A (Brief) Report on the Roberts Court and Free Speech

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1. Preliminaries

A. The idea is to consider and expand on Monica Youn's post on the Roberts Court (2005-2010 terms) and free speech.[1] Free speech cases include the First Amendment guarantees of speech, press, assembly, and association.

B. Our findings are as follows.
   1. *Comparison with Youn.* Our coding and Youn's are almost identical. (Section 2 below)
   2. *Patterns.* In general, the Roberts Court's treatment of free speech cases is quite similar to its treatment of all other kinds of cases. The one exception of note is that the Chief Justice tends to self-assign free speech cases more than others. (Section 3)
   3. *Comparison with Earlier Courts.* Compared to its predecessors (1953-2004 terms), the Roberts Court has devoted a smaller fraction of its plenary docket to free speech; and, to greater and lesser extents, it has been less supportive of free speech claims. (Section 4)

C. Overall, the data could be read to suggest that the Chief Justice has a special interest in free speech cases. On the other hand (and in accord with Youn's commentary, among others), it's hard to make the case that Roberts Court has been especially supportive of the First Amendment (beyond the campaign finance context).

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[1] "The Roberts Court's Free Speech Double Standard," November 29, 2011, available at: http://www.acslaw.org/acsblog/all/monica-youn.

2. Our Coding versus Youn's

A. Cases

Youn originally identified 27 cases. Using the U.S. Supreme Court Database,[2] we identified 29 cases including all of Youn's plus (1) the first *Wisconsin Right to Life v.* FEC[3] and (2) *Hartman v. Moore*.[4] Youn had plausible reasons for excluding them[5] but, in the analysis to follow, we include them.

B. Coding

Our coding[6] is identical to Youn's, except:

1. The Supreme Court Database treats *Locke v. Karass*[7] as a union case, and codes it as a liberal (pro-union) decision. If we coded it as a free speech case (as we would have done in our work on the First Amendment[8]), we would have agreed with Youn's coding (anti-First Amendment).
2. The Database also treats *Davenport v. Washington Education Association*[9] as a union case, and codes it as an anti-union decision. If we coded it as a First Amendment case, we would have agreed with Youn's coding (anti-First Amendment).

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[2] The Database is available at: http://supremecourtdatabase.org.

[3] 546 U.S. 410 (2006).

[4] 547 U.S. 250 (2006).

[5] She included the second *Wisconsin Right to Life* case and didn't want to double count it. As for *Hartman,* she "originally excluded [it] since the holding turned on immunity pleadings standards under Bivens rather than on the first amendment retaliation claim, and because Chief Justice Roberts and Justice Alito did not participate in that case." [N.B.: Youn has now included the two cases. See the note at the end of her post.]

[6] When we refer to "our" coding, we mean the coding scheme developed in the Supreme Court Database, as we refined it in Lee Epstein & Jeffrey A. Segal, "Trumping the First Amendment," 21 *Journal of Law & Policy* 81 (2006). A major difference between our coding and the Database's comes in campaign finance cases. The Database treats a decision to uphold restrictions on campaign spending as a liberal decision ("pro-accountability and/or anti-corruption"). We code cases invalidating restrictions as pro-First Amendment decisions.

[7] 172 L. Ed. 2d 552 (2009).

[8] Epstein & Segal, "Trumping the First Amendment," note 6 above.

[9] 551 U.S. 177 (2007).

C. Some Particulars

1. Youn (originally) identified 5 campaign finance cases; we identified 6 (including the first *Wisconsin Right to Life* case). In all six cases, the Court supported the First Amendment.
2. Youn reports that the Court found no free speech violation in 18 of the 27 cases (66.7%). Of our 29 cases, the Court found no free speech violation in 19 (65.5%).

3. Patterns on the Roberts Court

A. Vote Divisions

1. Of the 29 free speech cases, a 9-person Court decided 26. 26.9% of the 26 (n=7) were 5-4 decisions. This is nearly identical to the fraction of 5-4 decisions in all other cases during the Roberts years (26.7%, or 91/341 cases).
2. Of the 26 decisions by a 9-person Court, 34.6% were 9-0 (9/26). The figure for all other Roberts Court cases is close, at 39.0% (133/341).

B. Majority Opinions/Judgments

Table 1 compares majority opinion writing in free speech cases and in all other cases decided after oral argument during the Roberts years.

