bear on what had become a generally behavioralist approach to public law studies, the "Neo-Institutional" strand of judicial decision-making literature has emphasized the role legal factors play in constituting decisions (Smith 1988; Clayton 1999; Whittington 2000; Feldman 2005). In terms of epistemological approaches, scholars have successfully done so within interpretivist (Graber 1992; Gillman 1993; Bybee 1998; Bussiere 1999; Keck 2004, 11; Richards 2013) and positivist (Hansford and Spriggs 2008; Richards and Kritzer 2002; Bartels and O'Geen 2015) research traditions.

However valuable diversity of research orientations might be for the production of knowledge, the insights gleaned from disparate efforts are limited in contributing to studies of judicial decision-making so long as they continue to resemble ships passing in the night. The review of recent scholarship aimed at explaining the constitution of freedom of expression by SCOTUS motivates the core substantive goal of the dissertation, but it also informs broader questions about judicial decision-making grappled with in the chapters to follow. Rather than staking a paradigmatic claim to the exclusion of other possibilities, this dissertation follows the recommendations and ontological orientation of Stephen Feldman in unifying what have become known as "external" and "internal" approaches to the study of judicial behavior.

According to Feldman, external approaches are premised on the idea that "Judges' decisions are responses to stimuli that are substantially independent of legal rules, principles, and precedents," while internal approaches believe "that precedents and legal rules have at least some influence on judicial decisionmaking." (Feldman 2005, 93, 96). For Feldman, when either of these paradigms structure the study of judicial behavior to the exclusion of the other, research findings are impoverished by a lack of comprehensiveness. The external view has merit for its

systematic modeling and prediction of judicial votes, but falls short by tilting at legal model windmills that few scholars actually believe. It can also be problematically acontextual, particularly when imposing ideological meaning on votes that may be too monolithic or do not easily map onto commonly understood meanings of liberal or conservative, or by ignoring how political preferences are constituted by the unique role of judging internalized by the institution's actors.

Conversely, the merits of the internal approach lie in the recognition that law is fundamentally an interpretive project, with judges in general agreement in terms of which jurisprudential rules and structures must be used to constitute decisions. For critics, however, this approach falls short in that it is mainly descriptive (or, as in law reviews, descriptive but also offering normative recommendations and concerns), and at times seems unconcerned with the fact that the Supreme Court often hears hard cases where "the law has run out," leaving policy concerns to fill the jurisprudential void. It has also been criticized by eminent, positivist scholars for being an unfalsifiable and even naïve account of the effect of law on decision-making (Spaeth and Segal 1999, 288; Segal and Spaeth 2002, 44-53), as it is incredibly difficult to establish that, in the presence of various legal structures and tests, a justice votes differently than he or she would absent those purported constraints (though see Corley, Steigerwalt, and Ward 2013 for evidence that law may act as a "decision-making vice" in some cases). Keith Whittington has pointed out that these critiques may miss the mark entirely, insofar as the practice of law is best understood as an institution that shapes the preferences of actors – even those with political preferences: "Justices are likely to think about and act on public problems differently as a consequence of their experiences and expectations on the Court." (Whittington 2000, 615).

Linking these two perspectives on judicial decision-making remains an untidy enterprise, though some efforts since the publication of Feldman's article have attempted to bring both perspectives together in a single frame (Corley et al. 2013; Richards 2013). Barring epistemological and methodological orthodoxy, there is little reason to maintain a firm division between research projects interested in the genesis and influence of the preferences of judges, whether legal or political. Because context is important and the meaning of legal norms and ideological preferences is characterized by periods of stability and fluidity (Smith 1988; Gerring 1997), any explanation of judicial decision-making drawing on both perspectives would benefit from carefully specified periods and carefully specified areas of law. A careful specification of scope conditions allows scholars interested in the effects of political or legal preferences across a series of decisions or votes to have a higher degree of confidence in the accuracy of results. The obvious trade-off to this approach is generalizability for accuracy, as the emphasis is on explaining an outcome for a well-defined period rather than a universal, longitudinal trend across many decisions and contexts.

The Court's First Amendment, freedom of expression project remains an important flashpoint for scholars in the ongoing debate concerning the relative influences of legal and ideological factors on Supreme Court judicial decision-making. In fact, the state of scholarship on the subject tracks the messy state of contemporary First Amendment free speech jurisprudence, with competing theoretical approaches and research designs mirroring increasingly complex subsets of jurisprudence, from the government speech to traditional content neutrality doctrines. Due to these scattered and disparate treatments, it remains an open question as to whether the Roberts Court is a pro- or anti-speech Court, whether free expression represents an exception to the attitudinal model of judging, whether the Roberts Court has reconstituted free

expression in a marked break from the previous Court, and the extent to which ideological preferences of justices or well-defined legal categories carries provides leverage on the question.

In developing answers to these questions in the course of this dissertation, the project examines the constitution of contemporary freedom of expression law from both perspectives. Here, the term "constitution" refers to the fact that the justices, as members of a particular institution and set of practices embedded within a particular historical context, set the contours and limits of First Amendment protection in an ongoing, fluid process of adversarial legalism. This constitution of freedom of expression is best understood as a shared practice of norms among members of a particular community, structured by a set of rules that are neither wholly determinate or hopelessly indeterminate. It accepts the premise that justices have an institutional duty to balance social facts and moral concerns, and that this practice is often fraught with "[cases] both similar to, and different from, a finite pattern of behavior in an infinite number of ways. Judicial discretion is inevitable because it is impossible for finite beings to guide conduct in ways that resolve every conceivable question." (Shapiro 2011, 251).

Because of law's simultaneous, fundamental indeterminacy in hard cases – precisely the type likely to populate the U.S. Supreme Court's agenda – and its ability to provide general guidelines that steer collective decision-making by a particular standard like a principle of content-neutrality (akin to Hart's "rule of recognition"(Hart 1994, 94-95, 98, 102-103)), studies of judging must account for the influences of social and moral preferences and legal principles alike.[5] These efforts must take seriously the different types of knowledge gleaned from internal

[5] Shapiro invokes Hart's "rule of recognition" and distinction between primary and secondary rules in suggesting constitutional law adjudication approaches a secondary rule – or rule of recognition – that government officials have a duty to "evaluate the conduct of citizens according to the rules these citizens are obligated to follow." In dispute resolution before Courts on issues of constitutional law, Article III (2011, 84-86) functions as a primary rule, and is a rule of recognition agreed to by government officials. In this project and specifically in chapter four, I view the

and external approaches to the study of judicial behavior and attempt to integrate them so as to gain the broadest possible perspective on an outcome of interest. This dissertation pushes back against the balkanization of judicial decision-making studies into camps sometimes bearing the labels quantitative and qualitative, behavioralist and post-behavioralist, attitudinalists and historical institutionalist. There is no guarantee that this structure will produce neat findings, however: To some, the findings may be as easily digestible as a Bob Ross landscape but to others a big picture akin to Jackson Pollock's work. This should be expected in any effort that brings the insights of competing perspectives together in offering a comprehensive answer to important political questions, providing empirical, quantitative analyses revealing measurable effects-of-causes, but also a detailed, complex causes-of-effects account. If persuasive, the project not only explains an important outcome of interest but will also serve as a model for judicial decision-making scholars interested in particular periods and/or issue areas to follow.

Plan of the Dissertation and a Brief Note on Research Design

Overall, the freedom of speech agenda of the contemporary Court is the broad outcome of interest to be explained in this dissertation project. More broadly, the project also uses contemporary freedom of speech as a proving ground for a number of longstanding conventions of judicial decision-making, especially a primary focus on individual judicial votes (and aggregations) and the merits stage of decision-making. In light of this structure and its accompanying methodological and epistemological pluralism, each individual chapter provides a specialized review of relevant literature and research design specific to the interrogation of the

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Supreme Court bench as a microcosm of society and the justices as players who agree to the rule of recognition that content-based regulations of speech by government actors are highly suspect under the First Amendment. Previewing a theme explored in chapter four, I argue that the secondary rule of fidelity to this jurisprudential regime rests on increasingly shaky ground.

conception of the judicial process at issue.[6] Material related to coding standards is included in the body of chapter two, and is developed further in a Appendices A through H of the dissertation. Data have been generated by the observable portions of the U.S. Supreme Court's decision-making processes and gleaned primarily from the close reading of judicial opinions and existing, universally accessible databases including the Supreme Court Database and the website of Andrew Martin and Kevin Quinn. The universe of free speech decisions decided on the merits during the Roberts and Rehnquist Court Eras was determined by cross-verification of several sources, including recent scholarship, The First Amendment Center, searches of the Supreme Court Database, and Westlaw key cites performed in connection with the Global Free Speech Repository (GFSR) at Syracuse University.

The following paragraphs provide an overview of each substantive chapter as well as key findings from each stage of the data analysis. Chapter two begins with the most fundamental part of judicial decision-making studies that may be taken for granted: the development of and scoring of indicators that accurately reflect concepts of interest. Scholars have recently developed new indicators in free speech decisions that move beyond the conventional "policy direction" variable assigned by the Supreme Court Database, a variable that has been of key importance in attitudinal studies of judicial decision-making. These ongoing efforts are a reminder that the scoring of indicators developed to measure key concepts is a key first step in any research endeavor (Adcock and Collier 2000). In chapter two, I develop and assess a new composite directional variable based on the idea of "INUS" conditions, defined as "an insufficient but necessary part of a condition which is itself unnecessary but sufficient for the

[6] Beyond that qualification – and consistent with best practices associated with data maintenance and transparency collected and examined by the Institute for Qualitative and Multi-method Research at Syracuse University (IQMR) - all data have been stored securely on a laptop hard drive with flash drive back-up copies and have also been uploaded to Dropbox with two-step authentication required for access. Data, including STATA analysis do-files, will be made available publicly to all parties via dataverse.com following submission of the project.

result." (Mackie 1965, 245; see also Mahoney and Vanderpoel 2015, 79-82). This composite indicator incorporates the identity of the speaker, speech act, and speech suppressor in assigning an ideological direction to judicial votes – each a necessary piece of information for determining the direction of a decision but none alone sufficient for characterizing a decision as liberal, conservative, or undetermined.

Chapter three assesses the Roberts Era free speech plenary (or merits) agenda from the perspective of the attitudinal model, specifying the probability of pro-speech votes primarily as a function of judicial attitudes (or ideological preferences) while controlling for a number of relevant case factors. This approach is part replication and part building upon the models and findings offered by Richards (2013) in a book-length treatment of the influence of factors beyond ideology on the Court's free expression decisions. I also argue for greater attention to the voting coalitions in cases as the key dependent variable of interest, rather than the probability of a pro-speech or anti-speech vote occurring given an aggregation of judicial votes. To examine the concept of voting disorder on the Court, I construct and elaborate on a series of descriptive typologies.

Chapter four builds upon the ideological explanation by considering the influence of jurisprudential structures, differing conceptions of the judicial role, and free speech philosophies within and across cases. This chronological and "causes of effects" explanation relies upon counterfactuals, cross-case, and cross-justice comparisons in the spirit of early work by C. Herman Pritchett, a pioneer of judicial behavior research who recognized the limits of effects-of-causes research designs that – to varying degrees – have emphasized ideological preferences over other possible explanations. While the model specified in this chapter is more complex than common judicial decision-making specifications, care is taken to mitigate against what could

become a scenario where "everything is somehow connected to everything else." (Smith 1988, 101; see also Davis 1999, 152).

Chapter five takes a different, innovative tack and leverages a different part of the judicial process in an attempt to pinpoint what lies behind the Roberts Era free speech agenda: the certiorari cut-point. To date, no issue-oriented study of the Supreme Court agenda has adequately – if at all –accounted for the non-random, discretionary nature of the Court's agenda. This strategy is not without its own perils. The secrecy of the certiorari process, possible strategic motivations, and questions of what constitutes "certworthiness" all contribute to a number of difficult case selection and research design choices. I develop an original dataset of all fairly comparable denials of certiorari in free speech cases from 2006-2015, and examine these cases via logit regression and case studies of issue area subsets within modern First Amendment law. The logic of looking to the body of cases denied certiorari is fairly straightforward, though complicated by the secrecy of the Court's review process: If the Court's free expression agenda is ideologically motivated, we may expect to observe similar patterns at the certiorari stage.

Chapter six summarizes the findings of this project, suggesting how this study could be a useful research program for other scholars interested in assessments of broad issue areas before the Court. Overall, the key finding of the dissertation is that the Roberts Court's constitution of freedom of expression is both ideological and legal. The findings are consistent with a Court interested in advancing a particular political agenda – hostility to campaign finance regulations and unions, sympathy to expanding the scope of freedom of expression to include commercial transactions - while also clearly marking the bounds of the scope of free expression protection. The Court's agenda has a clear conservative cast, though it is clearly not solely motivated by

conservative preferences. The Court regularly deviates from the expectations of the attitudinal model of judging, and the nature of these deviations is consistent with post-behavioral understandings of the Court as populated by actors with heterogeneous ideological and legal preferences. Simply put, the constitution of freedom of expression by the contemporary Court does not lend itself to bright-line dichotomies or categories.

Beyond the substantive outcome of interest, the conclusion also connects the assumptions and approaches offered here to the internal and external perspectives on law described above. It also suggests how this project may be expanded moving forward in the comparative courts context, the role of free speech in U.S. society, and the role of litigators in bringing cases before the Court. If this account is persuasive, then, it will successfully describe and explain the contemporary free expression agenda of the Roberts Era Court: It will also improve conventions relied upon in quantitatively and qualitatively (or positivist and interpretive) oriented studies of judicial decision-making.

Chapter 2

Rethinking Concept Measurement in the Study of U.S. Freedom of Expression

Introduction

The ideological coding of case outcomes is a key component of studies of Supreme Court decision-making. Foundational work in the attitudinal model of judicial decision-making has found strong correlations between the ideological values of justices and career voting patterns (Segal and Cover 1989; Segal and Spaeth 1993, 2002). The Supreme Court Database, a valuable research tool available to scholars of law and courts, has historically coded pro-free speech decisions as liberal – with some evolving exceptions, as in the case of decisions against provisions of federal and state campaign finance laws. Yet scholars from both the behavioral and doctrinal judicial decision-making camps have noted that there are conservative and liberal free speech traditions (Epstein and Segal 2006), as well as multiple potential indicators in any free expression controversy (Epstein, Parker, and Segal 2013; Pettys 2015).[7] If the indicators for ideological case factors do not closely reflect the underlying concept of interest - whether a decision's direction is liberal or conservative - then the foundation of judicial decision-making studies may be flawed (Adcock and Collier 2000). Thus, contemporary freedom of expression cases may represent a unique test population for some of the assumptions of what has become known as the attitudinal model of judging.

Consider the sustained scholarly debate concerning the nature of the Court's recent free speech decisions. Some of the Roberts Court's free expression decisions – particularly those involving campaign finance regulations and union fundraising - appear to be consistent with the

[7] For variation, cases generally concerning the First Amendment's free speech clause during the period of analysis in this dissertation use the terms "free speech" and "free expression" interchangeably.

attitudinal theory of judging, while others do not appear to fit so easily within the attitudinal paradigm, including cases involving protestors at military funerals, a federal animal cruelty law, a state law regulating the sale of violent videogames to minors, and even a federal law restoring copyright protections to artistic works previously in the public domain. Indeed, for a number of recent free expression decisions, it is not immediately clear which case-level indicator best reflects the ideological content of the case: The ideological, "in-group" affiliation of the speaker? The partisan identity of the speech suppressor? Or what about the ideological valence of the speech act itself?

The issue, then, is both substantive and methodological. Legal scholars continue to offer explanations of judicial behavior in Roberts Court Era free expression cases from a diverse array of epistemological perspectives and employing different methodological approaches (Youn 2011; Coyle 2013, 199-219; Epstein, Parker, and Segal 2013; Richards 2013; Tushnet 2013, 215-246; Tribe and Matz 2014, 121-153; Pettys 2014; 2015; Knowles and Lichtman 2015, 239-254). This sustained focus on the coverage and scope of free expression protection is connected to the First Amendment's place as a "lodestar" of democracy in the United States, a right that, when litigated, has frequently produced strange bedfellows among the Court's Justices (Edelman, Klein, and Lindquist 2008) and even among interest groups filing amicus curiae briefs in merits cases before the Court (Swenson 2016).Whether operationalized through quantitative scoring and regression techniques or richly detailed, interpretive narratives, all of these accounts share an implicit concern for the relationships between the ideological values of the Justices and the ideological direction of votes in decisions on the merits.

Recently, some scholars have drawn attention to the importance of accurately measuring the values of the justices, stressing the importance of accurately measuring the ideological

preferences of Justices (Johnston, Mak, and Sidman 2016). Alternatively, other scholars have highlighted the importance of accurately measuring ideology on the "votes" side of this relationship (Shapiro 2010; Hagle 2015). What else can be done to improve upon the content validity of the dependent variable operationalized in quantitative analyses of judicial decision-making? In this chapter, I focus on the votes side of the equation and develop an alternative, composite indicator for coding the ideological direction of decision direction in contemporary free expression controversies. Drawing on concept formation literature and the notion of "INUS Conditions," or "an *insufficient* but *non-redundant* part of a condition which is itself *unnecessary* but *sufficient* for the result" (Mackie 1965, 245), I develop a decision direction indicator that takes into account the speaker, speech suppressor, and valence of the speech act identified in each free speech decision issued by the Roberts Court since 2005. In other words, membership in the sets of "conservative," "liberal," or "unspecified" categories of Supreme Court decisions follows from the presence of multiple conditions – the type of speaker (rights claimant), speech act (the content of the speech), and the partisan identity of the speech suppressor (entity enacting the law or taking action suppressing speech) - which can be configured in multiple ways.

This chapter proceeds as follows: First, I describe the conventional policy basis for coding ideological direction developed by the curators of the Supreme Court Database, a resource widely-used by judicial decision-making scholars. Next, I review recent scholarship that has sought to improve upon the policy-based scoring of indicators by instead looking to the ideological affiliation of the speaker in a given case before the Court, as well as an emerging critique of this speaker-centric approach. A key theme that has come to light in a recent exchange between judicial decision-making scholars is the multiplicity of potential indicators

that may function as stimuli for justices considering free expression controversies, including the identity of the speaker but also the content of the speech and identity of the speech suppressor. To build upon this emerging research program, I develop a composite indicator for ideological direction that also accounts for the latter two considerations. Finally, I assess the composite indicator's performance by replicating the original values and votes regression appearing in conventional analyses of judicial behavior. I find that as scholars have refined the indicators for decision direction assignment, the relationship between values and votes has not remained constant but become more tenuous.

This replication of conventional analyses with new concept measurement techniques has immediate implications for the study of contemporary free expression decisions, where the conservative voting percentages of Roberts Court Justices in free speech cases from the 2005-2014 terms may be overstated. While the inferences drawn from this piece are necessarily limited in scope to recent free expression decisions and one possible model specification of many, the problem of multiple indicators and coding choices has implications for any study relying on the decision direction indicator assigned by the Supreme Court Database. More broadly, it is hoped that this project will encourage continued discussion across the quantitative and qualitative cultures in the epistemologically and methodologically diverse subfield of law and courts.

Measuring Decision Direction: The Policy-Based Approach

Ideology is a notoriously slippery concept. As John Gerring notes, "it has become customary to begin any discussion of ideology with some observation concerning its semantic

promiscuity." Gerring defines ideology as "a set of idea-elements that are bound together, that belong to one another in a non-random fashion." (Gerring 1997, 957, 980). This definition captures the core element of the concept of ideology, and allows the researcher to add and subtract particular attributes as dictated by case factors that resonate with modern liberalism or conservatism. In the dominant judicial decision-making paradigm, Supreme Court Justices, legal actors appointed in a political process to serve on the nation's highest tribunal as a co-equal policymaking branch of the federal government, face fewer institutional constraints in voting on cases and are therefore likely to vote ideological preferences rather than (or in addition to) commitments to precedent (Maltzman, Spriggs, and Wahlbeck 2000, 12; Hansford and Spriggs 2008; Corley, Steigerwalt, and Ward 2013). Generally, there are two dimensions used to gauge ideological preferences in American politics – one economic and one social (Fiorina, Abrams, and Pope 2011, 170-173). For illustration, pro-business decisions are coded as conservative while pro-union decisions are coded as liberal. On the social axis, a conservative decision is one that favors evangelical Christianity, while a liberal decision is one that favors social equality (of ethnic minorities, LGBT causes, etc.).

In a recent series of exchanges, judicial decision-making scholars have brought attention to potential problems with the assignment of decision direction indicator employed by the Supreme Court Database (SCDB)(Epstein and Segal 2006; Shapiro 2010; Epstein, Parker, and Segal 2013; Pettys 2014; 2015). These exchanges point toward the importance of accurately measuring the direction of votes. The most important factor in determining the ideological content of cases coded by the SCDB is the issue area. The Supreme Court Database emphasizes that, "Although criteria for the identification of issues are hard to articulate, the focus here is on the subject matter of the controversy (e.g., sex discrimination, state tax, affirmative action) rather

than its legal basis (e.g., the equal protection clause)," and that "The objective is to categorize the case from a public policy standpoint…"[8] At some point, the decision direction coding for First Amendment is the issue area cases began to make exceptions, such that some pro-First Amendment decisions were coded as conservative (Epstein, Landes, and Posner 2013, 149-151). For example, the current coding for First Amendment issue area decisions describes liberal decisions as those that are "pro-civil liberties or civil rights claimant, especially those exercising less protected civil rights (e.g. homosexuality)," "pro-accountability and/or anti-corruption in campaign spending," "pro-privacy vis-à-vis the 1st Amendment where the privacy invaded is that of mental incompetents," and "pro-underdog," while conservative decisions are "the reverse of above" (Supreme Court Database 2015). As one illustration, in campaign finance cases where the Court strikes down such regulations as inconsistent with the First Amendment, the database codes these pro-First Amendment votes as conservative under the anti-corruption criteria – though even here the choice of issue area and coding seems problematic.[9]

Basic Concerns: Multiple Issue Areas and Ad Hoc Adjustments

Commentators have occasionally questioned the degree to which coder discretion is constrained or scoring decisions can be replicated by the coding rules adopted by the SCDB (Hagle 2015). First, some cases present multiple issue areas. Sometimes, the SCDB recognizes this by disaggregating a case and coding each issue separately, but sometimes multiple issues are

[8] The Supreme Court Database, 2015 release.

[9] Even in this limited subset of First Amendment decisions, it remains unclear how the issue area is decided. In *American Tradition Partnership v. Bullock*, a 2012 per curiam decision holding unconstitutional a Montana statute prohibiting corporate spending in judicial elections, the database coded the decision as "liberal" in identifying the issue area as "First Amendment: Commercial speech, excluding attorneys." Nor is it clear why decisions favoring commercial speech claims are coded as liberal, given the link between such speech and a conservative/libertarian free market philosophy.

not recognized by database coders (Epstein, Martin, Quinn, and Segal 2012). Consider a contemporary free expression controversy recently coded by the Database: *Walker v. Sons of Confederate Veterans* (135 S.Ct. 2239 (2015)). In a 5-4 decision with Justice Thomas breaking with the Court's conservative bloc and joining Justice Breyer's majority opinion, the Court held that the Texas Motor Vehicle Board's rejection of a license plate design featuring the Confederate Flag was not subject to First Amendment scrutiny because it constituted government, rather than private, speech. Justice Alito's dissenting opinion, joined by Chief Justice Roberts and Justices Kennedy and Scalia, attacked the majority for misinterpreting the precedent established in *Pleasant Grove City v. Summum* (555 U.S. 460 (2009)), another government speech case decided unanimously and also authored by Alito.

According to the SCDB, the issue area in the case is the First Amendment, a coding choice that dictates the decision direction should be conservative, and that individual votes in favor of the Sons of the Confederate Veterans in the case should be coded as liberal. But is that the only issue area in the case? Lurking in the background is an issue about deference to states, a familiar theme for the Court's more conservative jurists during Rehnquist era (Volokh 2015). Should an additional issue area be added for the case (States' Rights), with the decision coded as conservative and dissenting votes coded as liberal (anti-states' rights)? Or, *ad hoc*, should an additional issue area category be added (right-wing speech), similar to the addition of the "anti-corruption" in campaign finance cases that transforms otherwise liberal First Amendment decisions to conservative ones because they struck down campaign finance regulations?

The potential to subtract and add coding rules without detailed explanation points to a related coding discretion issue: *ad hoc* measurement adjustments. As Carolyn Shapiro has noted, the issue area decision is important because it dictates the subsequent decision direction indicator

scoring. This choice has direct bearing on the dependent variables employed in attitudinal analyses of judicial decision-making (Shapiro 2010). In a recent book-length treatment of the behavior of federal judges, one of the book's co-authors offered corrections to a number of coding decisions in the SCDB based on a random sample of 110 cases drawn from the database: "We changed all votes to other from conservative or liberal in case type 30020, where every vote for the plaintiff in a commercial speech case had been coded as liberal, and in 30140, where likewise every vote in favor of requiring accountability in campaign spending had been coded as liberal." (Epstein et al. 2013, 150). The authors' notes on coding changes end with a comment on coding exercises of judicial review from liberal to "other," as "It would require a careful examination, which we have not undertaken, of individual cases to determine the ideological direction of a vote in favor of the exercise of judicial power." (Epstein et al. 2013, 151).

If, however, "The acid test of the role of ideology in Supreme Court decision-making is the ideological valence of the Justices' votes," then it should follow that a careful examination of case factors is appropriate for all types of decisions (Epstein et al. 2013, 105). This concern is not merely theoretical, as the Roberts Court's decision in *Milavetz, Gallop, and Milavetz v. U.S.* (559 U.S. 229 (2010)) illustrates. Here, the Court ruled against a First Amendment challenge brought by a law firm specializing in bankruptcy claims, which was restricted from advising clients to incur additional debt under amendments to the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Another contested provision of the law required that "debt relief" agencies disclose their identity in advertisements. Should "Commercial speech" decisions in favor of the claimant be coded as conservative, while commercial speech decisions in favor of lawyers be coded as liberal, based on the finding that attorneys tend to contribute campaign donations to Democrats? (Bonica and Sen 2015) On the

commercial speech issue, the SCDB codes the decision as liberal (Commercial Speech, Attorneys (cf. Commercial Speech)), while on the First Amendment issue the Database codes the decision direction as conservative (First Amendment, Miscellaneous)(cf. Comity: First Amendment)).[10] It is not clear why the two First Amendment issues point in different directions, or how to decide which decision (if it can be considered more than a single decision) should be given primacy – taking the case as a whole, is the proper decision direction "unspecifiable"?

Table 2.1 – Decision Direction Assignments, SCDB (1946-2014 Terms)

	Number of Cases	Percentage
Conservative	4,131	47.87%
Liberal	4,356	50.48
Unspecifiable	143	1.66
Total	8,630	100.00

Table 2.1 illustrates how rarely the unspecified code has been assigned by the SCDB. In Roberts Court free expression decisions, the unspecified code has *never* been assigned.[11] As Shapiro notes, this remains problematic for scholars in both the empirical and traditional legal studies fields: The behavioral approach linking values to votes "assumes that there is a single dimension – liberal to conservative – along which all cases' ideological character can be measured…In the U.S. Supreme Court Database, not only is the ideology coding unidimensional but it also binary." (Shapiro 2010, 88).

[10] Unless stated otherwise, Database results obtained via the Analysis tool (Analysis Case Detail) at the Supreme Court Database at http://supremecourtdatabase.org/analysis.php.

[11] Shapiro's claim that the SCDB direction coding is binary is not technically true, but in practice the unspecified code is rarely assigned. Since the 2005 term, the SCDB has assigned the unspecified code a total of 11 times. The code has not been assigned to any First Amendment free speech decisions during that period.

The In-Group Bias Debate

With these concerns in mind, scholars have recently developed an alternative indicator based on the ideological identity of the *speaker* in free speech cases (Epstein, Parker, and Segal 2013; see also Richards and Kritzer 2002 and Richards 2013 for earlier efforts at controlling for the identity of the speaker in free expression cases). In other words, the relevant stimulus for the justices is posited as the ideological identity of the claimant in a case, and the directionality of a judicial vote is determined by the purported alignment of the free speech claimant's ideology with the conservative or liberal values of the justices. Specifically, Epstein, Parker, and Segal define a "Nature of Expression" variable, "to assess the ideological direction of the expression (or expresser) – such that homophobic (e.g., [*Boy Scouts of America v. Dale*]) or racist (e.g. *Wisconsin v. Mitchell* [1993]) behavior, to provide but two examples, are coded as "conservative" expression. Nature of expression is liberal if the expression was, e.g., burning an American flag (e.g. *Texas v. Johnson* [1989]), providing support to (e.g. *Holder v. Humanitarian Law Project* [2010]), associating with un-American organizations (e.g. *Barenblatt v. United States* [1959]), and so on." (Epstein, Parker, and Segal 2013, 7).

The authors ultimately conclude that justices opportunistically rule in favor of pro-speech claims brought by members of their own ideological in-group, but with the caveat that "regardless of whether the law is liberal, conservative, or neutral, liberal justices are more likely to vote in favor of the expression," while conservative justices are only more likely to vote in favor of expression when the nature of expression is conservative (Epstein et al. 2013, 10; see also Liptak 2014). The study builds on conventional judicial decision-making scholarship in that it has spurred a re-assessment of whether free expression is simply another instrumental constitutional provision that justices put into service in the pursuit of liberal and conservative

causes, but the authors' operationalizing the nature of expression variable may also hinder our ability to draw inferences. By failing to clearly distinguish between the nature of the expression and the identity of the expressor, the authors' indicator may fail to reflect the underlying concept of interest. As legal scholar Todd Pettys suggests, there are at least two potential indicators present – the nature of the expression and the identity of the speaker (Pettys 2014, 16-17).

Epstein, Parker, and Segal responded to this charge and others in an ongoing debate with Pettys, who has found a number of coding errors and questionable operationalization issues in the study. One response by Epstein, Parker, and Segal included the admonition: "Another common misstep on [Pettys'] part is to conflate ideology and partisanship. Were he devising the coding rules, it seems that he would always code, for example, a challenge to an election law brought by a Democrat as liberal (and a Republican, as conservative). But that's not our approach. In these kinds of cases, a challenge motivated to bring about greater inclusion in the political process is liberal regardless of the challenger's partisan label." (Epstein, Parker, and Segal 2014, 1). This response not only draws attention to the muddy distinction between the nature of the speech at issue and identity of the speaker, but also stakes the claim that partisanship and ideology are two distinct, easily separable indicators. Recent scholarship in the political parties subdiscipline suggests that this claim may be more tenuous in contemporary politics, as the Democratic and Republican parties have become increasingly (though asymmetrically) more liberal and conservative, respectively, with partisan goals often reflecting the core ideological orientations of members of each party (Abramowitz 2011; Fiorina, Abrams, and Pope 2011). The point is not that the in-group bias approach to measurement is fundamentally incorrect in distinguishing partisan from ideological identity, but that the

distinction is not as cut-and-dried as their response suggests and that indicators employed to reflect concepts may be historically contingent.

Epstein, Parker, and Segal also code laws - the "speech suppressor" - on the basis of whether they are liberal or conservative, but the authors' definition is relatively thin: "For our study (as in all the others), conservative laws are actions taken by government that tend to restrict liberal speech (e.g. restrictions on flag burning); liberal laws are the reverse (restrictions on anti-union expression). The omitted category in our analysis is neutral laws – those that apply equally to liberal and conservative speakers, such as restrictions on campaign financing." (Epstein, Parker, and Segal 2014). Of course, laws against flag desecration or anti-union speech may have the effect of suppressing liberal or conservative speech, respectively, but these are obvious cases (Pettys 2015, 10). Here, it is not immediately clear whether the authors are coding the *identity* of the speech suppressor or their impression of the *effect* of that suppression. If it is the latter, and assuming the authors are serious about the claim that "votes to strike (and uphold) statutes tend to reflect [justices'] political preferences toward the policy content of the law," then it is unclear why campaign finance statutes are excluded from the "liberal" category, as the conservative opposition to such regulations has been well-documented and predates the contemporary Court.

Overall, this exchange underscores the importance of establishing a high degree of symmetry between systematized concepts and indicators: "Researchers routinely make complex choices about linking concepts to observations, that is, about connecting ideas with facts. These choices raise the basic question of measurement validity: Do the observations meaningfully capture the ideas contained in the concepts?" (Adcock and Collier 2000, 529, 531). In studies of judicial decision-making seeking to assess relationships between values and votes, measurement

concerns apply to both the independent variable – as is the case in the EPS study – and dependent variable.

Shifting the focus to the dependent variable in fundamental assessments of this relationship, it remains unclear how multiple, identity-based conditions present in cases should be accounted for when scoring the directional indicator. Consider another recent free expression case, *Williams-Yulee v. Florida Bar* (135 S.Ct. 1656 (2015)), a 5-4 decision upholding the Florida Supreme Court's adoption of the Bar's canon of conduct prohibiting candidates for judicial elections from soliciting campaign donations. Lanell Williams-Yulee is a member of a racial minority class and criminal-defense lawyer, suggesting the speaker identity for the case should be coded as liberal. The nature of the expression, however, concerns soliciting contributions for electoral campaigns – speech that resonates with the conservative, free market commitment equating money with speech. Further complicating matters is that the Florida Supreme Court adopted what is essentially an anti-corruption provision in regulating judicial elections in Florida. Is a decision against Williams-Yulee conservative, on the basis of her ideological identity? Liberal, on the basis of the speech suppressor in the case and the nature of her expression? How should scholars choose among these indicators that appear to point in different directions when operationalizing the concept of ideological direction of the decision?

Building on Recent Work: Case Conditions as INUS Conditions

The upshot of this emerging judicial decision-making scholarship has been the identification of a number of potential ideological indicators in free expression decisions, to include the identity of the speaker, the identity of the speech suppressor, and the nature of the

expression itself. Observers of the Court have no clear way of adjudicating among these components in terms of which is most relevant for assigning directional coding to a decision, as each component may have a conservative or liberal ideological valence. To choose one defining characteristic of the ideological content of a case at the expense of others raises questions about measurement validity and may lead to inaccurate relationships between values and votes. To contribute to this ongoing discussion concerning measurement in judicial decision-making studies, I offer an alternative approach that evaluates the ideological content of multiple theoretically relevant defining characteristics of contemporary free expression cases. I argue that accounting for these multiple, case-level factors yields more accurate characterizations of the decision direction of a case and, in turn, a better understanding of the relationship between values and votes. In the sections that follow, I build upon the speaker "in-group" account and its critiques by operationalizing the speech suppressor and speech act variables for Roberts Court Era free expression controversies. I then demonstrate how these indicators can be considered as multiple conditions that, when present, indicate membership in the categories of "conservative," "liberal," or "unspecified" through the qualitative tool known as INUS Conditions.

The Speech Suppressor

If justices are responding to the ideological valence of the entity enacting laws that suppress speech, scholars require an indicator that captures this valence. To operationalize the "speech suppressor" indicator in a way that is replicable and transparent, I draw upon a body of judicial decision-making literature emphasizing that Supreme Court Justices are appointed and confirmed by national partisan actors and will likely uphold statutes consistent with *partisan*

regime commitments and strike those inconsistent with said commitments (Dahl 1957). The notion of *regime politics* is defined as "the various ways in which governing coalitions organize their power and advance their political agenda within a system of interrelated institutions."(Gillman 2006, 107). As the parties have become more polarized – with conservatives likely to identify as Republicans, liberals likely to identify as Democrats, the partisan composition of enacting legislative coalitions has become a more plausible proxy measure for the ideological nature of laws.

At least one scholar has already looked to the composition of enacting legislative coalitions to facilitate inferences about the nature of judicial review by the Supreme Court (Keck 2007, 325). To the extent that partisanship is highly correlated with ideology in contemporary politics, the partisan composition of legislative coalitions voting in favor of relevant amendments (i.e. BCRA's "Millionaire's Amendment") or a relevant bill (i.e. The PROTECT Act) is a useful proxy for the ideological identity of the *speech suppressor* in a given case. As a proxy indicator, this approach is not without measurement validity concerns. However, I argue that it still represents an improvement over directional scoring that does not attempt to account for a measurable condition present in free expression controversies. Another limitation stems from data collection, as similar data on state-level legislative coalitions may not be readily available. When this is the case, scholars may look to well-documented regime commitments operating in the context of the case as a proxy. Ultimately, the assignment of a partisan or ideological identity to a government action suppressing speech calls for coder discretion. Recognizing this, Appendix A provides details on how this discretion was exercised.

Take for example the Roberts Court's decision in *Knox v. Service Employees International Union, Local 1000* (132 S.Ct. 2277 (2012)), which struck down a public workers'

union fee assessment for electoral or ideological purposes as compelled speech prohibited under the First Amendment. The suppressor in this case, a union fee assessment policy, is consistent with a longstanding Democratic regime commitment to labor unions, a key part of the Democratic electoral coalition (Karol 2009, 28-29, 37).[12] In these state and local level cases, when the partisan identity of a suppressor is not available due to missing legislative records or when the speech suppressor is an unelected official, I code the suppressor as Republican (or Democratic) when it is consistent with documented regime commitments expressed in national party platforms.[13] When such information is not available or the identity of the suppressor is unclear, set membership is coded as undetermined.

For example, in *FEC v. Wisconsin Right to Life* (559 U.S. 440 (2007)), the Court held that electioneering provisions of the Bipartisan Campaign Finance Reform Act of 2002 were unconstitutional as applied to the anti-Democratic candidate speech that Wisconsin Right to Life, a pro-life (conservative) 501(c)(3) non-profit corporation, wished to engage in. The Bipartisan Campaign Reform Act – despite its namesake – was passed with overwhelming Democratic and minimal Republican support.[14] As such, *WRTL II* is a case of a conservative speaker and Democratic speech suppressor. Any provision of a federal law can be categorized in the same way. If the challenged provision of a law in question in a free expression case passed with both majority Democratic support and Republican support in the House or Senate, it is coded as

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[12] As Karol notes, the problems associated with inferring unity and disagreement solely through reading positions articulated in platforms, I also adopt his recommendation of looking at votes cast by parties in the national legislature. The purposes of this project differ from Karol's in that his goal is to explain party coalition management, while mine is to develop indicators for the ideological direction of court case decisions. Party platforms offered by increasingly polarized elites are one way of doing so.

[13] "Moving America Forward: 2012 Democratic National Platform," last accessed Oct. 29, 2015, http://www.presidency.ucsb.edu/papers_pdf/101962.pdf; "We Believe in America: 2012 Republican Platform," last accessed Oct. 29, 2015, http://www.presidency.ucsb.edu/papers_pdf/101961.pdf.

[14] Roll Call Vote Information for the Bipartisan Campaign Reform Act of 2002 as follows: House of Representatives, Feb. 14, 2002: Democrats – 198Y, 12N; GOP – 41Y, 176N. U.S. Senate, Mar. 20, 2002: Democrats – 49Y, 2N; GOP – 11Y, 38N.

Bipartisan. For challenges to federal laws where the relevant provision was not offered by amendment, the roll call votes for the enrolled bill will be used to code the suppressor variable. If a federal law was enacted with majority Democratic (Republican) support, but with a majority of Republicans (Democrats) in opposition, then the nature of the speech suppressor is Democratic (Republican). Of course, sometimes laws that suppress speech will not have a clear partisan identity, such as the one in question in *U.S. v. Alvarez:* The Stolen Valor Act of 2005 was enacted with broad bipartisan support. In other words, the identity of the suppressor is neither Democratic (liberal) or Republican (conservative), but bipartisan. Coding suppressors as bipartisan or undetermined bears some similarities to coding speakers without any obvious or commonly understood ideological identity as unspecified. Appendix A provides descriptions of federal statute coding decisions.

A point of caution is in order: the basic assumption for coding the suppressor in a given speech controversy is that the justices respond to the valence of the legislative coalition or official because it is a *known* entity. The difficulty associated with finding and determining party positions via legislative votes and even party platform positions suggests that the justices are not familiar with the in-group identity of these political actors or which partisan coalitions favored speech suppressive laws. Admittedly, the results that follow in Table 2.3 do little to assuage this concern. However, if scholars remain convinced that this potential effect should be controlled for in attitudinal analyses and replications, this operationalization offers a degree of transparency not present in previous analyses.

The Nature of the Speech Act (Speech Content)

The shift from issue area to speaker identity followed work by Epstein and Segal (2006) that suggested that it is not at all obvious that all pro-free speech claimant decisions should be classified as liberal, notwithstanding the liberal tradition of robust protection for civil liberties. As Feldman has argued, a conservative free speech tradition exists alongside the liberal one – a tradition with distinctly Burkean elements (as in the Roberts Court's decision in *Morse v. Frederick* (551 U.S. 393 (2007)), as well as free-market, libertarian elements, as witnessed in the Roberts Court's line of decisions striking down campaign finance regulations (Feldman 2013, 144-146). Similarly, Timothy Kuhner (2014) has argued that the conception of a "free market Constitution" has influenced the justices in freedom of speech cases going back to at least *Buckley v. Valeo* (424 U.S. 1 (1976)) and has served to reframe economic controversies as civil liberties disputes. Here, the focus is on the conservative economic valence of the free market argument for speech, an argument that has appeared with regularity in the claims filed by speakers protesting restrictions on unfettered campaign spending and contributions.

To the extent that a conservative free speech tradition exists, it exists alongside competing liberal traditions as well. In *McCutcheon v. FEC*(134 S.Ct. 1434 (2014)), Chief Justice Roberts' opinion for the Court striking down aggregate contribution limits on individuals under provisions of FECA was also part of a broader debate with Justice Stephen Breyer (speaking for the Court's liberal bloc) about the role of free speech in the U.S. constitutional democracy. Roberts (along with the Court's more conservative justices) place heavy emphasis on the negative liberty component of the First Amendment's protections, while Breyer and the Court's liberal bloc interpret the First Amendment's command as a positive liberty. The work of Feldman (2013), Tushnet (2013), and Kuhner (2014), as well as Pettys' critique of the in-group

bias study (2015, 16-17) points to the relevance of the content of the locution at issue, or the nature of the speech act itself.

Late 20th and early 21st Century free speech jurisprudence has often turned on broader partisan and ideological commitments to protecting a "free market" conception of speech, extending coverage to claims against campaign finance regulations and commercial speech on the basis of ensuring an unfettered exchange of ideas. As Kathleen Sullivan (2010) has explained, this tradition has sometimes clashed with commitments to egalitarianism, or speech acts that appeal to equal treatment. In some controversies before the Court, this will be strongly correlated with the identity of the claimant. Consider again the case of *Knox*, where a class action against a local shop of the Service Employees International Union was filed by non-members of a union who objected to paying an additional fee assessed by the union to, in part, engage in ideological, pro-union speech in the heat of an election campaign. The speaker – union non-members opposed to pro-union political activities – is best scored as conservative and the speech act – protesting being compelled to contribute to pro-union ideological fundraising – can also be understood as a conservative speech act.

Other cases, however, do not feature this tidy convergence. *Milavetz*, described above, is one such example where the speaker in the case – a debt relief agency (lawyers) make a speech claim with conservative ideological valence (commercial speech). In this case, then, scholars attempting to score indicators are faced with a speech suppressor – the BAPCPA of 2005 – passed with bipartisan majorities, a liberal speaker (lawyers), and a speech act with conservative valence. Without a rule or weighting principle (or a view into the minds of the Justices to determine which factor was relevant in their respective voting decisions), how should coders proceed?

Table 2.2 – Proposed Coding Indicators for Roberts and Rehnquist Era Free Speech Cases[15]

	Speaker	Speech	Suppressor
Liberal	Lawyers; prisoners; unions; students; faculty; Democratic politicians; oppressed racial/ethnic minorities, liberal interest groups; government employees (except police); purveyors of adult entertainment and pornography; mainstream media outlets	Pro-racial, LGBT equality; pro-Democratic Party; secular speech; academic speech; anti-war speech; whistleblower speech; controversial left-wing speech (anti-war; animal rights); artistic speech including pornographic images and nude dancing	Federal Laws/provisions enacted with majority (minority) Democratic (Republican) support; laws consistent with most recent Democratic Party Platofrm. State and local laws/actions beneficial to unions, regulating campaigns, progressive-style ethics reforms; business regulations; abortion protections
Undetermined	No clear ideological identity; conflicting identities	Speech act lacks clear ideological component	Federal Laws/provisions enacted with majority support of both parties State and local laws without clear ideological purpose/object
Conservative	Businesses; doctors; law enforcement officials (police, corrections officers), mainstream and fundamental Judeo-Christian groups and individuals, GOP politicians, conservative interest groups, members of pro-life movement	Pro-life; anti-LGBT or racial equality; mainstream and fundamental Judeo-Christian speech; commercial speech; free market (anti-campaign finance and anti-tax) electoral speech; pro-GOP electoral speech; controversial right-wing speech (KKK; white nationalism, etc.)	Federal Laws/provisions enacted with majority (minority) Republican (Democratic) support; laws consistent with most recent GOP Party Platform State and local laws/actions beneficial to union non-members and right-to-work ideology, regulations of pornography/adult entertainment, actions by law enforcement officials; anti-abortion legislation/actions

Human discretion in measurement decisions is inevitable, and the meanings of ideological terms like "liberal" and "conservative" are period-specific. To ensure scholars may

[15] Note that the identity of the speaker may be distinct from the speech act, such that if a student protests the use of university funds subsidizing "liberal" campus groups, absent other identifying information about the student the coding for the speaker would be "liberal" and the speech act "conservative." In addition, labeling controversial speech by KKK members as conservative or ardent animal rights supporters as liberal indicates a general valence of the speech act that should not be taken to mean all conservatives are KKK sympathizers or all liberals animal rights activists. Such codes assume the speech act does, however, resonate with one part of the spectrum.

evaluate this measure on their own terms – a transparency issue - and to facilitate replication, Table 2.2 provides a summary of the proposed ideological coding rules for the composite indicator components for the contemporary Court. These classifications build on judicial behavior literature in the context of First Amendment theory so that "liberal" reflects a commitment to egalitarianism and political equality, while "conservative" tends to reflect an affinity for speech rationales committed to a free market theory of the First Amendment (Sullivan 2010). They also reflect general ideological and partisan regime commitments, so that decisions favoring unions, prisoners, and students and their speech claims are generally "liberal," while those favoring mainstream, Christian religious groups, businesses, police, and conservative interest groups are coded as "conservative." As concept measurement entails a great deal of description, the guidelines in Table 2.2 represent an effort to be transparent so that others may build upon and attempt to replicate this analysis (George and Bennett 2005, 105-106). Others may disagree with these choices and configurations; critiques are valuable and welcomed in moving this broader research program forward.

Pettys' charge that the EPS study conflates speaker and speech identity is an empirical question that can be systematically assessed through conventional statistical modeling. In the study, EPS model votes on the speech claim in a given case (=1 for a pro-speech vote) as the effect of a number of theoretically relevant factors. Support for the claim that the justices generally support speakers of their own ideological stripe is found in an interaction term between the ideological preferences of the Justices (Segal-Cover scores) and the *nature of expression* variable described above. The authors find statistically significant support for the in-group bias claim for the Rehnquist and Warren Courts, but not the Burger Court. As for the Roberts Court, the authors' reported coefficient is in the expected negative direction (suggesting the current,

conservative Court is less likely to support liberal expression), though its magnitude approaches zero and does not register at conventional levels of statistical significance. The authors attribute this to "the relatively small number of votes cast by the Roberts Justices (N=248, from 28 cases)." (Epstein et al. 2013, 11).

At the conclusion of the 2014 term, that count stands at 388 individual justice votes. Scholars interested in the Roberts Court now have a decade of observations and 44 cases to leverage causal claims. The death of Justice Antonin Scalia in early 2016 also represents a clear break from the previous ten year period , though the nature of the post-Scalia period is difficult to even speculate on given recent obstructionism by the GOP-controlled Senate and uncertainty related to President Trump's forthcoming nominee. With these new data and cases across a fairly stable period of Court membership, scholars can attempt to replicate or assess the in-group bias account. In addition, scholars have also benefitted from the critiques of Pettys and others who have raised conceptual measurement concerns with the in-group bias account. For example, the *nature of expression* variable can and should be operationalized as two separate indicators: one for the identity of the *speaker*, and a separate one for the identity of the *speech* act, or content of the expression. A replication may either confirm the widely publicized findings of the initial study – at least as concerning the Roberts Court – or serve as a call for more circumspect characterizations of the modern Court's work.

To assess the in-group bias account's claims, I use logit analysis to model the vote on a free expression claim (=1 if pro-speech) as the result of the Justices' ideological preferences (*Segal-Cover* scores), whether the law in question was a *federal* statute or official action (=1), the identity of the *speaker* in a case, the identity of the *speech* act, the partisan or ideological identity of the *speech suppressor* in a case, and interaction terms between the Justices'

ideological preferences and the speaker, speech, and speech suppressor variables. The speech and speaker variables were coded categorically, including liberal (=0), undetermined (=1), and conservative (=2). Speech suppressor was coded categorically as well, with the difference being liberal/Democratic suppressor (=0), undetermined (=1), and conservative/Republican suppressor (=2). The undetermined categories are important to include in the model, because as Epstein and King (2002) note, "the quickest way to create a biased measure is to develop a procedure that relies in a biased way on responses from the population under analysis" (92-93). The baseline category for the speaker and speech variables is the liberal category, while the suppressor baseline is conservative/Republican suppressor. Standard errors are clustered on the Justices for a total of twelve clusters. Following the expectations of the EPS study, a positive sign on the speaker and speech variables would indicate that conservative justices are less likely to support liberal speakers and speech. As well, positive coefficients on the interaction terms between ideological preferences and speakers and ideological preferences and speech would suggest that the "gap between liberal and conservative justices in their support for free expression grows when the speech under consideration is liberal speech." (Epstein et al. 2012, 7).

Table 2.3 – In-Group Bias Account, Roberts Era (2005-2014 Terms)

	Coef.	R.S.E.
Justice Level		
Ideology (Segal-Cover)	-1.016	.6298
Case Level		
Federal Law	.2566	.2609
Speaker		
Liberal (Baseline)	---	---
Undetermined	1.592	1.214
Conservative	.2104	.6404
Speech		
Liberal (Baseline)	---	---
Undetermined	.4563	1.263
Conservative	**-3.284*** **	**1.102**
Suppressor		
Liberal/Democratic (Baseline)	---	---
Undetermined	.6698	.5748
Conservative/GOP	**-1.803*** **	**.5339**
Interactions		
Speaker		
Ideology x Liberal (Baseline)	---	---
Ideology x Undetermined	-1.325	1.907
Ideology x Conservative	.7969	.9032
Speech		
Ideology x Liberal (Baseline)	---	---
Ideology x Undetermined	-.4968	1.490
Ideology x Conservative	**4.666**** **	**1.311**
Suppressor		
Ideology x Lib/Dem (Baseline)	---	---
Ideology x Undetermined	**-2.086*** **	**.6657**
Ideology x Conservative/GOP	-.6208	1.303
Constant	.5430	.4614
N = 388		

Note: Logit coefficients with standard errors clustered on Justice (C.S.E.). p<.001****, p<.01***, p<.05**, p<.10*. Pseudo R^2=0.1585.

Table 2.3 reports the size, direction, and magnitude of logit coefficients for voting patterns for all freedom of speech decisions during the Roberts Court Era. Compared to the initial EPS study, neither the speaker nor suppressor variables register at conventional levels of

statistical significance. In addition, while the sign on the undetermined speaker variable is positive and significant, the sign on the speech variable's highest category (conservative) is negative, which suggests that the presence of conservative speech is less likely to result in a pro-speech decision. This could be due to hostility to conservative speech claims brought by liberal speakers (such as lawyers, in the case of *Williams-Yulee*). In addition, neither of the categories for the speech suppressor variable register at conventional levels of statistical significance, and the coefficient direction is the opposite of what would be expected.

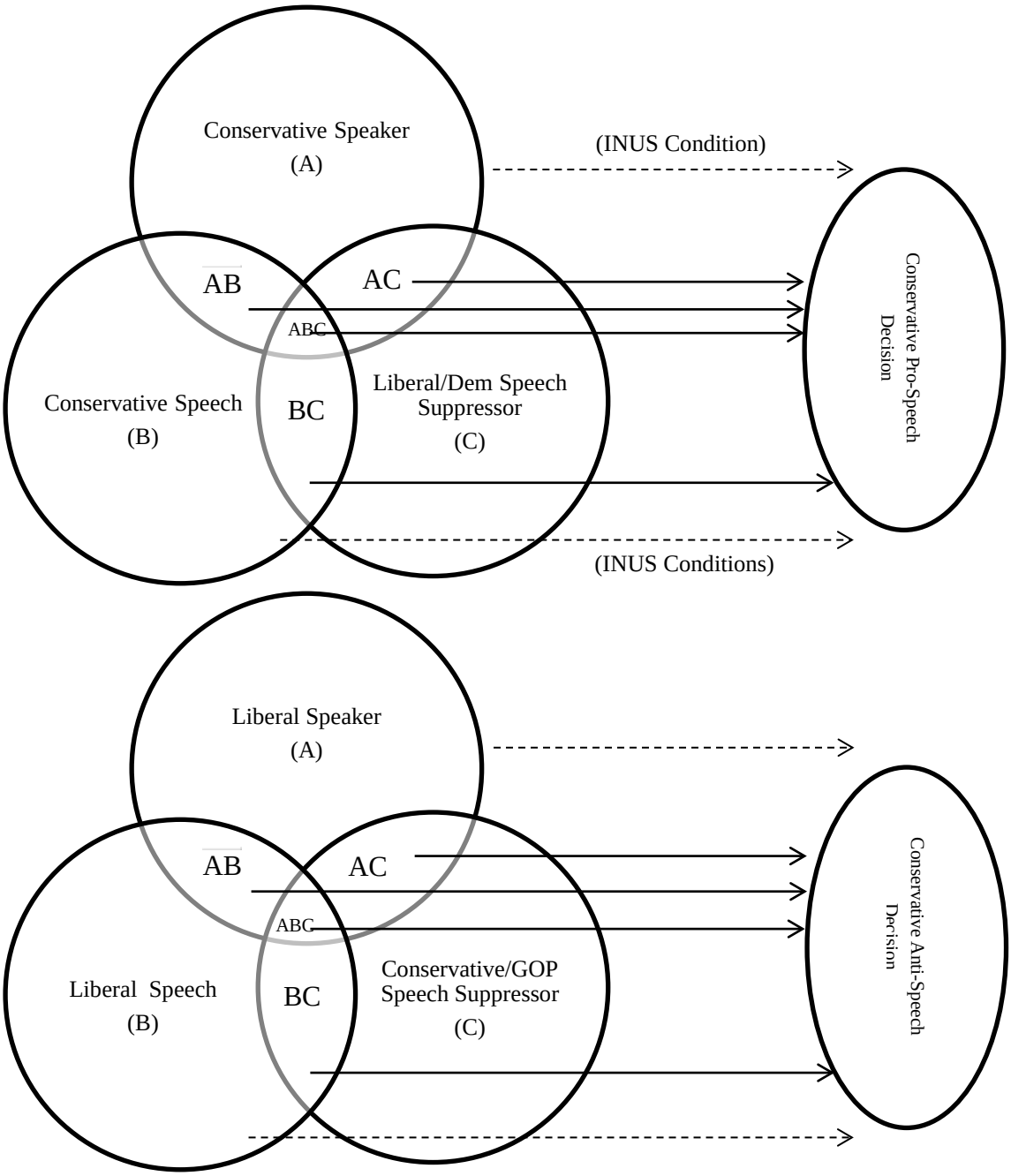
More important for this replication effort and the lynchpin of the EPS study are the coefficients for the interactions between ideology and each of the theoretically relevant case factor categories. None of the interactions between ideology and speaker are statistically significant, though the direction of the coefficient indicates that conservative justices are more likely to vote for speech claims brought by conservative speakers. What is more important, consistent with Pettys' critique , is the *content of the speech* in a case – the coefficient on the interaction between ideology and conservative speech acts is strong and statistically significant (2014, 5 (fn. 17)). A statistically significant relationship exists for the interaction between ideology and the speech suppressor when the identity of the suppressor is bipartisan or undetermined, as conservative justices are less likely to vote for the pro-speech position. However, the relationship is not significant for the interaction between ideology and liberal or Democratic-enacted laws. In other words, there is reason to believe that either the concept that truly matters is the content of the speech act, or the finding of in-group bias may not apply to the current Court – at least as conceptualized in the EPS study. Fundamentally, these findings suggest that the conclusions reached in the EPS study are not wholly supported by the data. Additionally, these findings suggest that evaluating correlations between each of these

constituent components and judicial votes may be insufficient for measuring and estimating the relationship between judicial values and votes in free expression cases.

Visualizing and Applying INUS Conditions

The central claim of this chapter is that knowing the ideological or partisan affiliation of any one of these components alone is neither *necessary* nor *sufficient* for coding the ideological direction of a case. To ensure the decision direction indicator reflects the underlying concept to be measured, scholars should account for the presence of multiple conditions when faced with coding choices. In contemporary free expression controversies, the identity of the speaker, speech act, and speech suppressor can be viewed as conditions that are "Insufficient but Nonredundant components of a combination of conditions that is Unnecessary but Sufficient," or what are commonly referred to in the qualitative methods literature as INUS conditions (Mackie 1965; quoted in Mahoney and Vanderpoel 2015, 79). Knowing the ideological identity of the speaker alone is not enough to classify the decision as liberal or conservative; one must also consider the valence of the speech act in a particular legal controversy and/or the ideological/partisan affiliation of the speech suppressor. The interplay of these three theoretically relevant components in free expression cases can be depicted visually as well. Following Mahoney and Vanderpoel (2015, 79-82), Figure 2.1 depicts these relationships through the use of family resemblance and INUS concept formation diagrams.

Figure 2.1 – Family Resemblance and INUS Conditions for Direction Assignments[16]



[16] Some ideological objects cannot be assigned a liberal or conservative coding, or involve laws enacted with bipartisan support (or actions without any clear ideological component). As such, a middle "undetermined" category exists (similar to the "unspecifiable" category available – but infrequently assigned – at the Supreme Court Database).

Figure 2.1 can be interpreted as follows: Conservative (liberal) decision direction is assigned when a case is a member of the following sets: ABC, AB~C, AC~B, or BC~A.[17] The "~" notation preceding a set category represents "not (set condition)." AB~C reads as "conditions A and B are present but not C." In the contemporary free expression context, a case presenting a conservative speaker (business) engaged in conservative speech (commercial speech) but not presenting a Liberal/Democratic law or action claimed to be suppressing speech is sufficient for assigning a pro-speech vote (decision) the ideological direction of conservative. When only one member of the set can be classified as conservative (liberal) and the other two sets take on the values of undetermined, then the directional coding of liberal or conservative cannot be assigned with any certainty. Again, this is because multiple considerations exist in a given case and it is not known which of those considerations ranks first for any member of the majority (or dissent) even if it is in fact A, B, or C alone that led to a conservative or liberal decision.

In some cases, free speech conflicts arise between two members of the same ideological group. For example, *Morse v. Frederick* (551 U.S. 393 (2007)) is understood as a conflict between a student and school administrator, arguably both a speaker and suppressor with liberal identities. One argument against this scoring of speaker and suppressor indicators is that the school official, Deborah Morse, is suppressing student speech so in this dialectic she is more properly scored as a conservative suppressor. However, the rule adopted here relies on the type of speech category to break the tie – Frederick's speech was pro-drug, political, student speech, which is coded as liberal. The Supreme Court's anti-speech decision in favor of Morse and

[17] The "~" notation preceding a set category represents "not (set condition)." AB~C reads as "conditions A and B are present but not C." In this context, the presence of a conservative speaker (business) engaged in conservative speech (commercial speech) but not a Liberal/Democratic law or action claimed to be suppressing speech is sufficient for assigning a pro-speech vote (decision) the ideological direction of conservative.

against Frederick, then, is conservative on the basis that it is AB~C. Another Roberts Court case featuring a conflict between two ideological identities is *Garcetti v. Ceballos (*547 U.S. 410 (2007)), where Democratic District Attorney Gil Garcetti's retaliatory actions against Deputy District Attorney Ceballos is decided by the nature of Ceballos' speech. His administrative reassignment followed what can be considered "whistleblower" speech, for his efforts in alerting defense counsel in an ongoing criminal case of problems relating to a inaccuracies in an affidavit leading to the issue of a search warrant.

Again, the scoring of the decision as conservative, anti-speech follows from the presence of case factors as AB~C. A complete listing of the combinations for classifying case outcomes is provided in Appendix B. The qualitative tools of concept formation – family resemblance and INUS conditions – consider the multiple ideological components of a free expression controversy in assigning ideological codes to merits decisions and therefore produce a more accurate indicator of the underlying concept of interest. In this approach to concept measurement, determining the ideological direction of the decision is independent of the votes of the justices and treats relevant case facts as defining characteristics rather than causal indicators (Goertz and Mahoney 2012, 127-138). Concept measurement and determining the essence of a concept is prior to causal identification or quantification (Sartori 1970, 1038). Accordingly, the composite indicator incorporates the theoretically relevant sets of speaker identity, speech suppressor, and type of expression in making determinations of decision direction for any given free expression case.

