

## HOW THE JUSTICES VOTED IN FREE SPEECH CASES, 1994–2002

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This article is an updated version of *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001).

Which Justices generally take a broader view of the freedom of speech and which take a narrower view? Conventional wisdom still tells us that this should break down mostly along “liberal”/“conservative” lines, as it seemingly did during the 1970s and much of the 1980s. But it turns out that this is no longer true.

Between the 1994–1995 Term, the last in which the U.S. Supreme Court’s personnel changed, and the 2001–2002 Term, the last completed before this Article was updated, the Court has decided 47 cases involving the freedom of speech (including the freedom of expressive association). This data set provides an opportunity to rigorously identify the free speech maximalists and minimalists.

Here is the method I used to do this:

1. For each of the 47 cases, I counted 1 point each time a Justice voted for the free speech claimant, and 0 points each time the Justice voted against.
2. I then adjusted up by 1/3 whenever the Justice wrote or joined an opinion that was more speech-protective than the majority (or plurality) or than the lead dissent, and down by 1/3 whenever the Justice wrote or joined a similarly more speech-restrictive opinion.
3. For the cases that involved two or three separate issues, I split the points accordingly.

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4. I then divided the result by the number of cases, and multiplied by 100 to produce a percentage. Recognizing that the 1/3 adjustments are somewhat arbitrary, I also repeated the entire process with adjustments of 40 percent and of 1/6 in place of the 1/3 figure.

I deliberately looked only at the bottom line. I refrained from injecting my views about whether the Justices were right or wrong,<sup>1</sup> 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. And though the result might be somewhat affected by accidental circumstances—such as the particular mix of cases that the Court has been facing—I think the number of cases is large enough to mitigate such effects, especially when one treats scores that were very close (differing by less than one case’s worth, or 2.1%) as ties.

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1. For instance, while I generally take a fairly broad view of free speech, I think Justices Antonin Scalia and Clarence Thomas in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), were right to conclude that the NEA was free to engage in viewpoint discrimination in its funding decisions. See Eugene Volokh, *How Free Is Speech When the Government Pays?*, WALL ST. J., June 29, 1998, at A18. Still, I counted 1 point for Justice David Souter, who was the only vote for the free speech claim; 0 for Chief Justice William Rehnquist and Justices John Paul Stevens, Sandra Day O’Connor, Anthony Kennedy, and Stephen Breyer, who voted for the NEA; -1/3 for Justices Scalia and Thomas, who voted for a rule that would have been even less hospitable to free speech claimants; and +1/3 for Justice Ruth Bader Ginsburg, who largely joined the majority but who refused to join a particularly anti-free-speech-claimant portion of the majority opinion—I counted that as a vote that was somewhat more friendly to free speech claimants.

Likewise, I counted campaign finance cases and cases involving religious speech by nongovernmental actors as free speech/association cases, because the U.S. Supreme Court has consistently treated them this way. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (concluding, by at least a seven-to-one vote, that restrictions on campaign contributions and expenditures pose a serious first amendment issue).

Others might prefer to categorize the cases in other ways, reflecting their own views of what speech should be protected. Cf., e.g., *CBS News: The Early Show* (CBS television broadcast, Oct. 30, 2000), 2000 WL 6655500 (remarks of Prof. Alan Dershowitz) (faulting an earlier article that was based on this study for “miscount[ing] and talk[ing] about prayer cases [presumably referring to the cases involving religious speech by private persons] . . . and cases on campaign contributions as free speech cases,” and thus “not [being] an accurate article”). I believe that the more objective approach is to use the Supreme Court’s definition of what constitutes a free speech/association case, rather than creating my own.

