Trumping the First Amendment?[†]

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The primary goal of this Article is to assess whether the relationship between the ideology of Supreme Court Justices and their support for the First Amendment guarantees of speech, press, assembly, and association has declined, such that left-of-center Justices no longer consistently support those guarantees, and right-of-center Justices no longer consistently support their regulation. Utilizing data drawn from the 1953 through 2004 terms of the Court, we show that, in disputes in which only First Amendment claims are at issue, the more liberal the Justice, the higher the likelihood that he or she will vote in favor of litigants alleging an abridgment of their rights. That relationship, however, fails to emerge in disputes in which other values, such as privacy and equality, are also prominently at stake. In these cases, liberal Justices are no more likely than their conservative counterparts to support the First Amendment; indeed, if anything, a reversal of sorts occurs, with conservatives more likely, and liberals less likely, to vote in favor of the speech, press, assembly, or association claim. Taken collectively,

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these results indicate that commitment to First Amendment values is no longer a lodestar of liberalism. We consider the implications of these findings in light of long-held assumptions of (quantitative) political science work on the Court.

INTRODUCTION

To say that political scientists have long equated liberalism with a fundamental commitment to the First Amendment guarantees of speech, press, assembly, and association is hardly an exaggeration.[1] In attempts to empirically assess whether judges make decisions in line with their ideological commitments, political scientists almost always take into account freedom of expression. When they do, they inevitably classify a "liberal" judge as a supporter of expression, and a "conservative" judge as a supporter of regulation of expression. In other words, in this line of inquiry, support for First Amendment freedoms is one of the, if not *the*, defining features of a "liberal" judge, a "liberal" case outcome, or a "liberal" vote.[2]

But does a commitment to First Amendment values continue to provide a bellwether of liberalism? Many legal academics respond in the negative, asserting that unadulterated support for expression hardly demonstrates dedication to a left-of-center approach to judging.[3] Rather, the First Amendment has become an instrumental value—one that so-called liberal Justices are all too willing to

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

2. The work along these lines is voluminous. Seminal studies include C. HERMAN PRITCHETT, THE ROOSEVELT COURT (1948); DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); GLENDON SCHUBERT, THE JUDICIAL MIND (1965). For a recent example, see Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited*, 66 J. POL. 1018 (2004).

3. *See infra* Part I. Worth mentioning here, though, are Eugene Volokh's quantitative studies showing that approaches to freedom of speech "no longer . . . break down mostly along 'liberal'/'conservative' lines, as [they] seemingly did in the 1970s and much of the 1980s." EUGENE VOLOKH, HOW THE JUSTICES VOTED IN FREE SPEECH CASES, 1994–2002, *available at* www.law.ucla.edu/volokh/howvoted.htm (updating Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191 (2001)). For earlier descriptions of the trends identified by Professor Volokh, see J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 103–04 (1992).

abandon when it impedes the achievement of other policy goals, and one that conservatives are all too willing to embrace when it advances their objectives. So, for example, an otherwise liberties-oriented Justice may vote against the First Amendment claims of pro-life activists if those claims stand in the way of women exercising their right to obtain an abortion. Likewise, a Justice typically hostile to First Amendment claims in, for example, the flag burning context may be more willing to embrace them in litigation brought by abortion protestors.

Certainly, we can point to a handful of recent Supreme Court decisions that seem to support this claim. In *Boy Scouts v. Dale*,[4] the Court's five "conservatives" (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) held that the First Amendment prohibited New Jersey from requiring the Boy Scouts to admit a gay male;[5] the Court's four "liberals" (Stevens, Souter, Ginsburg, and Breyer) dissented.[6] Likewise, in *McConnell v. Federal Election Commission*,[7] the same four liberals (joined by O'Connor) upheld major provisions of the Bipartisan Campaign Reform Act against a First Amendment challenge.[8]

But does the claim of an ideological reversal regarding the First Amendment hold across a larger pool of cases, or is it limited to a few well-known exemplars?[9] The primary goal of this Article is to address this question. Specifically, we examine whether the relationship between the ideology of Justices and their support for the First Amendment guarantees of speech, press, assembly, and association has declined, such that left-of-center Justices no longer consistently support those guarantees, and right-of-center Justices no longer consistently oppose them.

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4. 530 U.S. 640 (2000).
5. *Id*. at 655.
6. *Id*. at 663. For the basis of these ideological labels, see *infra* fig.7.
7. 540 U.S. 93 (2003).
8. *Id*. at 139.
9. In some sense, Eugene Volokh's quantitative studies, *see supra* note 3, also attempt to address this question. We take a different approach to mapping the ideology of the Justices, but our conclusions parallel those of Professor Volokh, as well as of Professors Balkin and Sullivan. *See supra* note 3.

Our exploration unfolds in three steps. In Part I, we briefly describe the central role that ideology plays in political science theories of judging, as well as the measures scholars have developed to assess ideology. Our chief purposes here are first, to highlight the literature's long-held assumption that support for the First Amendment is a defining feature of liberalism, and second, to delineate contemporary objections to this assumption. In Parts II and III, we assess the relationship between the Justices' ideology and their voting in First Amendment cases. Utilizing data drawn from the 1953 through 2004 terms of the Court, we show that, in disputes in which only First Amendment claims are at issue, the more liberal the Justice, the higher the likelihood that he or she will vote in favor of litigants alleging an abridgment of their rights. That relationship, however, fails to emerge in disputes in which other values, such as privacy and equality, are also at stake. In these cases, liberal Justices are no more likely than their conservative counterparts to support the First Amendment; indeed, if anything, conservatives are more likely, and liberals less likely, to vote in favor of the speech, press, assembly, or association claim. Taken collectively, these results indicate that commitment to First Amendment values is no longer a bellwether of liberalism. While this may not come as news to legal academics, it poses something of a challenge to long-held assumptions of political science work on the Court.

I. JUDGING, IDEOLOGY, AND THE FIRST AMENDMENT

The role of ideology in the study of political behavior has a long and distinguished history. Whether writing in the 1940s, the 2000s, or eras in between, political scientists have long examined the assumption that the ideological commitments of the masses and elites alike help explain the political choices they make—from their willingness to support particular public policies, to the votes they cast.[10] As James A. Stimson, the eminent student of public opinion, put it, "Ideology won't go away. It is too important."[11]

10. Political scientists do, however, disagree over the definition of ideology. For a range of possibilities, see John Gerring, *Ideology: A Definitional Analysis*, 50 POL. RES. Q. 957 (1997). However, we think Bawn's approach captures contemporary thinking: "*Ideology is an*

With even less controversy, we can say much the same of political scientists who study judging.[12] These scholars coalesce around the idea that ideology is critical to an understanding of the decisions judges make. Even more relevant for our purposes, they also tend to define liberal judges, votes, and outcomes as supporting First Amendment values.

In what follows, we briefly describe the role that ideology plays in political science theories of judging, and the role the First Amendment plays in assessing those theories. We end with some contemporary challenges to the long-held political science assumption that support for the guarantees of free speech, press, and association continues to define a liberal ideology, and that support for regulation is a hallmark of conservatism.

A. The Role of Ideology in Political Science Theories of Judging

Ask ten law professors to articulate a theory of judging, and ten different responses are not unlikely. Ditto for political scientists. No single theory of judging, much less a unifying paradigm, dominates the field. On the other hand, in virtually all political science accounts of Court decisions, ideology moves to center stage.[13]

According to these accounts, in a nutshell, Justices maximize their ideological (or policy) preferences; that is, they bring the law in line with their own political commitments. Justices accomplish this mission, according to some political science accounts, by voting on the basis of their sincerely held ideological (liberal or conservative)

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enduring system of beliefs, prescribing what action to take in a variety of political circumstances. For example, if an abortion clinic opens in my neighborhood, my ideology tells me whether I should (a) picket the entrance (b) write a check to support the clinic, or (c) do nothing." Kathleen Bawn, *Constructing "Us": Ideology, Coalition Politics, and False Consciousness*, 43 AM. J. POL. SCI. 303, 305 (1999).

11. JAMES A. STIMSON, PUBLIC OPINION IN AMERICA 61 (1991). *But see* Philip Converse, *The Nature of Belief Systems in Mass Publics*, *in* IDEOLOGY & DISCONTENT 206 (David Apter ed., 1964) (arguing that American voters typically lack the attitudinal constraint necessary for ideological behavior).

12. *See, e.g.*, PRITCHETT, *supra* note 2; ROHDE & SPAETH, *supra* note 2; SCHUBERT, *supra* note 2.

13. For more on this point, see Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783 (2003).

attitudes vis-à-vis the facts of cases, and nothing more.[14] In other words, Scalia "votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."[15] According to other political science accounts, Justices achieve their policy goals by acting strategically, that is, by taking into account the preferences and likely actions of actors who are in a position to thwart the achievement of their political objectives—including Congress, the President, and their own colleagues.[16]

These accounts may differ in their details, but they do not shift their attention from the importance of politics, as opposed to principles of law. Neither posits Justices as neutral, principled decision makers; rather, both subscribe to Stimson's general view that ideology is a driving force in politics—including on the bench.[17]

B. The Role of the First Amendment in Assessing Political Science Theories of Judging

If policy goals unite political science theories of judging, so too does their developers' belief in the importance of assessing the implications of their theories against data. In other words, in (most) political science circles, theories are a starting, not ending, point in research. From theories, we derive observable implications (or hypotheses) that we use to test our theories. If data support the implications of our theories, we might conclude that our account

14. For the leading contemporary statement of this account, called "the attitudinal model," see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

15. *Id*. at 86. We took the liberty of substituting Justice Scalia for the late Chief Juice Rehnquist.