Using this conceptual framework, Appendix C contains the coding of case ideological content for all Roberts Court First Amendment free expression cases from the 2005 through 2014 terms along with the directional coding assigned by the composite indicator developed here, the

issue area based decision direction coding assigned by the SCDB, and the ideological direction as assigned in light of the identity of the speaker in the EPS study. For comparison purposes, Appendix D provides the same for the Rehnquist Era (1994-2004 terms). For each case, the ideological direction of a decision (and by extension, the justices' votes) turns on the totality of circumstances for a given case – in other words, there must be evidence from at least two of the three categories in order to categorize a given vote as liberal or conservative. For example, a decision is coded as conservative when the vote is for a conservative speech claimant and conservative expression (i.e. a conservative non-profit interest group protesting campaign contribution or expenditure limits)), a conservative claimant and a Democratic (or liberal) law (speech suppressor), or some combination of at least two of the three categories that point toward the conservative end of the ideological spectrum.

This approach is not without limitations. First, measurement decisions concerning the ideological identity of theoretically relevant case factors are likely to vary greatly across time periods. Earlier canonical free expression decisions may be understood as "liberal" based on the *Carolene Products* commitment to protecting unpopular speakers and speech from government suppression. Writing in 2006, Lee Epstein and Jeffrey Segal noted that "political scientists have long equated liberalism with a fundamental commitment to the First Amendment guarantees of speech, press, assembly, and association." (Epstein and Segal 2006, 82). Consider *Brandenburg v. Ohio* (395 U.S. 444 (1969), which featured a member of the Ku Klux Klan punished for making a number of racially inflammatory statements at a ritual cross-burning. During this period of the development of free expression jurisprudence by the liberal Warren Court, the decision for Clarence Brandenburg may be best understood as a liberal, pro-expression decision: Direction assignment is based on scoring the speaker as "liberal" under the unpopular speaker

understanding, the speech type (racist speech) might be properly scored as "conservative" even during this era, but the official action of censoring expression could plausibly be scored as a conservative speech suppressor (a general, period-specific concern with government actions stifling expression).

This point hints at a second assumption made in judicial decision-making studies, sometimes implicit but often animating judicial decision-making studies: A judicial vote can and should be reduced to interest in a particular partisan or ideological position, whether it is a policy orientation as imposed by the SCDB or a psychological affinity for members of a particular in-group in the EPS study. The meaning of a judicial vote is a subject that will likely continue to divide scholars, though recent evidence from a series of experiments – the gold standard in inferring causation – suggests that this reduction to this bottom-line motivation is problematic (Kahan, Hoffman, Evans, Devins, Lucci, and Cheng 2014, 4): Judges tend to be more resistant to the sort of "top-down" reasoning assumed in external approaches. The goal of the INUS composite indicator is to account for the different ideological or partisan referents in freedom of speech controversies, which places this effort squarely in the "external" camp of judicial decision-making studies. But engagement with this understanding of judicial votes on its own terms should not be mistaken with an endorsement of that view. Wallace Mendelson cautioned long ago that "no matter how precise and objective the neo-behavioralist's calculating machine, it cannot rise above the errors that are fed into it." (Mendelson 1963, 595). Though the approach outlined here may still – however unintentionally - feed Mendelson's beast, it answers the charge to more carefully develop a system of indicators put to use in behavioral studies.

To summarize, the scoring of decision direction – with this composite indicator and any other approach to measuring the direction of votes – rests upon the meanings of these terms

within the social and political context of those terms at different points in U.S. history. The approach is consistent with the "external" approach to decision-making studies described in chapter one, which reduces votes to a series of ideological indicators. While the idea of using the INUS conditions specified here travels to all free expression decisions issued by the Supreme Court, different issue areas embedded in different political and social arrangements entail the development of ideological indicators that account for these differences. A full discussion or application of this approach to every issue area or time period is beyond the scope of this dissertation, but a brief example may help illustrate how scholars can employ this approach in other areas: In the federalism context, for example, an INUS approach to coding might consider the identity of the partisan identity of a legislative act allegedly encroaching on state sovereignty under the 10th Amendment, the in-group identity of the claimant if such information is available, or the ideological orientation of the state challenging a federal law. As with the approach offered here, scholars would become familiar with the general characteristics of cases within the federalism issue area and, based on extant scholarship and theory, isolate theoretically relevant indicators of interest. In the words of Hagle (2015, 384), "To understand the forest, one also needs a solid working knowledge of the trees."

Finally, the INUS approach builds upon extant scholarship but it does not completely reinvent the wheel. Table 2.4 illustrates the degree to which the composite indicator coding correlates with the measurements employed by the SCDB and Epstein, Parker, and Segal (EPS). While they do not approach congruency, the generally high levels of actual compared to expected agreement suggest each indicator at least partially reflects the concept of interest (ideological decision direction of votes)(Viera and Garrett 2005). In the next section, I assess the

performance of each of these measures through a series of basic, bivariate models designed to assess the degree to which Justices' values and votes are correlated.

Table 2.4 – Agreement With Composite Indicator, Roberts and Rehnquist Court Eras

	Paired Observations	Agreement (Expected)	Kappa	Significance
Roberts Era (2005-2014)				
Supreme Court Database	43	62.79% (45.32)	0.3195	.0018
Epstein, Parker, Segal (EPS)	26	71.34% (52.04)	0.4043	.0008
Rehnquist Era (1994-2004)				
Supreme Court Database (SCDB)	54	49.06% (40.83)	0.1390	.0936
Epstein, Parker, Segal (EPS)	52	76.47% (41.41)	0.5984	0.0000

The Bivariate Case Revisited

To assess the performance of the composite indicator and to replicate models demonstrating a strong correlation between values and votes, I construct the original bivariate relationship that appears in early and more recent attitudinal scholarship (Segal and Cover 1989; Segal, Epstein, Cameron, and Spaeth 1995; Segal and Spaeth 1993; 2002; Epstein et al. 2013). It is true that scholars have elaborated upon this relationship through other techniques (logit modeling) and have offered a number of control variables: The EPS study focuses on developing a directional indicator that explains the free expression votes of the Justices, establishing probabilities for pro-expression votes. Instead, this chapter focuses on measuring a concept related to the dependent variable in a number of judicial decision-making studies, past and present (Segal and Cover 1989; Segal et al. 1995; Segal and Spaeth 1993; 2002; Epstein et al. 2013; Bryan and Kromphardt 2016, 11; Johnston, Mak, and Sidman 2016, 173).

The decision to reassess the bivariate model evaluating the relationship between values and votes is that it remains the most fundamental evaluation – or "acid test" - of this relationship (Epstein et al. 2013, 105). In this relationship, as Justices' Segal-Cover scores increase so too should their career conservative voting percentages. Generally, plots of actual and fitted (predicted) votes reveal something about the performance of a model specification: A model featuring minimal residuals between the actual and predicted votes represents a good fit. However, if the indicator employed to reflect the concept of decision direction does not account for the multiple factors presenting themselves in controversies before the Court, then the model may be inaccurate – the model's goodness of fit will be an artifact of concept measurement that is imperfect. Importantly, this measurement concern is prior to estimating causal effects and subsequent econometric concerns about biased estimators and the potential for error terms in the dependent variable to be correlated with independent variables (Adcock and Collier 2000; Goertz and Mahoney 2012; Wooldridge 2009, 316-318).

If concept measurement issues distort the relationship between values and votes, we may expect that *as indicators have improved in reflecting the concept of decision direction, residuals between the justices' positions and a line of best fit will likely increase.* If this is the case, then basic assumptions about the relationship between values and votes may be incorrect – they may fail the "acid test" of judicial behavior. As such, assessing the bivariate relationship between values and votes with new measurements of the decision direction variable is a replication effort with substantive implications for the study of contemporary free expression controversies and broader methodological and substantive implications for the study of judicial decision-making. The dependent variable for the models that follow is the percentage of conservative votes cast by each Justice since the October 2005 term (the beginning of the Roberts Court Era), while the

independent variable is each Justice's exogenously determined Segal-Cover score. In the first model, to calculate the percentage of conservative votes cast for each justice during this period I use the decision direction variable assigned by the SCDB. In the second model, I base the conservative vote percentages on the speaker identity indicator developed in the EPS study. In the third model, decision direction is scored based on the composite indicator developed via the INUS approach.

Table 2.5 – Ideological Scores and Percentages by Indicator

Justice	SC	% Conservative FS (SCDB)	% Conservative FS (EPS)	% Conservative FS (Composite)	Differences (SCDB/EPS)
Roberts Court (2005-2014 Terms)					
A. Scalia	1	72.5	77.78	72.09	-0.41/-5.69
S. Alito	.90	70.27	75.00	62.50	-7.77/-12.50
J. G. Roberts	0.88	65.00	81.48	67.44	+2.44/-14.04
C. Thomas	0.84	72.50	74.07	69.77	-2.73/-4.30
J. P. Stevens	0.75	50.00	52.38	27.27	-22.73/-25.11
D. Souter	0.675	50.00	50.00	37.50	-12.5/-12.5
A. Kennedy	0.635	72.50	77.78	67.44	-5.06/-10.34
S. Breyer	0.525	52.50	51.85	30.23	-22.27/-21.62
R. B. Ginsburg	0.32	47.50	48.15	32.56	-14.94/-15.59
E. Kagan	0.27	40.00	50.00	27.78	-12.22/-22.22
S. Sotomayor	0.22	43.48	54.54	34.62	-8.86/-19.92

Note: N=11. Percentages based on conservative voting percentages of each Justice from the 2005-2014 terms of the Court (the Roberts Court Era). For the SCDB and Composite vote percentages, the total number of decisions scored is 43. Due to the replacement of Souter and Stevens with Sotomayor and Kagan, respectively, the number of cases each of these Justices participated in is less than 43 (Justice Alito also did not participate in three of these cases at the beginning of his tenure on the Court).

In addition, data collected in the EPS study for the Roberts Court Era is only available for the 2005-2010 terms of the Court. For EPS vote percentages, the total number of cases scored is 27. Justice Alito voted in 24 of these cases, Stevens in 21, Souter in 16, Sotomayor in 11, and Kagan in 6.

Rehnquist Court (1994-2004 Terms)					
A. Scalia	1	75.93	78.85	64.81	-11.12/-14.04
W. Rehnquist	.955	62.96	67.31	55.56	-7.4/-11.75
C. Thomas	0.84	68.52	75.00	61.11	-7.41/-13.89
J. P. Stevens	0.75	29.63	28.85	31.48	+1.85/+2.63
D. Souter	0.675	33.33	40.38	38.89	+5.56/-1.49
A. Kennedy	0.635	51.85	67.31	64.81	+12.96/-2.5
S. D. O'Connor	0.585	55.56	63.46	53.70	-1.86/-9.76
S. Breyer	0.525	50.00	44.23	38.89	-11.11/-5.34
R. B. Ginsburg	0.32	35.18	36.54	31.48	-3.7/-5.06

Note: N=9. Percentages are the conservative voting percentages of each Justice from the 1994-2004 terms of the Court (the "stable" Rehnquist Court Era). For the SCDB and Composite indicator vote percentages, the total number of decisions scored is 54. For the EPS percentage, the authors do not code two First Amendment free speech decisions: *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) and *San Diego v. Roe*, 543 U.S. 77 (2004).

Table 2.5 arrays the justices in descending order of their rescaled Segal-Cover scores, beginning with the most conservative (Scalia) and ending with the most liberal (Sotomayor). The table also includes the percentage of conservative votes cast by each justice in free speech cases since the Court's 2005 term, using the ideological direction variable for cases at the SCDB,

EPS study, and the composite indicator. The difference column takes a positive value when a justice's proportion of conservative votes increased under the composite indicator, while negative values indicate the proportion of conservative votes decreased compared to the SCDB policy-based coding and the EPS speaker coding, respectively. Table 2.6 provides the results of each model estimated with OLS regression, including robust standard errors.

Table 2.6 – Bivariate Models: SCDB, EPS, and Composite Indicator

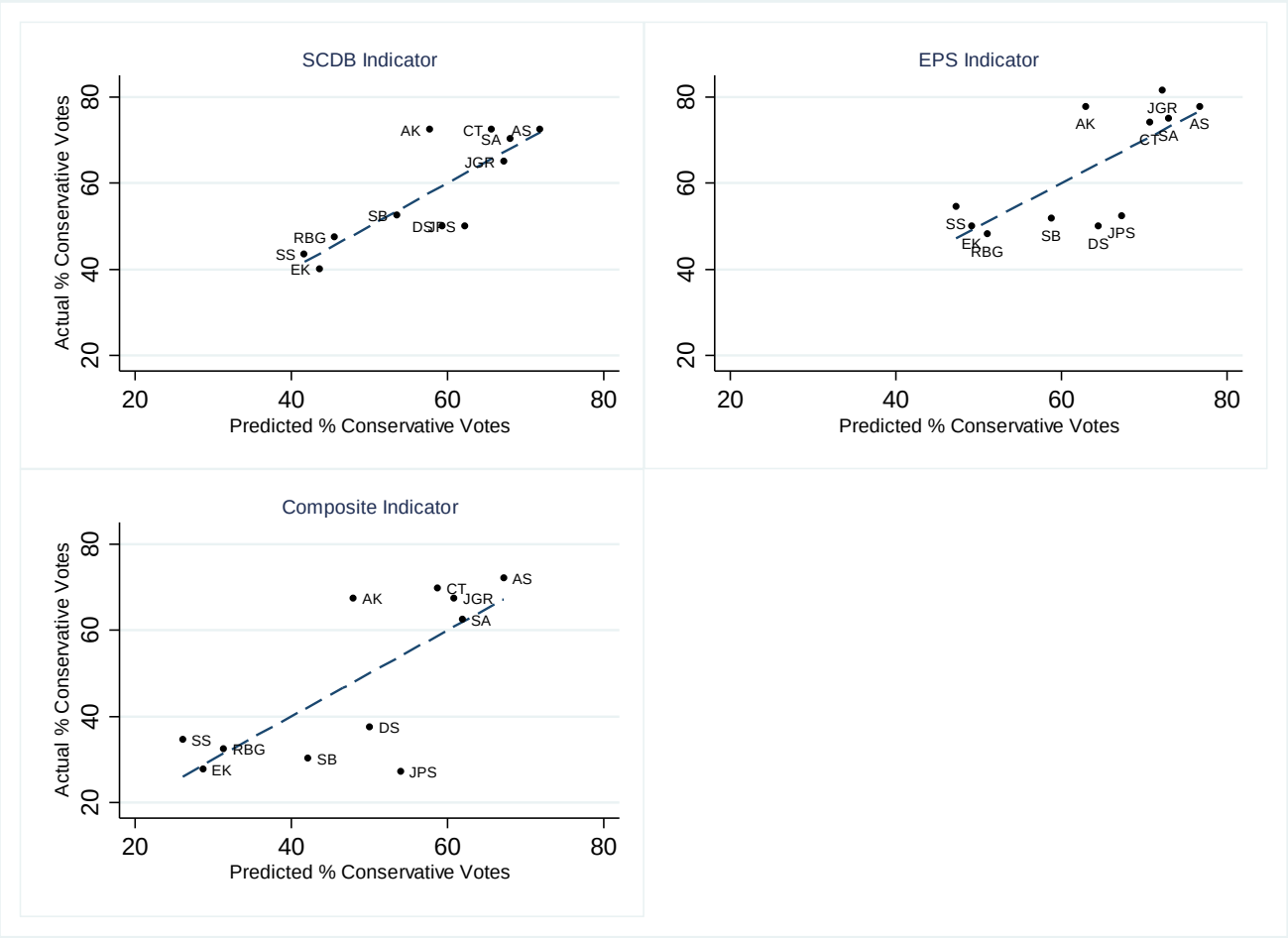
	Roberts Era	Rehnquist Era
	OLS Coefficient (R.S.E.)	OLS Coefficient (R.S.E.)
Model 1 (SCDB)		
Segal-Cover Value	38.68****	48.54***
	(4.06)	(12.27)
Constant	33.18****	17.54*
	(2.73)	(8.24)
R^2	0.68	0.41
Model 2 (EPS)		
Segal-Cover Value	37.71****	52.11***
	(6.70)	(11.42)
Constant	38.96****	19.38*
	(4.68)	(8.24)
R^2	0.55	0.37
Model 3 (Composite)		
Segal-Cover Value	52.65****	38.75***
	(8.83)	(8.75)
Constant	14.53**	21.91**
	(5.72)	(7.40)
R^2	0.55	0.36

Notes: N=11 for Roberts Era; N=9 for Rehnquist Era. p<.001****, p<.01***, p<.05**; p<.10*. Robust Standard Errors.

The first point of interest is that there is a clear, statistically significant relationship between values and votes in each model specification. Figure 2.2 displays the results of the attitudinal model's bivariate regression as applied to Roberts Court free expression cases. Moving from left to right, the models plot the Justices' positions relative to the line of best fit

based on predicted values of the dependent variable, using the SCDB, EPS, and composite indicator coding, respectively. Justices closer to the line are well-predicted by the model. If measurement of the underlying concept of decision direction does not vary across the models, this would indicate precision in measurement but not necessarily accuracy. If, however, the residuals vary markedly across the models, then concerns about model fit are somewhat irrelevant: accurate measurement of concepts is prior to these concerns. Again, the central argument of this chapter is that the fundamental correlations among values and votes offered in support of the attitudinal model may be a product of suspect indicators. If the structure of the composite indicator is persuasive, then large deviations from predicted values of the dependent variable may suggest that in contemporary free expression cases, considerations beyond ideology may be motivating the Justices. Specifically, if the fit becomes more tenuous as scholars refine the direction assignment indicator, then there is reason to believe that free expression decisions in the Roberts Court Era are motivated by considerations beyond ideological preferences, or that the ideological values of the justices in this area of law during this time period are somehow different.

Figure 2.2 – Actual and Predicted Votes, Free Expression Cases (2005-2014)



The SCDB model reveals that the Court's conservative justices – as measured by exogenous, Segal-Cover scores - tend to vote conservatively (for the conservative position in a case) at higher rates than the Court's liberal justices, though even the liberal justices' conservative vote proportions are greater than or approach 50%. Justice Kennedy tends to vote conservatively more frequently than would be predicted by the model, while Chief Justice Roberts' position suggests that he is less conservative than would be predicted by the model. This suggests that the Chief Justice may indeed be at the helm of the Court in contemporary free expression cases (Baker 2015a). This model specification is consistent with characterizations of

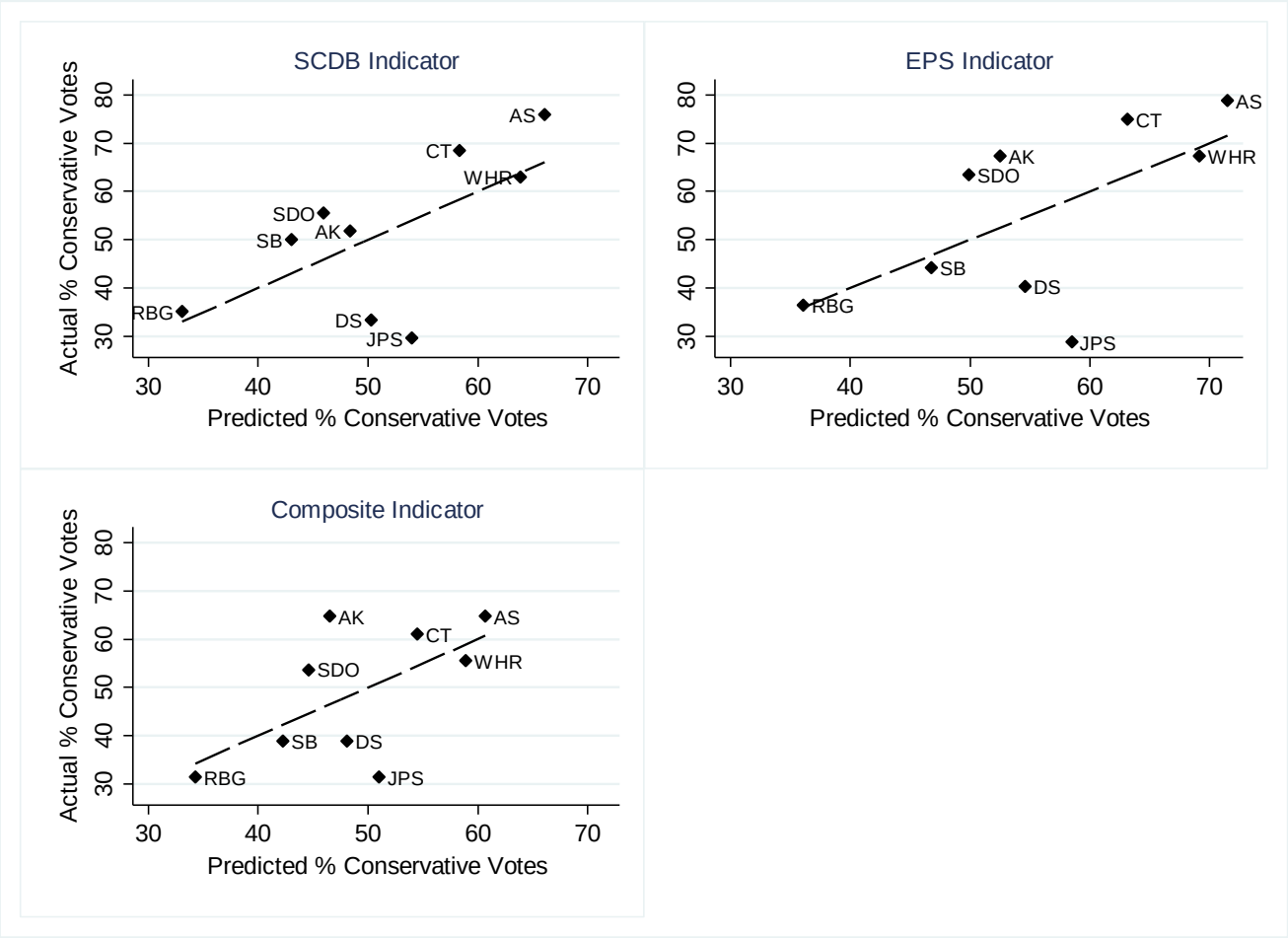
the Roberts Court record on free expression as generally conservative, as Erwin Chemerinsky (2011), Monica Youn (2011), Epstein et al. (2013), and Burt Neuborne (2015, 10) have suggested.

Though the minimal residuals suggest the model is a good fit, it is beside the point if indicators lack measurement validity. The model using the EPS indicator – which the authors argue is an improvement over the SCDB policy issue coding – features larger residuals yet still captures a general relationship between the values and votes of the Justices. While the dependent variable in this specification is calculated with 17 fewer cases (and should therefore be interpreted cautiously), a clear relationship is present for the earlier Roberts Court period. Compared to the SCDB specification, Justices Breyer, Souter, and Stevens' votes are less frequently conservative than would be predicted by the model. In addition, Chief Justice Roberts' actual conservative voting percentage is larger than the model's predictions. Under this specification, observers might expect Justice Thomas to be a key player in the contemporary Court's free expression merits agenda, with a conservative voting percentage aligned with the model's fitted predictions and the lowest overall percentage of the Court's conservative bloc. One recent narrative of the Court's behavior in this issue area suggests that Thomas's conception of the judicial role differs from other members of the Court's Republican-appointed bloc (Tribe and Matz 2014, 141, 153). This specification is consistent with that account.

At first glance, the general slope of the composite indicator model is similar to that observed in the SCDB and EPS specifications. But note the plots of the individual justices by their actual and predicted conservative vote percentages. The Court's liberal justices are far less conservative than the issue area oriented bivariate model predicts, especially Justice Breyer. This may be the biggest difference between the composite variable and the EPS and SCDB

variables: It shifts most Justices points toward the less conservative end of the plots. The conservative voting percentages of the Court's conservative justices are predicted well by the model, but these too are generally lower than the SCDB and EPS models. Although some commentators have suggested that it is the "Roberts Court" and not the "Kennedy Court" when it comes to free expression (Baker 2015b), the composite indicator model suggests that Justice Alito has voted less conservatively than any other member of the conservative bloc on the Court. While the Chief Justice clearly has a special interest in free expression (Collins 2013), in practice his vote may only be controlling in some of the Court's closely divided decisions – the most recent example being *Williams-Yulee.* Overall, this analysis suggests that while the Court often divides on ideological lines in contemporary free expression controversies, the degree to which the justices are characterized as conservative in using the coding of the SCDB and EPS study may be overstated.

Figure 2.3 - Actual and Predicted Votes, Free Expression Cases (1994-2004)



The finding that residuals tend to increase as indicators move beyond the coding imposed by the SCDB is also true for the stable Rehnquist Court Era prior to the Roberts Court. Figure 2.3 suggests the fit between values and votes is an effect of coding choices for the decision direction variable. Substituting the EPS variable for the SCDB direction codes reveals that Kennedy and O'Connor in particular vote more conservatively than their values would predict, while Thomas, Scalia, and Rehnquist remain in the same relative positions. Breyer's position is closer to the predicted trend line, though the in-group bias codes suggest he is less conservative than the conventional bivariate model would predict. Similarly, the wider residuals associated

with the composite indicator predictions more closely approximate the EPS codes than the SCDB, with the exception of Sandra Day O'Connor. Interestingly, the composite measure suggests members of the Court's liberal bloc vote in that direction more often than the SCDB and EPS models, while members of the conservative bloc tend to be less conservative overall than in those competing specifications. A similar pattern appeared in the comparison of the Roberts Court specifications in Figure 2.2.

Discussion

The importance of developing indicators that accurately reflect underlying concepts of interest is a standard shared across social science research traditions. Determining what something is – sometimes known as content validity – as detailed knowledge and descriptions of case conditions comes prior to preferred model specifications (King, Keohane, and Verba 1994, 44-45). In the judicial decision-making tradition, scholars have made great progress in developing and refining indicators that facilitate empirical assessments of the relationship between judicial ideologies and judicial votes. Indeed, that project continues in earnest on the values side of the equation with scholars examining the performance of interval versus categorical level measures of Justices' preferences (Johnston, Mak, and Sidman 2016). But even this study relies heavily on the assumption that indicators for the ideological direction of votes are accurately coded (173). The EPS study – while substantively focused on the motivations of Justices in free expression controversies – represents a refinement of this concept by developing a novel, speaker-centric indicator to reflect the ideological direction of votes. Pettys' critique of the in-group bias study encourages scholars to continue to refine and make clear how indicators

are developed and scored so as to ensure descriptive and subsequent analytical accuracy in establishing causal linkages between values and votes in free expression cases.

Caution is counseled in interpreting these findings. As should be clear, this is an effort in improving on measurement accuracy in a set of decisions within a particular issue area and particular time period. The ability to replicate these measures is a precision concern, and one that can be examined more closely in future work in this vein (Pettys 2015). In addition, scholars can continue to assess the accuracy of measures through competing model specifications – the fundamental relationship examined in this chapter represents a first step in a broader effort to continue to refine indicators that will prove useful to traditional and empirical legal scholars, whether the focus is on the forest or the trees (Hagle 2015, 384). The composite indicator developed and assessed here does not claim perfection; it is best understood as a provisional alternative with application to a specific period and issue area of the Supreme Court's docket. It is based on a qualitative tool of concept formation that has the potential to travel to other issue areas and time periods. The finding that the model's relationship becomes more tenuous as measures of decision direction have improved points toward alternative approaches in assessing the link between values and votes in judicial decision-making studies, including qualitative tools of descriptive inference. For example, scholars interested in studying the influence of ideological preferences in conjunction with other considerations germane to free expression cases could conduct a broader "within case" study of a particular Court. As chapter four of this dissertation demonstrates, carefully tracing the development of this issue area within a bounded period where individual cases can be reconceptualized as diagnostic, "causal process observations" that function as "hoop tests" for hypotheses to jump through (Collier 2011, 825).

These research design choices are at the discretion of the scholar: If a number of cases within a period feature voting alignments not predicted by the attitudinal model – a necessary condition for the hypothesis – then scholars have good reason to closely assess what other conditions in a case may be present and exerting an effect on a decision. If scholars find, through closely reading judicial opinions, that justices regularly interpret such jurisprudential rules as the content-neutrality doctrine in a less categorical manner or appear to be motivated by a certain conception of the judicial role, these findings may be sufficient conditions to validate "ideology-plus" hypotheses of judicial behavior. This process-tracing approach is only one of many rigorous research design choices available to scholars interrogating this relationship. While social scientists may generally be divided into "two cultures," it is hoped that the INUS approach to defining essential, ideological aspects of free expression controversies developed above is a bridge of sorts between the two worlds (Goertz and Mahoney 2012).

Conclusion

Correlations among judicial values and votes have shown great promise in enriching our understanding of judicial behavior, and these contributions cannot be overstated. However, indicators used in quantitative studies of judicial decisionmaking – including the bivariate model often invoked in defense of the attitudinal model of judging – must accurately reflect the underlying concept of interest. Scholars interested in studying judicial decision-making must consider multiple, theoretically relevant case facts unique to certain issue areas and historical periods before deciding to define a decision as conservative, liberal, or undetermined. One factor that has contributed to sustained scholarly interest surrounding the contemporary Court's

free speech decisions is the centrality of the First Amendment to the U.S. ideal of self-governance in a democratic republic. If the Justices' voting percentages are less strongly correlated with exogenously determined values than would be expected as indicators are improved upon, then perhaps the idea that the Court's constitutional protection extends only to "free speech for me, but not for thee" is something of an overstatement (Hentoff 1992). Giovanni Sartori's admonition that conceptualization comes before quantification is increasingly relevant, as scholars strive to explain the motivations of the Roberts Court: A Court that has often decided to decide cases with wide-ranging implications for the role of free expression in the United States' republican democracy. In the next chapter, I assess the Court's record from additional external perspectives on judicial decision-making.

Chapter 3

Modern Judicial Conservatism and Contemporary Free Speech: Attitudes, Votes, and Voting Order

> "When it comes to freedom of speech, the Roberts Court has been very much a conservative court. I think you can understand what the Roberts Court has done with regard to free speech by just focusing on traditional, contemporary, conservative ideology. I have often said I think you can understand the Roberts Court better by reading the 2008 Republican platform than by reading the *Federalist* Papers, and I think that is certainly true with regard to freedom of speech" (Chemerinsky 2011, 581).

> "With the important exception of cases involving advertising and similar business activities that happen to fall under the First Amendment, politics doesn't explain much" (Tushnet 2013, 215).

The observations by Erwin Chemerinsky and Mark Tushnet bring the spotlight back to the primary puzzle motivating this project: A number of Roberts Court free expression decisions appear to be consistent with attitudinal explanations of judicial decision-making; these decisions often involve challenges to campaign finance statutes at the state and national level, union challenges to restrictions on the collection of fees, and union non-member challenges to union fee assessments. Another group of decisions, however, appear to be less well explained by dominant attitudinal model. These cases include disputes involving the criminalization of depictions of animal cruelty, the sale of violent videogames to minors, and the prosecution of a government official for lying about military service.

Chapter two argued that characterizations of the Roberts Court as a conservative court are partially attributable to concept measurement issues. In replicating the bivariate model establishing a relationship between judicial values and judicial votes using three different indicators – the directional coding assigned by the Supreme Court Database, the speaker ideology indicator developed by Epstein, Parker, and Segal, and the composite indicator that

accounts for the identity of the speaker, speech, and speech suppressor through a basic set membership approach –the relationship between values and votes became more tenuous as measures of the ideological direction of free expression decisions improved. That analysis followed from the finding that, contra the speaker in-group account developed by Epstein, Parker, and Segal, the purported ideological identity of the free speech claimant in First Amendment cases does not predict a vote in favor of the claimant.

Chapter two also found that votes in freedom of expression cases appear partially explainable by judicial attitudes, which moves this project to another broader issue in the study of judicial decision-making at the Supreme Court. The justice-centric, attitudinal explanation of judicial behavior generally models the probability of a binary outcome (a vote in favor of or against a particular position in a case) occurring given a set of theoretically relevant covariates. Scholarship in this vein has demonstrated the average effect of a particular variable – the ideological attitudes of the justices – across all votes within particular subsets of the Court's merits docket, whether civil liberties, economic cases, or statutory decisions (Segal et al. 1995).

Some recent work has measured the effect of judicial attitudes across all votes on the Court's free expression agenda (Epstein et al. 2013; Richards 2013), though the effect during the Roberts Era is less clear. However, scholars have not systematically compared the nature of this effect to any comparable, well-defined period in the Court's history. In addition, scholars in this tradition have rarely deviated from this effects-of-causes approach, treating each case as little more than a loose collection of votes to be aggregated with other votes in other cases. These observations raise a series of interrelated questions: What is the average effect of judicial attitudes across votes in freedom of expression decisions? What can this effect, once identified, be compared to? Is this approach, with its reliance on pooled votes, a useful way to identify the

ideological nature of the Court's decisions in this important area of law? If not, what alternative assessments may shed more light on this aspect of the relationship between law and politics?

This empirical chapter presents a number of goals and testable claims that draw upon the contributions of previous attitudinal scholarship, and also offers an alternative approach to gauging the extent to which the free expression agenda of historical Courts can be characterized as ideologically driven. Here, the analysis moves beyond concept measurement and the fundamental model replicated in chapter two and assesses the relationship between values and the likelihood of a pro-free speech vote while controlling for a set of theoretically relevant covariates. To do so, this chapter employs two limited categorical dependent variable models (logit) to assess the extent to which the aggregated ideological preferences of the justices predict pro-speech claimant votes in First Amendment free expression cases during the Roberts (2005-2015) and Rehnquist (1994-2005) Courts.

The Rehnquist period represents a period of stability on the Court prior to the current era that serves as a comparison point for claims about the degree to which the current Court can be considered pro-speech claimant or conservative. I find that, compared to the Rehnquist Era, the Roberts Court Era free expression decisions are well explained by judicial attitudes: The effect of ideology is strong and significant across all judicial votes. In fact, the effect of judicial attitudes on freedom of expression votes in the Rehnquist Era does not register at conventional levels of statistical significance, suggesting the limits of that Court's well-documented conservatism. The second part of this chapter develops an alternative to this conventional modeling approach that, instead of pooling individual judicial votes across cases, shifts the analytical focus back to the cases themselves. Specifically, I develop a descriptive typology of the judicial voting coalitions present in all free expression decisions during the Roberts Era. I

demonstrate that "disordered voting" – or judicial coalitions that do not easily map onto the ordering predicted by quantitative measures of judicial values – is a more useful approach to discerning the role political values play in judicial decision-making, for scholars and practitioners alike.

From what has been described as a more agnostic perspective on judicial behavior (Fischman and Law 2009, 30-34), the typology reveals that a clear majority (67%) of Roberts Era decisions fit somewhat uncomfortably with conventional attitudinal expectations; that is, they feature disordered voting or are decided unanimously. This is a higher percentage than the Rehnquist Era (62%), additional evidence suggesting that there is something special about the Roberts Era constitution of free expression. Once accounting for the salience – or perceived importance of cases - by the justices, however, it is also clear that the current Court's constitution of the right to freedom of expression is more polarized than previous Courts. Importantly (and as with chapter two), this analytical approach has broader theoretical potential for the study of judicial behavior: If this account is persuasive, scholars interested in predicting case outcomes as part of ongoing litigation efforts or connecting judicial behavior to longstanding judicial decision-making paradigms – such as realism or the new institutionalism – should consider the limits of effects-of-causes modeling when describing and attempting to predict judicial behavior. This perspective on judicial decision-making has the potential to travel to other areas of the Court's docket beyond contemporary First Amendment free expression controversies.

A Brief Review of the Attitudinal Model

Jeffrey Segal and Harold Spaeth's influential characterization of the primary causal factor (ideology) of judicial decision-making continues to resonate among political scientists. Going back to the work of C. Herman Pritchett (1953) and even beyond with the work of the early-20th century legal realists (Holmes 1897; Frank 1931-1932; Fisher, Horwitz, and Reed 1993, Tamanaha 2010), scholars have long argued that judges – and especially Supreme Court Justices - are *at least* as much political as legal actors. As Segal and Spaeth (1993, 2002) go to great lengths to demonstrate in two book-length accounts, Supreme Court Justices are appointed in a highly politicized process by the national leader of either the Democratic or Republican Party and subject to confirmation by the U.S. Senate (see also Epstein and Segal 2007).

Once appointed, justices enjoy life tenure, generally lack political ambitions beyond the Supreme Court, and (due to the high bar required for a constitutional amendment) have the ability to be the final arbiters of the meaning of the U.S. Constitution (Segal and Spaeth 2002, 92-97). As such, the justices are relatively unconstrained in voting their sincere political preferences when it comes to the merits of a case. The bivariate relationship between judicial attitudes as scaled by Segal and Cover and the proportion of conservative or liberal votes cast represents prima facie empirical evidence in support of this claim. In other words, in a counterfactual world where justices were primarily motivated by law – or were structurally constrained from voting their ideological preferences -we would not expect such robust correlations between the two variables.

The bivariate model replicated in chapter two – following the early work of Segal and Cover (1989) and Segal and Spaeth (1993, 2002) as well as recent work by Epstein, Landes, and

Posner (2013, 137-142) - establishes a statistically significant relationship between values and votes. Importantly, chapter two also demonstrates the importance of concept measurement in developing the indicator that has been the foundation of the attitudinal model. The fit between values and votes using the traditional "policy issue" coding could be problematic, given the numerous ideological referents (speaker, speech, and suppressor) present in any free expression controversy. The composite indicator is not without limitations, however: It does not help scholars understand the probability of voting for a pro-speech claimant given a group of control variables. Recognizing this in developing the attitudinal paradigm of judicial decision-making studies, Segal and Spaeth built upon the work of Segal and Cover (1989) and modeled the likelihood of a vote for a particular position as the result of judicial attitudes (Segal-Cover scores) and a number of case facts theoretically relevant to a particular area of law.

For Fourth Amendment search and seizure cases, for example, Segal and Spaeth model the likelihood of a liberal vote (those prohibiting searches and seizures for being unreasonable due to evidentiary concerns or execution) as influenced by the presence of such facts as the location of the search (house, business, car), the circumstances under which government action occurred (warrant, probable cause), and exceptions to warrant requirements (incident to a lawful arrest)(Segal and Spaeth 2002, 316-318, 325). They conclude, following logit analysis, that "one is clearly better off knowing the attitudes of the justices than the facts of the case." (Segal and Spaeth 2002, 324). This specific test of the attitudinal model of judicial decision-making has been replicated across other areas of the Court's agenda and theoretically relevant covariates, including more recent work concerning the Court's attitudes toward the First Amendment (see Epstein and Segal 2006 for a case-centric account; Richards 2013).

Although some recent efforts have provided insight to the nature of the Roberts Era constitution of free expression, the takeaways have been more akin to a watercolor painting than polaroid. Epstein and Segal's 2006 analysis, "Trumping the First Amendment?," found support for the theory that the justices vote for the pro-speech position in First Amendment cases in an instrumental way, such that when claims intersect with another value – such as LGBT equality as in *Boy Scouts of America v. Dale* – the "liberal" value appears to dictate the votes of the Court's liberal justices (90-91). As described in chapter two, Epstein, Parker, and Segal develop this instrumental First Amendment account further with a theory of ideological in-group bias, finding some support for the theory that conservative and liberal justices vote for free speech claims brought by members of their own ideological in-group. This account remains somewhat underdeveloped, however, as legal scholars have raised important questions about the assumptions motivating the authors' operationalization of the speaker indicator (Pettys 2014; 2015; Hagle 2015).

In perhaps the most ambitious account of judicial behavior in First Amendment freedom of expression cases, Richards coded 2672 votes by justices from the 1953 to 2011 terms and found that judicial ideology – measured by Segal-Cover estimates – is a statistically significant predictor of a pro-speech decision across all eras, and both before and after the Court's decision in *Grayned v. City of Rockford* (408 U.S. 104 (1972))(2013, 93-95). Richards' goal was to demonstrate the existence of a content-neutrality regime that, once established, caused the justices to issue more speech protective decisions and, as such, does not disaggregate his analysis by particular historical eras of the Court. Thus, readers interested in understanding why the Court decides free expression cases as it does in particular eras are left without defined periods allowing historical comparisons.

Richards' template, geared toward assessing the influence of jurisprudential regimes, is nevertheless incredibly detailed and provides a useful building block for making these comparisons. Comparing the Roberts Court to the Rehnquist Court era is a sensible approach because both Courts have operated in a political climate (increasingly) animated by polarization and so-called "culture wars," and both Courts feature relatively stable periods of membership. This comparison also serves as an extension and replication of Richards' account, which found a general correlation between increasing Segal-Cover scores (more liberal attitudes) and the likelihood of a pro-speech decision (conventionally viewed as a liberal decision, though as chapter two notes the SCDB has since made some adjustments in this assignment).

The disagreement among scholars like Chemerinsky and Tushnet is an empirical issue: Do higher values of conservatism among the justices predict a pro-speech outcome? The claim appears to be facially valid, given the proportion of pro-speech claimant cases featuring conservative claimants and conservative expression. In fact, the only clear "liberal" win in the conventional understanding of the term has been *Alliance for Open Society International v. Agency for International Development* (2013), a 6-3 decision through Chief Justice Roberts holding that forcing NGOs fighting HIV and AIDS abroad to adopt an anti-prostitution plank in order to receive federal funding amounted to compelled speech in violation of the First Amendment. If one stretches the liberal label to include such cases as *Alvarez, U.S. v. Stevens* (559 U.S. 460 (2010)), and *Snyder v. Phelps* (562 U.S. 443 (2011)) by reasoning that these are "unpopular speakers" within the traditional liberal tradition established by such decisions as *West Virginia v. Barnette* (1943), however, then the criteria for scoring claimants and types of expression as "liberal" are open to charges of vagueness. The dependent variable of interest in this story, however, is the likelihood of a vote in favor of a First Amendment claim given

conventional measurements of the ideological attitudes of the justices. The fundamental test of the conservative Court narrative can be constructed such that *as the conservatism of the justices increases, so does the likelihood of a pro-speech claim vote.*

Research Design

To estimate the latent propensity to vote for a pro-speech claim, I estimate four logit regression models with the justices' *ideological values* as the key independent variable of interest and the likelihood of a *vote* for a pro-speech claimant in a case as the limited dependent variable to be estimated. I operationalize ideological values as the estimates developed by Segal and Cover (Segal-Cover scores), which assign values of 0 (most conservative) to 1 (most liberal) based on newspaper editorial characterizations of Supreme Court nominees from the time of nomination to the point at which the nominee is confirmed by the Senate. I then invert this scale such that 1 is the most conservative score and 0 the most liberal, so that the expected relationship between a pro-speech vote (=1) and values is positive. Segal-Cover scores for all justices are available in *The Behavior of Federal Judges* (Epstein, Landes, and Posner 2013, 108-109, 111). The measure is most appropriate for regression analyses measuring the relationship between votes and behavior because it is exogenously determined: The measures are based on characterizations of the justices prior to established voting patterns while serving on the U.S. Supreme Court. The tradeoff is that Segal-Cover scores do not account for ideological drift over a judicial career (Epstein, Martin, Quinn, and Segal 2007, 1491-1492).

The units of analysis for the first and second model are individual judicial votes in all Roberts Era cases (N=380), and the individual judicial votes in all Rehnquist Era cases (N=477)

for the third and fourth models. The second and fourth models are restricted to the relationship between ideological values and votes, dropping all other theoretically relevant covariates. If the conservative Court hypothesis is correct, the relationship between ideological values and votes should hold in the full and restricted specifications. The logit specification is appropriate because the goal of the analysis is to determine the latent, unobserved propensity (y*) of a pro-speech vote (y=1) given a set of theoretically relevant case factors. The specification of either logit or probit differs in the magnitude of the coefficients produced because of the assumed modeling of the variance in the error term, which is an arbitrary choice (Long 1997, 60). Stated differently, the predicted probability of a pro-speech vote is unaffected by assumptions about the nature of the variance for the latent variable (Long 1997, 61).

Variables

Judicial *votes* are coded as "1" if the vote in a case is for the speech claimant and "0" if against. Following the model specified by Segal and Spaeth that includes case facts (1993, 218-220) and judicial attitudes (2002, 320-324) as independent variables in the context of 4th Amendment search and seizure cases, as well as the work of Mark Richards (2013, 90-91; see also Richards and Kritzer 2002, 318), I include a number of *case factor* control variables. These factors include dummy variables for the *level of government* involved (local, state, or federal), the identity of the *speaker* (i.e. religious, union, union non-member, government employee, politician, academic, student, non-profit/public interest group, business, media outlet, political party, politician, lawyer), and the *type of speech* involved in each case to control for the possibility that the justices may be more protective of certain types of speech (i.e. religious, free

market electoral (anti-campaign finance restrictions), commercial, whistleblowing, general election or policy speech, speech related to sex or gender, newsreporting, anti-equality, pro-equality, pro-union, anti-union) than others.

The case factor categories were determined inductively and assigned values by closely reading the published opinion for the case, generally following the inductively determined variable lists specified by Richards and Kritzer (2002) and Richards (2013). When the US Supreme Court opinion did not provide detailed information on the litigants or nature of expression involved in a case, the immediate lower court decision was used. While it is true that the facts deemed relevant by the majority opinion may be endogenous to unobserved ideological preferences, it is worth noting that lower court opinions – as well as the briefs filed by petitioners and respondents – may also be read by the justices to make sense of a particular controversy. There is no perfect solution to this issue other than to closely read both opinions to ensure as accurate coding of case facts as possible.

These factors are often noted in the first or section sections of the majority opinions. It must also be noted that this assessment departs from that of Richards and Kritzer (2002) and Richards (2013) in that I am not interested in developing a theory of jurisprudential regimes. Chapter four specifically addresses the insights of jurisprudential regime theory, but the substantive goal here is to explain an outcome of interest – the constitution of free expression by the modern Court – via comparisons with the closest situated Court in terms of political climate, membership stability, and similar ideological composition.

Finally, I also control for *amicus briefs* filed in support of each position in each decision. I searched for each decision via the Lexis-Nexis Academic database and tallied the number of

amici filed in support of the petitioner and respondent and characterized each position as either pro- or anti-speech. When the number of briefs for the pro-speech position in a case was greater (less than) than the anti-speech position, I assigned that case the positive (negative) differential between the two. Drawing on scholarship finding a positive relationship between the number of briefs filed for a particular position and an eventual decision for that position (Collins 2007, 62), I expect that *as the amicus differential increases so too will the likelihood of a pro-speech vote*.

Limitations

There is a danger in this so-called garbage can regression approach insofar as the inclusion of many variables in a logit model may make "coefficients zip around" when variables are removed and included in models (Achen 2005, 336). Long also cautions against modeling too many independent variables as binary regression models appear to require more observations in order to ensure accurate convergence (1997, 67). In the full models, the various speaker and speech categories are unrelated to one another so that the direct effect of each variable is not diminished by the inclusion of another (Achen 2002; 2005, 329). Cases involving lawyers as speakers – conventionally thought of as liberal claimants – have regularly featured commercial speech claims, a type of claim that has conventionally been characterized as conservative (Supreme Court Database 2016; Batchis 2016, 130-139; Gillman, Graber, and Whittington 2012, 795). Achen's call for renewed emphasis on simpler tabulations and creative data presentation is answered in part by the typology approach described later in this chapter, though the logit models in the following pages are admittedly the types Achen cautions against. This is primarily because of the status of scholarship in this vein and the present effort aims at confirming or

casting doubt on existing theories about Court behavior. As a check against having too many independent variables and too few observations, I also compare the results of the full model to a restricted model regressing votes on Segal-Cover scores alone to ensure that the effect is robust in both specifications (see Achen 2002, 445-447 on the benefits of "A Rule of Three" independent variables).

With these considerations in mind, the logit regression results that follow test a key hypothesis concerning the nature of the Roberts Court record on speech. In assessing whether the conservative Court narrative is true, I expect that – given the set of relevant variables included in the model and the general conservative tilt of the Court - *as the ideological values of justices increase from 0 (most liberal) to 1 (most conservative), the likelihood of a pro-speech vote will increase with the most conservative justices the most likely to vote in favor of a speech claim.* Specifically, the models will reveal whether and how much ideological preferences and case factors affect votes in constitutional freedom of expression cases. This approach is a conventional "effects of causes" analysis concerned with determining the average effect of particular causes across many individual cases (Goertz and Mahoney 2012, 41-42). The units of analysis are individual judicial votes occurring within two discrete and generally stable eras of the Court (Rehnquist and Roberts).

Table 3.1 – Logit Regression, Case Factors and Rehnquist-Roberts Court Pro-Speech Votes

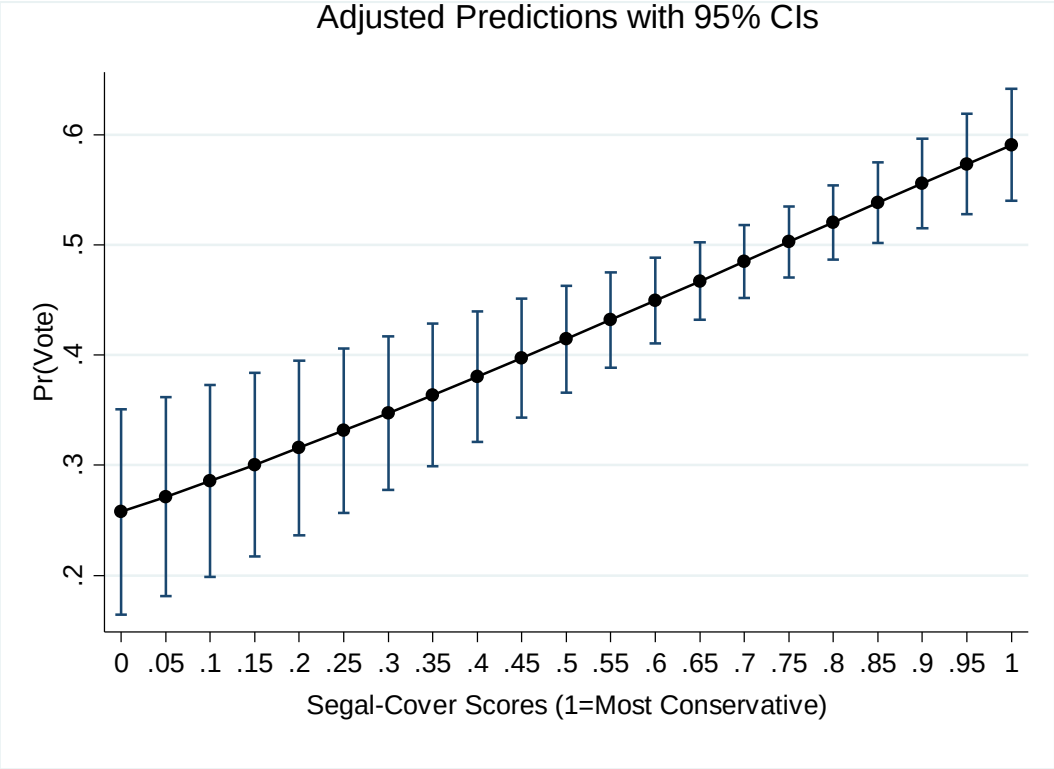
	Roberts Era (2005-2014)(Full)		Roberts Era (2005-2014)(Restricted)		Rehnquist Era (1994-2004)(Full)		Rehnquist Era (1994-2004)(Restricted)	
Variable	Coef.	R.S.E.	Coef.	R.S.E.	Coef.	R.S.E.	Coef.	R.S.E.
Justice Ideology								
Segal-Cover Attitudes	1.426****	.3250	.6644**	.1928	.0481	.5242	.0146	.4396
Post-*Citizens United*	.8255****	.2087	---	---	---	---	---	---
Level of Government								
Federal	-2.747	2.354	---	---	1.085	1.128	---	---
State	-3.453	2.387	---	---	.3695	1.067	---	---
Local	-7.392*	4.407	---	---	-.7246	.9136	---	---
Speaker Types								
Academic	-4.988	3.582	---	---	-1.166*	.6384	---	---
Student	-3.295	2.377	---	---	-2.392****	.5888	---	---
Business	.7407**	.2737	---	---	.4700	.6839	---	---
Religious	-12.459****	2.074	---	---	1.006	1.421	---	---
Union	.2076	.7557	---	---	-.2558	.8582	---	---
Union Nonmember	.3585	.9555	---	---	#	#	---	---
Media Outlet	#	#	---	---	.5881	.5297	---	---
Lawyer	-.9751	.5402	---	---	.6579	1.134	---	---
Gov't Employee	4.065*	2.455	---	---	.9565	.7940	---	---
Non-profit or Interest Group	.7198	.4471	---	---	.5070	.5709	---	---
Private Individual	-.8206*	.4682	---	---	-.5213	.3997	---	---
Political Party	.9610	.6630	---	---	-.4542	.9062	---	---
Politician/Official	-.3488	.2591	---	---	1.462*	.7806	---	---
Speech Type								
Free Market Electoral (Anti-CF)	.7299	1.065	---	---	-2.177*	1.177	---	---
Religious Expression	16.84****	.8445	---	---	1.596	2.186	---	---
Commercial Expression	-.9551	.9375	---	---	-.5402	.8389	---	---
Union Fundraising/Pro-Union	#	#	---	---	#	#	---	---
Union Nonmember/Anti-union	#	#	---	---	#	#	---	---
Anti-equality	-1.124*	.6238	---	---	.9867	.6113	---	---
Pro-Equality	-1.455	.9410	---	---	-1.374*	.8076	---	---
Whistleblower/Gov't Corruption	-.2556	1.052	---	---	.5408	.6583	---	---
Sex/Gender-related speech	-.5415	.6768	---	---	-.1490	.3108	---	---
General Electoral/Policy Speech	-.1703	.4919	---	---	1.042****	.2459	---	---
Amici Differential	.0158**	.0064	---	---	.0146****	.0039	---	---
Constant	.6132	3.266	-.6955****	.1594	-1.629*	.9287	-.0144	.3394
N	380		388		468		477	
Pseudo R^2	.2248		.0050		.1223		.0000	

Note: Logit coefficients with robust standard errors (R.S.E.) clustered on justices. p<.001****, p<.01***, p<.05**, p<.10*. # denotes dropped due to collinearity or perfectly predicting success.
Log likelihood reduction from restricted to full model for: Roberts Era = -264.64 to -200.97; Rehnquist Era = -330.63 to -284.69.

Table 3.1 reports the logit coefficients, robust standard errors (clustered on the justices), and levels of significance for the case factors included in the full model of all votes on free expression issues by Roberts Court justices from the 2005-2014 terms and Rehnquist Court justices from the 1994-2004 terms, as well as the initial models restricted to the effect of judicial attitudes. Of particular interest is the magnitude and significance of the coefficient for Segal-Cover scores. For the Roberts Court Era, the direction of the Segal-Cover coefficient is significant and in the expected direction; that is, as a justice's score increases toward the conservative end of the continuum, the likelihood of a pro-speech decision increases. This relationship holds for the restricted and full models, and demonstrates support for the conservative Court hypothesis.

Of some interest is that this average effect finding is inconsistent with part of Richards' account, which found in a similar limited dependent variable model of free expression voting that the *liberalism* of the justices predicted a pro-speech vote (Richards 2013, 95). Richards' account – primarily concerned with detecting the existence of jurisprudential regimes (described more fully in chapter four) - divides data chronologically into pre- and post-*Grayned* free expression decisions and does not disaggregate further by historical Courts, which suggests this design choice misses the development of a conservative freedom of expression jurisprudence (see generally Batchis 2016). It also suggests that, despite the Court's adoption of the content-neutrality regime, those jurisprudential principles have been put to use in the service of conservative causes (Segal and Spaeth 2003, 33). Using Stata's margins command and setting all other variables at their respective means (Williams 2017), Figure 3.1 illustrates this positive relationship between the probability of a pro-First Amendment claim vote and Segal-Cover values for the Roberts Court Era (2005-2014).

Figure 3.1 – Marginal Effects of Judicial Ideology on Pro-Speech Vote (2005-2014)



During the Roberts Era, Figure 3.1 illustrates that while a justice characterized as highly conservative like Scalia (1.0) is likely to vote for a First Amendment claimant approximately 59% of the time, a liberal jurist like Justice Sotomayor (.368) votes for that position at a rate just over 36%. Another interesting finding is the weak magnitude and lack of significance of Segal-Cover scores as predictors of pro-speech votes during the Rehnquist Court Era. From this effects-of-causes perspective across all votes, judicial attitudes are not robust predictors of voting in freedom of expression cases in either the full or restricted model. In contrast with the Roberts Era, the marginal change in the probability of a pro-speech vote from the most liberal to most conservative judicial ideology score is less than 2 percentage points (49.5 to 50.93%).

This unanticipated, null finding may be partially attributed to that Court's willingness to uphold some types of laws that its successor has been far more hostile to, such as the campaign finance cases. In terms of robustness, these results do not change appreciably when substituting Martin-Quinn for Segal-Cover measures of ideology for either Court – both indicators are significant predictors of votes for the Roberts Era but not the Rehnquist Era. This suggests that the Rehnquist Era freedom of expression merits agenda was less motivated by judicial ideological preferences than the Roberts Era. Part of the explanation for this result may lie in the types of cases decided by each Court, described in greater detail in the discussion of voting disorder that follows. During the Roberts Era, other coefficients register in the expected direction and at conventional levels of statistical significance including the dummy variables for union and academic speakers (both negative). Less intuitive are the coefficients for religious speakers and government employees, with the former negatively associated with a pro-speech vote while the latter is positively associated with a pro-speech vote. In addition, the significance and direction of the dummy variable for decisions after the *Citizens United* decision suggests that the Roberts Court pro-speech voting pattern is a relatively recent phenomenon.

The conventional models specified above provide some support for the conservative Court hypothesis. Compared to the previous era, judicial attitudes during the Roberts Era emerge as statistically significant predictors of pro-speech votes in First Amendment free expression cases. The relationship holds after controlling for a number of case factors, including the identities of speakers and speech types. These models build upon and replicate the contributions of Richards and others, yet this approach has inferential limits. In the remainder of this chapter, I develop an alternative assessment of the Court's merits agenda that draws upon the qualitative tool of conceptual typologies and a measurement strategy that connects the

ideological direction of decisions with voting alignments. I find initial evidence that suggests the importance of accounting for conceptions of the judicial role held by the justices – a theme developed further in chapter four.

Behavior in Institutional Context: Voting Disorder, Typologies, and Judicial Decision-making

The analysis of aggregated votes via limited dependent variable models reveals that in contemporary free expression decisions, as a justice's conservatism increases so does the likelihood of casting a pro-speech claimant vote. This relationship is stronger during the Roberts Court Era, which supports the "conservative Court" hypothesis advanced in various forms by Chemerinsky (2011), Epstein, Parker, and Segal (2012), and Youn (2011), and is all the more striking given the lack of a relationship during the previous Rehnquist Era. But this is only part of the story: Frequently, members of the Court's liberal bloc have joined the Court's conservatives in decisions that can be characterized as conservative. Oftentimes, these conservative decisions have been unanimous, as was the case in the recent decisions of *Wood v. Moss* (134 S.Ct. 2056 (2014)) and *Reed v. Town of Gilbert* (135 S.Ct. 2218 (2015)). Less frequently (but notably), members of the Court's conservative bloc have joined the Court's liberals in liberal decisions. In the Court's most recent term, Chief Justice Roberts and Justice Clarence Thomas did so in *Williams-Yulee* and *Sons of Confederate Veterans*, respectively. To be fair, the attitudinal model does not (and cannot) make point predictions about votes in particular cases – the goal is to ascertain the average effect of one theoretically dominant cause across a large population of cases (Goertz and Mahoney 2012).

This critique follows from the epistemological limitations of effects-of-causes research: Causation is inferred from the effect of an independent variable of interest (here, unidimensional judicial ideologies or values) across a population of observations (here, case decisions). In judicial decision-making studies of the Supreme Court, this dependent variable may take the form of a broader population of cases (i.e. "What is the effect of values across all cases where the Court heard a constitutional claim?"), or a narrower subset (i.e. "What is the effect of values across all Fourth Amendment Search and Seizure cases?"). The analytical focus is geared toward determining the effect of an independent variable of interest, with the assumption that there are multiple potential independent variables that may lead to a particular outcome, known as equifinality (Goertz and Mahoney 2012, 41-42, 59-60). But this epistemological assumption and the methods designed to provide an average effect estimate are somewhat divorced from the practice of litigation at the US Supreme Court: Because different doctrinal boundaries exist on the larger planet of First Amendment free expression jurisprudence, because reasoning by analogy is fundamentally an imperfect exercise, and because the justices clearly do not mechanistically vote ideological or partisan preferences, average treatment effects cannot be the end of the story. The focus on aggregated votes at the expense of individual cases shifts attention away from the votes on the merits that matter for lower court judges, cause lawyers, and scholars interested in making inferences about the Court's behavior.

Stated differently, this conventional assessment of the influence of ideological values on decisions is divorced from the actual practice of legal contestation at the US Supreme Court. To be sure, there is scholarly and practical value in knowing that Justice Kennedy's voting patterns place him at the median of the Court. And there is something to be learned from knowing that Justice Scalia's ideological values correlated with his observed, career conservative voting

percentage. However, the goal of predicting outcomes at the US Supreme Court – whether to refine theories of judicial decision-making, to further various political causes via judicial fiat, to earn a victory for a so-called "one shot" litigant or repeat players (Galanter 1974)– has always been connected to the ruling of the Court in or across particular cases. It has *not* been connected to correlations across aggregations of values and votes where the unit of analysis is an individual judicial vote. In general, these individual judicial votes are wrenched from the context of each particular controversy and, most important for this effort, the particular arrangement of the justices on the bench at any one time.