Here are my results:

|         |           |       |
|---------|-----------|-------|
| 1       | Kennedy   | 74.5% |
| 2 (tie) | Thomas    | 61.1% |
|         | Souter    | 61.0% |
| 4       | Stevens   | 55.7% |
| 5       | Ginsburg  | 53.6% |
| 6       | Scalia    | 49.6% |
| 7       | O'Connor  | 44.7% |
| 8       | Rehnquist | 41.8% |
| 9       | Breyer    | 39.7% |

The results with adjustments of 40 percent and 1/6 instead of 1/3 were almost identical.<sup>2</sup>

Many people, I think, would be a bit surprised by these results. Of the two Democratic appointees, one is #5 and one is #9; they have an average of 46.6 percent, compared to 55.5 percent for the Republican appointees. Even counting Justices John Paul Stevens

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2. Here are the results using adjustments of 1/6:

|         |           |       |
|---------|-----------|-------|
| 1       | Kennedy   | 74.5% |
| 2 (tie) | Souter    | 62.4% |
|         | Thomas    | 60.3% |
| 4       | Stevens   | 56.0% |
| 5 (tie) | Ginsburg  | 52.8% |
|         | Scalia    | 51.4% |
| 7 (tie) | O'Connor  | 45.2% |
|         | Rehnquist | 43.3% |
| 9       | Breyer    | 41.7% |

Souter and Thomas are just barely tied, with a difference of a bit less than one case.

Here are the results using adjustments of 40 percent:

|         |           |       |
|---------|-----------|-------|
| 1       | Kennedy   | 74.5% |
| 2 (tie) | Thomas    | 61.4% |
|         | Souter    | 60.4% |
| 4 (tie) | Stevens   | 55.5% |
|         | Ginsburg  | 53.8% |
| 6       | Scalia    | 48.9% |
| 7       | O'Connor  | 44.4% |
| 8       | Rehnquist | 41.3% |
| 9       | Breyer    | 38.9% |

and David Souter as well as Justices Ruth Bader Ginsburg and Steven Breyer as “liberals” (a view derived from their votes on matters such as federalism and racial preferences), the “conservatives” have an aggregate percentage of 54.3 percent and the liberals have 52.5 percent, basically a draw. Justices Antonin Scalia and Clarence Thomas, who often agree on many issues, are fairly far from each other. Justice Thomas, who is still seen by many as an archconservative, is tied for second place.

Of course, when one disaggregates the votes, some (though not all<sup>3</sup>) of the results in particular types of cases may seem more politically predictable. Justices Stevens and Ginsburg, for instance, are likelier than others to conclude that the First Amendment protects campaign-related speech and expressive association less than it does other kinds of speech; likewise for religious speech by private citizens using government facilities. Justice Scalia is likely to take the opposite views, but tends to conclude that sexually themed speech should be less protected.

These Justices naturally have thoughtful and plausible reasons why they draw the distinctions that they draw. Generalizing about where a Justice stands on “free speech” may thus be dangerous, precisely because there are good arguments for treating different kinds of speech differently; this may lead us to query whether counting the Justices’ votes in all free speech cases is a valuable enterprise.<sup>4</sup>

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3. For instance, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 192 (1999), is an anonymous speech case in which Justice Thomas takes the most speech-protective view, Justices Stevens, Scalia, Kennedy, Souter, and Ginsburg take a fairly speech-protective view, and Chief Justice Rehnquist and Justices O’Connor and Breyer take the least speech-protective view; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), is a commercial speech case in which Justice Thomas takes the most speech-protective view, Justices Stevens, Kennedy, and Ginsburg take a fairly speech-protective view, Justice Scalia is relatively undecided, and Chief Justice Rehnquist and Justices O’Connor, Souter, and Breyer take a less speech-protective view. Neither of these lineups can be easily explained on conservative/liberal lines.

4. This of course is a common objection to many kinds of quantitative surveys of court decisions; such surveys necessarily aggregate together cases that involve subtly different legal issues.

Note, though, that it’s a mistake to overstate the degree to which one category of free speech cases accounts for the results found in this study. One response to an

But it seems to me that such an approach is nonetheless helpful, for three reasons:

1. Many people do indeed generalize about the Justices' general approach on a variety of matters.

Laypeople, journalists, law students, and even law professors talk about whether a particular judge generally takes a broad view of free speech or a narrow one,<sup>5</sup> and their claims may often be based on inaccurate assumptions drawn from the Justice's political orientation. My guess is that most law students, for instance, would erroneously assume that Justice Breyer, a Democratic appointee, is a free speech maximalist and that Justice Thomas, a conservative Republican appointee, is a free speech minimalist.

