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Free Expression, In-Group Bias, and the Court's Conservatives: A Critique of the Epstein-Parker-Segal Study

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INTRODUCTION

On May 6, 2014, the *New York Times* reported on a new study[1] conducted by three prominent political scientists—Professors Lee Epstein, Jeffrey Segal, and Christopher Parker—concerning Supreme Court justices' voting patterns in First Amendment free-expression cases.[2] After analyzing all such cases decided between the Court's 1953 and 2010 terms, the study's authors determined that there is evidence of pervasive in-group bias on the Court, with "the justices' votes tend[ing] to reflect their preferences toward the

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1. *See* Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* (on file with author), *available at* http://epstein.wustl.edu/research/InGroupBias.pdf (last visited Nov. 17, 2014). The authors presented the study at the 2013 Annual Meeting of the American Political Science Association. *See id.* at n.*.

2. *See* Adam Liptak, *For Justices, Free Speech Often Means 'Speech I Agree With'*, N.Y. TIMES, May 6, 2014, at A15.

speakers' ideological grouping."[3] The authors found that the justices are more likely to support speakers' legal claims when the expression at issue "conforms to [the justices' own] values"[4] and "are much less apt to protect expression rights when the expresser is from the opposing ideological team."[5]

The authors also reported that the members of the Roberts Court are not equal ideological offenders. The four current justices who proved most likely to vote in favor of ideologically likeminded speakers during the study's time period, the authors told the *New York Times*, are the Court's most conservative members: Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[6] The authors supported that indictment with a chart,[7] listing all Roberts Court justices (current and former) in order from most conservative to most liberal, excluding the Court's two most recent appointees (Justices Sotomayor and Kagan) on the grounds that those justices had not yet cast votes in a statistically meaningful number of free-expression cases.[8] The authors

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3. Epstein et al., *supra* note 1, at 2. Using the Supreme Court Database, the authors identified 516 cases that fell within the study's time parameters. *See id.* at 7; *see generally About*, SUPREME COURT DATABASE, http://scdb.wustl.edu/about.php (last visited Nov. 17, 2014).

4. Epstein et al., *supra* note 1, at 3.

5. *Id.* at 16.

6. *See* Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate?* 4 (May 2, 2014) [hereinafter *Summary*] (on file with author), http://epstein.wustl.edu/research/InGroupBiasSummary.pdf; *see also Lee Epstein: Research*, WASH. U. ST. LOUIS, http://epstein.wustl.edu/research/InGroupBias.html (last visited Nov. 17, 2014) (stating that the document was "prepared for the *New York Times*"). Liberal justices did not emerge from the study unscathed. Among past justices, for example, Justices Brennan, Marshall, Stevens, and Warren all were found to have statistically significant disparities in their support for conservative and liberal speakers. *See Summary*, *supra*, at 7.

7. *Summary*, *supra* note 6, at 5.

8. *Id.* at 4-5. The authors placed the justices along the conservative-liberal spectrum by assigning them Segal-Cover scores. *See* Epstein et al., *supra* note 1, at 8; *see also* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559-63 (1989) (proposing that justices' ideological values be ascertained by analyzing pre-confirmation newspaper editorials in left-leaning and right-leaning national newspapers); *see generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 73-74 (2013) [hereinafter EPSTEIN ET AL., BEHAVIOR OF

used an asterisk to indicate those justices for whom the difference in support for conservative and liberal speakers was statistically significant. The resulting array follows:

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

Table A: The Authors' Report on the Roberts Court Justices

The authors' findings—particularly those concerning the Court's conservatives—received wide attention in the press and in the blogosphere. Adam Liptak opened his coverage for the *New York Times* by using the study to debunk the notion that Justice Scalia is "a consistent and principled defender of free speech rights," writing that "Justice Scalia voted to uphold the free speech rights of conservative speakers at more than triple the rate of liberal ones."[9] *Salon* covered the study under the title *Scalia's Free Speech Hypocrisy: What a New Study Proves About His Bias*.[10] A writer for *The Economist* used the study to condemn ideologically motivated

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FEDERAL JUDGES] (briefly discussing the strengths and weaknesses of relying upon Segal-Cover scores for such purposes).

9. Liptak, *supra* note 2.

10. Elias Isquith, *Scalia's Free Speech Hypocrisy: What a New Study Proves About His Bias*, SALON (May 15, 2014, 8:30 AM), http://www.salon.com/2014/05/15/scalias_free_speech_hypocrisy_what_a_new_study_proves_about_his_bias.

voting by conservative and liberal justices alike, but emphasized that "the Supreme Court's current liberal and conservative wings are not—not *remotely*—equally implicated in the shady free-speech-for-my-friends racket," because "the righties on today's court appear to be significantly guiltier of in-group bias than are their liberal colleagues."[11] Under the headline *Conservative Court's Free Speech Rulings Drenched in Biases*, a writer for the website *Common Dreams* said the study shows that "conservative members of the court are tied much tighter to their own political and ideological biases than the liberal justices when it comes to ruling on cases concerning free speech."[12] One blogger said the study demonstrates that "[t]he in-group bias of the conservative justices is far more prevalent and they are much more likely to support only speech that they agree with."[13] Another declared that the study provides "yet another example of how the Supreme Court has become rigged to favor conservatives."[14] Many of these writers' readers presumably saw things the same way.

The story here has as much to do with those who write and read about the Court as it does with those who serve on it. The study's conclusions are stunning—particularly the uniformity of those conclusions regarding the Court's current conservatives—because they appear to strike a devastating blow to the Court's integrity as an institution that claims fidelity to the rule of law. Given those profound implications, the credulity with which some have uncritically accepted all of the study's results at face value is remarkable. One

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11. S.M., *Playing Favourites*, THE ECONOMIST (May 13, 2014, 4:25 PM), http://www.economist.com/blogs/democracyinamerica/2014/05/judicial-bias.

12. Jon Queally, *Conservative Court's Free Speech Rulings Drenched in Biases*, COMMON DREAMS (May 6, 2014), https://www.commondreams.org/headline/2014/05/06-0.

13. Ed Brayton, *Conservative Justices Far More Biased on Free Speech*, FREETHOUGHT BLOGS (May 7, 2014), http://freethoughtblogs.com/dispatches/2014/05/07/conservative-justices-far-more-biased-on-free-speech.

14. David Badash, *Report Proves Scalia Most Likely to Side with Conservative Speakers in Free Speech Cases*, THE NEW CIVIL RIGHTS MOVEMENT (May 6, 2014), http://thenewcivilrightsmovement.com/1-report-proves-scalia-most-likely-to-side-with-conservative-speakers-in-free-speech-cases/discrimination/2014/05/06/86824.

wonders whether those who speedily embraced the study would have been as quick to do so if the Court's current *liberals* had uniformly been the ones coming out looking the worst. As I will explain,[15] the very same in-group biases that the study's authors attribute to the justices can make laypeople and scholars alike particularly credulous when presented with arguments that categorically cast their ideological opponents in an unflattering light.

The ease with which many have accepted the study's blanket critique of today's conservative justices would be of no consequence if that critique could readily withstand a more patient review. Based upon an analysis of the authors' evidence against Chief Justice Roberts and Justice Alito, however, my judgment is that it cannot.[16] The accuracy of at least some of the authors' findings is undercut by a mixture of coding errors, superficial case readings, and questionable classifications of many speakers' ideological affiliations. Those defects influenced the themes that emerged in the press's and public's consumption of the authors' conclusions.

I begin in Part I.A by briefly explaining the phenomenon of in-group bias. Then, in Part I.B, I describe the means by which Professors Epstein, Parker, and Segal said they determined speakers' ideological identities in each of the cases within their study. In Part I.C, I introduce readers to the possibility that something is amiss by discussing problems in the authors' handling of the Court's 2008 ruling in *Washington State Grange v. Washington State Republican Party*.[17]

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15. *See infra* Part IV.

16. For a similarly skeptical critique of the study, see Eugene Volokh, *The Justices, the Freedom of Speech, and Ideology*, VOLOKH CONSPIRACY (Oct. 13, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/the-justices-the-freedom-of-speech-and-ideology (concluding that the study "does not, I think, support its conclusion, precisely because it classifies speakers as 'liberal speakers' or 'conservative speakers' for reasons other than the 'ideological grouping' of the speaker or the speech"). If anything, Volokh argues, the study simply supports the comparatively unremarkable conclusion that "[c]onservative Justices tend to be persuaded by conservative arguments (not necessarily conservative speakers' arguments) for why a law should be upheld (or struck down), and likewise for liberal Justices." *Id.*

17. 552 U.S. 442 (2008).

In Part II, I identify many instances in which the authors either coded cases improperly or made readily debatable judgments about speakers' ideological affiliations. Drawing upon Part II's discussion of cases and coding decisions, I turn in Part III to the authors' appraisal of the free-expression votes of Chief Justice Roberts and Justice Alito—two conservatives whose comparatively slim records are readily susceptible to a comprehensive reassessment. The evidence of in-group bias in those two justices' chambers is far weaker than the authors reported. The evidence of bias in Justice Alito's chambers might actually be non-existent, while—depending on what one makes of his votes in campaign-finance cases—the evidence of bias in Chief Justice Roberts's chambers might rest upon just a vote or two in a tiny data pool.

In Part IV, I invoke the literature on motivated reasoning and in-group bias to explain why some might be willing to quickly embrace a study that yields a uniformly damning report on the Court's currently sitting conservatives. I conclude in Part V by arguing for greater rigor in empirical analyses of the justices' ideological voting patterns; by suggesting that the problems with this particular study raise important concerns regarding the publicly available Supreme Court Database, the data-handling norms that generally prevail among those who do empirical work of this sort, or both; and by discussing the chief challenge that needs to be resolved before launching future large-scale studies of the justices' tendency toward ideological in-group bias. I close by briefly commenting on the authors' problem-compounding response to this Article's critique of their study.

I. THE EPSTEIN-PARKER-SEGAL STUDY

Professors Epstein, Parker, and Segal aimed to break new ground, examining for the first time the influence that in-group biases might wield when Supreme Court justices cast votes in the cases that come before them. The authors chose to focus their inquiry on First Amendment free-expression cases—that is, cases involving the freedoms of

speech, press, assembly, and association.[18] For each of the cases that fell within the time parameters of their study, the authors had to confirm that the dispute did indeed concern the First Amendment, they had to determine the ideological affiliations of the speakers or their speech,[19] and they had to determine how each of the then-sitting justices voted. Each of those tasks—particularly the second—proved problematic.

A. *In-Group Bias*

As Professors Epstein, Parker, and Segal explain, in-group bias is the tendency to favor those who belong to one's own group and to disfavor those who do not.[20] Researchers have located this tendency both when the groups play meaningful roles in people's lives (such as claiming one country rather than another as one's own)[21] and when the groups are manufactured by researchers on entirely random grounds (such as dividing people with the toss of a coin).[22] Even in the latter instances, when the criteria for determining group membership have no relation to otherwise meaningful similarities or differences, researchers find that individuals behaviorally and attitudinally favor those they regard as their own.[23] Scholars have advanced a number of

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18. *See* Epstein et al., *supra* note 1, at 2 n.6. Although the authors did not say so, they also included at least one case involving the freedom of petition. *See infra* notes 111-18, 222-28 and accompanying text (discussing the authors' problematic handling of *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011)); *see generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

19. The authors did not explain how they would handle a case in which a liberal speaker produced conservative speech, or vice versa. *See infra* Part II.E.

20. *See* Epstein et al., *supra* note 1, at 1.

21. *See* HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY 187-90 (Cambridge Univ. Press 1981) (discussing experiments with children from several different countries).

22. *See id.* at 234.

23. *See, e.g.*, Yan Chen & Sherry Xin Li, *Group Identity and Social Preferences*, 99 AM. ECON. REV. 431, 448 (2009); *see also* Miles Hewstone et al., *Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 576 (2002) ("Bias can encompass behavior (discrimination), attitude (prejudice), and cognition (stereotyping)."). Tolerance of in-group members is not, however, unlimited. *See* Scott Eidelman & Monica

theories to explain this feature of our social lives.[24] Some theorists posit, for example, that favoring in-groups and disfavoring out-groups are means by which we try to enhance our own prestige and self-esteem.[25] Others argue that identifying strongly with one group and rejecting identification with another can help reduce one's uncertainties about how to behave in the world at large.[26] Whatever its causes, the phenomenon is unquestionably real. As Professors Epstein, Parker, and Segal write, "[o]f all the manifestations of social identity, in-group bias (or favoritism) may be among the most central—and best documented."[27]

In one of many laboratory studies, for example, researchers gave test subjects a set of lottery tickets and asked them to divide the tickets between themselves and an anonymous individual.[28] In one variation, subjects were told that the unknown individual was a registered Democrat and in another they were told that the would-be recipient was a registered Republican. The researchers found that Democrats and Republicans alike were more generous with individuals they believed to be members of their own political party. The stronger the subject's own self-identification as a

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Biernat, *Derogating Black Sheep: Individual or Group Protection?*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 602, 602-06 (2003) (arguing that individuals harshly judge in-group members who threaten the clarity and positivity of the group's identity).

24. Hewstone et al., *supra* note 23, at 580-83 (identifying five theories that have emerged in the literature).

25. *See* Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 40 (William G. Austin & Stephen Worchel eds., 1979).

26. *See, e.g.*, Michael A. Hogg, *Uncertainty, Social Identity, and Ideology*, *in* 22 SOC. IDENTIFICATION IN GROUPS 203, 209-15 (Shane R. Thye & Edward J. Lawler eds., 2005).

27. Epstein et al., *supra* note 1, at 3; *accord* David G. Rand et al., *Dynamic Remodeling of In-Group Bias During the 2008 Presidential Election*, 106 PROC. NAT'L ACAD. SCI. 6187, 6187 (2009) ("In-group favoritism, or solidarity, is a well-documented aspect of human behavior. People give members of their own group preferential treatment, and often discriminate against members of other groups.") (internal citation omitted).

28. James H. Fowler & Cindy D. Kam, *Beyond the Self: Social Identity, Altruism, and Political Participation*, 69 J. POL. 813, 814 (2007).

Democrat or Republican, the less favorably he or she treated the other party's members.[29]

B. *The Authors' Classification of Speakers' Ideological Affiliations*

Launching "the first full-blown test of ideological in-group bias in the judicial context,"[30] Professors Epstein, Parker, and Segal hypothesized that the justices' "votes are neither reflexively pro- or anti- the First Amendment but rather pro- or anti- the speaker's ideological enclave."[31] They suspected, in other words, that the "justices are opportunistic free speechers," tending to support the First Amendment claims of speakers they regard as ideological allies and to oppose the claims of speakers they regard as ideological adversaries.[32] To test that theory, the authors had to make judgments about the identity of the "speaker's ideological team"[33] in each of the free-expression cases that fell within the study's time period. The authors evidently did not find that task difficult. Two of the authors independently coded the speakers' ideologies in all of the cases decided between the 2005 and 2010 terms.[34] Finding that "[t]here was almost no disagreement in their codings," one of the authors then coded the many remaining cases in the study, using the criteria that the authors believed they shared.[35] They explained those criteria as follows:

> The idea here is to assess the ideological grouping of the speaker—such that anti-gay or pro-life expressers, to provide two examples, are coded as "conservative" speakers . . . . This variable is

29. *See id.* at 824; *see also id.* at 815 ("[S]ocial identity theory suggests that individuals gain utility from affiliating with social groups, from bestowing benefits upon the ingroup, and from withholding benefits from the outgroup.").

30. Epstein et al., *supra* note 1, at 4.

31. *Id.* at 6.

32. *Id.* at 3; *see also id.* at 6 (hypothesizing that the justices "engage in opportunistic behavior following from litigant favoritism").

33. *See id.* at 6.

34. *Id.* at 10 n.17.

35. *Id.*; *see also* Email from Christopher Parker to Todd E. Pettys (May 27, 2014, 10:05 CST) (on file with author) (describing the coding procedure).

> liberal . . . if the speakers were students espousing liberal causes, war protestors burning American flags, or donors providing support to or associating with left-wing organizations, and so on.[36]

In the examples that the authors provide, the accuracy of their classifications seems clear enough. Two of their three illustrations of liberal speakers, for example, are people espousing or associating with "liberal" or "left-wing" causes—it's hard to disagree with illustrations that incorporate the very term being illustrated. But what about other cases? How much ambiguity lies beneath those three closing words "and so on"? In his coverage for the *New York Times*, Adam Liptak acknowledged that "[t]here may be quibbles about how [the study's authors] coded individual votes," but he said that it "usually [is not] hard to assign an ideological direction to particular speakers or positions."[37] Is it really true that those who are skeptical of some of the study's conclusions can raise nothing more than quibbles?

Before proceeding to address that question in the balance of this Article, it is worth pausing for a moment to consider the heavy weight that the authors' brief explanation-by-examples must carry. In a 2002 article in the *University of Chicago Law Review*, Professors Epstein and Gary King elaborated on ways in which, in their judgment, "the current state of empirical legal scholarship is deeply flawed."[38] They persuasively argued that, among other things, "[g]ood empirical work adheres to the *replication standard*: another researcher should be able to understand, evaluate, build on, and reproduce the research without any additional information from the author."[39] By providing only a brief description of how they assessed whether speakers were liberal or conservative—a description that relies entirely

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36. Epstein et al., *supra* note 1, at 10.

37. Liptak, *supra* note 2.

38. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002).

39. *Id.* at 38; *see also id.* (stating that researchers should "provide information . . . sufficient to replicate the results in principle"); Frank Cross et al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135, 137 (2002) ("The ability of scholars to replicate each other's work independently is a central component of the scholarly enterprise, and it is one that Epstein and King rightly emphasize.").

upon uncontroversial examples—Professors Epstein, Parker, and Segal appear to assure the reader that most speakers' predominantly conservative or liberal affiliations can easily be determined by anyone with a reasonable grasp on those ideological concepts.

That assurance becomes even more significant when one considers other features of strong empirical work. In their 2002 article, Professors Epstein and King stressed the importance of ensuring that one's empirical research is both reliable and valid—reliable in the sense that "a measure . . . produces the same results repeatedly regardless of who or what is actually doing the measuring,"[40] and valid in the sense that a reliable measure accurately "reflects the underlying concept being measured."[41] (They usefully give the example of a bathroom scale: it is reliable if I step on it many times in a row and it repeatedly indicates the same weight, and it is valid if the weight it indicates is accurate.)[42] Replicability and reliability are related in important ways, with conceptual vagueness often lying at the heart of any difficulties concerning the two. "[W]hen researchers produce measures that others cannot replicate," Professors Epstein and King explained, "it is the researchers' problem: they, not the replicators, must take responsibility. . . . A major source of unreliability in measurement is vagueness: if researchers cannot replicate a measure, it is probably because the original study did not adequately describe it."[43]

With those concerns in mind, Professors Epstein and King underscored the importance of limiting the latitude for subjective judgments when measuring a given phenomenon:

> As a rule . . . human judgment should be removed as much as possible from measurement or, when judgment is necessary, the rules underlying the judgments should be clarified enough to make them wholly transparent to other researchers. The key to producing

40. Epstein & King, *supra* note 38, at 83.

41. *Id.* at 87.