At its core, this difference in perspective is tied to longstanding epistemological conflicts informing divergent research traditions, often reduced to a divide between quantitative and qualitative scholars. In the field of U.S. Supreme Court judicial decision-making, the issue is less about whether or not to "count cases" and more an issue of which unit of analysis is most appropriate when attempting to make inferences about judicial behavior. The primary argument of this chapter is that voting alignments within and across cases are more appropriate units of analysis when attempting to infer the influence of ideological values on court decisions. To date, judicial decision-making studies continue to rely on aggregations of individual judicial votes (Richards 2013; Epstein, Landes, and Posner 2013, 137-144; though see Bartels and O'Geen, 2015 for a case outcome-centered test of Richards and Kritzer, 2002 and the effect of jurisprudential regimes) in advancing explanations of Court behavior. This approach is incomplete and less useful because it is divorced from the process of judicial decision-making at the Supreme Court as it is actually practiced. To correct for this oversight, the next section develops the concept of voting disorder, building upon extant scholarship in demonstrating its applicability to explaining the constitution of free expression during the Roberts Era.

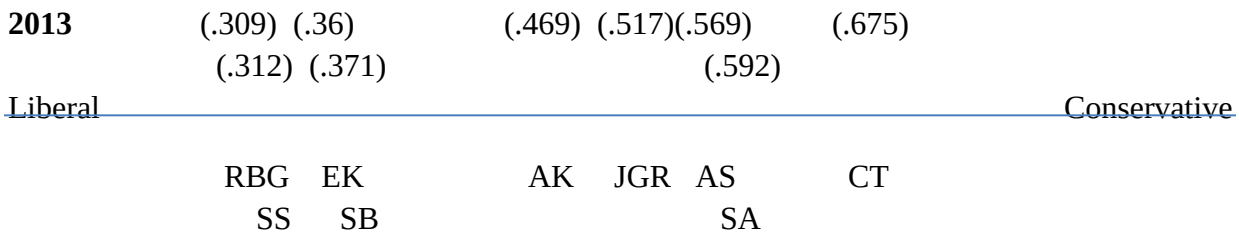
The Voting Order Assumption

According to Edelman, Klein, and Lindquist (2008, 821), voting disorder is an indication that something other than political or ideological attitudes is motivating the Justices in any given case. The attitudinal model assumes that the justices can be arrayed spatially on a one-dimensional continuum, ranging from extremely liberal to extremely conservative, using either the Segal-Cover or Martin-Quinn scores (or any other metric, for that matter). Voting disorder is a concept that highlights the limitations of the attitudinal model, which tries "to explain why Justice A is moderate over a series of cases while Justice B is liberal" (Segal and Cover 1989, 562). Knowing that Justice Scalia's high levels of conservatism tend to correlate with the pro-speech position over a range of cases – that is, gauging the effect of values on aggregated votes – is obviously useful for predicting Scalia's general behavior in future cases.

However, what litigants, elite litigators, lower court judges, and even scholars are ultimately interested in are the case decisions themselves. The point of emphasis here is that it is the majority decision in a particular case that establishes a rule or precedent for lower courts to follow, and it is the signal transmitted by voting coalitions that ultimately determines the contours of future litigation (Baird 2007), the structure of jurisprudence (whether one considers it to be a relevant mediating variable (Richards and Kritzer 2002; Richards 2013; Corley et al. 2013) or an invariable mechanism that merely functions as a cloak for policy preference (Segal and Cover 1989, 562; Spaeth and Segal 2002, 53). Simply put, examining the attitudinal model in light of the voting order of the justices in individual cases shifts the focus of judicial decision-making from individual justices to the Court speaking as an institution.

Figure 3.2 illustrates the expectations for ordered voting during the Court's 2013 term. This visual illustration has previously been used in scholarship interested in developing continuous measures of case outcomes (Jacobi and Sag 2009, 21). Each justice is placed on a spectrum ranging from extremely liberal to extremely conservative according to his or her rescaled Martin-Quinn score, with higher values – those approaching one – representing more conservative attitudes and lower values (approaching zero) representing more liberal attitudes. Martin-Quinn scores are endogenous measures of the ideological attitudes of the justices, meaning that the scores are calculated – in part – by considering the previous votes of the justice. As such, these scores may be open to the circularity criticism associated with some of Segal and Spaeth's early models examining the relationship between values and votes. Rather than use Martin-Quinn scores as an independent variable to predict votes, here the scores are used as a baseline for the most precise estimate of ordered voting for any given Supreme Court term.

Figure 3.2 – Illustration of Voting Disorder (Martin-Quinn Scores, 2013 Term)



For the 2013 term, based on the scores calculated by Andrew Martin and Kevin Quinn, the alignment above represents an educated guess as to the vote ordering in any given case before the Court. We would expect coalitions that split the justices between Stephen Breyer and Anthony Kennedy, but also at any cutpoint on the spectrum *so long as justices do not deviate*

from their expected position. In *McCutcheon v. FEC* (134 S.Ct. 1434 (2014)), for example, the Court's decision to strike down federal aggregate contribution limits split the justices between Breyer and Kennedy. The decision was ordered as expected by the term's Martin-Quinn scores, and could be characterized as "strongly ordered" in that the result is an exemplar or essence of the attitudinal model's predictions. Voting disorder is a matter of degree: Some decisions are likely to be ordered and characterized by a clear split along liberal-conservative lines. In *McCutcheon,* the conservative majority on the Court voted against the dissenting liberal bloc in striking down aggregate campaign contribution limitations as inconsistent with the First Amendment. Others, like *Alvarez*, may be ordered as expected but the majority coalition cuts across the ideological divide – the justices were divided (but ordered) at a point between Justice Scalia and Chief Justice Roberts.

Alternatively, some decisions may feature a single Justice who votes in a way that creates voting disorder: For example, Justice Stevens joined the Court's conservative bloc in *Holder v. Humanitarian Law Project* (561 U.S. 1 (2010)), a decision upholding the constitutionality of a federal statute prohibiting material aid (including aid in the form of teaching groups how to peacefully petition in lieu of violence) to groups placed on a government terror watchlist. Stevens, the most liberal justice of the term, jumped Justices Ginsburg, Breyer, and Sotomayor to join a conservative majority opinion penned by Chief Justice Roberts. Similarly, "strong" voting disorder can be operationalized as those cases where more than one Justice deviates from the expected ideological array. In *Knox v. SEIU, Local 1000* (132 S.Ct. 2277 (2012)), Justices Sotomayor and Ginsburg voted in favor of non-union member Diana Knox's claim that the SEIU's collection of non-chargeable union expenses without a new "*Hudson* notice" accompanying each fee equated to compelled speech, in violation of the First Amendment. In

other words, both justices jumped their expected voting position to join a conservative majority led by Justice Alito, while Justices Breyer and Kagan dissented.

In contrast to the ordered and disordered sides of the question, some cases fall on the edge of the coin and cannot be said to be ordered or disordered. *Wood v. Moss* (134 S.Ct. 2056 (2014)) saw all justices voting against a viewpoint discrimination claim brought by anti-George Bush protestors who had been relocated during an unscheduled campaign stop by Bush during the 2004 election campaign. Unanimous decisions present something of a problem for this categorical approach, as one can make an argument that unanimity reflects disorder to the extent that no cut-point is visible in the voting alignment of the justices (conservatives are voting together with liberals), just as one can argue that the lack of a voting order cut-point indicates agreement among the justices. Segal and Spaeth (2002) do not take a clear position on this issue, though subsequent behavioral-oriented scholars have argued that "the fact that a substantial fraction of the Court's decisions are unanimous despite the Court's being ideologically divided suggests that legalism plays a role too." (Epstein, Landes, and Posner 2013, 124).[18]

Conceptually, a unanimous decision like *Moss* lies somewhere between the ordered and disordered categories on the spectrum and would generally be unexpected by attitudinal models of judging. It is neither ordered nor disordered, and the willingness to vote together despite

[18] In their 2002 book-length elaboration of the attitudinal model, Segal and Spaeth are somewhat silent on relevance and causes of unanimous decisions. The authors' chapter on "Opinion Assignment and Opinion Coalitions" is silent on this point (2002, 357-405). Epstein, Landes, and Posner note that this body of decisions represents a comparatively neglected area of study, and define unanimous decisions as "ones in which no Justice dissented, even if there were one or more concurring opinions." (Epstein et al. 2013, 124). The authors' preferred explanation is that "when the ideological stakes are small, a combination of dissent aversion and legalistic commitments is likely to override Justices' ideological preferences," and conclude that "ideology plays only a small role in unanimous decisions." (126, 136). The authors' key *a priori* indicators for determining whether a case is relatively more ideological are based on the presence of a dissent in the decision below and whether the case involved a civil liberties dispute. As dissents below do not appear to be associated with a grant of certiorari in free expression decisions (see chapter five of this dissertation) and all free expression controversies are civil liberties disputes, I am relatively agnostic on whether cases ultimately decided unanimously can be easily gauged as ideological or non-ideological before knowing the eventual decision on the merits.

measured preferences strongly suggests the decision is not primarily ideological (Corley et al. 2013; Epstein, Landes, and Posner 2013, 124-136; though see Epstein, Landes, and Posner 2012 for limited support for the influence of ideological considerations in unanimous cases). Concurring opinions, examined more closely in chapter four, do provide some indication of the nature of the disagreement between justices who otherwise vote together. This chapter, however, is designed to be as deferential to the attitudinal paradigm of judicial decision-making as possible: The model generally views votes on the merits as the fundamental indicator on which causation is inferred; concurrences represent window-dressing on observable votes. Excluding unanimous decisions from analyses, however, is a research design choice that may overstate the effect of ideology in Supreme Court decision-making. For this reason and unlike Edelman, Klein, and Lindquist (2008, 830), I do not exclude them from the analyses that follow.

Research Design

To assess the degree to which free expression decisions are marked by voting disorder, I compare the judicial voting coalitions in all Roberts Court free speech decisions to the expected alignment of justices for that term according to the scores developed by Andrew Martin and Kevin Quinn (2002). These measures can be downloaded from the authors' website and are disaggregated by term in Appendix E.[19] The scores - calculated using complex formulae as well as the votes of the justices – are more precise than Segal-Cover Scores, though the circularity inherent in using votes to predict voting tendencies generally rules out their use as independent variables in conventional, quantitative judicial decision-making analyses. They can be used,

[19] "Martin-Quinn Scores: Measures." Last accessed Feb. 19, 2017. http://mqscores.berkeley.edu/measures.php

however, as a more precise approximation of the expected voting alignment for case decisions under the attitudinal model's general one-dimensionality assumption of the ideological preferences of the justices. Scholars have already employed Martin-Quinn scores in assessing the ideological salience of cases (Shapiro 2010), voting disorder (Edelman et al. 2008), and even attempts to introduce a gradient characterization of the ideological nature of a decision (Jacobi and Sag 2009; see Shapiro 2010, 111-128 for an overview and limitations of these efforts).

Scholars have diverged in efforts measuring voting disorder among justices. Edelman, Klein, and Lindquist measure divergence from expected unidimensionality along a liberal-conservative spectrum by calculating the smallest distance Justices must move from their ideal points (Martin-Quinn score averages for any stable period of a historical Court of at least two years) to meet the expectations of the unidimensional characterization of Supreme Court decision-making. Jacobi and Sag (2009, 69) create three separate, continuous measures of case outcomes and find that a "strategic" measure that relies on the majority coalition median and mean of Justices (again using Martin-Quinn scores) better reflects gradation in outcomes than binary conservative or liberal dummy measures imposed by the Supreme Court Database. Yet in some ways, the approach of comparing individual case results (the authors focus on intellectual property decisions) with numerical measures of possible causal phenomena highlights the problem of behavioral equivalence – case outcomes can plausibly be explained in more than one way (Fischman and Law 2009, 15). It remains unclear whether and how scholars should rely on myriad, discrete measures of such indicators as the coalition maximizing "strategic median" measure or the minimizing ideological measure, which assumes that the median Justice ideal point score is the most useful measure and reflection of ideological judging.

These efforts, reliant on complex data modeling and mathematical assumptions - and geared toward performing large-N analyses - have advanced the study of judicial decision-making by pointing toward more reliable empirical characterizations of case outcomes. I build upon this work by incorporating the new composite indicator developed in chapter two with the basic Martin-Quinn ordering technique to provide comparative perspective on two Courts in the modern era within a well-defined area of law featuring a "medium-N" sized set of cases. It is an approach that balances concerns for accessibility, accuracy, and replicability, allowing for comparisons across different types of cases combined with respect for the idea that legal norms may become entrenched for specific periods of the Court's history (Gillman 1993, 11, 200; see also Banks and Blakeman 2012, 255-311, for a similar approach in the area of federalism).

By including an undetermined category, this analysis takes seriously the idea that decisions do not always easily lend themselves to categorizations of decisions as liberal or conservative. However, it is also a test largely deferential to the theory that justices vote on the basis of political rather than jurisprudential preferences (Edelman et al. 2008, 829). This design choice is purposefully an easy test for the attitudinal model's voting order assumption, and uses measures of judicial ideology that capture ideological drift over time. Most importantly for the puzzle to be addressed here, it provides a new and theoretically sound window into how often the Court behaves in ways unexpected by the unidimensional assumption underpinning canonical work in the attitudinal paradigm. Chapter four builds upon these analyses by tracing the development of Roberts Era free speech jurisprudence through the qualitative method of process tracing.

Methodologically, this approach is best understood as developing a descriptive or conceptual typology. According to Collier, LaPorte, and Seawright, conceptual typologies are

tools that "explicate the meaning of a concept by mapping out its dimensions, which correspond to the rows and columns in the typology," creating cell types that "identify and describe the phenomena under analysis." (2012, 218). More concretely, a typology of judicial decision-making that compares coalition composition to the direction of a decision creates categories that facilitate descriptive explanations of the Court's behavior, which may in turn be used to assess the observable implications of particular theories of judicial decision-making. In this way, these typologies straddle the line between what Elman has described as descriptive and explanatory subtypes, as the column and row placement creates property spaces that facilitate theory testing (Elman 2005, 297-298). While some scholarship in the field of judicial decision-making has explicitly drawn on typologies in empirical analyses (Keck 2007, 327, 330, 332; Kapiszewksi 2011, 484-485, 487-488; Banks and Blakeman 2012, 279-280, 294), its potential contributions to the study of judicial behavior remains underdeveloped. Indeed, Seawright, LaPorte, and Collier's categorized, bibliographical search of scholarship using typologies as an analytical tool includes approximately 100 separate examples - across all disciplines of social science - and none of the entries concern U.S. Supreme Court decision-making or even judicial decision-making in general (2012, 4-5). Thus, this assessment not only builds upon this emerging empirical approach but also pushes back against the aggregation-centric, effects-of-causes paradigm dominant in the field of judicial decision-making. The immediate hypothesis of concern is similar to that evaluated from the justice-centered, effects-of-causes perspective presented above: From this case-centered perspective and focus on the expected ordering of the justices in case outcomes, *if the Roberts Court is a uniquely conservative tribunal in the area of freedom of expression, then the proportion of cases falling in the ordered columns would be expected to be higher during this era than in the previous Rehnquist Era.*

Table 3.2 – Voting Disorder of Roberts Court Speech Cases (2005-2014 Terms)[20]

Composite Direction	Strong Ordered	Ordered	Unanimous Decisions	Disordered	Strong Disorder	Totals
Conservative	*Garcetti v. Ceballos* (2006) ***Wisconsin Right to Life v. F.E.C.* (2007)** *Morse v. Frederick* (2007) ***Davis v. FEC* (2008)** ***Citizens United v. FEC* (2010)** ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)** ***American Tradition Partnership v. Bullock* (2012)** ***Harris v. Quinn* (2014)** ***McCutcheon v. F.E.C.* (2014)**	***Randall v. Sorrell* (2006)**	***Wisconsin Right to Life v. F.E.C.* (2006)** *Rumsfeld v. FAIR* (2006) *Davenport v. WEA* (2007) *New York State Board of Elections v. Torres* (2008) *Pleasant Grove City v. Summum* (2009) *Milavetz, Gallop & Milavetz, P.A. v. U.S.* (2010) *Reichle v. Howards* (2012) *Wood v. Moss* (2014) ***McCullen v. Coakley* (2014)** ***Reed v. Town of Gilbert* (2015)**	*Beard v. Banks* (2006) *Ysursa v. Pocatello Education Association* (2009) *Holder v. Humanitarian Law Project* (2010) ***Snyder v. Phelps* (2011)** ***Sorrell v. IMS Health* (2012)**	***Brown v. Entertainment Merchants Association* (2011)** *Golan v. Holder* (2012) ***Knox v. Service Employees International Union, Local 1000* (2012)**	Conservative Decisions: 61.36% Pro-Speech Decisions as Proportion of Conservative Decisions: 55.56% Pro-Speech Decisions as Proportion of All Decisions: 34.09%
Undetermined		***U.S. v. Alvarez* (2012)**	*TSSAA v. Brentwood Academy* (2007) *Duryea v. Guarnieri* (2011)	*U.S. v. Williams* (2008) ***U.S. v. Stevens* (2010)**	*Washington State Grange v. Washington State Republican Party* (2008)	Undetermined Decisions: 13.64% Undetermined Proportion: 33.33% All Decisions: 4.54%
Liberal	*Christian Legal Society v. Martinez* (2010)	*Doe v. Reed* (2010) ***Agency for International Development v. Alliance for Open Society International, Inc.* (2013**	*Locke v. Karass* (2009) *Nevada Commission on Ethics v. Carrigan* (2011) ***F.C.C. v. Fox Television Stations* (2012)** ***Lane v. Franks* (2014)**	*Williams-Yulee v. Florida Bar* (2015) *Walker v. Sons of Confederate Veterans* (2015)	*Hartman v. Moore* (2006)	Liberal Decisions: 22.73% Pro-Speech Proportion: 30.00% All Decisions: 6.82%
	(22.73%)	(9.1%)	(36.36%**)**	(20.45%)	(11.36%)	

[20] N=44. Pro-speech claimant decisions are indicated by bolded text.

Table 3.3 – Voting Disorder of Rehnquist Court Speech Cases (1994-2004 Terms)[21]

	Strong Ordered	Ordered	Unanimous	Disorder	Strong Disorder	Totals
Conservative	***Rosenberger v. Rector and Visitors of the University of Virginia* (1995)** ***Boy Scouts of America v. Dale* (2000)** ***Lorillard Tobacco v. Reilly* (2001)** *LA v. Alameda Books* (2002) ***Republican Party of Minnesota v. White* (2002)**	***U.S. v. Nat'l Treasury Employees Union* (1995)** ***Capitol Square Review and Advisory Board v. Pinette (1995)*** ***Colorado Republican Federal Campaign Committee v. FEC* (1996)** *Erie v. Pap's A.M.* (2000) ***Bartnicki v. Vopper* (2001)** *Ashcroft v. ACLU* (2002) *U.S. v. American Library Association* (2003)	***Rubin v. Coors Brewing Co.* (1995)** ***Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995)** ***44 Liquormart Inc. v. Rhode Island* (1996)** *Shaw v. Murphy* (2001) *Thomas v. Chicago Park District* (2002) *Virginia v. Hicks* (2003) *Littleton v. Z.J. Gifts, Inc.* (2004) *San Diego v. Roe* (2004)	***McIntyre v. Ohio Elections Commission* (1995)** *Arkansas Educational Television Commission v. Forbes* (1998) *NEA v. Finley* (1998) ***Good News Club v. Milford* (2001)** ***Watchtower Bible & Tract Society of NY v. Stratton* (2002)**	***U.S. v. United Foods, Inc.* (2001)** ***Thompson v. Western States Medical Center* (2002)** ***Virginia v. Black* (2003)**	Conservative Decisions: 59.26% Pro-Speech Decisions as Proportion of Conservative Decisions: 53.57% Pro-Speech Decisions as Proportion of All Decisions: 34.88%
Undetermined		***O'Hare Truck Service v. Northlake* (1996)** ***Board of County Commissioners v. Umbehr* (1996)** *Schenck v. Pro-Choice Network* (1997) *Tory v. Cochran* (2005)	***Greater New Orleans Broadcasting v. U.S.* (1999)**	*Eldred v. Aschroft* (2003)	***Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (1996)** ***Buckley v. American Constitutional Law Foundation* (1999)**	Undetermined Decisions: 12.96% Undetermined Propotion: 71.43% All Decisions: 9.26%
Liberal	*Turner Broadcasting System v. FCC* (1997) *Colorado Republican Federal Campaign Committee v. FEC* (2001) *McConnell v. FEC* (2003)	*FEC v. Beaumont* (2003)	***Reno v. ACLU* (1997)** *Board of Regents, UW v. Southworth* (2000) *Illinois v. Telemarketing Associates, Inc.* (2003)	*Florida Bar v. Went For It, Inc.* (1995) *Glickman v. Wileman Bros. & Elliott* (1997) *LAPD v. United Reporting Publishing Co.* (1999) *Nixon v. Shrink Missouri Gov't PAC* (2000) ***U.S. v. Playboy Entertainment Group* (2000)** *Hill v. Colorado* (2000) ***Legal Services Corp. v. Velasquez* (2001)**	***Ashcroft v. Free Speech Coalition* (2002)** ***Ashcroft v. ACLU* (2004)** *Johanns v. Livestock Marketing Association* (2005)	Liberal Decisions: 27.78%% Pro-Speech Proportion: 26.67% All Decisions: 7.4%
	(15.09%)	(22.64%)	(22.64%)	(24.53%)	(15.09%)	

[21] N=53. Bolded cases indicate a pro-speech claimant decision. Underlined cases indicate a mixed or split decision on the speech claim. For those cases, composite direction and speech decisions assigned based on counts of how many questions decided by the Court (if three provisions of a law were considered individually and the Court ruled for the pro-speech decision in two of them, then the case name is underlined but also bolded).

Tables 3.3 and 3.4 arrange all Roberts and Rehnquist Court speech decisions by decision direction and the degree of voting disorder present in each case, respectively. Decisions marked by one justice defecting from his or her predicted position are labeled as disordered, while those with more than one justice defecting are deemed strongly disordered. Similarly, decisions characterized by the conventional 5-4 split between the Court's conservative and liberal wings are placed in the strongly ordered category, while ordered splits at any other point on the expected continuum fall into the ordered column. The far right column includes the proportion of cases with membership in each row, as well as the percentages of pro-speech decisions within that row and the larger era population. Similarly, the table's bottom row provides summary percentages of membership in each voting coalition category.

From this perspective, it is apparent that the Roberts Court free expression record is generally a conservative one, particularly in campaign finance decisions. A greater proportion of cases fall into the conservative row in the Roberts Era compared to the Rehnquist Court though both Courts have typically issued conservative decisions. This finding holds when substituting the coding judgments of the Supreme Court Database, which features a number of coding decisions that appear questionable (see Appendices C and D for these typologies). With the exceptions of *Randall v. Sorrell* (548 U.S. 230 (2006)), a 6-3 decision by Justice Breyer and joined by the Court's conservatives and *Wisconsin Right to Life* (I), a unanimous decision holding that a conservative, non-profit advocacy group could present an as-applied challenge to electioneering provisions of BCRA, these cases have always been 5-4 splits with the Court's conservatives voting for the pro-speech position. However, it is also apparent that the Court's conservatism in this area is most pronounced in the number of unanimous, conservative decisions. In fact, the number of unanimous, conservative decisions (10) nearly matches the

number of strong attitudinal ordered decisions (9, or 43.18% of all cases when taken together). This finding that the Court's liberals frequently vote conservatively in free expression cases is somewhat surprising when juxtaposed with the predictions of the logit model specified above, and occurs at a higher rate than the previous Rehnquist Era (24.53%).

As far as modern liberal decisions go, there has been only one true win during the Roberts Era: *Agency for International Development v. Alliance for Open Society International*, which struck down a federal statute's requirement that non-governmental organizations receiving funds to combat AIDS abroad adopt an anti-prostitution mission statement (133 S.Ct. 2321 (2013)). Though *Lane* and *F.C.C. v. Fox Television Stations* (132 S.Ct. 2307 (2012)) both fall into the liberal, pro-speech category as well, neither decision is an unqualified victory for free expression. In the former, Justice Sotomayor's opinion at once ruled in favor of Lane and held that Franks was protected from the suit by the doctrine of qualified immunity. In doing so, the Court gutted any potential remedy for Lane, making the decision "pro-speech" in name only. In the latter, the Court relied on the 5th Amendment's vagueness doctrine in striking fines levied against Fox and ABC for three incidents involving a combination of fleeting expletives during awards shows and brief nudity. The case is, while unanimously decided, something of an exception and included in the analysis because of the clear and present First Amendment implications.[22]

Some of the weakly disordered decisions are those that have gained much attention and have been invoked in narratives portraying the Roberts Court as a pro-free speech Court. *Snyder v. Phelps* (131 S.Ct. 1207 (2011)) was a pro-speech holding (through Chief Justice Roberts) that the Westboro Baptist Church of Topeka, Kansas, could not be sued under the civil tort of

[22] A similar case selection decision was made with regards to *Borough of Duryea v. Guarnieri* (564 U.S. 379 (2011)) which is technically a First Amendment petition clause case but the nature of Justice Kennedy's analysis closely tracked the Court's government employee jurisprudence.

Intentional Infliction of Emotion Distress (IIED) for protests at military funerals, in part because the content of that speech was on matters of important political concern. Justice Alito, a reliably conservative jurist, departed from the rest of the Court and suggested that such speech is at the periphery of the First Amendment's ambit.

On the other hand, members of the Court's liberal bloc have regularly joined the Court's conservatives in pro- and anti-speech conservative holdings. Some of these disordered defections have been minimal. In *Humanitarian Law Project*, an anti-speech majority through Chief Justice Roberts held that while a federal law prohibiting material support or resources to groups designated as foreign terrorist organizations was indeed a content-based restriction on speech, judicial deference to the elected branches in matters of national security was appropriate – an institutional capability argument (561 U.S. 1, 25-26 (2010)). Justice Stevens – at the time the most liberal justice on the Court – joined the conservative bloc, with Justice Breyer writing for the Court's liberal wing. Others have been more surprising: In *Knox*, Justice Sotomayor (joined by Ginsburg) joined the Court's conservatives in ruling for non-members of Service Employees International, Local 1000. For that term, Sotomayor and Ginsburg were the two most liberal justices on the Court, voting for the same bottom-line result as the Court's conservatives.[23]

Others still have been notable for both conservative and liberal defectors. *Entertainment Merchants Association* was a case featuring a conservative speaker (business association) and arguably, a liberal/Democratic speech suppressor (a majority Democratic California legislature enacting a law restricting violent videogame access to minors). The type of speech at issue does not appear to carry any firm ideological valence – are depictions of gratuitous violence

[23] The unit of analysis in attitudinal studies – specifically the limited categorical dependent variable models - is generally votes. As such, these studies generally do not account for concurring opinions that reach the same result in terms of vote direction. Sotomayor and Ginsburg disagreed with a portion of Justice Alito's majority opinion that held union members must affirmatively opt-in (rather than opt-out) of special fee assessments for electoral or ideological purposes.

conservative speech? Or is the speech better understood as artistic speech, a category that (arguably) better resonates with modern liberalism? The Court's 7-2 decision in favor of the Entertainment Merchants Association was even more fractured than the votes reveal. Three of the Court's liberals and Justice Kennedy joined Justice Scalia's sweeping opinion, which cited *Stevens* for the proposition that the Court would not carve out a violence exception to the First Amendment. Justice Alito, joined by Justice Roberts, concurred, but left open the possibility that the California legislature could craft a law that would survive strict First Amendment scrutiny in light of the sense that long-term effects of such exposure are difficult to foresee (131 S.Ct. 2729, 2742 (2011)). The dissenters in the case, Justices Thomas and Breyer, could not be further apart in terms of conventional political ideology and judicial methodologies.

Shifting back to the conservative Court hypothesis, are these findings consistent with the argument that the Roberts Court record is distinctly conservative? The columns most useful for answering these questions are those populated by unanimous, disordered, and strongly disordered decisions. Recall that these decisions are those least well-explained or least consistent with the predictions of the attitudinal model. If the Roberts Court speech record is somehow exceptional such that free expression transcends ideological divisions in unexpected ways, we might expect a greater proportion of cases to fall into these categories compared to the Rehnquist Court Era. For the Roberts Era, 68.17% of decisions fall into these categories, while 62.26% of cases during the Rehnquist Era fall into these categories - a six-percentage point difference. Viewed this way, there is minimal though some measurable support for the "exceptional Court" characterization.

A closer look at the column totals, however, reveals that the increase can be entirely attributed to the proportion of unanimous decisions rendered during the Roberts Era: The

proportion of decisions claiming membership in either the disordered or strongly disordered categories is marginally higher during the Rehnquist Era (4.8 and 3.83% points, respectively), while the proportion of unanimous decisions is lower (13.72% points). In terms of voting, the Roberts Court can be understood as less conservative to the extent that the justices manage to find agreement in a variety of First Amendment issues, though this empirical support is complicated by the observation that membership in the strongly ordered column jumps from 15.09% in the Rehnquist Era to 22.73% during the Roberts Era. Additionally, membership in the two "soft" categories of ordered and disordered decisions has decreased from 22.64 and 24.53%, respectively, to 9.1% and 20.53%.

These findings appear consistent with an emerging phenomenon known as the "polarization paradox." As explained by Brandon Bartels, in recent eras, the Court has increasingly and counterintuitively produced more 5-4 split decisions while simultaneously producing more unanimous decisions (2015, 24-27). According to Bartels, this empirical trend might be attributable to the Court's dual commitments to maintaining what Pacelle has termed a *volitional* and *exigent* (or *institutional maintenance*) agenda. The former represents the body of cases for which the Court acts to enforce particular ideological or partisan commitments, while the latter represents cases that serve to preserve the Court's image as a legal – rather than politicized – institution (Pacelle 1991; cited in Bartels 2015, 24-27). While chapter five focuses explicitly on the Court's agenda-setting, certiorari docket during the Roberts Era, the conceptual typology of merits decisions adds a wrinkle to this account with the finding that the proportions of unanimous decisions that can be categorized as either liberal or undetermined have also marginally increased during the Roberts Era.

To systematically assess whether the polarization paradox explains contemporary freedom of expression decisions, Tables 3.5 and 3.6 include an additional consideration: the political salience (importance) of the cases decided by each Court. Multiple salience measures have been established, including a dichotomous variable based on front-page *New York Times* coverage after a decision has been rendered (Epstein and Segal 2000), a more nuanced indicator accounting for media coverage of Supreme Court cases at various stages of the decision-making process: coverage before oral argument, coverage of oral argument, coverage of cases pending decision, and the coverage of decisions once issued (Clark, Lax, and Rice 2015, 38-39), and an indicator designed to reflect the justices' (rather than media elites') sense of salient cases based on the number of words spoken by the bench during oral arguments (Black, Sorenson, and Johnson 2013).

Black, Sorenson, and Johnson's measure better reflects the underlying concept of interest of salience because it is focused on the justices, rather than what cases mainstream media outlets deem as salient. It is also a more practical measure, as measures are available through the Court's 2010 term, while Clark et al. end at the Court's 2008 term. In addition, Strother's assessments of the relationship between public opinion and salience, as well as salience in the coverage of Supreme Court opinions, found no difference in robustness of results when one measure was substituted for the other (Strother 2017a; 2017b). These data facilitate testing additional hypotheses about these Courts' free expression agendas: *If the polarization paradox applies to these Courts' free expression agendas, then we expect cases with higher degrees of salience to appear in the ordered and strongly ordered columns and, given both Courts' 5-4 conservative majorities, to fall mainly in the conservative row.* Because Justices O'Connor and Kennedy are median or "swing" justices during these two eras, *some cases with higher measures*

of salience may also fall in the liberal row. Conversely, *cases falling in the disordered or unanimous columns would be expected to be assigned lower case salience scores.*

Table 3.4 - Polarization Paradox and Roberts Era Free Speech Decisions (2005-2010 Terms)

Composite Direction	Strong Ordered	Ordered	Unanimous Decisions	Disordered	Strong Disorder	Totals
Conservative	*Garcetti v. Ceballos* (2006) [3.167] ***Wisconsin Right to Life v. FEC* (2007) [.4430]** *Morse v. Frederick* (2007) [1.464] ***Davis v. FEC* (2008) [-.0163]** ***Citizens United v. FEC* (2010) [4.150]** ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) [.3259]** **[1.589]**	***Randall v. Sorrell* (2006) [-.3413]** **[-.3413]**	***Wisconsin Right to Life v. F.E.C.* (2006) [.3285]** *Rumsfeld v. FAIR* (2006) [.6595] *Davenport v. WEA* (2007) [-.4708] *New York State Board of Elections v. Torres* (2008) [-.4474] *Pleasant Grove City v. Summum* (2009) [1.101] *Milavetz, Gallop & Milavetz, P.A. v. U.S.* (2010) [.0938] **[.2108]**	*Beard v. Banks* (2006) [.3855] *Ysursa v. Pocatello Education Association* (2009) [.5441] *Holder v. Humanitarian Law Project* (2010) [.3945] ***Snyder v. Phelps* (2011) [1.137]** **[.6153]**	***Brown v. Entertainment Merchants Association* (2011) [1.232]** **[1.232]**	Conservative Decisions: 64.29% Pro-Speech Decisions as Proportion of Conservative Decisions: 55.56% Pro-Speech Decisions as Proportion of All Decisions: 34.09% Average Salience of Decisions: **[.7861]**
Undetermined			*TSSAA v. Brentwood Academy* (2007) [-.5474] *Duryea v. Guarnieri* (2011) [-1.344] **[-.9457]**	*U.S. v. Williams* (2008) [.4067] ***U.S. v. Stevens* (2010) [.4985]** **[.4526]**	*Washington State Grange v. Washington State Republican Party* (2008) [-.0996] **[-.0996]**	Undetermined Decisions: 17.86% Undetermined Proportion: 20% All Decisions: 3.57% Salience: **[-.2172]**
Liberal	*Christian Legal Society v. Martinez* (2010) [1.009] **[1.009]**	*Doe v. Reed* (2010) [.9380] **[.9380]**	*Locke v. Karass* (2009) [.1193] *Nevada Commission on Ethics v. Carrigan* (2011) [.0215] **[.0704]**		*Hartman v. Moore* (2006) [.9076] **[.9076]**	Liberal Decisions: 17.86% Pro-Speech Proportion: 0% All Decisions: 0% Salience: **[.5991]**
	(22.73%) **[1.506]**	(9.1%) **[.2984]**	(36.36%) **[-.0486]**	(20.45%) **[.5611]**	(11.36%) **[.6800]**	**[.5736]**

Note: N=28.

Table 3.5 - Polarization Paradox and Rehnquist Era Free Speech Decisions (1994-2004 Terms)

	Strong Ordered	Ordered	Unanimous	Disorder	Strong Disorder	Totals
Conservative	***Rosenberger v. UVA* (1995)** **[.2545]** ***Boy Scouts of America v. Dale* (2000)** **[.9532]** ***Lorillard Tobacco v. Reilly* (2001)** **[.2923]** *LA v. Alameda Books* (2002) **[.4589]** ***Republican Party of Minnesota v. White* (2002)** **[1.293]**	***U.S. v. Nat'l Treasury Employees Union* (1995)** **[-.4394]** ***Capitol Square Review and Advisory Board v. Pinette (1995)*** [.9335] ***Colorado GOP Federal Campaign Committee v. FEC* (1996)** [.4609] *Erie v. Pap's A.M.* (2000) [.4979] ***Bartnicki v. Vopper* (2001)** **[-.3292]** *Ashcroft v. ACLU* (2002) [-.1390] *U.S. v. American Library Association* (2003) [.5018]	***Rubin v. Coors Brewing Co.* (1995)** [-.4793] ***Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995)** [.3348] ***44 Liquormart Inc. v. Rhode Island* (1996)** **[.6193]** *Shaw v. Murphy* (2001) [-.2360] *Thomas v. Chicago Park District* (2002) [-.1424] *Virginia v. Hicks* (2003) [.9227] *Littleton v. Z.J. Gifts, Inc.* (2004) [.4288]	***McIntyre v. Ohio Elections Commission* (1995)** [-.6715] *Arkansas Educational Television Commission v. Forbes* (1998) [.5018] *NEA v. Finley* (1998) [.3255] ***Good News Club v. Milford* (2001)** [1.439] ***Watchtower Bible & Tract Society of NY v. Stratton* (2002)** [.9745]	***U.S. v. United Foods, Inc.* (2001)** [-.4196] ***Thompson v. Western States Medical Center* (2002)** **[-.0896]** ***Virginia v. Black* (2003)** **[-.2100]**	Conservative Decisions: 51.92% Pro-Speech Decisions as Proportion of Conservative Decisions: 62.96% Pro-Speech Decisions as Proportion of All Decisions: 32.69%
	[.6504]	**[.2124]**	**[.2068]**	**[.5139]**	**[-.2937]**	Average Salience of Cases: **[.2976]**
Undetermined		***O'Hare Truck Service v. Northlake* (1996)** **[.6806]** ***Board of County Commissioners v. Umbehr* (1996)** [1.387] *Schenck v. Pro-Choice Network* (1997) [.1176] *Tory v. Cochran* (2005) [.4789]	***Greater New Orleans Broadcasting v. U.S.* (1999)** [.3110]	*Eldred v. Aschroft* (2003) [.0153]	***Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (1996)** [-.3377] ***Buckley v. American Constitutional Law Foundation* (1999)** [1.211]	Undetermined Decisions: 15.38% Pro-Speech Proportion: 62.5% All Decisions: 9.62%
		[.6660]	**[.3110]**	**[.0153]**	**[.4367]**	Salience: **[.4830]**
Liberal	*Turner Broadcasting System v. FCC* (1997) **[-1.138]** *Colorado GOP Federal Campaign Committee v. FEC* (2001) [-.7603] *McConnell v. FEC* (2003) [5.456]	*FEC v. Beaumont* (2003) [-2.676]	***Reno v. ACLU* (1997)** [-.1056] *Board of Regents, UW v. Southworth* (2000) [1.617] *Illinois v. Telemarketing Associates, Inc.* (2003) [.4459]	*Florida Bar v. Went For It, Inc.* (1995) [-1.710] *Glickman v. Wileman Bros. & Elliott* (1997) [1.048] *LAPD v. United Reporting Publishing Co.* (1999) [.2640] *Nixon v. Shrink Missouri Gov't PAC* (2000) [1.200] ***U.S. v. Playboy Entertainment Group* (2000)** **[.4989]** *Hill v. Colorado* (2000) [1.422] ***Legal Services Corp. v. Velazquez* (2001)** [.0353]	***Ashcroft v. Free Speech Coalition* (2002)** **[.3912]** ***Ashcroft v. ACLU* (2004)** **[-.9759]** *Johanns v. Livestock Marketing Association* (2005) [.4415]	Liberal Decisions: 32.69% Pro-Speech Proportion: 29.41% All Decisions: 9.62%
	[1.186]	**[-2.676]**	**[.6524]**	**[.3940]**	**[-.0477]**	Salience: **[.3208]**
	(15.09%)	(22.64%)	(22.64%)	(24.53%)	(15.09%)	
	[.8512]	**[.1229]**	**[.3378]**	**[.4110]**	**[.0014]**	**[.3182]**

Tables 3.5 and 3.6 add the Black, Sorenson, and Johnson salience measures for each individual case for the Roberts Court (2005-2010 terms) and Rehnquist Court (1994-2004). The salience estimates are standardized measures of the number of words spoken during oral argument and calculate a z-statistic for each combination of Court alignment and the number of justices present for that argument (Black, Sorenson, and Johnson 2013, 807). For each cell in the typologies, I calculate the average salience score for cases falling in those cells, as well as row and column averages. The inclusion of the salience dimension provides additional empirical support for Bartels' polarization paradox hypothesis. Cases claiming membership in the strongly ordered column were viewed by the justices as more salient compared to all others (1.506); the unanimous column scores lowest on the salience measure (-.0456). In addition, the cell with the highest average salience score is the conservative-strongly ordered (1.589), while the cell with the lowest average is the undetermined-unanimous category (-.9457). In other words, the most polarizing decisions in terms of voting alignment are also those decisions most salient to the justices. This is what would be expected from a Court that seeks to balance institutional legitimacy with partisan and ideological commitments, though this dynamic may be a contributing factor to – contra the Chief Justice's desire - perceptions of the Court as an increasingly politicized institution (Barnes 2015).

Viewed alongside the Rehnquist Era typology in Table 3.6, the salience dimension also suggests an increasingly polarized Court in the field of free expression. The average salience of unanimous decisions by the Rehnquist Court is considerably higher (.3378) than for its successor, while the average salience for cases claiming membership in the strongly ordered column is lower (.8512). In addition, while the average salience measure for the conservative-strongly ordered decision cell is still relatively high (.6504), is also lower than the same cell's

average during the Roberts Era. It is the liberal cell within that column with the highest overall salience score (1.186). This finding should not be overstated, however, as the average is almost wholly attributable to *McConnell v. FEC* (540 U.S. 93 (2003)): the other two cases in this cell both register at negative levels of salience.

While these findings support the polarization hypothesis, it should also be noted that the average salience of cases claiming membership in the strongly disordered column increases from .0014 during the Rehnquist Era to .6800 during the Roberts Court. This suggests that while polarization has occurred, the Roberts Court Era is also marked by cases that are salient to the justices in ways beyond political importance. Unfortunately, stronger inferences are limited by data availability: The Black et al. dataset has not been updated beyond the Court's 2010 term. This data limitation, along with higher salience averages in the strongly disordered column, suggests the limits of the polarization paradox while also suggesting that important cases will also be the most politically charged ones.

Conclusion

This project began with the observation that the Court's record on free expression is puzzling, insofar as a number of decisions appear to be explained by conventional, attitudinal models of decision-making while others do not fit comfortably within that paradigm. Examining the universe of decisions from both the individual vote and case outcome perspectives, it is apparent that the Roberts Court's free expression record is a conservative one. Upon closer examination and comparison with the previous Rehnquist Court, it is clear that in the field of First Amendment, freedom of speech litigation, the Roberts Court has balanced commitment to an ideological or partisan program with what appears to be a shared view of the judicial role that

simultaneously transcends ideological divisions and reduces First Amendment speech protections. The proportion of decisions that do not easily fit within the attitudinal paradigm exceeds that of the previous Court and – due to the discretionary nature of the Court's docket – suggests important considerations for the justices beyond the ideological characterizations conventionally offered by political scientists. At the very least, it calls into question the unidimensional assumption of ideology imposed on the measurement of both judicial values and case outcomes and points toward ongoing efforts to introduce new dimensions to this concept (see Robinson and Swedlow 2014). This window on the US Supreme Court's freedom of expression docket contributes to the ongoing scholarly debate concerning proper methods for teasing out purported influences on case outcomes, bringing the insights of qualitative research methods to bear on concept formation in attitudinal studies of judicial decision-making.

Specifically, what is generally missing from recent accounts is a closer examination of extra-ideological factors revealed by the justices' statements in judicial opinions. Numerical characterizations of the influence of ideology are limited to the extent that they are based on either editorial characterizations (Segal-Cover) or actual voting patterns of the justices (Martin-Quinn). The considerable variation in outcomes documented so far employ methods ill-equipped to capture the potential effect of sincerely held conceptions of the judicial role among justices, as well as variation in the type of ideological commitment sincerely held by the justices. In the next chapter, the role of these considerations during the Roberts Era is parsed more closely to determine whether and how differing conceptions of the judicial role and jurisprudential structures affect decision-making in free speech cases.

To recap, voting disorder occurs regularly in Roberts Court free speech decisions, and anecdotally appears attributable in part to the somewhat consistent application of differing

judicial methodologies. Alito's aversion to extending the sphere of First Amendment protection to peripheral "distractions" and Breyer's refusal to let doctrinal categories determine his vote are recurring themes that illustrate how moving beyond the "bottom line" of merits votes to the language of opinions informs our understanding of the observable judicial coalitions in contemporary free expression controversies. These interpretive philosophies may interact with or trump ideological preferences to produce sometimes surprising decisions, and suggest a need to study the rationales offered by justices in order to make sense of salient, contemporary areas of case law. How and when that happens are the questions examined through a comprehensive analysis developed in the next chapter.

Chapter 4

Beyond Single-Cause Explanations: Jurisprudence, Ideology, and Conceptions of the Judicial Role

> "The mind of a man who happens to be a judge is the center of many contending impulses when he is making it up, and an external reconstruction of the process is quite impossible. However, the rules of the game require that judges supply clues to their thought processes in the form of written opinions…It would be naïve to assume that justices in deciding cases are completely free to vote their own preferences, or that a voting record necessarily mirrors a justice's inner con- victions. On the other hand, it would be even more naive to assume that a Supreme Court justice merely "looks up the law" on a subject and applies it to the case in hand." (Pritchett 1953, 321-322).

> "First Amendment doctrinal change…was at least in part ideological. We have seen, however, that the relationship between ideology and doctrine is far from straightforward. It is rich and complex. Influence flows in both directions. Ideology and doctrine are both distinct and overlapping, independent and interdependent. Ideological modeling of judicial decision making may in some ways serve to clarify but in other important ways obscure the nature of the relationship." (Batchis 2016, 227).

The attitudinal model's emphasis on correlations among justices' values and lifetime proportions of conservative (or liberal) votes overstates the degree to which the Court's decisions are distinctly ideological. And, more fundamentally, the attitudinal model's policy-based scoring of ideological direction ignores indicators that may be unique to free expression controversies – the recent debate between Epstein, Parker, and Segal (2013) and Pettys (2014; 2015) demonstrates that the identity of speakers, identity of speech suppressors, and the type of speech itself are additional, understudied factors that have provisionally been demonstrated to correlate with merits votes. Suspect indicators aside, while there is predictive value for (extra) judicial actors in knowing the effect of ideology on the probability of pro-claimant vote given a population of cases, this conventional approach does not help observers understand when deviations from expected ideological patterns occur. A substantial proportion of contemporary

free speech cases are marked by voting disorder among the justices. In addition, the Roberts Court is often unanimous in deciding free speech cases, suggesting that something beyond ideological attitudes must be evaluated in attempting to solve the puzzle. How do these deviations relate to ideological values?

The evolution of judicial support for free expression in the United States from "lodestar of liberalism" to darling of conservatism will continue to elude comprehension by scholars so long as analyses give primacy the votes and values of justices at the expense of additional factors. These factors are not easily operationalized into indicators that are often put into the service of translating social relationships into logical, numerical expressions. Early to mid-20th century jurisprudential doctrines developed in cases brought by periodically "unpopular," peripheral claimants like Jehovah's Witnesses, racists, and unions – whether endogenous or exogenous to ideological preferences – have structured the free speech subset of the broader conservative rights agenda and have constituted claims previously outside the lexicon of U.S. free speech jurisprudence. Doctrines once thought solely the province of the unpopular individual speaker, soapbox orator, or lonely pamphleteer have now become tools of conservative entrenchment for free market, libertarian economic enterprise (Kuhner 2014).

The replacement of judicial moderate Sandra Day O'Connor with Samuel Alito and judicial restraintist William Rehqnuist with Chief Justice John Roberts appears to tell part of the story. Yet this univariate explanation does not tell us why the Court's conservatives (and liberals) disagree with one another, not only in terms of voting but also decision rationales. It cannot tell us how claims once outside the acceptable boundaries of free speech jurisprudence now rest comfortably within its aura of legitimacy. Nor does it distinguish between the types of conservative claims the Court has decided, which speaks to the problem of ideological

heterogeneity in cross-Court comparisons. More concretely, can the difference in the editorial-based conservatism score assigned to Chief Justice Roberts and Justice Alito tell us anything about why they disagree on case outcomes beyond restating that one score is marginally different from the other (see Baum 1999, 202-204)? The general focus on individual merits votes as the primary unit of analysis – and one interpretation of those votes, to boot - carries the cost of exacerbating the flattening of judicial behavior, ignoring what scholars have long characterized as a complex relationship among a variety of ideological, jurisprudential, and interpretive factors (Pritchett 1953, 321, 324; Shapiro 1963, 339-340; Smith 1988, 95-96; Gillman 1993, 11-19; Keck 2004, 11-12; Whittington 2000, 620-624; Feldman 2005, 91-92; Fischman and Law 2009, 7-10; Bybee 2012, 73-75).

These concerns are not fresh out of the box by any means – a number of scholars have noted the limits of the effects-of-causes modeling of judicial ideological preferences, and all too often this debate has taken on a bitter tone (*Law & Courts Newsletter* 1994; 2003). For all the insights gleaned from the vast body of judicial decision-making literature interested in the now taken for granted correlation between values and votes, the price has been an acontextual understanding of the relationship between ideological preferences and principles. If judicial decision-making is a context-specific enterprise marked by endogenous relationships between preferences and principles, then outcomes should be understood as longitudinal processes developing over time and contingent upon jurisprudential and ideological arrangements unique to particular periods of the Court. To understand the present nature of the Roberts Court's record on free expression, then, requires an explanation of *how* this process has unfolded. Within this broad, historical case, causal inferences may be drawn from diagnostic pieces of evidence present in individual Court cases. This analytical tool – sometimes known as "process tracing" –

allows researchers to move beyond effects-of-causes research designs and instead focus on complex relationships and descriptions of how an outcome came to be (see generally Collier 2011).

In this chapter, I argue that a missing piece of the Roberts Court free expression puzzle lies in the confluence of competing judicial interpretive philosophies, jurisprudential structures, conceptions of the judicial role, and ideological preferences. First, I briefly review scholarly work that has found evidence of the influence of jurisprudential considerations on Supreme Court decision-making – research that has been both quantitative and qualitative and has relied upon different epistemological assumptions (i.e. positivism v. interpretivism, or the "external" and "internal" views of judicial decision-making). From this body of literature, I develop a description of judicial decision-making featuring ideological, jurisprudential, philosophical, and interpretive conceptions of the judicial role as constitutive elements of *and* causes of judicial decisions. Finally, I offer a descriptive explanation via a comprehensive, "medium-N" study of the Robert's Court's 44 free expression decisions from the 2005 through 2014 terms of the Court, examining how and when these factors result in outcomes that do not comfortably fit within the attitudinal paradigm.

I find that substantial heterogeneity within the Court's conservative and liberal blocs along with differing conceptions of the judicial role have produced the fractured decisions not easily predicted by purely ideological models of judging. I also find evidence in support of the claim that the entrenched "content neutrality" regime structuring modern free speech controversies has slowly been eroded by this combination of considerations. This development has occurred simultaneously with the Court's gradual evolution into a "pro-speech" Court, an agenda that did not begin outside of the campaign finance decision context until the Court's 2009

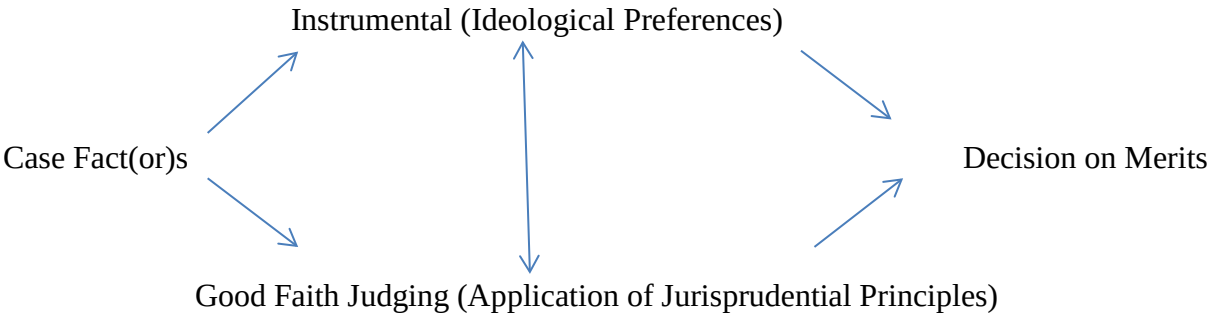
term and did not fully bloom until well into the Chief Justice's tenure. On the issue of freedom of expression jurisprudence, then, the Roberts Court is *best* understood as a tribunal in transition and flux rather than an unqualifiedly 'conservative Court.'These findings underscore that general correlations among values and votes – even while controlling for theoretically relevant covariates - offers an understanding of law and politics that is remarkably thin, often divorced from historical context and the jurisprudential structures that shape judicial decisionmaking. Beyond the confines of this project, it is hoped that this approach will be useful to scholars seeking to systematically draw attention to the complexity of judicial decision-making by assessing if, how, and when factors beyond conventional ideological explanations produce surprising outcomes.

Fundamentals of Judicial Decision-making: An Overview

Battle of the Strawmen: Beyond Conventional Legal and Attitudinal Accounts

The debate concerning the influence of ideological preferences and jurisprudential principles implies multiple pathways exist in moving from the facts of a case and the eventual decision on the merits. Unfortunately, a large amount of data is obscured by the self-imposed "black box" of Supreme Court decision-making: Scholars cannot see the process that unfolds at weekly conferences, the exchanges between clerks, or the initial grant of certiorari. Theoretical pathways do exist, however, and Figure 4.1 illustrates the crux of the debate.

Figure 4.1 – Conventional Mapping of Supreme Court Decision-making



To varying degrees, the dominant approaches of Supreme Court decision-making are represented by the multiple pathways illustrated above (see also Weller and Barnes 2014, 1-7, 25, 28-29). The attitudinal approach is generally represented by the upper pathway, where case factors are interpreted in light of ideological preferences and determine the decision on the merits for any particular judge. This understanding of judicial decision-making has been characterized as instrumental, meaning that to the extent jurisprudential principles are invoked in judicial opinions they are merely used to rationalize the decision – they do not control or, in the model's purest form, influence the decision on the merits. This model of judging may be deemed "top-down" reasoning (Bartels 2011; Braman 2009). Alternatively, the lower pathway approaches the legal model invoked in various forms by scholars claiming that judges wrestle with case facts in light of precedent, current social context, and other jurisprudential principles in reaching a decision on the merits (Kahn 1999; Kahn and Kersch 2006). In other words, legal considerations can and do constrain the calculus of judges, who mostly engage in "analogical reasoning" in reaching the disposition of a case. This model may also be described as "bottom-up" reasoning (Bartels 2011; Braman 2009; Carter and Burke 2005, 8-13).

Each model is an ideal type insofar as in pure form, they are accounts of how judging occurs given relevant institutional constraints. The lower pathway emphasizes legal constraints on justices, while the upper pathway generally assumes that justices are able to vote sincere preferences due to the position of the Court vis-à-vis other federal government actors; it is a stripped down version of more intricate rational choice judicial decision-making research programs. Yet ideal types are not real types, and some scholars continue to emphasize that the process of judging is at least partially political and at least partially legal (Bybee 2010). Richards and Kritzer (2002) and Richards (2013) have advanced a fairly developed theoretical account of this middle pathway and have offered large-N, empirical evidence in support of the claim that judicial decision-making is a process riddled by ideology and legal considerations in the First Amendment context (see also Batchis 2016, 46-64). This middle pathway is illustrated by the vertical arrow suggesting a give-and-take between ideological preferences and extra-ideological preferences related to judging.

The upshot of the middle pathway understanding, which considers both the lack of formal institutional constraints allowing ideology to operate at the Supreme Court and the constitutive effect of entrenched jurisprudential principles, is that the influence of factors beyond ideology is exceptionally difficult (though not impossible) to tease out. Following Keck's analysis of the the ideological and jurisprudential development of the Rehnquist Court Era, scholars can compare jurists' attitudes and conceptions of the judicial role with votes across a wide-range of cases, examining opinions for clues as to each jurist's interpretation of jurisprudential constraints (2004, 11-12). A decision that appears ideological may nevertheless be the result of different judicial methodologies applied by the justices, while a decision that appears to be consistent with established jurisprudential principles could simply be a reflection of the liberalism or

conservatism of the justices. In a recent account of the persistence of the content-neutrality regime, Richards (2013, 129-130) argues that the 6-3 decision in *U.S. v. Alvarez* reflects a continued though perhaps tenuous commitment to closely scrutinizing laws that regulate speech on the basis of the subject matter communicated. The likely rejoinder from those who emphasize the "political" in "political jurisprudence" might be that the decision was driven more by attitudes than Richards seems to believe, as the justices were divided along an imaginary line just to the left of Justice Alito and therefore the result is as expected once taking into account the expected ideological ordering of justices via Martin-Quinn scores.

Application to Contemporary Free Speech: Additional Considerations

A longstanding scholarly tradition has argued that the general attitudinal conception of judicial decision-making is complicated by claims that judges are socialized into a culture that places a premium on fidelity to jurisprudential rules and norms - institutional pulls that may create tension with preferred policy preferences (Dworkin 1978, 35-36; Richards 2013, 36; Whittington 2000). As one scholar has put it, judges "are constrained by law, even as they advance contested understandings of what constitutes legitimate law. The strike zone in baseball is contested, but a pitch that bounces before reaching home plate is a ball…One can argue in good faith that precedent sanctions presidential wars, but not that Article I mandates a parliamentary system of government" (Graber 1999, 299-301; 2006, 53). Coupled with the idea that protection of freedom of speech is a common good in the pluralist vision of democracy ascendant in the mid-20th Century, as well as the Court's general commitment to protecting "preferred freedoms" and Bill of Rights protections post-*U.S. v. Carolene Products* (304 U.S.

144 (1938)), it is theoretically plausible to suggest that free speech is a concern of justices that transcends partisan ideology (Feldman 2008; Tushnet 2013, 215, 217, 244; Knowles and Lichtman 2015, 242-243). The uniqueness of the issue area of free speech, then, provides an interesting case study insofar as jurisprudential and philosophical influences may be at their apogee.

Specifically, the justices of the contemporary Court have inherited multiple jurisprudential traditions and longstanding theoretical justifications for the protection of free speech in America. The former include the application of varying tiers of judicial scrutiny to the suppression of speech based upon whether the suppression at issue regulates speech on the basis of its subject matter – what Richards and Kritzer (2002) have described as the "content neutrality regime." The latter includes philosophical rationales including the so-called "marketplace of ideas," the argument from democracy, and self-fulfillment; the first two are consequentialist justifications insofar as protection for expression is important for its broader salutary social effects (the pursuit of truth, social progress, and political progress), while the latter is nonconsequential in that the importance lies in the fulfillment, development, or realization of the individual – put another way, free expression is an important value in its own right, outside of any broader salutary effects it might have for political or social progress. Adding to these jurisprudential and philosophical considerations are varying conceptions of the judicial role, or the justice's philosophy of judicial review: Does deference to legislative judgments play a key role in these decisions? Originalism? And are these interpretive philosophies consistently applied by the justices of the current Court?

The nature of the jurisprudential and philosophical underpinnings of contemporary free expression jurisprudence is not merely an academic question. The crux of First Amendment

judicial analysis has always been an attempt to balance legitimate government interests with the words that Justice Hugo Black deemed an absolute: "Congress shall make no law." Of course, this prohibition requires at least a working definition of what constitutes "speech" and the scope of that freedom. Students have often readily invoked the Holmesian quip about falsely yelling "FIRE!" in a crowded theater (*Schenck v. U.S*, 249 U.S. 47, 52 (1919)). But the issue runs deeper than that, particularly when one considers the communicative aspect of speech. Justices must decide whether the ambit of the First Amendment extends to speech that is artistic, whether in a traditional sense or what may be termed obscene, due to its focus on "prurient" sexual matters. If it does not, there must be some justification for that choice, and likewise if the protection does extend so far.

Similarly, if the purpose of the First Amendment is deemed to be the protection of political speech and little else as in the famous account by Alexander Meiklejohn (1948), justices are expected to articulate the reason for that distinction. And, if protection includes expression intertwined with conduct, the Court must articulate why some symbolic conduct is protected while other conduct is not. If the range of symbolic conduct captured by the First Amendment is extended to include, say, a motorist breaking the speed limit laws as a way of expressing displeasure with the limit of 65 m.p.h., then nearly all government regulation becomes suspect under the Constitution's first freedom. Conversely, if the First Amendment does not cover such conduct as the burning of draft cards to express opposition to the Vietnam War (*U.S. v. O'Brien*, 391 U.S. 367 (1968)), the robustness of that protection is also uncertain.

An imperfect analogy demonstrates a modern First Amendment problem centered on the question of what counts as speech and what does not: the use of the free speech clause to strike down government regulations related to economic transactions. In the post-*Carolene Products*

era, the Court has generally viewed legislation related to economic matters as subject only to rational basis scrutiny, a standard of judicial review entailing broad deference to legislatures. In recent years, the Court has extended the scope of protection available to commercial speech (expression related to economic transactions) in a variety of contexts, including alcohol content, casino gambling, tobacco advertising, and even identifying information of doctors ordering prescriptions for patients. Justice Breyer has compared the extension of free expression protections to economic transactions to the Lochner Era, the well-known period of Supreme Court history where justices held "class legislation" to a forerunner of the strict scrutiny standard (though see Kessler 2016 for a re-examination of this claim).

To recap, the Court's apparent philosophical struggle to interpret the meaning of the free speech clause of the First Amendment has effects beyond the content of casebooks. Philosophical justifications for protecting expression contract or expand the universe of potential outcomes for free speech controversies and *have the potential* to affect society and politics in a variety of ways.