Perhaps in a perfect world people wouldn't draw such generalizations that fail to distinguish the many different issues that come up in different free speech cases. But given that people do feel the need to generalize, generalizations based on the facts will be more reliable than ones based on political prejudices.

2. Moreover, there may be some value after all in broad generalizations about a Justice's view of free speech.

It's easy for Justices to propose distinctions between, say, sexually themed speech and other kinds of speech, or campaign-related expressive association and other kinds of expressive

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early report of these results speculated that rather than saying "that those who support free speech should be most comfortable with Republican nominees," "[i]t would be much more accurate to say that you should be comfortable with Republican nominees if you want the Supreme Court to strike down campaign finance laws." Cass R. Sunstein, Letter to the Editor, *Which Free Speech?*, N.Y. TIMES, Nov. 3, 2000, at A30. In fact, even excluding the three campaign finance cases in the 1994-2002 dataset, see *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996); *FEC v. Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351 (2001), the Republican appointees average 55.7 percent, the Democratic appointees average 50 percent of the time, the "conservative" Justices voted for them 53.1 percent of the time, and the "liberal" Justices voted for them 56.1 percent of the time.

5. This is often erroneously couched as "Justice X believes in free speech" and "Justice Y doesn't." I think this is an unsound locution, because it suggests that there's only one True Vision of free speech, that it's a maximalist one, and that those who disagree with it therefore don't really believe in free speech. It seems to me that it's less ideologically loaded to ask which of the Justices has a broader or narrower vision of the boundaries of free speech.

association. But in a system like ours, which is founded on precedent and analogy, restrictions on one kind of speech tend to lead to restrictions on other kinds. Doctrines that emerge in the context of sexually themed speech, for instance, such as the “secondary effects” test, may end up being applied to other kinds of speech.<sup>6</sup> The use of strict scrutiny to uphold a content-based restriction on campaign-related speech may weaken strict scrutiny in general, and lead to the acceptance of other content-based restrictions in other contexts.<sup>7</sup>

Excessive particularism in free speech cases may thus sometimes be justifiably criticized (at least by those whose jurisprudential philosophy leads them to worry about the downstream effects of decisions<sup>8</sup>), and a more consistent array of votes in one or another direction may be justifiably applauded. And voters, whether among the public or in the Senate, may conclude that they prefer new Justices who seem more likely to side with the consistent free speech maximalists (or minimalists), even if the voters disagree with one or another position that the maximalists (or minimalists) have taken.

3. A Justice’s general track record in free speech cases may be relevant, though far from dispositive, in evaluating that Justice’s new doctrinal proposals.

Proposals often acquire rhetorical strength when they deviate from what might normally be expected of their authors. When a prominent liberal Democrat speaks out in favor of some abortion restriction, people are more impressed than when a conservative Republican does the same; likewise when a prominent Republican endorses restrictions on guns.<sup>9</sup> People may reason that if *even he* is

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6. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (announcing the secondary effects test in a pornography case); *Boos v. Barry*, 485 U.S. 312 (1988) (plurality opinion) (applying the test to political speech, over the concurrence’s objections); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (applying the test to political speech, with no objection from other opinions).

7. See, e.g., cases cited in Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 170–71 & nn.92–100.

8. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 417 (1989); *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46, 55 (1988); *Cohen v. California*, 403 U.S. 15, 25 (1971); *Winters v. New York*, 333 U.S. 507, 510 (1948).

9. See, e.g., Representative Billy Tauzin (R-La.), Republican Leadership Deliver Remarks Opening the Republican Platform Committee Hearings (Aug. 5, 1996), in FDCH POLITICAL TRANSCRIPTS (“If you believe as I do that legalized

willing to endorse this proposal despite the fact that it would seem to go against his grain, then the proposal must be sensible indeed.<sup>10</sup>

The same applies for free speech. Justices can trade on their reputations for being free speech maximalists to support their arguments that this time the speech should be restricted.<sup>11</sup> And the converse is likewise true: Note how some defended the flag burning decisions, during an era when free speech maximalism was seen as a predominantly liberal position, by pointing out that the generally conservative Justices Anthony Kennedy and Antonin Scalia voted with the usually liberal Justices William Brennan, Thurgood Marshall, and Harry Blackmun.<sup>12</sup>