1. Although it's difficult to make claims about majority opinion assignment without knowing the Justices who voted in the majority in conference (and so were available for opinion assignment), Roberts seems inclined to self-assign in First Amendment speech cases. In these cases, he wrote for the majority (or plurality) in 32.1%, compared with 9.6% in all other cases.[10] The difference is statistically significant ($p < .05$).

[10] Note that Table 1 includes all cases during the Roberts years regardless of whether the Justice participated in the case. If, for example, we included only the 27 of the 28 non-per curiam cases in which Roberts participated, his fraction in speech cases would increase to 33.3%. (He did not participate in *Hartman v. Moore*, 547 U.S. 250 [2006].). His fraction in all other cases would also increase, to 9.7%.

2. When the Court held for the free speech claim, Roberts wrote the opinion in 44.4% of the cases (4 of the 9 non per curiams). In the 19 cases holding against the claim, Roberts wrote in 26.3% (5/19); Scalia was close (4/19 or 21.1%).

C. Direction of the Decision

1. As we noted above, the Court held against the free speech claim in 65.5% of the cases and found in favor in 34.5%.
2. In all other cases, the Roberts Court reached a "liberal" decision in 44.3%.[11] This is higher than the 34.5% for free speech cases, but the difference is not statistically significant. In other words, the Roberts Court has been no more or less supportive of speech claims than other "liberal" claims.

[11] We rely on the Supreme Court Database's definitions of liberal and conservative decisions. The definitions mostly comport with conventional understandings. "Liberal" votes are those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals against the government in privacy and due process cases; of unions and individuals over businesses; and of government over businesses in cases involving economic regulation. "Conservative" votes are the reverse. See also note 6.

Table 1. Majority Opinion Writers (Including Judgments of the Court), 2005-2010 Terms

Justice	*Free Speech Cases (N=28)*	*All Other Cases (N=397)*
Roberts*	32.1% (9)	9.6% (38)
Scalia*	17.9% (5)	12.1% (48)
Kennedy*	14.3% (4)	11.8% (47)
Breyer*	10.7% (3)	11.1% (44)
Alito	7.1% (2)	9.6% (38)
Stevens	3.6% (1)	8.8% (35)
Souter	3.6% (1)	7.1% (28)
Thomas*	3.6% (1)	12.1% (48)
Ginsburg*	3.6% (1)	11.8% (47)
Sotomayor	3.6% (1)	3.5% (14)
O'Connor	----	0.8% (3)
Kagan	----	1.8% (7)

Notes:

(1) There are only 28 (rather than 29) cases because the first *Wisconsin Right to Life* was a *per curiam.* The table excludes per curiam opinions.

(2) * Justice on the Court for all Roberts terms (2005-10).

4. Comparison of the Roberts Court and Its Predecessors (1953-2004 Terms)

A. Number of Cases

Table 2 lists the percentage of the Court's plenary docket (orally argued cases) devoted to free speech claims by Chief Justice era.

1. Since the Warren Court the percentage of free speech cases has never been greater than 10. And it has declined over time.
2. Even so, the percentage is now at its lowest since the Warren years, at 6.6.

B. Support for Free Speech

Table 2 also shows the percentage of cases in which the Court ruled in favor of the free speech claim.

1. Relative to all Courts sitting between the 1953 and 2004 terms, the Roberts Court is the least supportive of free speech claims: 34.5% (10/29 cases) for the Roberts Court versus 54% (273/506) for its predecessors. This is a statistically significant difference ($p < .05$).
2. But this difference traces primarily to the Warren Court. Even though the Roberts Court is less supportive of free speech claims than either the Burger or Rehnquist Court, the difference between the Roberts Court and these two eras (separately or combined) is not statistically significant. The difference between the Roberts Court and the Warren Court is statistically significant ($p < .05$).

Table 2. Free Speech Claims in the Warren, Burger, Rehnquist, and Roberts Courts

Court Era (Terms)	*Free Speech Cases as a Percentage of All Orally Argued Cases*	*Percentage of Decisions Holding in Favor of the Free Speech Claim*
Warren (1953-1968)	8.8% (157/1,793)	69.4% (109/157)
Burger (1969-1985)	8.6% (206/2,404)	45.6% (94/206)
Rehnquist (1986-2004)	7.7% (143/1,861)	49.0% (70/143)
Roberts (2005-2010)	6.6% (29/441)	34.5% (10/29)