Jurisprudential Constraints: Roots of the Content-Neutrality Regime

Philosophical theories justifying the scope of free expression protection provide the foundation for judicial methodologies structuring concrete controversies before the Court. Richards and Kritzer have argued that the Burger Court's decisions in *Police Department of Chicago v. Mosley* (408 U.S. 92 (1972)) and *Grayned v. Rockford* (408 U.S. 104 (1972)) marked the beginning of a jurisprudential regime – content-based v. content-neutral methodology – that has since been entrenched as a doctrinal rule and institutional commitment of the Court, curbing the ability of legislatures and executive officials to regulate speech on the basis of its subject

matter. The two cases concerned pro-racial equality picketing and the application of anti-picketing ordinances that treated "ordinary" picketing and peaceful picketing differently – both of which were struck down as unconstitutional - and an anti-noise ordinance that regulated the time, place, and manner of speech (regardless of content), which the Court upheld in *Grayned*. The doctrine also provides a common, legitimizing language for justices of various ideological stripes to explain and coordinate decisions in a way that would not be possible in a world where justices mechanically voted their preferences (Richards and Kritzer 2002, 308; Richards 2013, 34-35; Lindquist and Klein 2006, 141).

The research of Richards and Kritzer (2002) and Richards (2013) clouds the distinction between interpretivist and positivist approaches and suggests that justices - who are at once political and legal actors - create, maintain, are animated by, and (perhaps) constrained by *jurisprudential regimes*, defined as a shared commitment to evaluating facts of cases in light of relevant case factors and the application of appropriate forms of judicial scrutiny (Richards and Kritzer 2002, 310). More broadly, the concept of jurisprudential regimes describes "the way in which judges translate their political ideologies and identities into a preferred legal analysis. This legal analysis is made up of a set of rules, concepts, doctrines, precedents, and tests that collectively establish a standard operating procedure for the treatment of certain kinds of claims" (Gillman 2006, 114). These analyses suggest that a shared jurisprudential commitment may better explain Supreme Court decision-making for particular periods and in particular contexts than models treating justice ideology or partisanship as the primary explanatory variables of interest. Qualitative research has also suggested a similar dynamic on the Court. For example, in a medium-N comparison of all cases when the Rehnquist Court exercised judicial review to invalidate a federal law, Keck argued that free speech cases were sometimes an apparent

exception to ideological or partisan explanations of that Court's decision-making. Stated differently, judges behave differently than legislators insofar as the former view freedom of speech in more expansive terms than the latter (Keck 2007).

The judicial methodology of distinguishing between content-based and content-neutral regulations is a way for the Court to ensure that the government has not restricted the free flow of ideas by prohibiting speech solely on the basis of its content. While some justices and theorists may favor less absolutist, more contextual balancing tests for adjudicating free speech cases, this method is primarily a categorical approach to adjudicating free speech claims (Smolla 1994, 3-7; Barron and Dienes 2008, 28-44). If the Court views the government action in question as a regulation of speech on the basis of the content being communicated (i.e. political advertisements, union speech, speech on abortion), then the government must meet the burden of either proving that the speech is "low-value" (one of a number of historically well-defined categories of speech deemed outside of First Amendment protection), or pass the Court's "strict scrutiny" test. To do so, the government must show that a regulation is necessary to achieving a compelling government interest. Regulations that survive this strict scrutiny test are upheld as constitutional, while those that fail are unconstitutional abridgements of the claimant's First Amendment rights.

Alternatively, if the Court views the government action in question as a regulation of speech unrelated to the content of the speaker's message, then the government faces a far less severe burden in defending the law's constitutionality. Once categorized as content-neutral, the law in question is generally evaluated on the basis of whether it is a reasonable time, place, or manner restriction, or whether it satisfies a lesser standard of scrutiny under the Court's *O'Brien* test (*U.S. v. O'Brien,* 391 U.S. 367 (1968)). As one scholar has put it (somewhat humorously),

"Either a regulation of speech is content-based, in which case it is likely forbidden, or it is content-neutral, in which case it is likely permitted. The government is free to prohibit your neighbors from blaring music at high decibels at two in the morning, even though that music may have expressive value. But it is forbidden to ban *only* the playing of old Loggins and Messina records, simply because the government hates the music of Loggins and Messina" (Horwitz 2013, 32).

This last point serves as a reminder that the doctrine is clearly malleable enough to be put into the service of protecting liberal (or Democratic) and conservative (or Republican) interests. The Roberts Court has struck down regulations imposing "floating buffer zones" around individuals entering abortion clinics as impermissible, content-based regulations of speech, which could be considered a victory for the pro-life wing of the modern Republican Party. On the other hand, the conservative Rehnquist Court also struck down state and federal laws making it a crime to burn the American flag as impermissible content-based regulations of expressive conduct, a victory for unpopular dissenters (*Texas v. Johnson*, 491 U.S. 397 (1989)*; U.S. v. Eichman*, 496 U.S. 310 (1990)). While it does not appear that this shared commitment can be definitively traced to any clear partisan commitment that eventually became entrenched in the judiciary (Gillman 1993, 61), the doctrine is compatible with the idea that the Court sometimes acts in a way to protect what it perceives as uniquely institutional prerogatives from legislative encroachment.

While the content-neutrality doctrine may have appeal for its simplicity, this masks the fact that the doctrine does not provide any guidance on how to definitively distinguish content-based from content-neutral regulations (Horwitz 2013, 32). In other words, even if a jurisprudential regime establishes a new set of case factors that justices take into account when

deciding cases, the fundamental definitional problem and subjective nature of determining whether government regulations are wholly unrelated to the subject matter of the speech in question in a given case makes plausible the claim that jurisprudential regimes are simply more formalized vehicles for enacting justice policy preferences (Richards and Kritzer 2002, 310). The second, more fundamental reason is that ideological preferences and institutional commitments to principles are not readily observable (Fischman and Law 2009, 11-13). Judges generally forswear the idea that politics influences decisions, and there is no way of definitively knowing whether judicial opinions reflect a sincere commitment to jurisprudential rules or instrumentally draw upon available precedents and rules to justify a preferred ideological outcome.

According to proponents of the attitudinal model of judicial behavior, the institutional setting the justices operate in makes this pursuit of political preferences a foregone conclusion. In its purest form, however, this understanding assumes away a claim in need of closer interrogation: do jurisprudential structures, like the content-neutrality regime, exert any meaningful constraint on the justices? While difficult to assess, previous scholarship points to a promising approach to this question. In his re-evaluation of the maligned *Lochner* Era, Gillman found that "The patterns of judicial decision making and the preoccupations of judicial opinions display a remarkable degree of coherence and consistency, down to the kinds of issues the justices faced with near unanimity and the kinds of issues on which they divided." (Gillman 1993, 199). For Gillman, the issue is not that studies attributing judicial behavior to ideological or economic explanations are incorrect (though they appear to be in the case of police powers jurisprudence during his period of analysis), but that they are fairly incomplete. Explanations of behavior embedded in particular historical contexts must try to account for "the autonomous

influence of legal ideology as understood by interpretive communities" within those contexts (Gillman 1993, 200).

The Chicken and the Egg Problem – Jurisprudence and Ideological Values

While there is evidence for the claim that law may constrain the justices in some decisions (Pacelle, Curry, and Marshall 2011; Corley, Steigerwalt, and Ward 2013), jurisprudential regimes can clearly be invoked instrumentally to achieve certain results – that is, the choice of jurisprudential mode of analysis is likely endogenous to ideological values. Consider the Court's recent decision in *McCullen v. Coakley* (134 S.Ct. 2518 (2014)), a fractured yet unanimous decision to strike down a Massachusetts law establishing so-called buffer zones around abortion clinics as incompatible with the First Amendment. All the justices agreed that the law failed constitutional muster, yet the content of the concurring opinions reveals disagreement over the jurisprudential regime element. The Court's four liberals and Chief Justice Roberts, author of the opinion of the Court, held that the law in question was content-neutral – applying equally to all persons wishing to protest at clinics – and similar to a "time, place, and manner" restriction on speech. Four of the Court's conservatives (Scalia, Kennedy, Thomas, and Alito) concurred in the result but viewed the law as a content-based (specifically, a viewpoint-based) restriction on speech. The former characterization subjects laws to a lower, intermediate level of constitutional scrutiny, while the latter calls for a more searching standard (strict scrutiny). What determined the initial characterization of the speech suppression at issue?

Again, the question is not merely academic, as the choice is a cause and effect of political battles. The Court's division along a general (though not perfect) liberal-conservative divide on

the jurisprudential standard suggests that ideological values play a role in the selection of modes of jurisprudential analysis. Roberts' characterization of the Massachusetts law as content-neutral may have been a concession to the Court's four liberals (Ginsburg, Breyer, Sotomayor, and Kagan) in order to achieve unanimity, but the choice indisputably signals that states may regulate speech in and around clinics in a way that passes First Amendment scrutiny. The decision to classify the law as content-based viewpoint discrimination would send a different signal – that state laws attempting to regulate speech (and safety) at clinics face a tough hurdle and are likely to be struck down as unconstitutional.

That scholars have historically been divided on the extent to which legal principles and political preferences affect decisions is well-trod territory. In a symposium critiquing *The Supreme Court and the Attitudinal Model Revisited*, Segal and Spaeth responded to Herbert Kritzer's comments in part by noting that, "If the Court reaches a leading conservative decision on one issue (e.g. probable cause) and then follows that up with conservative decisions on other issues (e.g., lessening the protection granted to house searches), that could just as easily be due to attitudinal considerations as to legal considerations" (2003, 19-21, 33). Richards' own response to this critique is that it borders on tautology, at least to the extent that claiming ideological preferences are the cause of ideological judging is circular (2013, 39-40). Sara Benesh offered a similar observation in her biography of judicial decision-making pioneer Harold Spaeth, noting that, "Something caused the Court to vote Z in case X. Later, case Y is decided, and we predict from case X that the justices will again make decision Z. But, what caused the justices to choose decision Z in case X?" (Benesh 2003, 123-124). The introduction of Segal-Cover scores, described in chapters two and three, may not have fully resolved this problem, as the editorials

on which the ideological scores are based are at least partially a result of a nominee's previous political positions or case decisions in lower courts.

Modeling Judicial Decision-making and the Constitution of Free Speech

Figure 4.2 – Multi-factor Mapping of Supreme Court Decision-making

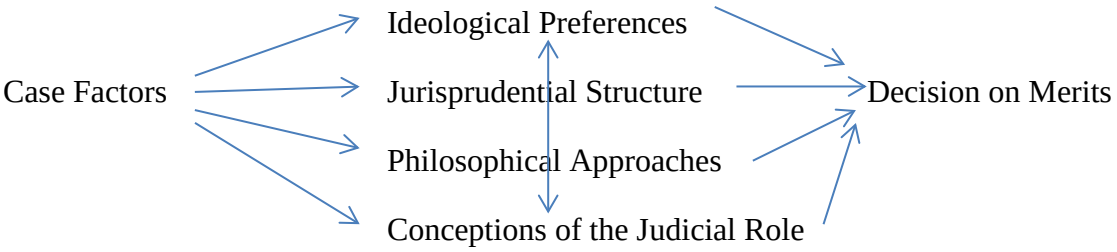


Figure 4.2 offers a framework of Supreme Court decision-making that takes account of three commonly referenced, extra-ideological components posited as causal explanations in free speech judicial decision-making studies, in addition to the ideological preferences of the justices. While impossible to recreate the total set of impulses animating judges in any given controversy or to assign relative weights, the basic factors included in this framework represent a synthesis of and an improvement over existing scholarship that may emphasize one factor (or only part of the Court's record) at the cost of others. The framework is specific to studying freedom of speech judicial decision-making, though the general framework may be imported to other areas of law. It avoids the tendency to reduce explanations to a single causal factor, recognizing instead that the development of law is a complex interaction among ideological preferences, jurisprudential structures, conceptions of the judicial role, and philosophical interpretations.

This framework admittedly trades parsimonious explanation for deeper analysis of the interaction of these specified components. This thicker model of judicial decision-making is designed to bring scholars a step closer to the reality and complexity of Supreme Court decision-making. Because, as Robert Gordon has found, "legal forms and practices don't shift with every realignment of the balance of political force," it follows that "they are independent variables in social experience and therefore they require study elaborating their peculiar internal structures with the aim of finding out how those structures feed back upon social life." (Gordon 1984, 101). In the following sections, I provide an overview of recent work that hints at this complex relationship along with the research design for assessing these factors across the Roberts Era constitution of free speech.

Scratching the Surface: Roberts Era Speech Controversies

Some recent accounts of judicial decision-making in constitutional free expression decisions point toward this potentially complex relationship among a variety of causal factors. Justice Kennedy, one of the Court's conservatives, frequently votes for pro-speech claims in a way that belies that ideological label (Knowles 2015, 170). Chief Justice Roberts has also demonstrated a special concern for freedom of speech, assigning free speech cases to himself at a higher rate than the other justices (Segal and Epstein 2011; Collins 2013, 465; Baker 2015) and sometimes breaking with the Court's other conservatives in free expression cases. Legal scholars have also touched upon the importance of considering different conceptions of the judicial role and varying ideological preferences within the current Court's liberal and conservative blocs in recent commentaries of the Court's free expression record. Tribe and Matz's account of this portion of the Court's agenda noted that Justice Alito is "a different kind

of conservative," pointing to a series of dissents in *Stevens*, *Phelps*, and *Alvarez*, as well as a cautious concurrence in *Entertainment Merchants Association* (2014, 141-142).

Similarly, Mark Tushnet's assessment of Justice Breyer's history on free speech controversies highlights his pragmatic, balancing approach that eschews what Breyer has called "a jurisprudence of labels" (Tushnet 2015, 215-238). Other projects, like Mark Richards' book-length treatment of the Court's content-neutrality regime, have focused on the Court's voting alignment in *Alvarez* in an attempt to tease out divergent understandings of the regime among the justices (2013, 129-130; see also Collins 2013, 437-439). These accounts are suggestive of the nuanced interplay among non-monolithic ideological preferences, longstanding jurisprudential structures, philosophical theories of free expression, and differing conceptions of the judicial role on the current Court.

Suggestive – but rarely systematic. A systematic explanation entails a comprehensive examination of votes and opinions across justices and issue areas. Even David Gans's recent article on the Roberts Court speech record after ten years focuses disproportionately on the votes of the Chief Justice, emphasizing the Court's campaign finance and union decisions (Gans 2015). Others, like Ronald Collins, have attempted to shoehorn the Roberts Era constitution of free speech into new jurisprudential paradigms ("the new absolutism") at earlier points in the era at the expense of other streams of jurisprudence or other theoretically relevant, judicial preferences (Collins 2013, 413).

Research Design

To assess the extent to which contemporary free expression is explained by factors beyond one-dimensional, ideological preferences – including conceptions of the judicial role and jurisprudential structures – I examine all judicial opinions from 2005 to 2015 written in the 45 free expression merits decisions of the Roberts Era, and divide the Roberts Court Era into three distinct periods based on voting patterns and commentary focused on the Court's free speech project. This periodization reflects the identification of what George and Bennett describe as "turning points in the causal chain," which allows researchers to "sort out which independent variables explain each step in the causal chain" (George and Bennett 2005, 92).

This analysis focuses primarily on majority, concurring, and dissenting opinions, with the goal of determining whether particular patterns of reasoning structure a particular jurist's decisions. For each justice, conceptions of the judicial role apparent in written opinions will be considered in light of the purported ideological attitudes of the jurist and the decision directions (liberal or conservative) of votes within and across cases. While this approach treats judicial opinions as the primary units of analysis, it differs from that of Gillman, whose seminal account decided "to focus on the jurisprudence and not the jurists." (Gillman 1993, 15-16). It does share with Gillman's account a chronological structure and approach in an effort to detect when changes appear to have occurred in the Court's free expression merits agenda and to make the analysis digestible for the reader (see generally George and Bennett 2005, 92-94).

To provide this context and to collect data, I engage in the interpretive approach of closely reading judicial opinions in order to determine the preferred rationales of justices deciding contemporary free expression decisions. This approach explicitly recognizes the value

of judicial doctrines as both empowering and constraining justices who have preferred ideological goals: what legal policy should be and who should benefit from it. As Elizabeth Bussiere has argued, "To some degree, judges who interpret the law through the filter of legal doctrines are acted upon by such doctrines because the existing categories of analysis shape judges very perception of, and reasoning in, the cases before them. (That, according to the new institutionalism, is what gives [justices] their uniquely institutional outlooks.)"(1999, 157-158).

Fundamentally, the method used in this chapter is best described as a medium-N case study employed to explain an important outcome of interest – the Roberts Court's constitution of free speech. By tracing the process through which the Roberts Era freedom of expression project has developed, this chapter is consistent with a definition offered by Ludvig Norman: "[Interpretive] process tracing…is a family of tools used to study how causal processes unfolding over time produce particular outcomes…it is also characterized by efforts to study intersubjective social institutions as part of causal processes." (Norman 2015, 4-5). In the context of judicial decision-making studies, Martin Shapiro describes the approach as a "set of related decisions, and then develops in the greatest possible detail all the institutional and individual attitudes and behavior that led up to and out of the decision. Such depth studies are designed to validate or suggest the broader hypotheses which it is the goal of the social sciences to formulate." (Shapiro 1963, 306). This project is medium-N in the sense that it balances in-depth, single case analysis with attention to patterns across a manageable population of cases (on medium-N case studies see Barnes 2005; Keck 2007; and Kapiszewski 2011).

Generalization beyond the specific outcome of interest is always a concern in descriptive, historical studies, yet there are clear implications beyond the period of analysis in this project. Borrowing again from George and Bennett, if a number of contemporary free expression cases

exhibit voting patterns and opinion language inconsistent with univariate, ideological explanations, this would not be grounds for revising theories of judicial decision-making across all issue areas and time periods. However, it does constitute a general argument about how judges are apparently affected by considerations beyond ideological values, which could then be developed in additional detail in other medium-N studies of particular constitutional issues in particular historical and political contexts (George and Bennett 2005, 93).

For each of three periods I have identified based on general periods of the Roberts Era, I focus on the following themes:

(1) Identify language suggesting guiding philosophical rationale in majority opinions, concurrences, dissents (equality v. liberty; marketplace/democracy/self-fulfillment). Doing so allows us to determine the philosophical underpinnings of contemporary free expression jurisprudence articulated by the Court. Scholars interested in political theory and important contemporary debates (i.e. deliberative democracy, Rawlsian equality, "Nozickian" liberty) may find the results here informative for their own projects.

(2) Identify key jurisprudential ideas (categorical approach, balancing, scrutiny tiers, and the content-neutrality regime). Previous work suggests jurisprudential ideas and regimes may become entrenched for periods of time and structure or affect the decisionmaking of institutional actors with varying ideological preferences. Identifying the preferred jurisprudential processes engaged in by the justices – and whether they do so consistently – allows us to understand whether entrenched norms transcend or enable the exercise ideological preferences (or both).

(3) Identify jurists' conceptions of the judicial role (deference to legislative branch; living v. original interpretation; pragmatism). Judges are not monolithic in terms of their ideological

preferences, nor do they all subscribe to the same interpretive philosophies. Nor, for that matter, should opinions be dismissed outright as being *entirely* window dressing, as the rationale (or, derisively, rationalization) for a decision may be part of a broader pattern across cases within a particular issue area. As Pritchett noted long ago, "Every justice in deciding a case must give some thought to what is appropriate for him as a judge to do…While no justice can be oblivious to [jurisprudential] pressures, they are not self-enforcing, and he is free to make his own interpretations of their requirements in guiding his own judicial conduct." (Pritchett 1953, 324).

More recently, Keck has argued that "To explain the jurisprudence of O'Connor and Kennedy, and hence that of the Rehnquist Court itself, we need to look at their visions of the judicial role as well as their political ideologies…Scholarly efforts to explain such decisions without reference to law tend to remain too vaguely specified to account for the actual pattern of judicial decisions."(Keck 2004, 274-275). Identifying different conceptions of the judicial role – and whether justices are consistent in applying those conceptions – allows us to understand whether interpretive philosophies prevail over or work in tandem with ideological preferences, and whether previous findings are limited to specific Court Eras.

(4) Assess the dimensions of the ideological preferences of the justices across cases. Notwithstanding critiques of attitudinal studies that indict scholars for engaging in "behavioral equivalence," or characterizing an outcome as ideologically motivated when the application of legal principles would lead to the same result, the idea that jurisprudence is endogenous to attitudes is a claim that must be taken seriously (Baum 1994, 4). The clue that jurisprudential considerations exert an influence separate from ideological values was touched upon in chapter three, with the finding that a substantial number of cases exhibited voting disorder or were unanimously decided.

Assessing the presence and extent to which extra-ideological factors come into play in decisions will be conducted in light of the expected ideological ordering of the justices votes as determined by the relevant term's Martin-Quinn scoring of the justices' preferences. While the ordering predicted by these scores serves as a general reference point, it is important to emphasize that these measures do not necessarily distinguish between different types of liberalism or conservatism except in degrees of difference along a single dimension. Again, attitudinal measures of ideological preferences assume a degree of ideological homogeneity that cannot distinguish between the conservatism of Chief Justice Roberts and Justice Thomas except to the extent that their voting patterns are more or less conservative – which in turn rests upon characterizations of decisions as either liberal or conservative (Epstein, Martin, Quinn, and Segal 2012, 712, 714-717).

This is not to impose a preferred explanation – ideological preferences – on the outcome of interest. It is simply a recognition that ideological preferences are one causal factor among others to be interrogated, and that the ideological explanation remains dominant in political scientists' study of judicial decision-making. In fact, due to the problem of observational equivalence noted by Baum, the extent to which the Roberts Court's free expression decisions are explained by additional considerations in this study could be viewed by some readers as an *understatement* of the degree to which these factors matter.

Methodological Assumptions and Epistemological Objections

Before proceeding with the descriptive explanation of the Roberts Court record on speech, I wish to address a series of additional, interrelated concerns that scholars operating in the positivist and/or quantitative tradition may find problematic.

The first issue concerns the lack of parsimony evident in the framework specified in Figure 4.2. While still a simplified version of reality, it is rife with a number of interpretive variables that are not easily reduced to numerical representation. The original critiques advanced by behavioral scholars within the legal realist tradition of early and mid-20th century studies of judicial decision-making focused on (1) the tendency of legal scholars to emphasize jurisprudential rules as predictors of judicial behavior and (2) the lack of predictive leverage offered by interpretive, richly descriptive explanations of judicial behavior. While it is true that jurisprudential norms, philosophies, and judges' own descriptions of interpretive philosophies can function as camouflage for the exercise of ideological preferences, it does not follow that judges always invoke such considerations instrumentally – or, for that matter, that they can.

Even scholars operating within the behavioral and rational choice traditions of judicial decision-making have at least implicitly channeled Alexander Hamilton's Federalist 78 in noting that the vitality of the judicial branch is at least partially dependent upon maintaining legitimacy in the eyes of the public and other government actors (Epstein and Knight 1997, 117). In other words, even if the justices are nothing more than legislators in black robes, successful policymaking is at least partially dependent upon the justices' willingness to act *as judges* – whether sincerely or strategically - rather than legislators. The justices' own explanations for behavior – offered in opinions – can prove valuable when studied alongside expected voting

patterns specified by attitudinal scholars. If a conservative justice's preferred rationale is always accompanied by a conservative vote, then the so-called "window-dressing" assumption *might* be warranted. However, if a justice's preferred rationale – or conception of the judicial role – is found to be present in both conservative and liberal votes, then opinions can be useful data points in explanations of judicial behavior. These artifacts may also be useful in assessing whether a justice agrees with such jurisprudential structures as the content-neutrality regime. Ultimately, the extent to which opinions matter is an unknown unless scholars take seriously their potential as additional data *in addition to* votes (Friedman 2006, 265-267).

It is also evident that the characterizations that follow do not carry the same neatness as numerical expressions; indicators scored to reflect underlying concepts of interest. The nature of the variables, in conjunction with an understanding of these broad legal factors as somewhat amorphous, is a barrier to the sort of quantitative correlations often associated with the ideological effects of judicial decisionmaking (though see Spaeth and Segal 1999, Hansford and Spriggs 2008, and Lindquist and Klein 2006 for attempts to characterize relationships among precedents, circuit conflicts, and textual meaning in a similar fashion). In other words, this concern is a variant of the charge that scholars not engaged in constructing "rectangular data sets" (RSDs) grounded in experimental logic and characterized by scoring variables by a readily observable indicator are prevented from making sound causal inferences (Goertz and Mahoney 2012, 43-45).

One potentially useful way to frame the descriptive explanation that follows can be found in the distinctions between qualitative and quantitative social research traditions offered by Gary Goertz and James Mahoney (2012). The "effects-of-causes" tradition, generally concerned with an effect across a population of cases (observations), is less useful to researchers interested in

developing "explanations that simultaneously apply to a group of cases and to each individual case within that group." (Goertz and Mahoney 2012, 46). Reducing complex relationships to numerical placeholders necessarily entails a loss of context and detail that works at cross-purposes with research questions concerned with – and answered by – contextualized, descriptive explanations. Here, the object of explanation is a broad outcome of interest – the Roberts Court's free expression project. This outcome is the product of an extended process featuring a number of discrete controversies (cases), and within these cases a number of so-called "causal process observations" (CPOs) can be examined. Prior research has identified free speech philosophies, differing conceptions of the judicial role, interpretations of the requirements of jurisprudential structures, and ideological preferences as the key factors affecting outcomes in individual cases. In order to confirm these explanations as causes – as opposed to the thin explanation of judicial behavior based primarily on ideological preferences - these within-case observations should result in outcomes not predicted by the null hypothesis.

In this case, a null finding may be framed as an explanation largely consistent with the attitudinal model's predicted alignment of the justices. Endemic to all studies of judicial decision-making that takes opinions seriously is the realist argument that jurisprudential language is fungible; that is, it could be employed instrumentally to achieve a preferred ideological result. In the language of qualitative scholars, invocations of philosophies, jurisprudential interpretations, and articulations of the proper judicial role are necessary conditions that are almost always present in the course of judicial decision-making. They represent easy "hoop tests" that do little work in supporting hypotheses (Goertz and Mahoney 2012, 94). According to Collier (2011), a hypothesis passes a hoop test when evidence is

necessary for affirming causal inference: “Passing affirms the relevance of [a] hypothesis, but does not confirm it.” (825).

To contextualize this in the present study, what evidence would disprove the attitudinal hypothesis? Unexpected voting alignments represent the best observable implication of the ideology-plus hypothesis, a sufficient condition that allows us to reject the null in cases where disordered voting occurs (see generally Edelman, Klein, and Lindquist 2008; Keck 2007 for a variant of this approach). As chapter three argued, vote ordering is a key observable implication of explanations of Supreme Court behavior such that the presence of disordered voting – failing the hoop test – somewhat strengthens alternative hypotheses. To move beyond diagnosing by exclusion, however, there must be positive evidence in favor of some sort of link between decisions and such factors as jurisprudential structures, philosophical justifications, and conceptions of the judicial role. This is a difficult task, as Carter and Burke (2005) make clear in pointing out that legal reasoning is an exercise in law and politics: “The legal process, for all its political characteristics, is still a distinctive kind of politics…Law, like any language practice, limits the horizons of what becomes thinkable within that framework.” (22). In other words, the problem for scholars assessing the role of legal factors in decision-making is developing a case that principles beyond conventional ideological preferences may be sufficient for producing a particular outcome.

The analytical move that allows this project to advance beyond description (King, Keohane, and Verba 1995, 39-41) is comparing these factors as expressed by the justices in the course of writing opinions to their votes, as well as the votes of the conservative and liberal coalitions on the Court. If Justice Breyer’s vote in a particular case is disordered, then, this is a strike against the attitudinal hypothesis. If, however, that vote is accompanied by an opinion that

makes explicit a certain conception of the judicial role, a unique interpretation of the existing jurisprudential regime, or relies on a particular philosophy of the First Amendment, we have some initial evidence in favor of the ideology-plus hypothesis. This hypothesis may be provisionally accepted if we then find that Breyer consistently articulates these reasons *and* they accompany behavior that cannot easily be explained by the attitudinal hypothesis. This adds some analytical bite to the study of judicial decision-making in a way that moves beyond a recognition that doctrinal considerations are constitutive elements of judicial decision-making – it suggests there is a causal element at play as well (NeJaime 2013, 10-11).

A descriptive explanation of the Roberts Court's constitution of the republic's free speech guarantee represents the "internal" perspective on judicial behavior that attempts to understand judicial decision-making as described by Tamanaha: A "practice based on a shared set of organized rules and standards" that are "nonetheless heterogeneous... The practice of judging contains norms oriented toward the application of rules but also norms oriented toward doing justice, demands which sometimes clash. Beyond the minimum necessary to constitute a practice as such, there is no reason to postulate or assume that the entire body of norms contained within that practice is internally consistent." (Tamanaha 1996, 179). While the gold standard for the internal approach would be an in-depth, qualitative analysis of all stages of the process – including observation of behavior behind closed doors – the secrecy of the Court prevents the sort of richly detailed, interpretive contributions to social science akin to the work of Richard Fenno (1978) on members of Congress in their home districts or even H.W. Perry's seminal account of agenda-setting (1991). Opinions remain the primary and most accessible window to the practice of judging and provide a different kind of knowledge than externally imposed codes

on particular behavioral outputs (see Curry 2017 for an overview of this epistemological conflict in the study of U.S. political institutions).

I also wish to make clear what this descriptive explanation *is not.* Importantly, this is not simply an exercise in what Glendon Schubert characterized as "a comparison of the extent to which empirical policy norms, as stated in judicial opinions, deviate from the ethical content of ideal norms excogitated from the earlier writings of eminent constitution-makers, judges, and political philosophers, or depart from the subjective value preferences of the commentators." (Schubert 1963, 1). Or, as stated more recently by Brian Pinaire, the purpose is not "to devise a system of meta-principles – airtight in the abstract – only to apply them to the considerations and conclusions of the Supreme Court." (Pinaire 2008, xiii). Instead, it is an effort to synthesize strands of research presenting evidence that *multiple* factors affect decisions all while accounting for the purported ideological preferences of the justices and to assess whether such factors cause deviations from expected voting alignments. In the words of Rogers Smith, it is an attempt "to integrate the study of ideas in law with *descriptive* studies of the historical evolution of institutions and behavior." (Smith 1988, 90).

If persuasive, the detailed account that follows provides evidence pointing toward the sufficiency of legal factors for producing case outcomes. The problem of behavioral equivalence, absent a method for dissecting the judicial mind, will always prove a barrier for scholars. However, when viewed alongside alternative accounts and research methods, this account takes seriously the idea that legal factors may play a role in the calculus of the justices beyond cloaks for policy preferences.

Not a Free Speech Court: The Early Period (2005-2008) Terms

The Politics of Free Speech: Campaign Finance, Election Regulations, and Unions

The Court's free expression agenda began in earnest with *Rumsfeld v. FAIR*, the 2006 decision discussed at the outset holding that the Solomon Amendment's military recruiter access condition to receive federal funding did not create an unconstitutional condition in violation of the First Amendment's speech clause. On January 23, 2006, however, the Court unanimously overturned a decision by the D.C. District Court against a pro-life interest group challenging a key provision of the McCain-Feingold campaign finance law, formally known as the Bipartisan Campaign Reform Act of 2002 (BCRA).

In *FEC v. Wisconsin Right to Life* (546 U.S. 410 (2006)); hereafter referenced as *WRTL I*), a unanimous Court held that an as-applied challenge to § 203 of BCRA brought by a non-profit, issue advocacy group was not foreclosed by the Court's *McConnell* decision just three years earlier. Returning to the D.C. District Court, a divided panel granted summary judgment, finding Wisconsin Right to Life's intended radio advertisements (which had aired prior to but not during the pre-election blackout period marked by § 203) urging listeners to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster [of President George W. Bush's federal judicial appointees]" were constitutionally protected "issue advocacy" statements rather than the "express advocacy" of federal election candidates barred within the pre-election timeframe prohibited under § 203 (466 F. Supp. 2d, at 204). The Court granted certiorari in the case and shortly thereafter heard arguments in *FEC v. Wisconsin Right to Life* (551 U.S. 449 (2007)); heretofore referenced as *WRTL II*).

Writing for himself and Justice Alito – and joined in part by the Court's conservative bloc, Chief Justice Roberts affirmed the ruling of the district court, articulating a new test for determining whether speech fell within § 203 while suggesting general skepticism toward BCRA's goals: "A court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate…" (551 U.S. 449, 469-470)), followed by the admonition, "Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech." (551 U.S. 449, 478-479)). If *WRTL I* united the Court in an effort to clarify the reach of BCRA's prohibitions, *WRTL II* divided the Court along what would become the San Andreas fault of this era's free expression merits agenda.

In the midst of the ongoing litigation in the WRTL cases, the early Roberts Era hinted at suspicion of state-level efforts to regulate elections as well. In *Randall v. Sorrell* (548 U.S. 230 (2006)), the Court struck down Vermont's Act 64 (Vt. Stat. Ann., Tit. 17, § 2801 *et seq.* (2002)) limitations on expenditures as lacking a compelling state interest, finding the argument that "such limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters" as foreclosed by the Court's decision in *Buckley v. Valeo* (424 U.S. 1 (1976); 548 U.S. 230, 243), and finding the Act's contribution limits to "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage…they are too low and too strict to survive First Amendment scrutiny." (548 U.S. 230, 248).

The majority opinion in *Randall* was written by Breyer, who throughout emphasized the importance of following the precedents established by *Buckley* and enforcing electoral

regulations in a way that account for First Amendment concerns, and - among other concerns - noted that the Court lacked a "scalpel" to precisely determine the balance). Following the Martin-Quinn ordering of justices for the 2005 term, Breyer's willingness to strike down the Vermont Act's expenditure and contribution limitations was not unsurprising from an ideological perspective. Yet the emphasis on balancing and aversion to establishing a bright line test hints at a particular conception of the judicial role based on what I describe throughout as pragmatism that consistently – but not unfailingly – appears during the Roberts Era. Breyer's opinion was joined in full by Roberts and Alito, which at this stage of the Court's free speech agenda did not foreshadow the sharper hostility toward campaign finance regulations that would emerge by the end of the second era of the Roberts Court's speech agenda.

The Court's decision two terms later in *Davis* continued the scaling back of BCRA, as the justices were presented with a challenge to § 319(a), the so-called "Millionaire's Amendment," by Jack Davis, a wealthy, recurring Democratic (and more recently, Republican) candidate in Western New York. Davis argued that the amendment's contribution formula – raising the ceiling on contribution limits for publicly financed candidates running against those privately financed (and therefore not subject to the same spending restrictions) – was a content-based regulation that burdened his own speech. Justice Alito and the Court's conservative bloc agreed, characterizing the formula as "an unprecedented penalty on any candidate who robustly exercises" the right to unlimited self-financing in federal congressional campaigns (554 U.S. 724, 739) and rejecting the government's asserted interest in ensuring "level electoral opportunities" as inconsistent with the philosophical rationale of "unfettered political speech" (554 U.S. 724, 739, 742).

The campaign finance cases – even at this early stage of the Roberts Era – appear to be ideologically driven. The Court's conservatives are highly suspicious of legislative bodies in this area, and have often invoked strongly libertarian language in their opinions. Roberts appealed to the political speech justification in *WRTL II* (citing, among other decisions, *New York Times v. Sullivan* (376 U.S. 254 (1964)), at 551 U.S. 449, 467, 469), while Alito echoed J.S. Mill (1859, 84-88) and Alexander Meiklejohn (1948) in announcing faith in citizens' ability to rationally evaluate candidates' ideas (despite aggregations of wealth) and carving out robust protections for political speech related to self-government. Considering the possible broad interpretations these philosophical principles can take and have taken – Meiklejohn's argument from democracy has consistently been appealed to in majority and dissenting opinions - the early Roberts Court merits agenda can be described as undeniably anti-speech: These ideological and partisan-tinted decisions are the only decisions that can be characterized as "pro-speech" during the early Roberts Era.

Two other election-related speech cases have united the Court across ideological lines, though the decisions in *Washington State Grange v. Washington Republican Party et al.* (552 U.S. 442 (2008))) and *New York v. Lopez-Torres* (552 U.S. 196 (2009)) were against the First Amendment claimants. In *Washington State Republican Party et al.*, Thomas wrote for the Court in dismissing a freedom of speech and association facial challenge brought by the Republican, Democratic, and Libertarian parties of Washington state to a ballot initiative (I-872) allowing candidates to self-identify their party affiliation on primary election ballots (the law also structured general election ballots so that the top two vote-getters in primaries would appear on the ballot). Here, Thomas left open the possibility for an as-applied challenge but expressly eschewed the "strong medicine" of First Amendment overbreadth doctrine. Roberts, again joined

by Alito, concurred in rejecting the facial challenge and mused that, given a well-designed ballot, “Voters would not regard the listed candidates as "party" candidates, any more than someone saying ‘I like Campbell's soup’ would be understood to be associated with Campbell's.” (552 U.S. 442, 461). Scalia, joined by Kennedy in dissent, found Roberts’ concurrence especially problematic, noting that “The electorate's perception of a political party's beliefs is colored by its perception of those who support the party; and a party's defining act is the selection of a candidate and advocacy of that candidate's election by conferring upon him the party's endorsement.” (552 U.S. 442, 462).

Though *Lopez-Torres* again featured as dispute between establishment political parties and an underdog – this time, a New York Supreme Court candidate challenging the cryptic, Tammany-esque selection of candidates via a complex delegate process – the Court unanimously rejected Judge Margarita Lopez-Torres’ free speech claim. Kennedy, who had joined Scalia in voting for the Washington State Grange, concurred separately with Breyer and opined that “Rule of law is secured only by the principled exercise of political will. If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now.” (552 U.S. 196, 213). Ultimately, the unexpected voting alignment in *Washington State Grange* and the unanimity in *Lopez-Torres* cast doubt on any unqualified claims about the Court’s hostility to election regulations, and suggest an unwillingness to expand the First Amendment beyond traditional jurisprudential structures.

Two additional, unanimous decisions by the Court during the early period were – in hindsight - early signals of another Roberts Era political project. In 2007, the Washington Education Association union raised a free speech challenge to § 760 of the Washington Fair

Campaign Practices Act (Wash. Rev. Code § 42.17.760), which held that unions could not spend agency shop fees contributed by non-members for election or political purposes unless the non-member affirmatively opted in to such an arrangement. Writing for a unanimous Court in *Davenport v. Washington Education Association* (551 U.S. 177 (2007)), Scalia viewed the union's claim as misguided "for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." (551 U.S. 177, 185). Breyer, concurring and joined by Roberts and Alito, disagreed only to the extent that the Court considered issues not properly raised by Washington in its briefs to the Court (551 U.S. 177, 192). Two terms later in *Ysursa v. Pocatello Education Association* (555 U.S. 353 (2009)), a divided Court upheld Idaho's Right to Work Act (Idaho Code § 44-2001) against a First Amendment challenge by another teachers' union, which argued that the Act's prohibition on union payroll deductions for political activities burdened the union's constitutional rights.

In an opinion by the Chief Justice, the Court again emphasized that "Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities. The concern that political payroll deductions might be seen as involving public employers in politics arises only because Idaho permits public employer payroll deductions in the first place." (555 U.S. 353, 361). Ginsburg, in her second concurring opinion of the early Roberts Era, concurred in the judgment only on the narrow grounds that the municipal ban on payroll deductions was valid because municipalities are entities of the state and therefore subject to the restriction. For Ginsburg, the controversy was outside of relevant First Amendment doctrines and marked the beginning of a comparatively disinterested or deferential take on the First Amendment. Breyer again disagreed with the Court's First Amendment analysis, suggesting the case should be remanded to the district court and subject to a form of

intermediate – rather than rational basis – scrutiny: "I would ask the question that this Court has asked in other speech-related contexts, namely, whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve." (555 U.S. 353, 367). Breyer also doubted whether the Court's negative liberty interpretation of the First Amendment could (or should) be relied upon in evaluating all controversies, arguing instead that "The distinction is neither easy to draw nor likely to prove determinative." (555 U.S. 353, 366).

Earlier in the 2008 term, the Court heard another union fundraising-related challenge, this time brought by non-members who opposed fundraising fees assessed by the local shop being used for national union collective bargaining and litigation efforts – efforts that did not always directly benefit their local Maine shop. In *Locke v. Karass* (555 U.S. 207 (2009)), Breyer wrote for a unanimous Court in dismissing the union non-members' claim, stating "We can find no significant difference between litigation activities and other national activities the cost of which this Court has found chargeable." (555 U.S. 207, 218). Alito, concurring with the Chief Justice and Scalia, noted that the result in the case could have been different had non-members questioned whether the relationship between chargeable expenses for national litigation was in fact a reciprocal benefit for the local Service Employee's International Union chapter (suggesting greater skepticism toward chargeable expenses than the rest of the majority).

Washington Education Association, Pocatello, and *Karass* marked the beginning of a series of cases where the Court first rejected free speech claims brought by unions, then became increasingly sympathetic to claims brought by union non-members. In each instance, the Court was initially marked by unanimity but became progressively more fractured in the cases' progeny. Similar to the the campaign finance decisions, the Court's union decisions began to

take on a more political tone during the early era. Apart from Justice Breyer's call for a case-by-case balancing approach in these cases, the Court generally operated within existing doctrinal structures. But these cases represent approximately half of the early Roberts Era free speech merits agenda. In suits brought by a government employee, prisoner, high school student, private school, an unpopular religious group, and an individual found guilty of trade in child pornography, the Court was consistently unwilling to rule in favor of speech claimants.

Bork's Renaissance

The early Roberts Era hints that ideological bloc explanations may overstate consensus *within* the liberal and conservative blocs came in the form of the student speech case *Morse v. Frederick*. But before assessing the rationales and coalitions manifest in the student, government employee, prisoner, and other disfavored speaker cases, the important context of the extent of the imaginary sphere of protection requires elaboration beyond the content-neutrality regime. Following an extended period of concern for protecting speech related to the political process and scholarly treatises making the case for the highest level of protection for political speech (Meiklejohn 1948), conservative jurist Robert Bork argued that, "Constitutional protection should be accorded *only* to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic…I am, of course aware that this theory departs drastically from existing Court-made law, from the views of most academic specialists in the field and that it may strike a chill into the hearts of some civil libertarians." (Bork 1971-1972, 20).

On October 23, 1987, Ronald Reagan's nominee to fill the Supreme Court seat vacated by moderate Lewis Powell was rejected by the U.S. Senate in a sharply divided 58-42 vote. While the confirmation hearings were notable for then-U.S. Senator Joseph Biden's critiques of Bork's "neutral principles" and purported judicial restraint, the implications of Bork's published formulation of First Amendment theory are no less important to U.S. constitutional democracy. Bork's First Amendment was limited in its scope of application to pure *political* speech, but with speech falling within that scope subject to *absolute* protection. The formulation takes the ideas of Alexander Meiklejohn (1948) to their logical extreme, and fashioned a judicial First Amendment philosophy that like the shot of a professional sniper was limited in target but extremely effective. For Bork, "Freedom for political speech could and should be inferred even if there were no first amendment," which is "the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification and their protection against legislative regulation involves the judge in making decisions of the sort made in *Griswold v. Connecticut*." (1971-1972, 21, 26).

For others, Bork's incantation of the Meiklejohnian guide to First Amendment adjudication portended a world with far less color and sound: "Robert Bork's America is a land in which…writers and artists could be censored at the whim of government." (Reston 1987). Bork's nomination was quashed but his ideas live on. Fast forward 20 years to the Supreme Court's decision in *Frederick*, the somewhat amusing controversy arising from a Juneau, Alaska high school student's display of a banner during the running of the Olympic Torch (which passed by the high school) which read "BONG HiTS 4 JESUS." High school principal Deborah Morse saw the banner and suspended student Joseph Frederick for – arguably – promoting a pro-drug use message during a school event. Frederick was not on school property when he displayed the

banner, but he was attending the school sanctioned event (congratulating relay runners as the Torch passed) directly across from the high school. In the tradition of the *Tinker* line of cases, Frederick brought suit against Morse under 42 U.S.C.S. 1983, which allows for any person deprived of constitutional rights to file a civil action against an individual acting "under the color" of any law, custom, or regulation.[24]

The Court split along the expected ideological fracture in *Frederick,* though Justices Alito, Breyer, and Thomas all offered different roadmaps to reaching their respective conclusions, and Justice Stevens (joined by Souter and Ginsburg) provided a take on the First Amendment opposed to Justice Alito's emerging disdain for peripheral First Amendment claims as well as the developing, selectively applied liberty vision of speech most visible in the Court's campaign finance agenda. Concurring in *Frederick,* Alito (joined by Kennedy) emphasized that the decision "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." (551 U.S. 393, 422). Alito's emphasis on forum analysis – noting that the special context of schools relaxes First Amendment standards –disavowed any deviation from existing precedent that would erode speech protections for students: "Public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits." (551 U.S. 393, 425).

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[24]"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Breyer, the most ideologically moderate liberal by Martin-Quinn estimates during the 2005 term, concurred in the result except to the extent that the majority decision framed and decided the case as a First Amendment controversy. Seeking to resolve the controversy on narrow grounds, Breyer argued that, "…the question focuses upon specific content narrowly defined: May a school board punish students for speech that advocates drug use and, if so, when?" (551 U.S. 393, 425). In ruling that Morse's actions constituted qualified immunity from the monetary claims sought by Frederick, Breyer noted that "Teachers are neither lawyers nor police officers." Resolving the case under the qualified immunity doctrine would "avoid the risk of interpretations that are too broad or too narrow," and would instead make it "easy to offer practically valuable guidance." (551 U.S. 393, 427-428). Breyer's concurrence, though consistent with the vote order predicted by attitudinal models, again revealed a concern for pragmatism that would become a mainstay of his reasoning in free expression controversies in the Roberts Era. Likewise, the emphasis on original understandings of the role of schools in society in Thomas's concurring opinion, would reappear in later Roberts Era decisions. This early example underscores the potential for differing conceptions of the judicial role to cut against common ideological rankings of the justices.

Frederick is also a useful jumping off point for assessing the constitution of free speech consistently articulated by Justices Stevens and Souter during the early Roberts Era, frequently joined by Justice Ginsburg. In the early Roberts Era, dissents by Justices Souter and Stevens (with Justice Ginsburg always joining these opinions) have always favored relatively powerless speech claimants. In *Garcetti v. Ceballos* (547 U.S. 410 (2006)), Justice Souter's dissent argued that Justice Anthony Kennedy's willingness to protect only government employee speech of public concern in the employee's capacity as a citizen – rather than as an employee – effectively

gutted the limited sphere of protection carved out in *Pickering* and *Myers*. For Kennedy, “The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy… Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.” (547 U.S. 410, 421-422).

Souter, joined by Stevens and Ginsburg, explained that “This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose.” (547 U.S. 410, 428-429). Stevens dissented separately as well, stressing Souter’s argument that “The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong.” (547 U.S. 410, 427).

The concerns expressed by the majority and principal dissent flow from the difficult context serving as the basis for Ceballos’s claim: His reassignment to another office and denial of a promotion following his investigation of possible police and prosecutorial misconduct related to the issuance of a search warrant in a criminal case. Dissenting separately, Breyer avoided the bright lines drawn by both the majority and principal dissent: “In a word, the majority says, "never." That word, in my view, is too absolute… While I agree with much of Justice Souter's analysis, I believe that the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority

describes." (547 U.S. 410, 446, 447). The dissenters in *Ceballos* would, however, cite to the decision in ruling against a private school employee in *Tennessee Secondary Schools Athletic Association v. Brentwood* (551 U.S. 291 (2007)), characterizing a state-sponsored, inter-school district association's rules on "hard sell" football recruiting as "strik[ing] nowhere near the heart of the First Amendment." (551 U.S. 291, 296).

Writing for a Court unanimous in voting but splintered in rationale, Stevens cited *Ceballos* favorably for the proposition that government employee speech was limited to speaking on matters of public concern in employees' capacity as citizens, concluding that, "We need no empirical data to credit TSSAA's common sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics." (551 U.S. 291, 300). Concurring in the result only, Thomas broke with the Court's reliance on the government employee speech line of cases, opposing the Court's willingness to expand the Court's lenient yet speech protective standard to Brentwood – a private school (551 U.S. 291, 306-307). The Court's other conservatives, through Justice Kennedy, appeared to be onboard with the Court's government employee analysis though disagreeing with Stevens' invocation of a precedent involving a lawyer's challenge to the in-person solicitation of clients (*Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); cited at 551 U.S. 291, 296).

Stevens has been far more speech-protective in other contexts, however. In *Beard v. Banks* (548 U.S. 521 (2006)), an ideologically divided majority ruled that the Pennsylvania prison system's Long Term Segregation Unit (LTSU) policy prohibiting inmates from having newspapers, magazines, and photos was constitutional under the precedent established in *Turner v. Safley* (482 U.S. 78 (1987)). Stevens, joined by Ginsburg, characterized the deprivation theory

of rehabilitation permitted by Breyer's plurality decision as "[having] no limiting principle; if sufficient, it would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior," viewing the prohibition on inmate literature as "strik[ing] at the core of the First Amendment rights to receive, to read, and to think," and preventing access to the exchange of ideas "central to the development and preservation of individual identity." (548 U.S. 521, 546, 543, 552). Ginsburg, joining Stevens' dissent and writing separately, expressed dismay at the plurality's standard for summary judgment, fearing that "By elevating the summary judgment opponent's burden to a height prisoners lacking nimble counsel cannot reach, the plurality effectively tells prison officials they will succeed in cases of this order, and swiftly, while barely trying." (548 U.S. 521, 556).

The concern for speech claims brought by unpopular speakers was also a recurring concern for Souter, dissenting with Ginsburg in the 2007 term case of *U.S. v. Williams* (553 U.S. 285 (2008)) in viewing provisions of the federal Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act (18 U.S.C. § 2252A(a)(3)(B)) as impermissibly overbroad under the First Amendment. Souter's disagreement with Scalia's majority opinion turned on the Act's criminalization of engaging in child pornography "pandering" transactions not involving real images of children. For Souter, "The tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material, and in allowing the new pandering prohibition to suppress otherwise protected speech," violated free speech principles. (553 U.S. 285, 311). Pointing to a consistent though not all-encompassing concern among the Court's liberal justices, Souter also noted that "What will

be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression." (553 U.S. 285, 320).

At the conclusion of the 2007 term, Souter concurred in the Court's holding against a claim brought by gnostic Christians in *Pleasant Grove City v. Summum* (555 U.S. 460 (2009)). The sect argued that the city's acceptance of a Ten Commandments statute for display in a local park while rejecting a monument inscribed with the group's "Seven Aphorisms" constituted impermissible viewpoint discrimination under the First Amendment. Alito's opinion for a unanimous Court reasoned that accepting Summum's argument would make government decisions to approve public displays impossible. Souter expressed some unease with the Court's decision, stating, "I have qualms, however, about accepting the position that public monuments are government speech categorically." (555 U.S. 460, 485). Breyer, while concurring, stressed that, "In my view, courts must apply categories such as 'government speech,' 'public forums,' 'limited public forums,' and 'nonpublic forums' with an eye toward their purposes--lest we turn 'free speech' doctrine into a jurisprudence of labels." (555 U.S. 460, 484). Breyer's express pragmatic approach argued that "it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective…After all, parks do not serve speech-related interests alone." (555 U.S. 460, 484-485). For his part, Stevens (joined by Ginsburg) characterized the Court's approach in less than flattering terms, noting "To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit." (555 U.S. 460, 481).

When considered in light of dissents in *Frederick* and *Ceballos*, members of the Court's liberal wing occasionally – though not consistently and only rarely voting together – raised

concerns with the Court's jurisprudential approaches to adjudicating claims. Much as *Lochner* Era justices generally decided economic regulation cases within the strictures of the class interests formula born of a Founding Era fear of special, class-based legislation (Gillman 1993), the justices in the early Roberts Era were largely united by conventional jurisprudential structures, disagreeing only to the extent that application of these jurisprudential regimes – beyond simple content-neutrality and including doctrines calling for lower, intermediate forms of scrutiny – lead to different results. Breyer's approach – much as Justice Holmes dissent in *Lochner v. New York* (198 U.S. 45, 74-76 (1905)) – is the exception that tests this rule, generally rejecting the content-neutrality formula. Even when united in votes, the justices provide clues to their preferred conception of the judicial role. Often, these *dicta* invoke speech-protective philosophies that can legitimize either pro- or anti-speech votes. But sometimes, it is apparent that certain conceptions of the judicial role create tensions not only with expected ideological voting, but also the conventions of jurisprudential regimes.

The preponderance of evidence gleaned from opinions and observed voting patterns in merits cases during the early Roberts Era provides marginal support for the ideology-plus explanation. In the language of process tracing, the attitudinal explanation jumps a number of "hoops" with a number of cases splitting the Court into the 5-4 voting coalitions predicted by conventional estimates of ideological preferences. But it also stumbles in a few cases as well: *Banks*, *Pocatello*, and *WSRP* each featured deviations from those expected alignments. Perhaps the most notable fracture during this era is the willingness of members of the Court's liberal bloc to generally favor speech claims brought by claimants at the "periphery" of the First Amendment's aura of coverage, including prisoners, students, and those convicted for soliciting child pornography. The Court's conservatives were generally far more willing to protect what

has been characterized as speech at the “core” of the First Amendment, or political speech. Table 4.1 provides an overview of behavior and trends in opinion reasoning during this early period, as well as a brief numerical characterization of each justice’s orientation toward the pro-speech position across these cases.

Table 4.1 – Not a Free Speech Court: The Early Roberts Era (2005-2008 Terms)

	Opinions Authored (Majority, Concurring, Dissenting)			Interpretive Preferences	% Pro Speech	Vote Deviations
John Roberts	*FAIR* *Frederick* ***WRTL II*** *Pocatello*	*WSRP*	---	Core Political, Institutional Maintenance	25%	
John Paul Stevens	*Brentwood*	*Lopez Torres* *Williams* *Summum*	***Ceballos*** *Randall* ***Banks*** ***Frederick*** *Davis* ***Pocatello***	Periphery	31.25%	
Antonin Scalia	*WEA* *Williams* *Lopez* *Torres*	*WRTL II* *Summum*	***WSRP***	Core Political, Originalism	31.25%	
Anthony Kennedy	*Ceballos*	*Randall* *Brentwood* *Lopez Torres*	---	Core Political	31.25%	***WSRP***
David Souter	---	*Summum*	***Ceballos*** *Randall* *WRTL II* ***Williams*** ***Pocatello***	Periphery	31.25%	*Banks*
Clarence Thomas	*WSRP*	*Randall* *Banks* *Brentwood* *Frederick*	---	Originalism, Core Political	25%	*WSRP*
Ruth Bader Ginsburg	---	*Pocatello*	***Banks*** *Davis*	Periphery	31.25%	*Pocatello*
Stephen Breyer	***Randall*** *Banks* (P) *Karass*	*WEA* *Frederick* *Summum*	***Ceballos*** ***Pocatello***	Pragmatism	25%	
Samuel Alito, Jr.	***Davis*** *Summum*	*Randall* *Frederick* *Karass*	---	Core Political	23.08%	

Notes: N=16. Percentage of pro-speech decisions by Court during this period=25%. For "Opinion" column, bolded cases denote a pro-speech claimant vote. "Interpretive Preferences" denotes themes apparent in the justices' opinions during this period. "% Pro-Speech" indicates the proportion of the justices' votes in favor of speech claims. One case, *FEC v. Wisconsin Right to Life*, 546 U.S. 410 (2006), was a unanimous, *per curiam* decision and does not appear in the opinion column but the votes are included in the percentage of pro-speech decisions category and overall N. Another case, *Hartman v. Moore*, 547 U.S. 250 (2006), was issued during this era but was omitted due to the absence of Justice Alito and Chief Justice Roberts during oral argument and the Court's decision.

The Most Pro-Speech Court in History? The 2009-2011 Terms.

Citizens United v. FEC (558 U.S. 310 (2010)) has become something of a touchstone for characterizations of a Court simultaneously willing to make difficult, speech protective decisions (Floyd Abrams, quoted in Liptak 2012) and placing hostility to campaign finance regulations above all other speech claims (Kairys 2013; Chemerinsky 2011; Youn 2011). The decision, in a lengthy opinion by Justice Kennedy, held BCRA Section 203's prohibition on electioneering expenditures from corporate, union, and non-profit treasury funds to be unconstitutional under the First Amendment for regulating speech on the basis of the subject matter communicated (political speech). Chief Justice Roberts' concurring opinion, joined by Justice Alito, emphasized the Court's institutional responsibility to make difficult decisions and was likely at least partially attributable to the draft dissent circulated by Justice Souter after the initial oral arguments in the case – a dissent that criticized the Court for answering an issue not properly presented before it (Coyle 2013, 251-252).

Justice Scalia's concurring opinion, joined by Thomas and Alito, reasoned that the First Amendment is agnostic when it comes to the identity of the speaker involved in a controversy because corporations had long been viewed as having rights despite a lengthy analysis offered by Stevens in dissent: "The Framers did not like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted -- not, as the dissent suggests, as a freestanding substitute for that text." (558 U.S. 310, 386).

Scalia's conception of the judicial role has its limits – he did not join Thomas's concurring opinion in *Frederick,* and the two were at loggerheads in *Brown v. Entertainment Merchants Association* (discussed below). For his part, Thomas dissented to the extent that Kennedy's expansive opinion nevertheless upheld BCRA's disclosure and reporting requirements: "I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters." (558 U.S. 310, 485). Stevens' dissent (joined by the Court's liberal justices), an attempt to discredit Scalia's brand of originalism, also feared that dismantling BCRA's key regulation came "at the cost of the individual and collective self-expression," (558 U.S. 310, 475), a theme buried in an extended defense of the anti-corruption, equalizing rationale underlying *Austin v. Michigan Chamber of Commerce* (494 U.S. 652 (1990)) but would become more prevalent in later Roberts Era campaign finance decisions.

Until the Court's near unanimous decision in April 2010 in the animal cruelty case of *U.S. v. Stevens* (559 U.S. 460 (2010)), the Court only ruled for speech claimants challenging state and federal campaign finance regulations. *Stevens* was the first indication of the Court's willingness to emphasize one strain of U.S. free speech jurisprudence – the so-called "categorical" or "absolutist" understanding, at least in an apparent unwillingness to specify certain types of speech areas as low-value categories not belonging to the core protections of the First Amendment. The vehicle for this emerging agenda was a suit filed by Robert J. Stevens, the producer and distributor of a number of alleged dog fighting and – less cynically – pit bull educational videos. Congress, viewing animal cruelty in the form of "crush videos" as a social problem in need of redress, criminalized the possession, distribution, and sale of such videos in 18 U.S.C.S. § 48.

For the first time in a non-campaign finance case and over four terms into the Roberts Era, the Court (through Chief Justice Roberts) ruled in favor of a free speech claim and did so through the "strong medicine" of First Amendment overbreadth doctrine. Roberts subjected the law to strict scrutiny, finding that Congress "create[d] a criminal prohibition of alarming breadth," adding that **"**There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban." (559 U.S. 460, 474, 479). In sum, the Court declined to recognize depictions of animal cruelty as a categorical exception to the Court's strict scrutiny regime and refused to adopt narrowing constructions of the statute, dismissing an exceptions clause as unconstitutionally underinclusive. Arguably, it was *Stevens* that signaled a willingness to aggressively enforce the First Amendment, rather than the ideologically divisive campaign finance cases.

Alito's Conservatism (?) and Breyer's Conception of the Judicial Role

Stevens is also notable for being the first clear instance of what Tribe and Matz have suggested is Justice Alito's own brand of "Burkean" conservatism (2014, 141-142). Dissenting alone in *Stevens*, Alito noted that **"**It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited" by Congress, suggesting Roberts' characterization of the law as facially overbroad as "straining" and, referencing the First Amendment philosophical search-for-truth foundation, argued that "the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess." (559 U.S. 460, 486, 495).

Alito's dismissiveness of peripheral (as opposed to core political) speech claimants was most pronounced during the most pro-speech period of the Roberts Era. This conception of the judicial role in free speech controversies has resulted in unexpected deviations from the expected ideological ordering of the justices. In *Brown v. Entertainment Merchants Association* (564 U.S. 786 (2011)), the heterogeneity within the Court's conservative bloc was hinted at during oral arguments on November 2, 2010, when in response to a line of questioning by Justice Scalia – the eventual author of a majority opinion holding that videogames were a form of artistic expression protected by the First Amendment – Alito interjected, "Well, I think what Justice Scalia wants to know is what James Madison thought about videogames. Did he enjoy them?" (Brown v. Entertainment Merchants Association - Oral Argument - Nov. 2, 2010; also quoted in Tribe and Matz 2014, 142).

Alito, joined by the Chief Justice, concurred in the judgment though he refused to enforce a categorical understanding of the First Amendment that refused to create a category of low-value, violent speech less worthy of constitutional protection: "The Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before." (564 U.S. 786, 816). In dissent, Thomas argued that the decision departed from original understandings of the First Amendment, putting him at odds with Scalia and underscoring the difficulty attached to characterizing the decision for an association of businesses as monolithically "liberal" or "conservative." Breyer, dissenting separately and somewhat uncharacteristically, subjected the law to strict scrutiny but found the trove of studies related to effects of videogame violence on adolescents as a valid, compelling interest (and suggested the

law would survive as-applied challenges as well, though left that possibility open)(564 U.S. 786, 841, 857).