42. *Id.* at 83.

43. *Id.*; *see also id.* at 76 (stating that "the closer researchers can come to clarifying concepts so that they can measure them empirically, the better their tests will be").

> reliable measures is to write down a set of very precise rules for the coders . . . to follow—with as little as possible left to interpretation and human judgment. This list should be made even if the investigator codes the data him- or herself, since without it others would not be able to replicate the research (and the measure) . . . . This is the way to conduct research and how it should be judged.[44]

Judging Professors Epstein, Parker, and Segal's study by those standards, they give the impression that the bases for classifying speakers as liberal or conservative are so widely and consistently perceived—among conservatives and liberals alike—that they do not require elaboration beyond a few obvious examples aimed at reassuring readers that this is conceptual territory with which we all are familiar. They appear to assure their readers, in other words, that just as two of them agreed about how to code nearly all of the speakers in cases decided between the 2005 and 2010 terms,[45] we would agree with their ideological classifications of nearly all of the speakers in their study if we were doing the coding ourselves, even though the authors have not given us a "wholly transparent" and "very precise" set of coding rules to follow.[46] Given the stakes that Professors Epstein and King described, those are remarkable assurances—and, as I will show, they ultimately prove ill-founded in a remarkably large number of instances.

Of course, the fact that the authors did not provide their readers with a detailed set of coding criteria does not mean that they lacked such criteria altogether. Their primary source of guidance was the publicly available Supreme Court

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44. *Id.* at 85. Professors Epstein and Segal have elsewhere stressed the need for conceptual precision when trying to measure the effects of ideology, explaining that researchers must make conservatism and liberalism "susceptible to observation" by developing "precise" definitions of those concepts. *See* Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH . U. J.L. & POL'Y 81, 87 (2006); *see generally* Jens B. Asendorpf et al., *Recommendations for Increasing Replicability in Psychology*, 27 EUR. J. PERSONALITY 108, 109 & n.1 (2013) (discussing replicability and reproducibility, acknowledging that different disciplines use varying terms for these concepts, and stressing the need for subsequent researchers to have access to original researchers' "code book").

45. *See supra* notes 34-35 and accompanying text.

46. Epstein & King, *supra* note 38, at 85.

Database, from which the authors derived their initial data set.[47] The managers of that database have developed protocols for determining whether the Court's treatment of given issues is conservative or liberal in nature and have used those protocols to classify more than half a century's worth of Court decisions.[48] Professors Epstein, Parker, and Segal considered those classifications when coding justices' votes.[49] They did not (and could not) simply apply the Supreme Court Database's coding protocols to all of the cases in their study without making at least some categorizing decisions of their own,[50] however, nor did they provide readers with an explanation of the criteria they used when deciding whether a given ideological classification was ultimately appropriate. Moreover, as I will explain in Part V, there are reasons to fear that the Supreme Court Database's own ideological classifications are not entirely trustworthy. At the end of the day, therefore, Professors Epstein, Parker, and Segal are depending heavily upon readers' willingness to embrace their implication that assigning ideological identities to speakers and speech is as easy as it is in the few

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47. In a helpful email, one of the study's authors explained that they used as a guideline the Database's standards for determining whether the Court's decisions are conservative or liberal, and that the authors caucused about how to handle free-expression cases that those standards did not address. Email from Christopher Parker to Todd E. Pettys (May 27, 2014, 11:14 CST) (on file with author); *see generally* Epstein et al., *supra* note 1, at 7-11 (describing their methodology).

48. *See Online Code Book: Decision Direction*, SUPREME COURT DATABASE, http://scdb.wustl.edu/documentation.php?var=decisionDirection (last visited Nov. 17, 2014).

49. *See, e.g.*, *Summary*, *supra* note 6, at 2 n.4 ("For many cases (92.5% of the 4,519 votes), our coding accords with the Database's direction variable but there are notable exceptions.").

50. *See id.* (explaining that "[t]o ensure consistency with our First Amendment concerns, we rechecked the coding of all votes and made alterations as necessary"). Although the Database's protocols could provide a starting point in many cases, the authors could not simply adopt them wholesale because they were not designed specifically for the purpose of capturing the ideological affiliations of all speakers and all speech. *Cf. Online Code Book: Decision Direction*, *supra* note 48 ("In order to determine whether the Court supports or opposes the issue to which the case pertains, this variable codes the ideological 'direction' of the decision.").

examples that they provide.

So, just how uncontroversial are the authors' ideological classifications? Unfortunately, it does not take long for the close reader of their study to begin to run into difficulties.

C. *An Introduction to the Problems*

The authors' handling of *Washington State Grange v. Washington State Republican Party*[51] illustrates some of the kinds of problems one finds. First, the authors simplistically classified this as a case featuring a speaker hailing from the conservative enclave.[52] Absent an after-the-fact explanation from the authors, one would surmise that they did so because the Washington State Republican Party prominently appears in the name of the case as the party challenging the Washington law. An "et al." follows that reference to the Republicans in the case's formal caption, however, and that is because the Republicans were joined in the litigation by the Washington State Democratic Central Committee and the Libertarian Party of Washington State. Those political parties argued that a newly adopted law concerning the state's election system—a law that allowed candidates to self-designate their party preferences on primary ballots—was

51. 552 U.S. 442 (2008).

52. Throughout this Article, I describe the authors' coding decisions. The authors of the study initially made those decisions publicly available in an Excel spreadsheet posted on Professor Epstein's faculty webpage. *See Lee Epstein: Research*, WASH. U. ST. LOUIS, http://epstein.wustl.edu/research/InGroupBias.html (first visited May 16, 2014) [hereinafter Codings] (providing a link to an Excel file that was posted on May 2, 2014). That version of the spreadsheet was removed within days of this Article being posted on SSRN, and was replaced with a new, more abbreviated spreadsheet. Recognizing that the authors might make further changes to the way in which they report their coding decisions, I simply cite in this Article to the version of the Excel spreadsheet that was originally posted on May 2, 2014. Copies of that spreadsheet are on file with me and the *Buffalo Law Review* and will be made available upon request. In that spreadsheet, the authors' coding of the speakers' ideologies appears in column I under the heading "speechdir" and their coding of the justices' votes as either "pro-speech" or "anti-speech" appears in column E under the heading "jvote." For ease of reference, I will refer to the Excel spreadsheet as "Codings" and will provide citations to the line numbers on which the cited coding decisions appear. The authors' coding of the speakers' ideology in *Washington State Grange* appears on line 4487.

facially invalid because it "compels [the political parties] to associate with candidates they do not endorse, alters the messages they wish to convey, and forces them to engage in counterspeech to disassociate themselves from the candidates and their positions on the issues."[53] The Republicans, Democrats, and Libertarians all appeared before the Court as respondents and each filed briefs opposing the Washington law on First Amendment grounds.[54] The fact that all three of those ideologically diverse parties were appearing as litigants was not lost on the Court. In his majority opinion, Justice Thomas explicitly noted that the Democrats and Libertarians joined the lawsuit soon after the Republicans filed their complaint,[55] and he consistently referred to the political parties in the plural.[56] With those three parties jointly advancing the same set of First Amendment arguments, there is no basis for assuming that the justices saw the speakers as coming from one ideological enclave but not the other.

In a brief response to this critique, the authors said they classified the case based upon the nature of the political parties' free-expression claim, rather than upon the usual ideological identities of the parties themselves: "Regardless of the participation of the Democratic Party in this case, we consider an argument in favor of limiting voter participation in elections (and therefore giving more influence to party elites in choosing nominees) to be a more conservative

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53. *Wash. State Grange*, 552 U.S. at 454. The Washington law stated "that candidates for office shall be identified on the ballot by their self-designated 'party preference'; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election." *Id.* at 444.

54. *See* Brief for Respondent Libertarian Party of Washington, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (Nos. 06-713, 06-730); Brief for Respondent Washington State Democratic Central Committee, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (Nos. 06-713, 06-730); Brief for Respondents Wash. State Republican Party et al., Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (Nos. 06-713, 06-730).

55. *See Wash. State Grange*, 552 U.S. at 448.

56. *See, e.g.*, *id.* at 449, 452-53, 458-59.

argument (entrenched interests)."[57] That explanation plunges us into difficulties that will reappear elsewhere in this Article. First, we have quickly traveled a long distance from anti-gay speech and pro-life speech, the two examples of conservative expression that the authors provided when originally describing their coding criteria.[58] Is there any reliable basis to believe that conservative justices would regard the Democratic, Libertarian, and Republican parties' opposition to Washington's law as a hallmark of their own ideological in-group, while liberal justices would regard the parties' opposition as a hallmark of their ideological enemies? Is it really on the basis of their positions on this kind of issue that justices are widely regarded as liberal or conservative in the first place?

Second, the authors provide no reason to be confident that, when it comes to ideological in-group bias in free-expression settings, a justice will make his or her in-group and out-group assessments based upon the perceived ideological slant of the First Amendment claim, rather than upon the usual ideological affinity that he or she may feel for one or more of the claimants. As I discuss in Part II.E, trying to capture the justices' ideological perceptions takes on an added level of speculation when, in a given case, the usual ideological identity of a speaker diverges from the ideological tenor of the speech that the speaker produces. As we will see, the authors themselves show evidence of resolving those uncertainties inconsistently, sometimes focusing on the speech and sometimes focusing on the speaker.[59] Absent a persuasive response to such objections, I would regard the authors' classification of *Washington State Grange* as erroneous (or, at best, as highly debatable). The justices'

57. Appendix C (Excel version), line 4368 (Sept. 30, 2014), http://epstein.wustl.edu/research/InGroupBias.html (last visited Nov. 17, 2014) (on file with author). Appendix C is part of a set of separately posted response materials that Professor Epstein placed on her faculty webpage shortly after an earlier draft of this Article appeared on SSRN. Anticipating that the authors might further amend those response materials, a copy of the September 30 version of Appendix C is on file with the author and the *Buffalo Law Review* and will be made available upon request.

58. *See supra* note 36 and accompanying text.

59. *See infra* Part II.E.

votes in that case cannot reliably tell us anything about the justices' ideological in-group favoritism.[60]

Even if the authors accurately captured the justices' own perceptions by coding the case as one involving conservative expression, a different coding problem caused them to state an exaggerated version of the empirical case against Justice Alito. The authors coded him as voting for the political parties.[61] That was a mistake. Justice Alito joined Justice Thomas's majority opinion *rejecting* the political parties' claims and joined Chief Justice Roberts's concurring opinion responding to Justice Scalia's pro-speaker dissent.[62] If Justice Alito's vote had been coded accurately, and if the authors had been correct in categorizing this as a case involving conservative (but not liberal) speakers, the authors would have reported that Justice Alito voted in favor of conservative speakers 46.2%—rather than 53.9%—of the time.[63]

Such mistakes would not be worth much of a fuss if the study's problematic treatment of *Washington State Grange* were anomalous. But when one takes a look at how the study's authors handled many other cases, additional problems appear. Taken as a group, the number of errors and reasonably debatable classifications is sufficiently large that one ought to regard at least some of the authors' conclusions with caution.

II. ERRORS AND QUESTIONABLE CLASSIFICATIONS

I reviewed the authors' treatment of all cases decided between 1987 and the close of the study's time period, amounting to 30% of the more than 500 cases in their study.

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60. *Accord* Volokh, *supra* note 16 ("[H]ow can one measure whether speakers are 'left or right of center' when the case involves speech and speakers that aren't particularly ideological, or that are ideological in ways that are hard to see as 'liberal' or 'conservative'—or involves a bipartisan (or multi-ideological) coalition of claimants?").

61. *See* Codings, *supra* note 52, at line 4487.

62. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008); *id.* at 459 (Roberts, C.J., concurring).

63. *Cf. supra* Table A (summarizing the authors' findings concerning Justice Alito and the other members of the Roberts Court).

In that review, I examined the authors' ideological classifications of those cases' First Amendment claimants and the authors' coding of Chief Justice Roberts's, Justice Scalia's, and Justice Alito's votes. The results of that review are troubling. Of the 159 cases I reviewed, I found one or more errors or readily debatable judgments in 40 cases, or in 25% of those I examined.[64] I devote a fair amount of space to describing those problems in the pages that follow, both to lay the groundwork for an evaluation of the authors' treatment of Chief Justice Roberts and Justice Alito and to demonstrate that researchers' methods of gathering and coding data on the justices' ideological voting patterns may be ripe for reevaluation.

With varying degrees of frequency, the authors logged justices as voting for or against speakers in cases having nothing to do with free expression; they incorrectly assessed whether justices voted for or against First Amendment claimants; their conclusions about speakers' ideological identities are either erroneous or subject to reasonable debate; they failed to come to grips with the problems that arise when the ideological affiliations of speakers and their speech diverge; they included speakers whom it is difficult to imagine *any* justice regarding as ideological teammates; and they double-counted at least one litigant who appeared twice before the Court during the course of a single lawsuit.

A. *Erroneous Inclusion of Cases Having Nothing to Do with Expression*

Despite their professed focus on free-expression litigation, the authors included at least a handful of cases in which there were, in fact, no First Amendment speakers.[65] The authors included *Department of the Navy v. Egan*[66] in

64. I catalogue the problematic cases in the Appendix to this Article, *infra*.

65. The problem's origins lie in how these cases are coded in the Supreme Court Database, *see infra* Part V (discussing limitations that afflict the Supreme Court Database), and in the authors' refusal—even once made aware of the problem—to second-guess the way in which the database codes these cases, *see infra* notes 407-09 and accompanying text.

66. 484 U.S. 518 (1988).

their study, for example, somehow determining that the case was one involving a liberal speaker.[67] That case had nothing to do with the First Amendment. Thomas Egan lost his job at a Navy facility when he was denied a security clearance due to past criminal convictions and prior problems with alcohol.[68] The "narrow question" before the Court was "whether the Merit Systems Protection Board . . . has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action."[69] In his brief on the merits, Egan had framed precisely that same issue for the Court.[70] It was not a free-expression case.

Neither was *Carlucci v. Doe*,[71] another case that the study's authors believed featured a liberal speaker.[72] As Justice White explained in his ruling for a unanimous Court, the issue was "whether the National Security Agency (NSA) invoked the proper statutory authority when it terminated respondent John Doe, an NSA employee."[73] Doe was fired after he "disclosed to NSA officials that he had engaged in homosexual relationships with foreign nationals."[74] In his brief to the Court, Doe framed the issue much like the Court itself later did: "Whether an employee of the National Security Agency, dismissed 'in the interests of national security,' is entitled to a hearing pursuant to 5 U.S.C. 7532, when the summary termination authority in 50 U.S.C. 833 is not invoked."[75] As the Court of Appeals for the D.C. Circuit

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67. *See* Codings, *supra* note 52, at line 1320.

68. *Egan*, 484 U.S. at 521.

69. *Id.* at 520.

70. *See* Brief for the Respondent at i, Dep't of Navy v. Egan, 484 U.S. 518 (1988) (No. 86-1552) ("Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance.").

71. 488 U.S. 93 (1988).

72. *See* Codings, *supra* note 52, at line 1388.

73. *Carlucci*, 488 U.S. at 95.

74. *Id*. at 97.

75. Brief for Respondent at i, Carlucci v. Doe, 488 U.S. 93 (1988) (No. 87-751).

had explained more fully below, Doe wanted a hearing to develop his argument that (among other things) the decision to fire him was "motivated by an unconstitutional prejudice against homosexuals."[76] Just as one would predict from the question on which it had granted certiorari, the Supreme Court disposed of the case entirely on statutory grounds, saying nothing about the First Amendment.

A similar case—again having nothing to do with free speech, but which the authors logged as involving a liberal speaker[77]—was *Webster v. Doe*.[78] The Central Intelligence Agency (CIA) fired Doe after he disclosed he was gay and the agency concluded he posed a security risk.[79] Doe filed suit, alleging (among other things) that the CIA had "deprived him of constitutionally protected rights to property, liberty, and privacy in violation of the First, Fourth, Fifth, and Ninth Amendments."[80] Although he thus cited the First Amendment among a cluster of constitutional provisions giving him privacy and liberty rights, he never advanced a claim concerning his freedom of expression. The sole issue before the Court was whether the CIA's decision to fire Doe was subject to judicial review under the Administrative Procedures Act.[81] A majority of the justices concluded that Doe could present his constitutional claims in federal court.[82] In the ensuing lower-court proceedings, Doe advanced three constitutional claims: a denial of equal protection, a denial of his right to privacy, and a denial of "a due process property interest in employment."[83] The case never had anything to do with expressive freedoms.

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76. Doe v. Weinberger, 820 F.2d 1275, 1278 (D.C. Cir. 1987), *rev'd sub nom.* Carlucci v. Doe, 488 U.S. 93 (1988).

77. *See* Codings, *supra* note 52, at line 1280.

78. 486 U.S. 592 (1988).

79. *Id*. at 595.

80. *Id.* at 596.

81. *Id*. at 598-99.

82. *See id.* at 601-05.

83. Doe v. Webster, 769 F. Supp. 1, 2 (D.D.C. 1991), *aff'd in part and rev'd in part sub nom.* Doe v. Gates, 981 F.2d 1316 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 928 (1993).

The fact that *Egan*, *Carlucci*, and *Webster* all concerned employees whom the government deemed security risks suggests that something went awry when the study's authors tried to pull free-expression cases from the Supreme Court Database.[84] Regardless of the mechanics that would explain why these (and possibly other[85]) irrelevant cases were swept up in the net that the authors initially cast, the authors should have removed them before proceeding with their analysis. These cases had nothing to do with the subject matter of the authors' study. The authors have provided a discouraging yet illuminating response to this critique, which I will recount at the close of this Article.[86]

Of course, most of the cases in the study did concern First Amendment free-expression claims. When examining the authors' handling of those cases, however, one finds a range of other problems.

B. *Erroneous Coding of Justices' Votes*

The authors sometimes failed to accurately determine whether justices voted for or against the First Amendment claimants. As I have already noted, for example, the authors coded Justice Alito as voting in favor of the political parties in *Washington State Grange*,[87] even though he joined the majority opinion rejecting the political parties' claims.

One finds a similar set of errors in the authors' handling of *Beard v. Banks*.[88] In that case, a state prisoner objected to a prison policy that denied him access to newspapers, magazines, and photographs.[89] Justice Breyer wrote for a four-member plurality rejecting the prisoner's claim, with Justices Thomas and Scalia concurring in the judgment on

84. *See supra* note 3 (noting the authors' use of the Supreme Court Database).

85. Again, I reviewed only 30% of the cases within the authors' data set.

86. *See infra* notes 407-09 and accompanying text.

87. *See supra* Part I.C.

88. 548 U.S. 521 (2006).