16. For a description of strategic accounts, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

17. We should offer a caveat to this claim. While it is true that under the attitudinal account Justices pursue one and only one goal (policy), on the strategic account, it is up to the researcher to specify *a priori* the Justices' goals; the researcher may select any motivation(s) he or she believes the particular Justices hold. Nonetheless, virtually every existing strategic account of judicial decisions posits that Justices pursue policy; that is, their goal is to see public policy—the ultimate state of the law—reflect their preferences. One (important) exception is John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) (positing that judges may have jurisprudential goals).

captures something interesting about judicial decisions; if the data fail to align with our expectations, we may go back to the drawing board.[18]

Crucial to this enterprise, as it pertains to tests of the various political science accounts of judging, is defining what we mean by "conservative" and "liberal" policy preferences. Without fleshing out these terms, we cannot assess the observable implications of either the attitudinal or strategic approach. For example, we would be unable to determine whether liberal Justices typically cast liberal votes, or whether liberal Justices occasionally modulate their votes so they are not completely overridden by, for example, Congress. This is because liberalism and conservatism are concepts that we cannot observe; it is up to researchers to make them susceptible to observation by defining what these terms mean when they are invoked.

Simply because we must develop definitions—and precise ones at that—does not mean that those definitions are always, or even often, precisely the same. Just as those seeking to assess the relative liberalism of citizens have developed a range of survey questions reflecting different conceptions of ideology, judicial specialists have devised an array of methods to categorize the ideology of Justices, their votes, and case outcomes. Sometimes the features that go into their ideological bundles are relatively compatible (e.g., support for defendants in criminal cases); sometimes they are not. In fact, there is at least one highly visible instance of a single author changing his definitions of ideology midstream; and there are other instances in which different authors have produced schemes that are contradictory.[19]

Yet, in reviewing definitions of ideology invoked in political studies of judging, we are struck by a common thread: there are very few essays or books in which a commitment to the First Amendment guarantees of press, speech, assembly, and association (or a lack

18. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

19. For example, the developer of the U.S. Supreme Court Judicial Database, Harold J. Spaeth, at one time defined decisions favoring the government in Takings Clause cases as "conservative;" he now defines them as "liberal." HAROLD J. SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE (2005), *available at* http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm.

thereof) was not a part of the author's conceptual and operational approach to assessing ideology. And we could identify none in which liberalism failed to hinge on a reading of the First Amendment that limits the regulation of expression.[20] This holds true for studies conducted in every decade since the 1940s; for research that contemplates only the First Amendment or is broader in scope; and work invoking ideology either as a dependent or independent variable.[21] In all of these studies, to put it succinctly, a liberal Justice is one who supports the First Amendment guarantees of free speech, press, assembly, and association; conservatives, in contrast, support regulation of those rights.

C. Challenges to the First Amendment as a Liberal Value

Even as we write these words, we hear the rejoinders—especially from members of the legal community. While at one time "liberal" academics may have agreed with the political scientists, as evidenced by their condemnation of virtually any private or governmental effort to regulate First Amendment freedoms, that time has long since past. As Martin Shapiro noted, "almost the entire [F]irst [A]mendment literature produced by liberal academics in the past twenty years has been a literature of regulation, not freedom—a literature that balances away speech rights. . . . Its basic strategy is to treat freedom of speech not as an end in itself, but an instrumental value."[22] Hirsch concurs: "It has become quite common and even fashionable to have second

20. We did, however, discover one study that defined judicial decisions upholding campaign finance laws as liberal. That study, perhaps not so surprisingly, was co-authored by a law professor, Cass R. Sunstein. Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004). In contrast to social scientists, legal academics have long argued that support for First Amendment values is no longer a hallmark of liberalism.

21. In most empirical research, the investigator asks whether a particular "event" influenced a particular "outcome." We can characterize the events and outcomes as "variables" that take on different values. That is, they vary. For example, as we explain in Part II, *infra*, in our study, an "event"—the ideology of the Court—varies from about -6 (very liberal) to 4 (very conservative). An "outcome"—a Court decision—can be in favor of the First Amendment claim or against it. We typically term the outcomes "dependent variables" and the event an "independent variable." *See* Epstein & King, *supra* note 18, at 35.

22. Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA L. REV. 385, 393 (1989).

thoughts about the First Amendment. In the academy, in the civil liberties and civil rights communities, and in constitutional law, the liberal orthodoxy that governed decades of thinking about the First Amendment has disintegrated."[23] On these accounts, even ardent civil libertarians are willing to put aside First Amendment guarantees when they cut into other "trumping" values, such as equality and privacy. For example, limitations on racist language are to be encouraged to eradicate bigotry and intimidation; curtailments on pro-life protesters are to be tolerated to protect the right to abortion; and regulations on materials and speech that degrade women are to be applauded in the name of sex-based equality.

Undoubtedly, as perusal of the law reviews reveals, there is truth to Shapiro's and Hirch's observations. Whether emanating from critical legal scholars, race and feminist theorists, or even proponents of economic approaches to law, proposals to regulate free expression abound in one way or another.[24]

These writings are normative in nature. More relevant for our purposes is the growing body of positive legal literature that points to a shift on the Court regarding the First Amendment—such that we "can no longer assume that the Left generally sides with speakers and the Right with the government."[25] In support of this claim, scholars point to a string of contemporary decisions including, but certainly not limited to, the following cases.

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23. H.N. Hirsch, *Second Thoughts on the First Amendment*, *in* CONSTITUTIONAL POLITICS 223 (Sotirios A. Barber & Robert P. George eds., 2001).

24. The literature along these lines is voluminous. Some recent examples include RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004) (arguing in favor of regulating forms of hate speech); Lynn Mills Eckert, *The Incoherence of the Zoning Approach to Regulating Pornography: The Exclusion of Gender and a Call for Category Refinement in Free Speech Doctrine*, 4 GEO. J. GENDER & L. 863, 863 (2003) (supporting "regulation justified on the basis of pornography's specifically gender-based harms as well as its more general, community-based harms"); Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 394 (2002) ("The government's interest in ensuring equal opportunity in ordinary workplaces generally outweighs employees' interests in engaging in unfettered debate at work."); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

25. Volokh, *supra* note 3, at 1198.

First, scholars point to *Madsen v. Women's Health Center*,[26] in which the Court upheld an injunction that prohibited pro-life groups from protesting within thirty-six feet of an abortion clinic and restricted noise levels,[27] but held bans on protest activity within three hundred feet of a clinic or private residence unconstitutional.[28] Three of the Court's most conservative members (Scalia, Kennedy, and Thomas) dissented from that portion of the judgment that upheld the thirty-six-foot zone and noise restrictions on the ground that such curtailments "were profoundly at odds with First Amendment precedents and traditions."[29]

Second, scholars note *Morse v. Republican Party of Virginia*,[30] in which the Court's four most liberal members (joined by Justice O'Connor) held that the Republican Party's imposition of a registration fee as a condition of participation for the election of the Party's Senate candidate required preclearance under the Voting Rights Act of 1965.[31] The Court's four most conservative members dissented, all of whom were troubled by the First Amendment concerns "presented by governmental intrusion into political party functions."[32]

Scholars also point out *Boy Scouts v. Dale*,[33] in which the five conservative Justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) held that the application of New Jersey's public accommodations law to require the Boy Scouts to admit a gay male violated the Boy Scouts' First Amendment rights.[34] The Court's liberals (Stevens, Souter, Ginsburg, and Breyer) dissented.[35] Writing for the dissenters, Justice Stevens acknowledged the importance of free speech and association, but emphasized that prejudice against gays is "still prevalent" in American society.[36] This situation "can

26. 512 U.S. 753 (1994).
27. *Id*. at 770.
28. *Id*. at 775.
29. *Id*. at 785.
30. 517 U.S. 186 (1996).
31. *Id*. at 201.
32. *Id*. at 290.
33. 530 U.S. 640 (2000).
34. *Id*. at 659.
35. *Id*. at 663.
36. *Id*. at 700.

only be aggravated," Stevens wrote, "by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers."[37]

Finally, scholars note *McConnell v. Federal Election Commission*,[38] in which five Justices (Stevens, O'Connor, Souter, Ginsburg, and Breyer) upheld the major provisions of the Bipartisan Campaign Reform Act against a First Amendment challenge.[39] Writing in dissent, Justice Thomas claimed that the majority's conclusion "is antithetical to everything for which the First Amendment stands."[40] Rehnquist, Scalia, and Kennedy also dissented.[41]

These examples, to be sure, shore up claims as to the willingness of seemingly liberal Justices to abandon the First Amendment when it conflicts with values of greater importance to them. However, they also demonstrate the willingness of conservatives to embrace the Amendment when its guarantees suit their purposes. In these disputes, unadulterated support for the First Amendment was hardly a hallmark of liberalism; but neither was unadulaterated opposition a lodestar of conservatism.

II. ASSESSING COMPETING CLAIMS ABOUT THE FIRST AMENDMENT

Without doubt, the cases of *Madsen*, *Morse*, *Dale*, and *McConnell* are suggestive: Justices who we might, under traditional definitions, deem "liberal" supported restrictions on expression, and "conservative" Justices opposed the regulations at issue. What these examples fail to provide, however, is a conclusive rebuttal to empirical political science work that continues to invoke support for (or opposition to) the First Amendment as a critical component of a liberal (or conservative) ideology. Making such a case requires a far more systematic evaluation of the Justices' ideology and their votes

37. *Id*.
38. 540 U.S. 93 (2003).
39. *Id*. at 139.
40. *Id*. at 274.
41. *Id*. at 248, 286, 350.

in First Amendment disputes, not just an analysis of a few self-selected exemplars.[42]

We undertake that challenge here, exploring the votes cast by the Justices in all First Amendment cases decided between the 1953 and 2004 terms. In what follows, we provide more details about two building blocks of our study—the cases and the Justices.

