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Helen J. Knowles and Steven B. Lichtman, eds., Judging Free Speech: First Amendment Jurisprudence of US Supreme Court Justices

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JUDGING FREE SPEECH: FIRST AMENDMENT JURISPRUDENCE OF US SUPREME COURT JUSTICES, by Helen J. Knowles and Steven B. Lichtman (eds). New York: Palgrave Macmillan, 2015.

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Most of us, scholars and laypeople alike, take First Amendment free speech protections for granted. We expect to be able to criticize the government either by speaking or in writing or by joining a political or social organization without fear of penalty or retribution. Yet, what the essays in this volume show is that these First Amendment free speech protections are actually quite recent, and a product of less than a century of development.

Political Scientists Helen Knowles and Steven Lichtman offer essays by political scientists and law professors that trace the development of First Amendment jurisprudence. They do so using a rather novel method. Instead of a chronological review of case law, each author writes a chapter about a Supreme Court Justice who has helped develop free speech jurisprudence, starting with Oliver Wendell Holmes and ending with Stephen Breyer. It is a curious list, considering the defense of free speech is usually associated with Justices that are more liberal. More than half of this list, however, includes Justices who range from the moderate to moderately conservative (John Harlan II, Potter Stewart and Anthony Kennedy) to two Justices (Sutherland and Thomas) who rank among the most conservative ever by voting record and various other measurements.

Much of the explanation lies in the emphasis in these chapters on the word used in the title – *jurisprudence*. The editors and authors make clear that this is not an exploration of judicial ideology or judicial policy preference. The authors argue that the political science focus on vote choice fails to examine the opinion language that is critical to understanding the evolution of free speech jurisprudence. The offerings in this volume focus on these Justices' contributions to the logic, reasoning and development of First Amendment law.

In several chapters, the authors highlight several cases not featured in many textbooks. These additional cases add nuance and understanding to the more prominent opinions that one usually reviews and discusses. Additionally, students will have an opportunity to learn more about these particular Justices beyond seeing them as names attached to opinions. For example, in the first chapter about Oliver Wendell Holmes, Jr. by Frederick Lewis, we learn of Holmes' initial venture into First Amendment jurisprudence in *Patterson v. Colorado*[1] in 1907. In this opinion, Holmes argued for a restrictive interpretation of free speech protections. However, by 1919 with his *Schenck v. United States*[2] opinion, Holmes moved away from his initial restrictive view to a more expansive interpretation of protecting speech. The author credits this development to, among other things, the influence of Judge Learned Hand and political theorist Harold Laski. This particular chapter does a nice job descriptively demonstrating how judicial views and preferences are not immutable, but subject to change over time. This also implicitly challenges the ideology measures[3] that remain fixed for each Justice from the time of confirmation onward, although to be fair, other measures do account for ideological variation over time.[4]

The inclusion of a chapter by Samuel Olken on George Sutherland is an interesting addition. Sutherland was one of the very conservative "four horsemen of the apocalypse" opposed to New Deal legislation. Sutherland and his conservative colleagues ruled against economic regulation as an interference with economic liberty, and Sutherland only wrote two opinions on speech, one of which was a dissent. However, Olken argues that Sutherland linked economic liberty to free speech, foreshadowing the modern court's extension of free speech rights to commercial speech.

The Michael Paris and Kevin McMahon chapter on Hugo Black reviews several early cases that show, in contrast to Justice Holmes, a steady development of Black's rigid free speech absolutism. The authors praise Holmes' courage in espousing his views, even when confronted with opposition from a public and congress concerned with allegations of communist infiltration of the private and public sectors. However, over the years, Black's support of Civil Liberties appeared to decline. Data show Black's increasing conservatism over the years, and many scholars point to his decisions in *Bell v. Maryland*[5] and *Tinker v. Des Moines*[6] as evidence of this more conservative shift. The authors, however, justify these votes as the continuation of an earlier lack of support for uncivil behavior, and not as any deviation from earlier jurisprudence.

Stephen Lichtman's chapter on Clarence Thomas also has to confront a change in judicial philosophy. Lichtman presents Thomas as an uncompromising free speech dogmatist analogous to the early voting and writing record of Hugo Black. Similar to Black, over time Thomas began to accept greater restrictions on speech. However, unlike the authors of the Hugo Black chapter, Lichtman does not attempt a justification for the change, instead finding that Thomas sacrificed principle for situational ethics.

Of course, Black and Thomas are not the only Justices in this volume to deviate in their opinions and voting over the course of their respective judicial careers. The chapter on Justice William Brennan by James Foster shows how Brennan evolved in his obscenity jurisprudence from accepting a test of "prurience" premised on community standards to disavowing the ability of any test to determine obscenity. Brennan gave up trying. Foster finds that this "evolution" was consistent with Brennan's belief in the promise of civil discourse and the need to keep all political conversation ongoing, even if such conversation is unsettling.