Now one might condemn this whole genre of argument as being *ad hominem*; after all, a proposal should be decided on its merits, not on the political views of its endorsers. But this objection isn't fully persuasive, because a big part of our evaluation of free speech proposals consists not of pure logic, but of speculation about the

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abortion is morally wrong, especially the almost unspeakable partial birth abortion that *even Senator Moynihan* observed was as close to infanticide as anything he had ever seen, then speak out against it." (emphasis added)); Editorial, *Brady Bill*, HOUSTON CHRON., Nov. 12, 1993, at A32:

The Brady bill is not an anti-gun bill, as opponents frequently contend. It infringes not a whit on Americans' Second Amendment right to keep and bear arms. *Even Ronald Reagan*, a lifetime member of the National Rifle Association who opposed a federal waiting period during his presidency, has had his mind changed by the rising tide of violence. Reagan now says the Brady bill is just common sense.

*Id.* (emphasis added).

10. This is a loose analogue of the logic behind the "declaration against interest" exception to the hearsay rule. See also Ward Farnsworth, *Talking out of School*, 81 B.U. L. REV. 13, 53–54 (2001) (discussing this "declaration against interest" point, though as to law professors rather than judges).

11. *Cf.*, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting) (making a similar argument in the context of religious freedom).

12. See, e.g., Thomas Blumenthal, *Bill of Rights Survives Another Year*, ST. LOUIS POST-DISPATCH, Jan. 14, 1991, at 3B:

The second assault on the First Amendment was a second cheap attempt at passing flag-burning legislation in response to presidential threats to propose a flag-burning amendment to the Constitution. For the second time in as many terms, the Supreme Court rejected the legislation as unconstitutional. Not even ultra-conservative Justice Antonin Scalia agreed with the naysayers on this issue.

*Id.*

future.<sup>13</sup> Will this narrow exception (say, for flag burning) likely lead to a broader one? Will this precedent eventually lead courts to endorse not just this restriction but other ones?

These are serious concerns in a system built on analogy, and addressing them requires judgment and experience as much as abstract reasoning. And because the Justices are seen as having unusually well-informed judgment about the consequences of Supreme Court decisions, we can reasonably put extra stock in their views when they speak out against their normal predilections.

Thus, if a free speech maximalist had been assured by Justice Brennan that a particular proposed exception is unlikely to eventually expand unduly, it would have made sense for that maximalist to defer in some measure to Justice Brennan's judgment. On the other hand, if the assurance comes from Chief Justice William Rehnquist or Justice Stephen Breyer, the observer might not be equally appeased: Both Justices are honorable men, but their assurances are likelier to reflect their normal tendencies to support many speech restrictions rather than any judgment that this particular exception is unusually low-risk. And to employ this sort of reasoning, we need to know who the Court's free speech maximalists and minimalists really are.

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Some of the above is speculation. Perhaps ultimately there's not that much to be learned from how a Justice generally votes on free speech questions, as opposed to how he votes on specific cases involving, say, sexually themed speech or commercial advertising.

But the vote tallies are not speculation: They reveal that we can no longer assume that the Left generally sides with speakers and the Right with the government. We've already seen this in universities with campus speech codes, but now we see it on the Supreme Court as

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13. Note also that lay observers, who may feel unable to judge the arguments fully on the merits, might find it especially useful to have a sense of where a Justice's normal predilections lie. Just as such an observer may be more willing to trust the soundness of a nine-to-zero decision than of a five-to-four decision, so he may be more willing to trust a speech-restrictive opinion written by someone who's usually a free speech maximalist than a similar opinion written by someone who usually takes a more restrictive view.

well.<sup>14</sup> Many of the strongest libertarian voices in favor of free speech rights and against government power now come from conservatives at least as much as from liberals.

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14. I am of course not the first to observe that some such shift has occurred. See, e.g., Jack M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993). However, I hope my analysis here is useful because it describes the shift quantitatively. Among other things, I suspect that even those observers who realize that some conservative Justices have begun to take a broader view of free speech may be unaware of the full magnitude of this effect, and of the magnitude of the opposite trend as to at least one liberal Justice.