A. The Cases

To assess the view that a reversal of sorts has occurred in First Amendment litigation over free speech, press, assembly, and association—with liberal Justices no longer fully committed to supporting free expression, and conservative Justices no longer fully committed to supporting government regulation thereof—we must identify the relevant pool of cases and determine whether or not the Justices voted in support of the litigant claiming a violation of his or her liberties.

The existence of Harold J. Spaeth's *U.S. Supreme Court Database* makes amassing data on the Court's First Amendment decisions a relatively straightforward task.[43] This database, which many scholars have used to study law and judicial politics,[44] contains information on over two hundred attributes of Court decisions—including the law or constitutional provision at issue and whether the Justices ruled in favor of or against individuals claiming a violation of First Amendment guarantees—in all cases decided with an opinion by the Court since the 1953 term.[45]

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42. *See also* Volokh, *supra* note 3 (attempting to move beyond the "few-representative-cases" approach).

43. SPAETH, *supra* note 19.

44. *See, e.g.*, Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1305 n.8, 1324–45 (2002) (relying on the Spaeth database to assess theories of federalism in the Rehnquist court); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1483–91 (2001) (relying on the Spaeth database to investigate the institutional context of the Court); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005) (using the Spaeth database to study the effect of war on Supreme Court decisions); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 733 n.19, 733–48 (2000) (employing the Spaeth database to assess stare decisis).

45. *See* SPAETH, *supra* note 19.

For the time period of interest, the Spaeth database identifies 506 disputes in which the First Amendment guarantees of press, speech, assembly, or association were at stake, representing approximately eight percent of all orally argued disputes resolved between the 1953 and 2004 terms.[46] Two types of these cases were of particular interest to us. The first, what we call "pure" disputes, are those that, by and large, do not require the Justices to weigh First Amendment guarantees against any other constitutional or political value. *Texas v. Johnson*[47] provides an example. Here, the Justices determined simply whether Texas' flag desecration law violated the First Amendment; the competing values of, say, equality or privacy did not come into play.[48] The second category of interest includes those cases in which another issue, liberty, or right substantially enters the picture. We label these "value-conflict" cases, and they include (but are not limited to) the four disputes listed above: *Madsen*, *Morse*, *Dale*, and *McConnell*.[49]

As seen in Figure 1, across the entire forty-year period, pure First Amendment disputes well outnumber those with value-conflicts: 82.41% (n=417) versus 17.59% (n=89).[50] Interestingly (though perhaps not surprisingly), this picture is changing. While value-conflict suits constituted only 5% of the 157 cases decided by the

46. *Id*.

47. 491 U.S. 397 (1989).

48. *Id*. at 399.

49. Several colleagues, including Eugene Volokh and Abner S. Greene, have suggested to us that the distinction between pure and value-conflict cases may be one without meaning because in all disputes a competing interest exists. This is no doubt true, but to us, the question is one of degree. For example, in terms of the "tension" between a First Amendment claim and another (typically, "constitutionally-grounded") value, a *Texas v. Johnson* and a *Boy Scouts v. Dale* seem quite distinct. For more on this general point, see Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223, 224 (1996) (exploring the Court's use of the "constitutional tension method," which involves "identifying certain values that the Constitution protects and suggesting that the Constitution's free speech guarantee must sometimes yield to these values").

If this is so, the task becomes one of categorizing cases as pure or value conflict. We can imagine a number of possible approaches, *see, e.g.*, Volokh, *supra*. We take one that, at the very least, is reproducible and that inter-coder reliability tests have validated: value-conflict cases are First Amendment cases identified by Spaeth as also including a non-First Amendment issue (e.g., civil rights or privacy); pure cases are those in which, according to Spaeth, the Court did not consider a non-First Amendment issue. *See* SPAETH, *supra* note 19.

50. *See infra* p. 95, fig.1.

Warren Court (1953 through 1968 terms), by the Rehnquist Court era (1986 through 2004 terms), that figure had risen dramatically, to 27.97% (40 out of 143 cases).[51]

With the relevant cases in hand, one task remained: determining whether or not the Justices voted in support of First Amendment guarantees. Using the Spaeth database, with certain adaptations made for our purposes,[52] we were able to make this determination for every vote cast by every Justice for all 506 disputes.[53] Specifically, we defined a liberal vote as one in favor of parties that allege a violation of the guarantees of press, speech, assembly, and association. Hence, a vote that supports a flag burner is a liberal vote, as is one against the campaign finance law at issue in *McConnell* or one in favor of the Boy Scouts in *Dale*.

Using this criterion, overall (that is, across the four decades in our database) the Court supported claims of deprivation of First Amendment liberties in 53.95% of the 506 cases. In light of their overwhelming numbers in our database, that figure varied little for

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51. *Id*.

52. Understanding our adaptations requires an understanding of three variables in the Spaeth database and how they interact. One is the direction of the decision (and the votes of each Justice), which is coded as liberal or conservative. Liberal represents, for example, support for the rights of the accused in criminal cases; support for women and minorities in civil rights disputes; support for individual rights in First Amendment and privacy litigation; support for unions, over both employees and employers, in union cases; and support for government regulation of business in economic cases. *See* SPAETH, *supra* note 19.

Second, there are separate variables in the database that represent the issue or issues in the case (e.g., loyalty oaths, clinic access, etc.) and the law or laws (e.g., specific legislative acts or constitutional provisions). *Id*. Any given case could have multiple issues and multiple laws or legal provisions.

Crucially, the direction of the decision is based on the primary issue in the case, not on the law(s) or on any secondary issues. For example, Spaeth identifies *Boy Scouts v. Dale*, 530 U.S. 640 (2000), as a Civil Rights case; on the Civil Rights issue, the Court voted conservatively (against the Civil Rights claim), even though it voted liberally on the First Amendment issue. *Id*. at 659. Accordingly, Spaeth codes the case and the votes of the majority Justices as conservative, and the dissenting Justices as liberal. *See* SPAETH, *supra* note 19.

To ensure that the direction variables (both for the Court and the individual Justices) were consistent with our First Amendment concerns, we checked the coding of those variables for any case in which the law variable included the First Amendment, but the issue variable included a non-First Amendment issue. For example, to include *Dale* as a First Amendment case, we altered the coding from a conservative Civil Rights decision to a liberal First Amendment decision. We repeated this procedure for cases in which a second- or subsequent-listed issue involved First Amendment concerns, but the first-listed issue did not.

53. *See infra* p. 96, fig.2.

the 417 pure cases (56.83%), but it was significantly lower for the 89 conflict cases (40.45%).[54]

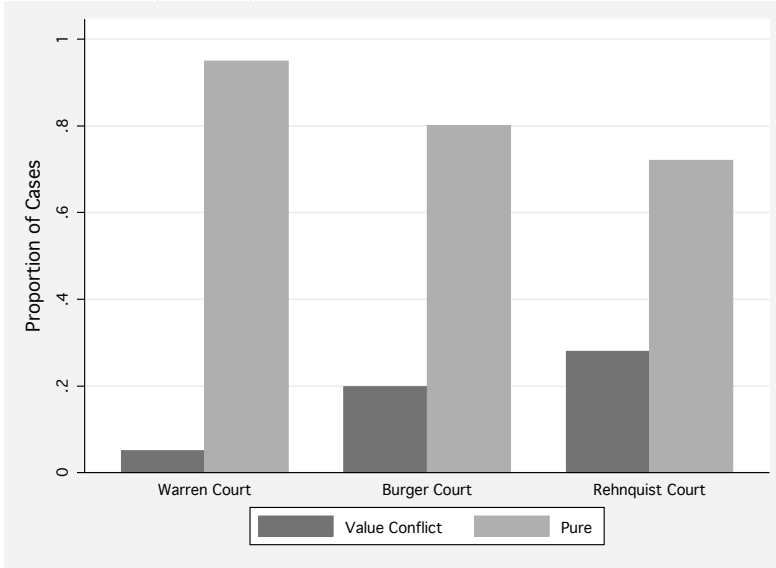

Figure 1: Pure and value-conflict First Amendment cases, by Chief Justice era. For the Warren Court (1953–1968 terms), N=157; for the Burger Court (1969–1985 terms), N=206; for the Rehnquist Court (1986–2004 terms), N=143.[55]

Looking at the three Chief Justice eras, as seen in Figure 2, we observe that in pure cases, the liberal Warren Court was far more likely to vote in favor of the First Amendment litigant than other Courts—71.81% versus 46.06% for the Burger Court and 52.43% for the Rehnquist Court. Note, however, that in the eight Warren Court disputes that presented a conflict of values, the percentage drops to only 25%.