In the funeral protester case of *Snyder v. Phelps* (562 U.S. 443 (2011)), Alito was again the lone dissenter and pitted against another ringing endorsement of free speech penned by the Chief Justice. The Court reversed a finding of approximately five million dollars in compensatory and punitive damages for intentional infliction of emotional distress for Albert Snyder, the father of a fallen Marine who had died in the line of duty in Iraq. Snyder subsequently suffered depression and other ailments after viewing news coverage of the Westboro Baptist Church's picketing of his son's funeral as well as the Westboro Baptist Church penned "The Burden of Marine Lance Cpl. Matthew Snyder," an online post (533 F. Supp. 2d 567, 571-72 (D. Md. 2008)). In finding for Phelps (the leader of the church), Roberts extolled the vice-protective virtues of free expression, stating, "While these messages may fall short of refined social or political commentary, the issues they highlight--the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy--are matters of public import," (562 U.S. 443, 454 (2011)), and pronouncing that "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and--as it did here--inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course--to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case." (562 U.S. 443, 460-461).

Alito characterized the decision as allowing a private figure to be "brutalized," and arguing that Roberts' emphasis on protecting political speech was misguided: "This portrayal is

quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected." (562 U.S. 443, 471). From a jurisprudential angle and with implications for determining Alito's conception of the judicial role, the dissent suggests a rigid, formal component to the adjudication of speech claims as well as the limits of framing controversies as involving speech on matters of public importance. Stated differently, it is consistent with the formal Meiklejohnian conception of speech that Bork articulated during the Nixon/Reagan era of conservatism. Breyer again concurred in the result on the narrower ground that the Court "…does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict." (562 U.S. 443, 462).

Breyer and Alito would again distance themselves from the majority in the copyright case of *Golan v. Holder* (132 S. Ct. 873 (2012)), dissenting from Ginsburg's opinion for the Court that § 514 of the Uruguay Round Agreements Act – restoring previous "public domain" works to copyright-protected status – violated neither the copyright clause of Article I, Sec. 2 of the U.S. Constitution nor the speech clause of the U.S. Constitution's First Amendment. Breyer, joined by Alito, dissented on the grounds that "By removing material from the public domain, the statute, in literal terms, 'abridges' a preexisting freedom to speak. In practical terms, members of the public might well have decided what to say, as well as when and how to say it, in part by reviewing with a view to repeating, expression that they reasonably believed was, or would be, freely available. Given these speech implications, it is not surprising that Congress has long

sought to protect public domain material when revising the copyright laws." (132 S.Ct. 873, 907).

The claimants in *Golan* were an amalgam of orchestra conductors and other individuals who performed or utilized works in the public domain – claimants offering a challenge that did not easily fit within the core political speech philosophy but resonated instead with human fulfillment (Emerson 1963, 879-881) and marketplace of ideas rationales (Mill 1859, 84-88; *Abrams v. U.S.*, 250 U.S. 616 (1919)). Breyer's unusually speech protective position - in light of previous statements seeking a more balanced, narrow rationale in speech controversies- highlights the complexity constituting decision-making, as does Alito joining Breyer's dissent given his frequent focus on core political speech. In fact, Alito's moniker as "a different kind of conservative" (Tribe and Matz 2014, 141-142) may be something of an overstatement. Alito led the Court's most conservative members in a dissent in *Alvarez* (discussed below), also characterizing lies about receiving military medals as low-value speech not entitled to robust constitutional protection (rejecting the content-neutrality requirement of strict scrutiny for the speech at issue).

Whether best attributed to a different sort of conservative ideological preference or a philosophical preference that affords the political speech philosophy primacy in free speech controversies, Alito's majority opinion in *Knox v. Service Employees International Union, Local 1000* (132 S.Ct. 2277 (2012)), characterizing the opt-out requirements related to the collection of union shop non-member fees as unconstitutional compelled speech, built upon an emerging hostility to union fundraising practices first evident in *Washington Education Association* and *Pocatello*. The decision held that the union's failure to send out a new "*Hudson* notice" for new fees charged to non-members violated the First Amendment, but the Court's five conservatives

also held that union non-members must "opt-in" rather than opt-out of fee assessments for ideological purposes.

Concurring in the result only, Sotomayor (joined by Ginsburg) noted that while the SEIU's "Political Fight Back Fund" – the subject of fee assessment in question and explicitly concerned with opposing anti-union ballot initiatives in California – required an opt-out provision for non-members, Alito's majority opinion "proceeds, quite unnecessarily, to reach significant constitutional issues not contained in the questions presented, briefed, or argued. Petitioners did not question the validity of our precedents, which consistently have recognized that an opt-out system of fee collection comports with the Constitution." (132 S.Ct. 2277, 2297). Breyer dissented (joined by Kagan), fearing that the Court's logic would apply to constitutional "chargeable" expenses related to collective bargaining as well as the non-chargeable, ideological fundraising activities, and would have upheld the entire SEIU administration of fees as constitutional under the Court's *Hudson* precedent (132 S.Ct. 2277, 2305).

Union cases, like those related to campaign financing , business, and abortion, can be plausibly viewed as the most politically salient First Amendment cases the Court is likely to hear. Viewed this way, cases within the development of freedom of speech during the Roberts Era represent easy hoop tests for the attitudinal hypothesis to jump through. *Knox*, a union case, is fairly inconsistent with these expectations, except the bottom-line finding that the Court's conservatives voted wholesale against the union position in the case. If we were to expect deviations from the predicted alignment of the Court in the case, then we might expect Breyer to take the split-the-baby approach advanced by Sotomayor and Ginsburg – the two most liberal members of the Court during the 2011 term. Nor can it be said that the case counts squarely in favor of the ideology-plus explanation – Breyer's regular aversion to hard and fast rules is in

tension with administrative deference in *Knox*, though both historically have appeared in his jurisprudence (Tushnet 2015, 215-217).

The Value of Concurring Opinions

These various preferences – legal and ideological – are difficult, though not impossible to disentangle. Though rationales revealed by Alito and Breyer have emerged as tenable explanations for unusual voting behavior during this period of the Roberts Era, a number of other examples illustrate diversity across and within voting coalitions on the Court. To provide one illustration that has received relatively less attention in coverage of the free expression agenda, consider *Doe v. Reed* (561 U.S. 186 (2010)), a decision following on the heels of *Citizens United* and holding that petition disclosure requirements under the Washington Public Records Act were not facially unconstitutional under the First Amendment. The speaker, John Doe (on behalf of all signatories) was aligned with Protect Marriage Washington, a group opposed to a law extending benefits to same-sex domestic partners, and expressed that disagreement by signing a petition in an effort to reach the 4% threshold needed to initiate a popular referendum challenging the law.

A close reading of the opinions in the case reveals a fairly fractured Court, despite agreement on the bottom line questions of whether the act of signing a petition is expression and whether the disclosure of petition signatories can survive a facial challenge. For Roberts, two factors were especially important: "To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude to enforce that regulation. Also pertinent to our analysis is the fact that the PRA [Public Records Act] is not

a prohibition on speech, but instead a *disclosure* requirement." (561 U.S. 186, 195-196). Though Chief Justice Roberts' majority opinion was joined by five other justices (Kennedy, Ginsburg, Breyer, Alito, and Sotomayor), each of those justices also filed concurring opinions. Breyer characteristically joined the Court's opinion and Sotomayor's concurrence to the extent that careful balancing of interests was necessary for the Court to uphold the statute (561 U.S. 186, 202), while Alito argued for accommodating as-applied challenges in light of "The widespread harassment and intimidation suffered by supporters of California's Proposition 8," suggesting the law was unconstitutional in nearly all applications where a reasonable possibility of a threat existed while still upholding it under facial challenge (561 U.S. 186, 205).

Sotomayor, joined by Stevens and Ginsburg, challenged Alito directly on that point: "Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue. Accordingly, courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process." (561 U.S. 186, 215). Stevens, joined by Breyer, underscored the speculative nature of Alito's fears in boiling the case down to "a neutral, nondiscriminatory policy of disclosing information already in the State's possession that, it has been alleged, might one day indirectly burden petition signatories." (561 U.S. 186, 215), while Scalia thought the controversy was wholly unrelated to the First Amendment, refusing to engage in "balancing" and providing a historical analysis demonstrating the First Amendment did not prohibit disclosures of information (561 U.S. 186, 220-221). Thomas, essentially

elaborating on his dissent in *Citizens United* and fearing retaliation against petition signatories, subjected the application of the PRA to petitions to strict scrutiny and found less burdensome means for Washington to achieve its asserted interest in transparency (561 U.S. 186, 243-246).

The Chief Justice's nuanced reasoning in *Doe,* demonstrating a willingness to uphold some state election regulations affecting expression, was conspicuously absent during this period's second campaign finance decision. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (564 U.S. 721 (2011), or *AFECFCP*), invalidated a state campaign finance law that subsidized additional speech (campaign funds) for publicly financed candidates facing privately funded challengers. For each dollar spent by or on behalf of a privately financed candidate beyond the state public financing cap, Arizona would provide matching funds to candidates agreeing to the state's public financing arrangement. The apparent deference to states articulated in *Doe* was absent from *AFECFCP*, with Roberts finding that "The burdens that this regime places on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. Just as with the candidate the independent group supports, the more money spent on that candidate's behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State." Roberts concluded that "laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand." (564 U.S. 721, 738, 755).

Kagan, speaking for the Court's liberals in dissent, argued instead that "the law has quite the opposite effect: It subsidizes and so produces *more* political speech," lamenting that "what petitioners demand is essentially a right to quash others' speech through the prohibition of a (universally available) subsidy program. Petitioners are able to convey their ideas without public financing--and they would prefer the field to themselves, so that they can speak free from

response. To attain that goal, they ask this Court to prevent Arizona from funding electoral speech--even though that assistance is offered to every state candidate, on the same (entirely unobjectionable) basis. And this Court gladly obliges. If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct." Kagan sharply characterized the Court's dismantling of the program as "chutzpah." (564 U.S. 721, 763, 766).

Campaign finance decisions appear across all periods of the Roberts Era, and have been marked by considerable acrimony. Notably, the disagreement is structured by the Court's longstanding precedents and aversion to regulations that single out speech on the basis of its content: a hallmark of the content-neutrality regime. The jurisprudential keys to campaign finance challenges have been searches for compelling interests, measuring the burdens imposed on speakers, and an express concern for protecting political speech. It is admittedly difficult to understand these decisions as anything less than political disagreements in terms of the positions taken by the justices (Republican appointees always voting to strike, Democratic appointees almost always voting to uphold). Ironically, John Stuart Mill's search for truth rationale and the admonition that "truth depends on a balance to be struck between two sets of conflicting reasons" appears to have given the justices little pause, all while dividing into camps contesting how the unfettered exchange of ideas – the means to truth – requires striking or upholding regulatory measures (Mill 1993 [1859], 88). It is in this subset of cases that the endogeneity charge advanced by Segal and Spaeth (2003) appears to have its greatest force. However, with the notable and consistent exception of Thomas, all justices have generally been united by the regime established in *Buckley*, differing only on the application of those standards to concrete controversies. In the language of process tracing, the hypothesis that ideological preferences

motivate the justices jumps through the hoop here, though the issue of observational equivalence again makes finding a smoking gun in favor of either the ideological or principle explanations difficult.

A number of unanimous or near-unanimous decisions also appear during this second period of the Court's free speech agenda, though these decisions notably united the Court *against* speech claims. *Milavetz, Gallop, and Milavetz v. U.S.* (559 U.S. 229 (2010)) marked the first opportunity for Justice Sotomayor to resolve a free speech challenge for the Court, this one brought by bankruptcy and debt relief attorneys opposed to disclosure provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Writing for the Court, Sotomayor dismissed the debt relief lawyers' claims as failing to satisfy the less exacting scrutiny standard adopted by the Court in controversies involving attorney advertising and communication: " § 528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements--specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs." (559 U.S. 229, 250). Concurring separately, Scalia expressed disagreement with the Court's analysis of the Act's legislative history while Thomas wrote separately to express dismay with commercial speech's position outside of the content-neutrality regime's strict scrutiny requirements: "I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech." (559 U.S. 229, 255). He would not have to wait long for the Court to revisit this issue.

In *Reichle v. Howards* (132 S.Ct. 2088 (2012)), a unanimous Court dismissed a retaliation claim brought by a citizen who approached – and touched the shoulder of - Vice President Dick Cheney at an appearance at a Colorado Mall. The altercation occurred after

Secret Service agents overheard a phone conversation where Howards stated, “I’m going to ask him how many soldiers he killed today.” Ginsburg, joined by Breyer, concurred on the basis that those charged with protecting government officials must be allowed to make on-the-spot judgments, but left open the possibility that law enforcement agents could be sued for retaliatory actions (132 S.Ct. 2088, 2097-2098). In *Nevada Commission on Ethics v. Carrigan* (564 U.S. 117 (2011)), a unanimous Court rejected the speech claim of Carrigan, an elected member of the Sparks, Nevada council (with GOP affiliation) who violated a state conflict of interest law after voting for an economic development project (The “Lazy 8” resort) spearheaded by a personal friend and consultant, Carlos Vasquez. Scalia’s opinion for the Court drifted deeply into a historical, originalist study of treatments of legislative actions as distinct from speech (564 U.S. 117, 122-125). In cases uniting the Justices, then, the nature of that agreement has been an unwillingness to expand First Amendment coverage.

The Kennedy Court?

Kennedy, while concurring in the result in *Carrigan,* suggested that the law had the potential to penalize any speech or voting that resulted from personal networks and political supporters through a hypothetical: “Assume a citizen has strong and carefully considered positions on family life, the environment, economic principles, criminal justice, religious values; or the rights of persons. Assume, too, that based on those beliefs, he or she has personal ties with others who share those views. The occasion may arise when, to promote and protect these beliefs, close friends and associates, perhaps in concert with organized groups with whom the citizen also has close ties, urge the citizen to run for office. These persons and entities may offer

strong support in an election campaign, support which itself can be expression in its classic form. The question then arises what application the Nevada statute has if a legislator who was elected with that support were to vote upon legislation central to the shared cause, or, for that matter, any other cause supported by those friends and affiliates." (564 U.S. 117, 130) Alito, while concurring in the judgment on the basis of Scalia's tradition-based argument, sharply disagreed with the Court's characterization of legislative voting as separate from speech (564 U.S. 117, 132).

Though evincing a certain concern for electoral speech in *Washington State Republican Party* and without exception in the campaign finance decisions, Kennedy also wrote for the Court in *Borough of Duryea v. Guarnieri* (564 U.S. 379 (2011)), a petition clause case involving the firing, rehiring (following the filing of union grievances), and sanctioning of a borough police chief resolved against Guarnieri primarily through the Court's government employee speech doctrine. Thomas, doubting that lawsuits against government employers qualified as petitions, essentially argued that the Court should adopt the *Ceballos* line of reasoning to adjudicate petition clause claims, denying claims arising from petitions filed in the claimant's capacity as employee and allowing only those petitioning government as sovereign (564 U.S. 379, 399-400). In partial dissent, Scalia largely echoed Thomas's approach (offering an originalist analysis of uses of the petition clause) but would allow the retaliation suit brought under 42 U.S.C. 1983 to stand.

A term later in *Fox Television Station v. FCC* (132 S.Ct. 2307 (2012)), Kennedy led a unanimous Court in striking down provisions of the FCC's 2004 policy on "fleeting expletives" as unconstitutionally vague – a decision that did not directly address the First Amendment claim in the case but carried clear implications for expression, nonetheless. Ginsburg concurred, but

argued that the Court should go further and use *Fox* as an opportunity to overturn the Court's decision in *FCC v. Pacifica Foundation* (438 U.S. 726 (1978)), the anti-speech decision against a radio broadcasting company that had aired comedian George Carlin's "Seven Dirty Words" monologue. With the possible exception of Scalia (and Thomas) in *Guarnieri*, extra-ideological causes are difficult to isolate from expected voting patterns and unanimous decisions, and the reliance on existing jurisprudential categories also suggests shared affinity for conventional free speech legal norms.

Scholars have generally homed in on Kennedy for his median, libertarian position on the Court in the Roberts Era (Knowles 2013), and for sometimes falling to the left of O'Connor during the Rehnquist Era (Keck 2004). Kennedy's opinion in *U.S. v. Alvarez* (132 S.Ct. 2537 (2012), a decision striking down the Stolen Valor Act as a content-based regulation of speech (and, for Kennedy, a manifestation of George Orwell's Oceania), has been offered as evidence to support the libertarian label (Knowles 2013). As the Court's reputation for being a pro-speech Court gained traction during the 2009 to 2011 terms, Justice Kennedy was not always in the vanguard in free expression cases. As Table 4.2 notes, Kennedy's proportion of votes for the pro-speech position (55.56%) tied with Thomas and lagged slightly behind the Chief Justice and Scalia, each at 61.1%. If anything, to the extent that Kennedy's libertarian streak in free expression cases is overstated, the swing positions on the Court may belong to Roberts, Alito, or Breyer. With some regularity, these justices have either been hesitant in moving too far too fast (Roberts, in the campaign finance case progression), or voted and voiced reasoning at odds with majority coalitions applying fairly standard doctrinal rules. For Kennedy, the strongly protective rationales advanced in *Citizens United*, *IMS Health*, and the Orwellian tone of *Alvarez* stand beside opinions that, while sometimes cautious (as in *Carrigan* and *Guarnieri*), have been

dismissive of claims. Kennedy's vote to join Ginsburg's opinion in *Christian Legal Society, v. Martinez* (561 U.S. 661 (2011), hereafter "*CLS*") also belies any broad, consistent libertarian description of Kennedy's voting behavior in Roberts Era speech controversies.

The issue in *CLS* was the application of the Hastings College of Law's "take all comers" policy, which prohibited registered student organizations from excluding students with beliefs or views the organization disagreed with. The Hastings chapter of the Christian Legal Society argued that the non-discrimination policy violated rights to free speech, association, and free exercise under the First Amendment, as the "Statement of Faith" required of all official chapters of the group had the following tenets: "The belief that sexual activity should not occur outside of marriage between a man and a woman…to exclude from affiliation anyone who engages in 'unrepentant homosexual conduct,'" and "students who hold religious convictions different from those in the Statement of Faith." (561 U.S. 661, 672).

Writing for the Court, Ginsburg's majority opinion characterized the membership condition as a "reasonable" and "viewpoint neutral," applying intermediate scrutiny to the policy in light of the Court's intersecting public forum (limited public forum) and free association strands of jurisprudence. Concurring, Kennedy adopted a consequentialist justification for free speech that could – arguably – be viewed as anti-speech in the immediate case but broadly pro-expression in rationale and potential effects. Fearing the balkanization of student groups and referencing the loyalty oaths the Court frequently considered during the mid-20th Century, Kennedy concluded that "A vibrant dialogue is not possible if students wall themselves off from opposing points of view." (561 U.S. 661, 705). Stevens, largely in response to Alito's strongly worded dissent, argued that the school's amended policy (not properly before the Court) would likely also pass constitutional muster, emphasizing equality over speech in the immediate case:"

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in ‘unrepentant homosexual conduct,’ The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women--or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.” (551 U.S. 661, 702-703).

Table 4.2 – Patterns During the Pro-Speech Period (2009-2011 Terms)

	Opinions Authored (Majority, Concurring, Dissenting)			Interpretive Preferences	% Pro Speech	Vote Deviations
John Roberts	***Stevens*** *HLP* *Doe* ***Phelps*** ***AFECFCP***	*CU*	---	Content-Neutrality; Core Political	61.1%	
John Paul Stevens	---	*Doe* *CLS*	*CU*	Collective	16.67%	*HLP*
Antonin Scalia	*Carrigan* ***EMA***	*CU* *Milavetz* *Doe*	***Guarnieri***	Categorical; Originalism	61.1%	***Guarnieri***
Anthony Kennedy	***CU*** *Guarnieri* ***IMS Health*** ***FOX TV*** ***Alvarez***	*CLS* *Carrigan*	---	Content-Neutrality; Core Political	55.56%	
Clarence Thomas	*Howards*	*CU* *Milavetz* *Guarnieri*	***Doe*** *EMA*	Core Political; Content-Neutrality	55.56%	
Ruth Bader Ginsburg	*CLS* *Golan*	*Howards* *Fox TV*	---	Collective; Deferential	38.89%	
Stephen Breyer	---	*Doe* *Phelps* *Alvarez*	***HLP*** *IMS Health* *EMA* ***Golan*** *Knox* *ATP*	Pragmatism, Collective	33.33%	*EMA* ***Golan***
Samuel Alito, Jr.	***Knox***	*Doe* *Carrigan* *EMA*	*Stevens* ***CLS*** *Phelps* *Alvarez*	Core Political, Burkean	50%	*Stevens* ***Golan*** *Phelps*
Sonia Sotomayor	*Milavetz*	*Doe* *Knox*	---	Deferential	44.44%	*Knox*
Elena Kagan	---	---	*AFECFCP*	Collective	40	

Notes: N=18. Percentage of pro-speech decisions by Court during this period=55.56%. For "Opinion" column, bolded cases denote a pro-speech claimant decision. "Revealed Interpretive Preferences" denotes themes apparent in the justices' opinions during this period. "% Pro-Speech" indicates the proportion of the justices' votes in favor of speech claims. One case, American Tradition Partnership v. Bullock, 132 S.Ct. 2490 (2012) – or *ATP* - was a *per curiam* decision and does not appear in the majority opinion column. However, the votes are included in the percentage of pro-speech decisions category and overall N.

Kennedy's position as median justice suggests that he would be the most likely justice to vote with the Court's liberals – a liberal vote for Kennedy, then, based on a nuanced rationale could be endogenous to ideological preferences (Segal and Spaeth 2003). Yet Kennedy often takes the hard line in free expression controversies, as illustrated by the Court's decision in *Sorrell v. IMS Health* (564 U.S. 552 (2012)), which struck down Vermont's Prescription Confidentiality Law ("Act 90") as an impermissible, content-based regulation of speech. The law, which prohibited state pharmaceutical data miners from selling prescriber identifying information to drug industry salespersons ("detailers") for fear of market capture and misinformation by large pharmaceutical companies, was characterized by Justice Kennedy as "burden[ing] a form of protected expression that [Vermont] found too persuasive." (564 U.S. 552, 580). Joined by the Court's conservatives and, unexpectedly, Justice Sotomayor, Kennedy's majority opinion found that "Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted." (564 U.S. 552, 565). To be clear, the law regulated commerce in data that would be used - among other things - for more efficient marketing pitches to drug prescribers, yet the majority opinion appeared to elide and perhaps enhance the Court's less-scrutinizing commercial speech doctrine.

In dissent, Justice Breyer (joined by Ginsburg and Kagan) viewed Vermont's law as a regulation of data as a commodity rather than protected speech, and broke with the majority on the proper jurisprudential standard to be applied as well: "The far stricter, specially 'heightened' First Amendment standards that the majority would apply to this instance of commercial regulation are out of place here." (564 U.S. 552, 582). Breyer's vote – essentially against big pharma – is consistent with an ideological explanation, as are the votes of the Court's conservatives (though not Sotomayor's), and the choice of the stringent, "heightened"

jurisprudential standard by Kennedy and the deference to the more relaxed, commercial speech standard by Breyer may be endogenous to broadly understood conservative and liberal policy attitudes, respectively.

Yet, Breyer's aversion to the increasingly absolute nature of the Court's content-neutrality regime has been fairly consistent, as the following and preceding sections detail. Here, Breyer questioned the Court's reliance on various labels and tests ("The Court reaches its conclusion through the use of important First Amendment categories--"content-based," "speaker-based," and "neutral"--but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent."), and did so in the course of making the point that the decision threatened to return the Court to "a happily bygone era when judges scrutinized legislation for its interference with economic liberty." (564 U.S. 552, 591, 602). It is also worth noting that Breyer's reference to the importance of maintaining a robust marketplace of ideas was done so in opposition to a free speech claim (564 U.S. 552, 583), highlighting the ease with which philosophical justifications can be put into service of opposing ideological and interpretive positions but also the way that such longstanding theories structure the adjudication of free speech controversies.

The 2011 term was notable for an incredibly speech protective ending, with Floyd Abrams proclaiming, "It is unpopular speech, distasteful speech, that most requires First Amendment protection, and on that score, no prior Supreme Court has been as protective as this." (Liptak 2012). Yet it was also during this period that critiques of the pro-speech assessment emerged as well, particularly those by Erwin Chemerinsky and Monica Youn (2011). This assessment of merits cases decided during this middle era has revealed the importance of accounting for thicker understandings of judicial ideological preferences (Alito) and differing

conceptions of the judicial role, particularly in the cases of Breyer, Alito, and to a lesser extent, Thomas. This finding, based on reading all cases in light of the four variables of interest described above, is consistent with Tribe and Matz's general impression of Roberts Era justices who often write separately in free speech controversies (2014, 153).

Yet, these disagreements run deeper than ideology. With some regularity, members of the Roberts Court have disagreed not only with the application of doctrinal tests – sometimes dividing in ways predicted by attitudinal explanations – but also across philosophies related to expression coverage (notably, Alito with political speech) and even with the jurisprudential structure itself (notably, Breyer's aversion to a jurisprudence of labels like "content-based"). Sometimes, members within the conservative and liberal blocs have disagreed with one another in terms of the path taken to a result, and have done so through concurring opinions – not a cost-free endeavor for an institution limited by time and a broader case load.

Test of Reputation: The 2012-2014 Terms

By the end of the Court's 2011 term, the Court had earned something of a Janus-faced reputation in free speech decisions. Notable, early anti-speech decisions including *FAIR*, *Ceballos*, *Brentwood*, *Banks*, and *Frederick* had been pushed to the background by a flurry of decisions striking down campaign finance regulations and cases featuring Youn's so-called "colorful" facts, of which *Stevens*, *Brown*, *Phelps*, and *Alvarez* share affinity. Defections from expected voting alignments by Justices Breyer and Alito during this period have been suggestive of the effect of causal factors beyond monolithic ideological preferences, though the argument that these instances may be isolated cases still stands.

Following a term that saw a variety of free speech challenges reach the Court, the 2012 docket featured only a single constitutional free expression decision in *Alliance for Open Society, International v. Agency for International Development* (133 S. Ct. 2321 (2013)). In an opinion channeling Justice Robert Jackson's ringing endorsement of free thought in *West Virginia Board of Education v. Barnette* (319 U.S. 624 (1943)), Chief Justice Roberts did not spare rhetorical flourish in striking down the federal government's requirement that disbursement of funds to non-governmental organizations (NGOs) fighting HIV and AIDS abroad could not be conditioned on the adoption of a formal anti-prostitution plank in the organization's mission statement.

The 6-2 decision struck down the bipartisan-approved "Policy Act" provision of the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (22 U.S.C. §7601 et al.), with Roberts characterizing the anti-prostitution statement requirement at issue (§7631(f)) as creating the unconstitutional condition of "requiring recipients to profess a specific belief," and going "beyond defining the limits of the federally funded program to defining the recipient." (133 S.Ct. 2321, 2330). For Roberts, the compelled speech controversy was resolved long ago by Justice Jackson's famous dicta in *Barnette*, quoting the opinion for the proposition that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (319 U.S. 624, 642; cited at 133 S.Ct. 2321, 2332). In dissent, Scalia (joined by Thomas) argued that "The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those

who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense." (133 S.Ct. 2321, 2332).

The Chief's Competing Concerns

In *Alliance for Open Society* International, Roberts was joined by the Court's liberal bloc, was well as Justices Kennedy and Alito in an alignment predicted by conventional measures of ideological preferences. Beyond the sweeping statement and potential walking back of the Court's position in *FAIR*, the decision represents the only unquestionably liberal (in terms of the identity of the speaker and content of the speech claim), pro-speech decision during the Roberts Era. It is also during this period that the Chief Justice's pro-speech reputation has been most visibly balanced by concerns for institutional maintenance, all while showing fidelity toward broader conservative and Republican goals. In the 2013 term, Roberts' opinions for a divided Court in *McCutcheon v. FEC* (134 S.Ct. 1434 (2014)) and a unanimous (in terms of votes but not rationale) Court in *McCullen* at once demonstrated a willingness to temper the desires of the Court's conservative wing while also providing opinions marking clear victories for wealthy Republican campaign contributors and abortion clinic "sidewalk counselors."

The question before the Court in *McCutcheon* was whether the aggregate contribution regulations established by Federal Election Campaign Act of 1971 and amended by BCRA (§ 441a(a)(3)), capping contributions to candidates and political committees at $48,600 and $74,600 respectively during the 2013-2014 election cycle (134 S.Ct. 1434, 1442-1443). The aggregate limits were designed to work in tandem with base contribution limits so as to prevent committees

and party organizations to effectively skirt the base limits by pooling additional contributions and redistributing them to individual candidates. In a pattern marked by only two exceptions during the Roberts Era, the Court split 5-4 in striking down the aggregate limits as an unconstitutional burden on political speech, lacking a closely drawn fit in addressing the government interest in preventing corruption.

In *McCutcheon*, Roberts – in no uncertain terms – provided a strongly libertarian defense of free expression, rooted in concerns for the abstract marketplace of ideas and tossing aside the egalitarian rationale advanced by Justice Breyer and the Court's liberal bloc (a rationale that has slowly developed in dissents by liberal members of the Court during this era). Citing the fallibility of majorities and rejecting anything approximating *ad hoc* balancing on the part of the Court, Roberts found "compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good." (134 S.Ct. 1434, 1449). Breyer's public good argument , citing to Founding Era figures James Madison and James Wilson, stressed that the "First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters," whereas under Roberts' vision, "a free marketplace of political ideas loses its point." (134 S.Ct. 1434, 1467-1468). This vision of free speech that places the collective capacity to speak as the object of the First Amendment's protection builds upon - but is distinct from - the level playing field rationale rejected by the Court in *Citizens United, AFECFCP*, and other recent campaign finance decisions.

From the ideological hypothesis perspective on judicial behavior, the dismantling of BCRA is likely unsurprising. Yet even here, the Chief Justice did not go as far as dismantling the regime established under *Buckley*, apparently subjecting the aggregate contribution limits to

an intermediate standard of scrutiny rather than the "strict in theory, fatal in fact" approach the Court applies in cases falling within the content-neutrality regime (134 S.Ct. 1434, 1457). Roberts' approach in *McCutcheon* did not escape comment by Scalia in *McCullen*, who penned a concurring opinion (joined by Kennedy and Thomas) noting that Roberts had written "an opinion that has Something for Everyone," adding that the "specious unanimity" of the decision was achieved by answering a question not in need of deciding: "Just a few months past, the Court found it unnecessary to 'parse the differences between . . . two [available] standards' where a statute challenged on First Amendment grounds 'fail[s] even under the [less demanding] test…' What has changed since then? Quite simple: This is an abortion case, and *McCutcheon* was not." (134 S.Ct. 2518, 2542 (internal citations omitted)). As for *McCutcheon* itself, Roberts once again avoided dealing a death blow to the *Buckley* dichotomy between expenditures and contributions (over Thomas's protests in a concurring opinion), though there is no denying that the Roberts Court has left far fewer options on the table for legislative bodies wishing to regulate the integrity of elections through redistributive instruments

Table 4.3 – Test of Reputation Period (2012-2015 Terms)

	Opinions Authored (Majority, Concurring, Dissenting)			Interpretive Preferences	% Pro Speech	Vote Deviations
John Roberts	***AOSI*** ***McCutcheon*** ***McCullen*** *Williams-Yulee*	---	---	Institutional Maintenance, Liberty Absolutism, Core Political	81.81	*Williams-Yulee*
Antonin Scalia	---	*McCullen*	*AOSI* ***Williams-Yulee***	Core Political	77.78	
Anthony Kennedy	---	---	***Williams-Yulee***	Liberty Absolutism; Core Political	90.91	
Clarence Thomas	***Reed***	---	---	Absolutism; Content-Neutrality	63.64	*SCV*
Ruth Bader Ginsburg	*Moss*	*Williams-Yulee*	---	Collective; Pragmatism	45.45	
Stephen Breyer	*SCV* ***Heffernan***	*Williams-Yulee* *Reed*	*McCutcheon*	Pragmatism, Collective	45.45	
Samuel Alito, Jr.	***Harris***	*McCullen* *Reed*	***Williams-Yulee*** ***SCV***	Core Political, Absolutism	72.73	
Sonia Sotomayor	***Lane***	---	---	Collective, Deferential	45.45	
Elena Kagan	---	*Reed*	*Harris*	Collective, Pragmatism	45.45	

Notes: N=10. Percentage of pro-speech decisions by Court during this period=63.64%. For "Opinion" column, bolded cases denote a pro-speech claimant decision. "Revealed Interpretive Preferences" denotes themes apparent in the justices' opinions during this period. "% Pro-Speech" indicates the proportion of the justices' votes in favor of speech claims. One case, *Heffernan v. City of Paterson* (2016) was decided in the post-Scalia period (2015 term). Another case, *Friedrich v. California Teachers Association* (2016) does not appear in the table because the decision was an unsigned *per curiam* opinion for an equally divided Court.

BCRA had been in jeopardy from the moment it was signed into law, with President Bush including a signing statement doubting the constitutionality of a number of the law's provisions (Statement on Signing the Bipartisan Campaign Reform Act of 2002, Mar. 27, 2002).

The effect of the appointments of Roberts and Alito to the Court is most visible in the campaign finance issue area, with the union speech cases a close second. George W. Bush's appointees have voted in lockstep in every single campaign finance case (and some union cases), even specially concurring together in a handful of cases, demonstrating that ideological preferences of justices and ideological case factors – with *Davis* suggesting that the former trumps the latter at the margins – explain a substantial part of the saga. However, the piecemeal fashion by which provisions of FECA, BCRA, and a handful of state campaign laws in Vermont, Arizona, and Montana have been invalidated suggests that Roberts does not wish to move too far, too fast. The Chief Justice's willingness to assign a majority of these opinions to himself – *Randall, Davis,* and *Citizens United* as exceptions – suggests a concern for institutional maintenance by tempering the wishes of the Court's conservative wing. Thomas – and to lesser degrees, Scalia and Kennedy – has consistently expressed skepticism of the entire *Buckley* regime.

McCullen is another indication of the Chief Justice's apparent willingness to – at times – give policy considerations equal footing with institutional concerns. The Court's decision in *McCullen* was 9-0 against Massachusetts in striking down the state's "floating buffer" zone abortion clinic law, yet the it was the Court's liberal bloc joining Roberts' opinion in full and the Court's conservatives concurring separately. In striking down the law, Roberts and the majority found that the law constituted a "time, place, or manner" restriction under the Court's longstanding content-neutrality regime, and was therefore subject to intermediate – rather than strict – judicial scrutiny. Hostility to abortion and women's reproductive care services has been a mainstay of the religious conservative prong of the national Republican Party since at least the mid-1970s and perhaps beyond (see generally Price and Keck 2015, 886-894), and ruling that the Massachusetts law was content-neutral in purpose yet failing to pass a moderate level of judicial

scrutiny had the politically important effect of saving other similar state (and likely federal) legislative efforts from jumping a high First Amendment bar. In other words, had a majority of justices found the Massachusetts law in question to be a content-based regulation of speech and subject to more searching judicial scrutiny, future attempts to regulate speech at or adjacent to women's reproductive care clinics would be viewed as presumptively unconstitutional.

One term later, in *Florida Bar v. Williams-Yulee* (135 S.Ct. 1656 (2015)), Roberts again wrote for the Court but this time *upholding* a campaign solicitation provision of the Florida Canon of Ethics as a content-based restriction that nevertheless survived strict scrutiny in light of the compelling government interest in preserving the perceived integrity of the judiciary. In terms of votes, Roberts parted company with his conservative colleagues for the first time in a campaign finance-related case, though the Chief was careful to emphasize that the integrity of the judiciary presented a special contextual concern for the Court. Scalia (joined by Thomas) and Kennedy (joined by Alito) each dissented, with Scalia allowing the content-neutrality regime to do all the lifting in the case, indicting Roberts for "applying the appearance of strict scrutiny" to a "vital public objective brooding overhead" and relying on original understandings in noting that "the peaceful coexistence of judicial elections and personal solicitations for most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges." (135 S.Ct. 1656, 1677-1678).

Kennedy, consistent with a recurring libertarian streak, connected the controversy to self-fulfillment and self-governance justifications for expression: "First Amendment protections are both personal and structural. Free speech begins with the right of each person to think and then to express his or her own ideas. Protecting this personal sphere of intellect and conscience, in turn, creates structural safeguards for many of the processes that define a free society. The individual

speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech." (135 S.Ct. 1656, 1682-1683). Alito, nodding favorably to the dissents by Scalia and Kennedy, homed in on the "narrow tailoring" or "fit" requirement of strict scrutiny, viewing the Canon's prohibition on mass mailing (which Williams-Yulee had done) to even non-judicial actors as too restrictive to survive First Amendment scrutiny (135 S.Ct. 1656, 1685).

With the explicit exceptions of Breyer and Ginsburg (discussed below), *Williams-Yulee* is another example of the justices generally united by jurisprudential structure, but disagreeing in its application. While most of the normative work for Scalia was handled simply by the invocation of the content-neutrality rule, Kennedy took the time to connect judicial methodology to philosophical principles – though, unlike with Alito, it is more difficult to determine the extent to which these convictions dictate outcomes. As with *McCullen*, Roberts' opinion is interesting for reaching an unanticipated, anti-speech result. It is an open question as to whether Roberts would have based his vote on the same jurisprudential rationale had he not been in the position of institutional steward. From one scholarly perspective, the difference is meaningless: those who are skeptical of the constraining power of rules may argue that the precedents established and jurisprudential regimes relied upon are simply endogenous to ideological preferences. Yet congruency with the conservative Republican agenda would seem to predict the emphatic dismantling of key liberal Democratic legislative achievements rather than the hedging observed in *McCullen* and to a far lesser (but, I argue, still detectable) extent, *McCutcheon*.

Voting Together, Thinking Apart

The most recent terms of the Roberts Era have featured cert. grants for claims brought by political protestors (*Wood v. Moss*, 134 S.Ct. 2056 (2014)), another embattled government employee (*Lane v. Franks*, 134 S.Ct. 2369 (2014)), and a small evangelical congregation seeking to place directional signs alongside roads in an Arizona town (*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)). These decisions have all been unanimous verdicts, with the former decided against the speech claimant while the latter two cases serving as free expression victories. In non-unanimous cases, the Court has rejected a claim brought by the Sons of Confederate Veterans civic group, upheld the Florida Bar rule prohibiting direct solicitation of campaign funds by judicial candidates, and ruled in favor of a retaliation claim brought by a Paterson, New Jersey police officer who had picked up campaign signs for his mother – signs for the candidate opposed to Democratic Mayor Jose Torres in an upcoming mayoral election (*Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016)). The latter case featured voting alignments predicted by attitudinal models of judicial behavior, while the former cases – *Walker v. Sons of Confederate Veterans* (135 S.Ct. 2239 (2015)) and *Williams-Yulee v. Florida Bar* (135 S.Ct. 1656 (2015)) – were marked by unexpected coalitions.

In chapter three, unanimity was defined by the votes on the merits of the case – the bottom line of the decision. This choice was informed by the attitudinal paradigm's general skepticism of looking to the content of opinions for explanations of voting behavior, and the desire to meet the paradigm on its own terms. But, if concurring opinions are viewed instead as a potentially useful window on some other motivation for behavior, scholars are left with a painting of a Court far more fractured. Of the unanimous decisions, only the political protest case – *Moss* – featured "true" unanimity among the justices: Justice Ruth Bader Ginsburg spoke

for the Court, and no justice offered a concurring opinion. Similar to the *Howard* case, speech claims that could be cast as potential threats to the security of the U.S. presidency have fallen on unsympathetic ears of any ideological stripe. The other two decisions – *Lane* and *Reed*– were each decided by 9-0 votes, but the unanimity among the justices was only vote-deep. In terms of rationales employed, *Reed* (and to a lesser extent, *Lane*) help illustrate the lack of jurisprudential and interpretive consensus underpinning the Roberts Era free expression agenda.

In *Lane*, Justice Sotomayor's opinion for the Court may represent a step back from the stringent standard for government employee speech articulated by Kennedy in *Ceballos* – and may also reflect responsiveness to the high frequency of government employee whistleblower and retaliation claims petitioned to the Court via certiorari during this period (see Chapter Five). Edward Lane, following testimony in a federal investigation of alleged fraud and absenteeism by Alabama state legislator Suzanne Schmitz, was fired from his position as director of a local youth program at the Central Alabama Community College (CACC) – and was then one of two employees not rehired following a reassessment of what was originally Lane's solution for CACC budget shortfalls. Writing for the Court, Sotomayor announced that "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment." (134 S.Ct. 2369, 2378). Arguing instead that the Court's decision in *Ceballos* controlled the judgment, Thomas (joined by Alito and Scalia) concurred but noted that "We accordingly have no occasion to address the quite different question whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities." (134 S.Ct. 2369, 2384).

The Court's decision in *Reed* vividly illustrates the tension between ideological preferences, conceptions of the judicial role, and jurisprudential regimes. Every week, Reed - the pastor of a small evangelical church in Gilbert, AZ, and his congregation - placed small roadside signs indicating the time and location of the week's services, which rotated according to logistical and financial considerations. The town of Gilbert had adopted a sign code that treated such "Temporary Directional Signs" differently from political and other signage, requiring that signs be no larger than six square feet, be placed no more than 12 hours in advance, and be removed within one hour of the end of the event (§4.402(P)). In a 9-0 decision, the Court struck down the sign ordinance as unconstitutional. Justice Thomas's majority opinion argued the ordinance was constitutionally suspect on its face because "The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." (135 S.Ct. 2218, 2227).

Breyer, concurring in the judgment, offered a familiar assessment: "The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit. In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation." (135 S.Ct. 2218, 2234). Kagan, concurring in the judgment, expressed considerable skepticism toward Thomas's wide-reaching, content-based assessment, instead narrowly reasoning that "The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to

every sign ordinance in every town across this country containing a subject-matter exemption." (135 S.Ct. 2218, 2239).

Reed followed on the heels of *Williams-Yulee*, the divided decision discussed previously that upheld – under strict scrutiny – a Florida Bar canon prohibiting in-person campaign solicitations by judicial candidates. In that decision, Justices Ginsburg and Breyer concurred in the result but wrote separately to criticize the Court's characterization of the law as a constitutionally suspect, content-based regulation of speech. In a brief concurrence, Breyer emphasized: "As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied." (135 S.Ct. 1656, 1673). Ginsburg, joined by Breyer, rejected the application of strict scrutiny to state laws regulating judicial elections, as well as the majority's reliance upon campaign finance precedents concerned with legislative offices. If the focus is shifted to constituent members of the Court's liberal bloc, *Williams-Yulee* illustrates cracks in the content-neutrality regime.

Breyer's pragmatic approach has not been without limits. In *Sons of Confederate Veterans* – also decided in the 2014 term – Breyer's majority opinion could be read as a strong endorsement of the government speech doctrine, characterizing the messages displayed on state-permitted vanity plates as reasonably interpreted as an endorsement of the message by the state. In dissent, Justice Alito mused that, "As you sat there watching these [specialty] plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says 'Rather Be Golfing' passed by at 8:30 am on a Monday morning, would you think: 'This is the official policy of the State--better to golf than to work?'" (135 S.Ct. 2239, 2255). The plate at issue in the case featured a depiction of a version of the flag of the Southern Confederacy, making the

division along liberal and conservative lines *somewhat* predictable – with one notable exception. Justice Thomas joined the Court's liberals in rejecting the free speech claim, possibly motivated by a reprehension of what some might characterize as a vitriolic symbol of hate – as he did previously in dissent in the Rehnquist Era decision in *Virginia v. Black (*538 U.S. 343 (2003)*)* or perhaps a commitment to states' rights, as Eugene Volokh has suggested (Volokh 2015).

Nor can it be said that Alito's Burkean conservatism always pits him against his conservative colleagues. The concern for limiting coverage to political speech that resulted in unusual votes in the second period of the Roberts Era has been followed with a period of unity with his conservative colleagues. As with *Knox*, Alito penned the Court's majority opinion in *Harris v. Quinn* (134 S.Ct. 2618 (2014)), which invalidated a collective bargaining agreement among the State of Illinois, SEIU Healthcare Illinois & Indiana, and personal assistants under Illinois' Home Services Program as unconstitutional. Following *Knox,* Alito's opinion held that the First Amendment precluded the collection of even chargeable, "fair share" fees assessed on assistants who did not want to join the union.

For Alito, the relevant distinction was between full-fledged public employees governed under state collective bargaining arrangements and employees only considered public for the purpose of collecting fair share fees, as was the case for the home care personal assistants in the case. Kagan, writing for the Court's liberal bloc in dissent (united in this case), thought the fact that the personal assistants were nominally public employees was sufficient grounds for dismissing the First Amendment challenge, and approved the majority's decision to not overturn the *Abood* precedent that permitted the assessment of fees on non-members to offset free-riding (134 S.Ct. 2618, 2645). The parallel to the Court's incremental dismantling of campaign finance laws is apparent in the union decisions, though the latter has only recently been characterized by

conservative-liberal splits on the Court. Returning to Alito, along with a dissent in *Heffernan* (again limiting the ability of government employees to state First Amendment retaliation claims, and in opposition to an opinion by Breyer that carved out protections against retaliation for mistaken assumptions about political beliefs) and joining Roberts' opinion in *McCutcheon*, President Bush's second appointee regularly though not exclusively votes in ways consistent with ideological models of judging.

Discussion

Many of these voting patterns are consistent with but not necessarily explained solely by ideological preferences. The fundamental problem with causation – the inability to observe it – has long been a problem for judicial decision-making scholars. The foregoing analysis of the most recent period of the Roberts Era constitution of free speech reveals that, since the 2012 term, the reputation as being a "pro-speech Court" is indeed an accurate assessment, whether looking at the collective decisions or the voting percentages of each individual justice. If anything, earlier assessments were prescient but premature. The other emerging trend appears to be that it is Justice Breyer's pragmatism that has gained cachet among the Court's liberal bloc, a balancing approach that eschews the assertive interpretation of the content-neutrality doctrine offered by Justice Thomas in *Reed*. As seen most clearly in *Entertainment Merchants Association* and *Golan* (but fairly consistently throughout the Roberts Era in concurring opinions), Breyer's conception of the judicial role and aversion to labels has sometimes resulted in votes that are not easily explained by the attitudinal paradigm.

The willingness of the Court's liberals to increasingly vote with Breyer's preferred rationale also calls into question earlier scholarship portending an emerging "new absolutism" on the Court (Collins 2013). Previous works by legal scholars and political scientists have suggested that Justice Kagan's willingness to spar with the Chief Justice in *Arizona Free Enterprise Club* portended an emerging dynamic with Kagan leading the Court's liberals in opposition to the Court's hostility toward campaign finance decisions (Tushnet 2013, 280; Knowles and Lichtman 2015, 245). Yet the emerging pattern reveals Justices Ginsburg and Kagan penning or joining concurrences that resonate with Breyer's fairly consistent conception of the judicial role as one of balancing rather than following various formulas. This interpretation is underscored by the finding that the Court's liberals have voted together in all cases during this period, while the record of the Court's conservatives is more heterogeneous.

Returning to the model specified in Figure 4.2, this analysis of the constitution of Roberts Era free speech protections provides little support for the idea that abstract, philosophical justifications for freedom of speech have resulted in a speech-protective Court. To the extent that such justifications as the search for truth (or "marketplace of ideas" theory) matter, they have been invoked strategically or, even more cynically, been paid lip service in nearly all decisions. In the campaign finance context, it may be characterized as a democratic mean to a Platonic end. Another theoretical proposition, that self-governance in a democracy is possible only when political speech is stringently protected, has sometimes appeared in opinions seeking to curtail free speech protections, from Alito's decisions in *Stevens*, *Phelps*, and *Alvarez*, to Thomas's decisions in *Frederick* and *Entertainment Merchants Association*.

To be clear, this assessment does not mean that philosophies of free speech do not matter – the justices clearly think it is important to couch decisions in language that echoes the

understandings of Milton (1644), Mill (1993 [1859], 84-88), and Meiklejohn (1948). This speech protective language also constitutes the U.S. free speech tradition, as the justices struggle to trace the fluctuating limits of speech protection – language that in turn structures the dicta and rationales for future political and legal controversies. But what these philosophical theories rarely do is function as testable predictors of how the justices will vote in free speech controversies – they are malleable to the point of being put into service of votes for and against claimants seeking to strike down campaign finance regulations, and for or against claimants more closely resembling the lonely soapbox orator.

This finding is admittedly consistent with what judicial behavioralists and attitudinal scholars have long claimed, but philosophical justifications for speech represented only one part of the model specified above. As for ideological heterogeneity within the monolithic label of "conservatism," Thomas's dissents, as one example, are instructive. This heterogeneity that is not readily apparent from the assignment of editorial-based preference scores to the justices at the time of appointment or scores that take into account previous votes via simulation methods. Much as chapter two argued for taking into consideration a number of theoretically relevant case factors when assigning an ideological direction to a vote, this chapter has argued (and found supporting evidence) for making distinctions among justices often characterized as voting in conservative or liberal blocs. This finding, in turn, bleeds into the finding that differing conceptions of the judicial role can have meaningful effects on decisions exogenous to ideological preferences.

Put another way, Justice Breyer's position as the most ideologically moderate member of the Court's liberal bloc during the Roberts Era may be as much a reflection of his view of judging as a pragmatic, balancing exercise. Breyer's explicit and fairly consistent aversion to a

jurisprudence of labels – found in his written opinions and lines of questioning during oral arguments in *Frederick, Sons of Confederate Veterans, Reed* – has resulted in unexpected departures from the Court's liberal bloc in *Golan, Entertainment Merchants Association*, and *Morse*, and has been a mainstay of concurrences, as found in *Williams-Yulee, Reed, Summum*, and dissents in *Pocatello* and *McCutcheon.* Similarly, Chief Justice Roberts has parted company with the Court's conservatives in terms of voting and rationale employed in *Williams-Yulee*, and *McCullen*. This pattern – especially when considered in light of his votes in the two decisions upholding key provisions of the Patient Protection and Affordable Care Act of 2010 – can be characterized as a reflection of his view of the Chief Justice's role as one of institutional maintenance. This too, however, is a pattern that has emerged only during the most recent period of the Court's free speech project, suggesting claims that Roberts was "at the helm" of the Court's constitution of free speech were prescient, but ultimately premature (Collins 2013, 452). Taken together, these findings suggest that the attitudinal understanding of judicial decision-making understates the effect of different conceptions of the judicial role held by the justices.

Other justices have played a much more subdued role in the Roberts Court's constitution of free speech. As this descriptive explanation relies heavily on the reasoning of justices as revealed through their respective opinions, there is something of a missing data problem here. Due to this issue, this account shares with other recent efforts an emphasis on the patterns of Justices Breyer, Alito (Tribe and Matz 2014, 141-142, 153), and Thomas, as well as Chief Justice Roberts (Gans 2015). In this analysis, disproportionate focus is an artifact of the data collection process and availability. Justice Ginsburg has only infrequently revealed her approach to free speech adjudication, though recent decisions suggest an emerging affinity with Justice Breyer's pragmatism. Earlier opinions suggest either a circumspect role for speech, especially

when conflicting doctrinal strands are present (state-local relations in *Pocatello* and equality in *CLS*) or security is a concrete, particular concern (which might explain her opinion in *Moss* while also joining Breyer's dissent in the more abstract threat presented by *HLP*).

The same growing warmth toward pragmatism might be said for Justice Kagan as evident in her concurring opinion in *Reed* and joining Breyer's concurrence in *Alvarez*, though attention to date has largely focused on her dissent in *Arizona Free Enterprise Club's Freedom Club PAC*. Justice Sotomayor has generally operated within conventional jurisprudential structures in her opinions for the Court in *Milavetz* and *Lane* (both unanimous in result), though she has concurred separately to address Justice Alito's opinions twice, first in *Doe* and again to criticize perceived overreach in *Knox* (joined by Justice Ginsburg in the latter). These limited data points are also consistent with the explanation offered here: Namely, that the content-neutrality regime is undergoing a slow, sporadic erosion. These patterns may become more clear as the Court populates its plenary docket with additional free speech controversies.

What then, can be said about the outcome of interest – the Roberts Court record on free expression? If understood as the product of multiple layers of institutional concerns and individual level preferences, this period is best characterized as one of *transition* rather than stasis. Whatever benefits may be wrought from a content neutrality principle built on suspicion of legislative and government official actions, the alignment of justices during this period – reflecting a variety of political commitments and each with a preferred interpretive philosophy and vision of the judicial role – suggests the foundations of this longstanding order are being slowly eroded. Much as *Grayned* and *Mosely* represented a moment of synthesis of strands of free expression and equal protection jurisprudence, voting patterns and opinion language suggests the potential for an *ad hoc* rather than "definitional" balancing jurisprudential regime,

one that views speech not only as an individual liberty but a collective right. Such a regime appears to be more concerned with scrutinizing the purposes of legislation and harms addressed, as well as the purported liberty interest cited by individuals bringing free expression suits. This approach resonates with recent normative theory work by Sonu Bedi, who has highlighted the benefits of focusing on legislative purpose and taking seriously the idea of *concrete* harms visited upon legislative subjects. The upshot of this approach, while less formally speech protective in the civil libertarian tradition, is negotiating the breakwaters of the harbor imposed by the knee-jerk emphasis on "rights," a general social and political paradigm that often makes the experiment of democratic government impossible (Bedi 2009).

Taken as it is, the Roberts Court is undeniably Janus-faced, though this nature extends beyond news coverage pitting the Court's conservative justices against the liberal bloc. There are more than two faces to the contemporary Court. Some decisions appear consistent with ideological explanations, such as the campaign finance cases and, at times, the union decisions. Others are less compatible with that explanation. Yet it would be an overstatement to characterize the enterprise as one of total uncertainty (Tribe and Matz 2014, 152-153). Closer readings of opinions – perhaps the only insight we have into the judicial understanding of what doctrine requires – reveals deeper disagreements about the application of jurisprudential tests and what judging requires. We are left simultaneously with a "categorical" commitment to protecting certain types of speech (Collins 2013; Tushnet 2013, 215-231), a recurring yet inconsistent concern for political speech (Tribe and Matz 2014, 91, 133), and stewardship that sometimes searched for unity in politically divisive controversies.

On the notion of moving forward, on February 13, 2016, Associate Justice Antonin Scalia passed away in his sleep while visiting a west Texas hunting estate. A month later, President

Obama announced the nomination of D.C. Circuit Chief Judge Merrick Garland to Scalia's seat. Senate Republicans quickly announced they would refuse to meet with or hold confirmation hearings for Garland, with Senate Majority Leader Mitch McConnell of Kentucky declaring that "The nomination should be made by the president the people elect in the election that's underway right now," adding that "This nomination should not be filled, this vacancy should not be filled by this lame duck president." (Davis 2016). Beyond being the latest entry in this period of ideologically polarized, partisan politics, the appointment of Neil Gorsuch may be most relevant for the two clear political projects within the broader constitution of Roberts Era freedom of speech: campaign finance and union fundraising cases.

The lack of a ninth vote on the Court defused what was anticipated to be a blow to public sector union fundraising in *Friedrich v. California Teachers Association* (136 S.Ct. 1083 (2016)), a 4-4 split decision decided by a brief *per curiam* opinion that had the effect of allowing the Ninth Circuit's decision to stand. In addition, it is unclear what will become of the Court's campaign finance agenda - though there are potential hints. In a counterfactual world where Merrick Garland was confirmed by the Senate, anecdotal evidence would suggest a second life for campaign finance regulations. In *SpeechNow.org v. FEC* (599 F.3d 686 (D.C., 2010)), Garland joined the D.C. Circuit's unanimous opinion striking down BCRA amendments to federal campaign contribution limits (2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3)). as applied to the pro-First Amendment, "527" political advocacy group SpeechNow (a decision, when paired with *Citizens United*, allowed for the rise of so-called "Super PACs"). Gorsuch's First Amendment principles have been overshadowed by his statements on the sanctity of life, though there is some evidence that he strongly supports preserving well-established free speech traditions (Liptak 2017). Again, compared to a world where Garland filled Scalia's seat, free

speech claims brought by union nonmembers objecting to fee assessments may find a sympathetic tribunal. The effect of Gorsuch's appointment on the newest era of the Roberts free speech project remains to be seen.

Conclusion

Explaining the constitution of freedom of speech in the modern era has proven to be a slippery subject for scholars and commentators. This inability to gain traction can be attributed to non-comprehensive assessments or a tunnel-vision like focus on ideological preferences. This chapter demonstrates that the Court is divided not only by fairly heterogeneous ideological preferences but also differing judicial interpretive methodologies, or what I have referred to here as different conceptions of the judicial role. The justices, at times, also appear to differ in terms of modes of analysis and core First Amendment theoretical principles.

The more relevant distinctions among the justices, however, involve their relative willingness to protect core versus peripheral speech, and modes of reasoning engaged in the course of reaching a decision. Studies of the Court's free speech project have, to date, focused on important subsets of the free speech universe but have often done so at the expense of comprehensiveness (a case selection issue) or theoretically relevant causes of judicial decision-making offered in previous scholarship. No single, univariate theory, absent a considerable amount of straining and conceptual stretching, explains the modern Court's constitution of free speech. The model presented here is agnostic on the exact order or precise formula needed to produce a result; instead, it offers a configuration that accounts for theoretically relevant considerations offered by previous scholars and assesses its performance through chronologically

structured, case and justice-centric description of the relevant issue subset of the Court's docket and contrasts these empirics with the components of the model. This detailed analysis attempts to balance an overarching concern with determining patterns across cases with more in-depth evaluations of rationales offered in individual cases; it is an exercise in what King, Keohane, and Verba label "descriptive inference." (1994, 34-49; see also George and Bennett 2005, 92-98).

The findings are complex, but can be summed up as follows: A majority of the current Court's justices – albeit sporadically - appear to be motivated by concerns beyond the preference measures conventionally assigned to them by political scientists, and this motivation - *occasionally but not infrequently* - leads to surprising decision coalitions and outcomes. Justice Kennedy's libertarian streak (Knowles 2013) and Chief Justice Roberts's apparent special concern for free speech (Gans 2015) have been referenced in assessments of this important subset of the Court's merits agenda, though across all cases it appears that the preferred conceptions of adjudication adopted by Justices Breyer and Alito – and to a lesser extent, Justice Thomas and Chief Justice Roberts – have the potential to cut against the preferred ideological positions measured by political scientists.

This review of the Roberts Era constitution of speech also suggests that the foundational content-neutrality regime structuring a great deal of the Court's free speech decision-making may have far more cracks than previously understood. While Collins (2013) and Richards (2013) pointed to *Alvarez* and a handful of other decisions in underscoring the limits of the regime, a growing number of justices are increasingly hesitant to wield the sword of content-neutrality in the face of free speech claims. Even in the most politically salient cases – usually concerning campaign finance regulations and union fundraising – the written opinions of justices

suggest emergent trends that may usher in new jurisprudential regimes, the most visible being the collective vision of positive free speech liberty linked with Breyer's pragmatism.

Chapters three and four have operated within the structures of modern judicial decision-making studies, with a near-exclusive focus on votes, opinions, and decisions in cases accepted by the Supreme Court for argument and placed on the plenary docket. This institutional process, however, is non-random. In the next chapter, I integrate the Roberts Court's free speech certiorari docket with the analyses conducted thus far – a contribution to the study of the issue area of free speech and the study of Supreme Court decision-making in general.

Chapter 5

A Tale of Two Dockets: Certiorari, Free Expression, and the Roberts Court Era

U.S. Supreme Court Justices influence the development of law at the merits and agenda-setting (certiorari) stages of the decision-making process. Judicial decision-making scholarship has found that judicial decisions are motivated by a confluence of legal principles and political preferences at both stages of the decision-making process. Assessments of the Roberts Court's record, however, have focused exclusively on the merits voting patterns of the justices. In First Amendment freedom of speech controversies, these assessments often point toward the Court's record of striking down campaign finance laws in support of ideological explanations of the Court's behavior (Clayton and McMillan 2012; Collins 2013). In *Randall v. Sorrell*, *FEC v. Wisconsin Right to Life* (II), *Davis v. FEC*, *Citizens United v. FEC*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, *American Tradition Partnership v. Bullock*, and most recently in *McCutcheon v. FEC*, the Roberts Court has struck down provisions of federal and state laws that either limit campaign contributions, expenditures, and electioneering advocacy, or have sought to equalize competition by subsidizing the speech of publicly financed candidates in various forms (Sullivan 2010).[25]

During the same period, however, the Court has also let stand a number of appellate court decisions upholding campaign finance regulations. In *Flint v. Dennison* (488 F.3d 816 (9th Cir., 2007)), for example, the U.S. Court of Appeals for the Ninth Circuit rejected a free speech claim

[25] 548 U.S. 230 (2006); 551 U.S. 449 (2007); 554 U.S. 724 (2008); 558 U.S. 310 (2010); 564 U.S. 721 (2011); 132 S. Ct. 2490 (2012); 134 S. Ct. 1434 (2014). The lone exception to this pattern has been Chief Justice Roberts' five-justice majority opinion in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), which upheld a state canon of judicial conduct restricting direct campaign solicitations under the First Amendment.

raised by a student running for the Associated Students of the University of Montana (ASUM),[26] a legislative body with a "primary responsibility…to serve as an advocate for the general welfare of the students." (488 F.3d 816 (9th Cir., 2007)). During his ultimately victorious campaign for president of that legislative body, Aaron Flint twice exceeded the $100 campaign expenditure limit imposed on ASUM students running for office, racking up electioneering expenses of $300 and $214.69. After being warned that the lavish spending was in violation of ASUM bylaws, Flint was denied office by ASUM and filed a claim under 42 U.S.C. Section 1983. Flint's claim was that the $100 expenditure limits violated his First Amendment right to free speech.