## Appendix: The Raw Data

| Case Name                                                                 | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|---------------------------------------------------------------------------|-----------|---------|----------|--------|---------|--------|--------|----------|--------|
| Republican Party v. White, ___ S. Ct. ___ (2002)                          | 1         | 0       | 1        | 1      | 1 1/3   | 0      | 1      | 0        | 0      |
| Watchtower Bible & Tract Soc'y v. Stratton, 122 S. Ct. 2080 (2002)        | 0         | 1       | 1        | 1      | 1       | 1      | 1      | 1        | 1      |
| Ashcroft v. ACLU, <sup>[d]</sup> 122 S. Ct. 1700 (2002)                   | 0         | 1       | 1/6      | 0      | 1/3     | 1/3    | 0      | 1/3      | 1/6    |
| Los Angeles v. Alameda Books, 122 S. Ct. 1728 (2002)                      | 0         | 1       | 0        | -1/3   | 1/3     | 1      | 0      | 1        | 2/3    |
| Thompson v. Western States Med. Ctr., 122 S. Ct. 1497 (2002)              | 0         | 0       | 1        | 1      | 1       | 1      | 1 1/3  | 0        | 0      |
| Ashcroft v. Free Speech Coal, <sup>[a]</sup> 122 S. Ct. 1389 (2002)       | 0         | 1       | 1/2      | 0      | 1       | 1      | 5/6    | 1        | 1      |
| Thomas v. Chicago Park Dist., 122 S. Ct. 775 (2002)                       | 0         | 0       | 0        | 0      | 0       | 0      | 0      | 0        | 0      |
| Lorillard Tobacco Co. v. Reilly, <sup>[a]</sup> 121 S. Ct. 2404 (2001)    | 2/3       | 1/3     | 2/3      | 2/3    | 2/3     | 1/2    | 8/9    | 1/3      | 1/3    |
| FEC v. Colorado Republican Fed. Campaign Comm. II, 121 S. Ct. 2351 (2001) | 2/3       | 0       | 0        | 1      | 1       | 0      | 1      | 0        | 0      |
| U.S. v. United Foods, Inc., 121 S. Ct. 2334 (2001)                        | 1         | 1       | 0        | 1      | 1       | 1      | 1      | 0        | 0      |
| Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001)          | 1         | 0       | 1        | 1      | 1       | 0      | 1      | 0        | 2/3    |
| Bartnicki v. Vopper, 121 S. Ct. 1753 (2001)                               | 0         | 1       | 2/3      | 0      | 1       | 1      | 0      | 1        | 2/3    |

| Case Name                                                                                      | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|------------------------------------------------------------------------------------------------|-----------|---------|----------|--------|---------|--------|--------|----------|--------|
| Shaw v. Murphy,<br>121 S. Ct. 1475<br>(2001)                                                   | 0         | 0       | 0        | 0      | 0       | 0      | 0      | 1/3      | 0      |
| Legal Service<br>Corp. v.<br>Velazquez, 531<br>U.S. 533 (2001)                                 | 0         | 1       | 0        | 0      | 1       | 1      | 0      | 1        | 1      |
| L.A. Police Dep't.<br>v. United<br>Reporting Publ'g.<br>Corp., 528 U.S.<br>32 (1999)           | 0         | 1       | -1/3     | 1/3    | 1       | -1/3   | 1/3    | -1/3     | -1/3   |
| Boy Scouts v.<br>Dale, 530 U.S.<br>640 (2000)                                                  | 1         | 0       | 1        | 1      | 1       | 0      | 1      | 0        | 0      |
| Hill v. Colorado,<br>530 U.S. 703<br>(2000)                                                    | 0         | 0       | 0        | 1      | 1       | 0      | 1      | 0        | 0      |
| Cal. Democratic<br>Party v. Jones,<br>530 U.S. 567<br>(2000)                                   | 1         | 0       | 1        | 1      | 1       | 1      | 1      | 0        | 1      |
| United States v.<br>Playboy Entm't<br>Group, Inc., 529<br>U.S. 803 (2000)                      | 0         | 1       | 0        | -1/3   | 1       | 1      | 2/3    | 1        | 0      |
| City of Erie v.<br>Pap's A.M., 529<br>U.S. 277 (2000) <sup>[a]</sup>                           | 0         | 1       | 0        | -1/3   | 0       | 1/2    | -1/3   | 1        | 0      |
| Bd. of Regents v.<br>Southworth, 529<br>U.S. 217 (2000)                                        | 0         | -1/3    | 0        | 0      | 0       | -1/3   | 0      | 0        | -1/3   |
| Nixon v. Shrink<br>Mo. Gov't PAC,<br>528 U.S. 377<br>(2000)                                    | 0         | -1/3    | 0        | 1      | 2/3     | 0      | 1      | -1/3     | -1/3   |
| Greater New<br>Orleans Broad.<br>Ass'n v. United<br>States, 527 U.S.<br>173 (1999)             | 2/3       | 1       | 1        | 1      | 1       | 1      | 1 1/3  | 1        | 1      |
| Buckley v. Am.<br>Constitutional<br>Law Found., Inc.,<br>525 U.S. 182<br>(1999) <sup>[a]</sup> | 1/3       | 1       | 1/3      | 1      | 1       | 1      | 1 1/3  | 1        | 1/3    |