54. Pearson $\chi^2 = 7.926$; $p = 0.005$.

55. We identified the First Amendment cases from Spaeth's database. *See* SPAETH, *supra* note 19.

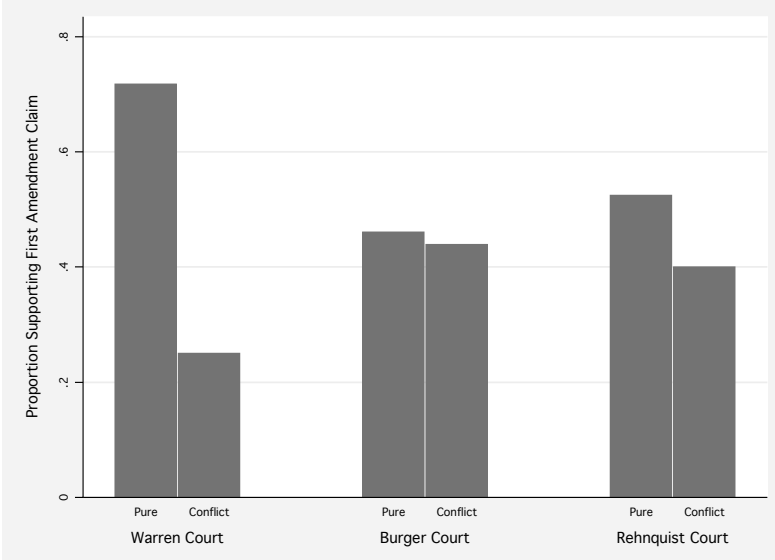

Figure 2: Proportion of decisions supporting First Amendment claims, by pure and value-conflict cases and Chief Justice era. For the Warren Court (1953–1968 terms), N=157; for the Burger Court (1969–1985 terms), N=206; for the Rehnquist Court (1986–2004 terms), N=143.[56]

B. The Justices

Identifying the First Amendment cases and determining the direction of the Court's (and each Justice's) decisions are necessary but insufficient steps to assess claims about First Amendment guarantees; we also must characterize each Justice as liberal, conservative, or something in between.

Political scientists have taken two broad approaches to assessing judicial ideology: exogenous and endogenous measures. Exogenous measures are those that are completely independent of the votes that the Justices cast; endogenous measures rely at least in part on those votes. Exogenous measures have the benefit of independence; endogenous measures have the benefit of greater precision. The

56. *Id.*

choice between the two depends substantially on the goals of the study.

When the goal is explanation, scholars prefer exogenous measures because explaining votes with measures derived (even in part) from votes involves a degree of circularity. But if we take as given—as we do for purposes of this Article—that ideology drives Supreme Court behavior, and wish to describe how that works (e.g., whether liberals or conservatives are most likely to support First Amendment values), we need the most precise measure possible. Therefore, we utilize in the text findings yielded from an endogenous measure; in Appendix A, we supply the results produced by an exogenous measure. Ideally, findings from both will result in similar answers, thus giving added confidence to our conclusions. Almost universally, that is what we find.

While social scientists and legal academics have proposed several operational approaches to measuring ideology endogenously, we rely here on a vote-based measure developed by Andrew D. Martin and Kevin Quinn.[57] Derived from analyses of voting patterns on the Supreme Court each term—meaning that the Justices' ideal points can and do change over time—the "M-Q" scores are theoretically unbounded.[58] For the Justices in our dataset, however, they range from a very liberal -6 (Justice Douglas) to a very conservative +4 (Justice Thomas).[59]

Figure 3 underscores these points about the range and dynamic nature of the Martin-Quinn approach. Figure 3 depicts the ideological estimates for Justices serving on three courts, in 1963, 1983, and 2003. Note, first, the range, from an exceptionally liberal Justice Douglas in the 1963 term to the exceptionally conservative Justice Thomas in the 2003 term. Now consider the dynamic character of the

57. We used a modified version of the scores developed by Martin and Quinn. These scores are available at Ideal Points for the U.S. Supreme Court, http://adm.wustl.edu/supct.php (last visited May 16, 2006). For more details about their creation, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002), *available at* http://adm.wustl.edu/pdfs/pa02.pdf. We adapt our description of the Martin & Quinn ideal point estimates from Lee Epstein et al., *The Judicial Common Space*, __ J.L. ECON. & ORG. (forthcoming 2006).

58. *See* Martin & Quinn, *supra* note 57.

59. *Id.*

estimates, such that Justice Brennan's ideal point estimate of -0.83 in 1963 was considerably more moderate than his 1983 estimate (-2.82). On the other hand, Rehnquist was more moderate during his penultimate term as Chief Justice (in 2003) than during his associate days (1983 term).

Even from this brief description of the Martin-Quinn scores, their assets for our project move into relief. They are susceptible to replication and demonstrate strong facial validity; that is, they square with our overall impressions of the ideology of the Justices. In Figure 3, notice, for example, that Justices Scalia and Thomas, generally considered the most reliably conservative members of the Rehnquist Court, anchor the right end, and Justices Stevens and Ginsburg, the left. Of equal importance for our purposes is that ideological estimates are available for all Justices and all terms in our dataset, thus enabling us to assess whether liberals generally support the First Amendment and conservatives support regulation for each year under analysis.

Of course, we understand a potential critique of this measurement strategy: because Martin and Quinn derive their estimates from voting records, our invocation of them here appears to be using votes to predict votes. One solution would be to remove the First Amendment cases from the data used to generate the Martin-Quinn estimates and recompute them. By purging the particular issue at interest, in other words, the Martin-Quinn scores are more appropriate for use in research as to the role of the Justices' preferences in their decision making.

While there is nothing inherently wrong with this solution, Martin and Quinn themselves show that it is not necessary for analyses of the sort conducted here—an analysis of a particular issue area. They note:

> As a practical matter using the full data Martin-Quinn scores when modeling votes in a single issue is perfectly appropriate. While circularity is a technical concern, the resultant measures from purging issues will change very little, and so it is not

worth the effort to do so. When modeling votes in a single issue area, circularity is not a practical concern.[60]

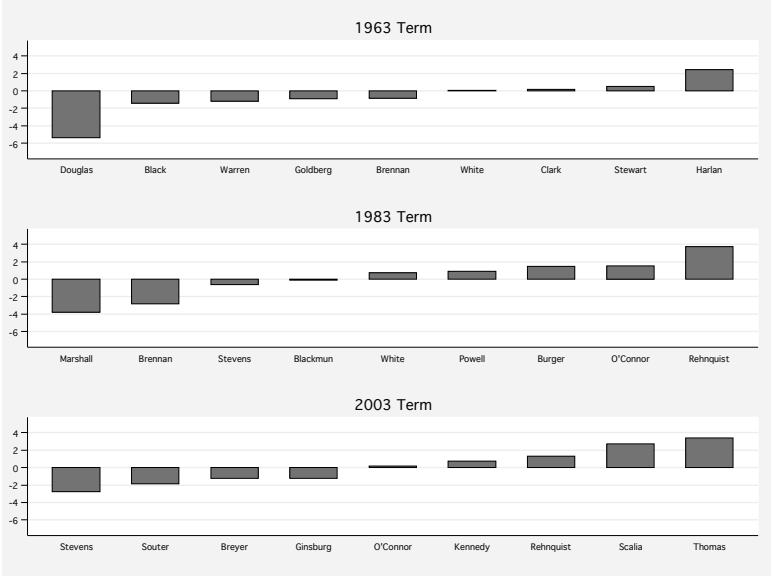

Figure 3: Martin & Quinn's ideal point estimates, 1963, 1983, 2003 terms. We have ordered (on the horizontal axis) the Justices serving during each term from most liberal to most conservative based on the estimates of their ideal points, which are depicted on the vertical axis. The vertical axes run from most liberal (here, -6) to most conservative (+4).[61]

Nonetheless, to mitigate concerns as to the use of a vote-based measure to explain votes, we replicate all analyses using an exogenous approach to ideology: the Segal-Cover scores.[62] Appendix A houses these results; they mirror almost precisely the findings depicted in the text.

60. Andrew D. Martin & Kevin M. Quinn, Can Ideal Point Estimate Be Used as Explanatory Variables? 3 (Oct. 8, 2005) (unpublished manuscript, available at http://adm.wustl.edu/supct/resnote.pdf (last visited May 16, 2006)).

61. Martin & Quinn, *supra* note 57.

62. *See infra* note 86.

III. RESULTS

With the ideological scores and cases in hand, we can now assess the relationship between support for the First Amendment and Justices' policy preferences. In what follows, we consider decision making at the Court level, and then turn to the votes cast by individual Justices.

A. The Court

If traditional political science perspectives continue to characterize the Court's treatment of First Amendment claims, we would expect to observe a strong relationship between the ideology of the Court and the direction of its decisions—such that the more liberal the Court, the greater its propensity to rule in favor of litigants claiming a violation of their First Amendment rights. To put this perspective, we began by using Martin and Quinn's estimates of the ideological location of the median justice for each term in our analysis.[63] This technique is consistent with public choice and jurisprudential theories that emphasize the importance of the swing vote, as well as with contemporary commentary stressing the critical role that Justice O'Connor (and, to a lesser extent, Justice Kennedy) played on the Court by casting key votes in many consequential cases.[64]

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63. *See* Martin & Quinn, *supra* note 57 (describing estimates of the median Justice). For more details on these estimates, see Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005). The reason for choosing the median Justice, as we have written elsewhere, *see* Epstein et al., *supra* note 44, has a clear and obvious grounding in the public choice literature on strategic decisionmaking. *See, e.g.*, DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 18 (1958) (demonstrating that median voter controls the outcome of any majority vote); Martin et al., *supra* (proposing a systematic approach for identifying median Justice).