89. *See id.* at 527 (plurality opinion).

grounds even more favorable to prison officials.[90] The authors correctly coded the Court as a whole as voting against the prisoner but somehow determined that Chief Justice Roberts voted in the prisoner's favor.[91] That was a mistake—the Chief Justice joined Justice Breyer's plurality opinion.[92] In fact, the authors erroneously coded the votes of *all* of the participating justices in this case,[93] mistakenly logging Justices Kennedy, Scalia, Souter, Thomas, and Breyer as voting in the speaker's favor,[94] while tallying Justices Stevens and Ginsburg as voting against him.[95]

The authors' handling of Justice Scalia provides a few additional illustrations. When evaluating *United States v. X-Citement Video, Inc.*,[96] the authors determined that he voted against a liberal speaker.[97] The case concerned the criminal conviction of Rubin Gottesman (X-Citement's owner) for shipping in interstate commerce videotapes of actress Traci Lords engaging in sexually explicit conduct prior to her eighteenth birthday.[98] The Court of Appeals for the Ninth Circuit had vacated the conviction, finding the federal statute at issue facially unconstitutional because it did not require defendants to know that recordings they were shipping or receiving contained *minors* engaged in sexually explicit conduct.[99] The Supreme Court reversed, finding that the statute did indeed demand knowledge "both [of] the

90. *See id.* at 525 (plurality opinion) ("[W]e find, on the basis of the record now before us, that prison officials have set forth adequate legal support for the policy."); *id.* at 536-37 (Thomas, J., concurring in the judgment) (arguing that only the Eighth Amendment constrains states' ability to define the terms of imprisonment).

91. *See* Codings, *supra* note 52, at line 4471.

92. *See Banks*, 548 U.S. at 521.

93. Justice Alito did not participate.

94. *See* Codings, *supra* note 52, at line 3830 (Scalia); *id.* at line 4025 (Kennedy); *id.* at line 4080 (Souter); *id.* at line 4208 (Thomas); *id.* at line 4448 (Breyer).

95. *See id.* at line 3553 (Stevens); *id.* at line 4340 (Ginsburg).

96. 513 U.S. 64 (1994).

97. *See* Codings, *supra* note 52, at line 3789.

98. *X-Citement Video*, 513 U.S. at 66.

99. *Id.* at 67.

sexually explicit nature of the material and [of] the age of the performers."[100] Although expressing views favorable to the government in this general area of regulation, Justice Scalia dissented, taking the position that the statute could not reasonably bear the majority's interpretation, that the properly construed statute "establishes a severe deterrent, not narrowly tailored to its purposes, upon fully protected First Amendment activities," and that Gottesman's "conviction cannot stand."[101] He voted *for* Gottesman, not against him. The authors have subsequently (and curiously) defended their coding of Justice Scalia's dissent by stating that they were "coding votes (not opinions), in accord with a set of established rules."[102] It is difficult to imagine what worthy set of vote-focused, reality-reflecting rules would dictate that Justice Scalia's vote to vacate Gottesman's conviction should be logged as an *anti*-speaker vote.

One finds a similar problem in the authors' treatment of *Pope v. Illinois*.[103] In that case, two attendants at an adult bookstore had been convicted of violating Illinois's obscenity statute.[104] The attendants argued that their convictions violated the First Amendment because the jury had not been properly instructed to use an objective test—rather than the locality's or state's community standards—to determine whether the materials at issue had serious political, artistic, scientific, or literary value.[105] The proper remedy, the attendants said, would be to reverse their convictions.[106] Justice Scalia joined the Court's majority opinion embracing the attendants' First Amendment argument, rejecting the state's defense of the jury instructions, and remanding for

100. *Id.* at 78-79.

101. *Id.* at 86 (Scalia, J., dissenting); *cf. id.* at 87 (Scalia, J., dissenting) ("The Court today saves a single conviction by putting in place a relatively toothless child-pornography law that Congress did not enact, and by rendering congressional strengthening of that new law more difficult.").

102. Appendix C, *supra* note 57, at line 3743 (incorporating by reference the explanation given on line 3133).

103. 481 U.S. 497 (1987).

104. *See id.* at 499.

105. *See id.*

106. *See id.* at 501.

harmless-error analysis (rather than invalidating the convictions outright).[107] The authors counted this as a vote against a liberal speaker.[108] Is that a fair characterization of Justice Scalia's actions when he *agreed* with the attendants' First Amendment claim but stopped short of giving them their most favorable remedy? Elsewhere in their study, the authors themselves provide reason to doubt it. When evaluating a different case (*Dawson v. Delaware*[109]), the authors counted Justice Scalia as voting in *favor* of a *conservative* speaker when he voted to accept the speaker's First Amendment argument but also to remand for harmless-error analysis.[110] Needless to say, the conflict between those coding decisions cannot be resolved by supposing that a remand for harmless-error analysis is irrelevant when Justice Scalia otherwise supported a conservative speaker, but that the same remand negates a vote that would otherwise count as support for a liberal speaker.

The authors again failed to fairly characterize Justice Scalia's vote in *Borough of Duryea v. Guarnieri*.[111] Charles Guarnieri, a unionized employee, alleged that his former municipal employer violated his constitutional rights by firing him in retaliation for asserting his legal rights in an earlier workplace dispute.[112] He argued that, to prevail under the First Amendment's Petition Clause, he did not need to prove that the matter for which he suffered retaliation was a matter of public concern.[113] Justice Scalia filed a separate opinion concurring in the judgment in part and dissenting in part, and the authors counted it as a vote against Guarnieri,

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107. *See id.* at 500-04.

108. *See* Codings, *supra* note 52, at line 3782. They have tried to defend their decision, again opaquely stating that they were "coding votes (not opinions), in accord with a set of established rules." Appendix C, *supra* note 57, at line 3133.

109. 503 U.S. 159 (1992); *see also infra* notes 188-96 and accompanying text (discussing the authors' problematic handling of *Dawson*).

110. *See Dawson*, 503 U.S. at 168-69 (inviting the lower court to take up the harmless-error issue on remand); Codings, *supra* note 52, at line 3807.

111. 131 S. Ct. 2488 (2011).

112. *Id.* at 2492.

113. *See id.* at 2491.

just as they counted the vote of the Court as a whole.[114] Unlike the majority, however, Justice Scalia *agreed* with Guarnieri's contention that, to bring a claim under the Petition Clause, he need not show that the matter for which he suffered retaliation was a matter of public concern.[115] Moreover, although Justice Scalia concluded that Guarnieri could not cite his union grievance as a basis for a First Amendment retaliation claim,[116] he nevertheless believed there were grounds on which Guarnieri should win. Because the parties had agreed (over Justice Scalia's doubts) that lawsuits are "petitions" protected by the Petition Clause, Justice Scalia contended that Guarnieri *should prevail* on his claim alleging that he suffered retaliation for bringing a Section 1983 action against city officials.[117] (That was the basis on which a portion of his opinion was labeled a dissent.) The authors thus erred when they simplistically coded Justice Scalia as voting against the speaker. The authors have since tried to justify their coding decision by again reiterating that they were "coding votes, not opinions."[118] Once again, however, that opaque explanation fails to take account of Justice Scalia's *vote* to dissent from a portion of the majority's anti-speaker judgment.

One of the authors' mistakes when coding Justice Scalia's votes worked to his advantage in the study. In *Rosenberger v. Rector & Visitors of the University of Virginia*,[119] a Christian student group challenged the University of Virginia's denial of their request for funding.[120] The authors coded the students as conservative but logged Justice Scalia

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114. *See* Codings, *supra* note 52, at line 3777.

115. *See Guarnieri*, 131 S. Ct. at 2504-06 (Scalia, J., concurring in the judgment in part and dissenting in part).

116. *Id.* at 2506 (stating that the Petition Clause should not protect employees from retaliation for petitions that "are addressed to the government in its capacity as the petitioners' employer" and that "[a] union grievance is the epitome" of such a petition).

117. *Id.* at 2506-07.

118. Appendix C, *supra* note 57, at line 4490.

119. 515 U.S. 819 (1995).

120. *See id.* at 822-27.

as voting against them.[121] The latter was a mistake. Justice Scalia joined Justice Kennedy's majority opinion, ruling in the students' favor.[122] Once that error was pointed out to them, the authors corrected it.[123]

C. *Erroneous Classifications of Speakers' Ideological Identities*

There are numerous cases in which there are good reasons to conclude that the authors incorrectly classified speakers' ideological identities. As I have already explained, for example, the authors coded the speakers in *Washington State Grange* as conservative, thereby either disregarding the fact that the Washington State Republican Party—the speaker named in the case caption—was joined by the Washington State Democratic Central Committee and the Libertarian Party of Washington State; overestimating the likelihood that the justices themselves regarded the parties' claims as ideologically conservative in nature; or making an undefended assumption that—in the eyes of a justice driven by in-group bias—the ideological quality of the speech always trumps the usual ideological identity of the speaker.[124]

The same kinds of problems afflict the authors' classification of *New York State Board of Elections v. Lopez Torres*[125] as a case involving a liberal speaker.[126] Margarita Lopez Torres had repeatedly tried and failed to secure the Democratic nomination for a seat on the Supreme Court of New York.[127] She alleged that the state's system of using political parties' conventions to select Supreme Court justices violated her First Amendment right of association.[128] A majority of the Court rejected that claim.[129] If Lopez Torres's

121. *See* Codings, *supra* note 52, at line 3883.

122. *See Rosenberger*, 515 U.S. at 822, 845-46.

123. *See* Appendix C, *supra* note 57, at line 3797.

124. *See supra* Part I.C.

125. 552 U.S. 196 (2008).

126. *See* Codings, *supra* note 52, at line 3904.

127. *See Lopez Torres*, 552 U.S. at 201.

128. *See id.* at 203-04.

129. *See id.* at 203-07.

Democratic affiliation were all one knew about the case, one would indeed classify the case's First Amendment claimant as liberal. Yet even then, the case would be problematic for purposes of the authors' study because a loss for Lopez Torres would amount to a win for the state's Democratic Party, and vice versa. It thus would be difficult for a justice to determine on which side of the "v" his or her ideological opponents or allies appeared. Would a bias-driven conservative rather vote against a Democratic judicial candidate or against the Democratic Party whose nomination the candidate sought?

Just as in *Washington State Grange*, however, there were multiple parties involved in the case. Lopez Torres was one of nine plaintiff-respondents challenging the New York system, a group that included both Democratic and Republican candidates for judicial office and both Democratic and Republican voters who objected to the state's manner of selecting Supreme Court justices.[130] Correspondingly, beneath the "et al." on the other side of the "v" were (among others) the New York Republican State Committee and the New York County Democratic Committee.[131] Because the case concerned the jointly asserted First Amendment claims of Democrats and Republicans against their respective political parties, because there is no persuasive reason to assume that conservative and liberal justices made different in-group and out-group assessments of the plaintiffs' challenge to the convention system, and because the authors provide no reason to believe that the ideological quality of speech always trumps the usual ideological identity of the speaker, the case probably should have been excluded from the study. It simply does not give us a reliable basis for assessing a justice's susceptibility to in-group bias.

The authors' handling of *California Democratic Party v.*

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130. *See id.* at 201 (noting that Lopez Torres was joined by other judicial candidates and voters); Complaint for Declaratory and Injunctive Relief at 4-9, Lopez Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212 (E.D.N.Y. 2006) (04-CV-1129), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/complaint_004.pdf (describing each of the parties to the lawsuit).

131. *Cf. Lopez Torres*, 552 U.S. at 203 ("[B]oth the Republican and Democratic state parties have intervened from the very early stages of this litigation to defend New York's electoral law.").

Jones[132] is even more objectionable. The issue in that case concerned political parties' objection to California's decision to allow non-party members to vote in parties' primary elections.[133] The authors classified the case's First Amendment claimants as liberal,[134] perhaps due to the identity of the speaker identified in the name of the case. As the fourth paragraph of the Court's opinion explains, however, the Democrats were joined by the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party.[135]

The authors have tried to explain their coding of the case, stating that "[a] challenge to the party establishment to offer more inclusion in the nomination process and on the ballots [is driven by] a liberal motivation regardless of which party is being challenged."[136] I have already questioned the accuracy of the authors' assumption that conservative and liberal justices would indeed make differing in-group and out-group assessments of a case on those sorts of grounds.[137] But even if that were a sound basis for coding the expression in *California Democratic Party*, the authors have got things exactly backward. The First Amendment claimants were the political parties *resisting* non-party voting in primary elections. On the authors' explanation of their coding decision, they should have coded the case as one featuring conservative expression, not liberal.

The same problems recurred in *Eu v. San Francisco County Democratic Central Committee*.[138] The Democrats in that case objected to various ways in which California law restricted their party activities, such as by banning official party endorsements in primary elections, limiting the tenure

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132. 530 U.S. 567 (2000).

133. *See id.* at 569-70.

134. *See* Codings, *supra* note 52, at line 3071.

135. *See Cal. Democratic Party*, 530 U.S. at 571.

136. Appendix C, *supra* note 57, at line 3985 (incorporating by reference the explanation provided on line 4359).

137. *See supra* notes 51-60 and accompanying text (discussing *Washington State Grange*).

138. 489 U.S. 214 (1989).

of party chairs, and requiring geographic rotation of party chairholders.[139] The authors coded the First Amendment claimants as liberal,[140] perhaps in part because the San Francisco Democrats were named in the case caption. Once again, however, political parties from across the ideological spectrum joined together to advance the same set of constitutional arguments. As Justice Marshall explained early in his opinion for the Court, the suit was brought by "[v]arious county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics."[141] How would an opportunistic, bias-driven justice know where to turn?

In an attempt to justify their coding decision, the authors have reiterated their view that "[a] challenge to the party establishment to offer more inclusion in the nomination process and on the ballots" is ideologically liberal in nature.[142] Unfortunately, the authors are again confused about the facts. The First Amendment claimants in *Eu* were the political parties themselves, not those challenging the parties' preferred ways of doing business. On the authors' explanation, they should have coded the case as one involving conservative expression. The mismatch between coding decisions and explanations lends strength to the worry that, at the time the coding decisions were being made in the first instance, case captions played an outsized role.

The case caption evidently once again caused problems for the authors when coding *Rutan v. Republican Party of Illinois*.[143] The authors determined that the First Amendment claimants in that case were conservative.[144] Those claimants were individuals who alleged that the

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139. *See id.* at 216-19.

140. *See* Codings, *supra* note 52, at line 1065.

141. *Eu*, 489 U.S. at 219.

142. Appendix C, *supra* note 57, at line 3305 (incorporating by reference the explanation provided on line 4359).

143. 497 U.S. 62 (1990).

144. *See* Codings, *supra* note 52, at line 1106.

Republican Governor of Illinois denied them jobs, promotions, or transfers because they were *not* supporters of the Republican Party and because they *lacked* the support of local Republican officials.[145] There is no reason to suppose that conservative justices would regard those individuals as desirable beneficiaries of preferential voting.

A narrow focus on the First Amendment claimant named in the caption also appears to have led the authors into trouble when evaluating *United States v. National Treasury Employees Union*.[146] That case concerned a federal law barring nearly all federal employees from receiving honoraria for their speaking and writing engagements.[147] The law's primary purpose was to avoid the ethical problems that could arise when federal employees received honoraria for speaking or writing about matters relating to their employment.[148] The ban, however, extended even to speeches and writings dealing with non-work matters.[149] The National Treasury Employees Union—one of several plaintiffs who filed lawsuits challenging the restriction—was named to represent the class of *all* Executive Branch employees below the GS-16 level who would receive honoraria but for the federal restriction.[150] One of the plaintiffs, for example, was an attorney for the Department of Labor who lectured on Judaism; another was a Postal Service employee who lectured on the Quaker religion; another was an attorney for the Nuclear Regulatory Commission who wrote on Russian history; another was a microbiologist who reviewed dance performances; another was a tax examiner who wrote about environmental matters and earthquakes; another was an aerospace engineer who lectured on African-American

145. *See Rutan*, 497 U.S. at 66-67.

146. 513 U.S. 454 (1995).

147. *See id.* at 457-60 (identifying the relevant statutes and administrative regulations).

148. *See id.*

149. *See id.* at 457.

150. *Id.* at 461.

history.[151]

The authors concluded that the case featured a liberal speaker simply because (they have since explained) one of the many First Amendment claimants was a union.[152] Yet the dispute had absolutely nothing to do with labor law or with the powers of unions. Rather, the union represented a class composed of *all* lower-ranking Executive Branch employees who wished to speak and write in exchange for payment but were barred by federal law from doing so. There is no reliable basis for presuming that the justices saw all—or even most—of those employees as coming from one ideological enclave rather than the other. There certainly is no reason to think that intelligent justices would regard the entire set of First Amendment claims in an ideologically liberal light merely by virtue of the fact that one of the scores of plaintiffs was a union.

Just as the authors too quickly assumed that a case with a union in the title involved liberal speech, they too quickly assumed that *Board of Regents v. Southworth*[153] involved liberal speech because the speakers were college students. In *Southworth*, a handful of students enrolled at the University of Wisconsin raised a First Amendment objection to the university's use of mandatory student fees to support student organizations and activities to which those students objected on political or ideological grounds.[154] The authors coded those speakers as liberal,[155] evidently on the assumption that college students tend toward the ideological left. Here, however, at least some of the students were decidedly conservative. Among the student groups to which they

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151. *See id.* at 461-62 (providing some of these examples); Brief for Respondents, National Treasury Employees Union, et al. at 7-8, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995) (No. 93-1170) (providing some of these examples).

152. *See* Codings, *supra* note 52, at line 3183 (coding the case); Appendix C, *supra* note 57, at line 3751 ("While the individual speakers may have different beliefs, this is also a union dispute and the [Supreme Court] Database codes the pro-union position as liberal (unless it is a union member against the union.").

153. 529 U.S. 217 (2000).

154. *Id.* at 226-27.

155. *See* Codings, *supra* note 52, at line 3242.

objected were Amnesty International; the Campus Women's Center; the Internationalist Socialist Organization; the Lesbian, Gay, Bisexual Campus Center; the Madison AIDS Support Network; the student chapter of the National Organization for Women; the Progressive Student Network; the Student Labor Action Coalition; and the UW Greens.[156] That presumably is one of the reasons why conservative organizations like the Christian Legal Society and the Washington Legal Foundation lined up as amici curiae in support of the students,[157] while the liberal Brennan Center for Justice and the Lambda Legal Defense and Education Fund were among those who filed briefs in support of the university.[158]

There was only one speaker in *Arkansas Educational Television Commission v. Forbes*,[159] and so here one encounters difficulties of a different sort. The issue in *Forbes* was whether a public television station violated the First Amendment rights of an independent candidate named Ralph Forbes when it refused to allow him to join a televised debate among candidates for a congressional seat.[160] The study's authors counted him as a liberal speaker[161] because

156. *See* Brief for Respondents at 3-12, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189).

157. *See* Brief of Christian Legal Society as Amicus Curiae in Support of Respondents, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189); Brief of the Washington Legal Foundation and the Committee for a Constructive Tomorrow as Amici Curiae in Support of Respondents, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189); *see generally* LEE EPSTEIN, CONSERVATIVES IN COURT 172 (1985) (explaining that the Washington Legal Foundation was established "to defend the free enterprise system and to counter the liberal public interest law movement").

158. *See* Brief of Amicus Curiae the Brennan Center for Justice at New York University School of Law in Support of Petitioners, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189); Brief of the Lesbian, Gay, Bisexual and Transgender Campus Center at the University of Wisconsin-Madison and Lambda Legal Defense and Education Fund as Amici Curiae in Support of Petition for Writ of Certiorari, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189).