| Case Name                                                                                               | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|---------------------------------------------------------------------------------------------------------|-----------|---------|----------|--------|---------|--------|--------|----------|--------|
| NEA v. Finley, <sup>[b]</sup><br>524 U.S. 569<br>(1998)                                                 | 0         | 0       | 0        | -1/3   | 0       | 1      | -1/3   | 1/3      | 0      |
| Ark. Educ. TV v.<br>Forbes, 523 U.S.<br>666 (1998)                                                      | 0         | 1       | 0        | 0      | 0       | 1      | 0      | 1        | 0      |
| Reno v. ACLU, <sup>[a]</sup><br>520 U.S. 1113<br>(1997)                                                 | 1/2       | 1       | 1/2      | 1      | 1       | 1      | 1      | 1        | 1      |
| Glickman v.<br>Wileman Bros. &<br>Elliott, Inc., 521<br>U.S. 457 (1997)                                 | 1         | 0       | 0        | 1      | 0       | 1      | 1 1/3  | 0        | 0      |
| Turner Broad.<br>Sys., Inc., v. FCC,<br>507 U.S. 1301<br>(1993)                                         | 0         | 0       | 1        | 1      | 0       | 0      | 1      | 1        | 0      |
| Timmons v. Twin<br>Cities Area New<br>Party, 520 U.S.<br>351 (1997)                                     | 0         | 1       | 0        | 0      | 0       | 2/3    | 0      | 1        | 0      |
| Schenck v. Pro-<br>Choice<br>Network, <sup>[a]</sup> 519<br>U.S. 357 (1997)                             | 1/2       | 1/2     | 1/2      | 1      | 1       | 1/2    | 1      | 1/2      | 0      |
| Denver Area<br>Educ.<br>Telecomms., Inc.<br>Consortium v.<br>FCC, <sup>[a]</sup> 518 U.S.<br>727 (1996) | 0         | 2/3     | 1/3      | 0      | 1       | 2/3    | 0      | 1        | 2/3    |
| O'Hare Truck<br>Serv., Inc. v. City<br>of Northlake, 518<br>U.S. 712 (1996)                             | 1         | 1       | 1        | 0      | 1       | 1      | 0      | 1        | 1      |
| Bd. of County<br>Comm'rs v.<br>Umbehr, 518 U.S.<br>668 (1995)                                           | 1         | 1       | 1        | 0      | 1       | 1      | 0      | 1        | 1      |
| Colo. Republican<br>Fed. Campaign<br>Comm. v. FEC, <sup>[a]</sup><br>518 U.S. 604<br>(1996)             | 1         | 0       | 1/2      | 1      | 1       | 1/2    | 1      | 0        | 1/2    |
| 44 Liquormart,<br>Inc. v. Rhode<br>Island, 517 U.S.<br>484 (1996)                                       | 2/3       | 1       | 2/3      | 2/3    | 1       | 2/3    | 1 1/3  | 1        | 2/3    |