64. *See, e.g.*, Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making*, 28 LEGIS. STUD. Q. 247, 249, 253 (2003) (employing median-Justice theory in analyzing the effects of institutional constraints on Supreme Court decisionmaking); R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court*, 29 PEPP. L. REV. 637, 638–39 (2002) (discussing the role of swing Justices O'Connor, Kennedy, and Souter in fifty-four Supreme Court decisions between 1997 and 2000); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 41–42 (1997) (testing the separation-of-powers model with data on median Justices' positions). The role of the pivotal Justice is deeply rooted in the theory of the median voter. *See also* Harold Hotelling,

Figure 4 depicts these Court "swings," with Court terms on the horizontal axis and the relative liberalness of the median Justice on the vertical axis. These data are consistent with commonly held intuitions about particular Court eras. Note, for example, the high level of liberalism during the Warren Court years (1953 through 1968 terms), and the low levels thereafter as Justices appointed by Republican Presidents Richard M. Nixon, Ronald Reagan, and George H.W. Bush ascended to the bench.

To determine whether the Court's (i.e., the median Justice's) ideology helps account for decisions in the free expression context, we estimated a probit model with the direction of the majority's decision (either for or against the litigant claiming a First Amendment violation) as the dependent variable, and ideology as the sole independent variable.[65]

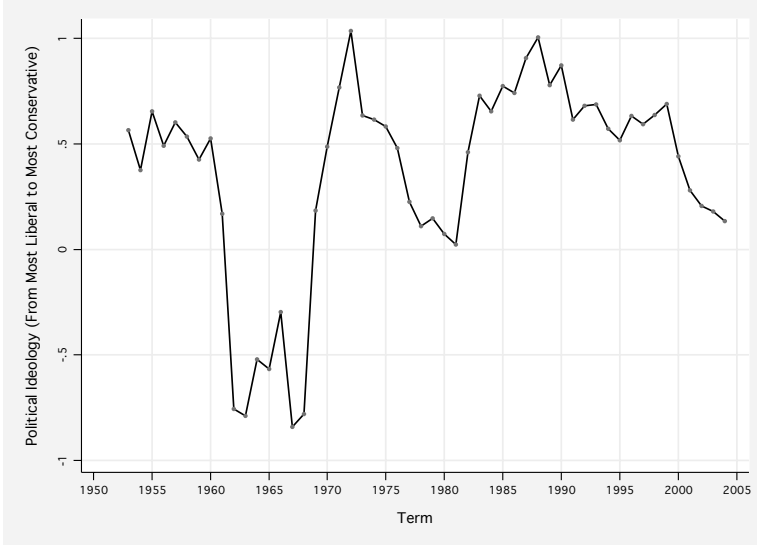

Figure 4: The political ideology of the median Justice on the U.S. Supreme Court, 1953–2004 terms. The line depicts the Martin-Quinn estimate of location of the median Justice for each term. The scores indicated on the vertical axis measure liberalness, ranging from -1 (most liberal) to +1 (most conservative).[66]

Stability in Competition, 39 ECON. J. 41, 53–57 (1929) (discussing the general tendency for excessive conglomeration near a median position).

65. *See supra* note 21.

66. For Martin-Quinn estimates of the location of the median Justice, see Martin & Quinn,

Through this exercise, not only does a statistically significant relationship emerge between the Court's ideology and its decisions,[67] but one that is substantively meaningful as well. Figure 5 illustrates this by plotting the range of ideology of the median Justice against the predicted probability that the Court would decide in favor of litigants alleging an abridgment of their liberties. Note that as we move from an extremely liberal (-.8) to an extremely conservative (1.0) Court, this probability decreases from .78[68] to .40.[69] In more concrete terms, during the Warren Court era, when the median Justice was -.01,[70] the predicted probability of a pro-First Amendment decision was .63 (with a 95% confidence interval of .58-.68). During the Rehnquist Court years, that figure fell to .49 (with a 95% confidence interval of .44-.54).[71]

Replicating this analysis for the 417 pure First Amendment cases produces similar results: the Court's ideology and its decisions are significantly related.[72] In substantive terms, we predict that a very left-of-center Court, such as the Warren Court in its 1968 term (-.781 ideology), would rule in favor of the First Amendment litigant in

supra note 57.

67. Specifically, the estimates are as follows (where ** indicates $p < .01$; and Std. Errs. are robust standard errors clustered on term):

Variables	Coefficient	(Std. Err.)
Ideology of the Court	-0.578**	(0.132)
Intercept	0.325**	(0.074)
N	506	
Log-likelihood	-337.276	
$\chi^2_{(1)}$	19.246	

68. The 95% confidence interval is .69–.86.

69. The 95% confidence interval is .33–.48.

70. This represents the mean score of the median Justice between the 1953 and 1968 terms.

71. The mean score of the median Justice was a rather conservative .54.

72. The estimates for the 417 pure cases are as follows (where ** indicates $p < .01$; and Std. Errs. are robust standard errors clustered on term):

Variables	Coefficient	(Std. Err.)
Ideology of the Court	-0.624**	(0.165)
Intercept	0.406**	(0.094)
N	417	
Log-likelihood	-272.99	
$\chi^2_{(1)}$	14.283	

eight out of every ten "pure" cases (predicted probability = .81, with a 95% percent confidence interval of .68–.90). In contrast, a very right-of-center Court, such as the Burger Court in its 1975 term (.58 ideology), would support the First Amendment claim in approximately one out of every two "pure" cases (.52, with a confidence interval of .45–.58).[73]

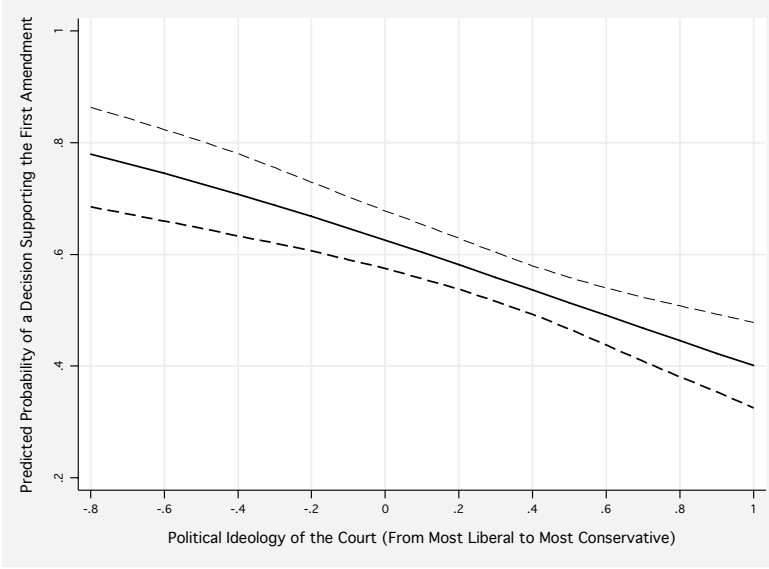

Figure 5: The effect of ideology on Supreme Court voting on First Amendment claims. The solid line shows the predicted probability that the Court would decide in favor of a litigant alleging an abridgment of First Amendment liberties, when we set the Court's ideology at very liberal (-.80), very conservative (1), and in-between levels (-.7 to .9). The dashed lines represent 95% confidence intervals.[74]

73. We used CLARIFY to compute these predictions. See Gary King, Software, http://gking.harvard.edu/stats/shtml (last visited May 16, 2006). For the underlying model, see *supra* note 72.

74. We computed this figure using CLARIFY, *see supra* note 73. For more details, see Gary King et al., *Making the Most of Statistical Analyses*, 44 AM. J. POL. SCI. 347 (2000). For the underlying model, see *supra* note 67.

What these results tell us, in short, is that over the 506 cases, as well the 417 "pure" cases, ideology provides a reasonable predictor of outcome: the more liberal the Court, the more likely it is to rule in favor of a party alleging an abridgment of First Amendment liberties. That relationship, interestingly enough (and depending on the measure of ideology we deploy), either disappears or reverses when we focus exclusively on the eighty-nine "value-conflict" cases. Using the Martin-Quinn estimates, no statistically significant relationship emerges between ideology and First Amendment decisions ($p = .82$). Using the (exogenous) Segal-Cover scores, as in Appendix A, the relationship reverses: the level of liberalism is negatively and significantly associated with the Court's decision ($p = .02$), such that the more liberal the Court, the *less* likely it is to support a First Amendment claim in conflict cases.[75]

Either way, these findings provide some ammunition for scholars who challenge conventional political science notions of liberalism. For disputes presenting a conflict of values, support for the guarantees of speech, press, assembly, and association is hardly the hallmark of a liberal Court, as so many assume.

B. The Justices

Thus far our results are provocative. We observe a strong positive relationship between the ideology of the Court and the direction of its decisions in the great bulk of cases—pure First Amendment disputes. For these cases, the more liberal the Court, the more likely it is to rule in favor of litigants alleging a violation of their rights. The value-conflict cases are of a different order: at a minimum, we find no relationship between ideology and outcomes; at a maximum, we find one that works in the reverse, such that liberal Courts are *less* likely to favor First Amendment claims. Do similar patterns emerge when we move away from Court-level decisions and towards the votes cast by individual Justices? The answer, as it turns out, is yes.

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75. For more details, see Appendix A.

Looking first at all 506 cases, as in Figure 6, the relationship between ideology and votes remains quite strong and positive.[76] Specifically, if the ideology of a Justice corresponds to his or her votes, we should see conservative Justices (e.g., Rehnquist or Scalia) clustered toward the bottom right of Figure 6. Similarly, more liberal Justices should cluster near the top left, and moderate Justices should appear closer to the middle.