159. 523 U.S. 666 (1998).

160. *Id.* at 669-71.

161. *See* Codings, *supra* note 52, at line 3092.

(the authors have since explained) he was advocating "greater inclusion in the political process."[162] To judge the likelihood that this was indeed the factor that determined the justices' in-group and out-group assessments of the ideological enclave from which Forbes's First Amendment claim came, one might want to take a closer look at Forbes himself. In a 1990 story, the *New York Times* reported that Forbes was then seeking the Republican nomination to become Arkansas's lieutenant governor, that Forbes was "a neo-Nazi white supremacist," that he had "managed the [1988] Presidential campaign of David Duke," that he declared himself to be "100 percent right-to-life" and believed that Republicans who were soft on abortion were "wimps" and "beady-eyed scuzzballs," that he "advocate[d] sending American blacks to a black homeland in Africa," and that he was "a fervent advocate of capital punishment."[163] That alleged history was not forgotten when Forbes's case arrived at the Court. When covering the parties' oral arguments, for example, the *Washington Post* reported that Forbes was "a former member of the American Nazi Party."[164] One simply cannot be confident that a bias-driven liberal justice would have seen Forbes's case as an opportunity to secure a victory for the liberal team.

One finds similar trouble (albeit on less inflammatory grounds) in *Burdick v. Takushi*.[165] Alan Burdick, a resident of Hawaii, alleged that the state violated his First Amendment rights of speech and association by refusing to count write-in votes that he wished to cast in primary and general elections.[166] The authors coded him as a liberal speaker on the rationale that Burdick was trying to open up the political

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162. Appendix C, *supra* note 57, at line 3913.

163. *Voters Face Racial Choice in Arkansas Runoff*, N.Y. TIMES, June 12, 1990, at A15, *available at* http://www.nytimes.com/1990/06/12/us/voters-face-racial-choice-in-arkansas-runoff.html.

164. Joan Biskupic, *Justices Question Barring Fringe Candidates from Debates on Public TV*, WASH. POST, Oct. 9, 1997, at A15, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/ark_100997.htm.

165. 504 U.S. 428 (1992).

166. *Id.* at 430.

process.[167] There are good reasons to believe, however, that Burdick himself identified with the conservative end of the spectrum, and that the justices themselves knew this claim was brought in an effort to weaken the Democratic Party's grip in Hawaii. The state explained in its brief that Burdick's dissatisfaction had blossomed when only one candidate appeared on the Republican primary ballot to fill a seat in the state legislature.[168] Burdick was dissatisfied with that candidate and wished to vote—in the Republican primary—for someone else.[169] Moreover, as Justice Kennedy explained in his dissent, Hawaii's opposition to write-in votes helped maintain the Democratic Party's political control in the state.[170] Indeed, as the case was winding its way to the Court, the *New York Times* reported that one of the reasons Burdick opposed Hawaii's restriction was that "the ban on write-in votes helps keep Hawaii politics a virtual Democratic monopoly."[171] On what basis can we be confident that liberal justices would regard Burdick as an ideological teammate and that conservative justices would regard him as an ideological enemy?

The same problem arises again in *Board of County Commissioners v. Umbehr*.[172] Keen Umbehr—a trash-hauler in Kansas—sued county officials after they terminated his contract with the county.[173] Umbehr alleged that the officials were retaliating against him for speech they found objectionable. Umbehr had long been a thorn in county officials' side, frequently writing and speaking about matters concerning landfill user rates, county officials' alleged violations of the state's open-meetings law, the cost and

167. *See* Codings, *supra* note 52, at line 1914; Appendix C, *supra* note 57, at line 3590 (incorporating by reference the explanation given on line 3913).

168. *See* Respondent's Brief at 15-16, Burdick v. Takushi, 504 U.S. 428 (1992) (No. 91-535).

169. *See id.*

170. *See Burdick*, 504 U.S. at 444 (Kennedy, J., dissenting).

171. Robert Reinhold, *Hawaii Lawsuit May Test Limits of Write-In Votes*, N.Y. TIMES, Aug. 29, 1991, at B12, *available at* http://www.nytimes.com/1991/08/29/us/hawaii-lawsuit-may-test-limits-of-write-in-votes.html.

172. 518 U.S. 668 (1996).

173. *Id.* at 671-72.

difficulty of obtaining public records from the county, the county's use of taxpayer money, and the like.[174] The authors concluded he was a liberal speaker.[175] Yet the matters about which Umbehr had spoken or sought transparency were not slanted in one ideological direction or the other—if anything, his speech likely tended toward the conservative to the extent he was complaining about government fees and uses of taxpayer money. Neither the opinion, the parties' briefs, nor the court of appeals' ruling below provides a reliable basis for assuming that Umbehr was allied with the liberal ideological team. If one digs deeper into Umbehr's biography, one learns that, throughout the time of this lawsuit and beyond, he identified as a Republican and was active in Republican politics, even once running as a Republican for county office.[176] (At the time of this writing, Umbehr is running as the Libertarian candidate for the Kansas governorship.[177]). Umbehr was certainly not a liberal and neither was his speech, and there is nothing on the face of the record that would have caused the justices to believe otherwise.

One again finds Republicans—this time on both sides of

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174. *See id.* at 671.

175. *See* Codings, *supra* note 52, at line 3137.

176. Telephone Interview with Keen Umbehr (May 28, 2014). Of course, the justices might not have known about Umbehr's Republican activism—but even if they didn't, they still had no clear reason to believe he was liberal. Setting that important fact aside, the case raises a question: when trying to sniff out evidence of in-group bias, how much knowledge should we presume the justices possess about the players in local party politics? Consider, for example, *Burson v. Freeman*, 504 U.S. 191 (1992). In that case, a local party activist was working on a city council candidate's political campaign in Tennessee. She objected on First Amendment grounds to a state law that restricted electioneering activities near the entrances to polling places. *See id.* at 193-94. The authors regarded the activist as a liberal speaker. *See* Codings, *supra* note 52, at line 3845. The fact that a person wishes to solicit votes or distribute campaign literature near the entrance to a polling place tells one nothing about that person's conservative or liberal tilt. As far as I can tell, the parties' briefs do not identify the political affiliation of the party activist or of the political candidate on whose campaign she was then working. Friends in Tennessee tell me they suspect the activist was a Democrat. When can we safely assume that the justices themselves know (or take steps to learn) the ideological affiliations of participants in local politics, when the briefs do not make those affiliations clear?

177. *See Libertarian Umbehr Files for Kansas Governor*, NEWTON KANSAN, May 21, 2014, at 6.

the "v"—in *Morse v. Republican Party of Virginia*.[178] In that case, three individuals objected to the Republican Party of Virginia's requirement that they (like all other would-be delegates) pay a fee to participate in a convention being held to select the party's nominee for United States Senator.[179] The individuals were two Republicans who had long been active in Republican politics, plus one independent.[180] The authors coded those three First Amendment claimants as liberal.[181] All three individuals wished to participate in the Republican convention, and there is nothing in the Court's opinion that would lead one to believe they were liberals trying to crash the Republicans' party. If the fact that the plaintiffs were trying to open up the Republicans' political process is the reason we are to assume that the justices saw those plaintiffs in an ideologically liberal light,[182] then we are being asked to stretch a very long way indeed.

San Francisco Arts & Athletics v. United States Olympic Committee[183] takes us far from the realm of intra-party disputes among Republicans. The organizers of the Gay Olympic Games slated to be held in San Francisco in 1982 raised a First Amendment objection to federal legislation granting exclusive use of the word "Olympic" to the United States Olympic Committee.[184] The authors coded the Gay Olympics' organizers as conservative,[185] notwithstanding the conflict with one of the few coding criteria that the authors expressly described for their readers—namely, that speech

178. 517 U.S. 186 (1996).

179. *See id.* at 190-91.

180. *See* Brief for Appellants at 6, Morse v. Republican Party of Va., 517 U.S. 186 (1996) (No. 94-203).

181. *See* Codings, *supra* note 52, at line 3243. The case primarily concerned the Voting Rights Act of 1965, but the parties on both sides did infuse their statutory arguments with First Amendment content.

182. That is the explanation that the authors have offered. *See* Appendix C, *supra* note 57, at line 3814 (incorporating by reference the explanation given on line 3913).

183. 483 U.S. 522 (1987).

184. *See id.* at 525-30, 535-41.

185. *See* Codings, *supra* note 52, at line 1206. Those organizers—not the USOC—were indeed the First Amendment claimants.

was deemed conservative if it was "*anti*-gay."[186]

D. *Questionable Classifications of Speakers' Ideological Identities*

There are many cases in which, even if not plainly wrong, the authors' classifications of speakers' ideological identities can readily be questioned, leaving one far from certain that those classifications correspond to the ideological identities that the justices themselves perceived. Of course, being reasonably certain that one has captured how the justices perceived the speakers is critical to the task that Professors Epstein, Parker, and Segal set for themselves. If one cannot be reasonably sure whether a justice perceived a given speaker as a member of an ideological in-group or out-group, one cannot confidently use the justice's treatment of that speaker to measure the justice's tendency toward ideological in-group bias. It is *the perception* that a person belongs to an in-group or out-group, after all, that triggers the temptation of bias.[187] As the following cases collectively illustrate, identifying in binary fashion the ideological team to which a speaker belongs can be a remarkably fuzzy business. My purpose here is thus not to say how the speakers' ideologies should have been coded; to the contrary, it is to highlight the uncertainties that surround *any* effort to capture the justices' own perceptions of ideologically nuanced cases.

Consider, first, the authors' startling treatment of *Dawson v. Delaware*.[188] David Dawson, a convicted murderer sitting on Delaware's death row, alleged that the state had violated his First Amendment rights during his sentencing proceedings by allowing the prosecutor to tell the jury that Dawson had the words "Aryan Brotherhood" tattooed on his hand, that the Aryan Brotherhood was "a white racist prison gang," and that Dawson called himself "Abaddon," by which

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186. *See supra* note 36 and accompanying text (emphasis added).

187. *See* Tajfel & Turner, *supra* note 25, at 40 (explaining that the groundwork for in-group bias is laid when, among other things, there is "a collection of individuals *who perceive* themselves to be members of the same social category") (emphasis added).

188. 503 U.S. 159 (1992).

he meant he was a disciple of Satan.[189] Eight justices concluded that Dawson's First Amendment right to free association had indeed been violated, then remanded for harmless-error analysis.[190] The authors counted those as votes in favor of a conservative speaker.[191] Calling himself one of Satan's disciples certainly did not land Dawson in the conservative camp. Is the assumption here that a speaker's self-identification as a racist will, standing alone, signal to the conservative justices that he "conforms to [those justices' own] values"?[192]

In earlier versions of their paper, the authors revealed that something along those lines was in fact their rationale, stating that they coded "racist communication" and "racist behavior" as conservative expression.[193] There are additional cases—a pair involving cross-burnings, for example—in which the authors appear to have proceeded on the assumption that conservative justices do indeed see racists as members of their own ideological in-group.[194] The authors evidently regarded racism as a hallmark of conservative justices' in-group no matter what the race of the individual who was behaving or speaking in a racist fashion. In one case,

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189. *Id.* at 161-63.

190. *See id.* at 165-69.

191. *See* Codings, *supra* note 52, at line 1927.

192. Epstein et al., *supra* note 1, at 3.

193. Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* 8 (Aug. 6, 2013) [hereinafter Epstein et al., *2013 Version*] (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572 ("racist communication"); Lee Epstein, Christopher M. Parker & Jeffrey Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* 7 (Aug. 16, 2012) [hereinafter Epstein et al., *2012 Version*] (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107425 ("racist behavior"). In the examples of conservative expression that the authors provide in the most recent version of their paper, racists have been replaced by pro-life speakers. *See* Epstein et al., *supra* note 1, at 10.

194. *See, e.g.*, Codings, *supra* note 52, at line 1813 (coding as conservative the teenager in *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992), who allegedly burned a cross in the yard of an African-American family); *id.* at line 3072 (coding as conservative the individuals in *Virginia v. Black*, 538 U.S. 343 (2003), who burned crosses at a Ku Klux Klan rally and in the yard of an African-American man).

for example—a case they foregrounded in earlier versions of their paper—they coded as conservative an African-American man whose sentence for aggravated battery had been enhanced because he selected his victim (a young white boy) on the basis of his race.[195] The authors' apparent belief about what qualifies a person for in-group-member status in the eyes of conservative justices is extraordinary. It is equally extraordinary to suppose that, in *Dawson*, the speaker's racist self-identification would trump the fact that he was a convicted murderer seeking invalidation of his capital sentence—hardly the kind of litigant one imagines would ordinarily draw a conservative justice's bias-driven vote.[196]

We move to quite different territory in *Los Angeles Police Department v. United Reporting Publishing Corp.*,[197] where the dispute concerned a particular kind of commercial speech. United Reporting was a privately owned business that gathered the names and addresses of recently arrested individuals and then sold that information to insurers, driving schools, drug and alcohol counselors, and lawyers.[198] A state statute required United Reporting and others requesting arrested individuals' addresses to declare that they would not use the information for marketing purposes.[199] The authors regarded United Reporting as a liberal speaker.[200] In other commercial-speech cases, however, the study's authors often classified the speakers as conservative (a decision that some might question on a case-by-case basis). Even more to the point, in another commercial-speech case

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195. *See id.* at line 1881 (coding *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)); Epstein et al., *2013 Version*, *supra* note 193, at 8 & n.23 (citing *Mitchell*); Epstein et al., *2012 Version*, *supra* note 193, at 7 (citing *Mitchell*).

196. In many other cases, the authors classified prisoners as liberal. *See, e.g.*, Codings, *supra* note 52, at line 3922 (coding as liberal the prisoner in *Turner v. Safley*, 482 U.S. 78 (1987), who challenged a prison restriction on inmate correspondence); *id.* at line 3837 (coding as liberal the prisoner in *Shaw v. Murphy*, 532 U.S. 223 (2001), who wished to assist other inmates with legal matters).

197. 528 U.S. 32 (1999).

198. *Id.* at 34.

199. *Id.* at 34-35.

200. *See* Codings, *supra* note 52, at line 3211.

(*Sorrell v. IMS Health Inc.*), the study's authors were faced with "data miners" in the business of gathering prescriber-identifying information from pharmacies and then selling that information to pharmaceutical companies for use in those companies' marketing efforts.[201] The authors coded those data miners as conservative.[202] Assuming that was a fair classification, why not similarly code United Reporting as a conservative data miner engaged in both producing and facilitating commercial speech?[203]

Some of the debatably classified cases involve the press. In *Florida Star v. B.J.F.*, for example, the *Florida Star*—a weekly newspaper in Jacksonville, Florida—had violated a state law by publishing the full name of a woman who had been sexually assaulted.[204] A jury awarded her damages,[205] but a majority of the Court ruled that imposing liability on the newspaper violated its First Amendment rights.[206] The authors coded the newspaper's speech as conservative because, in their view, keeping the identity of a survivor of sexual assault private "is more of a liberal interest."[207] There are good reasons to be skeptical about that decision. Do we really think the Court's conservatives perceive speech as coming from one of their own when—indeed, *because*—that speech is insensitive to a woman who has been sexually assaulted? Moreover, the *Florida Star* is part of a media industry that is widely perceived as tending toward the left as a general matter, and the authors sometimes coded other

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201. 131 S. Ct. 2653, 2660 (2011).

202. *See* Codings, *supra* note 52, at line 3882.

203. The authors have subsequently said they coded the case as they did because some of the information was supplied "to groups that could provide support to arrested individuals." Appendix C, *supra* note 57, at line 3949. But couldn't one just as easily say that some of the information was provided to profit-seeking insurance companies and driving schools to increase their revenues? If so, shouldn't one confess that one really has no idea how the individual justices themselves perceived the ideological tenor of the First Amendment claim?

204. 491 U.S. 524, 526-28 (1989).

205. *Id.* at 529.

206. *Id.* at 541.

207. Appendix C, *supra* note 57, at line 3349; *see also* Codings, *supra* note 52, at line 1060.

members of that industry accordingly.[208] A number of media organizations lined up behind the newspaper as amici curiae (including, for example, the New York Times Company and the American Newspaper Publishers Association),[209] while the conservative Pacific Legal Foundation filed an amicus brief in support of the woman.[210] The *Florida Star*, moreover, is no ordinary newspaper. It was founded in 1951 by an African-American journalist;[211] it bills itself as "Northeast Florida's oldest African American-owned newspaper" and as "committed to providing [readers] with the latest and most accurate news possible that affects the African American Community;"[212] and it claims that "[m]ore African-Americans turn to The Florida Star for their source of Black news than any other media in North Central Florida and South Georgia."[213] All things considered, can one really assume that the justices saw the newspaper's First Amendment claim as emanating from a conservative enclave?

United States v. Edge Broadcasting Co.[214] takes us from newspapers to radio. Here, the speaker was a radio station

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208. *See, e.g.*, Lars Willnat & David H. Weaver, *The American Journalist in the Digital Age: Key Findings* 11, IND. UNIV. BLOOMINGTON NEWSROOM, *available at* http://news.indiana.edu/releases/iu/2014/05/2013-american-journalist-key-findings.pdf (last visited Nov. 17, 2014) (reporting that American journalists are far more likely to identify themselves as Independents or Democrats than Republicans); Codings, *supra* note 52, at line 3772 (coding as liberal the newspaper in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which had published an allegedly defamatory story about a high-school wrestling coach).

209. *See* Brief of Amici Curiae American Newspaper Publishers Association, the New York Times Company, the Miami Herald Publishing Company, the Tribune Company, the Times Herald Printing Company, McClatchey Newspapers, Inc., and the Florida First Amendment Foundation, Fla. Star v. B.J.F., 491 U.S. 524 (1989) (No. 87-329).

210. *See* Brief of Amicus Curiae, Pacific Legal Foundation, in Support of Appellee, Fla. Star v. B.J.F., 491 U.S. 524 (1989) (No. 87-329); *see generally* EPSTEIN, *supra* note 157, at 171 (stating that the Pacific Legal Foundation was "the first conservative public interest legal foundation").

211. *See About*, FLA. STAR, http://www.thefloridastar.com/about-2 (last visited Nov. 17, 2014).

212. *Id.*

213. *Subscribe*, FLA. STAR, http://www.thefloridastar.com/subscribe (last visited Nov. 17, 2014).

214. 509 U.S. 418 (1993).

based in North Carolina that wished to air advertisements for the Virginia lottery.[215] North Carolina itself did not permit lotteries, and a federal statute thus barred the station from running the ads.[216] The authors regarded the station as a liberal speaker.[217] In other cases, however, the authors regarded speakers as conservative when they were radio and television stations wishing to run advertisements for casinos,[218] liquor stores wishing to advertise their prices,[219] and cigarette manufacturers and retailers wishing to advertise their products.[220] Assuming for the sake of argument that the authors properly classified the radio and television stations that wished to advertise casinos, as well as the entities that wished to advertise liquor prices and cigarettes (decisions with which one might disagree—after all, don't some social conservatives frown upon gambling, drinking, and smoking?), why should we categorize as liberal the radio station that wanted to advertise the Virginia lottery? From my vantage point—but not from the study's authors'[221]—it is far from clear that there is a dispositive difference between state-run lotteries and privately owned casinos in the eyes of conservative and liberal justices who are making in-group and out-group assessments of speakers' ideological identities.