| Case Name                                                                           | Rehnquist | Stevens   | O'Connor | Scalia    | Kennedy | Souter    | Thomas      | Ginsburg  | Breyer    |
|-------------------------------------------------------------------------------------|-----------|-----------|----------|-----------|---------|-----------|-------------|-----------|-----------|
| Morse v. Republican Party, 517 U.S. 186 (1996)                                      | 2/3       | 0         | 1/3      | 1         | 2/3     | 1/3       | 1           | 0         | 1/3       |
| Rosenberger v. Rector, <sup>[c]</sup> 515 U.S. 819 (1995)                           | 1         | 0         | 1        | 1         | 1       | 0         | 1           | 0         | 0         |
| Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995)                | 1         | 0         | 2/3      | 1         | 1       | 2/3       | 1           | 0         | 2/3       |
| Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995)                                  | 0         | 1         | 0        | 0         | 1       | 1         | 0           | 1         | 0         |
| United States v. Aguilar, 515 U.S. 593 (1995)                                       | 0         | 0         | 0        | 0         | 0       | 0         | 0           | 0         | 0         |
| Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995)              | 1         | 1         | 1        | 1         | 1       | 1         | 1           | 1         | 1         |
| Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)                                     | 1         | 1 1/3     | 1        | 1         | 1       | 1         | 1           | 1         | 1         |
| McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)                              | 0         | 1         | 1        | 0         | 1       | 1         | 1           | 1         | 1         |
| United States v. Nat'l Treasury Employees Union, <sup>[a]</sup> 513 U.S. 454 (1995) | 0         | 1         | 1/2      | 0         | 1       | 1         | 0           | 1         | 1         |
| Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995)                           | 1         | 1         | 0        | 1         | 1       | 1         | 1           | 1         | 1         |
| United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)                         | 1         | 1         | 1        | 0         | 1       | 1         | 0           | 1         | 1         |
| TOTAL                                                                               | 19<br>2/3 | 26<br>1/6 | 21       | 23<br>1/3 | 35      | 28<br>2/3 | 28<br>13/18 | 25<br>1/6 | 18<br>2/3 |
| PERCENTAGE                                                                          | 41.8      | 55.7      | 44.7     | 49.6      | 74.5    | 61.0      | 61.1        | 53.6      | 39.7      |

<sup>[a]</sup> This case involved two or more first amendment claims. The Justices' scores on each claim were averaged, weighing each claim equally to avoid subjective judgments about which claim was more important.

<sup>[b]</sup> Justice Ginsburg did not write a separate opinion that was more speech-protective than the majority's, but she did decline to join part of the majority's opinion that expressed a relatively non-speech-protective view.

<sup>[c]</sup> Justice O'Connor wrote a separate concurrence that might be seen as potentially less speech-protective, but she joined the majority's opinion, and her opinion seemed to be focused on how the Establishment Clause would play out in situations where the Free Speech Clause was less implicated. (This is unlike Justice Breyer's concurrence in *Good News Club v. Milford Central School*, which seemed to suggest that the Establishment Clause may indeed justify certain restrictions even when the Free Speech Clause is otherwise fully implicated.) Likewise, Justice Thomas's separate concurrence seemed to be focused only on the Establishment Clause question.

<sup>[d]</sup> Justices O'Connor and Breyer wrote opinions that took a slightly broader view of free speech than the plurality's opinion; and Justice Kennedy's opinion, which was joined by Justices Souter and Ginsburg, took a still broader view, though all these Justices voted to reject the free speech claim as it was presented in this particular case. I therefore marked the O'Connor and Breyer positions as 1/6, and the Kennedy, Souter, and Ginsburg position as 1/3.

Note: I excluded *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* (2001) and *City News & Novelty v. City of Waukesha* (2001) because they focused on general constitutional or procedural issues (state action and mootness) rather than the First Amendment as such, even though they did arise in the First Amendment context. I also excluded *Cook v. Gralike* (2001) because the majority opinion focused solely on the Article I question rather than only a two-Justice concurrence squarely discussed the Free Speech Clause.