Overall, this is the pattern we see: the more liberal the Justice, the more votes he or she cast in favor of a First Amendment claim. For example, based on our calculations, we would expect Antonin Scalia—a very conservative Justice with a mean ideal point of 2.51—to support the litigant alleging a liberties abridgment in approximately 31.05% of cases;[77] Scalia's actual value is 38.73%. Moving to the highest levels of liberalism—such as Thurgood Marshall with a mean ideal point estimate of -2.72—the expected percentage of votes favoring the First Amendment claim is 78.23%;[78] Marshall's actual support is slightly higher, but only slightly (80.94%).

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76. For this analysis and all others to follow, we include only those Justices who participated in ten or more cases. Figure 6 is based on a regression of the total percentage of cases in which the Justice cast a liberal vote on the mean of the Martin-Quinn ideal point estimate for each Justice (since the 1953 term). The estimates are as follows (where ** indicates $p < .01$):

Variables	Coefficient	(Std. Err.)
Justice's Ideology	-0.090**	(0.016)
Intercept	0.537**	(0.028)
N	28	
R^2	0.564	
$F_{(1,26)}$	33.701	

Note that this analysis explores Justices' voting over the course of their careers (the "Justice-level" analysis). If we disaggregate by case, in other words, if we model the votes of each Justice in each case (the "case-level" analysis), the results are quite similar. A probit (clustering on Justice) of vote on ideology produces a correctly signed and statistically significant estimate (-.256, $p < .01$).

77. The 95% confidence interval is 21.40–39.86. We computed these figures using CLARIFY. *See supra* notes 73, 74.

78. The 95% confidence interval is 68.14–88.63. We computed these figures using CLARIFY. *See supra* notes 73, 74.

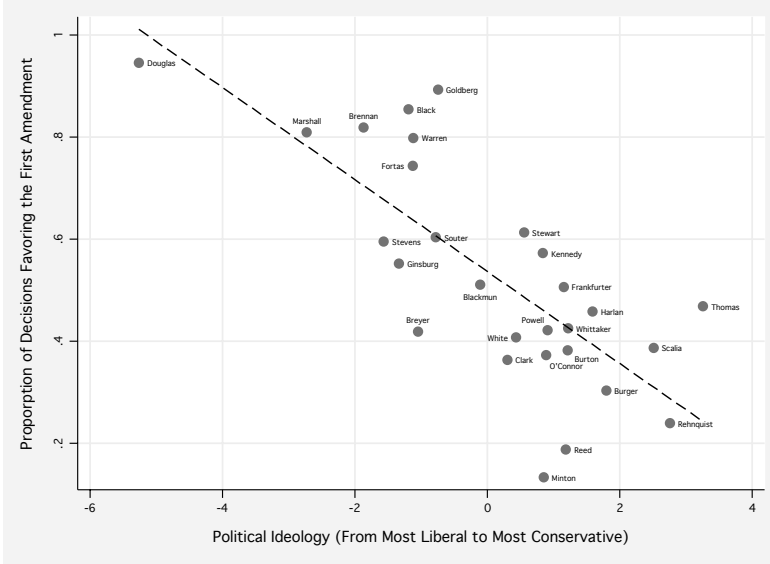

Figure 6: The relationship between the ideology of the Justices and their votes in all First Amendment cases, 1953–2004 terms. The dotted line represents a prediction of Justices' votes based on their Martin-Quinn ideal point estimate. The closer a point to the line, the stronger the association between ideology and votes cast in all First Amendment cases.[79]

Given that pure First Amendment cases comprise a very large fraction of our database (417 out of 506), it comes as no surprise that this pattern repeats itself as to these disputes. In the pure cases, just as across the whole sample, the Justices evince voting behavior consistent with the political science literature: liberals generally

79. For the estimates underlying this figure, see *supra* note 76.

support First Amendment values, and conservatives support regulation.[80]

If these results mirror our findings for the Court as a whole, so too do our results for the value-conflict cases: no statistically significant relationship emerges between ideology and votes. In other words, and in direct contrast to the patterns displayed in Figures 5 and 6, liberal Justices (or Courts, for that matter) are no more or less likely than conservatives to support or oppose regulation of First Amendment guarantees when another trumping value comes into play ($p = .154$).[81]

Given that only eighteen of the Justices in our sample participated in ten or more value-conflict cases,[82] additional statistical probing of this particular (non)-result may prove rather unilluminating.[83] But several descriptive patterns that emerge from the data are intriguing, to say the least.

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80. The following estimates are from a regression of the percentage of pure cases in which the Justice cast a liberal vote on the Justice's political ideology score (where ** indicates $p < .01$):

Variables	Coefficient	(Std. Err.)
Justice's Ideology	-0.083**	(0.017)
Intercept	0.580**	(0.031)
N	28	
R^2	0.469	
$F_{(1,26)}$	22.961	

81. Moving to a case-by-case analysis, *see supra* note 76, produces somewhat different results. Across the entire sample of value-conflict cases, liberal Justices remain more likely to support the First Amendment claim ($p < .01$). That same finding emerges in separate analyses of the Warren and Burger Court eras, but it does not hold for the Rehnquist Court. For the 1986 to 2004 terms, no statistically significant relationship emerges between ideology and votes in the value-conflict cases. For the last natural Court era (1994 to 2004 terms), however, left-of-center Justices were significantly more likely to support regulation in cases presenting a clash of values, and significantly more likely to support the First Amendment claim in pure First Amendment disputes. For more on this point, see Figure 7 and Appendix B.

82. *See supra* note 76.

83. *But see supra* note 81 and app. B.

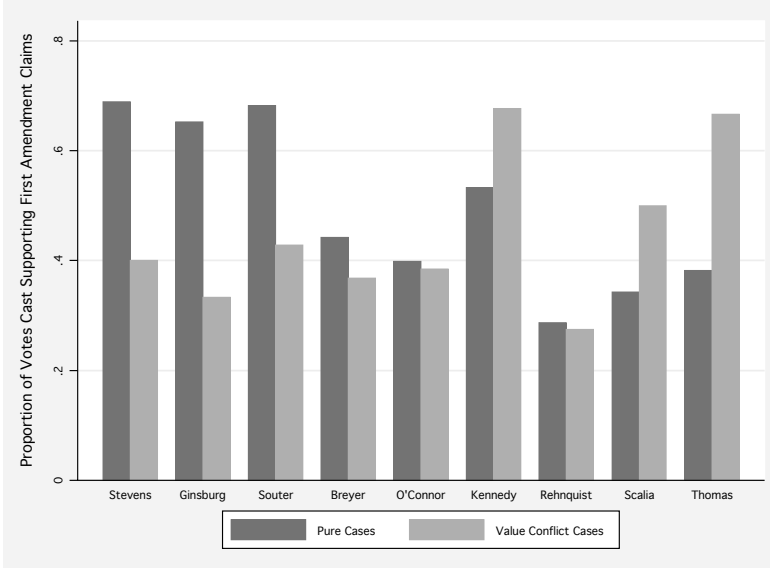

Figure 7: Proportion of votes supporting First Amendment claims, by pure and value-conflict cases. The proportions are derived from votes cast since the start of the Rehnquist Court in the 1986 term through its conclusion in the 2004 term. We order the Justices from most liberal to most conservative based on Martin & Quinn's ideal point estimates for the 2004 term (excluding First Amendment cases).[84]

Consider, for example, the data depicted in Figure 7. Figure 7 shows the proportion of cases in which each member of the 2004 Court voted for or against the First Amendment claim in pure cases and in those presenting a conflict of values during the Rehnquist years (1986 through 2004 terms).

Observe the rather sharp pattern that emerges: The Court's most liberal members (Stevens, Ginsburg, Souter, and, to a lesser extent, Breyer) were more supportive of First Amendment claims in pure disputes than in value-conflict cases, while three of the four conservative Justices (Thomas, Scalia, and Kennedy) evince precisely the opposite behavior.[85] Note, too, that for the Court's most extreme members, the differences are quite stark. On the left end of

84. *See supra* note 58.

85. For more rigorous support of this description of behavior on the Rehnquist Court, see app. B.

the spectrum, Justice Stevens was all too willing to vote in favor of the liberties claim in pure cases (nearly 70%), and all too willing to support regulation in the conflict cases (in only 40% did he support the First Amendment claim). Justice Thomas exhibits mirror image behavior, supporting the First Amendment in only about 40% of the pure cases, but in nearly 70% of the conflict disputes.

Justices Stevens and Thomas are the starkest cases, but they are not alone. Indeed, only Justice O'Connor and Chief Justice Rehnquist were consistent First Amendment voters. O'Connor, as Figure 7 shows, was consistently moderate, voting to support freedom of expression in four out of every ten cases, regardless of whether another value entered into play. Rehnquist was consistently conservative: across the board, in pure or in conflict cases, he was the Court's most ardent supporter of regulation of First Amendment guarantees.

IV. DISCUSSION

In more empirical studies than we can recount here, political scientists have equated liberalism with a fundamental commitment to the First Amendment guarantees of speech, press, assembly, and association, and have linked conservatism with a commitment to the regulation of those guarantees. Our results suggest a fundamental flaw with this equation. At least with regard to the U.S. Supreme Court, left-of-center Justices are no more likely than their right-of-center counterparts to support the First Amendment in disputes in which other values are at stake. In fact, if our descriptive analysis of the Justices of the Rehnquist Court is any indication,[86] precisely the opposite relationship emerges: it is liberals who support regulation, and conservatives who embrace the First Amendment.