Recall that, in *Borough of Duryea v. Guarnieri*,[222] a unionized employee alleged that his employer had unconstitutionally discriminated against him.[223] The authors

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215. *See id.* at 423-24.

216. *See id.* at 422-23.

217. *See* Codings, *supra* note 52, at line 1825.

218. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); Codings, *supra* note 52, at line 3764.

219. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Codings, *supra* note 52, at line 3774.

220. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Codings, *supra* note 52, at line 3776.

221. *See* Appendix C, *supra* note 57, at line 3679.

222. 131 S. Ct. 2488 (2011).

223. *See supra* note 112 and accompanying text.

determined that the employee was a liberal speaker.[224] If Guarnieri's union-member status were the only known fact about him, one likely would accept the authors' classification. This particular speaker, however, was the town's chief of police.[225] Coming to his defense as amici curiae were the National Fraternal Order of Police, the National Troopers Coalition, and the Pennsylvania State Troopers Association, who argued (among other things) that "[b]ecause of the higher standard to which police officers are held and the resulting political and media pressure which comes to bear, police officers are uniquely vulnerable to politically motivated, arbitrary and retaliatory employment action."[226] With police officers and their interests so squarely in the picture, can one confidently say that a conservative justice would see Guarnieri as a member of the opposing ideological team? In their discussion of a different case—*Garcetti v. Ceballos*[227]—Professors Epstein, Parker, and Segal write that in-group biases may have prompted conservative justices to be hostile to the claims of a speaker who "was a whistle blower (and one who blew his whistle on a law enforcement officer no less!)."[228] That emphatic reference to the fact that someone took actions adverse to a law-enforcement officer suggests that a conservative justice might look on Chief of Police Guarnieri with ideological affection. What reason do we have to believe that, for the justices, law enforcement officers switch ideological teams when they join a union or sue their employers for retaliation?

Brown v. Entertainment Merchants Association is also questionably classified.[229] Under the governorship of Arnold Schwarzenegger, California adopted legislation making it

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224. *See* Codings, *supra* note 52, at line 4455.

225. *See Guarnieri*, 131 S. Ct. at 2492.

226. Brief of Amici Curiae the National Fraternal Order of Police, the National Troopers Coalition & the Pennsylvania State Troopers Association in Support of Respondent at 7, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (No. 09-1476).

227. 547 U.S. 410 (2006).

228. Epstein et al., *supra* note 1, at 7.

229. 131 S. Ct. 2729 (2011).

illegal to rent or sell "violent video games" to minors.[230] The legislation defined such games as those

> "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[231]

The statute's drafters plainly tracked the famous language that—over the dissents of liberal justices—Chief Justice Burger and a majority of the Court had used when defining constitutionally unprotected obscenity in *Miller v. California*.[232] The Entertainment Merchants Association and the Entertainment Software Association (makers and sellers of video games) argued that the statute violated their First Amendment rights.[233] Governor Schwarzenegger and

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230. *Id.* at 2732 (quoting CAL. CIV. CODE §§ 1746-1746.5 (West 2014)).

231. *Id.* at 2732-33 (quoting CAL. CIV. CODE § 1746(d)(1)(A) (West 2014)).

232. 413 U.S. 15, 24 (1973) ("The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (internal quotation and citations omitted).

233. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2733. The ESA represents businesses both huge and small. *See ESA Members*, ESA, http:/www.theesa.com/about/members.asp (last visited Nov. 17, 2014). As profit-seeking companies, one might think of many of them as conservative. As entities pushing entertainment to minors with content that might conflict with the values of those children's parents, one might think of many of them as liberal. According to one analysis, the ESA in the late 2000s divided its campaign contributions almost evenly between Republicans and Democrats. *See* Jennifer M. Profitt & Margaret A. Susca, *Follow the Money: The Entertainment Software Association Attack on Video Game Regulation* 18, *available at* http://www.academia.edu/2021684/Follow_the_Money_The_Entertainment_Software_Association_Attack_on_Video_Game_Regulation (last visited Nov. 17, 2014). As for the EMA, it supports policies one might associate both with the left (resisting "restrictions on adult content" and allowing the sale and rental of "lawfully made copies without restraint") and the right (supporting "laws against video piracy"). *See EMA's Public Policy Priorities*, ENTMERCH, http://www.entmerch.org/government-

Attorney General Jerry Brown filed the brief on the merits defending the law,[234] and then the case acquired Brown's name after he became California's next governor. Justice Scalia wrote for a majority of the Court, striking down the California law on First Amendment grounds.[235] Justice Alito filed an opinion concurring in the judgment, and Chief Justice Roberts joined it.[236] The authors coded those as votes for conservative speakers.[237]

Bearing in mind that the justices' own perceptions are what matter in a study of in-group bias, how does that classification fare? California's lawmakers had closely tracked the definition of obscenity that a conservative justice provided (and liberal justices resisted) in *Miller*, and the study's authors classified those who produced obscene speech as liberal.[238] In debates about the content of television shows, movies, and other forms of entertainment media, conservatives commonly make the case for decency and restraint, while liberals commonly make the case for free expression.[239] When it comes to seeking removal of controversial content from the children's section of libraries, conservatives have hardly been passive.[240] It may be true that

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relations/public-policy-priorities.html#.U-TcJqAo6M8 (last visited Nov. 17, 2014).

234. Petitioners' Brief, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448).

235. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2742 ("Legislation such as this . . . cannot survive strict scrutiny.").

236. *Id.* (Alito, J., concurring in the judgment) ("I . . . agree with the Court that this particular law cannot be sustained. I disagree, however, with the approach taken in the Court's opinion.").

237. *See* Codings, *supra* note 52, at line 4465 (Roberts); *id.* at line 4497 (Alito).

238. *See, e.g.*, *id*. at line 372 (coding *Miller v. California*, 413 U.S. 15 (1973)).

239. The memorable activism of Tipper Gore, a prominent Democrat, against violent and sexually explicit lyrics stands as a reminder that one cannot make universally applicable generalizations about liberals' and conservatives' wishes and behavior. *See Tipper Gore Widens War on Rock*, N.Y. TIMES, Jan. 4, 1988, at C18, *available at* http://www.nytimes.com/1988/01/04/arts/tipper-gore-widens-war-on-rock.html. Or perhaps it is a mistake to think that people ordinarily can be classified in a binary fashion in the first place.

240. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 856-58 (1982) (describing a school board's efforts to remove controversial books from school libraries following

conservatives sometimes are more tolerant of violent entertainment and that liberals sometimes are more tolerant of sexual entertainment.[241] But such a neat line is difficult to draw here; indeed, there are signs that this is *not* the line along which conservatives and liberals divided in this particular instance. The conservative Eagle Forum Education and Legal Defense Fund was among those who filed an amicus brief *in support* of the restrictive California law,[242] for example, while the National Coalition Against Censorship, which formed in response to the Court's 1973 anti-obscenity ruling in *Miller*,[243] was among the many free-speech-favoring organizations that filed an amicus brief *against* it.[244] Perhaps the speakers and speech in *Entertainment Merchants Association* are too ideologically indeterminate to classify. If pressed to place them in one camp or the other, however, I suspect many would join me in designating them as tending toward the left.

A different sort of question clouds the authors' handling of *Lehnert v. Ferris Faculty Association*.[245] The authors usually classified employees who resisted unions as conservative,[246] but they decided to classify the union-

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a meeting with "a politically conservative organization of parents"); *see generally* Robert P. Doyle, *Books Challenged or Banned in 2010-2011*, *available at* http://www.ila.org/BannedBooks/BBW_Short_List_2010-2011_Single_R5.pdf (listing some of the library books to which objections were raised between May 2010 and May 2011, the time period in which *Entertainment Merchants Association* was before the Court).

241. That is the basis on which the authors have tried to justify their coding of the case. *See* Appendix C, *supra* note 57, at line 4503.

242. *See* Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Petitioners, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448).

243. *See About Us*, NAT'L COAL. AGAINST CENSORSHIP, http://ncac.org/about-us (last visited Nov. 17, 2014).

244. *See* Brief Amici Curiae of the American Civil Liberties Union, the National Coalition Against Censorship and the National Youth Rights Association for the Respondents at 5-8. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448).

245. 500 U.S. 507 (1991).

246. *See, e.g.*, Codings, *supra* note 52, at line 3384 (classifying as conservative the dissenting employees in *Locke v. Karass*, 555 U.S. 207 (2009)).

resisting employees in *Lehnert* as liberal.[247] The authors have since explained that they coded the case as they did because this was (they believed) a case of "union members vs. union leadership."[248] Unfortunately, the authors are confused about the facts. The employees were *not* union members—rather, they were dissenting employees who contributed to the union only because they were required to do so by force of law.[249] And even if the authors had accurately applied their own coding criteria, one could still ask whether it was the employees' status as faculty members (sometimes seen as tending toward the ideological left) or their status as union resisters that predominated in the eyes of the justices.

University of Pennsylvania v. EEOC[250] shifts our attention from a state college to the Ivy League. Rosalie Tung—an associate professor at the University of Pennsylvania—filed a complaint against the school, alleging that it discriminated against her on the basis of her race, sex, and national origin when it denied her application for tenure.[251] Citing First Amendment principles of academic freedom, the university refused to give the Equal Employment Opportunity Commission the unredacted tenure files of the plaintiff and of five male faculty members whom the plaintiff said had received more favorable treatment.[252] The justices unanimously rejected the university's argument, and the authors tallied those as votes against a liberal speaker.[253] In many settings, universities and claims of academic freedom surely do have liberal overtones. But that line of thinking is plainly problematic here, where the university's First Amendment claim centered on the fact that the university was resisting the EEOC's

247. *See* Codings, *supra* note 52, at line 1849.

248. Appendix C, *supra* note 57, at line 3520.

249. *See Lehnert*, 500 U.S. at 511-13; *see also* Brief for the Petitioners at 3, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (No. 89-1217) ("Petitioners ('the nonmembers') are . . . not union members . . . .").

250. 493 U.S. 182 (1990).

251. *Id.* at 185.

252. *Id.* at 185-86.

253. *See* Codings, *supra* note 52, at line 1107.

effort to investigate a minority female's allegations of employment discrimination.[254]

The Court's ruling in *City of Dallas v. Stanglin*[255] concerned a dance hall catering to older children. Responding to demand for dance venues where children could safely go, the City of Dallas had adopted an ordinance under which business owners could obtain a license to run a dance hall to which only children between the ages of fourteen and eighteen could be admitted (making exceptions for parents, guardians, dance-hall employees, and law enforcement personnel).[256] Charles Stanglin, the owner of the Twilight Skating Rink, obtained one of the licenses and then divided his skating rink in half, with one side devoted to skating and the other devoted to dancing by children within the designated ages.[257] Stanglin then challenged the ordinance's age restriction, arguing that it violated the First Amendment associational rights of children who wished to spend time with individuals outside the designated age range.[258] For all nine justices, the focus was on the children, not on Stanglin (who did not assert a First Amendment claim of his own).[259] Specifically, the justices focused on the claim that teenagers congregating at a dance hall are engaged in an associational activity protected by the Constitution.[260] The authors regarded the speakers as liberal.[261] Yet it is not apparent why a liberal justice would personally regard those teenagers as ideological allies by virtue of the teenagers' desire to spend

254. *See Univ. of Pa.*, 493 U.S. at 188. For a discussion of the authors' problematic handling of instances in which a speaker ordinarily associated with one ideological camp produces speech that is ordinarily associated with the other, see *infra* Part II.E.

255. 490 U.S. 19 (1989).

256. *See id.* at 21-22.

257. *Id.* at 22.

258. *Id.*

259. *See* Respondent's Brief on the Merits, City of Dall. v. Stanglin, 490 U.S. 19 (1989) (No. 87-1848).

260. *Stanglin*, 490 U.S. at 24-25; *id.* at 28 (Stevens, J., concurring in the judgment). The Court also evaluated the case under the Equal Protection Clause because it involved an age-based classification. *Id.* at 25-28 (majority opinion).

261. *See* Codings, *supra* note 52, at line 1277.

time with people over the age of eighteen, nor is it apparent why a conservative justice would regard those teenagers as members of the "opposing ideological team."[262]

The authors coded personal-injury and foreclosure attorneys who wished to send direct-mail solicitations to potential clients as liberal,[263] while coding a Certified Public Accountant who wished to do the same thing as conservative.[264] (By the way, one cannot easily reconcile the authors' coding of those personal-injury and foreclosure attorneys with their decision to classify as conservative a trial attorney who wished to state on his letterhead that he was a "certified civil trial specialist."[265]) Let us suppose those are accurate classifications. What should one do when presented with an attorney who holds accounting credentials? In *Ibanez v. Florida Department of Business and Professional Regulation*,[266] Silvia Ibanez—a Florida attorney who handles a broad range of matters[267]—ran into ethics problems with the Florida Board of Accountancy (the Board) when she placed the letters "CPA" and "CFP" next to her name in her telephone-book listing, on her business cards, and on her business stationery.[268] Those acronyms indicated that she was credentialed as a Certified Public Accountant and Certified Financial Planner. The Board brought charges against her for (among other things) practicing public accounting in an unlicensed firm.[269] Ibanez contended that

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262. Epstein et al., *supra* note 1, at 16.

263. *See* Codings, *supra* note 52, at line 3166 (coding *Florida Bar v. Went for It*, 515 U.S. 618 (1995), concerning personal-injury attorneys); *id.* at line 1176 (coding *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), concerning a foreclosure attorney).

264. *See id.* at line 2029 (coding *Edenfield v. Fane*, 507 U.S. 761 (1993)).

265. Peel v. Att'y Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 96-97 (1990); Codings, *supra* note 52, at line 1201.

266. 512 U.S. 136 (1994).

267. *See* SILVIA S. IBANEZ, PLC, http://ibanezlaw.com (last visited Nov. 17, 2014). I have not been able to locate a record of Ibanez's practice areas during the relevant period twenty years ago. Today, she handles estate planning, small-business consulting, guardianships, wrongful deaths, and other matters.

268. *Ibanez*, 512 U.S. at 138.

269. *See id.* at 138-42.

she was practicing law, not public accounting, and that her use of the two acronyms was constitutionally protected commercial speech.[270] The authors regarded her as a conservative speaker.[271] Even if it generally is true that lawyers lean to the left and CPAs lean to the right, by what means can one reliably determine which of those specialties trumps the other in the eyes of the justices when a litigant has feet planted in both worlds? By saying that she practiced law, not accounting, Ibanez herself indicated that her primary professional identity was as an attorney. The Florida Bar filed an amicus brief in support of Ibanez,[272] while the American Institute of Certified Public Accountants filed an amicus brief against her.[273]

The authors have since indicated that they categorized Ibanez as conservative because the case involved "regulating commercial speech in the name of preventing fraud."[274] Suppose one finds that reasoning persuasive. One still has reason to wonder whether some of the justices made their in-group assessments on entirely different grounds, such as the fact that Ibanez was a minority female trying to launch her own business.[275] All things considered, can we be sure that the conservative justices regarded Ibanez as ideologically one of their own and that liberal justices did not?

E. *Disregarding the Problems that Arise When the Ideologies of Speakers' Speech and Usual Identities Diverge*

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270. *See id.* at 142-43.

271. *See* Codings, *supra* note 52, at line 2729.

272. *See* Brief of Amicus Curiae The Florida Bar in Support of Petitioner, Ibanez v. Fla. Dep't Bus. & Prof'l Regulation, 512 U.S. 136 (1994) (No. 93-639).

273. *See* Brief of the American Institute of Certified Public Accountants as Amicus Curiae in Support of Respondent, Ibanez v. Fla. Dep't Bus. & Prof'l Regulation, 512 U.S. 136 (1994) (No. 93-639).

274. Appendix C, *supra* note 57, at line 3715.

275. In another fraud-focused case, for example, the authors themselves appear to have focused on the usual ideological affiliation of the speaker, rather than on the ideological quality of the speech. *See infra* Part II.E (discussing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010)).

As I noted when discussing *Washington State Grange* in Part I.C,[276] capturing the justices' own ideological in-group and out-group assessments of First Amendment litigants takes on an added layer of complexity when people do not speak in ways that accord with their usual ideological identities. Numerous cases in the authors' study illustrate the problem; I describe several of them in the appended footnote.[277] Consider, for example, the authors' handling of *Milavetz, Gallop & Milavetz, P.A. v. United States*.[278] In that case, a law firm argued that the First Amendment shielded it from being forced to comply with certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[279] Specifically, the firm objected to two ways in which the legislation regulates entities that provide bankruptcy assistance to consumer debtors: the statute restricts those entities' ability to advise clients to incur additional debt prior to filing for bankruptcy,[280] and it compels those entities to make clear in advertisements and certain other communications that they are in the business of helping

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276. *See supra* notes 51-60 and accompanying text.

277. *See, e.g.*, *supra* notes 250-54 and accompanying text (discussing the authors' handling of *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990)); *see also* Watchtower Bible & Tract Soc. of N.Y., Inc. v. Vill. of Stratton, 535 U.S. 150 (2002) (concerning Jehovah's Witnesses who wanted to distribute Bibles and other religious literature in door-to-door encounters), for which the authors coded the speakers as liberal, *see* Codings, *supra* note 52, at line 3058; Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988) (concerning professional fundraisers who objected to state limits on the fees they could charge), for which the authors coded the speakers as liberal, *see* Codings, *supra* note 52, at line 1234; Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (concerning a general-interest magazine's opposition to a state sales tax), for which the authors coded the speaker as liberal, *see* Codings, *supra* note 52, at line 1037. This problem of divergence also helps to illustrate—but not resolve—the confusion surrounding cases in which the authors coded the Democratic Party as conservative or the Republican Party as liberal due to the First Amendment claims they advanced. *See, e.g.*, *supra* notes 51-60, 125-42 and accompanying text. When a political party with one prevailing ideological affiliation produces speech that might be associated with the opposing ideological team, how can we know how an opportunistic, bias-driven justice perceived the prevailing ideological tenor of the case?

278. 559 U.S. 229 (2010).

279. *See id.* at 231-34 (describing the law firm's claims).

280. *See* 11 U.S.C. § 526(a)(4) (2012).

people file for bankruptcy.[281] The latter restriction is aimed at preventing the entities from misleadingly advertising that they can help individuals obtain debt relief without having to go through the pains of bankruptcy.[282] A majority of the Court—including Chief Justice Roberts and Justice Alito—rejected the law firm's constitutional claims, and the authors counted those as votes against a liberal speaker.[283]

Did this case really come to the Court from the liberal ideological team? The question is difficult to answer because the case presents a complication: how should one classify a case in which the speaker might usually be regarded as liberal but a significant portion of the speech is likely conservative, or vice versa? The study's authors creep up to the edge of that question—stating, for example, that "the four most conservative Justices are significantly more likely to support the free-expression claim when the speaker is conservative (*or* espousing a conservative message) than when the speaker is liberal"[284]—but they do not squarely confront it.[285] The title of their study declares that they are examining whether justices defend "speech"—not "speakers"—that they "hate,"[286] while at various places within their text the authors indicate they are focusing on

281. *See id.* §§ 528(a), (b)(2).