Writing for a unanimous panel of the Ninth Circuit, George W. Bush appointee Carlos Bea held that Flint's claim did not apply to elections at public universities, describing ASUM as a "limited public forum…a forum opened by the University to serve viewpoint neutral educational interests" which outweighed the free speech interests of the students campaigning within that forum. The panel was unpersuaded by Flint's invocation of *Buckley v. Valeo* (421 U.S. 1 (1976)), the court-constructed doctrinal wellspring for nearly all controversies concerning contribution and expenditure limits in election campaigns. Subsequently, Flint appealed to SCOTUS via a petition for certiorari (cert. petition). On January 7, 2008, the U.S. Supreme Court denied certiorari (552 U.S. 1097 (2008)).

Flint's relevance becomes clearer once the case is contextualized within an emerging narrative invoked to explain protection for free expression during the Roberts Era: A conservative Supreme Court with a penchant for striking down various measures designed to equalize political campaigns and deter corruption decided not to decide a case that could have been a vehicle for accelerating the demise of democratically enacted (and generally, Democrat-

[26] James Bopp, frequent litigator in campaign finance free speech controversies, represented Flint.

supported) restrictions on campaign expenditures. And though the denial of certiorari in *Flint* did not establish a binding federal precedent, the effect of denying certiorari was to let stand an important precedent within the expansive Court of Appeals for the Ninth Circuit. This result, like many others, represents a shift in the availability of doctrinal resources available to students claiming free speech protections and schools seeking to maintain an ordered environment for learning (NeJaime 2013). This scenario raises a number of questions about the Roberts Court agenda that, to date, have been left unaddressed. These questions are both descriptive and causal: What does the population of certiorari denials in Roberts Era free expression controversies actually look like? Which litigants have been the winners and losers at the Court's gatekeeping stage? Do ideological preferences explain patterns observed in denials and grants of certiorari? On the subject of freedom of expression, does the Court's "hidden" certiorari docket mirror the far more visible merits docket?

This chapter is an effort to bridge the gap between the certiorari and merits stages of judicial decision-making. A large body of literature has examined determinants of judicial behavior at the certiorari stage, but far less attention has been given to the relationship between discretion in agenda-setting and broader effects on law and society. If scholars wish to make accurate inferences about what motivates judicial behavior within specific legal issue areas – as scholars have done with freedom of speech (Richards 2013; Epstein, Parker, and Segal 2013; Tushnet 2013; Tribe and Matz 2014; Knowles and Lichtman 2015; Pettys 2015), federalism (Banks and Blakeman 2012), search and seizure (Segal 1984), and others – then patterns observed on the certiorari docket must also be considered. To describe and assess how the certiorari decision influences the development of law and litigation, I develop an original dataset of 309 First Amendment, free expression cases for which certiorari was petitioned during the

2005-2014 Supreme Court terms. The assessment is comprised of two parts: First, following conventional scholarship, I model the certiorari decision as a binary choice via logit regression. The purpose of this analysis is to determine the extent to which ideological and jurisprudential considerations explain the variance observed in grants of certiorari in Roberts Era free expression cases.

The second part of this chapter focuses on the degree to which the Court's free expression merits docket reflects the certiorari docket. While the relationship between issue area "percolation" and granting certiorari is unclear, I begin with the premise that the Court will be at least somewhat responsive to the frequency of issues appearing in petitions for certiorari. If so, a degree of congruency between the two dockets might be expected so that if government employee cases are frequently petitioned to the Court, the merits docket will be comprised of a comparable proportion of government employee speech cases. Instead, I find substantial disparity between the two dockets, such that the Court appears to be actively hunting for cases featuring claims against unions and campaign finance regulations. These two issue areas are the most overrepresented on the Court's merits agenda, while those involving claims brought by government employee whistleblowers and student speakers are the most underrepresented. Somewhat surprisingly, within-case analyses of these issue areas suggest the role of ideology in the decision to grant certiorari varies considerably and its effect is not always in the expected direction.

One of the key claims advanced here is that certiorari decisions have untapped analytical potential: They represent additional "dataset observations" or "causal process observations" that can be employed in assessing these theoretical claims (Goertz and Mahoney 2012). Inference always entails "using the facts we know to learn about facts we do not know," but the failure to

connect the certiorari and merits stages in studies of Supreme Court decision-making – or even account for case selection issues in those studies – highlights just how little scholars actually know about the universe of cases before the Court (Epstein and King 2002, 21). The failure to account for the certiorari decision presents two related but distinct issues. Methodologically, the exclusive focus on cases granted certiorari and formally decided on the merits essentially constitutes a truncated, non-random sample. More formally stated, the problem is that all cases denied certiorari are dropped from the sample even though characteristics of the independent variable are available for all cases (Long 1997, 187, 199-201; Caldeira, Wright, and Zorn 1999, 552).

More substantively, ignoring the certiorari docket is to ignore normative concerns about the availability of the free speech clause's protection for various interests and individuals in society (Fischman 2013, 120). For many litigants, the denial of review by the nation's high court is effectively the end of the line. As Yates, Cann, and Boyea point out, "By focusing primarily on decisions on the merits…the attitudinal model overlooks the fullness of the extended litigation process that leads to legal outcomes" (2013, 850). More than mere docket management, certiorari is a process by which the contours of *law* can be shaped to the benefit or detriment of various classes of individuals across geographically expansive federal judicial circuits. This effort, then, carries important implications for judicial decision-making studies seeking to make inferences about causes of judicial behavior across different time periods and within particular issue areas.

Free Expression and Certiorari: A Primer

As described in previous chapters, general reverence for the First Amendment is both a cause and effect of the scrutiny following Roberts Court's decisions defining the scope and coverage of that fundamental protection. This scholarly focus has, in turn, generated numerous and contradictory descriptions of the Court as simultaneously "the most pro-speech Court in history," "not a free speech Court," a Court motivated by in-group bias, and a Court that has "really landed the plane" in difficult free expression cases (Ken Starr, quoted in Chemerinsky 2011; Epstein, Parker, and Segal 2013; David Hudson Jr., quoted in Liptak 2012). For example, Chemerinsky has strongly denounced the Court's decisions in student speech, prisoner speech, and campaign finance decisions in concluding the Court is "not a pro-speech Court" (Chemerinsky 2011). Similar efforts have varied considerably in terms of the number and types of cases evaluated in making inferences about the Court's motivations in this area (Tribe and Matz 2014, Coyle 2013), but they have not featured systematic case selection and analysis. Some scholars have also suggested that the Roberts Court record on free expression is not well-explained (or exclusively explained) by the ideological preferences of the justices (Tushnet 2013, 215; Richards 2013; Knowles and Lichtman 2015, 242). Common to all recent scholarship on free expression and the Roberts Era is the failure to even mention the Court's discretionary powers in shaping the merits agenda.

The Court's Criteria: Rule 10

The Court's near-total discretion over its merits docket is the institutional rule that at once creates opportunities and problems for judicial decision-making scholarship. As Crowe

explains in his study of the development of the federal judiciary, "The Judicial Act of 1925 gave the Court near-complete control over its docket for the first time in history" (Crowe 2012, 211).[27] Certiorari, now the most common path to nation's highest Court, is the decision by at least four members of the Court to accept a case to the Court's docket for oral argument. Denials of certiorari have the *formal* effect of allowing the lower court decision to stand with limited precedential value (Baum 2008, 33). The Court's self-imposed, official guidelines for granting certiorari are now known collectively as Rule 10 (previously Rule 19), which suggests grants will occur when:

> "A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;" or,
>
> "A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" or,
>
> "A state court of a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court."[28]

Rule 10 is prefaced by the reminder that certiorari is "not a matter of right, but of judicial discretion." As should also be apparent, "the criteria in Rule [10] are sufficiently vague and various to prevent even likely guesses about reasons for denial" (Provine 1980, 53-54). Further

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[27] Crowe also notes that, "The docket control was only "near-complete" because the act did preserve mandatory jurisdiction in a few select types of cases – notably, those relating to rulings by the Interstate Commerce Commission and injunctions against administrative agencies. In 1988, the right of appeal to the Court was virtually eliminated; 102 Stat. 662 (June 27, 1988)" (Crowe 2012, 211 (fn. 89)).

[28] "Rules of the Supreme Court of the United States." Last accessed Oct. 12, 2016. https://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf

complications arise from the lack of transparency endemic to this stage of judicial decision-making: Due to the "insane secrecy" surrounding the process (Cordray and Cordray 2008; see also Segall 2015), comprehensive data on the relationship between agenda-setting and merits votes is not available beyond those studies reliant on the released papers of a handful of justices during the Warren, Burger, and Rehnquist Eras (Provine 1980; Caldeira and Wright 1988; Ulmer 1984; Brenner, Whitmeyer, and Spaeth 2006; Black and Owens 2009; see generally Brenner 2000).[29]

The problems associated with the lack of judicial transparency are exacerbated by the decision rule for certiorari: Unlike votes on the merits, it takes only four votes for a grant of certiorari by the Supreme Court. It could be the case that the Court's four liberal justices frequently deny certiorari to prevent an expected conservative win on the merits of a case (a so-called defensive denial) or that the Court's conservatives deny based on uncertainty surrounding Justice Kennedy's swing vote. This may be especially true in free expression cases, where Justice Kennedy's vote and libertarian streak have been important considerations (Knowles 2015, 177-184). Without access to records of individual judicial votes at the certiorari stage, however, the data generated by the certiorari process present an ecological inference issue that is difficult to surmount (King 1997, 1-6).

The missing data problem for different periods of the Court's history has led some political scientists to caution against attributing outcome oriented voting to justices in all but the most narrow of decisions to deny certiorari (Brenner, Whitmeyer, and Spaeth 2006, 225). As Brenner, Whitmeyer, and Spaeth have shown, attribution of outcome oriented voting without

[29] Provine (1980) and Ulmer (1984) rely on the papers of Justice Burton, while Black and Owens (2009) mine the papers of Justice Blackmun.

individual voting data through the use of simulation techniques has overstated the degree to which outcome considerations drive the Supreme Court's agenda (2006, 233). Still, other scholars have examined the personal papers made public by former justices and found that strategic, outcome oriented voting is a "substantial" element of the case selection process while also acknowledging the importance of jurisprudential and institutional concerns (Cordray and Cordray 2008).

The struggle to give meaning to and extract inferences from the decision on certiorari is not limited to research design issues, however. In response to a question posed by Law Professor A.E. Dick Howard, "If you decide not to take a case, isn't there an implicit affirmation of the result of that case below?," then-Associate Justice O'Connor responded, "There isn't. It has no precedential value, a denial of certiorari." Justice Clarence Thomas followed with, "I think some of the public reporting on what we say confuses what we've done in the cert. process. When we don't take a case, often it is reported that 'The Supreme Court today upheld…' or 'The Supreme Court today ordered…' when in fact we've done no such thing."[30] These explanations, however, wink at reality. They do not adequately account for the experiences of individuals seeking redress by the Court: For many litigants, the denial of review by the nation's high court is effectively the end of the line. Nor do they adequately account for the citizens residing within the federal circuits for which the decision left standing often takes on precedential value. As Hellman noted, "the cases that become 'Supreme Court cases' do so as the result of a selection process that is no less interesting and important than the decisional process that follows" (Hellman 1985, 948; see also Ulmer 1972, 435).

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[30] Portions of this documentary are available on YouTube; the link to the relevant videoclip is "SCOTUS Video Part 1," *scotusfan*, Feb. 18, 2009 https://www.youtube.com/watch?v=_6Noye3MKkg&spfreload=10 Last accessed Aug. 31, 2016.

From this perspective, the ability of the justices to powerfully yet fractiously shape law through certiorari docket management comes into focus. Seasoned justices surely understand that denials of certiorari have important political and legal effects; though lacking scalpel precision, a conservative judicial bloc can craft law to conservative preferences by consistently refusing to grant certiorari for prisoners alleging free expression violations. In that same scenario, liberal to moderate justices may deny certiorari for fear of judicial conservatives setting a more speech restrictive precedent for prisoners. More unusual, however, would be for judicial conservatives to consistently deny certiorari in a way that is either damaging to conservative political interests or beneficial to liberal political interests. If a conservative Court consistently denies certiorari in school speech cases featuring mainstream religious claimants, then the ideological explanation for judicial behavior has failed a fairly easy test, a result that casts doubt upon or further narrows the scope of ideological attributions of judicial behavior.

Even without access to the justices' individual certiorari votes, earlier work concerned with determinants of Supreme Court agenda setting suggests the untapped potential of the Court's certiorari docket. Songer's early study of the political considerations in play at the certiorari stage noted the problem of missing individual votes and the reliance on the papers of retired justices, yet still offered measures of association and data in support of the position that political cues are at least as relevant as jurisprudential ones in deciding whether to grant certiorari (1979, 1189-1192).[31] The inferential object of Songer's study and others examining votes on certiorari has been the motivations of the justices at the certiorari stage across issue areas and across time. In other words, these scholars were more concerned with developing

[31] Songer assigned decision direction codes (liberal or conservative) to all economic regulation cases decided in the 1935, 1941, 1967, and 1972 terms, finding that conservative Courts tended to grant certiorari more often for liberal lower court decisions and that liberal Courts tended to grant when lower court decision favored conservative claimants.

general explanations for behavior at the gatekeeping stage, whether the relevant cues were ideological or jurisprudential. These theoretical insights, however, can also help scholars connect the two stages of the Court's decision-making process within particular issue areas: The inference that the Roberts Court favors a conservative vision of free expression becomes much stronger if it can be shown that the Court also denies certiorari at higher rates when litigants petition to challenge lower court, conservative "wins." If this pattern is not observed, however, judicial decision-making scholars may need to be far more circumspect when making inferential claims.

Research Design

Questions and Hypotheses

To gain additional leverage on the question of which factors help explain the Roberts Era free expression agenda, this chapter employs a multi-method research design combining conventional quantitative analyses commonly specified in studies of Supreme Court agenda-setting with a less conventional series of within-case studies of particular issue areas of the Court's certiorari docket. The purpose of these analyses is to address the following research questions and related hypotheses:

Q1: To what extent do ideological preferences help explain the Court's free expression agenda?

H1: *The likelihood of a grant of certiorari increases when the lower court decision direction is liberal and/or issued by Democratic-appointed judges. Conversely, the likelihood of a grant of certiorari decreases when the lower court decision is conservative and/or issued by GOP-*

appointed judges. Confirmation of this hypothesis represents additional evidence in support of the claim that ideological considerations have driven the free speech agenda of the Roberts Court.

Q2: To what extent to do jurisprudential preferences help explain the Court's free expression agenda?

H2: *The cases granted certiorari by SCOTUS are those presenting "jurisprudential cues," including square conflict, the U.S. as a litigating party, amicus briefs, and the presence of a dissenting opinion in the court from which certiorari was petitioned.* Confirmation of this hypothesis represents additional evidence in support of the claim that legal considerations have driven the free speech agenda of the Roberts Court.

Q3: To what extent does the Roberts Court's free expression merits docket reflect the certiorari docket?

H3: *The cases granted certiorari by SCOTUS are more likely to be those that have sufficiently "percolated" in the lower courts.* Confirmation of this hypothesis would suggest that the Court is responsive to litigation below, and that its record generally reflects the contours of legal contestation.

Data Collection

To identify all free speech denials of certiorari during the Roberts Court era, I used the search function of Lexis-Nexis Academic database. I searched for all federal appellate decisions from January 1, 2005 to August 30, 2015 under the search term "free speech," which returned

3,018 decisions. I repeated this process for all state high courts during the same time period, yielding a total of 958 decisions. On the search results screen, Lexis-Nexis provides a brief case history of the decision, including citations, dates, and prior/subsequent court decisions. I scanned these results screens for those decisions that noted the Supreme Court denied certiorari. For these cases, I recorded the citation for the federal appellate court decision, date of cert. denial, and the federal circuit deciding the case (1st, 2nd, D.C., etc.). I then read each opinion to identify the speech claimant (speaker), type of speech (commercial, anti-union, etc.), and the government entity suppressing the speech in the case (federal, state, local). In order to exclude non-comparable cases that might be considered "frivolous" or would have an exceedingly low chance of being granted certiorari, I also read opinions to determine whether the appellate court assessed the free speech claim on the merits.

To ensure comparability between free expression cases decided by the Court and those denied certiorari, I excluded cases where plaintiffs did not appeal a decision on First Amendment free expression grounds, the case was considered not properly before the Court, the question in the case was determined to be non-justiciable on ripeness, mootness, or standing grounds, cases decided on statutory grounds, claims failing to meet the threshold (failure to state a First Amendment claim), and cases resolved on *Younger-Huffman* and *Rooker-Feldman* grounds - doctrinal rules generally concerned with justiciability of case in federal courts. These theoretically replicable coding rules are employed to limit the universe of potential cases to those that have achieved a degree of "certworthiness" so as to avoid conceptual stretching and ensure

docket comparability via "the careful selection of cases that fit the research problem" (Ljiphart 1975, 167).[32]

After applying the above criteria to the search, the resulting dataset contains 309 free speech cases decided by a federal appellate court or state high court where petitions for certiorari were filed since the 2005 term. The dependent variable of interest is the Supreme Court's decision to grant certiorari in a free speech controversy decided by a lower federal appellate court or state high court. Because the votes of the individual justices to grant certiorari are not made public, the nature of the analyses conducted here are necessarily limited. However, they still provide insight as to whether the Roberts Court can be accurately characterized as a conservative, pro-speech Court, and whether the Court's free speech decisions on the merits are representative of the body of cases that have percolated through the lower federal courts.

Variables Overview

Previous scholarship reveals that judicial behavior at the certiorari stage is motivated by a mixture of jurisprudential and ideological "cues" or signals that justices use to help decide whether a case should be added to the merits docket. Here, the term "jurisprudential cues" refers to those case factors that generally indicate a case presents important legal questions that should be addressed. Conventional jurisprudential cues include the presence of *conflict* between sister circuits, the presence of a *dissenting opinion* (which may indicate disagreement about the

[32] This approach is not without its own infirmities, as "certworthiness" is a highly subjective concept that not even the Justices can agree upon or sharpen beyond a certain degree of abstraction. The inclusion rules described here, however, theoretically allow for replication tests by scholars wishing to compare cases on either side of the certiorari decision. See also Mak, Sidman, and Sommer (2013) for similar concerns and response in the context of selection bias in litigator decisions to file petitions for cert.

application of the proper legal standard to the facts of a particular controversy), and the presence of the *United States as a litigating party* in the case. "Ideological cues" refers to case factors that indicate a particular policy position, speaker, speech type, or even speech suppressor is at stake in a particular case. These cues include the *direction of the lower court decision* from which certiorari is petitioned and the *political composition of the panel majority or en banc Court* from which certiorari is petitioned. Admittedly, this categorical distinction has its limitations. The signals that have been characterized as jurisprudential-related may be as much an indication of the ideological divisiveness as the legal importance of an issue. This may be most problematic for the number of *amicus briefs* filed with the Court at the certiorari stage, described in further detail below. Each of these italicized terms or phrases represents a covariate included in the logit model specified in Table 5.1. I also operationalize an *issue area preference* variable to gauge the extent to which the court's certiorari docket is congruent to the merits docket. In the paragraphs that follow, I describe the process for coding each of these variables.

Variables: Square Conflict

Previous work on certiorari has found that the existence of conflicts among circuits has a statistically significant effect on the likelihood of the Court granting certiorari (Ulmer 1976; 1984). Anonymous interviews with justices and clerks have also suggested that the existence of conflict among circuits increases the chance of a cert. grant. Yet coding cases for the existence of conflict is not as straightforward as it may first appear. Litigators wishing to have their case heard by the Court – knowing this concern – are likely to frame their dispute as one where conflict exists among federal circuits. Ulmer's work itself, often referenced in scholarship

concerned with the Court's agenda-setting power, notes the problem of discerning "claimed" from "genuine" assertions of conflict but does not clearly state the coding rules for scoring cases as featuring genuine conflicts (Perry 1991; Ulmer 1984, 904).[33] In addition, Perry was careful to note that conflict is no guarantee of a grant of certiorari, instead packaging it with other considerations (frivolity, important legal question, percolation) that are neither necessary nor sufficient for granting certiorari. More recent work by Mak, Sidman, and Sommer (2013) ignores the conflict variable in its entirety, citing a lack of data and the incentive for litigators to find conflicts when none may exist (65-66).

Despite and because of these difficulties, I specify a conflict indicator based on the idea of "square conflict" defined by Estreicher and Sexton (1984). A square conflict "occurs when two or more courts – federal courts of appeals or state courts of last resort – take contrary positions on the same legal issue" (732). To determine whether square conflict exists in Roberts Court Era free expression cert. denials, I read each opinion via citation search on Lexis-Nexis and code "1" for conflict when opinion authors reference disagreement in approaches with "sister circuits," or explicitly note the presence of intercircuit conflict.[34] The latter is most likely to occur in dissenting opinions, as a circuit or state high court judge preferring a contrary result is more likely to state a case for conflict than the majority in a given case. This reliance on dissenting opinions is open to the charge that a judge in such a position has an incentive to allege conflict when none exists – as Perry notes is the case for litigators – but in practice, both majority opinion authors and dissenters have noted the presence of intercircuit conflict. Just as

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[33] Ulmer references the work of Feeney (1975), and collapses that framework to two categories of "genuine conflict" and "no genuine conflict." For Ulmer, genuine conflict occurs when either "direct conflict" (decision below deals with same explicit point as some other case and reaches a contradictory result) or "strong partial conflict" (decision below is in the same general area of the law as some other case and where the implications of the doctrine followed in one case would compel an opposite result in the other) is present.

[34] Another type of conflict occurs when a decision is arguably at odds with Supreme Court precedent. Due to the general indeterminacy of precedent as applied to novel fact patterns, I do not code for this form of conflict.

majority authors do not always "distinguish" cases instead of noting conflict, dissenters do not always claim square conflict exists.[35] A word of caution is needed, however, as this approach is not without shortcomings: Federal judges with preferred policy outcomes surely have incentives to use the language of conflict instrumentally. However, it is not subject to the same degree of "fluffing" as the claims filed by litigators in petitions for certiorari.

Because of the incentive and documented tendency of petitioning attorneys to claim (or overstate) conflict when none may exist, I err on the side of caution in scoring cases for conflict. Square conflict cases feature such language as that in Judge Clay's dissent in *Discount Tobacco City and Lottery v. United States* (2013), stating, "The recent decision from the D.C. district court also supports my analysis and conclusion that the color graphic warning requirement constitutes compelled speech which violates the First Amendment" (majority in conflict with D.C. Court)(674 F.3D 509, 530 (Clay, J., dissenting)), Judge Benavides' majority opinion in *Morgan v. Swanson* (2011), noting that on the question of whether First Amendment law requires a "categorical ban on all viewpoint discrimination in public schools," that, "our sister circuits have divided over the question. Indeed, as we have previously recognized, '[a] split exists among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality" in public schools'" (659 F.3d 359, 379), and Judge Lynch's concurring opinion in *Locke v. Karass* (2007), stating that, "The National Right to Work Legal Defense Foundation, representing non-unionized Maine state employees, brought this case in the hopes of persuading

[35] There is no single accepted method in contemporary scholarship for determining the existence of actual – rather than alleged – conflict among circuits. For example, Black and Owens (2009) code for "strong conflict," "weak conflict," and "alleged conflict" variables, with the former two determined by clerk notations found in the papers of Justice Harry Blackmun and the latter found by reviewing the petitioner's brief for certiorari (1073). Caldeira, Wright, and Zorn (2012) also code for alleged conflict based on the brief of the petitioning attorney, but do not include a description of how they coded for actual conflict (11).

the Supreme Court to resolve an issue that the Court left unanswered in *Lehnert* v. *Ferris Faculty Ass'n* and on which the circuit courts differ." (498 F.3d 49, 66 (Lynch, J., concurring)).[36]

Variables: Amicus Curiae Briefs as Cue

Scholars have found that amicus briefs tend to correlate with grants of certiorari. According to Caldeira and Wright, the amicus-as-cue theory "assumes that the potential significance of a case is proportional to the demand for adjudication among affected parties and that the amount of amicus curiae participation reflects the demand for adjudication" (1988, 1112). Importantly, the authors found that the direction of the brief – for or against the grant of certiorari – matters less than the presence of the brief itself. In other words, amicus briefs filed before the certiorari cut-point function primarily as signals to the justices regarding the policy importance of a case.[37]

To determine the presence and number of amicus briefs in a case prior to the certiorari cut-point, I entered the docket number assigned to cases by the Court in the search tool at supremecourt.gov. The docket results for each case provides general case details, including the timeline of the case from the point at which a petition for certiorari was filed, all the way to the decision on the merits (for those cases granted certiorari.). Following the work of Black and Owens (2009), I code the variable continuously with an expected positive relationship between number of amicus briefs and the probability of a grant of certiorari.

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[36] In addition, Judge Lipez's majority opinion discusses the results reached the Third, Sixth, and Tenth Circuits that created a conflict on the issue of union "pooled resources" (498 F.3d 49, 60-64).

[37] It is not clear whether the findings presented by Caldeira, Wright, and Zorn (2012) confirm a steadily declining trend in amicus relevance to cert. grants, whether scholars should continue to rely on amicus briefs in opposition to cert., or interest group maintenance as the primary reason for filing cert. stage amicus briefs (8).

Variables: Composition of Lower Court Panel as Ideological Cue

The most readily apparent signal to Supreme Court judges (the "principals" in the principal-agent relationship between the U.S. Supreme Court and federal appellate courts) is the proximate ideology of the appointing president (see Songer, Segal, and Cameron 1994, 679-680 for additional indicators). In this project, the question is not whether congruence or responsiveness exists between doctrinal goals of courts situated in a hierarchical relationship, but whether a relatively stable Roberts Court's free expression agenda is marked by ideological considerations at the agenda-setting stage.

If ideological cues are an important consideration when considering cert. petitions, then we should expect the Court to be more likely to grant review when the majority decision below is issued by Democratic appointees and less likely when the decision is issued by Republican appointees. As Sisk and Heise (2005, 783-790) have noted, the appointing president proximate measure of ideology is imperfect. However, the differences between the measure and Judicial Common Space scores (which take into account the norm of senatorial courtesy) also appear to be marginal (see also Fischman and Law 2009, 36-40).

To determine the composition of the panel, Court *en banc*, or state high court deciding the case from which certiorari was petitioned, I searched for each judge's appointing president at the Federal Judicial Center's Biographical Directory of Federal Judges.[38] Each decision was then coded as Democratic (majority decision of panel or *en banc* Court by Democratic appointees), Republican (majority decision of panel or *en banc* Court by GOP appointees), or Mixed/Unknown (majority decision of panel or *en banc* Court evenly split between Democratic

[38] Federal Judicial Center, "Biographical Directory of Federal Judges," Last accessed May 18, 2016. http://www.fjc.gov/history/home.nsf/page/judges.html

and Republican appointees). Because state high court judges are often (though not always) elected in "non-partisan" elections or retain party affiliations that may not always be comparable to the interests of the appointing national party regime, these panels are also scored as Mixed or Unknown.

Variables: Issue Area Frequency as a General Proxy for "Percolation"

One point of emphasis in Perry's account of the Supreme Court's agenda setting was the idea of percolation, and its effect on the likelihood of a grant of certiorari:

> Justices like the smell of well-percolated cases. A case that has not percolated through various courts will usually be considered uncertworthy. The concept is one well known in jurisprudence. The Supreme Court exists primarily to clarify the law. Once it speaks, however, its interpretation is final, so justices want to make sure that when they do speak, they can do so as intelligently as possible. It is good jurisprudence and makes good sense to put off rendering an interpretation as long as possible – or more precisely, as long as the benefits of avoidance outweigh the problems – so that the Court can benefit from analysis by others (Perry 1991, 230-231).

The idea that particular issues must be sufficiently percolated – heard by lower courts and discussed in other forums – is perhaps one of the most subjective indicators of certworthiness (Perry 1991, 232). Recently, scholars have interrogated the relationship between the percolation of inter-circuit conflicts and the "optimum" time for the Supreme Court to wait until resolving the conflict (Beim and Rader 2015; Clark and Kastellec 2013). Alternatively, percolation may rest on a broader definition of issue area: "The Court had decided to stay away from certain areas. For example, they decided to stay away from double jeopardy cases…they had decided several cases the year before, and they wanted to see how it was beginning to work its way out" (Perry 1991, 233).

From a theoretical perspective, the relationship between the Court's docket and the litigation that has percolated in the lower courts is unclear. At a fundamental level, issue areas that have been more heavily litigated – as reflected in the number of cert. petitions filed – might be more likely to be reviewed than those that have not. Recent work by scholars does not attempt to control for frequency within particular issue areas (Lindquist and Klein 2006; Mak et al. 2013; Beim and Rader 2014), perhaps due to the immense undertaking of disaggregating not only by general issue areas (First Amendment, Fourth Amendment, capital cases, etc.) but also specific issue areas within each of those subjects. In addition, Perry's interviews with justices, clerks, and other Court actors pointed in different directions. Some issues, for example, were deemed certworthy due to adequate "percolation" in lower courts due to the perception of intercircuit conflict. Others reached certworthiness via percolation because a decision by the U.S. Supreme Court had been applied by lower courts and the Court wished to revisit or adjust its approach based on observable results. Generally, the certiorari function is a way for the justices to clarify law or correct perceived errors by lower courts (230-233). Less has been written about how the Court's filtering process and concern for percolation relates to entire classes of litigants within particular issue areas.

If the Court is concerned with making clear legal rules for lower courts to follow, engaged in error correction, or creating a rule that favors certain classes of litigants over others, then the relationship between issue area frequency and the likelihood of certiorari is at least an interesting empirical question. In order to better understand this relationship, I count the number of cases petitioned to the Court within each inductively determined issue area from 2006 to 2015. Generally, the modal categories for each year were assigned a code of "high frequency," issue areas appearing less frequently were coded as "medium frequency," and issue

areas petitioned only once or twice each year were coded as "low frequency." Appendix G provides the counts for each issue area by year, as well as whether codes of high frequency (H) or medium frequency (M) were assigned. All others received the low frequency code. Additional details on the coding choices and assumptions employed in scoring these indicators are provided in chapter two, Appendix A, Appendix G, and Appendix H.

Issue areas were inductively derived on the basis of jurisprudential, speaker, and speech considerations.[39] For example, religious student speech claims stand apart from "traditional" student speech claims due to the former involving additional jurisprudential considerations beyond the application of the Court's line of *Tinker v. Des Moines* (1969) cases, such as Establishment Clause jurisprudence. Similarly, government speech cases – usually involving claims of retaliatory actions for speech or so-called whistleblower claims – generally fall into the Court's *Pickering v. Board of Education* (1968) or *Bivens* (1971) streams of jurisprudence.[40] "Free market" electoral speech claims – challenges to expenditure or contribution limitations – differ from traditional political, electoral, or policy speech claims due to the divergent interpretations of what constitutes speech, as well as jurisprudential considerations; free market electoral speech claims are generally governed by a restrictive burden test in light of the government interest in regulating elections, while the latter is often – though not always - framed as a subject matter restriction controversy.

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[39] The "Controversial Ideology" category captures claims that could broadly be captured under the labels of "liberal" or "conservative," but for concerns about harmful and/or inaccurate stereotypes mentioned by Pettys (2014) they are placed in this residual category. This includes racist (KKK rallies), anti-war, animal rights, and pro-environmental speakers and speech.

[40] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), holding that individuals may bring suits for damage against federal agents acting under the color of law but acting unconstitutionally.

Additional Variables: U.S. as Litigating Party and Dissent

Scholars have found correlations between a number of other variables and the decision to grant certiorari. Tanenhaus et al. examined certiorari petitions from the 1947 to 1953 terms and found a number of cues increasing the chances for a grant of certiorari, including the presence of the United States as a petitioner, dissent among judges at the Court from which certiorari was petitioned, and the presence of a civil liberties issue (1963, 111). These associations were confirmed by Armstrong and Johnson (1982), who examined samples of certiorari petitions from four terms during the mid-1960s and 1970s. As such, I code the theoretically relevant "cue" indicators dichotomously. I depart from Tanenhaus et al. and Perry in that I code the *U.S.* variable as "1" when the United States is either a petitioner *or* respondent in a particular case (Perry and Tanenhaus et al. code only for the U.S. as a petitioner). Perry (1991) found a cert. grant rate of 100% for grants where the U.S. was petitioner, compared to just 4% when a respondent (136-137). The choice to code for the presence of the U.S. as a litigating party (petitioner or respondent) was informed by work that has found a emergent hostility toward Congress in First Amendment free speech cases (Keck 2007, 332-333); cases presenting conflict between U.S. statutes and rights claimants often take a form such that the U.S. is a respondent in these cases.

Table 5.1 – Summary Statistics: Certiorari Docket and Free Expression (2005-2014 Terms)

Independent Variable	Denials (Mean)	Grants (Mean)	Overall (Mean)	Coding
Ideological Direction (Case)				
Liberal	.3774	.5682	.4045	=0
Undetermined	.2906	.2045	.2783	=1
Conservative	.3321	.2273	.3172	=2
Lower Court Composition				
Democratic	.3472	.3864	.3528	=0
Mixed/Unknown	.0755	.2273	.0971	=1
Republican	.5774	.3864	.5502	=2
Ideological Direction (Speaker)				
Liberal	.4528	.4091	44.66	=0
Undetermined	.1623	.0909	15.21	=1
Conservative	.3849	.5000	40.13	=2
Speech Claim Vote Direction				
Anti-	.7321	.4545	.6926	=0
Mixed	.0792	.0682	.0777	=1
Pro-	.1887	.4773	.2298	=2
Conflict	.0830	.2045	.1003	=1
Amicus Briefs	.8576	.1424	.6246	=0 to 16
Dissent	.1736	.4091	.2071	=1
U.S. as Litigating Party	.1811	.2955	.1974	=1
Issue Area Preference				
Low Frequency	.4000	.6136	.4304	=1
Medium Frequency	.2943	.2045	.2816	=2
High Frequency	.3057	.1818	.2880	=3
N	265	44	309	

Results

The summary statistics in Table 5.1 provide ideological proportions of the lower court decisions from which certiorari have been petitioned. At this basic level, there is no clear ideological component to the Roberts Court's free speech agenda – nearly 40% of the Court's

denials of certiorari have let liberal lower court decisions stand, while just over 30% of denials have been for conservative lower court decisions. While unobserved, strategic voting may play a role in some cases, at this aggregate level a Court motivated by political outcomes might generally be expected to deny certiorari at a greater rate for conservative decisions, or decisions issued by GOP-appointed appellate judges.

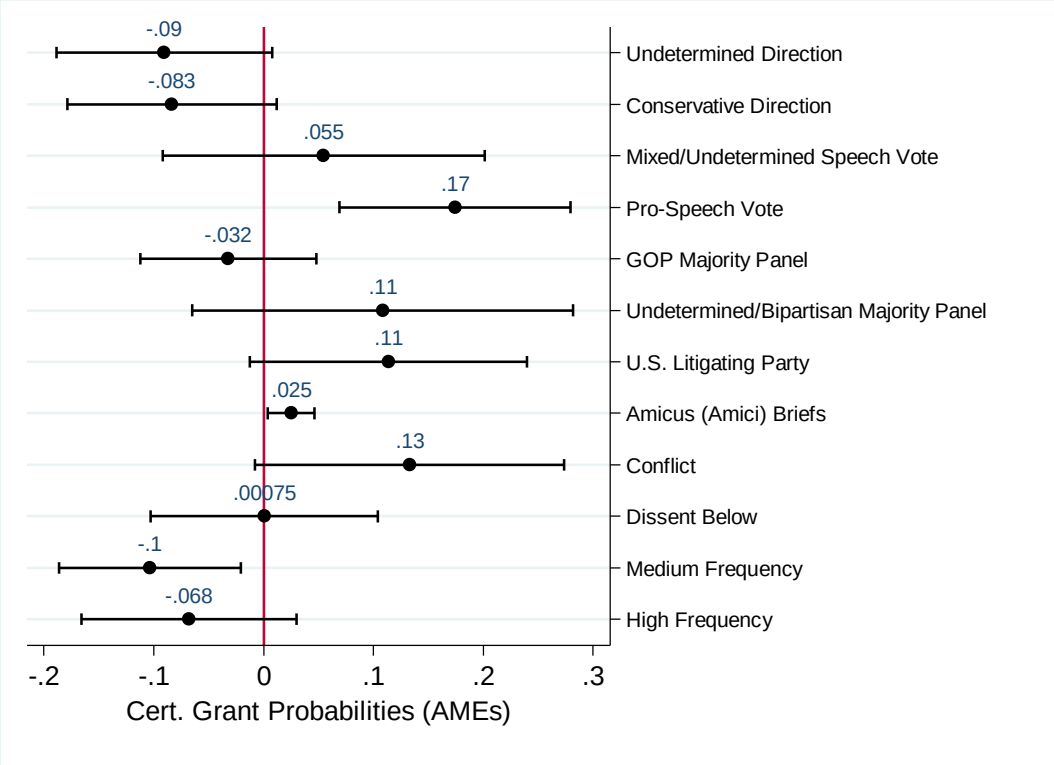
Table 5.2 – Logit Regression, Grants of Certiorari (2005-2015)

Variable	Coef. (Full Model)	R.S.E.	Coef. (Restricted Model)	R.S.E.
Direction				
Conservative	-.8316	.5145	-.7926	.4197
Undetermined	-.9211	.5200	-.7612	.4271
Liberal (Baseline)	---	---	---	---
Speech Claim				
Pro-Speech	1.516***	.4086		
Mixed	.6174	.7251		
Anti-Speech (Baseline)	---	---		
Panel Composition Below				
Majority GOP	-.3489	.4390	-.4755	.3763
Mixed/Undetermined	.8672	.6420	1.097*	.4723
Majority Dem. (Baseline)	---	---		
Jurisprudential Cues				
U.S. Litigating Party	1.024*	.4985		
Amicus Briefs	.2624*	.1151		
Conflict	1.124*	.5135		
Dissent Below	.0079	.5522		
Agenda/Issue Preference				
Low Frequency (Baseline)	---	---		
Medium Frequency	-1.164*	.5575		
High Frequency	-.6706	.5502		
Constant	-2.089***	.4805	-1.305***	.2902
N = 309				

Note: Logit coefficients with robust standard errors (R.S.E.); p<.001***, p<.01**, p<.05*. Log Likelihood Reduction: -126.47 to -98.58 (full), -126.47 to -118.54 (restricted); Pseudo R^2: 0.22 (full), 0.06 (restricted).

Table 5.2 represents a more rigorous test of H1 via logit regression analysis. In Roberts Era free expression cases, the effect of ideology on the likelihood of a grant of certiorari does not register at conventional levels of statistical significance: This is true for the direction of the lower court decision from which certiorari is petitioned as well as the composition of the panel or *en banc* court majority for that decision. All of the jurisprudential cue coefficients are in the expected positive direction, and all with the exception of the presence of a dissenting opinion below register at conventional levels of statistical significance.

Figure 5.1 – Predicted Probabilities, Grants of Certiorari (2005-2014 Terms)[41]



[41] The probability of a grant of certiorari is represented by labeled dots, while the brackets represent 95% confidence intervals around those probabilities.

To better visualize these relationships, Figure 5.1 provides the predicted probabilities of grants of certiorari via the average marginal effects of changes in each variable while holding all others constant at their means. Setting liberal lower court decisions as the baseline category, conservative lower court decisions are 8.3percentage points less likely to be granted certiorari, while ideologically undetermined decisions are 9.0 percentage points less likely to result in a grant. However, these relationships do not register at conventional levels of statistical significance. At some level, whether the direction of the decision below affects certiorari is an artifact of statistical conventions. While the p-value for the conservative direction coefficient is not less than the .05 threshold commonly set in regression results tables (and was chosen here prior to calculating results), it does pass the .10 threshold less commonly used. In other words, the choice of cut-off value selected here might have resulted in a "type two error," or accepting the null hypothesis (no relationship between the ideological direction of the decision below and the decision to grant certiorari). Ultimately, the borderline significance of the conservative direction coefficient is open to interpretation but it does at least partially address one important caveat to this chapter: Strategic voting at the certiorari stage is not explored in great detail. This is because, absent the individual voting information of the justices at the conference stage, there is little way of knowing whether the justices were engaged in strategic grants or denials of certiorari. However, the fact that the primary ideological variable (decision direction below) approaches conventional levels of statistical significance, it suggests that it is an important cue for the justices even while assuming strategic moves among the justices have occurred.

Of some interest, the Court is also more likely to grant certiorari for pro-speech decisions issued by lower courts compared to anti-speech decisions (17.43 percentage points). Overall, however, jurisprudential cues are the best predictor of grants of certiorari in contemporary free

expression controversies, as the magnitudes of the effects indicate for U.S. as a litigating party (11.37 percentage points more likely when the condition is present), amicus curiae (2.5 percentage points more likely for each additional brief filed), and conflict (13.3 percentage points more likely). Across the population of cases petitioned for certiorari, there is statistically significant support for non-ideological explanations of judicial behavior in free expression controversies (H2), and less support for ideological explanations (H1).

Hunting for Cases: Disaggregation by Issue Area

The coefficients displayed in Table 5.2 suggest that ideological cues are less important to the Justices than jurisprudential ones, as neither the direction of the lower court decision nor the composition of the panel majority for the decision from which certiorari is petitioned are statistically significant predictors of certiorari grants for free expression cases before the Roberts Court. If it is the case that ideological characteristics of cases below do not correlate with the certiorari decision and, more subtly, that the Court's merits and certiorari dockets reflect some degree of congruency, then scholars claiming a non-ideological explanation for the Court's behavior in free expression cases have another analytical leg to stand on (H2). If, however, disparities between the two dockets exist, there may be reason to believe the Court *does* respond to ideological cues but only within particular issue areas. In fact, the probabilities reported in Figure 5.1 for issue area presence on the Court's certiorari docket suggest such disparities. Issue areas coded as medium frequency are 9.9% points less likely to be granted certiorari and those scored as high frequency are 7.6% points less likely than those characterized as low frequency

to be granted certiorari, though the latter does not register at conventional levels of statistical significance.

Table 5.3 sorts issue area categories in descending value of the difference between composition of the Court's free speech certiorari docket and free speech merits docket. The issue areas with the greatest positive difference (indicating overrepresented areas) are those concerning "Free Market Electoral" speech (challenges to campaign finance regulations), speech claims involving unions and/or union (non)members, and controversies featuring non-mainstream ideologies (controversial ideologies such as white nationalism, anti-war, animal rights, and others that may represent extreme conservative or liberal positions but do not comfortably fit within the mainstream of American politics). Conversely, the issue areas featuring the greatest negative difference include prisoner speech claims, government employee/whistleblower speech claims, and (non-religious) student speech claims. If student speech claims involving religion – a separate issue area due to the additional jurisprudential consideration of Establishment and/or Free Exercise Clauses – are added to the student speech category, it becomes the most underrepresented issue area on the Court's merits docket.

Table 5.3 – Comparison of Certiorari and Merits Dockets, 2005-2015 (Free Speech)

Issue Area	Grants	Denials	Difference
Free Market Electoral	13.64	3.77	9.87
Union	11.36	2.26	9.1
Non-Mainstream Ideology	11.36	4.15	7.21
Petition Circulation/Ballot Access	6.82	3.02	3.8
Elected Official Speech	4.55	1.51	3.04
Sex/Gender, Women's Health	4.55	2.64	1.91
Sex/Gender, LGBTQ Equality	2.27	0.75	1.52
Electoral/Political Speech	9.09	8.68	0.41
Religious	6.82	6.42	0.4
Media	2.27	1.89	0.38
Terrorism/Security	2.27	2.26	0.01
Faculty Speech	2.27	2.64	-0.37
Lawyer	2.27	3.77	-1.5
Libel, Related Torts	0	1.51	-1.51
Child Pornography	2.27	4.53	-2.26
Sex/Gender, Adult Ent./Pornography	0	2.64	-2.64
Religious Student Speech	2.27	5.66	-3.39
Commercial/Business	2.27	6.04	-3.77
Miscellaneous	0	4.15	-4.15
Government Employee/Whistleblower	9.09	14.34	-5.25
Non-religious Student Speech	2.27	8.68	-6.41
Prisoner Speech	2.27	8.68	-6.41

Note: N for each category by year is noted in Appendix G. Percentages indicate proportion of overall certiorari docket from the 2005 through December of the 2015 term.

The overrepresentation of campaign finance and union speech claims on the merits docket, which have overwhelmingly been anti-union and anti-campaign regulation, is consistent with the conservative Court narrative advanced most forcefully by Erwin Chemerinsky (2011), Monica Youn (2011), and David Kairys (2013). Continued litigation in the underrepresented areas focusing on the application of strands of the *Tinker* standard (student speech), the *Turner* test (prisoner speech), and the *Ceballos* framework (government employees) – have attracted

similar criticism. Chemerinsky (2011) singles out the Court's merits decisions in these areas for pointed criticism as evidence of the Court's unwillingness to protect the interests of the relatively powerless in society. David Cole (2010) and Youn (2011) have offered similar criticisms, pointing to the Chief Justice's opinion in *Holder v. Humanitarian Law Project* (561 U.S. 1 (2010)) and the Court's emergent anti-union streak (ruling for non-members' compelled speech claims and against union fee collection efforts) as additional support for the ideological explanation narrative.

In the sections that follow, I sketch a more Janus-faced portrait of the Court that at once supports and casts doubt on ideological explanations for judicial behavior in contemporary free expression controversies. To demonstrate how and why scholars can connect the two dockets to reach better inferences about judicial behavior, I conduct within-case analyses of substantially overrepresented issue areas on the Court's certiorari docket: government employee and student (religious and non-religious) speech claims. These issue areas have been chosen because they have been flashpoints for scholarly criticism on the Court's merits docket. For each issue area, I examine three themes: The extent to which the U.S. Supreme Court has responded to the petitioning of each issue area preference, any patterns that may exist concerning the ideological direction of lower decisions from which certiorari is petitioned, and the contours of cases denied certiorari in order to illustrate their geographically limited but substantial impacts on particular social and legal classes. Overall, I find that the Justices are clearly hunting for vehicles to further a conservative, Republican agenda in the context of union and campaign finance speech claims, but that pattern has not been replicated within all of the underrepresented issue areas that scholars have singled out for criticism.

Government Employee Speech: Whistleblowers and Retaliation

The Court's government employee speech jurisprudence has historically attempted to balance the First Amendment rights of those employed by the government with the ability of government organizations to function. Justice Oliver Wendell Holmes' 1892 decision in *McAuliffe v. Mayor of New Bedford,* a Massachusetts free expression decision against a local police officer for "talking politics" and notable for the line, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," stands for the principle that government employment is a privilege rather than a right (155 Mass. 216, 220 (Mass., 1892)). This sentiment has been rejected or at least severely qualified by a series of subsequent decisions, most notably *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983) in order to both protect free expression and ensure government organization functionality.[42]

Generally speaking, the Court has adopted the "privilege" line of thinking in recent decisions, though all justices appear to accept the premise that government employees receive some level of First Amendment protection. *Garcetti v. Ceballos*, decided in 2006, is a recent example of the Court's approach to claims brought by whistleblowers for alleged retaliation. Richard Ceballos, assistant district attorney for Los Angeles County, faced a series of retaliatory actions after discovering (and sharing with defense attorneys) problems with a legal affidavit that was the basis for the issuance of a search warrant in an ongoing criminal case. The Court,

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[42] 391 U.S. 563 (1968), holding that the firing of a school district teacher for a letter published in a local newspaper critical of the school board's attempts to raise revenues violated the First Amendment rights of government employees), and 461 U.S. 138 (1983), holding that a New Orleans' ADA's circulation of a workplace morale petition after being transferred to another position and resulting in her termination was not speech on matters of a public concern protected under the First Amendment.

through Justice Kennedy in a 5-4 decision split along ideological lines, interpreted the precedent established in *Pickering v. Board of Education* as allowing for retaliatory actions within government hierarchies only when a government employee speaks on matters of public concern as a citizen. Put another way, the Court held that to give government organizations breathing room in the execution of duties, a free speech challenge can only stand when a government employee's speech on matters of public concern (here, alleged corruption in the Los Angeles County District Attorney's Office) is separate from that employee's official duties. Writing for the Court's liberal bloc in dissent, Justice Souter assailed the formalistic, "false distinction" between speaking as a government employee and speaking as a citizen.

In 2014, the Court appeared to backtrack a bit on the *Ceballos* holding in *Lane v. Franks* (134 S.Ct. 2369 (2014)), which held that a government employee's testimony in a federal corruption investigation of a faculty member (and former legislator) at an Alabama community college was protected by the First Amendment. Justice Sotomayor's expression of pro-speech principles was somewhat diminished by the simultaneous holding that the president of the community college who had refused to rehire Lane was protected under the doctrine of qualified immunity. Though the *Ceballos* decision has been maligned by some scholars (Chemerinsky 2011; Youn 2011), less is known about the Court's broader government employee speech agenda.

Though Table 5.4 reveals a generally unsympathetic trend toward government speech claimants, the Court's hostility to government employee speech claims has been marked by important exceptions. Consider *Jackler v. Byrne*, where a 2nd Circuit panel vacated a lower court decision that relied on *Ceballos* in dismissing a free speech claim brought by a police officer who refused to make false statements relating to an excessive force complaint brought by a New

York citizen (658 F.3d 225 (2nd Cir., 2011)). Jason Jackler, responding to a call for assistance by fellow officer Greg Metakes, arrived to find suspect Zachary Jones in custody. Jackler described Jones as having "multiple abrasions on his face" and indicated that he was subsequently "struck in the face" by Officer Metakes after directing an obscenity toward him. After Jackler filed his report in the course of Jones' official complaint against Metakes, Jackler's superiors pressured him to withdraw his supplementary report – which he refused to do. Jackler, a probationary officer at the time, was subsequently denied promotion to permanent officer in the Middletown Police Department.

Writing for a unanimous panel, Judge Kearse noted that while the *Ceballos* decision was controlling, the filing of a supplementary report concerning police misconduct was not simply speech in the course of Jackler's official duties as an agent of the state. Instead, "Jackler had a strong First Amendment interest in refusing to make a report that was dishonest. We think it clear that his refusals to change his statement as to what he witnessed when Metakes struck Jones were directed at a matter of public concern, rather than an effort to further some private interest of Jackler personally. The use of excessive force by a police officer is a matter of serious public concern...Metakes's use of force against Jones did not implicate Jackler's ability to do his own job properly…" (658 F.3d 225, 240). As such, the stated government interest in *Ceballos* – "the proper performance of government functions" and the "integrity" of the Middletown Police Department – was distinguished from the context of Jackler's speech.

Table 5.4 – Government Employee Speech Cert. Denials [Merits Decisions], 2005-2015

	Anti-Speech	Mixed	Pro-Speech	Totals
Liberal	5 (12.82%)	0	5 [2] (12.82%)	10 (25.64%)
Undetermined	7 (17.95%)	3 (7.69%)	3 (7.69%)	13 (33.33%)
Conservative	**16 [1]** **(41.03%)**	0	0	16 (41.03%)
Totals	28 (71.79%)	3 (7.69%)	8 (20.51%)	39 (100%)

Beyond the Supreme Court decisions in the area of government speech which have generally made such claims more difficult to prevail upon (*Ceballos*) or removed the teeth of redress via qualified immunity (*Lane*), the frequency of government employee speech claims illustrates the importance of accounting for certiorari decisions prior to advancing broad-brush claims about the U.S. Supreme Court agenda. Table 5.4 illustrates that there is a conservative cast to the Court's agenda-setting decisions in this frequently litigated issue area. The Court has been far more willing to deny certiorari for lower court decisions that have been decided in a conservative direction, though a handful of less restrictive, liberal decisions have been left standing. If, instead of a closer contextual reading of the identity of the government employee in a case, the liberal outcome of interest is simply whether government employees prevail on free speech claims, then the effect of the Court's cert. denials has been generally anti-speech (71.79% of all government employee cases). Still, decisions like *Jackler* that the Court has declined to revisit in order to settle conflict signaled by lower court judges are useful legal resources for employees bringing whistleblower actions against government employment hierarchies and draw attention to how doctrinal standards can be meaningfully affected by the certiorari vote alone.

Student Speech

In *Morse v. Frederick,* the Court considered the constitutionality of a school principal's suspension of Joseph Frederick, who had displayed a "pro-drug" banner near school property during the passing of the 2002 Olympic Torch Relay through Juneau, Alaska. Frederick, along with other students, unfurled a banner reading "BONG HiTS 4 JESUS" during the event, for which students were released from classes to attend. Frederick was not on school property during the event, but the banner was clearly visible from the school. In his opinion for the Court – again, mostly divided along ideological lines – Chief Justice Roberts argued that the school's interest in maintaining an environment free of disorder and "pro-drug" messages outweighed Frederick's countervailing interest in free expression under the First Amendment. The decision was the latest in a line of student speech decisions that have incrementally chipped away at the robust protection for student speech articulated by Justice Fortas in the Vietnam War protest case of *Tinker v. Des Moines* (393 U.S. 503 (1969)).[43] Mary Beth Tinker, her brother, and another student who chose to wear black armbands as a way to silently yet symbolically protest the Vietnam conflict and was subsequently suspended for doing so. In ruling for Tinker and against the school district armband policy, Justice Fortas made clear that students do not shed their constitutional rights at the schoolhouse gate (393 U.S. 503, 506 (1969)).

[43] The Court qualified the Tinker holding in subsequent decisions against student speech claims in Bethel School District v. Fraser, 478 U.S. 675 (1986), which held that a school's suspension of a student for a sexually explicit student election nomination speech did not violate the First Amendment because it was unrelated to any political viewpoint expressed, and Hazelwood v. Kuhlmeier, 484 U.S. 260 (1987), which held that because schools were not traditional public forums, the school's removal of parts of a student news publication entailed a more deferential level of First Amendment scrutiny. The Roberts Court's decision in Morse v. Frederick, 551 U.S. 393 (2007) represents a similar narrowing of student speech rights.

Decisions on the merits represent only one vehicle by which the Court has adjusted the boundaries of student speech protection. Most notably, in 2005 the Court denied certiorari in *Hosty v. Carter*, a Seventh Circuit *en banc* decision that applied the Supreme Court's *Hazelwood v. Kuhlmeier* standard for restricting high school student speech to a university's student newspaper (412 F.3d 731 (7th Cir., 2005)). In the case, Jeni Porche and other members of *The Innovator*, including Margaret Hosty, published articles critical of the Dean of the College of Arts and Sciences (Roger K. Oden) following the university's dismissal of *The Innovator's* faculty adviser, Geoffrey de Laforcade. Following requests by college administrators to retract allegedly defamatory and false statements printed by the *Innovator* – requests falling on deaf ears – Dean of Student Services Patricia Carter called the printer of the *Innovator* and asked that printing cease for any issues not approved by the administration in advance. Due to the uncertainty of funding for the printing of the paper, the printer complied and the student newspaper brought suit in federal court under the First Amendment's free speech and press clauses. Following a finding of summary judgment for all officials except Patricia Carter, Carter appealed the affirmance of a Seventh Circuit panel citing qualified immunity to the First Amendment claim.

A divided Seventh Circuit ruled that SCOTUS's *Hazelwood* precedent favored Carter's defense of qualified immunity, and that the *Innovator's* First Amendment claim failed under the Court's line of student speech cases. Despite finding that the *Innovator* constituted a designated public forum and was therefore shielded from *ex post* censorship or punishment for printing materials the administration did not approve of, Judge Easterbrook's opinion made clear that Carter was protected from the suit under the doctrine of qualified immunity. In other words, Carter could not have "reasonably" been expected to know the limits of the Court's *Hazelwood*

decision, which Easterbrook interpreted as hinging on whether student speech occurred in a public forum or not, rather than whether the student speech at issue was that of a high school or college student (412 F.3d 731, 738 (7th Cir., 2005)). Writing in dissent, Judge Evans argued that the high school-college distinction was the rule articulated by the Court in *Hazelwood* rather than the forum analysis rule relied on by Easterbrook and the majority, and noted that the decision put the Court at odds with at least two other federal circuit courts (412 F.3d 731, 743-744 (Evans, J., dissenting)).

Table 5.5 – Student (Non-religious) Speech Cert. Denials [and Grants], 2005-2015

	Anti-Speech	Mixed	Pro-Speech	Totals
Liberal	**7** **(29.17%)**	__	3 (12.5%)	10 (41.67%)
Undetermined	1 (4.17%)	2 (8.33%)	2 (8.33%)	5 (20.83%)
Conservative	6 [1] (25%)	__	3 (12.5%)	9 (37.5%)
Totals	14 (58.33%)	2 (8.33%)	8 (33.33%)	24 (100%)

The upshot of *Hosty* was a shrinking of the First Amendment protective sphere for students at public universities, continuing the backslide of student speech rights since the Court's *Tinker* decision. Paired with *Frederick*, there is at least some congruency between the Court's certiorari and merits dockets when it comes to speaking in schools: According to Chemerinsky, "It is difficult to read [*Frederick*] and see the Roberts Court as protective of free speech" (2011, 728). Out of the 44 free expression decisions on the Court's merits docket during the period of analysis, *Frederick* is the only source of light on that subject. But expanding the scope of inquiry from merits decisions alone to the certiorari agenda suggests that this is an overstatement.

Table 5.5 reveals the Court's student speech certiorari decisions as generally evenhanded – liberal and conservative claims have either been rejected or granted at roughly the same rate.[44] The Court has left standing decisions upholding the constitutionality of school bans on displays of the Confederate flag as well as holding unconstitutional school disciplinary actions for the wearing of a shirt that portrayed President George W. Bush and the Iraq War in an unfavorable light.[45] In two cases decided by the 3rd Circuit and denied certiorari in the 2011 term, the *en banc* decisions asserted that the *Tinker* precedent was not limited to "brick and mortar" schoolhouses, but also student speech originating on non-school district computers.[46] If the assignment of more contextual, ideological codes for these claimants – a student speech claim brought by a student for such right-wing speech as Confederate Flag displays is not clearly a liberal win in the in-group bias account – is put aside and instead the liberal outcome of interest is the availability of free speech claims for all students, the effect of cert. denials is pro-student just over 33% of the time. Again, however, for students across multiple federal jurisdictions, the Court's *Frederick* precedent is not necessarily the most significant decision on the issue of student speech protection. Certiorari denials have carved out notches of First Amendment protection that exist alongside the *Frederick* line of cases, creating flexibility and uncertainty in the law for would-be litigants.

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[44] *Frederick* has been cited in support of the storyline that argues a double standard exists in the Roberts Court's treatments of some free speech litigants. Monica Youn (2011) and Adam Liptak (2012) have both cited Erwin Chemersinky's "Not a Free Speech Court" (2011) in presenting this argument.

[45] Defoe v. Spiva, 625 F.3d 324 (6th Cir., 2010), upholding Tennessee school district policy prohibiting displays of the Confederate Flag in light of historical and contemporaneous racial tension at the school; Guiles v. Marineau, 461 F.3d 320 (2nd Cir., 2006), ruling in favor of student suspended for wearing shirt critical of President Bush, the Iraq War, and featuring drug references; Barr v. Lafon, 538 F.3d 554 (6th Cir., 2008), upholding a school district ban on the Confederate Flag and other racially divisive symbols as permissible, content-based (rather than viewpoint-based) restrictions in applying the *Tinker* standard.

[46] Layshock v. Hermitage Area School District, 650 F.3d 205, 216 (3rd Cir., 2011); J.S. v. Blue Mountain School District, 650 F.3d 915 (3rd Cir., 2011).

Religious Speech and Schools

Writing shortly after the conclusion of the Court's 2014 term, Linda Greenhouse noted: "The court of Chief Justice John G. Roberts has been one of the most religion-friendly Supreme Courts in modern history. Nearly every religious claim presented to the court has emerged a winner, from explicitly sectarian prayer at town board meetings, in last year's closely divided Town of Greece decision, to beards for Muslim inmates in a prison system that banned facial hair — a unanimous decision that defied the court's tradition of deference to prison officials and their rules" (Greenhouse 2015). Speech claims involving religion have appeared on the Court's docket with some regularity, beginning with the Court's decision in *Pleasant Grove City v. Summum* (555 U.S. 460 (2009)), the unanimous 2009 decision holding that a city's refusal to place a Gnostic Christian statue depicting the sect's "Seven Aphorisms" in a public park – while also choosing to accept a Ten Commandments statue for display in the same park – did not violate the First Amendment. The decision was noteworthy for building on the so-called government speech doctrine, which would be elaborated upon in the Court's *Sons of Confederate Veterans* decision in 2015.