These results are fascinating, if for no other reason than that they suggest that unadulterated support for freedom of expression is hardly the lodestar of liberalism assumed by political scientists. On the other hand, our findings beg the crucial questions: What explains the liberal rejection of the First Amendment in disputes pitting rights against rights, and what explains the conservative embracement in

86. *See supra* fig.7; *see also* app. B.

those same disputes? Several possibilities present themselves, not least of which is that First Amendment values are merely instrumental of more basic ideological concerns, with equality the number one suspect. If support for the First Amendment favors equality, then liberals will support it; if not, First Amendment values may be little more than an impediment toward their desired goals.

APPENDIX A. A DIFFERENT MEASURE OF IDEOLOGY

In the text, we invoke the Martin-Quinn ideal point estimates to measure the Justices' ideologies. Because Martin and Quinn derive their scores from the votes cast by each Justice, our analyses are open to the criticism of circularity, that is, of using votes to explain votes.

In response, we supply this Appendix, in which we validate our results against one of the most widely deployed exogenous measures of ideology: a score, developed by political scientists Jeffrey A. Segal and Albert D. Cover, from newspaper editorials written between the time of a Justice's nomination to the Supreme Court and the Senate's vote.[87] As Segal and Cover explain their procedures, they

> trained three students to code each paragraph [in the editorial] for political ideology. Paragraphs were coded as *liberal*, *moderate*, *conservative*, or *not applicable*. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.[88]

Segal and Cover then measured judicial ideology by weighing the scores as 0 for conservative, 0.5 for moderate, and 1.0 for liberal.[89] The resulting scale of ideology (or policy preferences) ranges from 0 (unanimously conservative), to .50 (moderate), to 1.0 (unanimously liberal)—Figure 8 displays the score for each justice serving since 1953.

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87. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 816 (1995) (updating the Segal & Cover scores, *supra*, to cover Justices Souter, Thomas, Ginsburg, and Breyer). Segal has now computed a score for John G. Roberts (.12).

88. Segal & Cover, *supra* note 87, at 559.

89. *Id.*

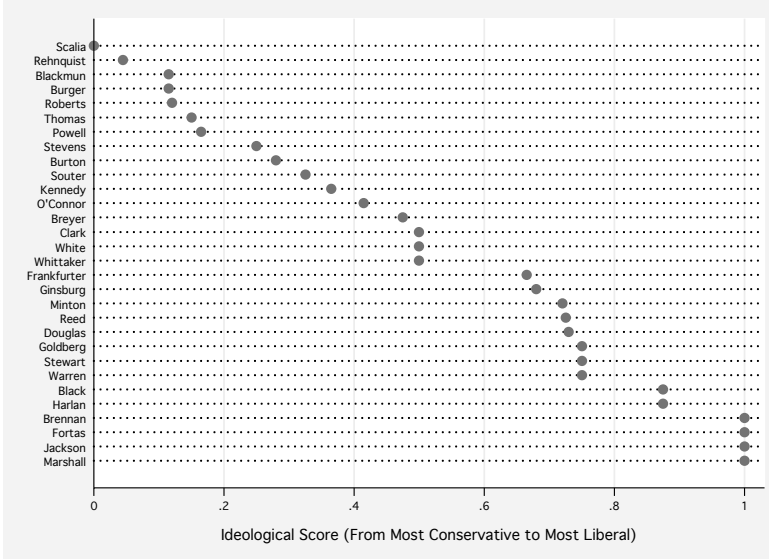

Figure 8: Perceived ideology of Supreme Court Justices based on the Segal-Cover scores. The ideological scores range from 0 (most conservative) to 1.0 (most liberal).[90]

These ideological scores have developed quite a following in the social sciences, and it is not hard to see why. While some exceptions emerge (for example, William O. Douglas was more liberal than his score; Clarence Thomas was more conservative than his), overall, the measure comports with our impressions of the Justices. William Brennan and Thurgood Marshall, generally regarded as liberals, receive scores of 1.00; Antonin Scalia and William Rehnquist, generally regarded as conservatives, receive scores of .00 and .05, respectively.[91] For purposes of cross validating our results, the

90. The ideological scores are available in LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 361 tbl. 4-16 (2003).

91. In fact, scholars have found that the ideological scores provide a satisfactory predictor of judicial votes. *See, e.g.*, LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT (2005). Certainly, they explain the votes in some issues better they do in others. *See* Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996). But, overall and across a range of cases, they have above-threshold predictive power. For example, for the Justices in our study, the correlation between the ideological scores and votes in civil liberties cases is .64.

scores' degree of validity (and reliability)[92] is important, but equally so is that they are independent of Court behavior.

A. Analyses of the Court Using the Segal-Cover Scores

To assess the extent to which the ideology of the Court explains its decisions in the First Amendment context, we relied on Martin and Quinn's estimates of the location of the median Justice. Here, we use the Segal-Cover scores depicted in Figure 8 to calculate the ideology of the median Justice for each term in our analysis. Figure 9 depicts these Court "swings;" they too (no less than the Martin-Quinn estimates)[93] are consistent with conventional views of particular Court eras, such that liberalism is quite high during the Warren Court years (1953 through 1968 terms), and decreases thereafter during the Burger and Rehnquist Court eras.

Invoking these median scores rather than the Martin-Quinn estimates produces results generally consistent with the findings denoted in Part III.A.

1. All Cases

In the text, we show that a statistically significant relationship emerges between the Court's ideology (as measured by the Martin-Quinn estimates) and its decisions in all First Amendment cases. When we substitute the Segal-Cover scores, ideology remains significantly related to Court decisions.[94] To put it more concretely,

92. Using π, Segal and his colleagues report reliability results of .72 ($p < .001$). Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees*, 84 AM. POL. SCI. REV. 525, 533 (1990).

93. *See supra* p. 101, fig.4.

94. Specifically, the estimates are as follows (where ** indicates $p < .01$ and * indicates $p < .05$; Std. Errs. are robust standard errors clustered on term):

Variables	Coefficient	(Std. Err.)
Ideology of the Court	0.722**	(0.273)
Intercept	-0.271**	(0.130)
N	506	
Log-likelihood	-344.471	
$\chi^2_{(1)}$	7.00	

across the Warren Court era, when the median Justice was a quite liberal .76,[95] the predicted probability of a pro-First Amendment decision is .61 (with a 95% confidence interval of .52–.69). During the Rehnquist Court years, that figure fell to .48 (with a 95% confidence interval of .43–.54).[96] Overall, as we move from an extremely conservative (0.0) to an extremely liberal (1.0) Court, the predicted probability of the Court deciding in favor of a litigant alleging an abridgment of his or her liberties jumps from .39 to .67.[97]

2. Pure Cases

When we conducted the same analysis for the 417 pure First Amendment cases (using the Martin-Quinn estimates), our results were quite similar: the Court's ideology and its decisions are significantly related. Substituting the Segal-Cover scores requires no change of interpretation: ideology remains associated with votes, such that we predict a very left-of-center Court, such as the Warren Court in its 1968 term (.875 ideology), to rule in favor of the First Amendment litigant in about two out of every three "pure" cases (predicted probability = .67, with a 95% confidence interval of .56–.78). A very right-of-center Court, such as the Burger Court in its 1975 term (.25), in contrast, would support the First Amendment claim in fewer than one out of every two pure cases (.47, with the confidence interval of .39–.55).[98]

95. This represents the mean Segal-Cover score of the median Justice between the 1953 and 1968 terms. *See* Segal & Cover, *supra* note 87.

96. The mean score of the median Justice was a rather conservative .32.

97. We used CLARIFY to compute these predictions. *See supra* notes 73, 74.

98. We used CLARIFY to compute these predictions. *See supra* notes 73, 74. The underlying estimates for the 417 pure cases (using the Segal-Cover scores) are as follows (where ** indicates $p < .05$ and † indicates $p < .10$; Std. Errs. are robust standard errors clustered on term):

Variables	Coefficient	(Std. Err.)
Ideology of the Court	0.849**	(0.332)
Intercept	-0.286†	(0.172)
N	417	
Log-likelihood	-279.905	
$\chi^2_{(1)}$	6.546	

3. Value-Conflict Cases

As we report in the text, if we measure ideology using the Martin-Quinn estimates, no statistically significant relationship exists between ideology and First Amendment decisions. From an analysis using the Segal-Cover scores, a different story emerges. For the eighty-nine value-conflict cases, the level of liberalism is negatively and significantly associated with the Court's decision: the more liberal the Court, the *less* likely it is to support a First Amendment claim.[99] The substantive effect, it turns out, is rather noticeable. For example, during the Warren Court years, the predicted probability of a liberal decision in a dispute pitting the First Amendment against another value is only .22.[100] That figure nearly doubles (to .43) during the Rehnquist era.[101]

99. The estimates for the eighty-nine value-conflict cases are as follows (where _ indicates $p < .05$):

Variables	Coefficient	(Std. Err.)
Ideology of the Court	-1.426**	(0.620)
Intercept	0.281**	(0.254)
N	89	
Log-likelihood	-58.284	
$\chi^2_{(1)}$	5.298	

100. The mean liberalism (of the median) is .76. The 95% confidence interval is .09–.39. These figures were calculated using CLARIFY. *See supra* notes 73, 74.

101. The mean liberalism (of the median) is .32. The 95% confidence interval is .34–.52. These figures were calculated using CLARIFY. *See supra* notes 73, 74.