282. *Milavetz*, 559 U.S. at 250 (explaining that the statute's "required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs").

283. *See* Codings, *supra* note 52, at line 4470 (Roberts); *id.* at line 4502 (Alito).

284. *Summary*, *supra* note 6, at 4 (emphasis added).

285. *Cf.* PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 50 (2008) (discussing research that tended to show that the Supreme Court heard from conservative groups more frequently than commonly supposed, and stating that the value of this research was "limited" because the authors "did not categorize the ideological orientations of the group's *positions* on a case by case basis but instead classified organizations [based upon more general criteria]") (emphasis in original).

286. *See* Epstein et al., *supra* note 1, at 1; *cf. id.* at 13 (stating that "conservative justices are less likely to support liberal speech than they are to support conservative speech").

the ideological identities of the speakers themselves.[287] In the chart they prepared for the *New York Times*, the study's authors conflated the two, providing one column labeled "Liberal Speakers/Speech" and another labeled "Conservative Speakers/Speech."[288] When presented with a case in which the ideologies of the speaker and the speech diverge, which of the two trumps the other for purposes of determining whether a justice is ideologically biased in favor of a First Amendment claimant?

Milavetz illustrates the difficulty. The speakers in that case were the law firm, its president, and one of its bankruptcy attorneys. One could fairly contend that consumer-bankruptcy attorneys as a whole tend toward the ideological left, and a glance at the Milavetz firm's website—which states that the firm's "key practice areas" are personal-injury, vehicle accidents, bankruptcy, and family law[289]—might lead one to assume that at least some of the firm's attorneys tend toward the left, as well. On the other hand, one of the key issues in the case concerned the government's effort to force profit-seeking entities like the Milavetz firm to make specified disclosures in their advertising, lest economically disadvantaged consumers be misled. It seems highly unlikely that the law firm's resistance to that compelled speech would strike the justices as liberal in nature. As one of the study's authors has noted elsewhere, liberals typically champion the cause of consumers, not the businesses with whom those consumers deal.[290] Indeed, four consumer-protection entities commonly associated with left-leaning causes joined together in filing an amicus brief in support of the *Government's* position on the issue, arguing

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287. *See, e.g.*, *id.* at 2 ("[T]he justices' votes tend to reflect their preferences toward the speakers' ideological grouping.").

288. *See Summary*, *supra* note 6, at 5; *supra* Table A.

289. MILAVETZ, GALLOP & MILAVETZ, P.A., http://www.milavetzlaw.com (last visited Nov. 17, 2014).

290. *See* Karen O'Connor & Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. POL. 479, 480 (1983) (labeling interest groups as "liberal" if they typically represent "the interests of minorities, criminal defendants, or consumers" and as "conservative" if they typically represent "the interests of employers and business").

that "[e]ven a brief sampling of the myriad disclosure regimes upon which much of the nation's economic activity relies illustrates the critical importance of maintaining a deferential level of First Amendment review for laws requiring factual commercial disclosures."[291] With the firm itself possibly tending toward the left and one of the firm's chief speech claims possibly tending toward the right, one cannot reliably say that an ideologically motivated justice is likely to see the speaker and the speech in *Milavetz* as both being either conservative or liberal. Without knowing whether the speaker or the speech is preeminent in the eyes of an ideologically opportunistic justice, the case is an unreliable basis for assessing justices' in-group biases.

F. *The Possibility of Unclaimed Speakers*

There are some cases in which one finds speakers whom it is difficult to believe *any* justice would perceive as a values-sharing, ideological in-group member. We already encountered such speakers in *Dawson* and other cases featuring racist expression.[292] Is it plausible to believe that *any* justice today would regard as a values-sharing ideological teammate a man who trumpets his membership in the Aryan Brotherhood, or chooses his young assault victim on the basis of the boy's race, or burns crosses at a KKK rally or in the yard of an African-American family?

There are additional speakers in the study whom one assumes no justice would perceive as an ideological ally. Consider, for example, *United States v. Williams*.[293] "[U]sing a sexually explicit screen name," Michael Williams entered an Internet chat room and declared that he had "good pics" of himself with his daughter, that he wanted to swap them for other "toddler pics," and that he possessed photographs of

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291. *See* Brief of Public Good, the Center for Science in the Public Interest, the Environmental Law Foundation, and the Center for Environmental Health as Amici Curiae in Support of Respondent United States at 30, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) (Nos. 08-1119, 08-1225).

292. *See supra* notes 188-96 and accompanying text.

293. 553 U.S. 285 (2008).

his four-year-old daughter being molested by other men.[294] He subsequently provided a hyperlink to "seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals."[295] When federal officials later searched his home, agents found "two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic."[296] When charged with pandering child pornography in violation of federal law, he argued that the statute at issue was vague and overbroad and that his prosecution thus violated the First Amendment.[297] Chief Justice Roberts and Justice Alito both joined Justice Scalia's majority opinion rejecting Williams's claims.[298] The authors tallied those as votes against a liberal speaker.[299]

Acknowledging that it typically is those on the ideological left who tend to press sexually oriented speech to its legal limits, are we really willing to say that, when it comes to a father pandering photographs of men molesting his four-year-old daughter, conservatives "hate" the speech more than liberals, or that liberal justices are likely to see the speaker as an ideological teammate—as one who "conforms to [the justices' own] values"—and to "engage in opportunistic behavior following from litigant favoritism"?[300] Some left-leaning justices have certainly argued that adults ought to be able to make their own expressive choices in the realm of adult, consensual obscenity,[301] and some justices have found

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294. *Id.* at 291 (internal quotation marks omitted).

295. *Id.*

296. *Id.* at 291-92.

297. *See id.* at 289-306.

298. *See id.* at 287.

299. *See* Codings, *supra* note 52, at line 4466 (Roberts); *id.* at line 4499 (Alito).

300. Epstein et al., *supra* note 1, at 1, 3, 6.

301. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 112-13 (1973) (Brennan, J., dissenting) ("[W]hile I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults.").

a First Amendment right to possess and distribute non-obscene yet sexually explicit computer-generated images of children.[302] But no jurist has argued that adults ought to be left free to make their own expressive choices in the realm of pornography that involves the sexual exploitation of toddlers. This surely is speech that *all* justices "hate." As Justice Kennedy put it in a 2002 opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people."[303] To the extent one aims to determine whether justices have an in-group bias in favor of ideologically likeminded speakers and a corresponding antipathy to speakers who belong to the opposing ideological team, I would have thought that *Williams* is best left on the sidelines.

It is similarly difficult to imagine any justice regarding the speakers in *Snyder v. Phelps*[304] as ideological teammates worthy of opportunistic favoritism. The First Amendment claimants in that case were Fred Phelps and other members of the infamous Westboro Baptist Church.[305] At a funeral for a United States Marine who was killed while serving in Iraq, Phelps and some of his fellow parishioners gathered near the site of the funeral and held signs carrying such messages as "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You.'"[306] When the Marine's father brought a variety of tort claims against Phelps and the church, those speakers raised the First Amendment as a defense.[307] Led by Chief

302. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 246-51 (2002).

303. *Id.* at 244.

304. 131 S. Ct. 1207 (2011).

305. *Id.* at 1213.

306. *Id.*

307. *See id.* at 1214.

Justice Roberts, the Court ruled in the speakers' favor,[308] with Justice Alito filing a lone dissent.[309] The authors coded those as votes, respectively, for and against conservative speakers.[310]

Does it indeed seem likely that the conservative justices saw Phelps and the other Westboro Baptist picketers as values-sharing ideological allies? That seems like an untenable assumption when one considers how the picketers framed their anti-homosexuality message—in language condemning the United States and celebrating the deaths of American soldiers, objects of patriotism to which conservatives certainly cede nothing to liberals in the degree of their attachment. As Chief Justice Roberts gently put it in his closing remarks, "Westboro believes that America is morally flawed; many Americans might feel the same about Westboro."[311]

G. *Handling Litigants' Successive Appearances*

Suppose a litigant appears before the Court twice in close succession concerning the same set of legal issues during the course of a single lawsuit. If a justice votes for the litigant on both occasions, does one have twice as much evidence of bias in favor of that litigant's ideological team as one would have if the litigant had appeared only once?

In a dispute with the Federal Election Commission concerning corporations' First Amendment freedom to produce political speech, Wisconsin Right to Life, Inc., came to the Court twice in successive Terms—first to argue that the district court's dismissal of its claim was founded upon an erroneous reading of the Court's campaign-finance

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308. *See id.* at 1220 ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.").

309. *See id.* at 1229 (Alito, J., dissenting) ("[Phelps's and the church's] outrageous conduct caused [the father] great injury, and the Court now compounds that injury by depriving [the father] of a judgment that acknowledges the wrong he suffered.").

310. *See* Codings, *supra* note 52, at line 4453 (Roberts); *id.* at line 4496 (Alito).

311. *Snyder*, 131 S. Ct. at 1220.

precedent,[312] and then again the following year when the FEC challenged the district court's ruling in favor of Wisconsin Right to Life on the merits.[313] On both occasions, Chief Justice Roberts sided with Wisconsin Right to Life. The authors coded those as two separate instances in which he voted in favor of conservative speakers.[314]

Treating a justice's successive encounters with the same speaker in the same litigation as if they were encounters with different litigants in different cases is problematic because it raises questions about whether the variables are as independent of one another as their separate treatment presupposes. Both of the *Wisconsin Right to Life* cases concerned the same speaker, wishing to produce the same political speech, running up against the same body of federal regulation, litigating against the same governmental entity during the course of the same lawsuit. If Wisconsin Right to Life had returned to the Court five times during the lifespan of that litigation, would we confidently count those appearances as five separate data points for assessing the justices' susceptibility to ideological in-group bias? If not, we probably should not count them even twice.

III. REASSESSING THE EVIDENCE OF BIAS: JUSTICE ALITO AND CHIEF JUSTICE ROBERTS

What do these sorts of difficulties mean for the authors' bottom-line assessments of individual justices? Because Justice Alito and Chief Justice Roberts cast the fewest number of votes of all the Roberts Court justices in the study, one can readily assess their voting histories for oneself. For each of those two conservatives, Professors Epstein, Parker, and Segal concluded there was a wide, statistically significant disparity in his support for conservative and liberal speakers.[315] As I indicated above in Table A, the

312. Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006).

313. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

314. *See* Codings, *supra* note 52, at line 4463; *id.* at line 4468.

315. Although those two justices' votes were sufficiently numerous to generate a finding of a statistically significant disparity, the authors found that they could not "estimate the full statistical model for" those two justices because they had

authors found that liberal speakers won Justice Alito's vote in only 9.1% of the cases in which they appeared, while conservatives comparatively flourished with a success rate of 53.9%. For Chief Justice Roberts, those numbers were similarly skewed, with liberals and conservatives securing his vote 15.4% and 64.3% of the time, respectively.[316] The evidence does not support those dramatic findings.

The authors identified 24 free-expression cases in which Justice Alito cast votes during the study's time period.[317] Of those 24 cases, the authors classified 13 as involving conservative speakers and 11 as involving liberal speakers. Chief Justice Roberts cast votes in 27 free-expression cases within the study, with conservatives and liberals appearing in 14 and 13 of those cases (in the authors' judgment), respectively. Placed into those two groupings, here are the cases, together with the authors' determination of whether Justice Alito and Chief Justice Roberts voted for or against the speakers.

Case	Authors' Coding of Alito's Vote	Authors' Coding of Roberts's Vote
Citizens United, Inc. v. FEC[318]	For Speaker	For Speaker
Locke v. Karass[319]	Against Speaker	Against Speaker
Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.[320]	Against Speaker	Against Speaker
United States v. Stevens[321]	Against Speaker	For Speaker

not cast votes in a sufficiently large number of cases. *See Summary*, *supra* note 6, at 4-5 & n.5.

316. *See supra* Table A.

317. *See* Codings, *supra* note 52, at lines 4480-503.

318. 558 U.S. 310 (2010) (concerning corporate expenditures on political speech); *see* Codings, *supra* note 52, at line 4480 (Alito); *id.* at line 4473 (Roberts).

319. 555 U.S. 207 (2009) (concerning the speech of nonunion employees); *see* Codings, *supra* note 52, at line 4481 (Alito); *id.* at line 4474 (Roberts).

320. 551 U.S. 291 (2007) (concerning the football-recruiting speech of a private high school); *see* Codings, *supra* note 52, at line 4482 (Alito); *id.* at line 4467 (Roberts).

321. 559 U.S. 460 (2010) (concerning video recordings of animal-on-animal violence); *see* Codings, *supra* note 52, at line 4485 (Alito); *id.* at line 4477 (Roberts).

Nev. Comm'n on Ethics v. Carrigan[322]	Against Speaker	Against Speaker
Wash. State Grange v. Wash. State Republican Party[323]	For Speaker	Against Speaker
FEC v. Wis. Right to Life, Inc.[324]	For Speaker	For Speaker
Doe v. Reed[325]	Against Speaker	Against Speaker
Sorrell v. IMS Health, Inc.[326]	For Speaker	For Speaker
Ariz. Free Enter. Club's Freedom Club PAC v. Bennett[327]	For Speaker	For Speaker
Randall v. Sorrell[328]	For Speaker	For Speaker
Snyder v. Phelps[329]	Against Speaker	For Speaker
Brown v. Entm't Merchs. Ass'n[330]	For Speaker	For Speaker
Wis. Right to Life, Inc. v. FEC[331]	N/A	For Speaker

Table B: Speakers Classified by the Authors as Conservative

322. 131 S. Ct. 2343 (2011) (concerning a city council member's vote on a real-estate development proposal); *see* Codings, *supra* note 52, at line 4486 (Alito); *id.* at line 4469 (Roberts).

323. 552 U.S. 442 (2008) (discussed *supra* Part I.C); *see* Codings, *supra* note 52, at line 4487 (Alito); *id.* at line 4457 (Roberts).

324. 551 U.S. 449 (2007) (discussed *supra* Part II.G); *see* Codings, *supra* note 52, at line 4490 (Alito); *id.* at line 4463 (Roberts).

325. 561 U.S. 186 (2010) (concerning the rights of individuals opposed to same-sex marriage); *see* Codings, *supra* note 52, at line 4491 (Alito); *id.* at line 4461 (Roberts).

326. 131 S. Ct. 2653 (2011) (concerning pharmacies' and data miners' right to provide information to pharmaceuticals for marketing purposes); *see* Codings, *supra* note 52, at line 4493 (Alito); *id.* at line 4476 (Roberts).

327. 131 S. Ct. 2806 (2011) (concerning Republican politicians' objection to a state's campaign-finance system); *see* Codings, *supra* note 52, at line 4494 (Alito); *id.* at line 4454 (Roberts).

328. 548 U.S. 230 (2006) (concerning Republican politicians' objection to limits on campaign contributions and expenditures); *see* Codings, *supra* note 52, at line 4495 (Alito); *id.* at line 4464 (Roberts).

329. 131 S. Ct. 1207 (2011) (concerning an anti-homosexuality protest at a military funeral) (discussed *supra* Part II.F); *see* Codings, *supra* note 52, at line 4496 (Alito); *id.* at line 4453 (Roberts).

330. 131 S. Ct. 2729 (2011) (discussed *supra* at notes 229-44); *see* Codings, *supra* note 52, at line 4497 (Alito); *id.* at line 4465 (Roberts).

331. 546 U.S. 410 (2006) (discussed *supra* Part II.G); *see* Codings, *supra* note 52, at line 4468 (Roberts).

Case	Authors' Coding of Alito's Vote	Authors' Coding of Roberts's Vote
Holder v. Humanitarian Law Project[332]	Against Speaker	Against Speaker
N.Y. State Bd. of Elections v. Lopez Torres[333]	Against Speaker	Against Speaker
Davenport v. Wash. Educ. Ass'n[334]	Against Speaker	Against Speaker
Davis v. FEC[335]	For Speaker	For Speaker
Pleasant Grove City v. Summum[336]	Against Speaker	Against Speaker
Morse v. Frederick[337]	Against Speaker	Against Speaker
United States v. Williams[338]	Against Speaker	Against Speaker
Ysursa v. Pocatello Educ. Ass'n[339]	Against Speaker	Against Speaker
Garcetti v. Ceballos[340]	Against Speaker	Against Speaker

332. 561 U.S. 1 (2010) (concerning the provision of aid for the humanitarian functions of terrorist organizations); *see* Codings, *supra* note 52, at line 4483 (Alito); *id.* at line 4460 (Roberts).

333. 552 U.S. 196 (2008) (discussed *supra* at notes 125-31); *see* Codings, *supra* note 52, at line 4484 (Alito); *id.* at line 4456 (Roberts).

334. 551 U.S. 177 (2007) (concerning the consent a union must obtain to use employees' fees for political and ideological purposes); *see* Codings, *supra* note 52, at line 4488 (Alito); *id.* at line 4478 (Roberts).

335. 554 U.S. 724 (2008) (concerning a Democratic politician's objection to a state's campaign-finance system); *see* Codings, *supra* note 52, at line 4489 (Alito); *id.* at line 4472 (Roberts).

336. 555 U.S. 460 (2009) (concerning a nontraditional religion's effort to erect a permanent display in a city park); *see* Codings, *supra* note 52, at line 4492 (Alito); *id.* at line 4458 (Roberts).

337. 551 U.S. 393 (2007) (concerning a student's display of an apparently pro-drug message); *see* Codings, *supra* note 52, at line 4498 (Alito); *id.* at line 4479 (Roberts).

338. 553 U.S. 285 (2008) (discussed *supra* at notes 293-303); *see* Codings, *supra* note 52, at line 4499 (Alito); *id.* at line 4466 (Roberts).

339. 555 U.S. 353 (2009) (concerning a union's objection to a state law limiting payroll deductions to fund the union's political activities); *see* Codings, *supra* note 52, at line 4500 (Alito); *id.* at line 4475 (Roberts).

340. 547 U.S. 410 (2006) (concerning a whistleblower employee's adverse treatment by his state employer); *see* Codings, *supra* note 52, at line 4501 (Alito); *id.* at line 4459 (Roberts).

Milavetz, Gallop & Milavetz, P.A. v. United States[341]	Against Speaker	Against Speaker
Borough of Duryea v. Guarnieri[342]	Against Speaker	Against Speaker
Beard v. Banks[343]	N/A	For Speaker
Rumsfeld v. Forum for Academic & Institutional Rights, Inc.[344]	N/A	Against Speaker

Table C: Speakers Classified by the Authors as Liberal

At first blush, the evidence of Justice Alito's ideological in-group bias appears strong. For reasons I have identified, however, the authors' handling of some of the relevant cases is problematic. The authors likely erred when they simplistically classified *New York State Board of Elections v. Lopez Torres* as a case involving liberal speech.[345] They categorized *Milavetz, Gallop & Milavetz v. United States* as a case involving a liberal speaker, even though one of the law firm's central speech claims was of a sort commonly associated with conservatives.[346] They categorized the speaker in *United States v. Williams* as liberal, even though there is no basis for believing that liberals look more tolerantly than conservatives on a father pandering photographs of other men sexually abusing his young daughter, and they categorized the speakers in *Synder v. Phelps* as conservative, even though there is no basis for believing that conservative justices would look preferentially upon speakers who celebrate terrorist attacks and the deaths of American soldiers.[347] They categorized *Borough of Duryea*

341. 559 U.S. 229 (2010) (discussed *supra* Part II.E); *see* Codings, *supra* note 52, at line 4502 (Alito); *id.* at line 4470 (Roberts).