The remaining chapters on Harlan II, Potter Stewart, Anthony Kennedy and Stephen Breyer examine the contributions to free speech jurisprudence by Justices occupying positions around the center of the ideological spectrum. In the chapter on John Harlan, Douglas Edlin notes how Harlan was able to differentiate judicial conservatism – deference to political branches, respect for precedent – from political conservatism. In Edlin's view, Harlan's judicial conservatism led him to balance rights for the speaker against the rights of government to regulate certain conduct. This balancing explains the seemingly contradictory votes in *Cohen v. California*,[7] and *O'Brien v. U.S.*[8] In the former, Harlan's majority opinion upheld the right of Paul Cohen to wear a jacket featuring an obscenity. In the latter, he voted to uphold the government in a draft card burning case.

Keith Bybee's chapter on Potter Stewart emphasizes Stewart's support for a free press because of his "innovative" belief in the need of a "fourth" institutional branch as an additional check on the three official branches. Finally, the chapters on Justice Kennedy by Helen Knowles and Justice

Breyer by Mark Tushnet emphasize the differing philosophies of these two contemporary Justices.

The editors and the authors clearly want to move beyond using a quantitative analysis of voting behavior to understand the development of the First Amendment. The chapters emphasize a qualitative analysis of language and reasoning to show us how we arrived at our general understanding of the protections offered by the First Amendment. However, to some degree this is an unnecessary cleavage between quantitative and qualitative analysis. Several recent works of scholarship using quantitative methods have also moved beyond a sole focus on voting behavior to examine the content of opinions and the constraint of law. Reference to some of these works might have strengthened some of the arguments made in these chapters. For example, Richards and Kritzer,[9] Bailey and Maltzman[10] and a recent book by Corley, Steigerwalt and Ward[11] all examine the influence and constraint of law on Supreme Court decision making.

Then too, the reader sometimes finds that the authors are trying too hard to fit a square peg in a round hole by trying to fit a Justice's opinions into a coherent jurisprudence. The simplest explanation might just be policy and partisan preferences. For example, the change in the votes and opinions of Clarence Thomas might just be because Thomas is extremely conservative and upholding commercial speech and finding campaign spending as speech are conservative political positions, as is supporting restrictions on violent video games (to be fair, Steven Lichtman does not try to justify these inconsistencies). Justice Brennan's evolving views on obscenity might be related to a society that went through sexual and student revolutions and the subsequent greater acceptance of ideas and images that were previously thought to be obscene.

Justice Black's differences might be related to the change in liberalism from the 1930's to the 1960's. In the earlier decades, one was a liberal if one supported the New Deal and greater economic regulation. The Vietnam War and social change divided the Democratic Party and New Deal liberals. Justice Black was an old man by the 1960's, and liberal values had changed. Perhaps Justice Black, unlike Brennan, did not change with the times, remaining a New Deal liberal, but conservative on the Vietnam War and social issues. Overall one could find that the increase in First Amendment protections, first opined by Justice Holmes, reached fruition in the last century because of the Justices on the Warren Court, the most liberal Supreme Court in United States history

One could analyze many of the Justices and their opinions through this simple policy preference framework. However, to say one could analyze judicial behavior and opinion writing though a different framework does not detract from the value of this volume. It is a nice read and nice contribution to our understanding of the First Amendment free speech. The book is a quality supplement to those teaching undergraduate courses in Civil Liberties or a stand-alone First Amendment course.

[1] *Patterson v. Colorado* 205 U.S. 454 (1907)

[2] *Schenck v. United States* 249 U.S. 47 (1919)

[3] See "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012," http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf

[4] See, e.g., Michael Bailey, 2016, "Measuring Ideology on the Courts" http://faculty.georgetown.edu/baileyma/MeasuringIdeology_Jan2016.pdf, presented at the 2016 Annual Meeting of the Southern Political Science Association, San Juan, Puerto Rico; Andrew D. Martin and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." Political Analysis. 10:134-153.

[5] *Bell v. Maryland*, 378 U.S. 226 (1964)

[6] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)

[7] *Cohen v. California*, 403 U.S. 15 (1971)

[8] *United States v. O'Brien*, 391 U.S. 367 (1968)

[9] Mark J. Richards and Herbert M. Kritzer, 2002, "Jurisprudential Regimes in Supreme Court Decision Making," *American Political Science Review* 96(2)pp. 305-320

[10] Michael A. Bailey & Forrest Maltzman, 2011, *The Constrained Court: Law, Politics, and the Decisions Justices Make*, Princeton: Princeton University Press

[11] Pamela Corley, Amy Steigerwalt and Artemus Ward, 2013, *The Puzzle of Unanimity: Consensus on the United States Supreme Court*, Stanford: Stanford University Press.