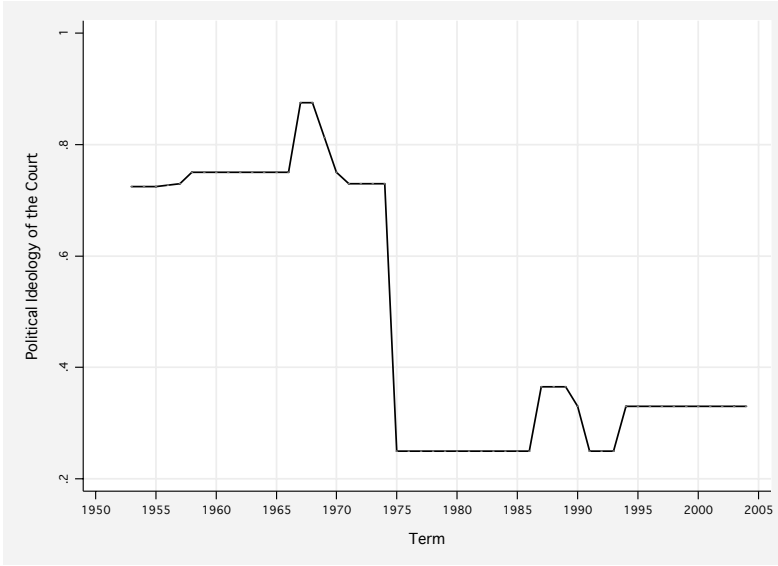

Figure 9: The political ideology of the median Justice on the U.S. Supreme Court based on the Segal-Cover scores, 1953–2004 terms. The line depicts the ideological score of the median Justice for each term. The scores indicated on the vertical axis measure liberalness, ranging from .2 (conservative) to 1.0 (liberal).[102]

B. Analyses of the Justices Using the Segal-Cover Scores

With the exception of the value-conflict cases, our results for the Court track those reported in the text. Likewise, invoking the Segal-Cover scores for individual Justices (see Figure 8), rather than the Martin-Quinn estimates, yields no major discrepancies.

1. All Cases

A regression of the proportion of liberal votes cast in all First Amendment cases on the Justices' ideology (as measured by the Martin-Quinn approach) shows a strong relationship between the two.[103] Substituting the Segal-Cover scores leads to no change in

102. These median scores are available in EPSTEIN ET AL., *supra* note 90, at 242–43 tbl. 3-12.

103. *See, e.g.*, *supra* p. 106, fig.6.

interpretation. As shown in Figure 10 (the Segal-Cover version of Figure 6), the more liberal the Justice, the more votes he or she cast in favor of a First Amendment claim.[104] For example, based on our calculations, we expect a very conservative Justice (such as Scalia, with an ideology score of 0) to support the litigant alleging a liberties abridgment in about 32.45% of the cases;[105] Scalia's actual value is 38.73. Moving to the highest levels of liberalism (such as Thurgood Marshall with an ideology score of 1.0), the expected percentage of votes favoring the First Amendment claim is 71.03%;[106] Marshall's actual support is 80.94%.

2. Pure Cases

If these results closely parallel those reported in the text, as they do, then we can say the same of pure cases. Whether we invoke the Martin-Quinn estimates or the Segal-Cover scores, the Justices evince behavior consistent with the political science literature: liberals generally support First Amendment values and conservatives support regulation in pure cases.[107]

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104. For this analysis and all others to follow, we include only those Justices who participated in ten or more cases. Figure 10 is based on a regression of the percentage of cases in which the Justice cast a liberal vote on the Justice's Segal-Cover score. The estimates are as follows (where ** indicates $p < .01$):

Variables	Coefficient	(Std. Err.)
Justice's Ideology	0.377**	(0.117)
Intercept	0.330**	(0.071)
N	28	
R^2	0.286	
$F_{(1,26)}$	10.415	

105. The 95% confidence interval is 17.94-44.83. We computed these figures using CLARIFY. *See supra* notes 73, 74.

106. The 95% confidence interval is 57.87-84.98. We computed these figures using CLARIFY. *See supra* notes 73, 74.

107. The following estimates are from a regression of the percentage of pure cases in which the Justice cast a liberal vote on the Justice's Segal-Cover score (where ** indicates $p < .01$ and * indicates $p < .05$):

3. Value-Conflict Cases

In the text we report the lack of a statistically significant relationship between ideology (using the Martin-Quinn estimates) and votes. This finding holds true when we deploy the Segal-Cover scores: liberal Justices (or Courts, for that matter) are no more or less likely than conservatives to support or oppose regulation of First Amendment guarantees when another trumping value comes into play (p = .177).

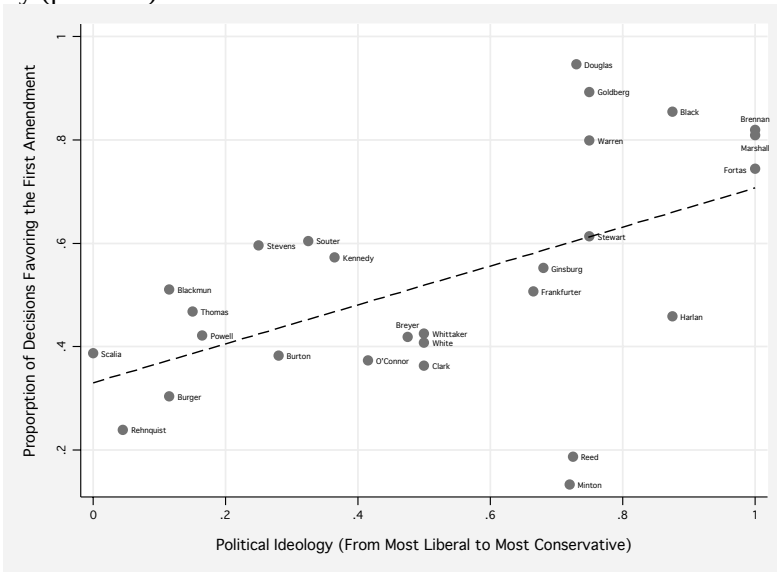

Figure 10: The relationship between the ideology of the Justices and their votes in all First Amendment cases based on the Segal-Cover scores, 1953–2004 terms. The dotted line represents a prediction of Justices' votes based on their ideology. The closer a point to the line, the stronger the association between ideology and votes. Justices

Variables	Coefficient	(Std. Err.)
Justice's Ideology	0.316*	(0.125)
Intercept	0.406**	(0.076)
N	28	
R^2	0.197	
$F_{(1,26)}$	6.382	

above the line cast more liberal votes than predicted; Justices below the line cast more conservative votes than predicted.[108]

108. For the estimates underlying this figure, see *supra* note 104.

APPENDIX B. THE 1994–2004 TERMS

The descriptive data in Figure 7 suggest that the Court's most liberal members (Stevens, Ginsburg, Souter, and, to a lesser extent, Breyer) were more supportive of First Amendment claims in pure disputes than in value-conflict cases. Three of the four most conservative Justices (Thomas, Scalia, and Kennedy), on the other hand, were more supportive of the First Amendment in cases presenting a conflict of values than in pure cases.

Two sets of analyses lend support to the basic lesson of the descriptive data: in value-conflict cases, it is liberals on the Court who support regulation, and conservatives who embrace the First Amendment. In the first, we simply regressed the proportion of value-conflict cases decided by each Justice in favor of the First Amendment claim since 1994 on the mean of each Justice's Martin-Quinn ideal point estimate. The results indicate that ideology is significantly related to votes in these cases, but it is conservatives who are more likely than liberals to support First Amendment claims.[109]

When we estimate the same model for pure cases, the coefficient on the ideology variable is statistically significant and negative (-6.516; p = .012). What this indicates, in line with Figure 7, is that liberals are more likely than conservatives to support the First Amendment claim when no other competing values come into play.

Given the small N (= 9) in these models, we thought it prudent to move to a second set of analyses—one that disaggregates to the case level.[110] These analyses confirm that a reversal of sorts has occurred regarding the First Amendment. In the value-conflict cases, right-of-

109. The estimates are as follows (where **dicates p < .01 and * indicates p < .05). Note the positively signed coefficient on the Ideology var iable.

Variables	Coefficient	(Std. Err.)
Justice's Ideology	5.769*	(2.251)
Intercept	44.402**	(4.243)
N	9	
R^2	0.484	
$F_{(1,7)}$	6.566	

110. For more on these types of analyses, see *supra* note 76.

center Justices were significantly more likely, and left-of-center Justices significantly less likely, to vote in favor of the speech, press, assembly, or association claim. (In the probit analysis, the coefficient on the ideology variable is .170, $p < .01$; N=171.) Once again, in the pure cases, it was the liberals who supported the First Amendment, and conservatives who supported regulation. (In the probit analysis, the coefficient on the Ideology variable is -.130, $p < .01$; N=387.)

The substantive effect, it is worth noting, is quite impressive. For very conservative Justices, such as Scalia (at 2.97 on Martin and Quinn's measure), the predicted probability of supporting a First Amendment claim in the absence of a value conflict is a quite low .37 (with a 95% confidence interval of .30–.45); that figure skyrockets to .67 (the 95% confidence interval is .57–.76) for liberals in the category of, for example, Stevens (-2.92). This is precisely what traditional conceptions of the First Amendment anticipate: liberal Justices support it and conservatives support its regulation. Now consider the reversal that occurs in the value-conflict cases: while Scalia is likely to support the First Amendment claim (.66),[111] Stevens is likely to oppose it (.27, with a 95% confidence interval of .19–.37).[112]

111. The 95% confidence interval is .57–.75.

112. We computed the predicted probabilities and confidence intervals denoted in this paragraph using CLARIFY. For more details, see *supra* notes 73, 74. The underlying models are probits, using robust clustered (on Justice) standard errors.