Later, a 5-4 Court through Justice Ginsburg would uphold the University of California's "take all comers" policy against a challenge by a Christian student organization, which sought to exclude members based upon certain characteristics, including sexual orientation (561 U.S. 661 (2010)). Perhaps most famously, an 8-1 Court struck down a jury award of damages for the intentional infliction of emotional distress to the father of a marine killed in Iraq, whose funeral was picketed by the Westboro Baptist Church of Topeka, Kansas (562 U.S. 443 (2011)). And most recently, in *Reed v. Town of Gilbert* (135 S. Ct. 2218 (2015)), a unanimous Court voted to invalidate an Arizona municipality's sign ordinance that – arguably – treated roadside signs

differently on the basis of content. The victorious party in the suit, Pastor Clyde Reed and his Good News Presbyterian Church congregation had protested the town's treatment of noncommercial signs as a content-based burden on speech. The invalidated ordinance held that such signs be displayed no more than 12 hours before and one hour after an event – and be only six square feet in size – while political signs were regulated less stringently (Margolin 2015).

Viewed in light of the Court's certiorari docket in student religious speech cases (or religion and schools generally), Greenhouse's claim is clearly overstated. It is true that the Court's decisions in *Summum, Phelps,* and *Reed* were victories for mainstream Christian and conservative religious speakers, while only *Christian Legal Society* placed liberal anti-discrimination and equality principles before the expression and association claims of a conservative Christian university organization. A review of the Roberts Era certiorari docket demonstrates the Court has consistently ruled against religious speakers or for the secular position.

Table 5.6– Religious and Non-religious Student Speech Cert. Denials [and Grants], 2005-2015

	Anti-Speech	Mixed	Pro-Speech	Total
Liberal	**18 [1] (47.37%)**	-	2 (5.26%)	20 (52.63%)
Undetermined	3 (7.89%)	4 (10.53%)	1 (2.63%)	8 (21.05%)
Conservative	6 [1] (15.79%)	-	4 (10.53%)	10 (26.32%)
Total	27 (71.05%)	4 (10.53%)	7 (18.42%)	38 (100%)

Adding religious student speech cases to the analysis confirms that across all student speech claims on the certiorari docket, the pattern has been anti-speech and liberal (against religious freedom claims brought by parents and/or students): Nearly 50% of cert. denials in this

area have been both anti-speech and let liberal decisions standing. These cases have generally featured students – or parents filing suit on their behalf – facing adverse actions by school administrators for making religious statements in various forms, from art projects to commencement addresses. In these conflicts, the liberal position is generally that of school administrators taking a secular position against religious claimants, conventionally a conservative First Amendment claim. In *Morgan v. Swanson* (659 F.3d 359 (5th Cir., 2011)), for example, parents of a student unsuccessfully brought a free speech claim against a local school after a teacher prevented distribution of a student (and apparently, parent) designed Christmas card retelling the Christian "story of the candy cane." Here, the Court had an opportunity to expand the sphere of First Amendment protection available to religious speakers and resolve an inter-circuit conflict in the process, but chose not to.

Occasionally, the Court has also denied certiorari to the benefit of conservative positions. Consider *Peck v. Baldwinsville Central School District* (426 F.3d 617 (2nd Cir., 2005)), where a student project (completed with the aid of a parent) included overt Christian references on a kindergarten poster. The theme for this elementary school assignment was saving the environment. After the poster was rejected by the student's teacher and the school principal, the student (and parent) completed a second poster – a poster that was displayed but partially censored at the discretion of the same officials. By allowing the 2nd Circuit's conservative decision to stand and assuming the justices vote preferentially at the agenda-setting stage, the Court's conservative Justices may have viewed a denial as an effective vehicle to furthering the protection of mainstream religious speakers in public schools.

Alternatively, a grant in this case might have resulted in a merits decision that more strongly protects student religious claims, authoritatively and across the federal judiciary while

also resolving an inter-circuit conflict. To be clear, the claim is not that a conservative Court, apparently sympathetic to constitutional claims by religious speakers, must *always* grant certiorari to the benefit of conservative religious claims or chagrin of liberal, secular causes. But the substantial pro-secular trend in this area of free expression suggests that the Court is satisfied with the religious speaker and school forum standards established during the Rehnquist Era, or is actually *less* conservative on that issue and willing to allow gradual yet important adjustments via decisions on certiorari. It could also be the case that the Court simply does not care as much about religion in this context, or at least not as much as recent commentary suggests.

Discussion

Compared to the Court's merits docket, denials of certiorari command far less attention from commentators and scholars, and have a more limited effect due to the formal geographical and legal limits of the state and circuit holdings left standing. However, the within-issue area comparisons between the certiorari and merits dockets draw attention to the important effects of denials of certiorari on law and society. The actions of the justices at certiorari shape doctrinal rules within particular issue subsets of First Amendment law, sometimes allowing circuits to walk back harsh standards imposed on claimants – as with government speech in *Ceballos* and *Jackler* – and other times further tightening speech-restrictive doctrines, as with student speech in *Frederick* and *Hosty*. While recent work has examined how and when conflicts among circuits lead to grants of certiorari by the Court, these accounts tend to ignore how law and society are meaningfully shaped by certiorari decisions in their own right. In the future – and if eventually made available by one of the Court's current justices - the degree to which

"aggressive grants" and "defensive denials" influence the free expression docket will become much clearer (Boucher and Segal 1995, 835).

Compared to union speech and free market electoral speech (campaign finance law), cases, government employee and student speech cases are substantially underrepresented on the Court's merits docket. The relatively high proportion of cases in the latter issue areas that continue to be petitioned to the Court post-*Ceballos* and *Frederick* is interesting, as the infrequency of cert. grants and the direction of the subsequent merits decisions suggest that the justices are less interested or hostile to these issues (Hurwitz 2006, 327). In addition, available evidence demonstrates that there has not been one clear ideological winner, either. Government speech denials of certiorari have generally been conservative, there is no clear ideological winner in non-religious student speech cases, and religious student speech cert. denials have generally been liberal (for school administrators or the "secular" position in the case). This finding that the Court actively hunts for some types of cases – cases that are infrequently petitioned yet are overrepresented on the merits docket – is consistent with ideological explanations of Court behavior.

While there is less support for the ideological in-group explanation once accounting for patterns within those issue areas that commentators have singled out for criticism, the underrepresentation of cert. grants in the modal issue areas gives some reason for pause. This apparent lack of responsiveness to certain classes of litigants on the merits docket raises some questions about the extent to which continued, "upstream" efforts at agenda-setting – much like lower courts (Hurwitz 2006, 338), litigators (Baird 2004; 2007), and broader social and political trends (Pacelle 1991) - can be effective first-movers of sorts in influencing the US Supreme Court agenda outside of such areas as union non-member and campaign finance challenges.

Building upon recent work by scholars examining the ways in which unelected judges can produce quasi-democratic decisions in heavily litigated areas (Keck 2014), future research may also expand beyond free expression litigation in order to better understand how and the extent to which sustained, bottom-up litigation across different issue areas can secure a foothold on the Court's limited merits docket. Within the general legal area of the First Amendment and an eye toward theoretical development, the next step for this analysis is to look beyond the Roberts Era and compare certiorari patterns with the previous Rehnquist Era in order to better understand how these relationships have evolved over time.

Conclusion

The free expression agenda of the Roberts Court has been the subject of sustained scrutiny by scholars and legal commentators. To date, studies of the Court's free expression agenda have been limited to votes on the merits of cases, with varying degrees of systematic case selection and vote analysis. Scholars have examined these decisions in order to make claims about the Court's agenda, sometimes describing it as applying a double standard and ignoring claims brought by vulnerable individuals. The conservative Court explanation, however, sits uncomfortably beside a substantial proportion of the merits docket upholding free speech claims brought by a menagerie of unpopular speakers. This study demonstrates how the certiorari docket may be leveraged by scholars attempting to adjudicate between this series of claims and, in doing so, offers a more nuanced picture of the Roberts Court's free expression project.

In contemporary free expression controversies, access to the Court is most likely to occur when jurisprudential cues are present, including conflict, amicus curiae briefs, and the U.S. as a

litigating party. This finding replicates traditional cue theory analyses and is somewhat unsurprising. The cues that do not register at conventional levels of statistical significance, however, are the ideological indicators which include the direction of the lower court decision from which certiorari is petitioned and the political composition of the panel or *en banc* court issuing that decision. Once disaggregated by issue area, however, certiorari voting patterns provide support for and against ideological explanations of Court behavior, with patterns observed in student speech cases (religious and non-religious) perhaps the most counterintuitive.

These findings at once demonstrate the strengths and weaknesses of the conventional quantitative models often specified in studies of certiorari. First, modeling the effects of case factors on the certiorari vote provides additional leverage to scholars seeking to make broad claims about the Court's motivations in particular issue areas. Due to the issue of missing certiorari voting data for the individual justices in contemporary cases, scholars must remain wary of ecological inference barriers. The second point underscores a weakness of studies employing aggregate data: Disaggregating the Court's free expression certiorari docket by issue area reveals that the Court has not been monolithic in furthering a conservative, Republican agenda. The Court has had numerous opportunities to more effectively circumscribe free expression rights in the contexts of student (religious and non-religious) and government employee speech. Future efforts can and should expand beyond single issue areas and particular historical Courts to analyses that compare across these categories.

Beyond methodological concerns, it is clear that judicial behavior at the certiorari stage meaningfully shapes law across broad swaths of society, by virtue of the geographic sprawl of circuit court jurisdictions and the many individuals within institutional contexts shaped by these decisions. Extant scholarship has remarked on the importance of choices at the certiorari stage,

but these efforts rarely describe what those effects are or how they impact classes of citizens and litigants in practice (see Black and Owens 2009). This chapter sketches one approach scholars may follow in putting "'jurisprudence' back into 'political jurisprudence,'" by describing what choices at the certiorari stage actually look like in practice and some potential effects on classes of litigants and citizens. *Ceballos* was a doctrinal shift that placed the onus on government employees seeking to win First Amendment whistleblower and/or retaliation suits, yet lower circuit decisions like *Jackler* serve as a legal resource for many employees seeking redress for unconstitutional actions by employers. In cases involving offensive or disruptive speech by students – the classic *Tinker* speakers – the Court's certiorari docket reveals that *Frederick* was not the last nor perhaps the most important word on the scope of student speech protections. Finally, the degree to which the label of "conservative" can be applied to the current Court's free expression agenda appears to vary substantially across the issue areas scholars have identified as indicators of the Court's commitment to protecting expression. The considerable variation within various issue areas on the discretionary certiorari docket suggests that U.S. Supreme Court observers and contemporary free expression scholars should be more circumspect in making inferences about the motivations of the justices.

Chapter 6

Conclusion

Review of the Findings

This dissertation has been motivated primarily by the sustained attention to the Roberts Court's puzzling constitution of U.S. First Amendment rights to freedom of expression. As such, the dissertation focuses squarely on the actions and study of the justices in the contemporary era. A number of findings have emerged in each of the project's chapters, beginning with rethinking concept measurement. In chapter two, I developed and provided an initial assessment of a new composite directional variable based on the idea of "INUS" conditions, defined as "an insufficient but necessary part of a condition which is itself unnecessary but sufficient for the result." (Mackie 1965, 245; see also Mahoney and Vanderpoel 2015, 79-82). This composite indicator incorporated the identity of the speaker, speech act, and speech suppressor in assigning an ideological direction to judicial votes – each a necessary piece of information for determining the direction of a decision but none alone sufficient for characterizing a decision as liberal, conservative, or undetermined. I assessed this variable's performance in relation to the basic bivariate attitudinal model, finding that the relationship between values and career voting percentages in freedom of expression cases grows more tenuous as this indicator is refined to better capture the concept of interest: the ideological direction of decisions. This finding is true for the Rehnquist and Roberts Court Eras under comparison, though particularly visible for the latter. The upshot of this chapter is that additional work needs to be done in developing the indicators commonly employed in statistical analyses of judicial decision-making.

Chapter three answered the question of whether a relationship exists between the conservative attitudes of the justices and votes on First Amendment freedom of expression

claims for two Courts in the modern era. Somewhat unexpectedly, the Roberts Era is distinct in that the likelihood of pro-speech claim votes is strongly predicted by the ideological preferences of the justices, whereas the votes of the stable Rehnquist Court Era preceding the Roberts Court cannot be explained by those preferences. This finding holds for both Segal-Cover and Martin-Quinn operationalization of judicial preferences, and is not affected by the inclusion of various case-level factors in the regression models. I did not anticipate this finding, particularly in light of previous work that found such a relationship.

In chapter three, I also argued for greater attention to the voting coalitions in cases as the key dependent variable of interest, rather than the probability of a pro-speech or anti-speech vote occurring given an aggregation of judicial votes. I find that a greater percentage of Roberts Era decisions (67%) are inconsistent with core assumptions of the attitudinal model of judging compared to the Rehnquist Era (62%). A closer examination of conceptual typologies of Roberts and Rehnquist Era decisions finds support for the polarization paradox described by Brandon Bartels (2015, 24-27): Fewer decisions in the current era are marked by weaker cases of voting order and disorder, yet more decisions are characterized as either unanimous or strong ideological ordering of the justices.

Chapter four shifted away from quantitative relationships between values and votes and instead adopts an internal view of judicial decision-making. The period of analysis was the Roberts Court from the 2005-2014 terms, and the subject of interest was First Amendment free speech decisions. While I did not enter this stage of the research with firm expectations, previous scholarship suggested that special attention be paid to conceptions of the judicial role, the role of various free speech theories, and the role of jurisprudential structures like the content-

neutrality regime. Chapter four took seriously the idea that the content of judicial opinions can provide valuable insight to the practice of judicial decision-making.

In drawing upon the method of process tracing and the use of "hoop tests" to highlight when and how the Roberts Court's free expression decisions are particularly problematic for the attitudinal paradigm of judging, I found evidence that the Roberts Court's make-up is actually fairly heterogeneous in terms of conceptions of the judicial role held by the justices and the types of ideological commitments held by those justices. Furthermore, this comprehensive and detailed diagnosis of the Roberts Court justices' constitution of freedom of expression revealed that the jurisprudential regime commonly known as "content neutrality" has been eroded by a competing, pragmatic approach regularly expressed by Justice Breyer (and now joined by members of the Court's liberal bloc, including Justices Kagan and Ginsburg) and ideological fractures within the Court's conservative bloc. The latter finding is illustrated most prominently by the opinions of Justices Alito and Thomas, as well as Chief Justice Roberts' apparent commitment to preserving the institutional legitimacy of the Court. These results may be attributable to the types of cases the Court chooses to review compared to the Rehnquist Era, where fewer controversies focus on the rights of the traditional soapbox speaker embedded in First Amendment jurisprudence and more concern the emerging government speech doctrine and efforts to expand the meaning of speech under the First Amendment.

Chapter five offered an innovative approach to interrogating the purported ideological motivations of the Roberts Court, leveraging the certiorari process in evaluating claims that the Court has been generally conservative. I developed an original dataset of all fairly comparable denials of certiorari in free speech cases from the 2005 to 2014 terms (and some early 2015 term decisions prior to the death of Justice Scalia), and through the use of a logit regression model

find support for both ideological and jurisprudential considerations at the agenda-setting stage. Through case studies of the issue areas frequently petitioned before the Court, I also find that narratives critical of the Court's decisions in cases involving students, government employees, and religious student claimants may be in need of revision. While jurisprudential considerations appear to explain more grants of certiorari in aggregate, a closer examination of particular issue areas on the Court's certiorari docket reveals both predictable and surprising ideological trends.

External or Internal?

This project was motivated, in part, by scholarship seeking to integrate two perspectives on judicial decision-making that have often stood in opposition to one another: the external and internal approaches. The external approach privileges observable behavior – judicial votes – over the content of opinions and generally seeks to establish correlations between judicial attitudes and patterns across decisions. The internal approach emphasizes the institutional norms and rules that structure decision-making, viewing the constraining (or enabling) language of law as an important factor in evaluating the work of judges. Here, scholars tend to take the content of opinions and organizing force of jurisprudential structures seriously – without denying the role played by ideological attitudes.

Beginning with the general premise that the judicial constitution of free expression may be an ideological or more nuanced, legal practice, this dissertation cannot claim to definitively settle this ongoing debate. I am not even confident stating, as Feldman does, that in terms of prediction the more effective view is " the external view, maybe (and I mean maybe)." (2005, 118). This is due to the essentially contested nature of what the judicial enterprise is, and the

Rorschach nature of the enterprise of Supreme Court judging in particular. Even with the caution in measurement expressed in chapter two and the effort to develop more valid indicators, scholars interested in the bottom line may view the key takeaway from this project as conservatism predicting the decisions observed in free expression controversies. This claim is supported by the data, and there is nothing inherently wrong with it.

It is, however, an incomplete claim. Deviations from expected voting patterns happen frequently enough that more detailed analyses giving attention to the so-called legal elements of the enterprise are warranted, even recommended. After looking from both perspectives and in light of the data offered in this project, my position is that scholars interested in high court politics should give weight to both approaches. If nothing else, an external view sympathizer will gain context beyond the bottom line and better understand the limits of such dominant paradigms as the attitudinal conception of judging. Similarly, those who see judging as a particular form of bottom-up reasoning embedded in and constrained by the specific institutional context of the Court can gain a richer understanding of how the inevitable need for discretion in hard cases where 'the law runs out' opens the door for the insights of the external approaches. In that regard, I provisionally accept Feldman's more basic argument: "Both [approaches] are valid and…intertwine." (2005, 129).

Beyond the broader contributions noted in each chapter, it is hoped that this project will serve as a more comprehensive, empirical model for other scholars seeking to understand how the two approaches intertwine in practice. Despite my efforts here, I also recognize this account is underinclusive in that additional areas of the decision-making process can be leveraged in understanding the relative roles of ideology and legal structures. For example, another direction this project may take as it develops is accounting for the strategies employed by litigators as they

seek review and adjudication of freedom of expression controversies. Judges need law to justify decisions, no matter the grounds on which the decisions are actually reached. And in the case of the Supreme Court, those legal options are presented to the justices by litigators. These litigators have an institutional capacity "to think and act independently, and thus to challenge official state law…especially true within the United States' decentralized governmental and adversarial legal systems" (Wilson 2013, 22). Litigators transform claims into rights, and understanding their arguments sheds light on claims about the principled or power-politics views of law (Brigham 1987; McCann 1996).

Though it is true that judges ultimately decide the content of rights, they are only one type of what Ran Hirschl terms "strategic legal innovators" who "determine the timing, extent, and nature" of constitutional guarantees (Hirschl 2004, 43). Litigators provide information to the justices (McAtee and McGuire 2007), locate a case within a particular constitutional tradition (Wedeking 2010), and drive the agenda of the Supreme Court. A key difference between the Supreme Court and the other branches of the federal government is that unlike members of Congress and the President, the justices are relatively passive actors. They require litigators to articulate claims before them, to petition for certiorari in a complex, adversarial process (Perry 1991), and to sharpen arguments made in briefs during oral advocacy (Johnson et al. 2012).

Theories of judicial decision-making are explicitly judge-centric: concerned with the determinants of the behavior of judges. The general preferences of judges are inferred from observable behavior, as captured by the effect of a cause or package of causes within a single case or across a population of cases. It is true that litigators craft persuasive legal arguments in the course of Supreme Court adjudication, yet the longstanding realist assumption is that legal doctrine does not offer a definitive, correct answer in particular cases (Tamanaha 2010; Holmes

1897), especially due to the method by which the Supreme Court is constituted. For external view adherents, complicated free speech doctrinal rules such as public forum analysis, low v. high value speech, and speech v. conduct distinctions merely frame disputes for justices – it is somewhat problematic to suggest that law alone *caused* a result in a particular case or provided a definitively "correct" answer (Horwitz 2013).

Litigators then, whether motivated by winning a case for a particular client or seeking to establish case precedents favorable to broader partisan movements, must be intimately familiar with the preferences of the justices. It follows that litigators should be expected to craft strategies based on the perceived preferences and motivations of judges. While it is the case that lawyers need law (Price 2013), it is also true that judges need litigators to do more than simply frame cases within the appropriate area of law. If theories of judicial decision-making do reveal something about the actual preferences of justices, then it stands to reason that litigators will appeal to those preferences in order to increase the likelihood of winning cases.

Free Speech in U.S. Society

This dissertation is U.S. Supreme Court-centric. I also recognize that however important the role of the Court in establishing the contours of this area of law, freedom of expression is not a value cabined by high court politics. This recognition points toward additional, future research avenues. During the 2016 U.S. Presidential Election campaign, freedom of speech became a hotly contested issue. Donald Trump began his campaign, in part, on a platform opposed to liberal, politically correct (or "PC") culture in society (Itkowitz 2015). In the immediate aftermath of the election, the news cycle focus shifted to the spread of so-called "fake news" – a

term which now encompasses everything from stories that are literally untrue, to stories based on anonymous, unverified sources, to others that clearly reflect a set of partisan or ideological commitments (Holan 2016). Following inauguration on Jan. 20, 2017, President Trump has regularly been at odds with mainstream media outlets, in one example calling such outlets the "enemy of the people." (Jackson 2017).

Concurrent with President Trump's sparring, college campuses have witnessed new unrest in light of student efforts to organize talks by conservative or "alt-right" speakers. The violent response by Berkeley students and other members of the community to a scheduled Milo Yiannopoulos appearance in late January 2017 (Fuller and Mele 2017), followed by the cancellation of a scheduled talk by controversial political scientist Charles Murray at Middlebury College (Volokh 2017), have tested the broader social commitment to free expression in the American polity. Speech in protest of conservative guest speakers on college campuses has rarely taken the form of the counterspeech Mill argued would strengthen truth in his canonical account, and has at times been accompanied by violent conduct. Other American institutions and ideological orientations have not been immune to free speech controversies either, as members of the U.S. Senate learned in February 2017 following Senator Elizabeth Warren's attempt to read Coretta Scott King's letter against Jeff Sessions' nomination to a federal district judge position nearly a generation ago (Chappell 2017).

These controversies underscore the role of freedom of expression as a political value often put in the service of competing ideological and partisan camps. In the contemporary era, freedom of expression has at times been framed as in opposition to the goal of social and political equality for historically oppressed members of society. Though a number of these battles involve disputes between bitterly opposed, private associations and interests, in recent

years freedom of speech has also been a mainstay on the nation's legal agenda. The justices of the U.S. Supreme Court are ultimately charged with constituting the content of our First Amendment protection as individuals come into conflict with government actions. The opinions of the justices often remind us of why it is that freedom of expression is an important value beyond immediate instrumental use by political adversaries. Further interrogation of the social constitution of U.S. free expression is one direction this study may take in the future: Laura Beth Nielsen's (2004) assessment of the role of harassing speech of women in the public sphere and Josh Wilson's (2013) study of the tactics engaged in by pro-life protestors are potential models for moving beyond courts and to broader society.

Beyond the U.S. Context

In one notable respect, this dissertation is limited by the fact that the U.S. free expression tradition is only a single case study: It is an explanation for a single important event (the scope and coverage of contemporary free expression law) but it is unclear what, if anything, may be generalizable to the broader question of how constitutive rules of constitutional law structure judicial decision-making. Throughout the project, the Rehnquist Court Era (1994-2004) has served as a comparison point for inferential leverage, and to assess what relative changes the Roberts Court has brought to the constitution of freedom of expression law. I have also compared the merits agenda of the Roberts Court to its certiorari docket in an effort to assess various explanations for the Court's behavior.

Moving forward, I intend to compare the Roberts Court Era to a similarly situated tribunal to better understand the interplay between ideology, legal structures, and case outcomes.

The Supreme Court of Canada (SCC) frequently considers freedom of expression controversies brought under Section 2(b) of the Canadian Charter of Rights and Freedoms. A package of associated rights, Section 2 states that "Everyone has the following fundamental freedoms: (a) Freedom of conscience and religion; (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." Unlike the U.S. Constitution's First Amendment or accompanying text, the Canadian Charter also contains a clear qualification to this package of related rights: Section 1 states, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

As Richard Moon notes, Section 2(b) "roughly parallels the distinction in American jurisprudence between content restrictions and time, place, and manner restrictions." (Moon 2000, 34). In terms of the two-step analysis which first requires the Supreme Court of Canada to determine whether the government has infringed on the fundamental freedom of expression and then calls for scrutiny under Section 1 ("The court asks whether the restriction represents a substantial purpose, advances this purpose rationally, impairs the freedom no more than is necessary, and is proportionate to the impairment of freedom." (Moon 2000, 35)), the Court's analysis approximates the heightened and/or strict scrutiny regime adopted by the U.S. Supreme Court in cases where the government regulates speech on the basis of the message being conveyed.

Previous scholarship has also found another similarity between the Supreme Court of Canada and the U.S. Supreme Court: the justices political preferences emerge as statistically significant explanations for career voting patterns. Songer and Johnson (2007) found that the

party of the prime minister appointing a justice was positively correlated with career liberal voting percentages in cases involving economic disputes, though not in criminal or civil rights and liberties cases (928, 930-931). This effort stood in contrast to the work of Tate and Sittiwong (1989), who found appointee partisanship as one of a series of judicial attributes related to voting percentages. Still others have argued that the Supreme Court of Canada is not motivated primarily by partisanship: Alaire and Green (2009) assess the relationship between Segal-Cover score approximations for the Canadian justices and career liberalism voting percentages across five different case types – including Charter controversies – and find that "the attitudinal model of decision-making does not apply straightforwardly to the Supreme Court of Canada." (33-36, 43).

C.L. Ostberg and Matthew Wetstein provide an assessment of the relationship between the Canadian justices and votes in free expression cases from 1994-2003 and find that the Supreme Court of Canada's decisions in this area of law do not follow the same ideological patterns as U.S. cases (2007, 144). Left unanswered is whether this finding is time-bound, and whether that difference may be attributed to the differences in constitutional language and jurisprudential structures. Recent work on additional ideological dimensions of decisions by the U.S. Supreme Court beyond "liberal" and "conservative" suggests this is a topic that may benefit from a comparative study (Robinson and Swedlow 2015). Unsettled as this debate may be, the Supreme Court of Canada's record on freedom of expression would be an interesting comparison point for the U.S. Supreme Court in the modern era, particularly as the former has heard a number of cases related to campaign finance law and the practices of workers' unions. Earlier comparative work in terms of U.S.-Canada freedom of expression law focused on a narrow slice

of cases - hate speech and subversive speech – and at a an earlier point in the Canadian Court's life (Greenawalt 1992).

Early data collection in connection with the Global Free Speech Repository project at Syracuse University has also found that, despite the comparatively short period of development for Canadian free speech jurisprudence, the justices often cite to the U.S. Supreme Court in the course of their opinions. On multiple fronts, then, the debate between the external and internal perspectives may be fruitfully informed by a comparative angle in terms of patterns of decision-making across aggregations of votes, patterns across subsets of Canadian free expression law, and the role of extra-ideological factors including the conceptions of the judicial role held by the justices. It will also speak to Ran Hirschl's call for "a more holistic approach to the study of constitutions across polities." (Hirschl 2014, 15). Though in its early stages, this comparison represents a logical next step as this project moves toward publication as book length project.

Appendix A – Supplementary Data Collected on Federal Statutes, 1994-2015[47]

Case/Statute	Coding Choice Details
Turner Broadcast System, Inc. v. FCC, 512 U.S. 622 (1994) Cable Television Consumer Protection and Competition Act of 1992, 47 USCS 534 and 535 (the "must-carry" provisions); Pub. L. 102-385, 106 Stat. 1460	Decision: For FCC (Anti-Speech) Speaker: Turner Broadcast Systems; Cable companies (Conservative) Speech: General anti-regulation; pro-free market (Conservative) Suppressor: Dem/Liberal Note that Congress overrode Pres. Bush veto S.12 bill enacted by 73-18 (GOP: 27Y, 14N; Dems: 46Y, 4N); initial vote on bill (pre-veto) was 74-25 House vote on override: 308-114 (GOP: 77Y, 85N; Dems: 230Y, 29N)(similar pattern in initial vote on conference report) C.Q. Almanac suggests that this was a Democratic-led effort with a pro-consumer valence that attracted substantial, though less firm, GOP support. Close call, but coded as Dem/Liberal (171-183, 1993). Direction Coding: Liberal
Glickman v. Wileman Bros. and Elliott, Inc., 521 U.S. 457 (1997) Agricultural Marketing Agreement Act of 1937 (AMAA), P.L. 75-137	Decision: For Glickman (Anti-Speech) Speaker: Wileman Bros. and Elliott, fruit distribution business (Conservative) Speech: Advertising; compelled speech claim (Conservative) Suppressor: AMAA advertising fee assessments Direction Coding: Liberal
NEA v. Finley, 524 U.S. 569 (1998) National Foundation on the Arts and Humanities Act, As Amended in the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 738, 738-742.	Decision: For NEA (Anti-Speech) Speaker: Karen Finley, other performance/controversial artists (Liberal) Speech: Funding of controversial performance art (pro-feminism, etc.; anti-religious)(Liberal) Suppressor: Bipartisan (Williams/Coleman; 1990 Act) According to opinion, Congress adopted bipartisan "Williams/Coleman Amendment" that would not impose funding restrictions, but would provide agency guidance on acceptable decency standards Direction Coding: Conservative

[47] A number of cases during the Rehnquist Era were coded previously in Keck (2007), specifically Rehnquist decisions striking down federal statutes. I adopt those codes for cases included in this paper.

Ashcroft v. ACLU (I), 535 U.S. 564 (2002) Child Online Protection Act (COPA), 47 U.S.C. § 231 (Oct. 21, 1998, P.L. 105-277)	Decision: For Ashcroft (Anti-Speech) Speaker: ACLU and other individuals groups purveying adult entertainment Speech: Sex/Gender; adult pornography Suppressor: GOP/Conservative HR 3783: Voice vote (bipartisan) -Language of COPA rolled into Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 -Note that 2000 GOP Platform calls out pornography as "not a question of free speech," language about porn addicts in libraries and need to protect children (http://www.presidency.ucsb.edu/ws/index.php?pid=25849) No add'l information found; consistent w/GOP regime commitment Direction Coding: Conservative
Eldred v. U.S., 537 U.S. 186 (2003) Copyright Term Extension Act (CTEA), Pub. L. 105-298, § 102(b) and (d), 112 Stat. 2827-2828	Decision: For U.S. (Anti-Speech) Speaker: Artists, businesses, others making use of copyrighted works in public domain (Unspecified) Speech: Artistic (Liberal) Suppressor: Undetermined Introduced by Hatch (S. 505), discharged out of Senate Judiciary Committee, passed by suspension of rules in October, signed by President. No additional information available in almanac. Direction Coding: Unspecified/Undetermined
FEC v. Beaumont, 539 U.S. 146 (2003) Federal Election Campaign Act, § 441(b) – Corporation contribution ban	Decision: For FEC (Anti-Speech) Speaker: Elizabeth Beaumont and NC pro-life group (Conservative) Speech: Free market (contribution limits); pro-life advocacy (conservative) Suppressor: FECA regulations; campaign finance (Dem/Liberal) Direction Coding: Liberal

United States v. American Library Association, 539 U.S. 194 (2003) Children's Internet Protection Act (CIPA), 20 U.S.C.S. § 9134(f) and 47 U.S.C.S. § 254(h); Dec. 21, 2000, P.L. 106-554	Decision: For U.S. (Anti-Speech) Speaker: American Libraries (Liberal) Speech: No defined act (academic freedom)(Liberal) Suppressor: GOP/Conservative According to CQ, originating in amendment by Ernest Istook, R-OK, approved by House Education and Workforce Committees by voice vote… Congress.gov has CIPA originating w/Charles Pickering (R-MS) on June 8, 2000 McCain supported Senate version (S.97) though little information available beyond six of seven co-sponsors being Republican (exception was Fritz Hollings, SC (D)). Adopted as part of Consolidated Appropriations Act of 2001 Consistent w/2000 GOP Party Platform language (http://www.presidency.ucsb.edu/ws/index.php?pid=25849)
Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) Child Online Protection Act (COPA), 47 U.S.C. § 231 (Oct. 21, 1998, P.L. 105-277)	Decision: For ACLU (Pro-Speech) Speaker: ACLU and other individuals groups purveying adult entertainment Speech: Sex/Gender; adult pornography Suppressor: GOP/Conservative HR 3783: Voice vote (bipartisan) -Language of COPA rolled into Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 -Note that 2000 GOP Platform calls out pornography as "not a question of free speech," language about porn addicts in libraries and need to protect children (http://www.presidency.ucsb.edu/ws/index.php?pid=25849) No add'l information found; consistent w/GOP regime commitment

Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005) Beef Promotion and Research Act of 1985 Dec. 23, 1985, P.L. 99-198	Decision: For Johanns (Anti-Speech) Speaker: Conservative (livestock businesses) Speech: Compelled; commercial (objection to fees); Conservative Suppressor: Bipartisan Close call: Act passed House (HR 2100) on Dec. 18, 1985 R: 131-47 D: 194-49 Senate: 55-38 R: 33-15 D: 22-23 According to 1985 CQ Weekly (Index edition), virtually none of the debate focused on the Beef Promotion Act inclusion (never mentioned). Close, but coding as bipartisan.
Rumsfeld v. FAIR, 547 U.S. 47 (2006) Solomon Amendment, 10 U.S.C. Section 983 (b)(1) National Defense Authorization Act for FY 1996	Decision: Against FAIR (Anti-Speech) House Amendment 569 to National Defense Authorization Act of 1995 (H.R.4301), sponsored by Rep. Gerald Solomon, R (NY-22) Purpose: An amendment to prohibit the Defense Department from making grants to, or contracting with, educational institutions that deny access to military recruiters. 103rd Congress HoR Roll Call no. 191 (5/23/1994) R: 162/1/14 (Majority GOP Support) D: 109/124/27 (Minority Dem Support) I: 0/1/0 Source: http://clerk.house.gov/evs/1994/roll191.xml (last accessed 8/11/2015) DOD policy extended to other federal funds in 1997, 1999; post-2001 DOD policy codified by Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (P.L. 108-375); H.R. Rep. No. 108-443 From 1994 CQ Almanac, p. 58-H: Adopted in the Committee of the Whole 271-126: R 162-1; D 109-124 (N.D. 55-101, S.D. 54-23); I 0-1; May 23, 1994.

Rumsfeld v. FAIR, 547 U.S. 47 (2006) [continued]	Provision: (Sec. 552) Requires that military recruiters be given access to college or university campuses and students that is at least equal in quality and scope to the access provided to any other employer. Includes funds made available for the Department of Homeland Security, the National Nuclear Security Administration of the Department of Energy, and the Central Intelligence Agency (CIA) among the funding sources that could be terminated if an institution is found to have a policy of preventing military recruiter or Senior ROTC unit access. GOP administration policy; no separate amendments; vote on the final bill was bipartisan (no add'l info in 2004 CQ Almanac). Source: http://clerk.house.gov/evs/2004/roll528.xml (Senate gave unanimous consent) Partisan Suppressor Coding: GOP Spaeth Ideological Direction: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity) Infrequently litigated statutes
Randall v. Sorrell, 548 U.S. 230 (2006) Vermont Act 64 June 26, 1997	Democratic Regime Commitment (Campaign Finance) https://www.sec.state.vt.us/elections/election-results/election-results-search.aspx?primaryFilterId=12449&secondaryFolderName=1996+Election+Results&q= HoR (6/12/1997) 121Y/17N D: 78Y/5N R: 36Y/11N O: 4Y/1N NV: 10 Senate (5/29/1997) 20Y/9N D: 14Y/0N R: 3Y/9N D/R: 2Y/0N http://www.leg.state.vt.us/docs/1998/journal/SJ970612.htm Y: Ankeney (D), Backus (D), Bartlett (D), Costes (R), Cummings (D), Doyle (R), Greenwood (R), Hallowell (D), Hooker (D), Illuzzi (R), Kittell (D), MacDonald (D), Mazza (D/R), McCormack (D), Ptashnik (D), Ready (D), Rivers (D), Sears (D), Shumlin (D/R), Spaulding (D)

Randall v. Sorrell, 548 U.S. 230 (2006) [continued]	N: Bahre (R), Bloomer (R), Brownell (R), Canns (R), Ehrich (R), Ide (R), Maynard (R), Riehle (R), Snelling (R) Partisan Suppressor: Democratic (CF regime commitment) http://www.presidency.ucsb.edu/ws/index.php?pid=29612 Spaeth DD: Conservative Issue/Legal Provision: First Amendment Campaign Spending (Governmental Corruption), Constitutional Amendment: First Amendment (speech, press, assembly)
Garcetti v. Ceballos, 547 U.S. 410 (2006) Discretion of L.A. District Attorney	Democratic D.A. (Garcetti) Partisan Suppressor: Democratic Speaker: ADA/Deputy Att'y, Democratic Speech: Whistleblower Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, assembly)
Beard v. Banks, 548 U.S. 521 (2006) PA Prison Policy (LTSU 2)	Republican Regime commitment (Law and Order); Prison Officials Partisan Suppressor: GOP Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, assembly)
Morse v. Frederick, 551 U.S. 393 (2007) Juneau School Board/Principal's Actions	Partisan Suppressor: Liberal (school administrator) Spaeth DD: Conservative Issue/Legal Provision: First Amendment (Protest demonstrations based on First Amendment guarantees); Constitutional Amendment: First Amendment (speech, press, assembly)

Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007) §42.17.760 (hereinafter §760), which is a provision of the Fair Campaign Practices Act (Affirmative Consent by nonmember required before agency shop fees spent on election-related purposes)	Republican Regime commitment (anti-union) (http://www.presidency.ucsb.edu/ws/index.php?pid=78545) Partisan Suppressor: GOP State initiative approved by voters in 1992 **Information not available on Wash. Sec. of State Historical Election Results page** Spaeth DD: Conservative Issue/Legal Provision: Unions (union or closed shop: includes agency shop litigation); Constitutional Amendment: First Amendment (speech, press, and assembly)
Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442 (2008) Washington Initiative I-872	Ruling against Washington State Republican AND Democratic Parties, Grange Party is a populist component of Republican Party Coding: Bipartisan/Undetermined Spaeth DD: Liberal Issue/Legal Provision: Civil Rights (Ballot Access of Candidates and Political Parties); Constitutional Amendment: First Amendment (association)
U.S. v. Williams, 553 U.S. 285 (2008) 18 U. S. C. §2252A(a)(3)(B); The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT) of 2003 RC 127 (Conference Report) S. 151 (Conference Report)	House R.C. 127 (Conference Report): R: 225/1 D: 175/23/2 present (N.D. 123-19, S.D. 52-4) I: 0/1 NV: 8 Senate (S. 151; R.V. 132; 4/10/03): 98 YEA/0 NEA/2 NV Source: https://www.congress.gov/bill/108th-congress/senate-bill/151/actions (unamended Senate Bill also unanimous vote) Partisan Suppressor: Bipartisan Spaeth DD: Conservative Issue/Legal Provision: First Amendment (obscenity, federal); Constitutional Amendment: First Amendment (speech, press, assembly)

N.Y. State Bd. of Elections v. Torres, 552 U.S. 196 (2008) New York electoral system for choosing Supreme Court Justice nominees; Act of May 2, 1921, ch. 479, §§45(1), 110, 1921 N. Y. Laws 1451, 1454, 1471.	Democratic Candidates, but decision for Democratic Party New York electoral system for choosing Supreme Court Justice nominees; Act of May 2, 1921, ch. 479, §§45(1), 110, 1921 N. Y. Laws 1451, 1454, 1471. Partisan Suppressor: Bipartisan/Unknown for now Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (association)
Ysursa v. Pocatello Education Ass'n, 555 U.S. 353 (2009) Idaho state law §44–2004(2), banning union checkoffs for political activities.	Republican Regime commitment (anti-union, right to work) Partisan Suppressor: GOP (http://www.presidency.ucsb.edu/ws/index.php?pid=78545) Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, and assembly)
Pleasant Grove City v. Summum, 555 U.S. 460 (2009) Pleasant Grove City's rejection of religious minority monument	Gnostic Christian: Religious Minority (left-wing) Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, and assembly) Partisan Suppressor: Code as Bipartisan/Unknown for now
Locke v. Karass, 555 U.S. 207 (2009) Maine State Law, Use of Union Dues	Pro-Union (Democratic Regime Commitment) Partisan Suppressor: Democratic (http://www.presidency.ucsb.edu/ws/index.php?pid=78283) Spaeth DD: Liberal Issue/Legal Provision: Unions (union or closed shop, includes agency shop litigation); Constitutional Amendment: First Amendment (speech, press, and assembly)

U.S. v. Stevens, 559 U.S. 460 (2010) (PL 106-152); 1999	18 U. S. C. §48 Purpose: Amends the Federal criminal code to prohibit, and set penalties for, knowingly creating, selling, or possessing a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain. Makes an exception for any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. H.R. 1887 (RC No. 514; 10/19/1999): R: 177/35 D: 194/7 (N.D. 146-3, S.D. 48-4) I: 1 NV: 19 Senate: Unanimous Voice (11/19/1999) Introduced by Gallegly, R-CA; no other information found in CQ Partisan Suppressor: Bipartisan **Note that Stevens' book, *Velvet and Steel*, noted that pit fighting "should remain illegal," brief frames him as somebody interested in educating and training pit bulls for salutary purposes http://www.scotusblog.com/wp-content/uploads/2009/07/08-769bs.pdf Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Infrequently litigated statutes
Agency for International Development v. Alliance for Open Society International, Inc., 133 S.Ct. 2321 (2013) U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (U.S.C.S. Section 7601)	H.R. 1298 (RC 158; 5/1/2003): R: 183/40 D: 191/1 (N.D. 140-0, S.D. 51-1) I: 1/1 NV: 19 Senate: Voice Vote (5/16/2003) Source: https://www.congress.gov/bill/108th-congress/house-bill/1298/actions?q=%7B%22search%22%3A%5B%22%5C%22United+States+Leadership+Against+HIV%5C%5C%5C%2FAIDS%2C+Tuberculosis%2C+and+Malaria+Act+of+2003%5C%22%22%5D%7D&resultIndex=1 Partisan Suppressor: GOP

Agency for International Development v. Alliance for Open Society International, Inc., 133 S.Ct. 2321 (2013) [continued]	The challenged provision was the Christopher Smith (R – N.J.) Amendment requiring any group receiving funds pledge not to support prostitution or sex trafficking. According to CQ Almanac 2003, "The vote was the only clear Republican win in the markup" (10-6). Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, assembly)
Davis v. FEC, 554 U.S. 724 (2008) Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 109, 2 U. S. C. §441a–1(a)	H Amendment 422 – "Millionaire's" -According to CQ Almanac, amendment offered by Shelly Moore Capito, raised hard money contribution limits to gain support for Shays-Meehan Voice Vote, 2/14/02 Source: https://www.congress.gov/bill/107th-congress/house-bill/2356/amendments?q=%7B%22search%22%3A%5B%22%5C%22Bipartisan+Campaign+Reform+Act+of+2002%5C%22%22%5D%7D&resultIndex=1 BCRA H.R. 2356 (R.C. 34) R: 41/176 D: 198/12 (N.D. 150-6, S.D. 48-6) I: 1/1 NV: 6 Senate (R.V. 54; 3/20/2002): R: 11/38 D: 48/2 (N.D. 40-1, S.D. 8-1) I: 1 Source: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=107&session=2&vote=00054 Partisan Suppressor: Democratic Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Campaign Spending (Governmental Corruption); Infrequently litigated statutes; Constitutional Amendment: First Amendment (speech, press, and assembly)

U.S. v. Alvarez, 132 S.Ct. 2537 (2012) Stolen Valor Act (2006) PL 109-437 18 U.S.C.S. Section 704(b)	S.1998 (9/7/2006): Unanimous Consent HoR (12/6/2006): Voice Vote Per CQ Almanac: Introduced by Kent Conrad, D – N.D. on Nov. 10, 2005 Partisan Suppressor: Bipartisan Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Infrequently litigated statutes
Milavetz, Gallop & Milavetz, P.A., v. U.S., 559 U.S. 229 (2010) Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 PL 109-8	S. 256 (3/10/2005; RV 44): R: 55/0 D: 18/25 I: 1/0 NV: 1 HoR (S.256; RC 108; 4/14/2005) R:229/0/0 D:73/125/0 I:0/1/0 Partisan Suppressor: Bipartisan (note that while the overall bill was generally a GOP leadership effort – closed rule, etc. – the provisions at issue here are generally consumer protection ones. No separate votes found, but would seem to be in line with Democratic/liberal support). Spaeth DD: Liberal Issue/Legal Provision: Attorneys (Attorneys, Commercial Speech); Federal Statute: Bankruptcy Code, Act or Rules, or Reform Act of 1978

Harris v. Quinn, 2014 U.S. LEXIS 4504 (2014) Gov. Blagojevich's Executive Order 2003-08, and subsequent amendment to the Public Labor Relations Act (PLRA. Pub. Act no. 93-204, §5, 2003 Ill. Laws p. 1930.), which unionized PAs under the Illinois Home Services program.	Democratic Governor, Pro-Union (Democratic Regime Commitment), Cannot find votes counts for legislature Partisan Suppressor: Democratic (http://www.presidency.ucsb.edu/ws/index.php?pid=78283; http://www.presidency.ucsb.edu/ws/index.php?pid=101961#restoring) Spaeth DD: Conservative Issue/Legal Provision: Unions (Labor-management disputes: Right to Organize); Constitutional Amendment: First Amendment (speech, press, and assembly)
McCullen v. Coakley (2014) 2007 Amendment to Massachusetts Reproductive Health Care Facilities Act, establishing 35-foot buffer zone	Democratic Regime commitment (pro-choice) (http://www.presidency.ucsb.edu/ws/index.php?pid=101962) Partisan Suppressor: Democratic (pro-choice; Democratic Regime commitment) Spaeth DD: Conservative Issue/Legal Provision: Privacy (Abortion: Including Contraceptives); Constitutional Amendment: First Amendment (speech, press, and assembly)
FCC v. Fox Television Stations, 132 S.Ct. 2307 (2012) 2001 F.C.C. Policy Statement on Indecency (extension of Title 18 U.S.C. § 1464 bans the broadcast of "any obscene, indecent, or profane language;" failure to give fair notice to broadcasters of what counts as patently offensive and subject to broadcaster liability.	Michael Powell: R seat (Clinton, 1997); Chair (Bush, 2001) Susan Ness: Clinton, 1994 Gloria Tristani: D (Clinton, 1997) Harold W. Furchtgott-Roth: Clinton, 1997 Coded: Bipartisan/Unknown for now Spaeth DD: Liberal Issue/Legal Provision: Due Process (Miscellaneous); Constitutional Amendment: Fifth Amendment (Due Process) Cert Grant: (131 S.Ct. 3065 (2011)). Sotomayor took no part in grant decision. Cert explicitly notes Court limited to considering First or Fifth Amendment violated by FCC indecency regulations.

Brown v. Entertainment Merchants Association, 131 S.Ct. 2729 (2011) California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§ 1746-1746.5	9/8/05, Floor Vote: 66 AYE/7 NO/6 NV Partisan Composition of Assembly was majority Democratic Gov. was Schwarzenegger (R), Brown (D) became party to suit after winning Partisan Suppressor: Dem/Liberal for now Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, and assembly)
Arizona Free Enterprise Club's Freedom PAC v. Bennett, 131 S.Ct. 2806 (2011) Arizona Citizens Clean Elections Act (Ariz. Rev. Stat. Ann. § 16-940 *et seq*.)	Citizens' referendum (Prop 200), passed in 1998 following wave of scandals Passed: 481,963/459,373 (941,336) (51.20%/48.80%) McCain and Jane Dee Hull also on ballot, both Republicans (Turnout ~ 45%) Partisan Suppressor: Democratic (regime commitment) (http://www.presidency.ucsb.edu/ws/index.php?pid=29612) Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Campaign Spending (Governmental Corruption); Constitutional Amendment: First Amendment (speech, press, and assembly) http://www.azsos.gov/election/1998/General/Canvass1998GE.pdf
Sorrell v. IMS Health, Inc., 131 S.Ct. 2653 (2011) Vermont Stat. Ann. tit. 18, § 4631(d)	Prescriber Data provision http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=18&Chapter=091&Section=04631 Vote data not found Coded: Bipartisan/Unknown for now Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Commercial Speech Excluding Attorneys; Constitutional Amendment: First Amendment (speech, press, assembly)

Nev. Comm'n on Ethics v. Carrigan, 131 S.Ct. 2343 (2011) Nevada Ethics in Government Law	Michael Carrigan –Member of Sparks, NV City Council (Involved in GOP) Source: http://www.bloomberg.com/research/stocks/private/person.asp?personId=9104740&privcapId=1052525&previousCapId=1052525&previousTitle=Truckee%20Meadows%20Water%20Authority Nevada Ethics in Government Law – mid-1970s anti-corruption reforms Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, and assembly)
Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 18 U.S.C.S. § 2339B	AEDPA HoR (18 April 1996), R.C. 126 (Conference Report) R: 188Y/46N D: 105Y/86N I: 0Y/1N NV: 7 Senate (17 April 1996) 91Y/8N R: 51Y/1N D: 40Y/7N NV: 1 IRTPA S.2845 (Scienter requirement, defining "expert advice" language in enrolled bill) **H.R. 10 (Amendment to Senate Bill, insisted upon by House; also contains language pursuant to amending 2339B(a))** **R.C. 523 (10/8/2004)** **R: 213/8/6** **D: 69/125/11** **I: 0/1/0** Agreement to Conference Report HoR (R.C. 544; 12/7/2004) R: 152/67/8

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) [continued]	D: 183/8/14 I: 1/0/0 Senate (R.V. 216; 12/8/2004) 89Y/2N/9NV (Clearly bipartisan) Partisan Suppressor: Bipartisan *Language to change 2339B was in H.R. 10, adopting 9/11 recommendations, but all other parts of the eventual law approved with bipartisan majorities (note Stone 2006, wartime suppression of speech usually bipartisan); no specific amendments in record for language in question Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Federal or State Internal Security Legislation: Smith, Internal Security, And Related Federal Statutes; Infrequently litigated statutes; Constitutional Amendment: First Amendment (speech, press, and assembly); Constitutonal Amendment: First Amendment (association)
Doe v. Reed, 561 U.S. 186 (2010) Washington Public Records Act (PRA), Wash. Rev. Code § 42.56.001	Washington HoR (H.B. 1133, 4 March 2005) 96Y/0N Washington Senate (not found) Signed by Christine Gregoire (D) http://search.leg.wa.gov/search.aspx#document Coding: Bipartisan Spaeth DD: Conservative Issue/Legal Provision: Privacy, Freedom Information Act and Related Federal or State Statutes or Regulations; Constitutional Amendment: First Amendment (speech, press, and assembly)
Snyder v. Phelps, 131 S.Ct. 1207 (2011) Jury Finding of IIED for Snyder	Minority/Extreme Right Christian Group (Conservative) Civil jury awards for IIED (Bipartisan/Undetermined) Coding: Bipartisan/Unknown for now Spaeth DD: Liberal Issue/Legal Provision: Protest Demonstrations/Demonstrations and Other Forms of Protest Based on First Amendment Guarantees; Constitutional Amendment: First Amendment (speech, press, assembly)

Borough of Duryea v. Guarnieri, 131 S.Ct. 2488 (2011) Police Officer bringing union grievance, subsequent issuing of directives by Duryea Council	Police Chief (Republican, Law and Order), Anti-union (Republican regime commitment) council directives Partisan Suppressor: Conservative/GOP (Anti-union directives) Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (petition clause)
Reichle v. Howards, 132 S.Ct. 2088 (2012) Actions of Secret Service Agents, detaining Reichle for probable cause	Secret Service for GOP VP (Republican), Republican regime commitment (Law and Order) or undetermined? Partisan Suppressor: GOP Spaeth DD: Conservative Issue/Legal Provision: Civil Rights, Liability, Civil Rights Acts (Liability, Governmental and Liability, Nongovernmental, Cruel and Unusual Punishment, Non-death Penalty); Constitutional Amendment: First Amendment (speech, press, and assembly)
Golan v. Holder, 132 S.Ct. 873 (2012) Uruguay Round Agreements Act	HoR (29 Nov 1994), R.C. 507 288Y/146N D: 167Y/89N R: 121Y/56N I: 0Y/1N Senate (1 Dec 1994), R.C. 329 76Y/24N D: 41Y/14N R: 35Y/10N Coding: Bipartisan Spaeth DD: Conservative Issue/Legal Provision: Economic Activity, Patents and Copyright: Copyright; Constitution, Article Section 8, Paragraph 8 (patent and copyright clause); Constitutional Amendment: First Amendment (speech, press, and assembly)

Wood v. Moss, 2014 U.S. LEXIS 3614 (2014) Actions of Secret Service Agents, relocating anti-Bush protestors	Secret Service detail for GOP President…strictly from association, GOP (but also Republican regime commitment to law and order) Would the Court have ruled the other way if it were a Democrat? Seems extremely unlikely. Partisan Suppressor Coding: GOP Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Protest Demonstrations: Demonstrations and Other Forms of Protest Based on First Amendment Guarantees; Constitutional Amendment: Fourth Amendment
Lane v. Franks, 2014 U.S. LEXIS 4302 (2014)	Franks, President of Community College; Lane = fired employee for testifying in federal investigation Partisan Suppressor Coding: Liberal Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, and assembly)
Citizens United v. FEC, 558 U.S. 310 (2010) Section 203(c) of Bipartisan Campaign Reform Act PL 107-155	BCRA HoR (14 Feb 2002) – Shays/Meehan (R.C. 34) 240Y/189N/6NV R: 41Y/176N D: 198Y/12N I: 1Y/1N Senate (20 Mar 2002) 60Y/40N R: 11Y/38N D: 49Y/2N Partisan Suppressor: Democratic Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Campaign Spending (Governmental Corruption); Constitutional Amendment: First Amendment (speech, press, and assembly); Infrequently litigated statutes

Wisconsin Right to Life v. FEC, 551 U.S. 449 (2007)	BCRA HoR (14 Feb 2002) 240Y/189N/6NV R: 41Y/176N D: 198Y/12N I: 1Y/1N Senate (20 Mar 2002) 60Y/40N R: 11Y/38N D: 49Y/2N Partisan Suppressor: Democratic Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Campaign Spending (Governmental Corruption); Federal Statute (Federal Election Campaign); First Amendment, Miscellaneous (Comity)
Tennessee Secondary School Athletic Association v. Brentwood Academy, 551 U.S. 291 (2007)	Against school district Coding: Bipartisan/Unknown Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Miscellaneous (Comity); Constitutional Amendment: First Amendment (speech, press, and assembly)
Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010) Hastings CoL "Take All Comers" Policy for Registered Student Organizations	Hastings College of Law (Democratic), Christian group right to Association (Republican) Partisan Suppressor: Democratic (Equality regime commitment) Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Free Exercise of Religion; Constitutional Amendment: First Amendment (free exercise of religion) Spaeth DD: Liberal Issue/Legal Provision: Civil Rights (Sex Discrimination); Constitutional Amendment: Fourteenth Amendment (equal protection)

McCutcheon v. FEC, 2014 U.S. LEXIS 2391 (2014) Aggregate Contribution Limits of Federal Election Campaign Act (FECA), as updated by BCRA 2 U.S.C.S. § 441a(a)(3)	FECA (1971) Enacted on Feb. 7, 1972 as PL 92-225. Senate: S 382 Passed on Aug. 5, 1971 (Senate Vote 182); 88Y - 2N (both Arizona Republicans). Democrats: 51Y - 0N Republicans: 37Y - 2N (Information above from the 1971 CQ Almanac, Vol. XXVII (92nd Congress, 1st Session): 883-896 "Major Congressional Action, and 31-S "CQ Senate Votes") HoR: HR 11060 Passed on Nov. 30, 1971. Bill was nearly the same as S 382. Roll Call 283; 372Y - 23N. Republicans: 153Y - 12N Democrats: 219Y - 11N (Northern Dems 151Y - 2N, Southern Dems 68Y - 9N) (HoR information from Congressional Quarterly Weekly Report, Vol. XXIX, no. 50 (Dec. 11, 1971): 2580.) BCRA HoR (14 Feb 2002) 240Y/189N/6NV R: 41Y/176N D: 198Y/12N I: 1Y/1N Senate (20 Mar 2002) 60Y/40N R: 11Y/38N D: 49Y/2N Partisan Suppressor: Democratic Spaeth DD: Conservative Issue/Legal Provision: First Amendment, Campaign Spending (Governmental Corruption); Constitutional Amendment: First Amendment (speech, press, and assembly)
American Tradition Partnership v. Bullock, 132 S.Ct. 2490 (2012) Montana Campaign Finance Law on Corporate Contributions	Application of Citizens United holding to states, Democratic Regime Commitment (anti-corporate spending in judicial elections) (http://www.presidency.ucsb.edu/ws/index.php?pid=29612) Coding: Democratic Spaeth DD: Liberal Issue/Legal Provision: First Amendment, Commercial Speech, Excluding Attorneys; Constitutional Amendment: First Amendment (speech, press, and assembly)

Knox v. SEIU, Local 1000, 132 S.Ct. 2277 (2012)	Republican Regime Commitment (Anti-union) (http://www.presidency.ucsb.edu/ws/index.php?pid=101961#restoring) Coding: Democratic Spaeth DD: Conservative Issue/Legal Provision: Unions, union-union member dispute (except as pertains to union or closed shop); Constitutional Amendment: First Amendment (speech, press, assembly)

Appendix B – INUS Condition Combinations and Classifications

Identity of Speaker (A)	Type of Speech (B)	Speech Suppressor (C)	Coding of Pro-Speech (Anti-Speech) Holdings
Liberal	Liberal	Liberal/Democratic	Liberal(Conservative)
Liberal	Liberal	Undetermined/Bipartisan	Liberal(Conservative)
Liberal	Liberal	Conservative/GOP	Liberal(Conservative)
Liberal	Conservative	Liberal/Democratic	Conservative(Liberal)
Liberal	Conservative	Undetermined/Bipartisan	Undetermined
Liberal	Conservative	Conservative/GOP	Liberal(Conservative)
Liberal	Undetermined	Liberal/Democratic	Undetermined
Liberal	Undetermined	Undetermined/Bipartisan	Undetermined
Liberal	Undetermined	Conservative/GOP	Liberal(Conservative)
Undetermined	Liberal	Liberal/Democratic	Undetermined
Undetermined	Liberal	Undetermined/Bipartisan	Undetermined
Undetermined	Liberal	Conservative/GOP	Liberal(Conservative)
Undetermined	Conservative	Liberal/Democratic	Conservative(Liberal)
Undetermined	Conservative	Undetermined/Bipartisan	Undetermined
Undetermined	Conservative	Conservative/GOP	Undetermined
Undetermined	Undetermined	Liberal/Democratic	Undetermined
Undetermined	Undetermined	Undetermined/Bipartisan	Undetermined
Undetermined	Undetermined	Conservative/GOP	Undetermined
Conservative	Conservative	Liberal/Democratic	Conservative(Liberal)
Conservative	Conservative	Undetermined/Bipartisan	Conservative(Liberal)
Conservative	Conservative	Conservative/GOP	Conservative(Liberal)
Conservative	Undetermined	Liberal/Democratic	Conservative(Liberal)
Conservative	Undetermined	Undetermined/Bipartisan	Undetermined
Conservative	Undetermined	Conservative/GOP	Undetermined
Conservative	Liberal	Liberal/Democratic	Conservative(Liberal)
Conservative	Liberal	Undetermined/Bipartisan	Undetermined
Conservative	Liberal	Conservative/GOP	Liberal(Conservative)

Appendix C – Ideological Content of Roberts Court Free Expression Cases and Direction Assignments

Case (Claimant)	Speaker Identity	Speech Suppressor	Nature of Expression	SCOTUS Decision	Composite Coding of Decision Direction	SCDB Coding of Decision Direction	Epstein, Parker, Segal Decision Direction	Areas of Disagreement
WRTL (I)	Pro-Life, Non-profit Interest Group (Conservative)	BCRA, § 203 (Dem/Liberal)	Electoral Speech, Criticism of Democratic U.S. Senators (Conservative)	For WRTL (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	Suppressor (EPS = No Direction); SCDB Direction
FAIR	Law School Consortium (Liberal)	Solomon Amendment, 10 U.S.C. Section 983(b)(1) (Bipartisan)	Equality; Protesting "Don't Ask, Don't Tell" (Liberal)	Against FAIR (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Ceballos	Deputy District Attorney Ceballos; Gov't Employee/Lawyer (Liberal)	District Attorney Gil Garcetti (Dem/Liberal)	Gov't Employee Speech; Whistleblowing (Liberal)	Against Ceballos (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	Suppressor (EPS = Conservative)
Randall	Vermont Right to Life, Vermont Republican State Committee; Vermont Libertarian Party (Conservative)	Vermont Pub. Act 64 (2002) (Dem/Liberal)	Free Market; Protesting Contribution Limits (Conservative)	For Randall (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	Suppressor (EPS = No Direction)
Banks	Prison Inmate (Liberal)	LTSU Policy (GOP/Conservative)	Equality Speech; Access to Information (Liberal)	Against Banks (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	