342. 131 S. Ct. 2488 (2011) (discussed *supra* at notes 111-18, 222-28); *see* Codings, *supra* note 52, at line 4503 (Alito); *id.* at line 4455 (Roberts).

343. 548 U.S. 521 (2006) (discussed *supra* at notes 88-95); *see* Codings, *supra* note 52, at line 4471 (Roberts).

344. 547 U.S. 47 (2006) (concerning law schools' objection to hosting military recruiters with policies adverse to homosexuality); *see* Codings, *supra* note 52, at line 4462 (Roberts).

345. *See supra* notes 125-31 and accompanying text.

346. *See supra* Part II.E.

347. *See supra* Part II.F.

v. Guarnieri as a case involving a liberal speaker, even though there is reason to suppose that conservative justices might have looked favorably upon the chief of police who was claiming a violation of his First Amendment rights.[348] They categorized the videogame makers and sellers in *Brown v. Entertainment Merchants Association* as conservative, even though noteworthy ideological conservatives lined up to defend the speech-restricting California law and noteworthy ideological liberals lined up to support the purveyors of controversial entertainment.[349] And the authors erred twice in their handling of *Washington State Grange v. Washington State Republican Party*, first by simplistically coding the case as involving conservative speech, and then by coding Justice Alito as voting in the speakers' favor.[350]

How would Justice Alito's voting record appear if we removed *Lopez Torres*, *Milavetz*, *Williams*, *Snyder*, *Guarnieri*, and *Washington State Grange* as not reliably probative on the issue of justices' in-group biases, and moved *Entertainment Merchants Association* to the liberal-speaker side of the balance sheet? The gap between his support for conservative and liberal speakers would narrow to a difference of 50% support for the ten conservatives and 25% for the eight liberals. The numbers with which we now are dealing are so small that the raw difference is not statistically significant. And even those raw numbers might not be what they seem. Might anything other than in-group bias account for the remaining apparent difference?

Take a look at Justice Alito's votes in cases involving campaign finance. There are five such cases—four in the conservative camp (*Citizens United, Inc. v. FEC; FEC v. Wisconsin Right to Life, Inc.*; *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*; and *Randall v. Sorrell*) and one in the liberal camp (*Davis v. FEC*). In each of those five cases, Justice Alito voted in favor of the speaker. Some might explain that consistent voting pattern by suggesting that Justice Alito believes campaign-finance restrictions disadvantage Republicans, and so he takes any chance he

348. *See supra* notes 111-18, 222-28 and accompanying text.

349. *See supra* notes 229-44 and accompanying text.

350. *See supra* Part I.C.

gets to hold such restrictions unconstitutional, even when—as in *Davis*—the immediate beneficiary is a Democrat. Justice Alito himself would surely say he has a nonpartisan view of political speech and the First Amendment, and this view renders campaign-finance restrictions especially vulnerable to constitutional attacks, no matter whom those restrictions benefit or burden in a given case. If one brackets that disagreement about the campaign-finance cases for a moment and looks at the balance of Justice Alito's record, one finds there is *virtually no raw difference at all* in his support for conservative and liberal speakers in the tiny number of remaining cases, with votes for conservatives in 1 of 6 cases and votes for liberals in 1 of 7. It is the campaign-finance cases, in other words, that drive the seeming disparity in his voting record—and when a Democrat appeared before him in a campaign-finance case, that speaker won Justice Alito's vote.

After accounting for the problems in the authors' handling of Chief Justice Roberts' voting record, one finds that the campaign-finance cases again play a powerful role. The authors found that Chief Justice Roberts voted in favor of liberal speakers in 15.4% of the cases in which they appeared, but that conservative speakers fared substantially better with a success rate of 64.3%.[351] Consider what happens, however, if we again remove *Washington State Grange*, *Lopez Torres*, *Milavetz*, *Guarnieri*, *Snyder*, and *Williams* on the grounds already stated;[352] again realign the videogame makers and sellers in *Entertainment Merchants Association* with the ideological liberals;[353] count *Wisconsin Right to Life* only once, rather than twice, for the campaign-finance lawsuit that brought it to the Court in successive Terms;[354] and correct the authors' mistaken finding that Chief Justice Roberts voted in favor of the state prisoner in *Beard*.[355]

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351. *See supra* Table A.

352. *See supra* notes 345-50 and accompanying text.

353. *See supra* notes 229-44 and accompanying text.

354. *See supra* Part II.G.

355. *See supra* notes 88-95 and accompanying text.

With those changes, the difference between Chief Justice Roberts's support for conservative and liberal speakers initially does not appear to change much, with 60% support for the former and 20% support for the latter. That difference remains statistically significant. But we now are dealing with such small numbers (10 cases involving conservative speakers and 10 involving liberals) that the campaign-finance cases again loom particularly large. Just as we did with Justice Alito, let us briefly bracket the debate about why he voted for the speakers in the campaign-finance cases, so that we can assess the balance of his voting history. We would be left with a record in which he voted for conservative speakers on 2 of 6 occasions (with neither of those two winning sets of speakers—a seller of dog-attack videos in one case and pharmacies and their data miners in the other—being quintessential ideological conservatives of the sort the authors described when explaining their coding criteria), while voting for liberal speakers on 1 of 9. That difference is not statistically significant. Errors and questionable judgments aside, it is the campaign-finance cases—in which Chief Justice Roberts treated ideologically diverse litigants even-handedly—that account for most of the apparent disparity in his voting record.

The evidence of Justice Alito's and Chief Justice Roberts's susceptibility to in-group bias grows no stronger when one looks at matters from the perspective of the rule-of-law principles that are at stake. Professors Epstein, Parker, and Segal argue that the justices' "in-group favoritism" stands in strong tension with "the carving on the main portico of their building promising equal justice under law" and with "claims about the justices' broader concern with following and building precedent (seemingly difficult to do when they reach dissimilar decisions in suits *differentiated only by the nature of the parties*)."[356] Fundamental principles about our legal system are indeed at stake here. Are Justice Alito and Chief Justice Roberts indeed reaching differing decisions in cases that are distinguishable from one another "only by the nature of the parties"?

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356. Epstein et al., *supra* note 1, at 16 (emphasis added).

As I have noted, both justices have been consistently hostile to campaign-finance regulations, treating the Democratic speaker who appeared before them just as favorably as they treated a handful of Republicans. Once one starts to compare the few other cases that remain in the pool, arguably meaningful factual and legal differences begin to abound, and the window of opportunity for confidently charging a justice with bias narrows even further.

At the end of the day, therefore, Professors Epstein, Parker, and Segal's monolithic conclusions about the Court's currently sitting conservatives—the conclusions on which reporters and bloggers seized most powerfully—are not well founded. The evidence of ideological in-group bias in Justice Alito's chambers is arguably non-existent, while the evidence of bias in Chief Justice Roberts's chambers is only marginally stronger.

IV. IN-GROUP BIAS AND MOTIVATED REASONING *OFF* THE COURT

In light of the difficulties in Professors Epstein, Parker, and Segal's study, we find ourselves confronting an ironic twist: working in tandem with the temptations of motivated reasoning, the very same sort of biases that the authors aimed to measure on the Court may have helped predispose many writers and readers to be too quick to embrace the study's uniformly damning critique of the Court's currently sitting conservatives.

In-group biases can shape our perceptions of the justices just as surely as in-group biases can shape the justices' perceptions of litigants. As Jonathan Haidt has explained, "[p]eople bind themselves into political teams that share moral narratives. Once they accept a particular narrative, they become blind to alternative moral worlds."[357] Among many who self-identify as liberal, a common narrative about the Court's staunchest conservatives is that they are yoked in stubborn service to an ideological agenda, shunning

357. JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION xvi (2012); *see also id.* at 107-09 (providing a biographical example of Haidt's own experience with this worldview).

precedent and any other constraining force that inconveniently gets in the way.[358] Of course, many who self-identify as conservative embrace a comparable narrative about the Court's liberals.[359] Both ideological camps claim the mantle of judicial integrity and aim to hang the millstone of judicial activism around the necks of the other.

For many liberals, therefore, the authors' study will simply illustrate the truth of what they already believed: across the board, today's conservative justices are far less faithful to the rule of law than their liberal counterparts. The study's conclusions have the added appeal of painting *all* of the Court's current conservatives with the same unflattering brush, while finding that *none* of the currently sitting liberal justices in the study manifests statistically significant evidence of ideological in-group bias. The study thereby provides a vocabulary with which liberals who are so inclined can reaffirm the virtues of the justices they regard as their own and categorically demonize the justices whom they regard as their ideological adversaries.[360] Categorical generalizations about the Court's conservatives are made all the more seductive by virtue of what social-psychologists call the out-group homogeneity effect—the tendency in many circumstances to perceive that members of an in-group are diverse but that members of an out-group are all the same.[361]

In-group bias is not the only likely reason for the study's easy reception in many circles; the more wide-ranging power of motivated reasoning may play a role, as well. Whether one finds a given item of evidence persuasive can depend to a significant degree on whether that evidence comports or

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358. That narrative will be familiar to anyone who has followed the debate about *Citizens United, Inc. v. FEC*, 558 U.S. 310 (2010).

359. That narrative will be familiar to anyone who has followed the debate about *Roe v. Wade*, 410 U.S. 113 (1973).

360. *Cf.* HAIDT, *supra* note 357, at 85 ("We can believe almost anything that supports our team.").

361. *See* Mark Rubin & Constantina Badea, *They're All the Same! . . . But for Several Different Reasons: A Review of the Multicausal Nature of Perceived Group Variability*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 367, 368 (2012) (stating that this is "a robust and widespread phenomenon, [but] by no means ubiquitous").

conflicts with beliefs to which one already is committed.[362] Discomfiting though it is to confess, we are most likely to believe what we want to believe.[363] That is true both of those who consume scholarship and of those who produce it. Consumers of scholarship may fall prey, for example, to a disconfirmation bias—a tendency to accept quickly and uncritically those arguments that appear to confirm what one already believes, and to discount arguments that cast the truth of those beliefs in doubt.[364] Researchers have found, for example, that test subjects frequently take longer to mentally process arguments that challenge their beliefs—not because they are open-mindedly reconsidering their own commitments, but because they are devoting time and mental resources to finding fault with arguments that lead in undesired directions.[365] Adam Liptak's opening paragraph

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362. *See* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099-100 (1979) (discussing the authors' influential study of test subjects' evaluation of arguments concerning the death penalty's deterrent effect). In one study, for example, researchers found that undergraduate and law students tended to construe the same legal precedents differently, in keeping with their own policy preferences. *See* Eileen Braman & Thomas E. Nelson, *Mechanisms of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 954-55 (2007); *cf.* David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 824-28 (arguing that the forces of motivated reasoning prevented many scholars from recognizing the constitutional vulnerabilities of President Obama's signature healthcare legislation).

363. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 495 (1990) ("People are more likely to arrive at those conclusions that they want to arrive at.").

364. *See, e.g.*, April A. Strickland et al., *Motivated Reasoning and Public Opinion*, 36 J. HEALTH POL., POL'Y & L. 935, 938 (2011) (reaching this conclusion following a study involving arguments about gun control and affirmative action); *see also* Lord et al., *supra* note 362, at 2099 ("[I]ndividuals will dismiss and discount empirical evidence that contradicts their initial views but will derive support from evidence, of no greater probativeness, that seems consistent with their views.").

365. *See, e.g.*, Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5, 18 (1996) (reporting the results of a study in which test subjects were asked to assess a variety of public-policy issues); Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 761-63

in the *New York Times*—a paragraph casting Justice Scalia as one of the study's chief villains[366]—may have been all that some readers needed to hear in order to conclude that all of the study's findings were accurate.

Scholars too, of course, are susceptible to these sorts of analytic pitfalls. Like everyone else, we can be too quick to accept data that appear to support the theses we wish to advance, and too slow to accept data that cut against us. We also have to fend off what psychologists call a confirmation bias—a tendency to seek out information that supports the conclusions we wish to reach and to interpret ambiguous information in ways favorable to those same conclusions.[367] In a study of the sort we are examining here, for example, there is a risk that—absent precautions to prevent it—those who are coding the data might inadvertently rely at least in part upon particular justices' votes when trying to determine speakers' ideological affiliations (e.g., presuming that if Justice *X* voted against the litigant, then the litigant likely belongs to one ideological camp rather than the other).[368] Data-coders might also inadvertently allow speakers' ideological affiliations to reduce the care with which they try to determine how particular justices actually voted (e.g., presuming that if the litigant belongs to a given ideological camp, then Justice *X* likely voted against her). More generally, if they do the coding themselves—rather than provide a detailed written protocol to disinterested

(2006) (reporting the results of a study in which test subjects were asked to assess arguments concerning affirmative action and gun control).

366. *See* Liptak, *supra* note 2; *see also supra* note 9 and accompanying text (discussing Liptak's coverage of the study).

367. *See* HAIDT, *supra* note 357, at 79-80 (defining "confirmation bias" as "the tendency to seek out and interpret new evidence in ways that confirm what you already think"); Taber & Lodge, *supra* note 365, at 763-64 (reporting the results of a study in which test subjects were allowed to choose from among a variety of differently slanted sources of information concerning affirmative action and gun control).

368. *Cf.* Anna Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG. 414, 420-29 (2013) (arguing that confirmation bias—instigated by perceptions of the Court's ideological leanings at the time decisions were rendered—may help to explain curious ways in which certain data were coded for the Supreme Court Database).

individuals and ask them to code the ideologies of the cases' speech and speakers—those conducting a study of this sort open themselves to the possibility of bias-laden observer effects, in which the experimenters' hopes and expectations influence what they believe they are seeing.[369] Of course, if any of those were to occur, the study's ultimate conclusions would, in self-fulfilling fashion, overstate the evidence of in-group bias.

CONCLUSION: LARGER LESSONS AND THE PATH AHEAD

In Professors Epstein, Parker, and Segal's widely publicized study of justices' in-group biases in First Amendment free-expression cases, the Court's four most conservative members—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—come off looking by far the worst among the justices serving on the Court today. Not surprisingly, the conservative justices' uniformly poor performance provided the focal point for much of the press's and blogosphere's coverage.[370] Beneath the authors' conclusions regarding those and other justices, however, one finds a range of problems. With varying degrees of frequency, the authors erroneously included cases having nothing to do with free expression; ignored crucial facts about the speakers and their First Amendment claims when appraising speakers' ideological identities; erroneously coded the ways in which justices actually voted; assigned ideological identities to speakers in the face of facts that could lead a reasonable person to make a different judgment; disregarded the difficulties that arise when a speaker affiliated with one ideological camp asserts a speech claim commonly associated with the other; included cases in which it is difficult to imagine *any* justice regarding the speaker as a member of his or her own ideological team; and, in at least one instance, treated a speaker who appeared twice before the Court during the course of the same litigation as if that speaker were two different litigants. Taken together, I found one or

369. *See* D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 6-27 (2002) (providing an overview of observer effects).

370. *See, e.g.*, *supra* notes 2, 9-14 and accompanying text.

more such difficulties in 25% of the 159 cases I reviewed, covering all of the cases in the study from 1987 forward. One thus has ample reason to believe that numerous additional difficulties afflict the authors' treatment of many of the other cases in their study.

It is possible, of course, that although the authors' analyses of Chief Justice Roberts and Justice Alito were negatively affected by coding errors and questionable judgments, those difficulties are distributed throughout the larger study in such a way that the authors' bottom-line judgments about some of the other current and former justices would not be meaningfully affected by the problems' correction. In early work on this Article, for example, I started to examine whether problems corrupted the authors' evaluation of Justice Scalia, who cast more votes than any other currently sitting justice in the study.[371] As the number of errors and debatable classifications in those cases grew (many of which worked to Justice Scalia's detriment but others to his benefit), and as my own uncertainties about how to classify some of those speakers accumulated, I abandoned the effort to make and defend a fine-grained assessment of his sizable voting record, comparable to what I have offered for Chief Justice Roberts and Justice Alito (the two justices in the study with the fewest total number of votes). My sense is that Justice Scalia might benefit from a correction of the kinds of problems I have identified, but perhaps not to a large degree.[372] One would indeed expect that, the larger a justice's

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371. *See supra* Table A.

372. The authors' treatment of Justice Scalia does, however, raise a question in addition to those I already have discussed. Of the 92 cases in which the authors determined that Justice Scalia encountered liberal speakers, more than one-fifth involved speech of a sexual nature (obscenity, child pornography, nude dancing, and the like). If the data set were adjusted to take account of the other criticisms I have made, those sexual-speech cases might make up an even larger fraction of the liberal-speaker cases. The authors coded the speakers in all of those sexual-speech cases as liberal, and Justice Scalia cast anti-speaker votes in almost all of them. If *all* speakers who produce a given species of speech are coded as members of one ideological group precisely because they produced that species of speech, and if there are plausible constitutional reasons to treat that species of speech more harshly than many others—as Justice Scalia has claimed is true of at least some forms of sexual expression—then it is not clear how heavily one can rely upon those cases to determine whether, across the board, a justice is "reach[ing]

voting record, the greater the likelihood that even a sizable number of erroneous or readily debatable coding decisions will wash out, so long as the errors are not skewed to the advantage or disadvantage of that justice's ideological group. If that is the case here, the individual justices in the authors' study may vary greatly in the degree to which they would benefit from a reassessment. Given the ease with which many of the study's problems could have been avoided, it is unfortunate that the trustworthiness of the study's justice-specific findings is left to depend upon such speculation by the reader.

Some of the difficulties in the authors' study might be related to problems that reportedly trouble the database that provided Professors Epstein, Parker, and Segal with their starting point.[373] The publicly available Supreme Court Database is widely used by scholars conducting empirical analyses of the Court and of the justices' voting patterns,[374] but its contents are not beyond criticism.[375] Suspicious that the database's coding protocols were yielding inaccurate information about whether the outcomes of the Court's cases were ideologically conservative or liberal in nature, for example, Professor Carolyn Shapiro selected ninety-five

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dissimilar decisions in suits differentiated only by the nature of the parties." Epstein et al., *supra* note 1, at 16; *see generally* City of Littleton v. Z.J. Gifts D-4, 541 U.S. 774, 787 (2004) (Scalia, J., concurring in the judgment) ("[T]he pandering of sex is not protected by the First Amendment."); City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring in the judgment) ("The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment . . . that nude public dancing *itself* is immoral, have not been repealed by the First Amendment."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting) (stating that "[t]here is no doubt" that laws barring obscenity do not violate the First Amendment because such laws "existed and were universally approved in 1791").

373. *See supra* note 3 (noting the authors' use of the Supreme Court Database).

374. *See* Lee Epstein, *Introduction: Social Science, the Courts, and the Law*, 83 JUDICATURE 224, 225 (2000) ("There is little doubt that today [the] U.S. Supreme Court Judicial Data Base is the greatest single resource of data on the Court; there are virtually no social-scientific projects on the Court that fail to draw on it.").