Washington Education Association	Union (Liberal)	WA Fair Campaign Practices Act, Section 760 (GOP/Conservative)	Union Speech; Protesting Affirmative Consent requirements (Liberal)	Against WEA (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Brentwood Academy	School Employee (Liberal)	State Athletic Association (Undetermined)	Faculty Speech; Recruitment Letter (Undetermined)	Against Brentwood (Anti-Speech)	Undetermined	Conservative	Liberal (Conservative Claimant)	Speaker (EPS=Conservative); SCDB
Frederick	High School Student (Liberal)	School Official (Liberal)	Student Speech; Pro-drug (Liberal)	Against Frederick (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Wisconsin Right to Life (II)	Pro-Life, Non-profit Interest Group (Conservative)	BCRA, § 203 (Dem/Liberal)	Electoral Speech, Criticism of Democratic U.S. Senators (Conservative)	For WRTL (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	Suppressor (EPS=No Direction); SCDB
Lopez-Torres	Non-establishment, Democrat (Liberal)	N.Y. State Act of 1921, ch. 479, sections 45(1), 110; Parties choose candidates (Undetermined)	Electoral Speech; Equality of Ballot Access (Liberal)	Against Lopez-Torres (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Washington State Republican Party	Republican, Democratic, Libertarian Parties (Undetermined)	WA Initiative (I-872); Candidates declare affiliation (Undetermined)	Electoral Speech; Restricting Ballot Access (Conservative)	Against WSRP et al. (Anti-Speech)	Undetermined	Conservative	Liberal (Conservative Claimant)	Speaker (EPS=Conservative); SCDB
Williams	Purveyor of Child Pornography (Undetermined)	PROTECT Act (18 U.S.C. 2252A(a)(3)(B) (Bipartisan)	Extremist Speech; Pictures of Children Engaged in Sexual Acts (Undetermined)	Against Williams (Anti-Speech)	Undetermined	Conservative	Conservative (Liberal Claimant)	Speaker (EPS=Liberal); Suppressor (EPS=Conservative); SCDB

Davis	Democratic Candidate, NY House District (Liberal)	Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 109, 2 U. S. C. §441a–1(a) (Dem/Liberal)	Free Market; Protesting "Millionaire's Amendment" Contribution Formula (Conservative)	For Davis (Pro-Speech)	Conservative	Conservative	Liberal Claimant (Liberal)	
Locke	Union Non-Members (Conservative)	Maine State Employees Collective Bargaining Agreement (Dem/Liberal)	Anti-union Speech; Objection to paying fee for national collective bargaining (Conservative)	Against Locke (Anti-Speech)	Liberal	Liberal	Liberal (Conservative Claimant)	
Pocatello Education Association	Public Employee Union (Liberal)	Idaho Right to Work Act, Idaho state law §44–2004(2) (GOP/Conservative)	Union Speech; Protesting prohibition on collecting union dues through paychecks (Liberal)	Against Pocatello (Anti-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	
Summum	Religious Minority, Gnostic Christians (Liberal)	Pleasant Grove City Council's rejection of Seven Aphorisms while accepting 10 Commandments Monument (GOP/Conservative)	Religious Speech; Placing a non-mainstream monument in public park (Liberal)	Against Summum (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	Suppressor (EPS=Conservative)
Citizens United	Non-profit, interest group (Conservative)	BCRA, Section 203(c) (Dem/Liberal)	Electoral Speech; Documentary critical of Hillary Clinton (Conservative)	For Citizens United (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	Suppressor (EPS=No Direction)
Milavetz, Gallop, and Milavetz	Law Firm (Liberal)	Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Bipartisan)	Commercial Speech, Advertising (Conservative)	Against Milavetz (Anti-Speech)	Undetermined	Liberal	Conservative (Liberal Claimant)	SCDB

Stevens	Distributor of Videos featuring animal cruelty (Undetermined)	18 U.S.C.S. § 48 (Bipartisan)	Extremist Speech; Depictions of animal cruelty (Undetermined)	For Stevens (Pro-Speech)	Undetermined	Liberal	Conservative (Conservative Claimant)	Speaker (EPS=Conservative); Suppressor (EPS=Liberal); SCDB
Humanitarian Law Project	Non-profit, human rights organization (Liberal)	Antiterrorism and Effective Death Penalty Act of 1996; (AEDPA) 18 U.S.C. § 2339B and Amendments (Bipartisan)	Academic Speech; Instructing terror groups on how to peacefully use law to resolve disputes (Liberal)	Against HLP (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	Suppressor (EPS=Conservative)
John Doe #1	Private individuals opposed to same-sex equality (Conservative)	Washington Public Records Act (PRA), Wash. Rev. Code § 42.56.001 (Dem/Liberal)	Anti-Equality Speech; Compelled disclosure of petition signatories (Conservative)	Against Doe (Anti-Speech)	Liberal	Liberal	Liberal (Conservative Claimant)	
Christian Legal Society	Christian Student Organization (Conservative)	Hastings College of Law "Take All Comers" Policy (Dem/Liberal)	Anti-Equality Speech; Excluding students on basis of sexual orientation and religion (Conservative)	Against CLS (Anti-Speech)	Liberal	Undetermined	Authors Have Not Coded	SCDB
Phelps	Far-right, Christian Church (Conservative)	Jury Verdict for tort of IIED; Damages Award (Undetermined)	Anti-Equality Speech; Denouncing homosexuals (Conservative)	For Phelps (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB
Carrigan	Elected member of Sparks, NV City Council holding GOP leadership position (Conservative)	Nevada Ethics in Government Law (Dem/Liberal)	Free Market; Carrigan's vote in favor of economic development owned by friend (Conservative)	Against Carrigan (Anti-Speech)	Liberal	Conservative	Liberal (Conservative Claimant)	Suppressor (EPS=No Direction); SCDB

Guarnieri	Chief of Police of Duryea, PA (Conservative)	Council Directives relating to Guarnieri's job (Undetermined)	Gov't Employee Speech; Whistleblower/ Union (Liberal)	Against Guarnieri (Anti-Speech)	Undetermined	Conservative	Conservative (Liberal Claimant)	Speaker (EPS=Liberal); Suppressor (EPS=Conservative); SCDB
IMS Health, Inc.	Corporation of pharmaceutical companies and data miners (Conservative)	Vermont Statute Ann. Tit. 18, Section 4631(d); protection of prescriber-identifying info (Undetermined)	Commercial Speech; access to pharmacy records; Deregulation (Conservative)	For IMS Health (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	Suppressor (EPS=Liberal); SCDB
Arizona Free Enterprise Club's Freedom Club PAC	AFECFCP; Arizona Taxpayers Action Committee, Arizonans for a Sound Economy; GOP Candidates for Office (Conservative)	Arizona Citizens Clean Elections Act (Ariz. Rev. Stat. Ann. § 16-940 *et seq*.); Ballot Prop 200 (1998) (Dem/Liberal)	Free Market; Protesting equality-based expenditure limits/formula (Conservative)	For AFECFCP (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	
Entertainment Merchants Association	Business association of software and videogame industries (Conservative)	California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§ 1746-1746.5; restricting sale of violent videogames to minors (Dem/Liberal)	Extreme Speech; Violent depictions (Undetermined)	For EMA (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB
Golan	Orchestra conductors, musicians, others (Liberal)	Uruguay Round Agreements Act Section 514 (Bipartisan)	Equality Speech; Use of works in public domain (Liberal)	Against Golan (Anti-Speech)	Conservative	Conservative	Authors Have Not Coded	

Howards	Private Individual; opposed to Iraq War (Liberal)	Arrest by Secret Service Agents (Conservative)	Electoral Speech; Criticism of VP Cheney, Bush Administration's Iraq Policy (Liberal)	Against Howards (Anti-Speech)	Conservative	Conservative	Authors Have Not Coded	
Knox	Union non-member (Conservative)	SEIU temporary fee for ideological/electoral purposes (Dem/Liberal)	Anti-union Speech; Protesting fee assessment for ideological/electoral fund of public employee union (Conservative)	For Knox (Pro-Speech)	Conservative	Conservative	Authors Have Not Coded	
Fox Television Stations	Mainstream Broadcast Media (Fox and ABC) (Liberal)	2001 F.C.C. Policy Statement on Indecency (extension of Title 18 U.S.C. § 1464) (Undetermined)	Sex/Gender Speech; Airing of two brief expletives in award shows, brief male nudity (Liberal)	For Fox Television (Pro-Speech)	Liberal	Liberal	Authors Have Not Coded	
American Tradition Partnership	Pro-business association (Conservative)	Mont. Code Ann. §13-35-227(1) (2011); Restrictions on Corporate Spending (Dem/Liberal)	Free market; Protesting expenditure prohibition in judicial elections (Conservative)	For ATP (Pro-Speech)	Conservative	Liberal	Authors Have Not Coded	SCDB
Alvarez	Local Politician; Three Valley Water District Board of Directors (Undetermined)	Stolen Valor Act of 2005; 18 U.S.C.S. Section 704(b) (Bipartisan)	False Speech; Lying about military service (Undetermined)	For Alvarez (Pro-Speech)	Undetermined	Liberal	Authors Have Not Coded	SCDB
Alliance for Open Society Int'l, Inc.	Non-profit organization combatting AIDS abroad (Liberal)	U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Bipartisan)	Sex/Gender Speech; Adoption of anti-prostitution message to receive funding (Liberal)	For AOSI (Pro-Speech)	Liberal	Liberal	Authors Have Not Coded	

McCutcheon	Private individual, donor to conservative politicians (Conservative)	FECA Section 441a(a)(3) as amended by BCRA (Dem/Liberal)	Free market; Protesting aggregate contribution limits (Conservative)	For McCutcheon (Pro-Speech)	Conservative	Conservative	Authors Have Not Coded
Moss	Anti-war protestor(s) (Liberal)	GOP President's Secret Service relocation of anti-war protestors (GOP/Conservative)	Anti-war Speech; Speech/protests critical of President George W. Bush's policies (Liberal)	Against Moss (Anti-Speech)	Conservative	Conservative	Authors Have Not Coded
Lane	Academic Faculty; Director of underprivileged youth program at Central Alabama Community College (Liberal)	President of CACC terminating Lane after testifying in federal fraud investigation (Dem/Liberal)	Gov't Employee Speech; Whistleblower (Liberal)	For Lane (Pro-Speech)	Liberal	Liberal	Authors Have Not Coded
McCullen	Private Individuals; Pro-life "sidewalk counselors" (Conservative)	Massachusetts Reproductive Health Care Facilities Act (2007) (Dem/Liberal)	Anti-abortion speech; Leafleting and counseling (Conservative)	For McCullen (Pro-Speech)	Conservative	Conservative	Authors Have Not Coded
Harris	Union non-member (Conservative)	Gov. Blagojevich's Executive Order 2003-08, and subsequent amendment to the Public Labor Relations Act (PLRA. Pub. Act no. 93-204, §5, 2003 Ill. Laws p. 1930.) (Dem/Liberal)	Anti-union Speech; protesting payment of collective bargaining fee (Conservative)	For Harris (Pro-Speech)	Conservative	Conservative	Authors Have Not Coded

Williams-Yulee	Criminal-Defense Lawyer, Candidate for Hillsborough County Court (Liberal)	Florida Supreme Court Canon 7C(1) of its Code of Judicial Conduct (Dem/Liberal)	Free market; solicitation of campaign contributions (Conservative)	Against Williams-Yulee (Anti-Speech)	Liberal	Liberal	Authors Have Not Coded	
Sons of Confederate Veterans	Non-profit interest group (Conservative)	Texas Department of Motor Vehicles Board (Undetermined)	Anti-Equality Speech; License plate design featuring Confederate flag/honoring Confederate servicemembers (Conservative)	Against SCV (Anti-Speech)	Liberal	Conservative	Authors Have Not Coded	SCDB
Reed	Pastor, Evangelical (Good News Community Church) (Conservative)	Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, §4.402 (2005). (Undetermined)	Religious speech; directional signs for service locations (Conservative)	For Reed (Pro-Speech)	Conservative	Liberal	Authors Have Not Coded	SCDB

Appendix D – Ideological Content of Rehnquist Court Free Expression Cases and Composite Direction Assignment

Case (Claimant)	Speaker Identity	Speech Suppressor	Nature of Expression	SCOTUS Decision	Composite Coding of Decision Direction	SCDB Coding of Decision Direction	Epstein, Parker, Segal Decision Direction	Areas of Disagreement
Nat'l Treasury Employees Union	Union (Liberal)	Honoraria ban of 5 U.S.C.S. Section 501(b); Ethics Reform Act of 1989 (Dem/Liberal)	Academic speech; receipt of small honoraria (Liberal)	For Nat'l Treasury Employees Union (Pro-Speech)	Liberal	Liberal	Liberal (Liberal Claimant)	Suppressor (EPS = No Direction)
Coors Brewing Co.	Coors; Business (Conservative)	§5(e)(2) of the Federal Alcohol Administration Act (FAAA or Act), 27 U. S. C. §205(e)(2) (Dem/Liberal)	Commercial speech; labeling requirements (Conservative)	For Coors Brewing (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Suppressor (EPS = No Direction)
McIntyre	Margaret McIntyre, anti-tax advocate (Conservative)	Ohio Rev. Code Ann. Section 3599.09(A)(Pro-disclosure law) (Dem/Liberal)	Anti-tax/small government advocacy (Conservative)	For McIntyre (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Suppressor (EPS = No Direction)
Hurley	Hurley; Boston Veterans Parade group/organizers (Conservative)	Boston Alliance of Lesbian, Gay, and Bisexual Individuals (Liberal)	Anti-LGBT Equality; Pro-military (Conservative)	For Hurley (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction
Went For It, Inc.	Injury Attorneys (Liberal)	Florida Bar; Florida State Bar Rules 4-7.4(b)(1) and 4-7.8(a) (Dem/Liberal)	Commercial Speech; Advertising/Soliciting (Conservative)	Against WFI (Anti-Speech)	Liberal	Conservative	Liberal (Liberal Claimant)	SCDB Direction; Suppressor (EPS = No Direction)
Pinette	KKK (Conservative)	Capitol Square Review and Advisory Board discretion under Ohio Rev. Code Ann. Section 105.41 (Undetermined)	Religious; Christian symbol (Conservative)	For Pinette (Pro-Speech)	Conservative	Conservative	Authors Do Not Code	

Rosenberger	Christian Student Organization (Conservative)	University of Virginia (Dem/Liberal)	Christian newspaper (Conservative)	For Rosenberger (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	
44 Liquormart, Inc.	Business (Conservative)	Rhode Island Gen. Laws §3–8–7 (1987) "Price Advertising Ban" (Dem/Liberal)	Commercial Speech; Advertising (Conservative)	For 44 Liquormart (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Suppressor (EPS = No Direction)
Colorado Republican Federal Campaign Committee (I)	State Republican Party Organization (Conservative)	FECA, 2 U. S. C. §441a(d)(3) "Party Expenditure Provision" (Bipartisan)	Electoral Speech (Anti-Democratic); Free Market Speech (Conservative)	For Colorado Republican Federal Campaign Committee (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	
Denver Area Educational Telecommunications Consortium	Cable Media; Academic (Liberal)	Cable Television Consumer Protection and Competition Act of 1992 (1992 Act or Act), 106 Stat. 1486, §§10(a), 10(b), and 10(c), 47 U. S. C. §§532(h), 532(j), and note following §531 (Bipartisan)	Sex/Gender Speech (Pornographic/adult images) (Liberal)	For Denver Area Educational Telecommunications Consortium (Pro-speech)	Liberal	Conservative	Liberal (Liberal Claimant)	SCDB Direction; Suppressor (EPS = Conservative)
O'Hare Truck Service, Inc.	Government Employee/Business (Undetermined)	Mayor Reid M. Paxon (Undetermined)	Electoral Speech; Partisan support unknown; whistleblower (Liberal)	For O'Hare Truck Service (Pro-speech)	Undetermined	Liberal	Liberal (Liberal Claimant)	SCDB Direction; Suppressor (EPS = Conservative), Speaker (EPS = Liberal)
Umbehr	Government Employee/Business (Undetermined)	Board of Commissioners of Wabaunsee County (Undetermined)	Electoral speech; Whistleblower (Liberal)	For Umbehr (Pro-speech)	Undetermined	Liberal	Liberal (Liberal Claimant)	SCDB Direction; Suppressor (EPS = Conservative), Speaker (EPS = Liberal)
Schenck	Pro-life advocates (Conservative)	Temporary Restraining Order by Reagan-appointee Judge Arcara, Western District of New York (GOP/Conservative)	Anti-abortion advocacy/protesting (Conservative)	Mixed; Fixed Buffer Zones upheld, Floating Buffer Zones struck down (Mixed)	Undetermined	Conservative & Liberal (Split Vote)	Conservative Claimant (Liberal)	Suppressor (EPS = Liberal)

Turner Broadcasting Systems (II)	Turner Broadcasting Systems (Liberal)	Cable Television Consumer Protection and Competition Act of 1992, sections 4 and 5 "Must Carry" Provisions (Dem/Liberal)	Free market; compelled speech (Conservative)	Against TBS (Anti-Speech)	Undetermined	Conservative	Liberal (Conservative Claimant)	SCDB Direction; Speaker (EPS = Conservative)
Wileman Bros. & Elliott, Inc.	California Fruit growers, distributors (Conservative)	Agricultural Marketing Agreement Act of 1937, 7 U.S.C.S. section 601 et seq. (subsequently amended by 1966 31 Fed. Reg. 8177; 36 Fed. Reg. 14381; 41 Fed. Reg. 14375, 17528 (1976)) (Undetermined)	Commercial Speech; Compelled Advertising (Conservative)	Against Wileman Bros. & Elliott (Anti-speech)	Liberal	Conservative	Liberal (Conservative Claimant)	SCDB Direction
(Reno v.) ACLU	American Civil Liberties Union & Others (Liberal)	Communications Decency Act of 1996 (CDA), 47 U.S.C.S. Section 223 (Bipartisan)	Sex/Gender Speech (Adult/Pornography) (Liberal)	For ACLU (Pro-speech)	Liberal	Liberal	Liberal (Liberal Claimant)	Suppressor (EPS = Conservative)
Forbes	Independent Candidate and former member of far-right party (Conservative)	Arkansas Educational Television Commission (Dem/Liberal)	Electoral Speech (Conservative)	Against Forbes (Anti-Speech)	Liberal	Conservative	Conservative (Liberal Claimant)	SCDB Direction; Speaker (EPS = Liberal), Suppressor (EPS = Conservative)
Finley	Avant-garde/protest artists (Liberal)	National Foundation on the Arts and Humanities Act, 20 U.S.C.S. section 954 (d)(1); grant-making procedures (Bipartisan)	Controversial art (i.e. Serrano, Mapplethorpe) (Liberal)	Against Finley (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
American Constitutional Law Foundation	ACLF (Undetermined)	Colo. Rev. Stat. sections 1-40-112(1); 1-40-112(2); 1-40-111(2); 1-40-121 (Undetermined)	Pro-petition/ballot access advocacy (Liberal)	For American Constitutional Law Foundation (Pro-Speech)	Undetermined	Liberal	Liberal (Liberal Claimant)	SCDB Direction; Speaker (EPS = Liberal)

Greater New Orleans Broadcasting	Local media group (Liberal)	18 U.S.C.S. section 1304 "Casino Advertising Ban" (Bipartisan)	Commercial Speech; Advertising for gambling/casinos (Conservative)	For Greater New Orleans Broadcasting (Pro-Speech)	Undetermined	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Speaker (EPS = Conservative), Suppressor (EPS = Conservative)
United Reporting Publishing Co.	Business, private publishing company (Conservative)	Cal. Gov't Code Section 6254(f)(3) (Undetermined)	Commercial Speech; Advertising/Solicitation (Conservative)	Against United Reporting (Anti-Speech)	Liberal	Conservative	Conservative (Liberal Claimant)	SCDB Direction; Speaker (EPS = Liberal), Suppressor (EPS = Conservative)
Shrink Missouri Gov't PAC	Anti-tax/small gov't interest group (Conservative)	Mo. Rev. Stat. Section 130.032.1(1) (Dem/Liberal)	Free Market Electoral; Electoral; support of State Auditor Candidate Zev David Fredman (R) (Conservative)	Against Shrink Missouri (Anti-Speech)	Liberal	Liberal	Liberal (Conservative Claimant)	Suppressor (EPS = No Direction)
Southworth	School students (Liberal)	Board of Regents of University of Wisconsin imposition of student activity fee (Liberal)	Compelled Speech; against subsidizing liberal student groups (Conservative)	Against Southworth (Anti-speech)	Liberal	Conservative	Liberal (Conservative Claimant)	SCDB Direction; Speaker (EPS = Conservative), Suppressor (EPS = No Direction)
Pap's A.M. ("Kandyland")	Adult entertainment business (Liberal)	City of Erie, PA Ordinance 75-1994 "secondary effects" ordinance (GOP/Conservative)	Nude dancing; artistic expression (Liberal)	Against Pap's A.M. (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Playboy Entertainment Group	Adult entertainment media (Liberal)	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136 (47 U.S.C.S. Section 561 (Section 505) (Bipartisan)	Sex/Gender (Adult Entertainment; Pornography) (Liberal)	For Playboy (Pro-Speech)	Liberal	Liberal	Liberal (Liberal Claimant)	Suppressor (EPS = Conservative)
Boy Scouts of America	Traditional values community group (Conservative)	NJ public accommodations law, N.J. Stat. Ann. Sections 10:5-4, 10:5-5 (2000) (Dem/Liberal)	Anti-LGBT Equality (Conservative)	For Boy Scouts of America (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	

Hill	Pro-life advocates (Conservative)	Colo. Rev. Stat. Section 18-9-122(3)(1999) (Dem/Liberal)	Anti-abortion speech/protests (Conservative)	Against Hill (Anti-Speech)	Liberal	Liberal	Liberal (Conservative Claimant)	
Velazquez	Lawyers affiliated with Legal Services Corporation (Liberal)	Legal Services Corporation Act, 88 Stat. 378, 42 U. S. C. §2996 et seq., and funding restrictions imposed by Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), §504, 110 Stat. 1321–53 (GOP/Conservative)	Criticisms of welfare system; pro-indingent client speech (Liberal)	For Velazquez (Pro-Speech)	Liberal	Liberal	Liberal (Liberal Claimant)	
Murphy	Prisoner/inmate "law clerk" (Liberal)	Montana state prison policy (GOP/Conservative)	Legal assistance/representation of prisoners (Liberal)	Against Murphy (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Vopper	Vopper, political radio commentator critical of unions in the past (Conservative)	Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, entitled Wiretapping and Electronic Surveillance (Bipartisan)	Electoral/Policy speech; anti-union – playing of illegally obtained tape capturing conversation between teacher union officials on air (Conservative)	For Vopper (Pro-speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Suppressor (EPS = Conservative)
Good News Club	Sponsors of children's private religious organization; Christian (Conservative)	Milford School community use policy restricting facilities to non-religious activities (Dem/Liberal)	Use of school facilities for worship/congregation (Conservative)	For Good News Club (Pro-Speech)	Conservative	Conservative	Conservative (Conservative Claimant)	
Colorado Republican Federal Campaign Committee (II)	State Republican Party Organization (Conservative)	FECA, 2 U. S. C. §441a(d)(3) "Party Expenditure Provision" (Bipartisan)	Electoral Speech (Anti-Democratic); Free Market Speech (Conservative)	Against Colorado Republican Federal Campaign Committee (Anti-Speech)	Liberal	Liberal	Liberal (Conservative Claimant)	

United Foods, Inc.	Large agricultural distribution/grower business (Conservative)	Mushroom Promotion, Research, and Consumer Information Act, 104 Stat. 3854, 7 U. S. C. §6101 et seq. (Bipartisan)	Commercial; anti-compelled speech (fee assessments) (Conservative)	For United Foods (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction
Lorillard Tobacco Co.	Big tobacco businesses (Conservative)	940 Code of Mass. Regs. §§21.01–21.07, 22.01–22.09 (2000) , issued by Democratic AG (Dem/Liberal)	Commercial speech/advertising of tobacco products (Conservative)	For Lorillard (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction/Issue; Suppressor (EPS = Conservative)
Thomas	Windy City Hemp Development Board (Liberal)	Chicago Park District; maintaining and advocating for public property (Dem/Liberal)	Speech/event to legalize marijuana usage (Liberal)	For Chicago (Anti-speech)	Conservative	Conservative	Conservative (Liberal Claimant)	Suppressor (EPS = Conservative)
Free Speech Coalition	California adult entertainment association (Liberal)	Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. §2251 et seq. (GOP/Conservative)	Sex/Gender Speech; "morphed images" neither obscene nor child pornography (Liberal)	For Free Speech Coalition (Pro-Speech)	Liberal	Liberal	Liberal (Liberal Claimant)	
Western States Medical Center	Licensed pharmacies specializing in drug compounding (Conservative)	Section 127(a) of the Food and Drug Administration Modernization Act of 1997 (FDAMA or Act), 111 Stat. 2328, 21 U. S. C. §353a (advertising restrictions) (Bipartisan)	Commercial speech/advertising of "compounded drugs" (Conservative)	For Western States Medical Center (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Suppressor (EPS = Conservative)
(Ashcroft) v. ACLU (I)	ACLU et al. (Liberal)	Child Online Protection Act, 112 Stat. 2681-736 (codified in 47 U. S. C. § 23 (GOP/Conservative)	Sex/Gender speech (adult entertainment, sexual health, education) (Liberal)	Against ACLU (Anti-speech)	Conservative	Conservative	Conservative (Liberal Claimant)	

Alameda Books	Adult entertainment establishments (Liberal)	Los Angeles Municipal Code §12.70(C) (1978); "secondary effects" (GOP/Conservative)	Sex/Gender speech; sale of adult pornographic videos and operation of viewing booths (Liberal)	Against Alameda Books (Anti-Speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
Watchtower Bible and Tract Society	Religious; Jehovah's Witness (Conservative)	Village of Stratton, Ohio Ordinance No. 1998–5 (Prohibiting private property canvassing) (Undetermined)	Door-to-door solicitation/advocating on behalf of Jehovah's Witnesses (Conservative)	For Watchtower Bible and Tract Society (Pro-Speech)	Conservative	Liberal	Liberal (Liberal Claimant)	SCDB Direction; Speaker (EPS = Liberal)
Republican Party of Minnesota	Republican Party of Minnesota; Judicial candidate Gregory Wersal (Conservative)	Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000), "announce clause" (Dem/Liberal)	Announcement of views on Minnesota Supreme Court decisions; criticism of abortion, welfare, crime decisions (Conservative)	For Republican Party of Minnesota (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction; Suppressor (EPS = No Direction)
Eldred	Individuals using works in public domain (Undetermined)	Copyright Term Extension Act (CTEA), Pub. L. 105–298, §§102(b) and (d), 112 Stat. 2827–2828 (Bipartisan/Undetermined)	Pro-public domain use; anti-property (Liberal)	Against Eldred (Anti-Speech)	Undetermined	Conservative	Conservative (Liberal Claimant)	SCDB Direction; Speaker (EPS = Liberal), Suppressor (EPS = Conservative)
Black	Members of KKK; far-right movement (Conservative)	Va. Code Ann. §18.2–423 (1996); cross-burning statute (Liberal)	Religious; far-right speech (cross burning) (Conservative)	For Black (Pro-Speech)	Conservative	Liberal	Conservative (Conservative Claimant)	SCDB Direction
Telemarketing Associates, Inc.	Illinois for-profit fundraising corporations (Conservative)	Fraud suit brought by Democratic Illinois AG Madigan (Dem/Liberal)	Solicitation of funds for VietNow; false speech (solicitation generally funded corporation rather than charity) (Undetermined)	For Illinois (Anti-speech)	Liberal	Conservative	Liberal (Conservative Claimant)	SCDB Direction; Suppressor (EPS = No Direction)

Beaumont	North Carolina Right to Life; non-profit advocacy group (Conservative)	Federal Election Campaign Act (FECA), §441b "contribution restriction" (Bipartisan)	Sex/Gender speech; anti-abortion; free market electoral (Conservative)	For FEC (Anti-speech)	Liberal	Liberal	Liberal (Conservative Claimant)	
Hicks	Private individual; non-resident of Whitcomb Court Housing Development (Undetermined)	Richmond Redevelopment and Housing Authority (RRHA) "trespass policy" (Undetermined)	No concrete speech act; general overbroad claim (Undetermined)	For Virginia (Anti-speech)	Undetermined	Conservative	Conservative (Liberal Claimant)	SCDB Direction; Speaker (EPS = Liberal)
American Library Association	Academic speaker; American Library Ass'n (Liberal)	Children's Internet Protection Act (CIPA), 114 Stat. 2763A–335 (Bipartisan)	Compelled speech/unconstitutional conditions claim; Sex/Gender speech (requiring filters to screen out websites purveying obscene material) (Liberal)	For U.S. (Anti-speech)	Conservative	Conservative	Conservative (Liberal Claimant)	Suppressor (EPS = Conservative)
McConnell	Mitch McConnell, Senate Minority Leader (Conservative)	Bipartisan Campaign Reform Act of 2002 (BCRA), primarily Titles I and II "soft money contribution" ban and "electioneering expenditures" ban (Dem/Liberal)	Free market electoral speech; opposition to expenditure limits and other provisions (Conservative)	For FEC (Anti-speech)	Liberal	Liberal	Liberal (Conservative Claimant)	Suppressor (EPS = No Direction)
Z.J. Gifts, Inc.	Adult entertainment business (Liberal)	Littleton City Code §§3–14–2, 3–14–4 (2003), "adult business licensing" (GOP/Conservative)	Sex/Gender Speech; adult entertainment media (Liberal)	For Littleton (Anti-speech)	Conservative	Conservative	Conservative (Liberal Claimant)	
(Ashcroft) v. ACLU (II)	ACLU et al. (Liberal)	Child Online Protection Act, 112 Stat. 2681-736 (codified in 47 U. S. C. § 23 (GOP/Conservative)	Sex/Gender speech (adult entertainment, sexual health, education) (Liberal)	For ACLU (Pro-speech)	Liberal	Liberal	Liberal (Liberal Claimant)	

Roe	San Diego police officer (Conservative)	San Diego Police Department (GOP/Conservative)	Sex/Gender speech; distribution of pornographic videos featuring respondent (Liberal)	For San Diego (Anti-speech)	Conservative	Conservative	Authors Do Not Code	
Livestock Marketing Association	Livestock/cattle business associations (Conservative)	The Beef Promotion and Research Act of 1985 (Beef Act or Act), 99 Stat. 1597 (Bipartisan)	Commercial speech; anti-compelled speech – fee assessment (Conservative)	For Johanns (Anti-speech)	Liberal	Conservative	Liberal (Conservative Claimant)	SCDB Direction
Tory	Ulysses Tory, former client of Johnnie Cochran for alleged civil rights violation by LAPD (Liberal)	Superior Court of CA injunction against Tory (Undetermined)	Defamatory speech; directed at Civil Rights Attorney Johnnie Cochran (Conservative)	For Tory (Pro-Speech)	Undetermined	Liberal	Liberal (Liberal Claimant)	SCDB Direction

Appendix E – Martin-Quinn Ordering of Justices by Term (1994-2015 Terms)

Note: Martin-Quinn Scores have been rescaled and inverted to range from 0 (most liberal) to 1 (most conservative) so as to approximate Segal-Cover scoring. The line and justices' individual scores and initials are designed to approximate the distance between the justices. Ordering is the basis for classifying degree of order in decisions (chapter three).

1994 (.266) (.438)(.445) (.446) (.522) (.523) (.591) (.658) (.708)

JPS RBG DS SB SDO WHR AK AS CT

1995 (.249) (.434)(.436) (.444) (.514) (.522) (.589) (.676)(.713)

JPS RBG SB DS AK WHR SDO AS CT

1996 (.242) (.419)(.428) (.444) (.523) (.532) (.58) (.69)(.717)

JPS SB RBG DS AK WHR SDO AS CT

1997 (.244) (.415)(.436) (.415) (.521) (.538) (.577) (.694)(.717)

JPS SB DS RBG AK WHR SDO AS CT

1998	(.244)	(.405)(.428) (.417)	(.528)	(.59) (.531)	(.693)	(.718)

	JPS	RBG DS SB	AK	WHR SDO	AS	CT

1999	(.247)(.378)(.401) (.414)		(.525)	(.581) (.538)	(.698)(.715)	

	JPS RBG	DS SB	SDO	WHR AK	AS	CT

2000	(.258)(.364) (.383) (.384)		(.506)	(.577) (.53)	(.698)	(.717)

	JPS RBG SB DS		SDO	WHR AK	AS	CT

2001	(.265)(.357) (.372) (.379)		(.491)	(.536) (.56)	(.688)(.715)	

	JPS	RBG DS SB	SDO	AK WHR	AS	CT

2002	(.273)	(.353)(.379) (.364)	(.483)	(.525) (.549)	(.667)	(.724)
	JPS	RBG SB DS	SDO	AK WHR	AS	CT
2003	(.274)(.348)	(.384) (.355)	(.48)	(.558) (.516)	(.654)	(.725)
	JPS	RBG SB DS	SDO	WHR AK	AS	CT
2004	(.276)(.352)	(.394) (.357)	(.474)	(.563) (.503)	(.639)	(.728)
	JPS	RBG SB DS	SDO	WHR AK	AS	CT
2005	(.279)(.359)(.382)	(.362)	(.499)(.558)	(.56)	(.635)	(.73)
	JPS	RBG SB DS	AK	JGR SA	AS	CT
2006	(.281)	(.358) (.37) (.375)	(.496)	(.56) (.562)	(.635)	(.727)
	JPS	RBG DS SB	AK	JGR SA	AS	CT

2007	(.289)(.354) (.366) (.381)		(.493)	(.56) (.568)	(.626)	(.718)	
	JPS	RBG DS SB	AK	JGR SA	AS	CT	
2008	(.278)(.352) (.362)	(.388)	(.504)	(.565)(.585)	(.619)	(.701)	
	JPS	RBG SB DS	AK	JGR	SA AS	CT	
2009	(.278)	(.356)(.379) (.363)	(.501)	(.557)(.587)	(.618)	(.692)	
	JPS	RBG SB SS	AK	JGR	SA AS	CT	
2010	(.33)(.36) (.373) (.375)		(.505)	(.558)(.595) (.607)		(.68)	
	RBG	SS EK SB	AK	JGR	SA AS	CT	

2011	(.312) (.351) (.374) (.375)		(.486)	(.545)	(.595) (.601)	(.678)
	RBG SS EK SB		AK	JGR	SA AS	CT
2012	(.309) (.326) (.376)		(.482)	(.539)	(.579) (.592)	(.674)
	RBG SS SB		AK	JGR	AS SA	CT
2013	(.309) (.36) (.312) (.371)		(.469)	(.517)	(.569) (.592)	(.675)
	RBG EK SS SB		AK	JGR	AS SA	CT
2014	(.302) (.357) (.305) (.365)		(.447)	(.503)	(.563) (.568)	(.675)
	SS EK RBG SB		AK	JGR	AS SA	CT
2015	(.30) (.366) (.304) (.372)		(.437)	(.484)	(.553)	(.676)
	SS EK RBG SB		AK	JGR	SA	CT

Appendix F – Voting Disorder Typologies, SCDB Directional Coding

Composite Direction	Strong Ordered	Ordered	Unanimous Decisions	Disordered	Strong Disorder	Totals
Conservative	*Garcetti v. Ceballos* (2006) *Morse v. Frederick* (2007) ***Davis v. FEC* (2008)** ***Citizens United v. FEC* (2010)** ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)** ***Harris v. Quinn* (2014)** ***McCutcheon v. F.E.C.* (2014)**	***Randall v. Sorrell* (2006)**	*Rumsfeld v. FAIR* (2006) *Davenport v. WEA* (2007) *TSSAA v. Brentwood Academy* (2007) *New York State Board of Elections v. Torres* (2008) *Pleasant Grove City v. Summum* (2009) *Nevada Commission on Ethics v. Carrigan* (2011) *Duryea v. Guarnieri* (2011) *Reichle v. Howards* (2012) *Wood v. Moss* (2014) ***McCullen v. Coakley* (2014)**	*Beard v. Banks* (2006) *U.S. v. Williams* (2008) *Ysursa v. Pocatello Education Association* (2009) *Holder v. Humanitarian Law Project* (2010) *Walker v. Sons of Confederate Veterans* (2015)	*Washington State Grange v. Washington State Republican Party* (2008) *Golan v. Holder* (2012) ***Knox v. Service Employees International Union, Local 1000* (2012)**	Conservative Decisions: 61.36% Pro-Speech Decisions as Proportion of Conservative Decisions: 55.56% Pro-Speech Decisions as Proportion of All Decisions: 34.09%
Undetermined	*Christian Legal Society v. Martinez* (2010)					Undetermined Decisions: 13.64% Undetermined Proportion: 33.33% All Decisions: 4.54%
Liberal	***Wisconsin Right to Life v. F.E.C.* (2007)** ***American Tradition Partnership v. Bullock* (2012)**	*Doe v. Reed* (2010) ***U.S. v. Alvarez* (2012)** ***Agency for International Development v. Alliance for Open Society International, Inc.* (2013)**	***Wisconsin Right to Life v. F.E.C.* (2006)** *Locke v. Karass* (2009) *Milavetz, Gallop & Milavetz, P.A. v. U.S.* (2010) ***F.C.C. v. Fox Television Stations* (2012)** ***Lane v. Franks* (2014)** ***Reed v. Town of Gilbert* (2015)**	***U.S. v. Stevens* (2010)** ***Snyder v. Phelps* (2011)** ***Sorrell v. IMS Health* (2012)** *Williams-Yulee v. Florida Bar* (2015)	*Hartman v. Moore* (2006) ***Brown v. Entertainment Merchants Association* (2011)**	Liberal Decisions: 22.73% Pro-Speech Proportion: 30.00% All Decisions: 6.82%
	(22.73%)	(9.1%)	(36.36%)	(20.45%)	(11.36%)	

Rehnquist Court Era (1994-2004 Terms)

	Strong Ordered	Ordered	Unanimous	Disorder	Strong Disorder	Totals
Conservative	***Rosenberger v. Rector and Visitors of the University of Virginia* (1995)** *Turner Broadcasting System v. FCC* (1997) ***Boy Scouts of America v. Dale* (2000)** *LA v. Alameda Books* (2002)	***U.S. v. Nat'l Treasury Employees Union* (1995)** ***Capitol Square Review and Advisory Board v. Pinette (1995)*** ***Colorado Republican Federal Campaign Committee v. FEC* (1996)** *Erie v. Pap's A.M.* (2000) *Ashcroft v. ACLU* (2002) *U.S. v. American Library Association* (2003)	***Rubin v. Coors Brewing Co.* (1995)** *Board of Regents, UW v. Southworth* (2000) *Shaw v. Murphy* (2001) *Thomas v. Chicago Park District* (2002) *Illinois v. Telemarketing Associates, Inc.* (2003) *Virginia v. Hicks* (2003) *Littleton v. Z.J. Gifts, Inc.* (2004) *San Diego v. Roe* (2004)	*Florida Bar v. Went For It, Inc.* (1995) *Glickman v. Wileman Bros. & Elliott* (1997) *Arkansas Educational Television Commission v. Forbes* (1998) *NEA v. Finley* (1998) *LAPD v. United Reporting Publishing Co.* (1999) ***Good News Club v. Milford* (2001)** *Eldred v. Aschroft* (2003)	***Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (1996)** *Johanns v. Livestock Marketing Association* (2005)	Conservative Decisions: 59.26% Pro-Speech Decisions as Proportion of Conservative Decisions: 53.57% Pro-Speech Decisions as Proportion of All Decisions: 34.88%
Undetermined		*Schenck v. Pro-Choice Network* (1997)				Undetermined Decisions: 12.96% Undetermined Propotion: 71.43% All Decisions: 9.26%
Liberal	*Colorado Republican Federal Campaign Committee v. FEC* (2001) ***Lorillard Tobacco v. Reilly* (2001)** ***Republican Party of Minnesota v. White* (2002)** *McConnell v. FEC* (2003)	***O'Hare Truck Service v. Northlake* (1996)** ***Board of County Commissioners v. Umbehr* (1996)** ***Bartnicki v. Vopper* (2001)** *FEC v. Beaumont* (2003) *Tory v. Cochran* (2005)	***Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995)** ***44 Liquormart Inc. v. Rhode Island* (1996)** ***Reno v. ACLU* (1997)** ***Greater New Orleans Broadcasting v. U.S.* (1999)**	***McIntyre v. Ohio Elections Commission* (1995)** *Nixon v. Shrink Missouri Gov't PAC* (2000) ***U.S. v. Playboy Entertainment Group* (2000)** *Hill v. Colorado* (2000) ***Legal Services Corp. v. Velasquez* (2001)** ***Watchtower Bible & Tract Society of NY v. Stratton* (2002)**	***Buckley v. American Constitutional Law Foundation* (1999)** ***U.S. v. United Foods, Inc.* (2001)** ***Ashcroft v. Free Speech Coalition* (2002)** ***Thompson v. Western States Medical Center* (2002)** ***Virginia v. Black* (2003)** ***Ashcroft v. ACLU* (2004)**	Liberal Decisions: 27.78%% Pro-Speech Proportion: 26.67% All Decisions: 7.4%
	(15.09%)	(22.64%)	(22.64%**)**	(24.53%)	(15.09%)	

Appendix G - Frequency of Cases by Type, Certiorari Dataset

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Prisoner	2	6 (H)	1	3 (M)	0	1	6 (H)	2 (M)	0	0	3 (H)	24
Electoral/Policy Speech	5 (M)	4 (M)	0	2	5 (H)	2	4 (M)	2 (M)	1	0	1	26
Govt Employee/ Whistleblower	7 (H)	1	6 (H)	4 (H)	5 (H)	7 (H)	2	2 (M)	5 (H)	1	3 (H)	43
Faculty	0	4 (M)	1	1	0	1	0	1	0	0	0	8
Religious	1	3 (M)	2	3 (M)	0	1	4 (M)	0	0	3 (H)	0	17
Terrorism/Espionage	0	2	0	1	1	0	1	2 (M)	0	1	0	8
Student	1	2	3 (M)	3 (M)	2	3	6 (H)	0	4 (M)	0	0	24
Religious (Schools)	1	1	1	2	5 (H)	4 (M)	3	0	1	0	0	18
Elected Official	0	1	1	0	0	1	1	1	0	0	1	6
Controversial Ideology/Extreme Speech (Violence, Anti-War, KKK, Threats, etc.)	2	1	4 (M)	0	2	2	1	0	1	2 (M)	1	16
Lawyer	1	1	1	0	2	1	1	1	1	1	1	11
Sex/Gender (Adult Ent.)	1	1	0	1	2	0	2	0	0	0	0	7
Sex/Gender (Women's Rights)	1	1	1	3 (M)	1	0	0	1	1	0	0	9
Sex/Gender (LGBT Equality)	1	0	0	1	0	0	0	0	0	1	0	3
Sex/Gender (Child Porn)	2	0	1	1	3 (M)	0	2	1	0	3 (H)	0	13
Union	1	1	1	1	1	1	0	0	1	0	0	7
Anti-Union/ Nonmember	0	0	0	1	0	0	1	0	1	1	0	4
Free Market Electoral (Anti-CF Reg)	2	0	1	0	1	3	3	1	3	1	1	16
Petition/Ballot Access	1	0	2	1	1	1	3	1	1	0	0	11
Commercial/ Business	3	0	1	1	0	4 (M)	3	2 (M)	0	2 (M)	2 (M)	18
Libel/ Related Torts	0	0	0	1	0	0	0	0	0	3 (H)	0	4
Media	0	0	0	0	1	0	2	1	0	0	1	5
Miscellaneous	1	0	1	3 (M)	0	0	1	3 (H)	1	0	1	11
Totals	33	29	28	33	32	32	46	21	21	19	15	309

Appendix H - Case List, Grants of Certiorari (2005-2014 Terms)

NAAMP v. Castille, 799 F.3d 216 (2015)
Valencia v. De Luca, 612 Fed. Appx. 512 (2015)
Petrella v. Brownback, 787 F.3d 1242 (2015)
Raub v. Campbell, 785 F.3d 876 (2015)
Hines v. Alldredge, 783 F.3d 197 (2015)
Werkheiser v. Pocono Township, 780 F.3d 172 (2015)
Spence v. Nelson, 603 Fed. Appx. 250 (2015)
Dahlstrom v. Sun-Times Media, LLC., 777 F.3d 937 (2015)
Loscombe v. City Of Scranton, 600 Fed. Appx. 847 (2015)
United States v. Whittemore, 776 F.3d 1074 (2015)
Jackson v. Humphrey, 776 F.3d 1232 (2015)
Baker v. Iowa City, 867 N.W.2d 44 (2015)
Heffernan v. City Of Paterson, 777 F.3d 147 (2015)
Friedrichs v. California Teachers Association, 2014 U.S. App. Lexis 24935 (2014)
Harnage v. Torres, 155 Conn. App. 792 (2015)
De Ritis v. Unemployment Compensation, Board Of Review, 2014 Pa. Commw. Unpub. Lexis 445 (2014)
Reed v. Town Of Gilbert, 707 F.3d 1057 (2013)
Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388 (2014)
Fla. Bar v. Williams-Yulee, 138 So. 3d 379 (2014)
NAAMP v. Berch, 773 F.3d 1037 (2015)
Watchtower Bible and Tract Society of New York v. San Juan, 773 F.3d 1 (2015)
U.S. v. Brune, 767 F.3d 1009 (2014)
U.S. v. Howard, 766 F.3d 414 (2014)
Hurst v. Lee County, Ms, 764 F.3d 480 (2015)
U.S. v. Anderson, 759 F.3d 891 (2015)
Liberty Coins v. Goodman, 748 F.3d 682 (2014)
Fields v. Tulsa, 753 F.3d 1000 (2014)
Heffner v. Murphy, 745 F.3d 56 (2014)
U.S. v. Hassan, 742 F.3d 104 (2014)
Pickup v. Brown, 740 F.3d 1208 (2014)
Obsidian Finance Group v. Cox, 740 F.3d 1284 (2014)
Harris v. Quinn, 656 F.3d 692 (2011)
Mccullen v. Coakley, 708 F.3d 1 (2013)
Lane v. Cent. Ala. Cmty. College, 523 Fed. Appx. 709 (2013)
Moss v. United States Secret Serv., 711 F.3d 941 (2013)
McCutcheon v. FEC, 893 F. Supp. 2d 133 (2012)
Johnson v. Murray, 544 Fed. Appx. 801 (2013)
B.H. v. Easton Area School District, 725 F.3d 293 (2013)

Chrzanowski v. Bianchi, 725 F.3d 734 (2013)
In Re: Ncaa Student-Athlete Name And Likeness Licensing Litigation v. Electronic Arts, 724 F.3d 1268 (2013)
Free Speech v. FEC, 720 F.3d 788 (2013)
U.S. v. Turner, 720 F.3d 411 (2013)
Iowa Right to Life Committee v. Tooker, 717 F.3d 576 (2013)
State Emp. Bargaining Agent Coalition v. Rowland, 718 F.3d 126 (2013)
Libertarian Party of Virgina v. Judd, 718 F.3d 308 (2013)
Hart v. Electronic Arts, Inc., 717 F.3d 141 (2013)
Yoder v. University of Louisville, 526 Fed. Appx. 537 (2013)
Hardwick v. Heyward, 711 F.3d 426 (2013)
Minnesota Majority v. Mansky, 708 F.3d 1051 (2013)
Yolanda Arnold v. City of Columbus, 515 Fed. Appx. 524 (2013)
A.M. v. Taconic Hills Central School District, 510 Fed. Appx. 3 (2013)
Pg Publishing Co. v. Aichele, 705 F.3d 91 (2013)
Dixon v. University of Toledo, 702 F.3d 269 (2013)
Doe v. Boland, 698 F.3d 877 (2012)
OSU Student Alliance v. Ray, 699 F. 3d 1053 (2012)
In Re Gleason, 492 Fed. Appx. 86 (2012)
Asgeirsson v. Abbott, 696 F.3d 454 (2012)
United States v. Williams, 690 F.3d 1056 (2012)
U.S. v. Chappell, 691 F.3d 388 (2012)
Haagensen v. Pa State Police, 490 Fed. Appx. 447 (2012)
Initiative and Referendum Institute v. USPS, 685 F.3d 1066 (2012)
United States v. Amster, 484 Fed . Appx. 338 (2012)
Brooks v. Arthur, 685 F.3d 367 (2012)
United States v. Stewart, 686 F.3d 156 (2012)
Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev., 651 F.3d 218 (2011)
United States v. Chi Mak, 683 F.3d 1126 (2012)
United States v. Brooks, 681 F.3d 678 (2012)
ACLU v. Alvarez, 679 F.3d 583 (2012)
Wersal v. Sexton, 674 F.3d 1010 (2012)
Discount Tobacco City and Lottery v. United States, 674 F.3d 509 (2012)
Holloway v. Magness, 666 F.3d 1076 (2012)
National Organization for Marriage v. McKee, 669 F.3d 34 (2012)
Sherrod v. Johnson, 667 F.3d 1359 (2012)
Field v. Board of Water Commissioners, 453 Fed. Appx. 811 (2011)
United States v. Alvarez, 617 F.3d 1198 (2010)
Western Tradition P'ship v. AG 2011 Mt 328, 271 P.3d 1 (2011)
Fox TV, Inc. v. FCC, 613 F.3d 317 (2010); Abc, Inc. V. Fcc, 404 Fed. Appx. 530 (2011)

Knox v. Cal. State Emples. Ass'n, Local 1000, 628 F.3d 1115 (2010)
Howards v. McLaughlin, 634 F.3d 1131 (2011)
Golan v. Holder, 609 F.3d 1076 (2010)
Obnigbene v. Parkes, 671 F.3d 174 (2011)
United States v. O'nan, 452 Fed. Appx. 280 (2011)
CBS Corp. v. FCC, 663 F.3d 122 (2011)
Koch v. City of Del City, 660 F.3d 1228 (2011)
Maslow v. Board of Elections in New York City, 658 F.3d 291 (2011)
Morgan v. Swanson, 659 F.3d 359 (2011)
Bumpus v. Watts, 448 Fed. Appx. 3 (2011)
Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (2011)
Frank Van Den Bosch v. Raemisch, 658 F.3d 778 (2011)
84 Video/Newsstand, Inc. v. Sartini, 455 Fed. Appx. 541 (2011)
Burnett v. Jones, 437 Fed. Appx. 736 (2011)
Lovette v. Paul, 442 Fed. Appx. 436 (2011)
National Organization for Marriage v. McKee, 649 F.3d 34 (2011)
Dish Network Corp v. FCC, 653 F.3d 771 (2011)
Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (2011)
Kowalski v. Berkeley County Schools, 652 F.3d 565 (2011)
Merrifield v. Board of County Commissioners for the County of Santa Fe, 654 F.3d 1073 (2011)
Jackler v. Byrne, 658 F.3d 225 (2011)
Neighborhood Enterprises v. City of St. Louis, 644 F.3d 728 (2011)
Layshock v. Hermitage School District, 650 F.3d 205 (2011)
J.S. v. Blue Mountain School District, 650 F.3d 915 (2011)
McKinley v. Abbott, 643 F.3d 403 (2011)
Bronx Household of Faith V. Board of Education of the City of New York, 650 F.3d 30 (2011)
Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School District, 640 F.3d 329 (2011)
281 Care Comm. v. Arneson, 638 F.3d 621 (8th Cir., 2011)
Doninger v. Niehoff, 642 F.3d 334 (2011)
O'Bryant v. Finch, 637 F.3d 1207 (2011)
Kendall v. Balcerzak, 650 F.3d 515 (2011)
United States v. Dean, 635 F.3d 1200 (2011)
Locke v. Shore, 634 F.3d 1185 (2011)
United States v. Hotaling, 634 F.3d 725 (2011)
Libertarian Party of New Hampshire v. Gardner, 638 F.3d 6 (2011)
Smith v. Arguello, 415 Fed. Appx. 57 (2011)
Dressler v. Walker, 409 Fed. Appx. 947 (2011)
Watchtower Bible and Tract Society of New York v. Sergardia De Jesus, 634 F.3d 3 (2011)
United States v. Farhane, 634 F.3d 127 (2011)

ACLU of Ohio Foundation, Inc. v. DeWeese, 633 F.3d 424 (2011)
Hrdlicka v. Reniff, 631 F.3d 1044 (2011)
Castle v. Appalachian Technical College, 631 F.3d 1194 (2011)
Bowens v. U.S. Dept of Justice, 415 Fed. Appx. 340 (2011)
American Atheists v. Duncan, 637 F.3d 1095 (2010)
Pest Committee v. Miller, 626 F.3d 1097 (2010)
Defoe v. Spiva, 625 F.3d 324 (2010)
Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (2009)
McComish v. Bennett, 611 F.3d 510 (2010)
IMS Health, Inc. v. Sorrell, 630 F.3d 263 (2010)
Guarnieri v. Duryea Borough, 364 Fed. Appx. 749 (2010)
Carrigan v. Comm'n on Ethics of Nev., 236 P.3d 616 (2010)
Snyder v. Phelps, 580 F.3d 206 (2009)
Evans-Marshall v. Board Of Education of the Tipp City Exempted Village School District, 624 F.3d 332 (2010)
Camp v. Naglich, 400 Fed. Appx. 519 (2010)
Slaughter v. Rogers, 408 Fed. Appx. 510 (2010)
Defabio v. East Hampton Union Free School District, 623 F.3d 71 (2011)
Ober v. Miller, 395 Fed. Appx. 849 (2010)
Miller v. City of Cincinnati, 622 F.3d 524 (2010)
Doe v. Silsbee Independent School District, 402 Fed. Appx. 852 (2010)
In Re: Anh Cao v. FEC, 619 F.3d 410 (2010)
Strickland v. City of Seattle, 394 Fed. Appx. 407 (2010)
Badger Catholic Inc. v. Walsh, 620 F.3d 775 (2010)
Abcarian v. Mcdonald, 617 F.3d 931 (2010)
Griswold v. Driscoll, 616 F.3d 53 (2010)
Melrose Inc. v. City of Pittsburgh, 613 F.3d 380 (2010)
Scheffer v. Civil Service Employees Union, Local 828, 610 F.3d 782 (2010)
Siefert v. Alexander, 608 F.3d 974 (2010)
Roberts v. Mentzer, 382 Fed. Appx. 158 (2010)
Fox v. Traverse City Area Public Schools Board Of Education, 605 F.3d 345 (2010)
Zutz v. Nelson, 601 F.3d 842 (2010)
Educational Media Company at Virginia Tech, Inc. v. Swecker, 602 F.3d 583 (2010)
Speechnow.Org v. FEC, 599 F.3d 686 (2010)
Alexander v. Cahill, 598 F.3d 79 (2010)
Weise v. Casper, 593 F.3d 1163 (2010)
Ass'n of Christian Schools Int'l v. Stearns, 362 Fed. Appx. 640 (2010)
Morgan v. Plano Independent School District, 589 F.3d 740 (2009)
Delano Farms Co. v. California Table Grape Commission, 586 F.3d 1219 (2009)
Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 Fed. Appx. 645 (2009)

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Max v. Republican Committee of Lancaster County, 587 F.3d 198 (2009)
Illinois Dunesland Preservation Society v. Illinois Dep't of Natural Resources, 584 F.3d 719 (7th Cir., 2009)
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Nurre v. Whitehead, 580 F.3d 1087 (9th Cir., 2010)
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Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir., 2009)
Milwaukee Deputy Sheriff's Ass'n v. Clarke, 574 F.3d 370 (7th Cir., 2009)
Levine v. McCabe, 327 Fed. Appx. 315 (2nd Cir., 2009)
Hallinan v. Fraternal Order of Police of Chicago, Lodge No. 7, 570 F.3d 811 (7th Cir., 2009)
Cablevision Systems Corporation v. FCC, 570 F.3d 83 (2nd Cir., 2009)
Bodenstab v. County of Cook, 569 F.3d 651 (7th Cir., 2009)
Independence News, Inc. v. City of Charlotte, 568 F.3d 148 (4th Cir., 2009)
Busch v. Marple Newtown School District, 567 F.3d 89 (3rd Cir., 2009)
Corder v. Lewis Palmer School District No. 38, 566 F.3d 1219 (10th Cir., 2009)
United States v. Wilson, 565 F.3d 1059 (8th Cir., 2009)
McComb v. Crehan, 320 Fed. Appx. 507 (9th Cir., 2009)
Del Gallo v. Parent, 557 F.3d 58 (1st Cir., 2009)
Connection Distributing Co. v. Holder, 557 F.3d 321 (6th Cir., 2009)
ACLU of Florida v. Miami-Dade County School Board, 557 F.3d 1177 (11th Cir., 2009)
Eng v. Cooley, 552 F.3d 1062 (9th Cir., 2009)
United States v. Whorley, 550 F.3d 326 (2008)
Hersh v. United States, 553 F.3d 743 (5th Cir., 2008)
National Taxpayers Union v. U.S. Social Security Administration, 302 Fed. Appx. 115 (3rd Cir., 2008)
Locke v. Karass, 498 F.3d 49 (2007)
Summum v. Pleasant Grove City, 483 F.3d 1044 (2007)
Jones v. Regents of the University of California, 164 Cal. App. 4th 1072 (2008)
United States v. Persing, 318 Fed. Appx. 152 (4th Cir., 2008)
IMS Health Inc. v. Ayotte, 550 F.3d 42 (1st Cir., 2008)
Shaw v. Cowart, 300 Fed. Appx. 640 (11th Cir., 2008)
Choose Life Illinois, Inc. v. White, 547 F.3d 853 (7th Cir., 2008)
Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir., 2008)
United States v. Schales, 546 F.3d 965 (9th Cir., 2008)
CarePartners, LLC v. Lashway, 545 F.3d 867 (9th Cir., 2008)

Cheek v. City of Edwardsville, 324 Fed. Appx. 699 (10th Cir., 2008)
Truth v. Kent School District, 542 F.3d 634 (9th Cir., 2008)
Lowry v. Watson Chapel School District, 540 F.3d 752 (8th Cir., 2008)
Barr v. Lafon, 538 F.3d 554 (6th Cir., 2008)
United States v. Calimlim, 538 F.3d 706 (7th Cir., 2008)
Hodak v. City of St. Peters, 535 F.3d 899 (8th Cir., 2008)
Turner v. City Council of the City of Fredericksburg, 534 F.3d 352 (4th Cir., 2008)
Frazier v. Winn, 535 F.3d 1279 (11th Cir., 2008)
ACLU v. Mukasey, 534 F.3d 181 (3rd Cir., 2008)
Hatfill v. New York Times, 532 F.3d 312 (4th Cir., 2008)
Center for Bio-ethical Reform, Inc. v. Los Angeles County Sheriff Department, 533 F.3d 780 (9th Cir., 2008)
Reilly v. City of Atlantic City, 532 F.3d 216 (3rd Cir., 2008)
United States v. Gerardo Tapanes, 284 Fed. Appx. 617 (11th Cir., 2008)
Cook v. Gates, 528 F.3d 42 (1st Cir., 2008)
Steinburg v. Chesterfield County Planning Commission, 527 F.3d 377 (4th Cir., 2008)
Purtell v. Mason, 527 F.3d 615 (7th Cir., 2008)
Davignon v. Hodgson, 524 F.3d 91 (1st Cir., 2008)
Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir., 2008)
Thampi v. Collier County Board of Commissioners, 273 Fed. Appx. 836 (11th Cir., 2008)
Citizens for Tax Reform v. Deters, 518 F.3d 375 (6th Cir., 2008)
Frazier v. McDonough, 264 Fed. Appx. 812 (11th Cir., 2008)
Arizona Life Coalition v. Stanton, 515 F.3d 956 (9th Cir., 2008)
Policastro v. Kontogiannis, 262 Fed. Appx. 429 (3rd Cir., 2008)
Davis v. FEC, 501 F. Supp. 2d 22 (D.C., 2007)
United States v. Williams, 444 F.3d 1286 (11th Cir., 2006)
Wash. State Republican Party v. Washington, 460 F.3d 1108 (9th Cir., 2006)
Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2006)
Jenkins v. Evans, 513 F.3d 580 (6th Cir., 2008)
Curry v. Hensinger, 513 F.3d 570 (6th Cir., 2008)
Al-Amin v. Smith, 511 F.3d 1317 (11th Cir., 2008)
Nixon v. City of Houston, 511 F.3d 494 (5th Cir., 2007)
Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir., 2007)
Vose v. Kliment, 506 F.3d 565 (7th Cir., 2007)
Karpova v. Snow, 497 F.3d 262 (2nd Cir., 2007)
Lowery v. Euverard, 497 F.3d 584 (6th Cir., 2007)
Allstate Insurance Company v. Abbott, 495 F.3d 151 (5th Cir., 2007)
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Shockency v. Fletcher, 493 F.3d 941 (8th Cir., 2007)
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Flint v. Dennison, 488 F.3d 816 (9th Cir., 2007)
Lee v. York County School Division, 484 F.3d 687 (4th Cir., 2007)
Boehner v. McDermott, 484 F.3d 573 (D.C. Cir., 2007)
Wickersham v. Memorial Day Weekend Salute to Veterans Corporation, 481 F.3d 591 (8th Cir., 2007)
The Nationalist Movement v. City of York, 481 F.3d 178 (3rd Cir., 2007)
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