375. I already have pointed out that quirks in the database caused irrelevant cases to appear in the authors' data set. *See supra* Part II.A.

cases at random and recoded them herself.[376] Among those ninety-five cases, she found thirty-five—nearly 37% of the total—whose outcomes the database simplistically coded in binary fashion as either conservative or liberal, but for which Professor Shapiro believed *both* conservative and liberal dimensions could readily be found.[377] Judge Richard Posner has gone through a similar exercise, examining 110 randomly selected cases in the database; he concluded that the coded outcomes in 25% of those cases were problematic.[378] In a separate analysis of the database's contents, Professor Shapiro located cases whose legal issues she believed had been misclassified, she identified problems flowing from the coders' reported reliance upon summaries of the cases rather than upon the texts that the justices themselves write, and she found instances in which coders failed to follow the database's own protocols.[379] Professor Anna Harvey and one of her graduate students have argued that confirmation bias—instigated by perceptions of the Court's ideological leanings at the time decisions were rendered—may help to explain curious ways in which some of the database's contents have been coded.[380]

Professors Epstein, Parker, and Segal are aware of the database's limitations,[381] and so one presumes they took steps to ensure that those limitations did not infect their own analysis. They did examine the information they retrieved

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376. *See* Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 94-100 (2010) [hereinafter Shapiro, *Context of Ideology*]. For a description of the protocol that the coders for the Supreme Court Database use when determining whether the outcome of a case is conservative or liberal, see *Online Code Book: Decision Direction*, *supra* note 48.

377. Shapiro, *Context of Ideology*, *supra* note 376, at 100.

378. EPSTEIN ET AL., BEHAVIOR OF FEDERAL JUDGES, *supra* note 8, at 105, 150.

379. *See* Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 494-500 (2009) [hereinafter Shapiro, *Coding Complexity*].

380. *See* Harvey & Woodruff, *supra* note 368, at 420-29; *see also supra* notes 367-69 and accompanying text (discussing confirmation bias).

381. *See* EPSTEIN ET AL., BEHAVIOR OF FEDERAL JUDGES, *supra* note 8, at 105 (discussing some of Professor Shapiro's criticisms of the Supreme Court Database); *id.* at 150 (discussing Judge Posner's test of the database's ideological classifications).

from the database before putting those data to work, explaining, for example, that "[t]o ensure consistency with our First Amendment concerns, we rechecked the coding of all votes and made alterations as necessary."[382] Numerous problems nevertheless appear in their study, leaving one to speculate about those problems' origins. The kinds of difficulties that Professor Shapiro identified in the Supreme Court Database—misclassified cases, overly simplistic designations of phenomena as conservative or liberal, coding cases without carefully attending to the texts of the cases themselves, failing to apply a consistent set of coding standards to ensure that like cases are treated alike—all bear a resemblance to the sorts of problems one encounters in Professors Epstein, Parker, and Segal's study. Moreover, the rate at which I found difficulties in the authors' treatment of individual cases approximates the rate at which Judge Posner found problems in the database. If there is indeed a causal relationship here, Professor Shapiro's warning bears revisiting: "Put bluntly, rather than illuminate the workings of the Supreme Court, some empirical findings may reflect the way the Database reports (or, in the language of empirical analysis, 'codes') information—or whether it reports certain types of information at all."[383]

If there is not, in fact, a direct causal relationship between the limitations of the Supreme Court Database and the problems in this study—that is, if researchers are independently producing data with the same sorts of shortcomings—then it probably is time to take a second look at the data-handling norms that generally prevail among those who gather and report data of this sort. As I noted when discussing the authors' mishandling of numerous cases,[384] for example, it appears that Professors Epstein, Parker, and Segal opted not to consider all of the relevant and readily available facts in (at least some of) the cases whose speakers and speech they were classifying, apparently choosing to rely instead upon case captions or superficial case summaries. As

382. Epstein et al., *supra* note 1, at 8.

383. Shapiro, *Coding Complexity*, *supra* note 379, at 480.

384. *See supra* Parts I.C, II.

Professor Shapiro pointed out in her criticism of the Supreme Court Database's coders on similar grounds,[385] failing to attend to the justices' written opinions can lead to problems. Relatedly, the study's authors appear to have paid little (if any) attention to the information contained in the briefs and other litigation documents for the cases they were coding, or to the identities and ideological affiliations of amici curiae, all of which (like the texts of the justices' decisions) can provide information that is relevant to the task that the authors set for themselves—namely, trying to ascertain how the justices themselves likely appraised the ideological affiliations of speakers and their speech.

Some of the study's problems may also be the result of the authors' decision not to provide readers with a detailed description of the criteria they used when classifying speakers' and speech's ideologies.[386] That surprising choice may have something to do with my inability to reproduce their assessments of Chief Justice Roberts and Justice Alito. Yet even if they had provided a full description of their coding criteria, it seems clear that those criteria sometimes produced measures whose validity can readily be challenged.[387] As I noted, for example, in earlier versions of their paper the authors revealed that they regarded "racist communication" and "racist behavior" as things that qualify a speaker for membership in conservative justices' ideological in-group.[388] In their short description of conservative speakers in the most recent version of their paper, they have replaced racists with pro-life advocates but have not disavowed their earlier treatment of racist expression.[389] In my own judgment, the authors' linkage between racism and conservative justices' ideological in-group is quite stunning. It is one thing to believe (as many conservatives do), for example, that race-based affirmative action violates the Equal Protection Clause; it is quite another to associate with

385. *See supra* note 379 and accompanying text.

386. *See supra* notes 36-46 and accompanying text.

387. *See supra* Parts I.C, II.

388. *See supra* notes 193-95 and accompanying text.

389. *See* Epstein et al., *supra* note 1, at 10.

the Aryan Brotherhood, or to identify with a man who attacks a young boy because he is white, or to feel an ideological affinity with one who burns a cross in the yard of an African-American family.[390]

Looking ahead, the authors urge other researchers to join the search for in-group biases among judges and justices, both within the free-expression realm and beyond.[391] That is a good proposal. As Professors Epstein, Parker, and Segal write, "the rule of law requires judges to dispense justice without regard to the parties,"[392] and prior, smaller studies (and perhaps even elements of this larger study) suggest that in-group biases do sometimes play a role in the way that courts adjudicate the disputes that come before them.[393] The public is well served by information about how all of its branches of government are performing, and that certainly is no less true of the judiciary than it is of the political branches.

Needless to say, however, the public is well served by information that can readily withstand reasonable criticism but ill-served by information that cannot.[394] With the justices now reportedly voting along partisan lines to an unprecedented degree,[395] the Court already invites cynicism

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390. *See supra* notes 188-96 and accompanying text (discussing cases involving those facts).

391. *See* Epstein et al., *supra* note 1, at 3, 16.

392. *Id.* at 16.

393. *See, e.g.*, David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 374 (2012) (reporting that, in a study of state cases adjudicated in Cook County, Illinois, the gap between the lengths of sentences that white defendants and racial-minority defendants received was significantly reduced when the sentences were imposed by African-American judges); Moses Shayo & Asaf Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q. J. ECON. 1447, 1448-49 (2011) (reporting that, in a study of small-claims courts in Israel, Arab and Jewish judges tend to favor litigants who are members of their own ethnic groups, particularly when there is terroristic activity geographically and temporally close to the rulings).

394. *Cf.* Epstein & King, *supra* note 38, at 9 ("[R]egardless of the purpose, effect, or intended audience of the research, academics have an obligation to produce work that is reliable.").

395. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court* 1 (William & Mary Law School, Research Paper No. 09-276), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432111. It bears noting that these authors, too, relied

among the larger public. As Adam Liptak noted in the *New York Times* several days after covering Professors Epstein, Parker, and Segal's study, "[t]he perception that partisan politics has infected the court's work may do lasting damage to its prestige and authority and to Americans' faith in the rule of law."[396] The gravity of that risk makes it all the more important for those who study the Court to ensure that, when reporting findings that play squarely into the hands of those who are eager to dismiss a politically identifiable block of justices as opportunistic ideologues, those findings are as unimpeachable as one can reasonably make them.[397]

The trickiest problem for future studies of justices' ideological in-group biases is determining how to assign ideological identities to litigants in a manner that leaves one reasonably confident that the identities one assigns correspond to the identities that the justices perceived. After all, if a justice does not regard a litigant as a member of an ideological in-group or out-group, then the groundwork for manifesting an in-group bias has not been laid.[398] Professors Epstein, Parker, and Segal got it exactly right when they wrote that "the two key inputs in [their] study" were "[t]he ideology of the Justices and the speakers."[399] Assigning ideological identities to the justices themselves is not as

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upon the Supreme Court Database and its coding of justices' votes as conservative or liberal. *See id.* at 7 & n.21. As I have explained, that reliance evidently comes with significant baggage. *See supra* notes 373-80 and accompanying text.

396. Adam Liptak, *The Polarized Supreme Court*, N.Y. TIMES, May 11, 2014, at SR6.

397. *Cf.* Shapiro, *Context of Ideology*, *supra* note 376, at 85 ("If we want to talk about whether we think the Justices get the balance between law and ideology right, then we have to know what balance they are *in fact* striking, when they allow ideology to dominate, and how other factors influence their decisions.") (emphasis added). The risk I describe above is made even more acute by the fact that ideologically driven us-versus-them thinking appears to be on the rise as a general matter. *See Political Polarization in the American Public*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public ("Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades.").

398. *See supra* note 187 and accompanying text.

399. *Summary*, *supra* note 6, at 2.

difficult today as it once might have been: the Segal-Cover scores on which the study's authors relied provide a plausible basis for carrying out that task.[400] But researchers evidently have not yet developed a comparably defensible basis for assigning ideological identities to litigants when those identities are not already clear. I am skeptical about whether it can be satisfactorily done, but the task's ultimate feasibility is for those who carry out these studies to determine in the first instance.[401]

The authors' explanation of how they determined speakers' ideological affiliations—saying that anti-gay and pro-life speakers were classified as conservative, "students espousing liberal causes, war protestors burning American flags, [and] donors providing support to or associating with left-wing organizations" were classified as liberal, "and so on"[402]—relies upon obvious examples and deflects readers' attention from the frequent difficulty of the task. Moreover, the authors' apparent (but unelaborated) partial reliance upon the Supreme Court Database's coding protocols evidently does not suffice to yield a high rate of uncontroversial results. As I have illustrated, there are many litigants to whom the study's authors assigned ideological identities that are either wrong or reasonably debatable.[403] So long as those identities remain open to question, one cannot be confident that one knows how those litigants were perceived by the justices themselves. Until those who study ideological in-group bias develop a means of surmounting

400. *See supra* note 8.

401. I would imagine that the ideal method would shun classifying litigants in binary fashion as either conservative or liberal, but instead would place litigants on a spectrum that is sensitive to degrees of ideological tilt. For examples of researchers' efforts to find nuanced ways to measure ideology-laden phenomena in other legal settings, see Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, *passim* (2009) (developing ways to measure case outcomes that are more nuanced than simply classifying those outcomes in binary fashion as either "liberal" or "conservative"); Shapiro, *Context of Ideology*, *supra* note 376, at 129-33 (suggesting means by which to measure a case's "ideological salience" for the justices).

402. Epstein et al., *supra* note 1, at 10.

403. *See supra* Parts I.C, II.

that difficulty, researchers are presented with a choice: they can either reduce the size of their data pools, retaining only those cases in which litigants' ideological identities are clear, or produce studies that might unjustifiably inflame those whose own in-group biases predispose them to embrace the results. The former seems the better path; the fires of cynicism and partisanship already burn well enough on their own.

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On September 30, 2014, shortly after I posted an earlier version of this Article on SSRN, Professors Epstein, Parker, and Segal posted a brief reply, conceding a handful of errors but otherwise declining to budge.[404] I have noted instances in which the authors' explanations of their coding decisions unfortunately make it even clearer that they misunderstood the facts of some of the cases they were coding.[405] There are larger points about the authors' response, however, that may usefully be made. First, at least at the time of this writing (October 2014), one will search their response materials in vain for a comprehensive list of their coding criteria. That strangely enduring lacuna is difficult to explain on terms favorable to the study, particularly given the insistence in 2002 of the study's lead author—in the context of sharply criticizing other scholars' work—that the public presentation of such a list is an indispensable feature of good empirical scholarship.[406] It is clear that the Supreme Court Database's coding criteria provided the authors with their start, but it also is clear that they supplemented those criteria with judgments of their own.

Second, recall that the authors erroneously included at least three cases that had nothing to do with First Amendment expressive freedoms—the area of law in which the authors said they were assessing the justices' tendencies toward ideological in-group bias.[407] The authors tersely

404. *See* Lee Epstein et al., *A Response to a Critique of Our Study on In-Group Bias* (Sept. 30, 2014), http://epstein.wustl.edu/research/InGroupBiasResponse.pdf [hereinafter *Response*].

405. *See, e.g.*, *supra* notes 132-42, 245-49 and accompanying text.

406. *See supra* notes 38-46 and accompanying text.

407. *See supra* Part II.A.

dismissed that criticism, and in the process they revealed an orientation that goes a long way toward explaining some of the study's other weaknesses. Here is what they wrote:

> [H]e asserts that three cases shouldn't be in our study because he doesn't think they implicate freedom of expression. What he thinks, though, wasn't our definition for inclusion. We selected cases based on the Supreme Court Database's issue area definitions. Now the author might not like these definitions. That's fine; he's free to write his own and then go through all the Supreme Court's decisions since 1953 to determine the cases that do and do not meet his new definition. But he's not free to condemn our work for failing to meet his self-imposed definition (whatever it might be).[408]

Even apart from the angry bluster, that is a discouraging but telling response. I would have thought that a case merits inclusion in a study purporting to focus entirely on First Amendment expressive freedoms only if that case concerns First Amendment expressive freedoms. My definition was no more "new" or "self-imposed" than that; indeed, it is identical to the definition that the authors themselves explicitly provided when they wrote that "[h]ere and throughout the paper, we focus *exclusively* on the First Amendment guarantees of speech, press, assembly, and association."[409] Anyone who reads those three cases will see that they had nothing to do with First Amendment claims of speech, press, assembly, association, or petition. Yet in the authors' judgment, we are to ignore that fact because the Supreme Court Database told the authors that those cases were relevant to their study. At some point, obeisance to the Supreme Court Database must reach its limits, giving way to what those who take the time to read the Court's cases can unambiguously see for themselves. In the meantime, there is nothing impertinent about pointing out ways in which researchers have misapprehended the facts.

There are more important things at stake here than merely the coding of those three cases. The orientation that the authors have now made explicit bears upon other problems in their study. Was the goal here to study in-group bias in First Amendment free-expression cases, based upon one's best effort to identify the justices' own in-group and out-

408. Epstein et al., *Response*, *supra* note 404, at 1.

409. *See* Epstein et al., *supra* note 1, at 2 n.6 (emphasis added).

group assessments of the free-expression claimants who appeared before them, or was it instead to see what the Supreme Court Database would say when asked a question? If agreement is elusive on that seemingly fundamental point, then there is little reason to be optimistic about reaching agreement on more subtle but nevertheless similarly important matters, such as the degree to which the authors' coding criteria—some of which remain undisclosed—can be trusted to accurately capture the justices' own in-group and out-group assessments of ideologically nuanced cases.

The issue for future researchers in the area of in-group bias is whether the authors' design, execution, presentation, and defense of this particular study are worthy of close emulation. The public deserves a thoughtful answer to that question.

APPENDIX

I reviewed the authors' treatment of all cases decided between 1987 and the close of their study's time period, amounting to 30% of the more than 500 cases they included. In that review, I examined the authors' ideological classifications of those cases' First Amendment claimants and the authors' coding of Chief Justice Roberts's, Justice Scalia's, and Justice Alito's votes. Of the 159 cases I reviewed, I found one or more errors or readily debatable judgments in 40 cases, or in 25% of those I examined.

The following table lists in chronological order the cases in which I found problems. In the right-hand column, an "**A**" signifies that the case had nothing to do with the freedom of expression; a "**B**" signifies that the authors miscoded the vote of Chief Justice Roberts, Justice Alito, and/or Justice Scalia; a "**C**" indicates that the authors likely erred when assigning an ideological classification to the case; a "**D**" indicates cases in which, even if one cannot confidently say that the authors erred, one can easily question whether the authors' ideological classifications accurately captured how the justices themselves assessed the First Amendment claimants' ideological in-group or out-group status; an "**E**" denotes cases in which it is difficult to imagine *any* justice regarding the speakers as members of his or her own ideological in-group; and an "**F**" signifies that the authors

double-counted a speaker who appeared twice before the Court during the course of the same litigation.

1	Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)	D
2	Pope v. Illinois, 481 U.S. 497 (1987)	B
3	S.F. Arts & Athletics v. USOC, 483 U.S. 522 (1987)	C
4	Dep't of Navy v. Egan, 484 U.S. 518 (1988)	A
5	Webster v. Doe, 486 U.S. 592 (1988)	A
6	Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)	D
7	Carlucci v. Doe, 488 U.S. 93 (1988)	A
8	Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989)	C
9	City of Dallas v. Stanglin, 490 U.S. 19 (1989)	D
10	Fla. Star v. B.J.F., 491 U.S. 524 (1989)	D
11	Univ. of Pa. v. EEOC, 493 U.S. 182 (1990)	D
12	Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990)	D
13	Rutan v. Republican Party of Ill., 497 U.S. 62 (1990)	C
14	Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)	D
15	Dawson v. Delaware, 503 U.S. 159 (1992)	D; E
16	Burdick v. Takushi, 504 U.S. 428 (1992)	C
17	R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992)	D; E
18	Wisconsin v. Mitchell, 508 U.S. 476 (1993)	D; E
19	United States v. Edge Broad. Co., 509 U.S. 418 (1993)	D
20	Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994)	D
21	United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)	B
22	United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995)	C
23	Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995)	B
24	Morse v. Republican Party of Va., 517 U.S. 186 (1996)	C
25	Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996)	C
26	Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)	C
27	L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999)	D
28	Bd. of Regents v. Southworth, 529 U.S. 217 (2000)	C
29	Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)	C

30	Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 535 U.S. 150 (2002)	D
31	Virginia v. Black, 538 U.S. 343 (2003)	D; E
32	Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006), and FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007)	F
33	Beard v. Banks, 548 U.S. 521 (2006)	B
34	N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008)	C or D*
35	Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)	B; C or D*
36	United States v. Williams, 553 U.S. 285 (2008)	E
37	Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)	D
38	Snyder v. Phelps, 131 S. Ct. 1207 (2011)	E
39	Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011)	B, D
40	Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011)	D

* In the two cases marked with both a C and a D, I argue that the authors either erred by assigning a single ideological identity to a coalition of ideologically diverse speakers, erred by assigning an ideological classification to speech in the absence of a persuasive reason to believe that the justices themselves placed that speech in one ideological category rather than the other, or made an undefended assumption that, for a justice driven by ideological in-group bias, the ideological tenor of the speech matters more than the usual ideological affiliation of the speaker. For more, see *supra* Parts I.C, II.C, II.E.